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# Abortion in Brazil: Substantive and Procedural Flaws in the Criminalization of Women

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**TRIALWATCH** WOMEN & GIRLS REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE



## ABOUT THE AUTHORS

Created in 1934, the **University of São Paulo (USP)** is a **public university**, maintained by the State of São Paulo and linked to the Secretariat of Economic Development. The talent and dedication of its faculty, students, and staff have been recognized by different **world rankings**, created to measure the quality of universities from several criteria, mainly those related to scientific productivity. This project was designed and supervised by Professors Fabiana Cristina Severi and Gislene Aparecida dos Santos, and authored by the following students: Isabelle Fernanda dos Santos, Júlia Marçal Silva, Juliana Fontana Moyses, Luiza Barroso Pereira e Silva, Maria Eduarda Souza Porfírio, Patrícia Oliveira de Carvalho, Rebeqa Lima Cavalcante, Renata Gonçalves Queiroz, Robert Augusto de Souza, Thaís Becker Henriques Silveira, and Thainara Saiane da Silva José.

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The legal assessment and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice or any of the authors' affiliated organizations.

# EXECUTIVE SUMMARY



Across Latin America, decades of organizing and activism by women's groups against harsh abortion restrictions have produced significant legal reforms over the last few years. In 2021, Argentina legalized abortion up to the 14th week of pregnancy;<sup>1</sup> that same year, Mexico<sup>2</sup> decriminalized abortion, followed by Colombia in February 2022.<sup>3</sup> Ecuador also took steps to decriminalize abortion in cases of rape in 2021.<sup>4</sup> At the regional level, in a landmark ruling stemming from a case out of El Salvador, the Inter-American Court of Human Rights decided in November 2021 that treating obstetric emergencies as homicides resulted in the arbitrary and discriminatory criminalization of impoverished women.<sup>5</sup>

But in Brazil, the largest and most highly populated country in Latin America and the Caribbean, abortion remains a 'crime against life'—criminalized in the majority of circumstances—and public prosecutor's offices around the country charge women for abortion. The criminalization of abortion in Brazil has a disproportionate, discriminatory, and intersectional impact across the race and income of the girls and women. Further, few women appeal their convictions for abortion, and even fewer win when they do.

Abortion remains a deeply divisive issue in Brazil, and its criminalization has a significant impact on access to safe abortion and other reproductive health services, even where they are legal, especially for Black women and girls from low-income communities. For instance, in a highly publicized case in 2020, a 10-year-old girl who became pregnant after four years of rape by her uncle was first refused an abortion by a hospital. After a court order, she was permitted the abortion to which she was legally entitled but fled over 1,000 miles to receive care.<sup>6</sup> Even then, anti-abortion activists leaked the girl's name and hospital

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<sup>1</sup> *The Guardian*, "Argentina legalises abortion in landmark moment for women's rights", Dec. 30, 2020, <https://www.theguardian.com/world/2020/dec/30/argentina-legalises-abortion-in-landmark-moment-for-womens-rights>.

<sup>2</sup> Lizbeth Diaz and Laura Gottesdiener, *Reuters*, "Mexico's top court decriminalizes abortion in 'watershed moment'", Sept. 8, 2021, <https://www.reuters.com/world/americas/mexico-supreme-court-rules-criminalizing-abortion-is-unconstitutional-2021-09-07/>.

<sup>3</sup> *The Washington Post*, "Colombia court decriminalizes abortion, adding to regional momentum", Feb. 21, 2022, <https://www.washingtonpost.com/world/2022/02/21/colombia-decriminalize-legal-abortion/?request-id=e380724f-0461-4bef-a44a-900084b40d6d&pml=1>; CAUSA JUSTA, Demanda de inconstitucionalidad del artículo 122 de la Ley 599 de 2000 del Código Penal, <https://www.womenslinkworldwide.org/files/3133/resumen-de-la-demanda-aborto-en-colombiacausa-justa.pdf> (access on November 8, 2021); Jesse Levine, Reproductive Rights in Colombia: Expanding Legal Access to Abortion on the Basis of Human Rights, *COLUMBIA POLITICAL REVIEW* (Oct. 2, 2021), <http://www.cpreview.org/blog/2021/10/reproductive-rights-in-colombia-expanding-legal-access-to-abortion-on-the-basis-of-human-rights>

<sup>4</sup> *Associated Press*, "Ecuador's high court backs decriminalizing abortion for rape", Apr. 28, 2021, <https://apnews.com/article/guillermo-lasso-ecuador-courts-39ea79427c9abed11d859970dbdef80f>.

<sup>5</sup> Inter-American Court of Human Rights, *Manuela y otros v. El Salvador* (IACHR 13.069), Nov. 30, 2021.

<sup>6</sup> Delphine Starr, Human Rights Watch, "A 10-Year-Old Girl's Ordeal to Have a Legal Abortion in Brazil", Aug. 20, 2020, <https://www.hrw.org/news/2020/08/20/10-year-old-girls-ordeal-have-legal-abortion-brazil#>

name and blocked entrance to the hospital. She eventually made it into the facility hidden in the trunk of a minivan.<sup>7</sup> As this case—and other recent developments<sup>8</sup>—demonstrate, even where abortion is legal, the atmosphere created by its criminalization under other circumstances creates significant hurdles, and as documented in prior research studies, can contribute to the legitimization of violence against and other mistreatment of women and perpetuation of moral judgments and discrimination and stereotypes about women who have abortions.

Brazil and its judicial system have not always or consistently restricted the right to abortion. In 2004, for example, the Federal Supreme Court (STF), Brazil's highest court, became the first constitutional court in Latin America to receive a lawsuit filed by health workers for the extension of the right to abortion to anencephaly cases, deciding in favor of the petitioners in 2012.<sup>9</sup> In 2017, the STF also became the first court in the region to accept a lawsuit requesting the legalization of abortion in the first trimester of pregnancy. This is still an ongoing lawsuit, and in 2018 the Court held public hearings on the topic.<sup>10</sup>

Despite these advances at the country's highest court, procedural and substantive violations of women's rights continue in the lower courts, where criminal cases continue to be brought. This report is based on an analysis of 167 judicial decisions, (61 from Courts of Justice (TJs), 20 from the Supreme Court of Justice (STJ), and 86 from the Federal Supreme Court (STF)) across 12 Brazilian courts (at the habeas, trial, and appeal stages) and, where possible, trial monitoring. As detailed in this report, the women prosecuted for

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<sup>7</sup> See also: *Extra*, "Menina de 10 anos entrou no hospital em porta-malas de carro para fazer aborto legal após estupro," Aug. 19, 2020 <https://extra.globo.com/noticias/brasil/menina-de-10-anos-entrou-no-hospital-em-porta-malas-de-carro-para-fazer-aborto-legal-apos-estupro-24594211.html>; *Estado*, "Justiça autoriza aborto de menina de 10 anos que foi estuprada," Aug. 16, 2020, <https://brasil.estadao.com.br/noticias/geral,justica-autoriza-aborto-de-menina-de-10-anos-que-foi-estuprada,70003401825>

<sup>8</sup> There are numerous pending bills that would further restrict the already tenuous right to abortion in Brazil, and federal agencies have added new impediments to legal abortion services. In 2020, the Ministry of Health enacted new administrative rules for legal abortion in cases of rape, requiring women to provide medical practitioners with detailed information about the assault and the perpetrator, to be turned over to police. See: Ministério da Saúde/Gabinete do Ministro, Portaria N. 2.282, Aug. 27, 2020, <https://www.in.gov.br/en/web/dou/-/portaria-n-2.282-de-27-de-agosto-de-2020-274644814>. See also: Marina Rossi, *El País*, "Cruzada antiaborto tem nova vitória com portaria que dificulta o procedimento legal às vítimas de estupro," Aug. 28, 2020, <https://brasil.elpais.com/brasil/2020-08-28/cruzada-antiaborto-tem-nova-vitoria-com-portaria-que-dificulta-o-procedimento-legal-as-vitimas-de-estupro.html>. In 2019 Brazil's Minister of Women, Family, and Human Rights, Damares Alves, referred to the World Health Organization recommendations for a safe abortion as "dangerous information," Jose Miguel Vivanco, Human Rights Watch, "Brazil's Human Rights Minister's Feigned Concern for Women," Oct. 4, 2019, <https://www.hrw.org/news/2019/10/04/brazils-human-rights-ministers-feigned-concern-women>, and filed a complaint with prosecutors, urging them to charge a magazine that published the recommendations, Júlia Zaremba, *Folha de S. Paulo*, "Revista faz reportagem sobre aborto e é denunciada por Damares" Sept. 23, 2019, <https://www1.folha.uol.com.br/cotidiano/2019/09/revista-faz-reportagem-sobre-aborto-e-e-denunciada-por-damares.shtml>.

<sup>9</sup> Federal Supreme Court, Claim of Non-Compliance with Fundamental Precept n° 54. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013, <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>.

<sup>10</sup> Federal Supreme Court decision scheduling the hearings: <http://www.stf.jus.br/arquivo/cms/audienciasPublicas/anexo/ADPF442Deciso.pdf>; and media coverage: <https://g1.globo.com/politica/noticia/2018/08/06/supremo-tem-segundo-dia-de-audiencia-publica-sobre-aborto-veja-argumentos-de-entidades-pro-e-contra-a-legalizacao.ghtml>.

abortion in Brazil are too often convicted based on tenuous and legally insufficient evidence (sometimes illegally obtained), in trials where they may face stigma and bias from female and male prosecutors and judges, and rarely appeal their detention or conviction. The medical practitioners they go to for life-saving care may be the very people who refer them to the police and testify against them at trial. And it appears to be predominantly low-income Black women, relying on public health services, who are referred for prosecution and whose rights to privacy, equal treatment under the law, and freedom from gender and racial discrimination are often violated in these trials.

This report adds to several other studies carried out in the last two decades in the country, which substantiate the arguments in favor of the decriminalization of abortion, by recognizing that the criminalization of abortion has been a way of reproducing multiple and intersectional forms of discrimination and violence against women.

# LEGAL OVERVIEW: THE CRIME OF ABORTION IN BRAZIL



## A. OVERVIEW

In Brazil, abortion is only legal in cases of rape, to save a woman's life, and in the case of anencephaly (a fatal medical condition where infants are born without parts of the brain or skull). While activists and women's rights groups in Brazil continue to push for reforms in the courts, and a case is pending before the Federal Supreme Court (STF),<sup>11</sup> the right to safe and legal reproductive services including abortion is consistently under threat from Brazil's political leadership. Since the Bolsonaro administration took office in 2019, at least 30 bills have been introduced in the legislature that would further restrict abortion services in Brazil.<sup>12</sup>

Despite having strict laws criminalizing abortion, Brazil has the highest estimated frequency of abortions in the world, at 44 per 1000 women.<sup>13</sup> A 2016 national study showed that one in five women in Brazil had had an abortion by the age of 40, with higher rates of abortion among those with less education and income.<sup>14</sup> At the same time, few hospitals in Brazil provide legal abortion services: In 2020, only 42 hospitals in Brazil performed legal abortions<sup>15</sup> (compared with 76 in 2019<sup>16</sup>). Along with the threat of prosecution if the abortion is or is suspected of being illegal, the lack of services means that many women resort to life-threatening abortion practices and end up choosing not to seek help during a miscarriage or after a dangerous abortion.<sup>17</sup> Unsafe abortion is one of the leading causes of preventable

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<sup>11</sup> STF, ADPF 442/DF; <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5144865>.

<sup>12</sup> UOL, "Câmara tem 83% mais projetos sobre aborto em 2020; maioria tenta restringir," Sept. 14, 2020, <https://noticias.uol.com.br/politica/ultimas-noticias/2020/09/14/projetos-de-lei-aborto-camara-dos-deputados.htm?cmpid=copiaecola>; Associated Press, "Brazilian women head to Argentina to avoid abortion ban", Jan. 7, 2021, <https://apnews.com/article/brazil-abortion-ban-884b4f8e96d773d15d503cefc4930c32>.

<sup>13</sup> Monica Malta, Samantha Wells, et al., *Abortion in Brazil: The case for women's rights, lives, and choices*, 4 *the Lancet* 552 (2019) [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(19\)30204-X/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(19)30204-X/fulltext).

<sup>14</sup> Débora Diniz, Marcelo Medeiros & Alberto Madeiro, *Pesquisa Nacional de Aborto 2016*, 22 *CIÊNCIA & SAÚDE COLETIVA* 653, at 653- 660, 2017, <https://www.scielo.br/j/csc/a/8LRYdgSMzMW4SDDQ65zzFHx/?format=pdf&lang=en>. Women undergo abortions when they are 18 to 29 years old, and abortion is more common among less educated women. See: DINIZ, Debora; MEDEIROS, Marcelo; MADEIRO, Alberto. *Pesquisa Nacional de Aborto 2016. Ciência & Saúde Coletiva*, Rio de Janeiro, v. 22, n. 2, p. 653-660, Feb. 2017.

<sup>15</sup> Agência Brasil, "População do Brasil passa de 211,7 milhões de habitantes, estima IBGE", Aug. 27, 2020, <https://agenciabrasil.ebc.com.br/geral/noticia/2020-08/populacao-do-brasil-passa-de-2117-milhoes-de-habitantes-estima-ibge> (accessed on October 14, 2020).

<sup>16</sup> Article 19, "Atualização no Mapa Aborto Legal indica queda em hospitais que seguem realizando o serviço durante pandemia", June 2, 2020, <https://artigo19.org/blog/2020/06/02/atualizacao-no-mapa-aborto-legal-indica-queda-em-hospitais-que-seguem-realizando-o-servico-durante-pandemia/> (accessed on Oct. 6, 2020).

<sup>17</sup> See generally Human Rights Watch, *Submission to the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) on Brazil, 79<sup>th</sup> Session (2020)*, [https://www.hrw.org/news/2020/10/21/submission-committee-elimination-all-forms-discrimination-against-women-cedaw-0#\\_ftnref28](https://www.hrw.org/news/2020/10/21/submission-committee-elimination-all-forms-discrimination-against-women-cedaw-0#_ftnref28).



deaths in Brazil,<sup>18</sup> leading to the deaths of over 200 women each year.<sup>19</sup> Approximately 50% of women who undergo unsafe abortions in Brazil need to be hospitalized.<sup>20</sup>

The criminalization of abortion in Brazil, then, does not eliminate the procedure but rather restricts access to safe abortion and results in the prosecution and in the imprisonment of women from low-income families who rely on public health services for abortions and cannot use private services where they are less likely to be reported to the police.

## **B. ABORTION UNDER BRAZILIAN LAW**

### **1. The 1940 Penal Code of Brazil**

In Brazil, abortion is considered a ‘crime against life,’ illegal except in a few circumstances. The Brazilian Penal Code prohibits and punishes three types of conduct related to abortion: (a) a woman who has a “self-abortion”, which she performs on herself or gets from a third party such as a medical practitioner (Article 124) (b) a third party who performs an abortion without the consent of the mother (Article 125); and (c) a consensual abortion performed by a third party (Article 126), in which case the person causing the abortion is incriminated.<sup>21</sup>

A person who voluntarily terminates their pregnancy through abortion (“self-abortion” under Article 124) faces one to three years of detention; a third-party who causes or performs an abortion, such as a health care professional, is punished with one to four years of imprisonment (with consent of the pregnant woman) or three to ten years of imprisonment (without consent of the pregnant woman).<sup>22</sup> This risk of prosecution means that in practice, health workers who could safely perform abortions—whether legal or illegal under Brazilian law—often refuse to and/or may refer women to police when they seek an abortion or medical assistance during miscarriages or from complications from abortion.

There are only a few situations where abortion is legal in Brazil. The first is the so-called necessary (or therapeutic) abortion, that is, when there is no other way to save the pregnant woman's life but through abortion.<sup>23</sup> The second is in case of pregnancy resulting from rape,

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<sup>18</sup> FAÚNDES, Aníbal; BARZALATTO, José. *O drama do aborto: em busca de um consenso* (The drama of abortion: in search of a consensus). Campinas: Komedi; 2004.

<sup>19</sup> Monica Malta, Samantha Wells, Sara LeGrand, Michele Seixas, Angelica Baptista, Cosme Marcelo Furtado & Passos da Silva, *Abortion in Brazil: the case for women's rights, lives, and choices*, 4 the Lancet 552 (2019), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(19\)30204-X/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(19)30204-X/fulltext)

<sup>20</sup> Debora Diniz & Marcelo Medeiros, *Pesquisa Nacional de Aborto 2016*, *Ciência & Saúde Coletiva* 22(2): 653–660 (2017).

<sup>21</sup> Decreto Lei No 2.848 (1940) (hereinafter Brazilian Penal Code), arts. 124-126.

<sup>22</sup> The penalty of ‘imprisonment’ is more severe than ‘detention’ because it begins in a closed regime. The penalty of detention, on the other hand, must begin in an open or semi-open regime. The difference, then, is not in the number of years of the sentence, but in the way it will be served, whether in a closed regime (in prison), or in a semi-open or open regime (outside prison). Articles 125 and 126 provides for the penalty of imprisonment, therefore, with the beginning of the sentence being served in a closed regime (in prison). If, as a result of the abortion or the means used to induce it, the pregnant woman suffers serious injury or dies, the penalty is increased by one-third.

<sup>23</sup> Article 128, I of the Brazilian Penal Code.

called humanitarian abortion.<sup>24</sup> These two types of cases are provided for in the Brazilian Penal Code. The final category concerns cases of fetal anencephaly. This is a recent addition to the limited legal options for abortion, which emerged from a 2012 case in the STF.<sup>25</sup>

At the trial and appellate level, courts in Brazil have very heterogeneous interpretations about the criminal statutes on abortion, and advocates have attempted—with some case-specific successes—to raise the fact that these laws violate women’s rights to privacy and equality. However, without legislative reform, support, and guidance, courts have not uniformly accepted or even engaged with these arguments.

For example, in one case before the Supreme Court of Justice (STJ, the second highest court) analyzed for this report, the reporting judge declined to hear a habeas claim challenging the constitutionality of the abortion law in part, they claimed, because the judiciary cannot decriminalize abortion. The judge argued that the legislature “certainly did not refer to the practice of abortion” when providing the right to family planning and that the issue was outside its sphere of jurisdiction and could not be analyzed, under the principle of diffuse constitutional control.<sup>26</sup>

## 2. Efforts at Judicial Reform

In 2013, the STF ruled that in cases of anencephaly, it was unconstitutional to criminalize abortion because there was no viable human life to be protected.<sup>27</sup> The Court based its decision on a UN Human Rights Committee case, *K.L. v. Peru*, which recognized that compelling an individual to carry to term an anencephalic pregnancy can amount to cruel, inhuman, and degrading treatment and violate the right to privacy.<sup>28</sup> Following this victory, feminist organizations and human rights groups advocating for the total legalization of abortion in Brazil redoubled their efforts at legalizing abortion through the Judiciary.

In 2016, the National Association of Public Defenders filed a claim with the STF—Direct Action of Unconstitutionality 5581/2016—to decriminalize abortion in cases of pregnant women affected by the Zika-virus, which can cause microcephaly in fetuses. Several UN human rights mandate holders filed an amicus brief in this case, observing that the denial of safe pregnancy termination services and the criminalization of abortion constitute gender

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<sup>24</sup> Article 128, II of the Brazilian Penal Code.

<sup>25</sup> This hypothesis was added in Brazilian law by the Supreme Court Decision in the Action for Non-compliance with Fundamental Precept 54 (ADPF 54), in which it was considered unconstitutional to interpret that such type of abortion would be typified in Articles 124, 126 and 128, I and II. ADPFs are constitutional lawsuits aimed at discussing norms that, in theory, do not comply with the precepts present in the Constitution and, disagreeing with them, should be excluded from Brazilian law.

<sup>26</sup> BRAZIL. Superior Court of Justice (5<sup>th</sup> Chamber). Habeas Corpus 140.123/MS. Judge-Rapporteur: Justice Laurita Vaz. Ruled on Dec 06. 2011. Date of publication: December 19, 2011.

<sup>27</sup> Federal Supreme Court, Claim of Non-Compliance with Fundamental Precept n° 54. Judge-Rapporteur: Justice Marco Aurélio. Brasilia, DF, April 30, 2013, <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>.

<sup>28</sup> Federal Supreme Court of Brazil, ADPF 54. STF, Judge-Rapporteur: Justice Marco Aurélio, Full Court. 2012:68. April 12. pp. 74–75, citing; *see generally*, Johanna B. Fine, Katherine Mayall, & Lilian Sepúlveda, The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally, *Health & Human Rights Journal*, June 2, 2017.



discrimination by the State causing severe harm and suffering to women and girls. As such, this may constitute torture or cruel, inhuman and degrading treatment in violation of the Convention against Torture.<sup>29</sup> The Court rejected the action in May 2020 on procedural grounds, holding that the National Association of Public Defenders lacked standing to bring the action because the right to abortion is not connected to the institutional objectives of the entity of the National Association of Public Defenders.<sup>30</sup>

In 2017, Partido Socialismo e Liberdade (Socialism and Liberty Party - PSOL) and the feminist organization Anis - Instituto de Bioética, Direitos Humanos e Gênero (Institute of Bioethics, Human Rights and Gender) filed a case before the STF—Action for Non-compliance with Fundamental Precept<sup>31</sup> n. 442—to decriminalize abortion at up to 12 weeks of pregnancy. Specifically, the petitioners argued that the criminalization of abortion violates women’s constitutional rights including the right to dignity, citizenship, non-discrimination, life, equality, freedom, health, family planning and freedom from torture. The petitioners further argued that Black, Indigenous, and poor women are the most affected by such criminalization because they are more affected by social vulnerability, difficulty in accessing health services, and incarceration. As such, criminalization discriminates against these women on the grounds of gender, race, and socio-economic status. Public hearings in this case took place in 2018, with dozens of civil society and professional organizations, experts, and representatives of various religions providing testimony and evidence. Much of the testimony addressed how the criminalization of abortion has disproportionately impacted the health, rights, and socioeconomic status of women belonging to more vulnerable groups.<sup>32</sup>

The STF has not yet ruled on this case. However, even if the court does decriminalize abortion through this case, the Legislative Branch<sup>33</sup> can override this decision by enacting a new law or amendment to the Constitution that limits, contradicts or essentially overturns the court’s decision, criminalizes abortion again, or even expands criminalization to the currently permitted modalities. This is more than a hypothetical danger, given the increasing number of bills advancing in the Legislative Branch introducing new obstacles to legal abortion, or even criminalizing already legalized abortion cases.<sup>34</sup>

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<sup>29</sup> Mandates of the Working Group on the issue of discrimination against women in law and in practice; the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on violence against women, its causes and consequences, Amicus Brief in ADI/ADPF 5581, <https://www.ohchr.org/Documents/Issues/Women/WG/AmicusBrazil.pdf>

<sup>30</sup> STF, ADI/ADPF 5581 (decision), <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15344876705&ext=.pdf>.

<sup>31</sup> An Action for Non-compliance with Fundamental Precept or ADPF is a constitutional remedy by which parties can contest laws that violate constitutional rights, seeking relief at the Federal Supreme Court.

<sup>32</sup> <https://g1.globo.com/politica/noticia/2018/08/06/supremo-tem-segundo-dia-de-audiencia-publica-sobre-aborto-veja-argumentos-de-entidades-pro-e-contra-a-legalizacao.ghtml>.

<sup>33</sup> Brazilian Law falls under the so-called civil law system, that is, a system based on the codification of the law by written laws and their interpretation by legal actors. Unlike the common law system, based on judicial decisions and precedents, the civil law system has the written law as its protagonist.

<sup>34</sup> See, for example: GALLI, Beatriz; DESLANDES, Suely. Ameaças de retrocesso nas políticas de saúde sexual e reprodutiva no Brasil em tempos de epidemia de Zika. *Perspectivas* (Threats of setbacks in sexual and reproductive health policies in Brazil in times of the Zika epidemic. Prospects). *Cad. Saúde Pública*, 32, n. 4, 2016, <https://www.scielo.br/j/csp/a/nKjYnFLnmdqCtvx76kzNk7P/?lang=pt>. See also: GALLI, Beatriz. Desafios e oportunidades para o acesso ao aborto legal e seguro na América Latina a

## C. BRAZIL'S OBLIGATIONS UNDER HUMAN RIGHTS LAW

Brazil is a party, with no restrictions, to all the main human rights treaties that address sexual and reproductive rights, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>35</sup> and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.<sup>36</sup> Under Brazilian law, by ratifying such treaties, Brazil adopts these international instruments with supralegal force and, if the procedure of paragraph 3, Article 5 of the Constitution is followed, they have constitutional amendment status, meaning that they are binding on Brazil's courts and judicial decisions must comply with these human rights obligations.

Brazil has also made commitments regarding sexual and reproductive rights issues at major international conferences sponsored by the United Nations, such as the International Conference on Population and Development held in Cairo in 1994<sup>37</sup> and the Fourth World Conference on Women, held in Beijing in 1995.<sup>38</sup>

Laws that criminalize abortion violate human rights law and may further violate states' obligations to ensure that women and girls have equitable access to safe reproductive and other health care without discrimination. The UN Human Rights Committee has made clear that states should not "apply criminal sanctions against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compel women and girls to resort to unsafe abortion."<sup>39</sup> Human rights bodies have also made clear that complete bans on abortion are inconsistent with human rights law and standards.<sup>40</sup>

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partir dos cenários do Brasil, da Argentina e do Uruguai. (Challenges and opportunities for access to safe and legal abortion in Latin America from the scenarios of Brazil, Argentina and Uruguay). *Cad. Saúde Pública*, 36 (Suppl. 1), 2020,

<https://www.scielo.br/j/csp/a/N9MnGX8cfgmzb6NVNm4BWYR/?lang=pt&format=html>.

<sup>35</sup> Decree ratifying the Convention in Brazil:

[http://www.planalto.gov.br/ccivil\\_03/decreto/2002/d4377.htm](http://www.planalto.gov.br/ccivil_03/decreto/2002/d4377.htm).

<sup>36</sup> Decree ratifying the Convention in Brazil:

<https://legislacao.presidencia.gov.br/atos/?tipo=DEC&numero=1973&ano=1996&ato=342gXRU5EMJpWT990>.

<sup>37</sup> See: Tania Patriota, *Relatório da Conferência Internacional sobre População e Desenvolvimento - Plataforma de Cairo* (Apresentação), 1994, <https://brazil.unfpa.org/sites/default/files/pub-pdf/relatorio-cairo.pdf>.

<sup>38</sup> See: Maria Luiza Ribeiro Viotti, *Declaração e Plataforma de Ação da IV Conferência Mundial Sobre a Mulher* (Apresentação), 1995, [https://www.onumulheres.org.br/wp-content/uploads/2013/03/declaracao\\_beijing.pdf](https://www.onumulheres.org.br/wp-content/uploads/2013/03/declaracao_beijing.pdf).

<sup>39</sup> UN Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, Oct. 28, 2018, [https://www.ohchr.org/Documents/HRBodies/CCPR/CCPR\\_C\\_GC\\_36.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf).

<sup>40</sup> See generally: UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Combined Seventh and Eight Periodic Reports of Peru*, U.N. Doc. CEDAW/C/PER/CO/7-8, July 24, 2014, at para. 36 (urging Peru to "[e]xtend the grounds for legalization of abortion to cases of rape, incest and severe foetal impairment"); UN Committee on the Elimination of Discrimination Against Women, *Statement on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD Review* (Feb.10-28, 2014) ("States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment."); L.C. v. Peru, UN Committee on the Elimination of Discrimination Against Women, Comm'n No. 22/2009, UN Doc. CEDAW/C/50/D/22/2009 (finding that Peru should have provided access to an abortion given that there

The UN Committee on the Elimination of Discrimination against Women has similarly said that denial of safe abortion, criminalization of abortion, and forced continuation of pregnancy “are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”<sup>41</sup> The Committee has also repeatedly recommended that states “remove punitive measures for women who undergo abortion,”<sup>42</sup> opining on Brazil in 2012 that it “regrets that women who undergo illegal abortions continue to face criminal sanctions in the State party and that women's enjoyment of sexual and reproductive health and rights is being jeopardized by a number of bills under consideration in the National Congress.”<sup>43</sup>

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women recognizes violence perpetrated or tolerated by the state and its agents as a type of gender-based violence, wherever it occurs.<sup>44</sup> It obliges states parties to condemn all forms of violence against women—including, for example, forced or coerced abortions<sup>45</sup>— and to commit themselves to act expeditiously to prevent, investigate, and punish such violence and to establish fair and effective legal procedures, including

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were “sufficient reasons to state that continuing the pregnancy would put the girl’s physical and mental health at serious risk”); *K.L. v. Peru*, UN Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003, para. 6.4, (finding violation of right to privacy due to failure to permit abortion, despite satisfying domestic law requirements); *V.D.A. v. Argentina*, UN Human Rights Committee, Commc’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007, para. 9.3 (finding Article 17 violation where judiciary enjoined abortion that was ‘nonpunishable’ under domestic law); *Mellet v. Ireland*, UN Human Rights Committee, Commc’n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013, paras 7.7-7.11 (finding a violation of the right to be free of cruel, inhuman, or degrading treatment, specifically stating that “a woman’s decision to request termination of pregnancy is an issue which falls under the scope of [Article 17]. In the present case, the State party interfered with the author’s decision not to continue her non-viable pregnancy ... [and] the failure of the State party to provide the author with the services that she required constituted discrimination.”); *Whelan v. Ireland*, UN Human Rights Committee, Commc’n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014, paras. 7.7-7.12 (finding that Ireland’s limited exception to abortion ban resulted in violation of Articles 7, 17, and 26); UN Human Rights Committee, *General Comment No. 36 on Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36, para. 8 (2018) (“States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.”).

<sup>41</sup> UN Committee on the Elimination of Discrimination Against Women, General recommendation No. 35 on gender-based violence against women, updating General recommendation No. 19 (2017), para. 18, [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf)

<sup>42</sup> CEDAW Committee, *Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review*, 57th Session (Feb. 10-28, 2014), <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf>.

<sup>43</sup> CEDAW Committee, *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Brazil*, UN. Doc CEDAW/C/BRA/CO/7, Mar. 23, 2012, para. 28.

<sup>44</sup> Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”), June 9, 1994.

<sup>45</sup> See: Council of Europe, Convention on preventing and combating violence against women and domestic violence, May 11, 2011, <https://rm.coe.int/168008482e>. See also: Human Rights Watch, “Why do they want to make me suffer again?: The Impact of Abortion Prosecutions in Ecuador,” June 14, 2021 (discussing abortion lawsuits involving allegations of gender-based violence, “including allegations that [women] were forced or coerced into abortion”), <https://www.hrw.org/report/2021/07/14/why-do-they-want-make-me-suffer-again/impact-abortion-prosecutions-ecuador>.



measures of protection, timely adjudication, and effective access to processes concerning violence against women.<sup>46</sup>

In November 2021, the Inter-American Court on Human Rights ruled that El Salvador—where abortion is illegal in all circumstances—had violated the rights of women by prosecuting them for obstetric emergencies, including their rights to privacy, health, liberty, and non-discrimination.<sup>47</sup> The case, *Manuela v. El Salvador*, was brought to the Inter-American Court on behalf of survivors of a woman who was convicted of homicide after losing her baby during an obstetric emergency. The woman died in prison while serving her 30-year sentence. Acknowledging that this individual's medical treatment and conviction evidenced a larger systemic problem in El Salvador, the Court ordered a range of structural reforms to ensure that impoverished women were not arbitrarily criminalized, and to ensure that all women had the right to privacy and adequate medical care. Under this ruling, which applies to Brazil and other countries throughout Latin America and the Caribbean under the Court's jurisdiction, health care professionals cannot refer women seeking abortion and other medical treatment to law enforcement.<sup>48</sup>

Despite international and emerging regional human rights law supporting the decriminalization of abortion, however, Brazil continues to use its criminal laws to punish women and girls who have abortions, with a disproportionate impact on women who rely on public health services—namely, Black women with low-incomes, experiencing the intersectional discrimination of race, socio-economic status, and gender.

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<sup>46</sup> See: Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"), June 9, 1994, 7 (f).

<sup>47</sup> Inter-American Court on Human Rights, *Manuela y otros v. El Salvador* (IACHR N° 13.069), Nov. 30, 2021. See also: Inter-American Commission on Human Rights, Report No. 153/18, Case 13.069. Merits. *Manuela and family. El Salvador*. December 7, 2018.

<sup>48</sup> *Id.*, at para. 287.

# METHODOLOGY AND CASE ANALYSIS: OVERVIEW



In Brazil, abortion is a crime that is actively being prosecuted at the moment. While the criminalization of abortion has longer-term impacts on access to safe and legal abortion, stigma, discrimination against women, and core human rights, most immediately, it is an offense that results in the criminalization of dozens of women each year. And, consistent with prior research in Brazil and around the world, this criminalization has a disproportionate impact on Black women with low incomes. This chapter provides an overview of the cases of self-abortion and a brief procedural explanation of how abortion prosecutions proceed in Brazil.

## A. METHODOLOGY

Between January and October 2021, the Women's Human Rights Clinic of USP—CDHM-USP—analyzed 167 cases involving prosecution of abortion in Brazil. To identify the cases, the research team read judicial decisions trying to find the type of crime to which the case referred (if it was the crime of ‘self-abortion’) and if the defendant was a woman. In light of legal confidentiality requirements,<sup>49</sup> court webpages from 12 states were used to access and view the decisions, votes and procedural information on 167 cases. To further identify the number of cases of self-abortion, the USP team analyzed public data available from the National Council of Justice (CNJ). A total of 61 of the decisions analyzed in this report come from state courts (first and second instance); 20 were in the Superior Court of Justice<sup>50</sup> (the STJ, the second highest court, which is empowered to interpret federal statutory law); and 86 were in the STF (the final level of appeal, authorized to interpret the federal constitution and constitutional challenges to a law).<sup>51</sup>

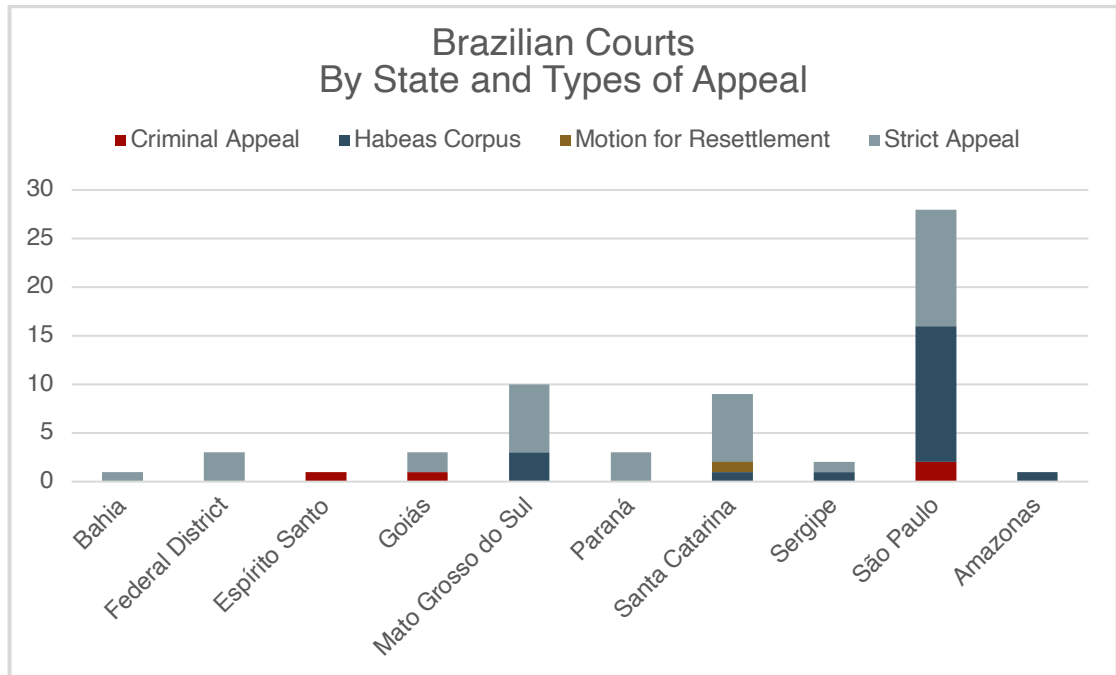
We analyzed 61 decisions from the following States: Sergipe (2), Santa Catarina (9), Paraná (3), Goiás (3), Espírito Santo (1), Amazonas (1), Bahia (1), Mato Grosso do Sul (10), São Paulo (28) and the Federal District (3). In the State of São Paulo, a date filter was used (as of 2018), due to the high number of cases returned in the search.

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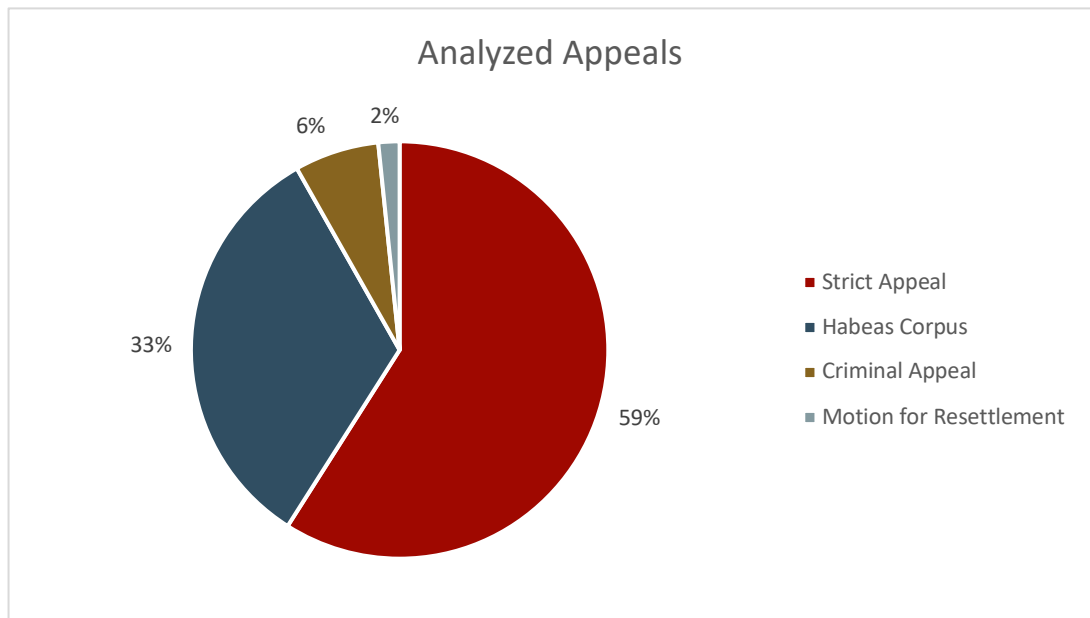
<sup>49</sup> In Brazil, the general rule is that court cases are public. The court can only require confidentiality in cases defined by law or that intrude into the privacy of the parties, and the requirement must be justified, on the ground of Article 5, item LX, of the Brazilian Federal Constitution, which states that “the law may only restrict the publicity of legal proceedings when the defense of privacy or the social interest so require.”

<sup>50</sup> The Superior Court of Justice (STJ) is a superior court in Brazil. It has competence in cases with an infra-constitutional nature: It is responsible for standardizing the interpretation of federal laws, for processing crimes committed by some authorities, as well as for prosecuting certain cases involving human rights violations and international treaties as the subject. It is also a court that processes appeals in special cases. Thus, in the hierarchy of Brazilian courts, the STJ is only below the STF.

<sup>51</sup> Most of the 86 cases in the STF are *Habeas Corpus* or *Habeas Corpus* Appeals, where individuals arrested for having or providing an illegal abortion are requesting release from detention. Of this total, only nine are cases in which the pregnant woman is the petitioner (others are predominantly medical professionals). All of them date back to before 2000.



Almost all of the cases analyzed are cases on appeal (Criminal Appeal, Strict Appeal, Habeas Corpus, and Motion for Resettlement) in which the accused was a woman who had an abortion and was prosecuted under Article 124 of the Brazilian Penal Code. A criminal appeal is an appeal of a guilty verdict, whereas a strict appeal is an appeal of the preliminary decision to take a case to trial and a motion for resettlement seeks clarity from the court itself, where a decision is obscure, vague or contradictory. Regarding the types of appeals, of the 61 decisions, there were 34 Strict Appeals, 20 Habeas Corpus,<sup>52</sup> 6 Criminal Appeals and 1 Motion for Resettlement.



<sup>52</sup> This category included petitions and appeals.



## B. ABORTION BY THE NUMBERS

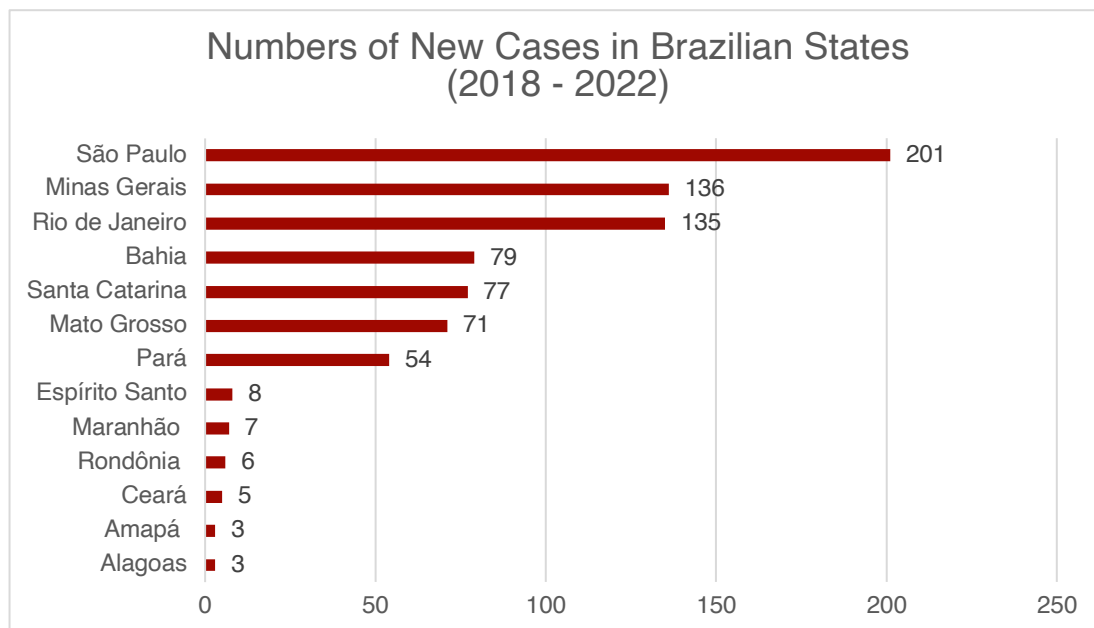
Over the last five years, there have been an average of 400 new court cases concerning self-abortion (Article 124) or consented to abortion (Article 126) per year.<sup>53</sup> Between 2018 and 2020, there were 1,052 new court cases concerning the crime of self-abortion under Article 124. In 2018, there were 188 new self-abortion cases in trial courts, 30 at the appeal stage, and eight in the STJ. In 2019, there were 302 new self-abortion cases in trial courts, 53 in courts of appeal, and four in the STJ. In 2020, there were 378 in trial courts and 89 in courts of appeal.

From 2018 to 2020, the number of new cases in Brazil's trial courts was four times higher than the new cases filed in the Court of Appeal, not all of them with a final decision yet.<sup>54</sup> It is estimated, then, that only 25% of cases proceeded to appeal. The Brazilian states with the highest numbers of cases under Article 124 of the Brazilian Penal Code in the period between 2018 and 2022 were: São Paulo (201), Minas Gerais (136), Rio de Janeiro (135), Bahia (79), Santa Catarina (77), Mato Grosso (71), and Pará (54). The states with the lowest numbers, on the other hand, were: Alagoas (3), Amapá (3), Ceará (5), Rondônia (6), Maranhão (7) and Espírito Santo (8).

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<sup>53</sup> The National Council of Justice provides statistical data on court cases from 2014 onwards. Thus, in 2014, there were 436 cases; in 2015, 419 cases; in 2016, 257 cases; and in 2017, 1,228 cases, 878 of which are from the Court of Justice of the State of Acre. Possibly, in this case, there may have been some mistake in data collection or an accumulation of cases from previous years that were registered in their entirety in 2017. That is why we only considered the data from 2018 onwards.

<sup>54</sup> In the courts of appeal, the judges, also called appellate courts, are responsible for reviewing the cases already analyzed by the trial judges of first instance. If one of the parties in the case does not agree with the lower court judge's decision, they can appeal to have the case heard by the Court of Appeals. Therefore, when we say that the case went to a second instance, it means that there was an appeal against the lower court judge's decision and the case is now being examined by a group of judges. The second-instance decision is a collegiate decision because it is produced by a group of judges. In general, there is a reporting judge who submits the text, with an indication of vote, to the group. The other judges vote in agreement with the vote of the reporting judge. The decision in this case is always the result of a majority vote.



The charges addressed in this report are not the only ones used to prosecute and punish those who get abortions. For example, prosecuting authorities may sometimes use the charge of infanticide or murder to get a more severe punishment as in a 2018 case from a first-instance court in the State of Mato Grosso do Sul, in which the judge indicted the defendant for the crime of qualified murder, instead of abortion or infanticide, based on the alleged use of "cruel means."<sup>55</sup> This report, however, focuses primarily on prosecutions for self-abortion under Article 124 of the Penal Code.

## C. CRIMINAL TRIAL PROCEDURE IN BRAZIL

### *Pre-trial stage*

In Brazil, a criminal case generally begins after a victim or a witness reports a crime to the police, who investigate to identify the offender; if the police determine that a crime has been committed and identify the perpetrator, they prepare a report for the State Prosecutor. Based on the investigation report and its findings, the public prosecutor's office can offer charges against the offender or request the permission of the Judiciary to drop the case. If the male or female Judge approves the indictment, the prosecution of the crime begins by finding whether there is sufficient evidence and probable cause as to the occurrence of the offense and that the accused might have committed it.

The cases proceed in one of the country's 27 State Courts of Justice, composed of female or male trial judges ("first instance") and female or male appellate judges ("second instance"). The São Paulo Court of Justice (TJSP) is the largest Brazilian court in terms of volume of cases and number of female or male judges.

<sup>55</sup> Strict Appeal (RESE) n° 0008512-32.2018.8.12.0001 (TJMS), tried in 2018. The decision states that the defendant had made several unsuccessful abortion attempts during her pregnancy. On the date of the incident at issue, she was at an advanced stage of pregnancy (there is no information about gestational age) and had gone into labor, alone in the room. Family members found the fetus or baby (there is no expert information in the decision) wrapped in a plastic bag under the bed.

At the initial stage of the proceedings, some courts have been operating under the understanding that before the indictment has been accepted, the principle of *in dubio pro societate* applies—meaning that the prosecution can continue even without sufficient elements establishing that (a) the offense took place and (b) the accused is the probable perpetrator. In other words, even if the prosecution has not demonstrated probable cause that the accused has committed an offense, the female or male judge can accept the indictment and move the process to trial, on the grounds that this decision favors the interests of society. This principle is an exception to the general rule of Brazilian law, which is governed by the guarantee of the presumption of innocence. In other words, cases can only proceed if there is a finding of probable cause. While it is not the standard rule in Brazil, in some cases reviewed for this report courts seemed to apply the principle of *in dubio pro societate* instead of the principle of *in dubio pro reo*, which favors the person and enjoys a constitutional basis. This is controversial under the case law of the Federal Supreme Court (STF). In any event, the defense may file for a writ of habeas corpus.

In some cases, women detained upon arrest have moved for release from detention—and sometimes also to have the charges dismissed—through a petition for Habeas Corpus, a constitutional remedy<sup>56</sup> against any constraint to individual freedom and the right to come and go. *Habeas* offers a sort of “fast-track” proceeding for tackling any violation of fundamental rights (e.g., to fight unlawful pretrial detention, illegal action from the Prosecutor or the judge, or in the production of evidence, etc.). On the other hand, the prosecution makes arguments in abortion cases to justify detention such as that:

- “if free, she represents a serious risk to social peace”<sup>57</sup>;
- “precautionary arrest is necessary to guarantee public order”<sup>58</sup>; and
- arrest would provide a “guarantee of public order and economic order”<sup>59</sup>.

Early in the criminal proceedings and before the trial, the Prosecutor may offer Conditional Suspension of Proceedings (SCP) to the defendant. SCP is a type of diversion program offered in the context of crimes the minimum sentence for which is equal to or less than one year and as long as the person accused has no prior conviction for another crime.<sup>60</sup> If the defendant accepts SCP, the criminal abortion case is suspended for two to four years, during which the defendant must comply with conditions in exchange for the termination of the process. These conditions may include not going to certain places (e.g., bars, parties, and political events), not being absent from the district where she lives without judicial authorization, and appearing before the court every month to report and explain her activities.

If the accused does not accept the SCP, she may be tried by jury. In most cases, these trials end in conviction, which influences many women to accept this diversion option even if they must plead guilty. Many of the decisions that came back in the search made by the USP

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<sup>56</sup> Article 5, LXVIII, of the Brazilian Federal Constitution and Articles 647 to 667 of the Brazilian Code of Criminal Procedure.

<sup>57</sup> Strict Appeal (RESE) n° 0005875-87.2014.8.12.0001 (TJMS), tried in 2017.

<sup>58</sup> Strict Appeal (RESE) n° 0005875-87.2014.8.12.0001 (TJMS), tried in 2017.

<sup>59</sup> Strict Appeal (RESE) n° 0003997-17.2007.8.05.0103/TJBA, tried in 2015.

<sup>60</sup> Art. 89, Law 9.099/95. [http://www.planalto.gov.br/ccivil\\_03/leis/l9099.htm](http://www.planalto.gov.br/ccivil_03/leis/l9099.htm).



team for this study concern the definition of the start of the SCP or the extinction of punishability after the defendant has served the SCP term.<sup>61</sup>

If the SCP does not occur or is not an available option, the criminal case resumes in court. At the outset, the defendant is summoned, informed of the charges against them, appointed legal assistance if they do not have it, and the legal representative presents a preliminary written defense. If the Court reviews the defense arguments and determines that there is no reason for a preliminary acquittal (whereby the case would be dismissed without trial), the indictment will be accepted and the case will move to further hearings with witness testimony and written submissions.<sup>62</sup> If the Court then concludes that the accused has likely committed a crime against life, they will move the case to a jury trial<sup>63</sup>, consistent with requirements for abortion cases that a jury conclude whether the accused intentionally committed this offence.<sup>64</sup>

### ***Trial Proceedings***

During the jury trial, the prosecution and defense will present oral arguments, cross-examine witnesses, question the defendant, and examine the evidence. The jury of seven people then decides if the defendant committed the crime. The sentence, however, is given by the female or male Judge and must be in accordance with the jury's decision. Both parties, the Public Prosecutor's Office and the defendant, have a right to appeal.

After the trial, a decision can be challenged by an appeal, but the courts of appeal cannot review *de novo* all the facts and arguments of the case.<sup>65</sup> The appeal is limited to cases in which (i) there is a procedural nullity; (ii) the female or male judge's decision is contrary to the law or the jury's decision; (iii) there is error or injustice in the application of the penalties; or (iv) the jury's decision is blatantly contrary to the evidence.<sup>66</sup>

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<sup>61</sup> See: Public Defender's Office of the State of Sao Paulo. *30 habeas corpus: a vida e o processo de mulheres acusadas da prática de aborto em São Paulo (30 habeas corpus: the life and lawsuits of women accused of abortion in Sao Paulo)*. Sao Paulo. DPESP, 2018. <https://www.defensoria.sp.def.br/dpesp/Repositorio/41/Documentos/30%20habeas%20corpus.pdf> e. Defensoria Pública Geral. *Entre a morte e a prisão: quem são as mulheres criminalizadas pela prática de aborto no Rio de Janeiro / Defensoria Pública do Estado do Rio de Janeiro, Coordenação de Defesa de Mulher dos Direitos Humanos. (Between death and imprisonment: who are women criminalized for abortion in Rio de Janeiro / Public Defender's Office of the State of Rio de Janeiro, Coordination of Women's Defense of Human Rights)*. Rio de Janeiro: Defensoria Pública Geral do Estado do Rio de Janeiro, 2018. <https://defensoria.rj.def.br/uploads/arquivos/c70b9c7926f145c1ab4cfa7807d4f52b.pdf>.

<sup>62</sup> Art. 155 and 394 of the Brazilian Code of Criminal Procedure.

<sup>63</sup> Art. 406 of the Brazilian Code of Criminal Procedure.

<sup>64</sup> The jury is composed of seven people from civil society and is responsible for processing and adjudging intentional crimes against life (committed with the intent or assumption of risk to kill). The task of the jurors is not to pass judgment, but to determine whether or not the crime in question actually occurred, and whether or not the defendant participated in this crime. If both questions are answered positively, there is a third decision: whether or not the defendant who participated in the crime should be acquitted. If the defendant is not acquitted, only then they are adjudged guilty, and judgment must be rendered. The Judge is responsible for rendering the judgment, which stipulates the sentence to be served if the defendant has been considered a participant in the crime.

<sup>65</sup> See: *supra* note 54.

<sup>66</sup> Art. 593 of the Brazilian Code of Criminal Procedure.

Individuals may also file “special appeals” at the STJ, challenging the decisions of the lower courts, when it is considered that they were against a federal law or treaty, when they have ruled that an act of local government challenged against a federal law is valid, or when they gave a federal law a divergent interpretation from that of another court. There is an understanding that this court does not reexamine the evidence (Precedent 7/STJ). In Habeas Corpus cases, it is understood that the STJ cannot make a profound examination of evidence.

### ***Judicial Authorization***

While not the focus of this report, the research also identified and analyzed cases stemming from a woman’s request for judicial authorization for abortion.<sup>67</sup> Of the eight cases identified, three of them reviewed concerned situations in which the abortion was legally permitted (e.g., in which pregnancy represented a risk to the life or health of the woman, cases of rape, anencephaly, etc.) and therefore should not have required authorization under the law, but where the pregnant women nevertheless decided to file for express authorization.<sup>68</sup> Given that most details about these cases were under judicial secrecy, it was not possible to ascertain the reasons leading to requests for judicial authorization in such cases but the requests could have stemmed from the refusal by a hospital or its medical staff to proceed with an abortion.

In such cases, pregnant women may file Habeas Corpus. In some cases, however, the Habeas Corpus mechanism has also been used to oppose abortion.<sup>69</sup> For example, some anti-abortion groups have filed Habeas Corpus on behalf of the fetus claiming its right to life, given that it is possible to file a Habeas Corpus on behalf of any individual, with or without their knowledge.<sup>70</sup>

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<sup>67</sup> Article 128 of the Brazilian Penal Code. The cases identified in the STJ of requests for judicial authorization for abortion are: HC 266.445/GO, HC 359.733/RS, HC 205.386/SP, HC 54.317/SP, HC 47.371/GO, HC 56.572/SP, HC 32.159/RJ and REsp 1.467.888/GO.

<sup>68</sup> Cases HC 54.317/SP, HC 359.733/RS and HC 56.572/SP.

<sup>69</sup> E.g., HC n. 266.445/TJGO; HC n. 205.386/SP; HC n. 47.371/GO; and HC n. 32.159/RJ.

<sup>70</sup> Art. 654 of the Brazilian Code of Criminal Procedure.

# ABORTION PROSECUTIONS AND GENDER DISCRIMINATION



## A. DISCRIMINATION FROM ARREST ONWARDS ON THE BASIS OF GENDER, RACE AND SOCIO-ECONOMIC STATUS

In Brazil, as in many other regions of the world, those most impacted by criminalization of abortion are women with greater social vulnerability. According to the last published national census from Brazil (2010), 50.7 percent of the Brazilian population defined themselves as Black (Black and mixed-race persons) compared with 47.7 percent self-identifying as White;<sup>71</sup> with the remaining 1.1 percent identifying as Asian and 0.4 percent as indigenous.<sup>72</sup> Even with a large portion of the population self-identifying as mixed race or Black, racial discrimination based on skin color persists in Brazil and impacts everything from life expectancy to employment to police brutality.<sup>73</sup> In 2019, for example, the Black population comprised only 18 percent of the national legislature,<sup>74</sup> and earned on average only 57 percent of what White Brazilians did.<sup>75</sup> Racial discrimination also impacts access to justice and the criminal justice system. Approximately 67 percent of the prison population in Brazil is Black/mixed while 79 percent of people killed by the police in Brazil are Black/mixed.<sup>76</sup>

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<sup>71</sup> In the categorization employed by the census researchers, "Blacks" encompasses both Black and mixed-race persons. See: IBGE. *Censo Demográfico 2010. Características da População e dos Domicílios. Resultados do Universo.* (Demographic Census 2010. Population and Household Characteristics. Results of the Universe.) Rio de Janeiro, 2011. [https://biblioteca.ibge.gov.br/visualizacao/periodicos/93/cd\\_2010\\_caracteristicas\\_populacao\\_domicilios.pdf](https://biblioteca.ibge.gov.br/visualizacao/periodicos/93/cd_2010_caracteristicas_populacao_domicilios.pdf) (accessed on Apr. 07, 2022).

<sup>72</sup> IBGE. *Censo Demográfico 2010. Características da População e dos Domicílios. Resultados do Universo.* (Demographic Census 2010. Population and Household Characteristics. Results of the Universe.) Rio de Janeiro, 2011. [https://biblioteca.ibge.gov.br/visualizacao/periodicos/93/cd\\_2010\\_caracteristicas\\_populacao\\_domicilios.pdf](https://biblioteca.ibge.gov.br/visualizacao/periodicos/93/cd_2010_caracteristicas_populacao_domicilios.pdf) (accessed on Apr. 07, 2022).

<sup>73</sup> Raphael Tsavkko Garcia, *Al Jazeera*, "Diversity in Brazil is still just an illusion," Oct. 22, 2020, <https://www.aljazeera.com/opinions/2020/10/22/diversity-in-brazil-is-still-just-an-illusion>; *Time Magazine*, "How Black Brazilians are looking to a slavery-era form of resistance to fight Racial injustice today," Dec. 16, 2020, <https://time.com/5915902/brazil-racism-quilombos/>; Mariana Ferrari, "O que é necropolítica. E como se aplica à segurança pública no Brasil", Sept. 25, 2019, <https://ponte.org/o-que-e-necropolitica-e-como-se-aplica-a-seguranca-publica-no-brasil/>; *The Economist*, "Rio de Janeiro asks why its cops kill so many black people," Aug. 14, 2021, <https://www.economist.com/the-americas/2021/08/14/rio-de-janeiro-asks-why-its-cops-kill-so-many-black-people>; César Muñoz, Human Rights Watch, "Brazil Suffers its Own Scourge of Police Brutality," June 3, 2020, <https://www.hrw.org/news/2020/06/03/brazil-suffers-its-own-scourge-police-brutality>.

<sup>74</sup> *O Globo*, "Apenas 17,8% dos parlamentares no Congresso são negros," Nov. 21, 2019, <https://oglobo.globo.com/brasil/apenas-178-dos-parlamentares-no-congresso-sao-negros-24091144>

<sup>75</sup> *Época Negócios*, "Trabalhador branco recebe 75% a mais que pretos e pardos no Brasil, aponta IBGE," Oct. 16, 2019, <https://epocanegocios.globo.com/Carreira/noticia/2019/10/trabalhador-branco-recebe-75-mais-que-pretos-e-pardos-no-brasil-aponta-ibge.html>.

<sup>76</sup> Fausto Salvadori, *The Washington Post*, "Brazil's racist wave of mass incarceration," June 14, 2021; Conectas, "Brazil has the world's 3rd largest prison population", Aug 12, 2017; Åsne Håndlykken-Luz, "Racism is a perfect crime: favela residents' everyday experiences of police pacification, urban militarization, and prejudice in Rio de Janeiro," 43 *ETH. & R. STUDIES* 348 (2020).

For women, race compounds the discrimination they face on account of gender in access to health and to justice. For example, women of color are more likely to experience sexual violence than White women in Brazil.<sup>77</sup> They are also three times more likely than White women to die from pregnancy and childbirth complications, including an unsafe abortion.<sup>78</sup>

In 2011, the UN Committee on the Elimination of Discrimination against Women (CEDAW) ruled that Brazil violated the rights of Alyne da Silva Pimentel Teixeira, an impoverished 28-year-old Afro-Brazilian woman who died of pregnancy complications due to inadequate medical care.<sup>79</sup> The Committee observed there is systematic “*de facto* discrimination against women, especially women from the most vulnerable sectors of society such as women of African descent.”<sup>80</sup> In finding that Brazil had denied her and other women access to timely, non-discriminatory, and appropriate maternal health services, the Committee concluded that Ms. da Silva Pimentel Teixeira was “discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background.”<sup>81</sup>

More recently, a 2018 report from the Public Defender's Office of the State of Rio de Janeiro, analyzing 55 abortion prosecutions between 2004 and 2017, found that 60 percent of the women prosecuted were Black.<sup>82</sup> As discussed in the next section, many prosecutions start with calls to the police by public health workers, reporting on women who seek emergency treatment after a failed clandestine abortion. In Brazil, as in other countries in the region and around the world, it is women who face disadvantage and discrimination based on race and class who rely most heavily on public services. According to 2020 data from the Brazilian Census, 60% of the users of the Unified Health System—Brazil’s public health service—are Black women.<sup>83</sup>

In cases analyzed for this report, the legal documents did not reveal the demographics of

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<https://www.tandfonline.com/doi/pdf/10.1080/01419870.2020.1800774>; Daniel Cerqueira et al., ATLAS DA VIOLÊNCIA 2019, [https://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=34784](https://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=34784)

<sup>77</sup> *El Pais*, “É preciso discutir por que a mulher negra é a maior vítima de estupro no Brasil,” July 23, 2016, [https://brasil.elpais.com/brasil/2016/07/14/politica/1468512046\\_029192.html](https://brasil.elpais.com/brasil/2016/07/14/politica/1468512046_029192.html).

<sup>78</sup> IPAS BRASIL, Ref: Information on effective practices in eliminating preventable maternal mortality and morbidity in Brazil, 2011,

<https://www2.ohchr.org/english/issues/women/docs/responses2ndNV/lpasBrasil.pdf>; *The Conversation*, “Beyond #MeToo, Brazilian women rise up against racism and sexism,” Jan. 11, 2018,

<https://theconversation.com/beyond-metoo-brazilian-women-rise-up-against-racism-and-sexism-89117>

<sup>79</sup> UN Committee on the Elimination of Discrimination against Women, Communication No. 17/2008, August 11, 2011, <https://reproductiverights.org/wp-content/uploads/2020/12/Alyne-v.-Brazil-Decision.pdf>.

<sup>80</sup> *Id.* at paras. 7.7- 7.8

<sup>81</sup> *Id.*

<sup>82</sup> Defensoria Pública Geral. Entre a morte e a prisão: quem são as mulheres criminalizadas pela prática do aborto no Rio de Janeiro / Defensoria Pública do Estado do Rio de Janeiro, Coordenação de Defesa de Mulher dos Direitos Humanos. (Between death and imprisonment: who are women criminalized for abortion in Rio de Janeiro / Public Defender’s Office of the State of Rio de Janeiro, Coordination of Women’s Defense of Human Rights). Rio de Janeiro: Defensoria Pública Geral do Estado do Rio de Janeiro, 2018. <https://defensoria.rj.def.br/uploads/arquivos/c70b9c7926f145c1ab4cfa7807d4f52b.pdf>.

<sup>83</sup> Brasil de Fato, “IBGE: mulheres negras e pardas são as principais usuárias da atenção básica à saúde” (IBGE: black and brown women are the main users of the basic health care service), October 21, 2020, <https://www.brasildefato.com.br/2020/10/21/ibge-mulheres-negras-e-pardas-sao-as-principais-usuarias-da-atencao-basica-a-saude>.



the defendants prosecuted for abortion. However, comments made during the trial and circumstantial evidence from the cases are suggestive of the socio-economic background of the women prosecuted.

For example, in multiple trials analyzed, women were referred to as:

- Having a “humble origin”;<sup>84</sup>
- Facing “financial hardship”;<sup>85</sup>
- Being a “prostitute”;<sup>86</sup>
- Being a “drug addict.”<sup>87</sup>

In some of the cases analyzed, the reports triggering arrest and prosecution for abortion came from anonymous reports, made for example by family members, former partners, or third parties. In these cases, it appears from the records that the complaint was made after the fetus was found in locations such as public bathrooms or open sewers. This suggests that the women accused were from vulnerable, low-income communities with poor infrastructure and sanitation.

In the Special Appeals and Habeas Corpus cases analyzed, there is also no data that directly explains the sociodemographic profile of the women reported. However, in six of the 12 out of 20 STJ cases that involved women charged with abortion, women were represented by the Public Defender's Office<sup>88</sup>, in contrast to the other 6 cases in which women were represented by private practice lawyers.<sup>89</sup> This further suggests that a significant portion of these women were in situations of socioeconomic vulnerability.

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<sup>84</sup> Criminal Action n. 0033096-57.2016.8.26.0224, ruled in 2019 at TJSP; Appeal n. 0001673-85.2011.8.26.0408, ruled at TJSP.

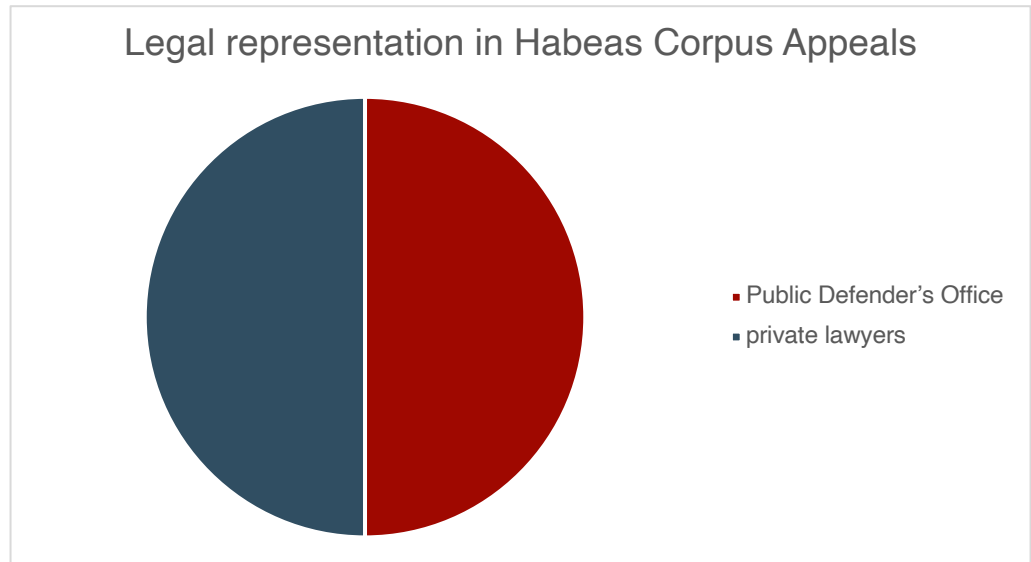
<sup>85</sup> Habeas Corpus n. 2188896-03.2017.8.26.0000, tried at TJSP; Appeal n. 0047467-97.2015.8.26.0050, ruled at TJ-SP; Appeal n. 0004804-04.2013.8.24.0069, ruled at TJSC; Appeal n. 1.696.625-1, ruled at the ECJ; Appeal n. 0003997-17.2007.8.05.0103, ruled at the TJBA.

<sup>86</sup> Appeal n. 0012259-93.2007.8.26.0224, ruled at the TJSP; Appeal n. 0005850-15.2007.8.26.0576, ruled at the TJSP; Appeal n. 0005850-15.2007.8.26.0576, ruled at the TJSP.

<sup>87</sup> Appeal n. 0005850-15.2007.8.26.0576, ruled at the TJSP; Appeal n. 0005850-15.2007.8.26.0576, ruled at the TJSP; Appeal n. 0001673-85.2011.8.26.0408, ruled at the TJSP.

<sup>88</sup> RHC n. 7.379/ECJ, ruled in 1998; Resp n. 594.046/TJMG, tried in 2004; HC n. 140.123/TJMS, tried in 2011; HC n. 339.460/TJSP, tried in 2017; HC n. 516.437/TJSP, tried in 2019; and HC n. 514.617/TJSP, tried in 2019.

<sup>89</sup> Judgment n. 122.643/TJMG, ruled in 1997; HC n. 11.515/TJRJ, tried in 2000; HC n. 12.429/TJRJ, tried in 2001; HC n. 236.882/TJMS, tried in 2012; RHC n. 62.158/TJSP, tried in 2015; and RHC n. 69.563/ECJ, tried in 2016.



While this information may not be dispositive, it is consistent with the overall reporting on abortion prosecutions in Brazil, demonstrating that Black and other minority women with low income are the most likely to be prosecuted and punished under Brazil's strict criminal abortion laws.

## B. GENDER STEREOTYPING IN COURTS

Human rights law requires that states eliminate harmful gender stereotyping, which can result in discrimination and a denial of women's and girls' human rights.<sup>90</sup> Under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), States Parties to the Convention have an obligation to take necessary measures to "achiev[e] the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."<sup>91</sup>

In its 2015 recommendation on access to justice, the UN Committee on the Elimination of Discrimination against Women warned:

Often, judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws... In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.

<sup>90</sup> See generally: Columbia Law School Human Rights Institute, TrialWatch, Gendered Prosecutions: An Overview of trials Targeting Women and Girls around the World, 2021.

<sup>91</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res 34/180, Dec. 18, 1979, Article 5, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>. The Convention on the Rights of Persons with Disabilities similarly requires that States Parties take measures to address stereotyping on the basis of sex. Convention on the Rights of Persons with Disabilities, Art 8(1).

Judges, magistrates, and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes undermining the claims of the victim ... Stereotyping can, therefore, permeate both the investigation and trial phases and shape the final judgment.<sup>92</sup>

Article 1(1) of the American Convention prohibits discrimination on the grounds of sex, age, and socioeconomic position, and thus, restricting rights based on those categories requires rigorous justification by the State to demonstrate that such restrictions do not have a discriminatory purpose or effect.<sup>93</sup> The Inter-American Court has recognized gender stereotyping as “a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women” and warned that “the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities.”<sup>94</sup> It has further observed, like the CEDAW Committee, that gender stereotyping can reveal a lack of judicial impartiality and violate the right to the presumption of innocence and to a reasoned decision.<sup>95</sup>

One pattern that has been documented in the region is the use of the term ‘cruel mother’ in abortion cases. For instance, a study on abortion cases in El Salvador documented the influence of rhetoric by antiabortion activists such as “perverse mother.”<sup>96</sup> That pattern can be found in the cases studied here, too.

Indeed, the Public Prosecution has relied on similar gender stereotypes to seek more severe punishment for women. For example, in one case where the defense counsel sought conditional suspension of the proceedings (SCP), the Public Prosecution argued that the case should proceed, pointing to the defendant's "display of coldness" in the way she disposed of the fetus:

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<sup>92</sup> UN Committee on the Elimination of Discrimination Against Women, General Recommendation on Women’s Access to Justice, CEDAW/C/GC/33, July 23, 2015, paras. 26-27. [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf).

<sup>93</sup> American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 22, 1969, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

<sup>94</sup> Inter-American Court of Human Rights, *Manuela y otros v. El Salvador* (IACHR 13.069), Nov. 30, 2021. para 133; Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*. Preliminary Objections, Merits, Reparations and Costs, Judgment of November 16, 2009. Series C No. 205, para. 401, *cited* by Inter-American Commission on Human Rights, Report No. 153/18, Case 13.069. Merits. *Manuela and family. El Salvador*. December 7, 2018, at para. 151, <http://www.oas.org/en/iachr/decisions/court/2019/13069FondoEn.pdf>.

<sup>95</sup> Inter-America Court of Human Rights, *Manuela y otro v. El Salvador*, *supra*, paras. 133-34.

<sup>96</sup> Jocelyn Viterna & Jose Santos Guardado Bautista, *Pregnancy and the 40-Year Prison Sentence: How “Abortion Is Murder” Became Institutionalized in the Salvadoran Judicial System*, 19 HEALTH AND HUMAN RIGHTS JOURNAL 81 (2017), at 86, 89.

[i]t is worth highlighting here as unfavorable circumstances for the accused (NAME) her late-stage pregnancy, of approximately twenty-two weeks; the failure to inform on one of the participants at the time of her first interrogation (page 06); the *coldness* that she has demonstrated when she discarded that fetus, placing it in the garbage, among other things.<sup>97</sup>

In another case from São Paulo (TJSP), the Public Prosecution argued against granting SCP alleging that the case showed “a very high degree of turpitude, maximum absence of pity and marked insensitivity to the product of human conception (fetus).”<sup>98</sup> The prosecution questioned the character of the accused, stating that she did not want to continue with her pregnancy because of the ‘absence of pity’:

[T]he specific case exposes far too many refinements of criminal intent (the free and conscious will to practice the criminal conduct, to abort, that is, to expel the fruit of human conception from the womb), which is evident from the reports that the accused tried, several times and in many ways, to cause the abortion...<sup>99</sup>

Female and male Judges have also relied on gender stereotypes to communicate social disapproval of women’s conduct in their judgments. In the second-instance decision on a Habeas Corpus action from the TJSP, the reporting judge describes the facts of the case, seemingly attributing irresponsible conduct to a defendant, including in relation to her personal relationships:

According to reports, the plaintiff had sexual intercourse with a person known only as “Beto” *and she had never seen him again*. She noticed that she was pregnant in January 2013 and, at the time of the facts, in order to cause voluntary abortion, she ingested two drugs that caused premature rupture of ovular membranes, causing expulsion and death of the fetus. (Name of the defendant) expelled the product of the conception in the bathroom of the property, activating the flushing mechanism so that it would descend through the sewer, causing its clogging. The conduct above caused damage to the plumbing of the house below the patient's property. The resident of said house then called a plumber who, while making the repairs, located the fetus.<sup>100</sup>

At the same time, courts are sometimes unwilling to consider mitigating evidence in these cases, perhaps because of judges’ own views on abortion. In one case from São Paulo, for example, a woman was indicted for homicide after her relatives found her bleeding profusely, passed out on the kitchen floor, and found a lifeless and bruised fetus wrapped in cloths inside the bathroom of the home. The woman’s family members and colleagues said that they did not know she was pregnant and that she had recently been to a

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<sup>97</sup> RESE n. 619.297-4/ TJPR, ruled in 2010 (emphasis added).

<sup>98</sup> HC n. 2202886-56.2020.8.26.0000/TJSP, ruled in 2020.

<sup>99</sup> *Id.*

<sup>100</sup> HC n. 2188887-41.2017.8.26.0000/TJSP, tried in 2018 (emphasis added).



psychologist because she was showing signs of being unwell. The judge accepted charges against the defendant for double aggravated homicide and increased the penalty because, according to the judge, the defendant acted "with evident homicidal intent," without considering other aspects of the defendant's personal circumstances and while emphasizing graphic descriptions of events, despite the fact that Brazilian procedural law prevents the judge from making value judgments in the indictment acceptance phase, since prejudgments of the accused can influence the jurors and may predetermine the outcome of the case. (The Lay Jury-Panel Sentencing Committee modified the charge to infanticide).<sup>101</sup>

As these and other examples demonstrate, gender stereotypes are sometimes used both by the prosecution and the judges in describing the accused. These stereotypes are problematic, especially when relied on by the court, because they can violate the defendant's right to be presumed innocent and also the right to be tried by an impartial tribunal.<sup>102</sup>

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<sup>101</sup> Brazil. Justice Court of São Paulo. Criminal Action of the Jury's Competence n. 0033096-57.2016.8.26.0224. Judge: Renata Vergara Emmerich de Souza. Ruled on: June 25, 2019.

<sup>102</sup> ICCPR Art. 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.")

# THE COMPLICITY OF MEDICAL PROFESSIONALS AND VIOLATIONS OF THE RIGHTS TO HEALTH, PRIVACY AND NON-DISCRIMINATION



## A. OVERVIEW

In cases reviewed for this report, there was a clear and consistent in pattern in how women who have abortions encountered police: referrals from their health care providers. This pathway is not unique to Brazil, or the cases examined. Rather, around the world, women who can afford private abortion services or to travel to a jurisdiction where abortion is legal do so. On the other hand, as the UN Human Rights Committee has observed, “lower income women rely on public hospitals, where health professionals are more likely than those in private clinics to report them to the police.”<sup>103</sup>

Medical professionals are not required under Brazilian law to report possible crimes, like certain abortions, that could lead to criminal charges against the patient,<sup>104</sup> and the Code of Medical Ethics in Brazil protects professional confidentiality.<sup>105</sup> Medical records, according to the Brazilian law, are protected under medical confidentiality and can only be handled by specialists who must be appointed by a judicial authority. However, due to a combination of medical professionals’ personal beliefs and the possibility of facing a higher criminal sentence for performing abortions than their patients for having the abortion, health care professionals have been involved in reporting women, providing evidence against them, and testifying in court.<sup>106</sup> Not only does their participation in these prosecutions harm patients but it also violates their patients’ rights to privacy and to receive adequate health care without discrimination.

## B. REPORTS BY MEDICAL PROFESSIONALS TO POLICE

In at least 12 of the cases in state courts analyzed, the criminal investigation started with a report of abortion by health care professionals who provided care to women in hospital units. In three of the 12 STJ cases reviewed, for example, the judgment demonstrated that the complaint against the accused was made by a medical professional or social worker

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<sup>103</sup> See UN Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of El Salvador*, U.N. Doc. CCPR/C/SLV/CO/7, para. 15 (May 9, 2018); see also AMNESTY INTERNATIONAL, ON THE BRINK OF DEATH: VIOLENCE AGAINST WOMEN AND THE ABORTION BAN IN EL SALVADOR 2014, at 11 (“Those with fewer resources suffer the most.”).

<sup>104</sup> Law on Criminal Offenses (DL No 3.688/1941), art. 66, II.

<sup>105</sup> Code of Medical Ethics, art. 73.

<sup>106</sup> Beyond this fear of legal consequences, many medical professionals are personally opposed to abortion and may refuse to perform the procedure or “over-investigate” cases, including legal abortion cases stemming from rape, to avoid performing abortions and may refer women to the police. See, in general, Debora Diniz, Alberto Madeiro, & Cristiao Rosas, Conscientious objection, barriers, and abortion in the case of rape: a study among physicians in Brazil, 22 REPRO. HEALTH MATTERS 141 (2014), <https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2814%2943754-6>.

responsible for taking care of the women.<sup>107</sup> As previously noted, women often come to the health system due to complications resulting from clandestine or unsafe abortions in emergency cases. At least in these 12 cases, women seem to have been arrested while seeking medical care or shortly after receiving care in health facilities, or soon after being discharged from the hospital. These health professionals, in many cases, make the fetus or embryo and the pregnant women's medical records or exams available to the police authorities, even though this is considered, in Brazil, a breach of the duty of professional secrecy—itself a potential violation of the penal code.<sup>108</sup> Situations like this are more likely when care is provided via the Unified Health System (SUS), which as previously discussed is one of the indications of the social and racial origin of women—sixty percent of those who use SUS are Black women.<sup>109</sup>

In the case of “Isabel,” the accused reported to the police, during the stage of criminal investigation, that she had been threatened by the attending physician during examination at the hospital unit.<sup>110</sup> According to the investigation data reproduced in the decision, the attending physician suspected that the patient's explanation about her injuries—that she had lost her baby due to a motorcycle accident—did not correspond to the clinical condition observed by the professional during the examination.<sup>111</sup> The doctor then told the patient that if she did not admit to having used abortifacient medication, the medication that would be administered on that occasion would be fatal.<sup>112</sup> The woman then confessed, and the doctor immediately instructed the nurse to report the case to the police authorities.<sup>113</sup> In the investigative phase, even before the judicial process began, the defendant said that after the doctor spoke, she “immediately remembered the two children she has to raise” and that if “her mother knew [she had had an abortion], she would die.” She also said that she was “very afraid of being arrested and destroying the lives of her two children and her mother.”<sup>114</sup>

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<sup>107</sup> HC n. 514.617/TJSP, tried in 2019; HC n. 516.437/TJSP, tried in 2019; and HC n. 339.460/TJSP, tried in 2017.

<sup>108</sup> Code of Medical Ethics, Art. 73; Article 154 of the Penal Code (“Revealing someone’s secret information of which one is aware, without just cause, due to function, ministry, position or profession, and whose revelation may produce harm to others: Penalty - imprisonment, from three months to one year, or fine. Single paragraph - May only be done through representation”)

<sup>109</sup> Brasil de Fato, “IBGE: *mulheres negras e pardas são as principais usuárias da atenção básica à saúde* (Black and mixed women are the main users of basic health care), October 21, 2020, <https://www.brasildefato.com.br/2020/10/21/ibge-mulheres-negras-e-pardas-sao-as-principais-usuarias-da-atencao-basica-a-saude>.

<sup>110</sup> Strict Appeal n. 0004804-04.2013.8.24.0069 in 2020 at TJSC.

<sup>111</sup> Strict Appeal n. 0004804-04.2013.8.24.0069 in 2020 at the TJSC, p. 6.

<sup>112</sup> Excerpt from the police report which originated the case: “That there she was examined by a physician who pressured her saying that she would administer an intravenous medicine, and that if she had taken something to abort, she would die immediately. That she immediately remembered the two children she has to raise. That she remembered that if her mother knew, she would die. That she knew that she had done something wrong, and she was very ashamed of what had happened. That the police were called and that she asked, for the love of God, not to be arrested *in flagrante delicto*, because of her sons and her mother. That she was hospitalized for 21 days. She went through surgery and lost an ovary and a tube. That she understands what she did was wrong but, at the time, while facing the whole situation, she saw no other alternative. That she has no lawyer, and she has no financial means to pay for one. She is very afraid to be arrested and to destroy the lives of her two children and her mother.” (Strict Appeal n. 0004804-04.2013.8.24.0069, TJSC, pp. 5-6).

<sup>113</sup> Strict Appeal decision n. 0004804-04.2013.8.24.0069 in 2020 at the TJSC, p. 6.

<sup>114</sup> Strict Appeal n. 0004804-04.2013.8.24.0069, TJSC, pp. 5 and 6.

These findings are consistent with prior research as well. Referrals by health professionals to the police have long been common in Brazil.<sup>115</sup> A report from the Public Defender's Office of the State of Rio de Janeiro, analyzing 55 abortion prosecutions there between 2004 and 2017, found that the majority of cases were initiated through complaints made by health professionals, reporting patients to law enforcement.<sup>116</sup> Similarly a 2018 study by Núcleo de Promoção e Defesa dos Direitos da Mulher (Center for the Promotion and Defense of Women's Rights - NUDEM) of the Public Defender's Office of the State of São Paulo documented that the majority of prosecutions were initiated by referrals from health professionals in the Unified Public Health System (SUS) (30 cases or 70% of the total cases analyzed).<sup>117</sup> The NUDEM report detailed that such health professionals testified as witnesses throughout the proceedings, contributing to the criminalization of these women.

## **C. RELIANCE ON MEDICAL PROFESSIONALS' TESTIMONY/EVIDENCE IN COURT**

It was clear that in some cases the only or primary evidence used to prosecute a woman for abortion came from health workers at public hospitals and clinics that women approached for medical care. Sometimes this information was voluntarily provided by those who should provide health care. And at other times it was seized by police investigating the medical clinic.

In Habeas Corpus n. 516.437/SP, for example, the woman was reported by the social worker and medical team who assisted her in the health care unit, after she went to the hospital because of health complications resulting from the use of the medicine known as Cytotec. In another case in the same court,<sup>118</sup> the hospital that assisted the woman communicated to the police that she had signs of abortion, and this same communication gave rise to all other pieces of evidence that served as a basis for the criminal prosecution. Something similar also happened in several other Habeas Corpus cases before the TJSP<sup>119</sup> where it was possible to identify who was responsible for the complaint.

As found in research for this report, courts in Brazil have sometimes rejected cases where the sole evidence came from health professionals and violated medical ethics and patient

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<sup>115</sup> See IPAS, WHEN ABORTION IS A CRIME: THE THREAT TO VULNERABLE WOMEN IN LATIN AMERICA, 2014, <https://www.ipas.org/wp-content/uploads/2020/07/CRIMRPT3E14-WhenAbortionIsACrimeLAC.pdf>; Angie McCarthy, *State obligations to protect the lives and Health of Women after abortion or miscarriage*, 21 H.R. Briefing 16 (2014), <https://www.corteidh.or.cr/tablas/r32820.pdf>.

<sup>116</sup> General Public Defender's Office. *Entre a morte e a prisão: quem são as mulheres criminalizadas pela prática do aborto no Rio de Janeiro* (Between death and imprisonment: who are women criminalized for abortion in Rio de Janeiro)/ Public Defender's Office of the State of Rio de Janeiro, Coordination of Defense of Women of Human Rights. Rio de Janeiro: General Public Defender's Office of the State of Rio de Janeiro, 2018. <https://defensoria.rj.def.br/uploads/arquivos/c70b9c7926f145c1ab4cfa7807d4f52b.pdf>.

<sup>117</sup> Public Defender's Office of the State of Sao Paulo. *30 habeas corpus: a vida e o processo de mulheres acusadas da prática de aborto em São Paulo* (30 habeas corpus: the life and process of women accused of abortion in São Paulo), São Paulo. DPESP, 2018. <https://www.defensoria.sp.def.br/dpesp/Repositorio/41/Documentos/30%20habeas%20corpus.pdf>.

<sup>118</sup> Case n. 2161941-27.2020.8.26.0000.

<sup>119</sup> Cases ns.: 2161932-65.2020.8.26.0000, 0001510-79.2017.8.26.0187.



confidentiality rules.<sup>120</sup> However, in other cases this report found that courts were willing to accept this evidence, either not questioning its appropriateness or else finding that on balance, the public interest weighed in favor of its admission.

In a case from 2019 from the STJ, for example, the physician in charge of taking care of the patient informed the police authority about the ingestion of abortifacient medication by the defendant.<sup>121</sup> The rapporteur judge said that professional secrecy is not an absolute rule and may be revoked when there is just cause, as in that case.

## **D. THE MANUELA DECISION AND THE PRACTICE OF BRAZIL**

As the Inter-American Court on Human Rights recently held in *Manuela v. El Salvador*, a law that requires or allows health professionals to refer women experiencing obstetric emergencies to law enforcement, in violation of their duty of patient confidentiality, violates human rights.<sup>122</sup> Ambiguity in the reporting requirements, moreover, disproportionately impacts women, given their “biological capacity to conceive,”<sup>123</sup> and so puts women at risk of severe harm. In the *Manuela* case, the Court held that where the state prioritized a criminal referral over its duty to provide essential medical care to a woman experiencing an obstetric emergency, this constituted both discrimination and also violence against women.<sup>124</sup>

In Brazil, it is clear that public health professionals are violating their obligations to patient confidentiality in referring women to the police when they seek medical care during an obstetric emergency or for reproductive care services. It also seems that the women most impacted by this practice are women with low incomes from Black or other communities who experience discrimination in Brazil. The practice of referring these women to the police for criminal prosecution reproduces other discrimination they face in society and in the justice system in Brazil.

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<sup>120</sup> See Consultation n. 151.842/16 of the Regional Council of Medicine of the State of Sao Paulo, ruled in 2016 (evidence obtained from the breach of secrecy by the health professionals responsible for caring for the patient is unlawful, also citing a statement by the Regional Council of Medicine of the State of São Paulo affirming that, specifically in cases of abortion, the physician cannot reveal the fact to police or legal authorities). For example, in HC 516.437/SP, the rapporteur acknowledged the illegality of the complaint by the physician and social worker; however, the prosecution continued on the basis of other elements, which appear to have been produced only from this complaint.

<sup>121</sup> HC n. 514.617/TJSP, tried in 2019.

<sup>122</sup> Inter-American Court of Human Rights, *Manuela y otros v. El Salvador* (IACHR 13.069), Nov. 30, 2021, para. 215.

<sup>123</sup> *Id.* at para. 254.

<sup>124</sup> *Id.* at para. 259.

# FAIR TRIAL VIOLATIONS: PRESUMPTION OF INNOCENCE AND OTHER EVIDENTIARY CONCERNS



While laws that criminalize abortion are, on their face, at odds with human rights law, the trials of those prosecuted for self-abortion evidence several violations of the fair trial rights of the accused. In some of the cases examined for this report, the judgments relied on evidence illegally procured or that should have been considered insufficient to sustain a conviction. This raises concerns for the presumption of innocence under human rights law.

Article 14 of the ICCPR requires that anyone charged with a criminal offense have “the right to be presumed innocent until proved guilty, according to law.”<sup>125</sup> As the UN Human Rights Committee has made clear, this presumption of innocence in a criminal trial “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, [and] ensures that the accused has the benefit of doubt.”<sup>126</sup> The Inter-American Court on Human Rights has similarly noted that the presumption of innocence requires courts to, among other things, provide a clear justification for the verdict and describe and weigh the evidence presented, including why it was or was not reliable and probative for criminal liability.<sup>127</sup>

Further, Article 14(3) of the ICCPR requires that anyone charged with a crime is given information “in detail” on the “nature and cause of the charge” they face.<sup>128</sup> The Human Rights Committee has confirmed that the accused must be informed of “both the law and the alleged general facts on which the charge is based.”<sup>129</sup>

In Brazil, however, research suggests that courts heavily rely on police statements and circumstantial and, sometimes discriminatory, evidence to establish guilt. In a different context, for examples, surveys have demonstrated that female and male Judges rely solely on police statements in 74 percent of drug trafficking convictions and often the supporting evidence is simply that the person lives in an impoverished and predominantly Black neighborhood.<sup>130</sup> In the cases examined for this report, a similar trend emerged. Although authorities did rely on various forms of evidence to prosecute women for self-abortion (e.g., expert reports, the location of the fetuses, pathological examination, medical bills, and records), often the only or the dominant evidence was a statement from the police, the health care provider, or the accused.

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<sup>125</sup> ICCPR, Art. 14.

<sup>126</sup> UN Human Rights Committee, General Comment No. 32, para. 30.

<sup>127</sup> Inter-American Court, Case of Zegarra Marín v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 15, 2017. Series C No. 331, paras.147-149, *cited by* Inter-American Commission on Human Rights, Report No. 153/18, Case 13.069. Merits. Manuela and family. El Salvador. December 7, 2018. at 147, <http://www.oas.org/en/iachr/decisions/court/2019/13069FondoEn.pdf>.

<sup>128</sup> ICCPR, Art. 14(3).

<sup>129</sup> UN Human Rights Committee, General Comment No. 32, para. 31.

<sup>130</sup> Fausto Salvadori, *The Washington Post*, “Brazil’s racist wave of mass incarceration,” June 14, 2021.

In particular, this research documented several patterns and recurring problems in prosecutions for abortion, including: (1) the overreliance on confessions made by defendants; (2) concerns about the sufficiency of the evidence and whether the authorities had met the burden of proof; and (3) potential violations of the right to appeal in the absence of a reasoned judgment.

## **A. USE OF CONFESSIONS**

Under Brazilian law, the evidence gathered during the investigation phase (police inquiry) cannot be the exclusive or sole basis upon which the Court makes their findings.<sup>131</sup> However, this research found that in prosecutions for abortion, women's confessions— to medical personnel or police—were sometimes the only or at least primary evidence in the cases against them. Not only does the use of this information undermine the legitimacy of the court's decisions but it may also violate the accused's rights against self-incrimination and to the presumption of innocence.

When women are interviewed by the police without legal assistance, perhaps soon after a traumatic medical experience, there is a danger they will feel coerced to confess. As this and other reports have also noted with concern, in many cases, the confession is made not to police but to a medical professional when the women are seeking care and rightfully expect confidentiality to be respected.

“Elaine” was prosecuted under Article 124 on the basis of a confession given during the police investigation phase and an expert report that was inconclusive as to whether she had had an abortion or a miscarriage.<sup>132</sup> “Olivia” sought Habeas Corpus before the STJ on the basis that the case against her was based on her confession and other evidence obtained during the police investigation phase.<sup>133</sup> In both cases the STJ denied the appeals on the basis that it was not appropriate to reconsider the evidence in that procedural posture.

In another case, that of “Joana,” the defendant was prosecuted for ‘self-abortion’ for having taken the abortifacient Cytotec.<sup>134</sup> The prosecution was predicated on the woman's reported confession to the police and a necroscopic report, which asserted that there was fetal evidence compatible with the second trimester of pregnancy. The first-instance judge closed the case, finding that there had been no evidence presented demonstrating a causal link between the alleged ingestion of the drug and the death or expulsion of the fetus. The prosecution appealed to São Paulo Court of Justice, which reversed, finding that the causal nexus had been “sufficiently clarified,” at least for the process to go to trial. The reporting

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<sup>131</sup> Article 155 of the Code of Criminal Procedure (Decree-Law n° 3,689, of October 3, 1941).

<sup>132</sup> Special Appeal n. 122.643/MG, ruled in 1997 at the STJ.

<sup>133</sup> Habeas Corpus n. 69.563/SE, May 3, 2016, ruled at the STJ.

<sup>134</sup> Vulnerable women can also be prosecuted for alleged involvement in providing abortifacients. These cases also reflect the moral judgment of the criminal justice system as to such women. For instance, “Marta” was convicted of counterfeiting Cytotec. In her case, too, the court relied exclusively on evidence collected in the investigation to sustain the conviction, finding that there would be no reason to doubt the statements made by the police officers. Cases like that of ‘Marta’ also show the risks women face when they obtain abortion medication clandestinely.

judge explained:

“[T]he defendant herself admitted the use of a drug known publicly as having abortion as one of its effects, Cytotec (Misoprostol). So much so that, although it is a drug aimed at treating ulcers and gastritis, it cannot even be sold in Brazil in conventional pharmacies. Rather, its use is restricted to the hospital environment, due to the risk it poses to pregnant women and the fetus, given its property of causing uterine contractions, in addition to relaxation and dilation of the uterine cervix, causing abortion or helping to induce labor. In fact, it is a drug used in legal abortions, in accordance with the guidance of the World Health Organization. Anyway, all this to say that the use of the infamous Cytotec as an abortive drug has been a notorious fact for a long time. And the defendant, aware of this property of the drug in question and, as indicated by the evidence, determined to cause the death of the child who was still in her womb in formation, would have intentionally acquired and ingested of the drug.” Strict Appeal (RESE) n. 1504683-95.2020.8.26.055, TJSP, August 23, 2021.

In an amicus brief from independent special procedures mandate holders of the Human Rights Council concerning abortion in the context of Zika in Brazil, the UN experts noted that under the Convention against Torture, the extraction of a confession under exigent medical circumstances may constitute torture and that the Committee Against Torture had similarly raised concerns with conditioning the provision of life-saving post-abortion care on women confessing to having undergone illegal abortions, or requiring medical professionals to alert authorities to patient’s illegal abortions.<sup>135</sup>

The reliance on such confessions, taken from women without legal consultation and at moments of unique vulnerability is deeply problematic, as these cases suggest, because it is often the only evidence against the woman, making her conviction a foregone conclusion.

## **B. BURDEN OF PROOF AND PROBABLE CAUSE**

A repeated concern in these cases is whether the authorities had sufficient evidence to support the prosecution and conviction. As previously discussed, many women were turned over to the authorities by medical professionals, in violation of medical ethics rules and taking advantage of these women’s vulnerability when seeking care from public health workers. Too often there is little or no other evidence on which the prosecution is based but courts have accepted both “the fact” that an abortion took place and also that it was intentionally committed by the accused with little interrogation of the case presented by the prosecution.

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<sup>135</sup> From UN Working Group Special Mandate Holders to Honorable Madame Justice Ministra Cármen Lúcia, concerning petition number ADI/ADPF 5581, Ref.: Denial of abortion services and the prohibition of torture and cruel, inhuman, and degrading treatment, <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/AmicusBrazil.pdf>.



These problems were epitomized in the 2007 Case of Campo Grande,<sup>136</sup> where police raided a family planning clinic, confiscated approximately 10,000 women's medical records, and then charged around 1,000 women and one of the doctors from the clinic with performing illegal abortions.<sup>137</sup> Based on the records obtained in the Campo Grande case, some women were still prosecuted for abortion—including some of the prosecutions in this report.

In cases reviewed for this report, the research team documented two trends with significant implications for the presumption of innocence and relatedly, the right to information about the charges: (a) prosecutions where the authorities had not definitively proven that an abortion took place, and (b) cases where the authorities proceeded without sufficient evidence as to what the defendant had done.

### **(a) Was there a "crime"?**

At the most basic level, it is not always clear that an abortion took place, as opposed to an obstetric emergency. A 2019 report found that prosecutions for self-abortion frequently proceed solely on the basis of the corpus delicti exam [examination dedicated to find proof of infractions that leave traces, such as examination to prove that the woman was pregnant] and postmortem reports of the fetus, which are used as documentary evidence, even when they do not reveal a causal connection between the death of the fetus and the defendant's action.<sup>138</sup>

In 13 cases analyzed,<sup>139</sup> the probable cause to believe that an offense had been committed was substantiated by the presence of the fetus, found in places such as: the residence itself, common areas of the condominium, commercial store bathrooms, around a university hospital, gas station bathrooms and common garbage cans (being located by a public cleaning professional). But the presence of a fetus is not by itself enough to prove an abortion; it may instead be evidence of a miscarriage. In only three of the 61 decisions of state courts analyzed, however, was there any mention of medical examination of the women by experts to verify whether there was pregnancy, abortion or whether abortion was self-induced or spontaneous.<sup>140</sup>

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<sup>136</sup> Strict Appeal n. 0001680-8.24. 12/8/0001 ruled in 2015 at TJMS.

<sup>137</sup> Alexandra Lopes da Costa, Abortion, "Criminal Law and the Ten Thousand Women: Portraits of the Inquisition in Contemporary Brazil" (eds. Maigul Nugmanova, Heimo Mikkola, Alexander Rozanov and Valentina Komleva (2019), <https://www.intechopen.com/chapters/70394>; Carmen Hein de Campo, *Mass Prosecution for Abortion: Violation of the reproductive Rights of Women in Mato Grosso do Sul, Brazil*, AWID, [https://www.awid.org/sites/default/files/atoms/files/feminists\\_on\\_the\\_frontlines\\_-\\_mass\\_prosecution\\_for\\_abortion\\_-\\_reproductive\\_rights\\_-\\_mato\\_grosso\\_do\\_sul\\_-\\_brazil.pdf](https://www.awid.org/sites/default/files/atoms/files/feminists_on_the_frontlines_-_mass_prosecution_for_abortion_-_reproductive_rights_-_mato_grosso_do_sul_-_brazil.pdf).

<sup>138</sup> RIBEIRO, Isabela Lopes Leite. Mulheres acusadas do crime de aborto: um estudo dos processos judiciais de 2017 e 2018 no Distrito Federal. (Women accused of abortion crime: A study of the lawsuits of 2017 and 2018 in the Federal District.) 2019. Thesis (Master's degree in Law) - School of Law, University of Brasilia. Brasilia, 2019, p. 100.

<sup>139</sup> This situation is verified in cases: HC 4008116-41.2020.8.04.0000/TJAM, tried in 2021; 0003997-17.2007.8.05.0103/TJBA, ruled in 2015; RESE 1999.09.1.001299-2/TJ -DF, ruled in 2004; RESE 2004.05.1.005455-3/TJDF, ruled in 2005); 0005151-48.2011.8.12.0002 (TJMS); RESE 0008512-32.2018.8.12.0001/TJMS, ruled in 2020; RESE 0001546-73.2012.8.12.0030/TJMS, ruled in 2020; RESE 0002047-52.2005.8.12.0004/TJMS, ruled in 2015; RESE 1.696.625-1/TJPR, ruled in 2017; RESE 619.297-4/TJPR, ruled in 2010, and Criminal Appeal 1988.047094-1/TJSC, ruled in 1992.

<sup>140</sup> This situation has been verified in the following cases: HC 4008116-41.2020.8.04.0000/TJAM, tried in

In two Habeas Corpus applications, the Court recognized that expert evidence on the woman and the fetus is indispensable to determine whether or not there has been induced abortion and whether to institute a criminal prosecution.<sup>141</sup> On the other hand, in some of the cases where Habeas Corpus was denied, the same court found that discussion of evidence was not appropriate to this type of action, even if it is a discussion of absence of or flaws in the expert reports (corpus delicti examination).<sup>142</sup>

In one TJSE appeal, the defense claimed a lack of probable cause, observing that the indictment was both too generic and also discounted the presence of a medical report finding that the death of the fetus was due to a miscarriage.<sup>143</sup> However, the reporting judge considered that the defendant's confession, the police report, the witnesses and, above all, information about the request for an abortion recorded in intercepted telephone calls were sufficient.

In a case before the STJ where a couple were prosecuted for having an abortion based on their confessions, the defense counsel argued that the technical evidence did not provide probable cause that an abortion took place, only that the pregnancy was interrupted.<sup>144</sup> The reporting justice held that these facts could not be reviewed by the court on appeal and dismissed the defendants' appeal.<sup>145</sup> The judge also quoted the opinion of the Federal Public Prosecutor's Office, which stated that the medical report was inconclusive on the provocation of abortion, but conclusive on the pregnancy and its interruption. This report, combined with other facts of the case, the judge determined, were sufficient to prove that the interruption was criminal under the principle *in dubio pro societate*.<sup>146</sup>

In one case before the TJSC,<sup>147</sup> an anatomopathological examination was performed and an expert physician and the physician on duty who provided care to the defendant were heard as witnesses. The medical expert reported that it was not possible to state whether there was use of a method or medicine to induce abortion and that there are no signs of expulsion of the fetus by violence. Based on this, the case was sent to a jury under the principle *in dubio pro societate*.

In a prosecution stemming from the Campo Grande raid, the on-duty physician who provided treatment to the defendant stated in court that it was not possible to say whether the death of the fetus had been spontaneous or induced. Despite this testimony, the reporting judge considered that the principle *in dubio pro societate* should prevail and dismissed the

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2021; RESE 0008512-32.2018.8.12.0001/TJMS, ruled in 2020, and RESE 619.297-4/TJPR, ruled in 2010.

<sup>141</sup> RHC 64.901/TJSP, tried in 1987, and RHC 40.042/SP, 1963.

<sup>142</sup> HC 73332/ TJSP, 1996; HC 70.488/TJSP, 1997 (the most recent in which the pregnant woman is a patient); and RHC 35565/ TJPA, 1958.

<sup>143</sup> RHC n. 69.563/TJSE, tried in 2016.

<sup>144</sup> Resp 122.643/TJMG, ruled in 1997.

<sup>145</sup> "The claim of a simple review of evidence does not give rise to appeal." (STJ's precedent statement no. 7, ruled in 1990).

<sup>146</sup> See *supra* for discussion of distinction between *in dubio pro reo* and *in dubio pro societate* and their respective status under Brazilian law.

<sup>147</sup> Strict Appeal of TJSC, n. 0001199-10.2017.8.24.0037, ruled in 2019.

defendant's appeal against the indictment, allowing the case to proceed to trial.

In another case,<sup>148</sup> stemming again from the “Case of Campo Grande,” the STJ denied habeas and the request to bar criminal prosecution, stating that the evidence collected by the police authority, together with the fact that the procedure occurred in a clinic in which former employees were convicted of abortions, constituted evidence that authorized the establishment of the police investigation. The reporting judge quoted part of the decision of the trial judge of this same case in which he stressed that this was one of the cases with “strong indications” of abortion. This particular defendant was investigated because the trial court judge authorized the police to separate over 9,500 records seized in the clinic into those with “weak evidence” and others with “strong evidence.” The patient in this habeas was one of the 1,200 patients in the second group. The defense counsel claimed in a motion for resettlement that there was categorical evidence proving the absence of pregnancy: the pharmacy test presented negative results and the ultrasound result was “not visualized.” The exams suggested an incomplete miscarriage.<sup>149</sup> Despite this evidence, the STJ rejected the motions, arguing that there was a conflict of theses: the defense stated that there was no evidence of pregnancy and the procedure for treatment of incomplete miscarriage presupposes pregnancy; and that it was not appropriate to make a thorough examination of evidence in Habeas Corpus.

### **(b) Sufficiency of the Evidence**

As previously noted, in Brazil, these criminal cases should not proceed solely on the basis of a confession in the investigative stage. But analysis for this report demonstrated that some cases proceeded without objective evidence. In 6 of the 167 cases analyzed, for example, there was no mention of any type of technical evidence in the grounds for the decision, such as a corpus delicti examination, localization of the fetus, necroscopic and anatomopathological examinations, or preparation of an expert report.<sup>150</sup> In these cases, the proceedings are based, for example, on witnesses, confessions and the contemporaneous report produced during the police investigation.

In the case of alleged drug counterfeiting discussed above,<sup>151</sup> the defendant was an informal street vendor at a street fair in downtown São Paulo (Praça da Sé); she was the mother of five children, three of whom had disabilities. She was arrested after police officers found boxes of the medicine Cytotec<sup>®</sup><sup>152</sup> in bags that were in a warehouse where she and other

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<sup>148</sup> HC n. 236.882/TJMS, tried in 2012.

<sup>149</sup> An incomplete miscarriage is a type of spontaneous abortion. It occurs when the embryo or fetus dies or ceases to develop but is retained in the maternal womb for weeks and even months.

<sup>150</sup> These cases are Habeas Corpus (HC), Strict Appeals (RESE), and a Criminal Appeal: HC 0015310-56.2011.8.12.0000/TJMS, tried in 2011; HC 0005065-54.2009.8.12.0000/TJMS, tried in 2009; HC 20156425/TJSE, tried in 2015; RESE 0001601-40.2014.8.12.0002/ TJMS, ruled in 2016; RESE 0001680-27.2011.8.12.0001/TJMS, ruled in 2015; RESE 00048040420138240069/TJSC from 2020.

<sup>151</sup> Case n. 0077607-17.2015.8.26.0050 (TJSP).

<sup>152</sup> Cytotec<sup>®</sup> is the brand name for the drug with the active ingredient misoprostol. It is well known for its abortifacient effects in the biomedical field and in the universe of women's abortion practices. Since 1998, the National Agency for Sanitary Surveillance (Anvisa) has prohibited its commercialization in pharmacies. But there is a wide illegal trade of this product and adulteration practices, which compromise its effectiveness. (See: DINIZ, Debora; MADEIRO, Alberto. *Cytotec e aborto: a polícia, os vendedores e*

street vendors kept their merchandise. She was convicted and sentenced to ten years of imprisonment.<sup>153</sup> The judge's decision was based exclusively on the expert report confirming that the product was Cytotec and on the *in flagrante delicto* arrest report based on the police officers' testimony. The defendant, in her defense, claimed that the drugs did not belong to her, and she had no prior criminal record.

In other cases, the evidence centers on the accused's presence at a clinic, sometimes coupled with a confession or other testimonial evidence. Cases 0015310-56.2011.8.12.0000, 0005065-54.2009.8.12.0000 and 0001680-27.2011.8.12.0001, ruled in Mato Grosso do Sul (37% of MS cases), and cases HC n° 140.123/TJMS, ruled in 2011 and HC n° 236.882/TJMS, tried in 2012 by STJ are examples of the various cases in which the complaint was initiated by a police investigation into a clinic on suspicion of performing illegal abortions, which enabled police to review patients' personal information and medical records.

In the trial court cases stemming from the "Case of Campo Grande," the main evidence against the women subsequently prosecuted came from medical records seized from family planning clinics.<sup>154</sup> Three cases reviewed for this report emerged from the seizure of medical records in the Campo Grande raid. One of the women prosecuted was accused solely on the basis of proof of an ultrasound scan, which is not in and of itself proof of an abortion.<sup>155</sup> In another of the resulting prosecutions, a woman was indicted based only on a registration form, filed in the clinic investigated, that contained her personal information but no information as to whether or not she had undergone any type of procedure at the clinic, such as abortion.<sup>156</sup>

In case n. 20156425 before the TJSE, in which the defendant had her request for Habeas Corpus denied,<sup>157</sup> the charges stemmed from another investigation of a clinic accused of

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*as mulheres* (Cytotec and abortion: Police, vendors and women). *Ciência & Saúde Coletiva*, v. 17, p. 1795-1804, 2012).

<sup>153</sup> This crime is provided for in Article 273 of Decree-Law No 2.848 of 07 December 1940.

<sup>154</sup> Situation in the cases of the TJMS distributed under the numbers: HC 0015310-56.2011.8.12.0000, tried in 2011, HC 0005065-54.2009.8.12.0000, tried in 2009, and RESE 0001680-27.2011.8.12.0001, ruled in 2015.

<sup>155</sup> 0015310-56.2011.8.12.0000, 0005065-54.2009.8.12.0000 and 0001680-27.2011.8.12.0001.

<sup>156</sup> Extracted from the decision in Case 0001680-27.2011.8.12.0001: "The Campo Grande raid was initiated following a news piece produced by journalists Ana Rael Copetti da Rocha and William Santos, for TV Morena, inside the "Family Planning Clinic", (...), in Campo Grande-MS, in which the reporter (...) interviewed the physician (...), the owner of the clinic, who confessed that she performed abortions. After this interview, a search and seizure operation was carried out inside the clinic and several medical records of women who underwent abortions on the site were seized.

According to the State Public Ministry, "SOFIA" was one of the women who underwent an abortion inside the clinic owned by Dr. "Adriana". (...) In the specific case, the State Prosecution attached "SOFIA's" medical record and indicated two witnesses, Simone Aparecida Cantagessi de Souza and Ana Raquel Copetti da Rocha, to prove probable cause. In

"SOFIA's" medical record, p.08, only her personal data was included. On page 9 of the Declaration, it was stated that "SOFIA" was submitted to a treatment for 'incomplete miscarriage'. (...) Therefore, the medical record itself does not prove any evidence of crime, since incomplete miscarriage is not a criminal act. In fact, the ultrasound that the State Public Prosecution included in the records as belonging to "SOFIA" (p.10), showed an 'unembryonated egg', that is, an egg that does not have an embryo, so much so that it was also recorded 'embryo not visualized' (f.10)."

<sup>157</sup> *Habeas Corpus* n. 20156425/ECJ, tried in 2008.



performing illegal abortions. The police, who had wiretapped communications at the clinic, obtained a telephone recording that established the defendant's presence at the clinic for an abortion procedure. Besides the wiretap, the only evidence in this case was the defendant's confession obtained during the police investigation phase.

In case 0001601-40.2014.8.12.0002 before the TJMS—a Strict Appeal filed and won by the defendant,<sup>158</sup> given the weakness of evidence at the trial level—the main evidence against the accused came from a wiretap in an unrelated investigation, which incidentally caught a call in which the defendant reported that she was four weeks pregnant, expressed her intention to have an abortion, and received instructions from the caller about the abortion medication to be used and the procedure to use it. Because this call was picked up during the prior, separate investigation, a new investigation was launched into this suspected illegal abortion. The prosecution argued that the phone call and the fact that the defendant had sought medical assistance to perform a uterine curettage would prove that she had practiced self-abortion. Because of the lack of specific expert examination, the case was dismissed.

### **C. THE RIGHT TO APPEAL**

Finally, research for this report suggests that very few women appeal unfavorable decisions against them (e.g., acceptance of the indictment, a conviction on the merits, or refusal of habeas). In the Courts of Justice (trial level), approximately 75 percent of appeals filed by the defendants—which are motions to dismiss due to lack of probable cause—have been denied.

The low percentage of cases that arrive in the STF in which the woman is accused (9.78%), compared to the large number of cases in which the defendant is a health professional (34.78%), may be due to difficulties in accessing justice for women who are prosecuted for this type of crime. In only four of these nine cases were the women successful in either getting pretrial release or having the charges thrown out.

Further impeding the defendant's right to an appeal is the absence of a reasoned judgment upon which the conviction is based in some cases.

Under the ICCPR, every person convicted of a crime must have a right to appeal the conviction to a higher court,<sup>159</sup> which requires that the individual be given sufficient information about the underlying decision to convict. In *Van Hulst v. The Netherlands*, for instance, the Committee indicated that courts must give “reasons” for dismissing a line of defense, finding a violation of the Article 14(5) right to appeal.<sup>160</sup> Similarly in *Timmer v. The Netherlands*, the Human Rights Committee made clear that this right to appeal required

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<sup>158</sup> Strict Appeal n. 0001601-40.2014.8.12.0002/TJMS, ruled in 2016.

<sup>159</sup> ICCPR, art. 14(5).

<sup>160</sup> UN Human Rights Committee, *Antonius Cornelis Van Hulst v. Netherlands*, Communication No. 903/1999, UN Doc. CCPR/C/82/D/903/1999 (2004), para. 6.5.

“access to a duly reasoned, written judgment of the trial court”.<sup>161</sup>

A review of the judgments convicting women of self-abortion revealed that courts sometimes rely on and directly quote the prosecution’s submissions with little inquiry into the sufficiency of the evidence and without challenging the conclusions about the accused.<sup>162</sup>

As dire as the situation is at the trial and Habeas level, even fewer women are successful in challenging the indictment or their conviction on appeal. Most STJ decisions confirm the position of the Public Prosecutor’s Office: in 13 of the 20 cases, there is confirmation; in 1 of them the Public Prosecution position is not stated, in 4 of them, the matter was judged moot, and in only 1 of them was the judicial decision contrary to the position of the Public Prosecution.

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<sup>161</sup> UN Human Rights Committee, *Gert Jan Timmer v. The Netherlands*, Communication No. 2097/2011, U.N. Doc. CCPR/C/111/D/2097/2011 (2014), para. 7.2.

<sup>162</sup> *See, e.g.*, case of “Joana” discussed above.

## CONCLUSION



This report builds on previous studies and reports and demonstrates that women in Brazil face significant discrimination in court and violations of their right to a fair trial under human rights law when arrested for allegedly having an abortion.

Although the number of prosecutions for abortion is low overall—compared to other offenses or in light of the high number of abortions in Brazil—the decisions and cases analyzed make clear that the social disapproval of abortion in Brazil can also infect trials and the conduct of male and female judges. Moreover, these cases show how medical professionals, police, and courts separately and together violate women’s rights to privacy and medical care in order to prosecute women who undergo abortions—which can include women who are experiencing obstetric emergencies.

The criminalization of abortion in Brazil, as in elsewhere in the world, does not stop women from having abortions. Rather, the criminal sanctions limit women’s access to safe and even legal abortion services and create a system where women face discrimination in court on account of race, gender, and socio-economic status. As this report and others demonstrate, it is women belonging to vulnerable socio-economic groups who are Black and from low-income communities who are the main targets of investigations and convictions. Because these women rely disproportionately on public health services, which in Brazil are more likely to turn women over the authorities or less likely to protect women’s right to privacy, minority women belonging to more vulnerable groups face criminal sanctions that wealthier women are able to avoid. Not only do the resulting prosecutions reflect societal discrimination on the basis of race, gender, and income, but the trials create and reinforce this intersectional discrimination as well.

Comments from prosecutors and judges in court and in written decisions evidence stigma on abortion and bias against women who have them, which impact women’s right to a fair trial. This not only reflects but also contributes to the marginalization, stigmatization, and vulnerability of certain groups of women, including those who would have the right to legal abortion. The report therefore adds to other studies that reinforce the discriminatory character of the penal legislation on abortion in the country and advocates for the decriminalization of the practice under all circumstances, combined with guaranteeing public policies guided by the assurance of women’s sexual and reproductive rights and the human right to equality and non-discrimination.