

# Neoconservative legal strategies against reproductive rights in Brazil

## Abstract

The article presents some strategies used by religious fundamentalists within the administrative norms of health and public safety to construct the social and legal representation of the fetus and even the embryo as subjects with rights superior to those of the pregnant woman. It also addresses the naturalization and acceptance of this idea by the justice system, paving the way for the approval of the “Statute of the Unborn,” a proposal advocated for years by conservatives in Brazil, and for the prohibition of any legal allowance for abortion. It particularly focuses on Bill 1904 of 2024, currently under consideration in the Chamber of Deputies.

**Keywords:** abortion, homicide, penal code, brazil, religious fundamentalism

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## Introduction

The debate on abortion in the country has become increasingly controversial and polarized, moving away from considerations of public health in favor of religious and dogmatic beliefs regarding the superior value attributed to the abstract life of the human embryo or fetus compared to the concrete life of the woman carrying it in her uterus. In the Brazilian Parliament, from 2021 to 2022, there was a 50% increase in projects on the topic, with the vast majority presented by right-wing and far-right lawmakers.<sup>1</sup> Meanwhile, at the Supreme Federal Court (STF), the request for interpretation of the current Penal Code to exclude the criminalization of self-induced abortion and abortion with the consent of the pregnant woman, when performed up to the 12th week of gestation, awaits judgment in the Action of Non-compliance with Fundamental Precept (ADPF, 442) since 2017.

In 2024, Congressman Sóstenes Cavalcante, supported by 32 parliamentarians, including some women, introduced Bill 1904 aimed at changing the crimes outlined in the Brazilian Penal Code regarding self-induced abortion, abortion with the pregnant woman's consent, and abortion without the pregnant woman's consent. The bill also seeks to amend the existing provision, in place for over 80 years, that excludes abortion from being considered a crime in cases of pregnancies resulting from rape. The bill was given priority in its processing, bypassing debates in committees, which sparked widespread outrage and led to its removal from the agenda, though not its outright dismissal. The campaign **#ChildNotMother** successfully mobilized public opinion, highlighting the dire consequences of harsher penalties for induced abortions in a country where the sexual abuse of children and adolescents by parents, step-parents, and other relatives reaches alarming levels.

This article, besides analyzing Bill 1904 from the perspective of criminal law principles in a democratic state, describes some strategies adopted by religious fundamentalism and patriarchy to deprive women of their right to their own bodies.

## Strategies of oppression

Reinserting women back into the domestic sphere, with their bodies and minds under male control, is the goal of the far-right. For this purpose, it is important to recognize the fetus, and even the

fertilized egg and embryo, as persons, and to criminalize voluntary pregnancy termination from conception onwards, regardless of whether it results from rape or poses a risk to the woman's life. To achieve this recognition, neoconservative legal-discursive strategies have been adopted for some time against reproductive rights, across various levels of administration, particularly in technical areas of health and public safety, creating obstacles to legal abortions and enhancing the efficiency of the criminal justice system in investigating and punishing self-induced abortions and abortions performed with the consent of the pregnant woman by others. There is a silent and ongoing politicization of the Ministry of Health, which establishes guidelines and protocols for public and private health services, and of the Federal Council of Medicine, the professional oversight body for physicians, as well as official reporting channels, even in cases of legal abortion.

Wardi<sup>2</sup> conducted an exploratory analysis of microdata from quantitative databases of 18 Public Security Secretariats in Brazil, categorized into representative categories assigned to those involved at the time of registering abortion incidents by civil police. Subsequently, Castilho et al.<sup>4</sup> articulated the categories of “victim,” “perpetrator,” and “fetus” with decisions rendered by eight state courts of justice from 2012 to 2021, identifying that the registration of the fetus as a victim of abortion, a concept questioned in criminal doctrine, and its understanding as a corpse, also questionable, are institutionalized and operationalize the defense of the fetus as a person, subject to rights superior to those of women and girls. The article where these research results were published also reveals how narratives about self-induced abortion procedures and clandestinely consented abortions are legally abusive and construct women's images as murderers, true perpetrators.

In reading judicial decisions, it has been observed that initiating criminal investigations has become common practice because health services contact the police and forward medical records without the woman's prior informed consent. This practice was further enforced by Federal Law No. 13,931 of 2019, which mandates nationwide reporting whenever there are signs or confirmation of violence against women in public and private health services, with mandatory communication to law enforcement within 24 hours. Nevertheless, there is still no standardization or common guidelines for recording

complaints in security departments, leading to significant arbitrariness in the information collected, often influenced by patriarchal judgments and condemning representations of women regardless of the violence they have experienced.

In parallel, the Ministry of Health issued Ordinance No. 2,282 on August 27, 2020, regarding the justification and authorization procedure for pregnancy termination in cases provided by law under the Unified Health System (SUS) in Brazil. The ordinance made it mandatory for doctors, other health professionals, or responsible personnel at health facilities where the patient is treated to notify the police authority in cases where there are indications or confirmation of rape. In such cases, these professionals must also preserve potential physical evidence of rape, such as embryo or fetal fragments, to be immediately handed over to the police for genetic testing to identify the perpetrator, irrespective of the woman's consent.

To achieve this scenario, there is considerable support from a segment of the judiciary in Brazil that allows for the breach of medical confidentiality on the grounds that no secrecy is absolute and must yield to the greater interest of the right to life. Thus, professional secrecy does not prevail over the duty to report the commission of a crime. This issue has not been settled in national case law. Recently, the Superior Court of Justice, which has the authority to make final decisions on the interpretation of federal law, issued a ruling recognizing the illegality of such evidence.<sup>3</sup> Conversely, the Supreme Federal Court (STF), which has the authority to interpret laws in relation to the Federal Constitution, issued a decision to the contrary.

The divergent decisions create legal uncertainty among healthcare professionals, who fear administrative and criminal liability and therefore choose to report all abortions, whether spontaneous or induced, to the police. As for women, they fear seeking assistance for contraception and incomplete abortions, often resorting to clandestine and high-risk procedures. They also fear that in cases of physical or sexual violence, the perpetrator's identity might be revealed, which they often want to conceal out of fear of retaliation.

In relation to raped girls, in the years 2020, 2021, and 2022, there was a sequence of events constituting institutional violence by healthcare and justice systems. The first case was that of a 10-year-old girl in the state of Espírito Santo, who during the pandemic had her request for an abortion rejected by the hospital that attended to her and needed to travel to the state of Pernambuco to seek her rights. Instead of actions to ensure legal abortion, the case gained national attention due to manifestations of hate attacks – including associating the girl with the image of a murderer – sensitive data leaks, persecutions by healthcare agents, and public disapproval from members of the former Ministry of Family, Women, and Human Rights, including the former minister and current senator Damares Alves. A few months later, an 11-year-old girl, also a victim of sexual violence, sought legal abortion in the state of Santa Catarina and had her right denied by healthcare services and complicated in the judicial process. Subsequently, a 12-year-old girl from the state of Piauí, in her second pregnancy, faced a series of institutional barriers to access legal abortion, which she did not obtain. In all three cases, there was evidence of creating obstacles and constraints to carry the pregnancy to term, even though, at that age, it posed a life-threatening risk to the girls.

Doctors, nurses, and clinic/hospital staff inform the Military Police about suspected induced abortions, while women seeking medical help, desperate with pain and hemorrhage, teetering between life and death, rarely deny having taken abortive medication. Medical records and hospital admission forms, along with healthcare personnel testimonies, corroborate the women's confessions, which

have been accepted as sufficient evidence of the crime's materiality for prosecution. In a case analyzed by Castilho et al.<sup>4</sup> was mentioned that there are "minimal elements of moral order." However, given the nature of the crime, forensic examinations are essential to determine the causal link.

With the change of federal government in 2023, the rising neoconservative policies regarding sexual and reproductive rights saw a setback in the Ministries of Health, Women, Human Rights, and Justice and Public Security. However, particularly the new regulations from the Ministry of Health regarding legally permitted abortion have been legally challenged and debated within the National Congress. The conservative bloc, which holds a significant majority, vigorously develops strategies to legislate the suppression of sexual and reproductive rights of women and girls, as well as the penalization of women in various societal contexts.

### Bill 1904, of 2024

The aforementioned bill amends Article 124 of the Penal Code ("to induce abortion on oneself or consent to another inducing it"), Article 125 ("to induce abortion without the pregnant woman's consent"), and Article 126 ("to induce abortion with the pregnant woman's consent") to include the following paragraphs: "When fetal viability is presumed, typically occurring in pregnancies beyond 22 weeks, penalties shall be applied akin to those for the crime of simple homicide as stipulated in Article 121 of this Code." It can be seen that a medical concept, "fetal viability," is incorporated into criminal law. In essence, fetal viability is the ability of a fetus to survive outside the uterus after birth, whether natural or induced. This viability is relative and depends not only on the degree of maturity of the fetus's organs but also on the available resources for premature infant care. Furthermore, the Health Care Protocol of the Health Department of the Federal District in Brazil, from 2018, regarding the viability limit in neonatology, notes that the definition of gestational age may vary depending on the diagnostic method used, making the marking of 22 weeks imprecise.

In the literature available in the Virtual Health Library, there are no scientific evidence to affirm that, as a rule, the fetus has the ability to survive outside the uterus from the 22nd week of gestation. Fetuses, like full-term newborns, have diverse genetic and physical characteristics, and providing intensive neonatal care to premature infants, despite being a specialized service with limited availability to the Brazilian population and costly, does not guarantee survival on its own. Generally, fetuses at more than 34 weeks of gestation (approximately eight months) show significant survival conditions. However, in various neonatal intensive care centers, fetuses generally achieve survival from around the twenty-sixth week (approximately six months) of pregnancy. Therefore, with the current advancement of medicine and appropriate equipment in some urban centers, it can be said that there is a classification of premature infants into pre-viable (from 22 to 25 weeks of pregnancy) and viable (from 26 to 36 weeks of pregnancy). (Wikipedia)

Bill 1904, aligned with science denialism professed by the far-right, fails to provide scientific justification for presuming fetal viability starting from the 22nd week of gestation. It also disregards the Brazilian reality regarding the health and living conditions of the majority of women and girls, as well as the challenges in accessing prenatal care and neonatal treatment services. The bill arbitrarily assumes that any fetus is viable in pregnancies beyond 22 weeks and equates it to a live birth at any time and place. Moreover, it overlooks that fetal viability outside the womb depends not only on the moment

of birth and the period of hospital support comparable to full-term birth. In many cases, premature infants require costly treatments, adequate nutrition, and multidisciplinary health care teams for years, experiencing physical, motor, behavioral, and emotional impairments beyond early childhood. Based on an unfounded presumption, the criminal justice system will be activated with its full weight and stigma against women in cases of fetal pre-viability. In these terms, it constitutes a penal law lacking legitimacy, characterized by arbitrary state action that is incompatible with the principles of freedom, human dignity, and the protection of life itself, extending far beyond birth.

Arbitrariness is reinforced when examining the penalties stipulated by the bill. In self-induced abortion or abortion induced by a third party with the pregnant woman's consent, the pregnant woman faces imprisonment from one to three years if the fetus is less than 22 weeks gestation, and six to 20 years of imprisonment if the fetal age exceeds that limit. For abortion induced by a third party with the pregnant woman's consent, the third party faces imprisonment from one to four years if the fetus is less than 22 weeks gestation. Above this limit, the penalty is six to 20 years of imprisonment. In cases of abortion induced by a third party without the pregnant woman's consent, the third party faces imprisonment from three to ten years if the fetus is less than 22 weeks gestation. If the fetus is older, the penalty is six to 20 years of imprisonment. It is observed that the penalty is the same whenever fetal viability is presumed, regardless of whether the abortion was induced by the pregnant person herself, by a third party with the pregnant person's consent, or by a third party without the pregnant person's consent. In other words, the life and will of the pregnant person have no value in the face of an abstract life of questionable viability at birth and thereafter.

The arbitrariness does not stop there. The Bill also changes the existing provision, existing for over 80 years, of excluding abortion as a crime in cases of pregnancy resulting from rape. It establishes that if the pregnancy results from rape and there is fetal viability presumed at 22 weeks of gestation, there will be a crime punishable with the same penalty as simple homicide, ranging from six to 20 years. Note that the penalty for the crime of rape is 6 to 10 years (adult woman), 8 to 12 years (girl between 14 and 18 years old), and 8 to 15 years (girl under 14 years old). Therefore, the penalty for abortion will be greater than that for rape. The disproportionality exposes how much the woman's body is devalued, treated as an object to be used and discarded. Her already formed life becomes execrated in sentences, currently even handed down in popular jury trials in small towns.<sup>4</sup>

The justification presented for the Bill is that if the right to life of one born person clashes with the dignity of another born person, "the dignity of life of the second person shall take precedence over the right to life of the first person." Thinking otherwise is seen by proponents as undermining the foundations of the Rule of Law, freedom, and modern civilization. They invoke the United States Declaration of Independence from 1776, which they assert contains the pillars of democracy and modern rule of law. They highlight the following phrase from the Declaration: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." They develop the reasoning that if the concept of human dignity is determined by the Constitution, legislation, or judicial review, the right to life will gradually become "incremental" or gradual. A person may have more or less right to life depending on the dignity achieved by them and compared to others who may have greater or lesser dignity. Thus, in such a legally ordered world, a greater right to life could be earned and become an object of investment, but it could also be immediately lost in its entirety or in parts, gradually.

However, around us we see millions of people born with less right to life and recognition of human dignity, as they lack sufficient and adequate food, lack access to clean water, bathe and use water contaminated by mercury and all kinds of waste, breathe polluted air, eat food contaminated by pesticides, live in precarious housing or simply have nowhere to live, lack access to land, etc. Witness the genocide of the Black population in the country, caused by the State itself, which brutally takes away from poor Black mothers their children murdered by public agents. This is a current reality, not part of a future scenario if recognized the right of women and people who gestate to self-determine, to decide about their bodies, as well as their right to desired motherhood. By emphasizing the phrase from the 1776 Declaration, they highlight only the right to life. They ignore the right to liberty and the pursuit of happiness. Why this silence? Why do they ignore women's right to freedom in all dimensions, including the exercise of sexual and reproductive rights? An analysis of the discourse in the justification text shows misogyny and retaliation against the achievements made by the "women's movement and other feminist groups."

It is explicitly stated:

If the unborn child is a person, as recognized by the legislator, the legislator would never admit that there is a right to kill an innocent person to solve a problem of the second person, no matter how serious it was caused by a third person. In fact, abortion services in cases of rape began in Brazil in 1989, not at the initiative of jurists interested in correcting a gap already pointed out and discussed in legal doctrine, but at the initiative of abortion advocates who used the idea that abortion in these cases would be a right and that public authorities had neglected for fifty years to provide the corresponding service. The next step will be the exclusion of the risk to the life of the pregnant woman, one of the two legal grounds for abortion exemption, and the exemption for anencephalic fetuses, recognized by the judiciary (Supreme Federal Court - STF).

Invoking the same 1776 Declaration, I emphasize liberty and the pursuit of happiness, and I refer to the understanding of the Inter-American Court of Human Rights, according to which the right to abortion is compatible with Article 4.1 of the American Convention on Human Rights, which deals with the right to life generally protected from conception. The Court's interpretation is that the holder of all rights under the Convention is the person in need of care, and there can be no talk of protecting the embryo without respecting this person's autonomy. The Court holds that the protection given to human life is gradual and incremental according to its stage of development, so that the rights of each pregnant woman cannot be disproportionately restricted by the protection given to the embryo. Recognizing legal abortion as a right for girls and women, the Court acknowledged that criminalizing abortion creates discrimination and gender-based violence, affecting even women who seek services for spontaneous abortions and other obstetric emergencies.

## Conclusion

Shortly after being approved under urgency in the Chamber of Deputies, this perverse Bill 1904 faced harsh opposition from Brazilian society, which quickly rose up against such infamy towards girls and women. Not only did feminist movements oppose it, but also grassroots groups from various racial, gender, age, regional backgrounds, etc. Significantly, critical Christian movements against religious fundamentalism and its patriarchal attacks on hard-won gender equity rights formed supra-denominational alliances and took to the public sphere to express their views, moving from private settings to church pulpits, social media posts, public letters, etc.

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None.

## Conflicts of interest

The author declares there is no conflict of interest.

## References

1. Feminist Center for Studies and Advice. CFEMEA. *Women and resistance in the National Congress: Feminist radar at the end of the 2019-2022 legislature*. Brasília, DF: Feminist Center for Studies and Advice. 1<sup>st</sup> edn. 2023. p. 70.
2. Wardi CF. *Reproductive inquisition: analyzes of clandestine abortion in the Criminal Justice System (2012-2021)*. (Master's Thesis). University of Brasilia. Brasilia. 2023. p. 214.
3. Almeida de EM. *The STJ's decision to block the persecution of women who have abortions*. Portal Catarinas. 2023.
4. Castilho EWC, de Wardi CF, Almeida T M. *Construction of the fetus as a subject of rights in the Brazilian Criminal Justice System: police records and judicial decisions in self-abortion and consensual abortion*. 2024. p. 209–238 .