

STRUCTURAL RACISM AND THE CRIMINALISATION OF ABORTION IN BRAZIL¹

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ABSTRACT

The reflections here expressed aim at further investigating the arguments presented by the Rio de Janeiro State Public Defender's Office to the Federal Supreme Court, in the Claim of Breach of Fundamental Precept, number 442, in which the constitutionality of two types of crime are discussed: induced or consented abortion practiced by the pregnant woman and the consented abortion practiced by third parties, with the consent of the pregnant woman (articles 124 and 126 of the Brazilian Penal Code). This paper sustains that the criminalisation of abortion represents a death policy for black women. On this basis, the research defends that racism and the anti-racist dimension of the principle of equality are regarded as the central analytical keys to solving the constitutional controversy.

KEYWORDS

Abortion | Racism | Indirect discrimination | Unconstitutionality

*In memory of Alyne da Silva Pimentel,
Maria Eduarda Alves Ferreira, Ingriane Barbosa Carvalho,
Claudia Silva Ferreira and Marielle Franco..*

The aim of this research is to launch an anti-racist perspective on the constitutional discussion surrounding the abortion, sparked by the filing of Claim of Breach of Fundamental Precept (ADPF) number 442, a lawsuit brought before the Brazilian Supreme Federal Court questioning the constitutionality of the crime of abortion.² Based on data collected by the Rio de Janeiro State Defender's office, along with indicators from the health field, we seek to demonstrate that the two types of crime in articles 124 and 126 of the Penal code not only fail to offer protection to the legal interest it claims to protect, but also reproduce inequalities that are prohibited by the Constitution.

The argument is developed around three topics that seek to debunk the 'neutrality' of the norms that incriminate abortion, based on the corporeal subordination of black women who are exposed to a policy of death as a result of its prohibition.

1 • Profile of the women criminalised by the practice of abortion in the State of Rio de Janeiro

In a report produced by its Board of Study and Research on Access to Justice, the Rio de Janeiro State Public Defender's Office, analysed criminal lawsuits brought against women, under article 124 of the Penal Code.³

Based on a filter by subject matter, the archive presented by the Rio de Janeiro State Court of Justice indicated 136 lawsuits in progress throughout the state, between 2015 and 2017, disregarding those files that have already been closed.

Among the presented lawsuits, there were *habeas corpus*, judicial orders, letters rogatory and others, and others were unavailable for consultation which meant the final sample involved 55 lawsuits, 42 of which represented criminal lawsuits in which sentencing under article 124 of the Brazilian Penal Code was ascribed to women ("inducing an abortion on herself or consenting someone else to induce an abortion on her").

In the first place, the small sample reveals an inconsistency with regards to the high frequency of abortions among Brazilian women. The National Abortion Research, for example, indicates that in 2015 alone, around half a million abortions were carried out in Brazil.⁴

It is necessary, therefore, to emphasise at the outset that this small group of people who were brought before the Rio de Janeiro Court of Justice in criminal lawsuits, cannot be considered representative of the totality of women who carried out abortions in the region in the same period.

The discrepancy can be explained by the phenomenon of secondary criminalisation, whereby there is a decision to select, from all the women who practice the crime of aborting, those who will actually be directed to the criminal justice system.⁵

In this sense, although the research is absolutely unreliable in scientific terms, given the total number of women prosecuted by the state as equivalent to the population of women who actually carried out abortions, it can be used as a reference to understand some of the trends of the process of criminalisation.

The analysis of the 42 criminal lawsuits, brought under article 124 of the Penal Code, led to the identification of two distinct groups of people condemned by Public Prosecution, according to four fundamental factors: i) the method used for pregnancy termination; ii) how penal action was triggered (criminal notification presented by the professionals involved in medical assistance at the health centre/family/third party/the victim herself or as a result of police investigations already in progress); iii) social indicators (race-colour, level of education, private or public legal assistance); iv) stage of pregnancy at the time of termination.

The first group is formed by 20 women who carried out abortions with no assistance, either by themselves or with the help of a third party such as their mother, a friend or their partner/companion/husband (**Group 1**).

These cases are characterised by the use of rudimentary methods of pregnancy termination, with a high risk of death, varying from taking medication illegally sold and abortive teas all the way to the insertion of objects or chemical substances in the vagina.

In over half the cases, criminal notification was carried out by health centre workers, when women sought medical attention following predictable complications (in the vast majority within the public health service. In one case, the pregnant woman was seen in a private clinic).

The racial profile of these 20 young women who were criminalised for self-induced abortion with no assistance was 60% black, ranging from 18 to 36 years old at the time of the event. Only 22% of them had completed secondary education – in cases where information on education was available. The vast majority, 75%, required the legal assistance of a public defender in order to exercise their right to defense.

In over 80% of the cases where information on stage of pregnancy was available, the women were more than 12 weeks pregnant at the time of termination. The delay in carrying out the procedure may be related to fear of being spotted, lack of information about the methods available or difficulty in organising resources or means for the abortion.

Compared with the second set of cases is made up of 22 women prosecuted as a result of an already existing police investigation of illegal clinics where they were seen (**Group 2**).

They were all caught by police officers when they were in the clinic to carry out the procedure. This means that, although the termination of pregnancy took place in an illegal setting, a medical professional was present to carry out the termination (in just one of the illegal clinics there was no professional with medical training). The risks of complication and death, therefore, were minimised by the methods used.

We see here a different profile. Ages were more wide-ranging with women from 19 to 40 years old. 53% of the accused were white, 75% had completed 2nd grade and the proportion of those receiving assistance from the Public Defender's Office was far lower in comparison with the first group (only 40% received state legal aid).

Another pattern observed in the second group revealed that women who had access to illegal clinics carried out an abortion at an earlier stage of pregnancy. In 100% of the cases with information about the gestation period, the abortion was carried out before the 12th week, a scenario that presents a lower risk of side effects and mortality. The price paid varied between R\$600.00 and R\$4,500.00 (Brazilian Reais).

In all these scenarios, both in unassisted abortion and in those carried out in illegal clinics, there is one common factor. None of the women was kept in custody during the court case, none of the women was given sentences of deprivation of freedom and over half the cases were suspended without the need to send the accused to trial.

While showing the similarity in judicial consequences for both the examined groups – which would lead to abandoning the possibility of showing a racial hierarchy in the application of penal norms – the identified patterns should be seen in terms that go beyond the strict limits of the criminal or judicial process.

2 • The central position of racism in the discussion on the constitutionality of the types of abortion crimes

As seen, the inconsistency between the number of abortions in Brazil and the actual application of penal norms is already enough to question whether there is any preventative function in the types of law analysed. Instead of discouraging the practice of abortion, it is clear that criminal prohibition encourages risky practices.⁶

The pattern observed in comparison with the groups of women formally denounced for practicing abortion is illustrative of the unequal distribution of risk that this legal categorisation produces.

The methods and care available to each of the groups discussed above, the differing average gestational period at the time of taking the decision and the social indications of the women who are prosecuted unveil a cruel inequality that the environment of illegality imposes.

Factors like income and race are decisive in facing the stigma imposed by the criminalisation of abortion and in the management of the resources available to the two groups submitted to illegality, in order for the women to protect their lives.

The majority of the women in Group 2 – white women with higher levels of education and in a higher income bracket – were able to make quick decisions and were able to access means to pay for medical assistance. On the other hand, Group 2 – mostly black women with lower levels of education, not having information and materials, used more basic methods of termination, with a greater risk of complications. Moreover, in some cases, fear of an inhuman and stigmatising approach within the public health services led them to wait a long time before seeking help, which exposed them to an even greater risk of death.

Cross-referencing of the research carried out by the Public Prosecutor's Office with data produced by health specialists, confirms the hypothesis of the production and reproduction of inequalities through criminalisation. The risk of death as a result of terminated pregnancies is 2.5 times higher for black women than for white women.⁷

While social inequality impacts on access to health, institutional racism determines the conditions of assistance to black women, which is the group with the highest exposure to an unfit access to SUS services, even in cases of women who are employed and earning money and who have a higher level of education.⁸

In the research “The colour of pain”,⁹ published in 2017 by the National School of Public Health Sérgio Arouca, at the Oswaldo Cruz Foundation – the first analysis covering the whole country on the influence of race/colour in the experience of pregnancy and birth, it is clear that the daily functioning of health services carries different benefits and opportunities depending on race/colour, even when socioeconomic characteristics are similar and demographic variables are controlled.

Here, we find the reason for the insufficient racialization as a subsidiary concept to ideas of selectivity and vulnerability¹⁰ in the scope of the discussion on constitutionality and the types of abortion crimes. The incrimination of abortion for Brazilian women is far more than racial selectivity. It means the exercise of a power of death, discussed by Foucault.¹¹ This means that, through the technology of race, a “biopower” is exercised that takes control of life in order to manage it and subject it to a complete instrumentalisation.

This sophistication of the exercise of power demands that any discussion on the subject of abortion must be centred on the true racialised subjects who experience not only a higher selective incidence of secondary criminalisation, but a real process of material domination.

A scenario such as this, presents the challenge for an epistemic and methodological turnaround in the application of constitutional norms by the Federal Supreme Court, so that the issue of race can be transformed into an indispensable analytical

category for the application of Brazilian law and not just an aspect of socioeconomic conditions or a factor of vulnerability.

In this second stage of the discussion, the proposal of this research is to provide evidence of structural racism as an organic component of Brazilian social order, reproduced on a daily basis by the normal functioning of institutions of the punitive system, as well as of the health, education, economic and political systems.¹²

The mechanisms that criminalise abortion do not merely target race as something external to them, instead, they integrate a set of phenomena, linked to the structure of Brazilian society, in which race and the penal system are created in tandem and determine which lives are worthy of protection and who can be left to die.¹³

Whilst worldwide feminist movements discuss the issue of abortion in terms of exercising sexual and reproductive rights, the result of private autonomy or the right over one's own body, for black Brazilian women exposed to death during the unsafe practice of abortion, not even the idea of 'compulsory motherhood' would be sufficient to portray their situation.

The black body, the preferred target for forced sterilisation and abusive depositions of power within the family, is often not even worthy of the recognition of the subordinate, decisive social role of motherhood.

In creating the conditions for systemic discrimination, the legislative option for a criminal policy for abortion reinforces the mechanisms that subject black women to a political regime of sub-citizenship and feeds the continuity of racism, understood as a historical and political process.¹⁴

For these reasons, protection of the constitutional principle of equality in its anti-racist dimension (article 3, line IV, of the 1988 Constitution) constitutes the epicentre of the Claim of Breach of Fundamental Precept number 442. In other words, the Supreme Court is called on to affirm the humanity of Brazilian women at its most radical conception – the point of view of the black women.

3 • Who can make decisions about black women's bodies?

The methodological turnaround proposed here challenges the paradigm of positivist normativism that, by reducing Law to a set of legal norms, hides other aspects of the complex judicial phenomenon that includes ethics, politics and, economics.

We present as the final problem then, the legitimacy of the majority decision to incriminate the practice of abortion by women, a recurring argument in debates on the subject.

The lens of legal formalism strategically silences the conditions of power that are behind the production of the law itself. Moreover, with this, the law gains legitimacy as the expression of the general will of the political body resulting from an assembly constituted in equal conditions.¹⁵

However, if the legal norm is produced by institutions that reflect structures of unequal distribution of power – like racism and patriarchy – laws are often an extension of the political power of the group that holds institutional power.

An emblematic example from history is the Constituent of 1987-1988, a sexual and racial pact signed by 594 members of parliament, predominantly white men, with only 26 women representatives and only one of them black, Benedita da Silva.¹⁶

In this scenario, black women did not have, and still do not have in the current configuration of the political system, a space to participate in deliberation on legislation which reinforces the democratic reasons why constitutional jurisdiction assumes its point of view, in order to recalibrate this reciprocity of forces.

When the Law is supportive of projects of systemic discrimination, as we have seen to be the case in the criminalisation of abortion, it is necessary to look beneath the surface, in order to identify the implications of rules that are seemingly neutral and democratically discussed, that actually represent the perpetuation of a situation of subordination of groups that have been historically discriminated against.

And this is the case of the ADPF number 442, that hopes to make way for taking a stand regarding the interpretation of constitutional norms in Brazil, in order to provide ample protection of the human dignity of black corporeality.

NOTES

- 1 • The article explores the pleas presented in oral arguments in public hearings before the Brazilian Federal Supreme Court on 7 August 2018, available in full on: “Audiência Pública - Descriminalização do aborto (4/4),” YouTube video, 4:45:50, posted by the Federal Supreme Court on 7 August 2018, accessed November 15, 2018, <https://www.youtube.com/watch?v=La8DG6eLyyY&t=10866s>.
- 2 • “Arguição de Descumprimento de Preceito Fundamental n°. 442,” Federal Supreme Court, Rapporteur Minister Rosa Weber, 2018, accessed November 15, 2018, <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5144865>.
- 3 • “Perfil de Mulheres Criminalizadas pela Prática de Aborto,” Defensoria Pública do Estado do Rio de Janeiro, 2017, accessed September 27, 2018, <http://www.defensoria.rj.def.br/uploads/arquivos/a144fd918d944afebc6fd61401e2e0e9.pdf>.
- 4 • Débora Diniz, Marcelo Medeiros e Alberto Madeiro, “Pesquisa Nacional de Aborto 2016” *Revista Ciência e Saúde Coletiva* 22, no. 2 (2017): 653-660.
- 5 • In contrast to the primary criminalization - the act of adopting a criminal law that criminalizes a certain conduct at the abstract level -, secondary criminalization is a punitive action upon concrete people, imposed selectively, given the limited operational capacity of police agencies and the judiciary. (E. Raúl Zaffaroni, Nilo Batista, Alejandro Alagia e Alejandro Slokar, *Direito Penal Brasileiro: Primeiro Volume – Teoria Geral do Direito Penal* (Rio de Janeiro: Ed. Revan, 2a edição, 2003): 43-44).
- 6 • Mario Francisco Giani Monteiro, Leila Adesse e Jacques Levin, “As Mulheres Pretas, as Analfabetas e as Residentes na Região Norte Têm Risco Maior de Morrer por Complicações da Gravidez que Termina em Aborto.” Research presented at the XVI Encontro de Estudos Populacionais, Caxambu/MG, 29 September to 3 October 2008, accessed November 15, 2018, http://www.nepp-dh.ufrj.br/ole/textos/monteiro_as_mulheres.pdf, p. 2.
- 7 • *Ibid.*, p. 6.
- 8 • Emanuelle Freitas Goes e Enilda Rosendo do Nascimento, “Mulheres Negras e Brancas e os Níveis de Acesso aos Serviços Preventivos de Saúde: Uma Análise sobre as Desigualdades,” *Revista Saúde em Debate* 37, no. 99 (Oct/Dec 2013): 571-579.
- 9 • Maria do Carmo Leal et. al., “A Cor da Dor: Iniquidades Raciais na Atenção Pré-natal e ao Parto,” *Cadernos de Saúde Pública* 33, supl. 1 (2017).
- 10 • Zaffaroniet al., *Direito Penal Brasileiro*, 2003.
- 11 • Michel Foucault, *Em defesa da Sociedade*. Translation by Maria Ermantina Galvão (São Paulo: Martins Fontes, 1999): 40.
- 12 • Jurema Werneck, “Racismo Institucional e Saúde da População Negra,” *Revista Saúde e Sociedade* 25, no.3 (2016): 535-549.
- 13 • Evandro Piza Duarte e Salo de Carvalho, *Criminologia do Preconceito: Racismo e Homofobia nas Ciências Criminais* (São Paulo: Saraiva, 2017).
- 14 • Silvio Luiz de Almeida, *O Que É Racismo Estrutural?* (Belo Horizonte: Letramento, 2018).
- 15 • Feminist criticism of Rousseau’s concept of social contract was formulated by Carole Pateman. By means of the notion of “sexual contract”, the author characterises sexual difference as political difference and interprets legislation and the civil state as dimensions of the complex and multi-faceted structure of domination of modern day patriarchy. See: Carole Pateman, *O Contrato Sexual* (São Paulo: Paz e Terra, 1993).
- 16 • Database of the Constituent National Assembly of 1988, Brasil, Senado Federal, 2018, accessed November 15, 2018, <http://www.senado.leg.br/atividade/baseshist/bh.asp>.

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