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## FOREIGN POLICY AND HUMAN RIGHTS

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# PRESENTATION



## Foreign Policy and Human Rights

The fields of human rights and foreign policy have coincided with increasing frequency in recent years. The convergence of these areas, however, has not been widely explored in academic circles of the Global South, and is often considered secondary by activists working at the national level. This issue of SUR, prepared in partnership with **Asian Forum for Human Rights and Development**, **CIVICUS: Worldwide Alliance for Citizen Participation** and **Commonwealth Human Rights Initiative**, proposes, on the one hand, to raise awareness about the different interfaces and interactions between the international activities of countries and the national *protection* of human rights, and, on the other, to examine contemporary international dynamics such as the emergence of a multipolar world and its impact on the global protection of human rights.

The thematic group of articles addresses the changes in the international system – primarily the more prominent role played by so-called emerging powers (Brazil, South Africa, India and China, among others) – and their impact on the global protection of human rights.

Reviewing the foreign policy of these countries and their impact on human rights includes, for example, analyzing their increased commitment to and engagement with regional and international human rights protection mechanisms. With respect to this point, the potential role of emerging powers in the field of human rights is examined by David Petrasek in **New Powers, New Approaches? Human Rights Diplomacy in the 21<sup>st</sup> Century**. In his article, Petrasek argues that, despite the reluctance of these new powers to adopt “traditional” tactics such as naming and shaming and the imposition of conditionalities in their bilateral relations, these countries play an important role in the international protection of human rights through standard-setting on specific human rights issues in multilateral forums.

In **Foreign Policy and Human Rights in Emerging Countries: Insights Based on the Work of an Organization from the Global South**, Camila Asano, coordinator of Foreign Policy and Human Rights at Conectas, examines the role of emerging countries,

with a focus on Brazil, in international and multi-lateral bodies. Based on the experience of Conectas, the article provides insights for other civil society organizations wishing to engage with the formulators and implementers of foreign policy to promote policies that are more respectful of human rights. SUR 19 also features a joint interview with Maja Daruwala, of the **Commonwealth Human Rights Initiative (India)**, and Susan Wilding, of **CIVICUS World Alliance for Citizen Participation (South Africa)**, two additional organizations that monitor how their countries’ activities abroad are affecting human rights. Both for Asano and for Daruwala and Wilding, the international performance of their countries leaves a lot to be desired in terms of consistency.

A subgroup of articles analyzes, more specifically, two topics of Brazilian foreign policy: health and international development cooperation. In **Public Health and Brazilian Foreign Policy**, Deisy Ventura addresses Brazilian diplomacy in the field of health – at a regional and international level – and analyzes how the human rights topic has been included in this agenda. In the article, Ventura demonstrates the solidarity that underpins Brazilian health diplomacy, but also warns of the proliferation of cross-cutting contradictions – both internal and external – that weaken, in the current context, the prevalence of human rights and the very effectiveness of Brazilian health cooperation. In **Brazil’s Development Cooperation with Africa: What Role for Democracy and Human Rights?**, Adriana Erthal Abdenur and Danilo Marcondes de Souza Neto revisit the role and presence of Brazil on the African continent, analyzing how and to what extent the “Brazilian model” of cooperation directly and indirectly impacts the dimensions of democracy and human rights on the African continent. The authors identify, despite the non-interventionist rhetoric of Brazilian foreign policy, a positive – albeit cautious – role of the country in its relationship with African nations. They point out, however, that Brazil could be a more active and decisive partner in the promotion of democracy and human rights on the continent.

This group also includes two articles on the national implementation of international norms, decisions and recommendations. These articles were

included with the aim of countering the normative analysis that usually underlies studies on this topic by including the political dimension that permeates the domestic incorporation of international instruments, given that, in the same one country, we find cases of active engagement, limited respect and even defiance of international norms. These dynamics interest us, since they have a considerable impact on the scope that victim protection systems will have in each specific context.

In this context, in **Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations**, Carlos Cerda Dueñas examines how the 2011 constitutional reform in Mexico established respect for human rights as a guiding principle of the country's foreign policy and what the impact of this has been on the incorporation of international norms by the country. Elisa Mara Coimbra, meanwhile, discusses the relationship between Brazil and the Inter-American System of Human Rights. In **Inter-American System of Human Rights: Challenges to Compliance with the Court's Decisions in Brazil**, the author comments on the implementation status of the decisions in five cases in which Brazil was condemned by the regional system.

Despite the variety of issues present in this edition, we should briefly mention the major research topics and agendas that emerged during the conception and production of this issue of SUR and that, for practical reasons, have not been fully addressed here. Prominent among them are, for example, the dynamics of transparency, accountability and citizen participation in foreign policy, and comparative studies of foreign policies of two or more countries from the Global South. As expected, and fortunately, the debate does not end with this issue, and SUR remains committed to continuing this dialogue.

## **Non-thematic articles**

This issue of SUR includes four articles in addition to the dossier. The first, **Finding Freedom in China: Human Rights in the Political Economy**, written by David Kinley, addresses human rights in China from an economic policy perspective, proposing new ways of viewing the relationship between the Chinese

economic model and the realization of fundamental freedoms in the country.

Laura Betancur Restrepo, in **The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia**, presents an analysis of the work of the Constitutional Court of Colombia on the subject of conscientious objection in the specific case of mandatory military service. Based on discourse analysis, the author attempts to comprehend the legal translation of social demands and its direct and indirect impacts for social movements.

Finally, the issue contains two articles that tackle the issue of sexual and reproductive rights. The first, **Modern-day inquisition: A Report on Criminal Persecution, Exposure of Intimacy and Violation of Rights**, written by Alexandra Lopes da Costa, discusses the implications of the ban on abortion in Brazil, in a quasi-journalistic account of a case that occurred in the state of Mato Grosso do Sul.

The second, **Case Study on Colombia: Judicial Standards on Abortion to Advance the Agenda of the Cairo Programme of Action**, by Ana Cristina González Vélez and Viviana Bohórquez Monsalve, examines how Colombia and, more broadly, Latin America, have advanced in the implementation of the Cairo Programme of Action, which addresses access to abortion and the protection of other reproductive rights.

Finally, we would like to emphasize that this issue of the Sur Journal was made possible by the support of the Carlos Chagas Foundation (FCC). Conectas Human Rights is grateful for the collaboration of the partner organizations throughout the production of the thematic section of this issue. We also thank Amado Luiz Cervo, Bridget Conley-Zilkic, Celia Almeida, Daniela Riva Knauth, Deisy Ventura, Eduardo Pannunzio, Eloisa Machado de Almeida, Fernando Sciré, Gabriela Costa Chaves, Gilberto Marcos Antonio Rodrigues, Gonzalo Berrón, Guilherme Stolle Paixão e Casarões, Katia Taela, Jefferson Nascimento, Louis N. Brickford, Márcia Nina Bernardes, Renan Honório Quinalha, Renata Avelar Giannini, Salvador Tinajero Esquivel and Thomas Kellogg for reviewing the articles published in this issue.



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## ABSTRACT

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In April 2007, Brazilian media reported the existence of a “Family Planning Clinic” that allegedly performed abortions in the city of Campo Grande (in the state of Mato Grosso do Sul). Three days later, the police raided the establishment and seized nearly 10,000 medical files, violating the privacy of women who had dared to exercise the freedom to make decisions and control their own lives. The article tells this story, known as the “case of the 10,000 women”, so as to reflect on the restrictions on women's reproductive rights and to comment on the coercion resulting from the law that bans the voluntary termination of pregnancy in Brazil.

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## KEYWORDS

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Human rights – Abortion – Reproductive rights – Women



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# MODERN-DAY INQUISITION: A REPORT ON CRIMINAL PERSECUTION, EXPOSURE OF INTIMACY AND VIOLATION OF RIGHTS IN BRAZIL \*

Alexandra Lopes da Costa

## 1 Introduction

Article 128 of the Brazilian Criminal Code, which dates from 1940, permits abortion only in cases of rape and when a woman's life is at risk. Following a recent decision by the Supreme Court, it is now also permitted for women carrying anencephalic fetuses.<sup>1</sup> However, contemporary ethical debates systematically emphasize that the decision over whether to have an abortion involves what is most intimate in a woman's psyche, involving physical, subjective, psychological and even existential dimensions, among other aspects, because only the female body can gestate and give birth (CORRÊA; PETCHESKY, 1996; ARDAILLON, 1997; SARMENTO, 2005; TORRES, 2010). For this reason, several authors question the use of coercion and the recourse to criminal law for matters such as sterilization, abortion and pregnancy.

This article aims to show that the criminalization of abortion, based on the defense of the right to life of the fetus, violates the constitutional principle of freedom, interpreted here as the exercise of reproductive decisions by women.

To illustrate this violation, the article tells the story known as the "case of the 10,000 women": on April 10, 2007, in the city of Campo Grande (in the state of Mato Grosso do Sul), after closing a family planning clinic, the police violated the privacy of nearly 10,000 women by confiscating, opening and publicizing their medical records.

When 9,896 women had their privacy violated, whether because they decided to terminate an unwanted pregnancy or simply because they had made an appointment at the clinic in question, the episode created an atmosphere of public accusation,

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\*This article was produced with the support of the first edition of the Program to Encourage Academic Production in Human Rights, between November 2011 and June 2012, under the supervision of Sonia Corrêa, research associate at the Brazilian Interdisciplinary AIDS Association (ABIA) and co-coordinator of Sexual Policy Watch. The program is a partnership between Conectas Human Rights and the Carlos Chagas Foundation. More information available at: <<http://www.conectas.org/pt/aco/es/sur/noticia/e-possivel-aliiar-ativismo-e-escrita-academica>>. Last accessed on: Nov. 2013.

sparking a debate on the conditions in which women have access to abortion in Brazil, as well as the ideology and the values that underlie the debate on the issue.

This article is based on documentary research, empirical observations of the jury trial and bibliographic review. The next section presents the recent developments involving women's rights in the international arena. The article then provides an overview of the political, social and economic climate in Mato Grosso do Sul, thereby putting the "case of the 10,000 women" into context. Afterwards, it describes the debates in the jury trial relating to the case and, finally, offers some comments on the arguments that were used. These comments are based on critical analyses of the restrictions imposed by criminal law on reproductive rights, in particular in the case of abortion, considering the violation of privacy and equality, as well as the disrespect of women as ethical subjects who should be capable of making decisions about their own lives.

## **2 Women's rights, reproductive rights and the criminalization of abortion**

Although the Universal Declaration of Human Rights of 1948 establishes equality between the sexes by guaranteeing that all people are entitled to the same rights and freedoms, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status" (NAÇÕES UNIDAS, 1948, art. 2), the text is also grounded on the generic perspective of man (white, heterosexual, Western male) as a synonym for human (PIOVESAN, 2002).

The process of internationalization of human rights, which began with the Universal Declaration, was improved with respect to women, children, indigenous peoples and black populations, as specificities, diversities and differences were integrated into the human rights discourse as factors of inequality and discrimination. Therefore, human rights are mutable, and they can and should be altered when societies and cultures change (PIOVESAN, 2002; 2008; 2010). In 1979, another fundamental step was the approval of the Convention on the Elimination of All Forms of Discrimination against Women, which broke with the paradigm of the male figure as the symbol of humanity that characterized the rhetoric of the Universal Declaration of 1948. Another notable event occurred in 1993, at the World Conference on Human Rights in Vienna. Article 18 of the Vienna Declaration asserts that the human rights of women and girls are inalienable, a principle that would later be incorporated into other United Nations conventions and conferences (IKAWA; PIOVESAN, 2009; BARSTED, 2002).

In other words, in contemporary times, human rights should not be viewed as separate from the debates on gender inequalities, which reflect the symbolic value culturally attributed to males and females that "form the basis of discrimination and underpin power relations" (BARSTED, 2001, p. 3). In search of equity, the principle of equality must consider gender relations in different societies (BARSTED, 2001).

In the intersection between human rights and gender, reproductive rights are particularly significant, since they involve a person's right to decide freely, without



constraint or coercion, whether or not to have children, as well as the number and the interval of time between pregnancies, all the while having at their disposal updated information and efficient methods of contraception, in addition to security, social services and quality healthcare.

However, Corrêa and Petchesky (1996) point out that men and women do not have the same prerogatives in the field of reproduction, since it is women who get pregnant and are largely responsible for raising and educating their children – in most cases, without any support from the fathers.

*If we take the problem of contraception as an illustration, the principle of equality would require that, to the extent that contraceptives come with risks and benefits, such risks and benefits be distributed fairly between men and women, as well as between women. This would mean a population policy that emphasized the male responsibility in the sphere of controlling fertility and scientific research into efficient male contraceptives (Pies/Sd). However, such a policy could also conflict with the basic right of women to control their own fertility and the need that many women feel to preserve this control, sometimes in secret and without 'equal division' of the risks.*

(CORRÊA; PETCHESKY, 1996).

According to the two authors cited above, sexual and reproductive rights should consider both the power relations in the private sphere and the resources available to women for decision making in this sphere. As such, the ability to exercise reproductive rights depends on social, cultural and economic conditions and also on gender, class, race, ethnicity and generation, and must include public policies that guarantee access to information and services. The authors indicate, therefore, that sexual and reproductive rights are not related exclusively to “personal freedoms” or “individual choices”, but also include other dimensions, such as the right to physical integrity, self-esteem, access to education and income, and respect for the ability of women to make ethical decisions about their own lives. Corrêa and Petchesky (1996) consider, therefore, that sexual and reproductive rights are also social rights.

However, the burden of unwanted pregnancy necessarily falls on women, in spite of the participation of men in biological reproduction. Thousands of women die each year around the world from causes related to abortion. In Brazil, the World Health Organization (WHO) estimates that 1.4 million women each year resort to unsafe abortions, and that one in a thousand lose their lives (COMISSÃO ECONÔMICA PARA A AMÉRICA LATINA E O CARIBE, 2010). Additionally, there occur severe impacts on the health, life trajectory and the dignity of women, since they are always subject to criminalization. In a report presented in 2011, the United Nations Special Rapporteur on the Right to Health asserted that measures that criminalize abortion constitute “an unjustifiable form of State-sanctioned coercion and a violation of the right to health” (NAÇÕES UNIDAS, 2011, p. 7).

According to the survey *Abortion and Religion in Brazilian Courts* (2008), the Brazilian justice system heard 781 abortion cases between 2001 and 2006. Although relatively few of them involved unsafe abortions compared to terminations due to anencephaly, sexual violence and risk to the woman's life they all featured

a strong criminalization or attempt at criminalization of clandestine abortions (GONÇALVES; LAPA, 2010). This situation has not changed significantly in recent years, and charges are still brought against women for having abortions. Among them were at least some of the nearly 10,000 women from Campo Grande who were stigmatized for an episode that could, allegorically, be compared to an inquisitorial “witch-hunt”. This process culminated in the trial by jury of four employees of the Family Planning Clinic, on April 8, 2010.

### 3 Human rights in Mato Grosso do Sul and the “case of the 10,000 women”

The state of Mato Grosso do Sul is located in the Center-West region of Brazil and the mainstay of its economy is agribusiness. Campo Grande, the state capital, has an estimated population of 832,352 people (INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, 2013). Associated with livestock raising, farming and, over the past decade, ethanol production by sugarcane distilleries, the region is marked by contrasts and stark inequalities. It is home to the second largest indigenous population in the country, in addition to various rural settlements and *quilombo*<sup>2</sup> communities, where many live in poverty. Income is highly concentrated and the traditional and conservative sectors exert a significant influence on lawmakers, the Executive and the Judiciary. Both the political culture and society are strongly patriarchal and androcentric.

The presence of dogmatic religious groups in the political arena has always existed, but has intensified since the 2000s, when the state government introduced a new system of presenting parliamentary budget amendments for spending on local projects. According to the system, the 24 state legislators may allocate funds to serve specific demands of their constituencies. These funds may be allocated to projects associated with religious charity such as the construction or reform of church halls; the activities of support groups for alcoholics; assistance for homeless families, pregnant women and migrants; the provision of vocational courses; the work of the Catholic Church’s pastoral outreach programs (such as the Child Pastoral, Land Pastoral, Indian Pastoral and Woman Pastoral programs) and evangelical social institutions. The availability of this public money has created a fertile ground for buying the votes of the beneficiaries of this funding.<sup>3</sup>

The close relationship between the public authorities and religious groups is reflected in the influence that dogmatic and anti-feminist positions have on the state’s laws and policies. An example of this was the vote in the state legislature, in 2005, of a bill banning the distribution and sale of the “morning after pill” emergency contraception. The initiative sparked an intense public debate, mobilized by the women’s movement, which resulted in the shelving of the bill.

In the same year, the municipal legislature of Campo Grande refused to issue the Association of Transvestites of Mato Grosso do Sul with a “public utility certificate” for tax purposes. This decision, repeated in 2007, was preceded by a public hearing in the First Baptist Church that was attended by legislators, pastors and faithful who professed skewed opinions and religious, moralistic and

homophobic beliefs, creating a negative and uncomfortable atmosphere for the homosexual and transsexual population of the city. In 2009, municipal aldermen approved a bill banning advertisements, magazine covers and billboards showing semi-nude models and forbidding storefronts from displaying lingerie mannequins and sex products. Known as the Anti-Pornography Law, the bill was vetoed by the mayor. In the following year, a bill approved by the same aldermen banned the use of so-called “sex bracelets”<sup>4</sup> in both public and private schools in the city. A similar bill extended the ban to the rest of the state.

In 2011, lawmakers staged an uprising against the installation of condom dispensers in municipal buildings and in public and private schools, despite the recommendations of the Ministry of Education’s “Health and Prevention in Schools” program.

This was the background against which the case of the women criminalized for abortion came to light. The episode was triggered on April 10, 2007, when a report featuring hidden camera footage was aired on the region’s largest television station, exposing the Family Planning Clinic for performing abortions.<sup>5</sup> The Civil Police from the state capital launched an investigation the very next day and on April 12 representatives from the Mixed Parliamentary Front in Defense of Life and Against Abortion, of the National Congress, met with the Attorney General of Mato Grosso do Sul to pressure for charges to be brought against the owner of the clinic, the anesthesiologist Neide Mota Machado (IPAS, 2008; CAMPOS, 2008). On April 13, police officers executing a search and seizure warrant closed the establishment, without the presence of its owner, and confiscated materials such as surgical instruments, medicines and syringes. They also confiscated the medical records of all the 9,896 women who had visited the clinic since it first opened, approximately 20 years before (CAMPOS, 2008; IPAS, 2008).

Three months later, the State Public Prosecutor’s Office charged Neide Mota and another eight clinic employees with the crime of abortion, which was allegedly performed on 25 women (IPAS, 2008).<sup>6</sup> The 9,896 medical records were included as evidence for the indictments. To avoid the statute of limitations, the Public Prosecutor’s Office filed charges against all the women (CAMPOS, 2008; IPAS, 2008), a number that was equivalent to all the women in prison in Campo Grande. The cases were categorized based on the medical records that included ultrasounds, positive pregnancy tests and forms signed by women authorizing medical procedures, regardless of the type of treatment, excluding the cases for which the statute of limitations had expired (IPAS, 2008 e GALLI; CAMPOS, 2008; 2011). These criteria resulted in charges against 1,500 women for the crime of abortion (CAMPOS, 2011).

Moreover, the first women who were subpoenaed to appear before the police without knowing the reason for the summons, and were interrogated without being informed of their rights, such as the right to remain silent and to be accompanied by a lawyer or public defender, in a blatant violation of the right to a full defense and in breach of judicial guarantees (GALLI; CAMPOS, 2010). Some of the women were offered the chance of having the charges dropped, provided they agreed to collaborate with the investigations under a series of conditions.<sup>7</sup> Only five men were charged during this stage (IPAS, 2008) and it is estimated that less than 10 were subpoenaed.

For three months, the cases (containing names, charges, addresses, etc.) were available for consultation on the website of the Mato Grosso do Sul State Court (TJ/MS). The page attracted a great deal of public curiosity over the identity of the women who had undergone abortions and represented a violation of the constitutional right of intimacy and privacy (IPAS, 2008). Based on Law No. 9,099/95 – which provides for the application of alternative penalties – many of the women were able to choose between paying a fine, doing community service or donating food to charities. Poor women chose to do community service and were sentenced to work in schools and daycares, so they would see the children and regret their actions, according to a statement made by the judge to the press (IPAS, 2008).

Although 1,500 were charged, it is no exaggeration to affirm that all the nearly 10,000 women had their rights violated, since neither their medical confidentiality nor their privacy were respected. Their medical records were seized and opened by the police, prosecutors and other authorities without the presence of an expert, which constitutes a violation of the right to medical confidentiality, guaranteed by Brazilian legislation (IPAS, 2008 e GALLI; CAMPOS, 2008; 2011).

It may also be said that, even before this violation of privacy and confidentiality due to the criminal law and the unacceptable investigation procedures, the reproductive rights of these women were also disrespected. A report produced by Ipas Brasil and Grupo Curumim reveals that family planning and maternal health policies are inadequate in Mato Grosso do Sul (COSTA et. al., 2010). The study identifies flaws in the Family Planning Program in the capital “referring to the quality of medical treatment, the maintenance of stocks of medicines and, consequently, the continuity of the provision of contraceptives” (COSTA et. al., 2010, p. 31). Furthermore, the state did not have a legal abortion service for cases of rape and when a woman’s life is at risk until 2008.

In the process of investigating and filing charges in the “case of the 10,000 women”, the judges on the Mato Grosso do Sul State Court (TJ/MS) unanimously decided to submit the owner of the Family Planning Clinic – Neide Mota Machado – and four of her female employees to a trial by jury. Months before the trial, however, on the evening of November 29, 2009, Mota was found dead in her car, on a deserted road near her country home. In the car were found two syringes, a vial of lidocaine hydrochloride and a note with words alluding to death: “there would be no panic, no trauma, nor pain”. Just days before, Mota had officially registered her desire to be cremated, leading the police to suspect suicide (MANIR, 2009).

The mysterious death caused a good deal of alarm. According to one article published in a local newspaper, the doctor left behind her many unanswered questions, since she allegedly had a CD with information on the medical procedures including the names of girls younger than 15 and of nearly 10,000 men involved in the cases of abortion, including authorities and distinguished people in society (BOCA DO POVO, 2009). After the investigation, the authorities concluded that the doctor had indeed committed suicide, but for many her death was not fully explained. As pointed out by Margareth Arilha, executive secretary of the Commission on Reproductive Citizenship (an organization that defends

reproductive rights), Mota would have faced a trial by jury a few months later: “[...] perhaps she would have used the trial to speak out, once again. To speak out about the national hypocrisy when it comes to reproductive rights, while for some anything is permitted, for others, it gags, lies and kills” (ARILHA, 2009).

Nearly three months after the closure of the Family Planning Clinic, four of its female employees were tried for the crimes of abortion and criminal conspiracy.

#### 4 Trial by Jury: a modern-day inquisition?

The trial of the four former employees of the Family Planning Clinic, which began on April 8, 2010, lasted two days. Despite all the repercussions of the case, only 30 or so people attended the trial: family and friends of the defendants, some students, legal practitioners and just five feminists from the city. There was no public demonstration outside the courthouse, although journalists from various television stations, newspapers and news sites covered the event.

In its opening statements, the prosecution pointed to the first two television reports as having triggered the criminal investigation. In the first report, a male journalist and female producer visited the clinic posing as a couple that was looking for an abortion. Using a hidden camera, they were informed of the prices of the procedure. In the second report, which did not involve a hidden camera, Neide Mota admitted to the journalist Honório Jacometto that she performed abortions, upon the request of her customers. The defendants were accused of involvement in 26 abortions performed by the Family Planning Clinic on 25 women,<sup>8</sup> listed as witnesses for the prosecution. During the interrogation stage, the nurses described their work at the clinic. Two of them affirmed that the clinic only performed procedures to remove miscarried fetuses, remove cysts, perform curettage and insert intrauterine devices (IUDs), and that it was frequented by people of all classes, including patients referred by other doctors.

The psychologist said that her function was to triage patients. When the women came to the clinic to terminate their pregnancies, she said she explained about methods of contraception, described the procedures and presented alternatives to abortion. She emphasized that her role was not to convince anyone either way, and that the decision to terminate a pregnancy was left to the women.

The prosecution began its case by showing the video of the television report in which Neide Mota confirmed that the clinic performed abortions. In the interview, she stressed the health risks associated with abortions conducted without adequate medical assistance, said that prohibition does not stop abortions from happening and, therefore, that abortion should be legalized. One of the main concerns of the prosecutor, Douglas Oldegado Cavalheiro dos Santos, was “the induced diversion of the case towards this controversy” (SANTOS, 2010, informação verbal), since, he said, it was not about supporting or opposing abortion: the decision of the jury must be based on the law, despite the fact that NGOs had threatened to denounce the case internationally. He emphasized that the activities at the clinic clearly constituted a violation of the right to life, since nowhere in the world, not even where abortion is legal, is the procedure performed on the first appointment.

The arguments of the prosecution stressed the adverse effects of abortion on the psychological integrity of women and pointed out the financial interests, the commercial nature and the social segregation that characterized the activities of the clinic. The prosecutor then revealed that the clinic had expired medicines, veterinary drugs used to “abort pigs” and a “disgusting suction machine” (SANTOS, 2010, informação verbal), which he exhibited in the court. No feminist movement could possibly support what went on there, he declared.

Only two lawyers for the defense presented arguments during the trial. One of them, responsible for defending the psychologist, showed the recording of the first television report on the case, made by a hidden camera. In this report, his client appears advising the supposed couple that was allegedly looking for an abortion. The lawyer drew attention to the illegal nature of the recording by TV Morena, an affiliate of the *Rede Globo* network, and emphasized the hypocrisy of society in relation to abortion.

In addition to contesting the evidence presented to demonstrate that abortions were performed at the clinic, this lawyer directed the jurors to reflect on the motives that led such a large contingent of women to choose to terminate their pregnancies. After two days of trial, the jury decided to convict the clinic’s former employees, who received prison sentences in semi-open facilities. Rosângela de Almeida was sentenced to seven years; Simone Aparecida Cantaguessi, to six years and four months; Maria Nelma de Souza, to four years; and Libertina de Jesus Centurion, to one year and three months. Afterwards, the defense appealed the conviction and in October 2010 the women had their sentences reduced by the Mato Grosso do Sul State Court (TJ/MS): Almeida had her sentence cut to one year; Cantaguessi, to two years; Souza, to two years; and Centurion, to ten months.

## 5 Interpreting the judgment

As already mentioned, the political culture and society of Mato Grosso do Sul is characterized by conservatism, patriarchy, oligarchy and a growing influence of religious dogmatism in politics. There is a clear exchange of political favors between the State government and the religious institutions and leaders that openly violates the principles of a secular State. The local elites and the dominant power structures tend to perpetuate the patterns that prevent full equality between men and women, respect for differences and sexual and reproductive rights.

In this context, the analysis of Mujica (2011) can be applied, namely that the changes underway since the 1980s in the oligarchic States of Latin America, coupled with the neoliberal models of governance, have impelled conservative groups to shift their arguments, previously based on tradition-family-religion, to “defense of life” in its broadest sense. Defense of life is a highly valued principle in contemporary democracies, and considered indispensable for the exercise of human rights. Nevertheless, the exploitation of the defense of life by religious groups creates countless possibilities for ideological manipulation and intervention in political, legislative and legal debates in the field of reproductive rights.

The concept of life promoted by these groups is not the same as in the vocabulary

of human rights. Their arguments emphasize the sacredness of life as emanating from God, which would give the Church the full responsibility to “legislate” on this matter and, consequently, on all social conducts involving the reproduction and preservation of biological life. This implies a permanent effort by these groups to influence laws and policies, and to penetrate the human rights discourse and the state apparatus, to “introduce, furtively, a conservative discourse of exclusion of what they consider different and what they call ‘abnormal’” (MUJICA, 2011, p. 341).

The “case of the 10,000 women” is, no doubt, an illustration of how in Brazil – and particularly in Mato Grosso do Sul – conservative religious forces have resorted to various types of stratagems, including legal, to restrict the principles of freedom and colonize sexuality and reproduction based on dogmatic rules. The trial described in this text makes it clear how recourse to criminal law favors this “colonization”. On the subject of unsafe abortion, it is also necessary to consider the problems encountered in the public health service, since access to contraception, just like in other places around the country, is still low among poor women. Access to regular gynecological check-ups and means of contraception, as well as abortions under safe conditions, is contingent on income and social class.

In other words, social conditions lead a large number of women to decide to terminate pregnancy. This aspect was highlighted during the jury trial by the lawyer for the defense of the psychologist who worked at the Family Planning Clinic in Campo Grande:

*What I'd like to know is this: what led these women to have an abortion? Weren't they able to raise a child or did the father not want to take responsibility? Were they forced by their husband or boyfriend or fiancé? How many people do we know who had to give up their child because they weren't in a position to raise them? Am I telling a lie here? What about all the street kids in Campo Grande... This has nothing to do with being for or against abortion! You have to look deep inside every person. How can I see inside the heart of a person who is compassionate, who nobody knows? How can I? Campo Grande has around 800,000 people. These 10,000 women... That's nearly 5% of the population, over the course of these 20 or so years. They were in Dr. Mota's office, it's on the record, they were in her office.*

(SIUFI, 2010, informação verbal).

The lawyer's statements also highlight another crucial point: the respect for the privacy of women who choose to have an abortion. The dilemma over whether to carry an unwanted pregnancy to term or to terminate it considering the woman's specific circumstances is an intimate, private matter. It is worth pointing out that statement the right to privacy is protected by the Brazilian Constitution of 1988, which, in article 5, item X, affirms: “the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured” (BRASIL, 1988, art. 5º, inciso X). According to Sarmiento (2006), the principle of reproductive self-determination is essential for preserving the dignity of the human person, since it involves the intimacy of the individual in choosing what is best for their own life, without interference from third parties.

Every citizen, male and female alike, is an autonomous agent capable of making decisions based on his/her values, ideologies, personal beliefs, specific life circumstances and plans for the future. Nonetheless, since men and women are affected differently by the impact of reproduction on the body, forcing women to carry an unwanted pregnancy to term is an affront to their dignity and reduces their bodies to mere vessels of reproduction. This creates the need for legal guarantees to protect the individuality and the decisions of women. Restrictive criminal law, however, serves as a punishment on women. In the “case of the 10,000 women”, for example, only five men were charged. Drawing attention to this disparity does not mean calling for a new witch-hunt against men. We do not propose the selective use of criminal law, not do we simply defend punishment for men, but instead to demonstrate the gender inequality in the legal treatment on the matter of abortion. As Ventura (2006) points out, there is a huge disproportionality in the control of the State over the reproductive life of women. The issue is directly associated with the power asymmetry between the genders that prevails in society.

The contempt for women who refuse to continue an unwanted pregnancy and the irresponsible behavior of many men when faced with paternity are aspects that are socially tolerated (DOMIGUES, 2008). Even though laws exist on the responsibility of the father, “Men have the choice either to form a family, to provide for their family without building an emotional bond with them, or simply to abandon their partners without ever seeing the product of their sexual relationship” (DOMINGUES, 2008, p. 94).

To this can be added the difficulty faced by many women over men’s resistance to using condoms.

According to the Brazilian judge Torres (2010), the criminal justice system presents strong androcentric characteristics and its discourse on the protection of life conceals the political nature of controlling female sexuality, which perpetuates prejudices and inequalities. In other words: abortion is still illegal in criminal law (broadly speaking, drafted by men) for the purpose of policing the sex of women. Moreover, the legal restriction on the voluntary termination of pregnancy in Brazil is an affront to the right to equality established in article 5, item I of the Constitution, since it results in discrimination both between social classes – since the consequences of unsafe abortions affect women living in poverty more acutely – and between genders – since it places a greater burden on women than on men (SARMENTO, 2006; VENTURA, 2006). In short, the prohibition of abortion has contributed to the selective death of women, only women, and in particular the poorest women.

Zaffaroni (2011) denounces the arbitrary and highly selective nature of punitive power, a model of vertical imposition of power that is unconcerned with solving conflicts and characteristic of strongly hierarchical societies. He explains that the punitive model is radically exclusionary and inefficient, and in addition to not solving the conflict, it prevents or hampers any combination with other models, such as the reparatory, therapeutic or conciliatory models, which resolve situations in other ways. In accordance with the punitive model, injured parties have no power to participate, to decide on how to resolve the conflict, but must instead declare themselves as victims. Moreover, this model tends to reduce legal authority to a form of direct coercion, through extensive policing, that possesses a



latent and irrational element of vengeance. Its content can vary depending on the “enemy in the crosshairs”, but, for punitive power, nothing must stand in the way of the task of safeguarding the moral order.

The effects of coercive power derived from criminal law could be observed at various times during the trial of the employees of the Family Planning Clinic. This was the case, for example, when the judge denied the request by the defense for the security guards surrounding the women in the dock to be removed from the court:

*In relation to the security guards, the defendants, despite being women...Well, tradition requires the guards to remain. The treatment they shall receive shall be the same as all the others who have been here. I asked, only, for a female police officer to be among the guards. We can ask the police officers to stand a little farther away because [the defendants] are not dangerous. At any rate, however, we have to have the security so we are not caught off guard by any unexpected situations; so the police shall stay.*

(SANTOS, 2010, informação verbal).

Another point identified by Zaffaroni (2011) concerns the inefficiency of criminal law. Criminalization does not stop thousands of women from getting around the law and having unsafe abortions, either by using drugs or seeking out underground clinics. Prohibition under criminal law, therefore, causes pain, suffering, fear and even death for many women. Punitive legislation also reinforces stigmas, making the exercise of the right to decide about one’s life an abominable act.

We are not making an apology for abortion, nor defending pregnancy termination as a method of contraception. Neither does it boil down only to the need to guarantee women’s freedom to decide over their own bodies. From the perspective of sexual and reproductive rights, the decision over abortion involves both ethical parameters and mechanisms to allow individuals to exercise their emancipation, in the sexual arena, and their reproductive capacity with full autonomy and dignity (PIMENTEL apud TORRES, 2010). This assessment requires a non-absolutist treatment of the right to life of the embryo. It is important to point out that the legal structures of many contemporary democracies permit voluntary pregnancy termination without compromising the defense of the right to life, including intrauterine life. However deep the divisions caused by the diversity of opinions, the plurality of beliefs and the difference between ideologies (characteristics of democratic societies), there is always a humanitarian answer that confers intrinsic value to human life. This common thread needs to be emphasized, as Professor Dworkin affirms: “what we share is more fundamental than our quarrels over its best interpretation” (DWORKIN, 2009, p. 99).

Religious freedom and freedom of thought are principles defended by the Brazilian Constitution, although the Brazilian State is secular. This means that the country cannot legislate or create unrestrictive policies based on moral or religious beliefs (BRASIL, 1988, art. 19, inciso I). It should also be considered that the right to life is not an absolute value, as illustrated by legal systems that recognize justifiable homicide in cases of legitimate self-defense (LOREA, 2006; VENTURA, 2006). An embryo has

the potential for life, but it is not a person; therefore, its legal protection cannot be the same as that afforded a human person. There is a conflict between the rights of women and the protection of embryos that can be resolved through reasonableness, minimizing the sacrifice of those involved while pragmatically observing the principle of the dignity of the human person (VENTURA, 2006). On a legal and political level, an international consensus has been established to resolve the dilemma between the protection of embryonic life and the right to terminate a pregnancy (VENTURA, 2006). In this equation, the degree of protection for the embryo increases in accordance with the stage of development and the possibilities of survival outside the womb.

*However, what cannot be permitted is for the protection of the unborn child to disproportionately infringe on the fundamental rights of the woman, i.e. that legislation and decisions strike a balance between the rights of the pregnant woman and the interests of the State to protect the unborn child.*

(VENTURA, 2006, p. 186).

Many of these laws guarantee women the free choice to terminate a pregnancy not only in situations of physical health risk, sexual violence and fetuses with incurable abnormalities, but also when they experience emotional suffering upon becoming pregnant, as a result of financial, social or family problems. In this case, counseling is recommended for pregnant women, as well as the consideration of alternatives before choosing abortion. These experiences illustrate the need to strike a balance between the right to the life of the fetus and the rights of women. If a balance cannot be found, then it is necessary to admit the prevalence of just one right, based on the context and the delicate relationship established between the pregnant woman and the unborn child (SARMENTO, 2006; TORRES, 2010). This concept of reasonableness of rights appears to be what guided the professional ethics of the psychologist who worked at the clinic, according to her testimony at the jury trial: “What was at stake wasn’t my life, it was their lives [...] what they would choose for their lives” (SOUZA, 2010, informação verbal). Imposing on women the obligation to carry an unwanted pregnancy to term implies coercion, violates their physical, mental and psychological integrity and interferes with their desires and life plans. Reproduction should not be considered as destiny, martyrdom or a burden, nor be a source of pain or suffering. Criminal law, therefore, violates the exercise of freedom and self-determination.

During the trial of the “case of the 10,000 women”, the prosecution claimed that abortion is a tragedy for the psychological integrity of the woman, since the body produces “305 million new cells when pregnancy occurs... Chemical depression and suicidal tendencies can occur, in cases of abortions... It is necessary to question the woman to determine whether she is really capable of deciding to have a safe abortion” (SANTOS, 2010, informação verbal). However, a report prepared by the UN Special Rapporteur on the Right to Health stresses that criminal restrictions on abortion infringe human dignity – a fundamental principle for the realization of human rights – since they negatively affect the physical and emotional health of women, among other reasons due to their exposure to the risk of criminalization (NAÇÕES UNIDAS, 2011). According to the report, when criminal laws are used

to regulate and restrict conduct in the field of sexual and reproductive health, the State imposes its force, suppressing the will of the individual, which represents an interference and a serious violation of the right to sexual and reproductive health. In other words, the “creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfill the right to health” (NAÇÕES UNIDAS, 2011, p. 9). It is worth pointing out that the right to health is enshrined in article 6 of the Brazilian Constitution. The report of the UN Special Rapporteur also criticizes the use of legislation as a means of interfering with personal convictions and as a deterrent, by punishing people who engage in “prohibited” forms of conduct.

The use of the criminal justice system to control and regulate behavior and values, and to criminalize moral choices and conceptions is an assault on the democratic rule of law. Remember that thousands of women choose to have an abortion every year, both in Brazil and around the world. The discriminatory and coercive nature of criminal law was evident in the “case of the 10,000 women”, when once again the inquisitorial forces violated the privacy of the women, subjecting them to the punishment and criminalization of punitive power. The restriction of female freedom in the realm of sexuality and reproduction, particularly in relation to abortion, demonstrates that the decision in the field of reproductive self-determination and the exercise of freedom as a constitutional principle – inviolable principles of the autonomy to determine one’s own history and future – are still not a reality guaranteed to women in Mato Grosso do Sul or anywhere in Brazil. This exposes the need to systematically promote discussion on human rights, including sexual and reproductive rights, in order to broaden and deepen democracy in institutions and in society.

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## NOTES

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1. In 2004, the National Confederation of Health Workers (CNTS) filed an Allegation of Violation of a Fundamental Precept (ADPF 54) claiming that the ban on pregnancy termination in cases of anencephalic fetuses represented an affront to the dignity of the mother. On April 12, 2012, the Supreme Court approved pregnancy termination in cases of anencephaly.
2. Quilombos are settlements founded by escaped slaves before the abolishment of slavery in Brazil. Today, they are inhabited mostly by their descendants.
3. According to Figueiredo and Limongi (2002), parliamentary budget amendments cater to the special interests of voters, and politicians "expect these benefits to be converted into votes" (FIGUEIREDO; LIMONGI, 2002, p. 304). In Mato Grosso do Sul, this policy was implemented in 2000, following an agreement between the state government and the state legislature that allowed legislators to allocate funds from the state's Social Investment Fund – FIS (MATO GROSSO DO SUL, 2000). In 2012, each state legislator was entitled to allocate R\$ 800,000 in benefits.
4. Colored silicone wristbands worn by girls as part of a game in which a boy attempts to pull off one of the bands, whose colors represent acts ranging from hugging to sexual intercourse. In some regions of the country, girls wearing these bracelets have been raped. Afterwards, numerous municipalities banned the bracelets, reinforcing the idea that women who wear short skirts, low-cut tops and ultimately bracelets provoke the violence they suffer (CALLIGARIS, 2010).
5. The story broken by the journalists Ana Raquel Copetti and Wiliam Souza was aired during prime time on the local news program MS TV, produced by TV Morena, a station affiliated with Rede Globo, Brazil's largest television network.
6. Initially, eight employees from the Family Planning Clinic were charged, but the charges against four were dropped. The other four employees from the clinic, together with Dr. Mota, would face a trial by jury.
7. Over the course of the investigation, three different procedural options were offered: suspension of cases due to the application alternative penalties, suspension of cases due to the observance of certain requirements, and the application of the statute of limitations for abortions performed more than eight years earlier.
8. One of the witnesses for the prosecution had two abortions at the clinic.
9. The prosecutor is referring to the drug Cytotec. On some occasions during the trial, he uses the word "child" instead of "fetus".

## RESUMO

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Em abril de 2007, uma reportagem denunciou a existência de uma “Clínica de Planejamento Familiar”, que supostamente realizava abortos em Campo Grande (MS). Três dias depois, a polícia invadiu o estabelecimento, apreendeu cerca de 10 mil fichas médicas e violou seu conteúdo, trazendo à tona a intimidade de mulheres que ousaram usufruir da liberdade de tomar decisões e cuidar de suas vidas. O texto apresenta essa história, conhecida como o “caso das dez mil”, para fazer uma reflexão sobre as restrições aos direitos reprodutivos das mulheres, tecendo considerações acerca da coerção decorrente da lei que proíbe a interrupção voluntária da gravidez no país.

## PALAVRAS-CHAVE

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Direitos humanos – Aborto – Direitos reprodutivos – Mulheres

## RESUMEN

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En abril de 2007, un reportaje denunció la existencia de una “clínica de planificación familiar” que supuestamente realizaba abortos en Campo Grande (capital del estado de Mato Grosso do Sul). Tres días después, la policía invadió el establecimiento, incautó cerca de 10.000 fichas médicas y divulgó su contenido, desvelando la intimidad de mujeres que osaron hacer uso de la libertad de tomar decisiones y cuidar de sus vidas. Este texto presenta esa historia, conocida como el “caso de las diez mil”, para hacer una reflexión sobre las restricciones a los derechos reproductivos de las mujeres, abordando algunas consideraciones acerca de la coerción derivada de la ley que prohíbe la interrupción voluntaria del embarazo en Brasil.

## PALABRAS CLAVE

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Derechos humanos – Aborto – Derechos reproductivos – Mujeres

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