

The truth of the rape at reference abortion services in Brazil

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Abstract

This paper analyzes how the truth of the rape is constructed in order to authorize a woman victim of rape to have a legal abortion. We have interviewed 82 health care professionals (physicians, nurses and technicians, social workers and psychologists) at five reference facilities for legal abortion in Brazil. The interviews aimed to understand the procedures and practices imposed on a woman in order to be allowed to have the legal abortion. In spite of the particularities of each facility, we have identified a shared regime of suspicion of the woman's narrative, which investigates the *fact of the violence* and the *victim's subjectivity*. The truth of the rape for the legal abortion is not a woman's narrative with a status of veracity, but it is a moral and discursive construction shaped by the victims' submission to the forensic regimes of the services.

Key words: Abortion. Abortion, legal. Rape. Violence against women. Sexual violence. Brazil.

Resumo

A verdade do estupro nos serviços de aborto legal no Brasil

Este artigo analisa como se constrói a verdade do estupro para que a mulher que se apresenta como vítima tenha acesso ao aborto legal no Brasil. Foram entrevistados 82 profissionais de saúde de cinco serviços de referência para aborto legal, um de cada região do país, entre médicos, enfermeiros, técnicos em enfermagem, assistentes sociais e psicólogos. As entrevistas buscaram compreender procedimentos e práticas a que a mulher é submetida para ter acesso ao aborto legal. Apesar de particularidades na organização e no funcionamento dos serviços, identificamos um regime compartilhado de suspeição à narrativa da mulher que se expressa por práticas periciais de inquérito em torno do *acontecimento da violência* e da *subjetividade da vítima*. A verdade do estupro para o aborto legal não se resume à narrativa íntima e com presunção de veracidade, mas é uma construção moral e discursiva produzida pela submissão da mulher aos regimes periciais dos serviços.

Palavras-chave: Aborto. Aborto legal. Estupro. Violência contra a mulher. Violência sexual. Brasil.

Resumen

La verdad de la violación en los servicios de aborto legal en Brasil

Este artículo analiza cómo se construye la verdad de la violación sexual para que la mujer que se presenta como víctima de violación tenga acceso al aborto legal en Brasil. Fueron entrevistados 82 profesionales de salud de cinco servicios de referencia para el aborto legal, uno de cada región del país, entre médicos, enfermeros, técnicos en enfermería, trabajadores sociales y psicólogos. Las entrevistas buscaban comprender los procedimientos y prácticas a que la mujer se somete para tener acceso al aborto legal. A pesar de las particularidades en la organización y funcionamiento de los servicios, identificamos un régimen compartido de sospecha a la narrativa de la mujer que se expresa por prácticas periciais de investigación en torno al *acontecimiento de la violencia* y de la *subjetividad de la víctima*. La verdad de la violación sexual para el aborto legal no se resume a la narrativa íntima y presunción de veracidad, sino es una construcción moral y discursiva producida por la sumisión de la mujer a los regímenes periciais de los servicios.

Palabras-clave: Aborto. Aborto legal. Violación. Violencia contra la mujer. Violencia sexual. Brasil.

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The legal abortion in Brazil

“Legal Abortion” is a Brazilian expression to describe the ambiguity of the punitive character and of public policies. Abortion is considered a crime against life by the Criminal Code of 1940; a woman who causes herself (abortion) shall be punished with imprisonment¹. While the Penal Code provides such severe punishment, it recognizes exceptions in which abortion should not be punished - when the pregnancy is the result of rape or when the woman’s life is at risk. The same act is punishable or not depending on their modulators for the regime of causality: in rape, the woman is a victim of violence; in the risk of life, the woman is the victim of a disease. More recently, in a new permissive for abortion decision by the Federal Supreme Court (STF)², it was understood that in case of anencephaly, there is no crime against life, once the fetus does not survive to birth. The three exceptions have in common punitive moral construction of women as victims - whether in patriarchal violence or nature.

The centrality of the figure of the woman as victim mobilizes public health policies which regulate the services of legal abortion in Brazil. For a long period, it was disputed who would fit into the description of a woman as a victim of rape: to herself, as witness the rape, or the police, with records of investigative documents, as the police report. The text of the Penal Code established the absence of punishment, but did not specify how to recognize the truth of rape or risk to woman’s life¹. For the second punishment excludent, systems of medical knowledge have organized practices and routines of report and file to demarcate the boundaries between health risk and risk to the woman’s life. It was on the first exclusionary, rape, the moral dispute achieved a momentum in Brazil³⁻⁵.

In 1999, the Ministry of Health (MOH) issued a document to regulate services of legal abortion in the country - the technical standard for Prevention and Treatment of Injuries Resulting from Sexual Violence against Women and Teenagers. This was the first text in which the silence of the Criminal Code on establishing the truth about the rape in the case of punitive exception for abortion was broken. The moral controversy was intense and the dispute over sovereignty of the truth of the rape was what moved the revising and expanding of this document in 2005 and its last revision in 2012⁶⁻⁸.

Thereafter, the consent of the woman or her legal representative became sufficient for accessing legal abortion. That is, the testimony of the women

should not be subjected to police or judicial investigation of truth for it to be recognized as legitimate for the access to health services. At least, for the texts of public policies, the narrative of the woman should be sufficient for the story of the rape and to the access for legal abortion in health services.

Opinion studies have pointed that gynecologists and obstetricians still believe to be necessary the Police Report or a judicial authorization for a woman to have access to legal abortion^{9,10}. If, on the one hand, it is possible to accept this ignorance as insufficient information on the framework of public health policies, on the other, it is also possible to understand it as a sign of the persistence of moral controversy about how to establish the truth of a rape for a legal abortion. There is a moral economy in progress on the body and sexuality of women, which rejects fissures on reproductive heteronomy imposed on women on abortion - this moral framework, the punitive exception would be a breath of sovereignty of women over their own bodies; therefore the intense surveillance on this update. The criminal ambiguity - abortion is a crime, but there are exceptions for punishment - animates a split in the recognition of the right to legal abortion: it is not the reproductive autonomy of women which is protected, but the woman victim of a rape.

This article analyzes one of the expressions of the moral economy of abortion in Brazil, the one that reproduces within the few legitimate and public spaces in which feeds the ambiguity of punitive penal exception to abortion, the legal abortion services. Our concern was to understand how health professionals of legal abortion build the truth of rape for a woman to have access to abortion. For a true rape, we comprehend the necessity of tests and procedures this woman is submitted to therefore present herself as a victim of rape seeking a legal abortion.

He legal abortion services and its interviews

Qualitative interviews with health professionals who work in abortion services provided by law in five capitals of Brazil, one in each region, were performed. Services were chosen according to the following criteria: haveng actually performed legal abortions in 2013 and 2012 and being referenced to the geographic region in which it is situated. There are no consolidated records of legal abortions performed in Brazil for determining the representativeness of these five services on the national sce-

nario; being, however, reference in their respective regions.

The project was reviewed and approved by the Ethics Committee in Research of the Institute of Humanities at the University of Brasilia before data collection, and all institutions demanded further review by their institutional committees. In total, the project was evaluated five times and the waiting time for approval took, on average, two months, being that in one of the committees the wait was eleven months. The survey was conducted between March 2013 and January 2014.

Legal abortion is an exclusively medical practice in Brazil. However, other health care professionals are part of the staff that welcome and serve women whose pregnancies fall in the three cases provided by law: risk of death, sexual violence and anencephaly. In other words, they are services given by multidisciplinary teams composed of doctors, nurses and nursing technicians, social workers and psychologists, according to the third edition of technical standard Prevention and Treatment of Injuries Resulting from Sexual Violence against Women and Adolescents⁸.

The focus of the interview was abortion by rape. The interviews were conducted by two researchers at the hospital, in a place provided by direction local or indicated by the professional. The consent for participation was obtained by a prior clarification and the Term of Free and Informed Consent (TFIC) was signed. A semi-structured form composed of 13 questions, divided into three categories of research (professional profile, service flow, stories and situations of denial of service in cases of legal abortion), guided the interview.

Eighty two interviews were conducted, among 25 gynecologists-obstetricians, 1 anesthetist, 19 social workers, 18 psychologists, 13 nurses and 6 nursing technicians. This universe corresponds to almost the totality of staff from the five legal abortion services (only 12 professionals refused to participate in the study or were not located during the field work on the unit).

The interviews were recorded and transcribed, but no data on vocational training, the institution or the region was indexed, because the focus is the *ethos* of abortion in Brazil and not from specific regions. To avoid any possibility of identification, there is no decline in gender transcripts. The voices were perceived as voices of the teams. Confidentiality of five years was requested for the divulgation of the project evaluation by ethics committees.

Three researchers read and coded the interviews and the data were tabulated from an instrument consisting of two questions: whether if there were forensic practices to the narrative of the woman, and by having it, how did they express themselves. The patterns were compared and, in case of discrepancy, the transcripts were reviewed. Although each service has a particular dynamic organization and functioning, the analysis of the interviews has shown the existence of a shared suspicion of the narrative about the rape of women especially in four of the services regime. In one of them, there is a unique system of voice recognition of women as sovereign, although the moral economy of abortion as exception of a criminal law imposes permanent constraints on the autonomy of the staff.

The violence

The inquiry is one of the judicial practices of the production of truth, according to Michel Foucault¹¹. By it, the power interpellates who holds knowledge. The inquiry is place in situations where there is no flagrant or witness: it is through it that an event is characterized as truth.

The technology of inquire is not exclusive of judicial or police powers; it was also incorporated into biomedical knowledge and practices, in particular for the management of life in the form of biopolitics¹². In the case of legal abortion, the practice of inquiry investigates the truth of the event and produces means for the subjectivity definition of the victim. In general, there is no flagrant rape scene - you must believe on the woman who presents herself as a victim and witnessess of herr own violence. The interviews, however, showed that not just the text of the woman; the truth of the rape is constructed in the encounter between the tests of truth about the events of violence and the readings about the subjectivity of the victim.

When a woman reaches a service of legal abortion, there is a regime of suspicion in progress that precedes and accompanies it. It is expressed in at least two moral dimensions. First, the exception *ethos* to the criminal law that governs the abortion in cases of rape. As a rule instituted with the power of a criminal punishment, abortion is a crime against life and its practice, in case of pregnancy resulting from rape, is authorized as an exception to this punishment. Maintaining the status of crime, however with no penalty. This legal ambiguity animates rumors among the health staff about the moral status of the

legal abortion services: protection services would be essential to the health needs of women or services related to the criminalizing moral of abortion?

The update of the criminal rule for professionals who assist women in legal abortion services animates the second dimension of the authoritarian regime - health professionals fear being “deceived”: *“... because there is always the ghost in the medical area that women lie ...”*. The vigilance against fault continually recalls the exceptional character of the service, making it difficult violations of the criminal rule by rationalities in health care.

Moreover, as important as criminal surveillance, the ambiguous status of services puts pressure on health professionals to remain under surveillance for describing their care practices as immoral. It is within this duplicity of the criminal law guardians and the immorality of abortion that the practices of inquiry for the truth of rape arise and go against professional and women.

The exception regime enables forensic practices of inquiry to be expressed as a routine service of the organization for the qualification of the victim and thus to produce the truth of rape - or, in the words of one of the professionals, *“... if the doctor is not very sensitive, he has a tendency to ask questions to confine the victim, once there is the need to know and confront if the person is telling a lie ...”*.

There is a recurring category within services that summarizes the peritil logic imposed by fear of exception - *causal nexus*. The current direction in services approaches dictionaries logical sense of the phrase, *“relationship that links the cause to the effect”*¹³, in which the cause is rape and the effect is pregnancy. However, veridiction tests are taken to evaluate different aspects of the woman’s narrative - from the rape until the chances of pregnancy to be a result of the alleged sexual event and not another. The test result is the consistency of the causal nexus.

“In the case of legal abortion, that does not have the requirement of a police report, but must have a causal nexus, what the patient told about the rape must coincide with the pregnancy time ...” said a professional when questioned on now had refused any assistance. For him, failing on the casual nexus would resume *“the last menstrual period does not match the date of violence”*, for example, not directly dispute the existence of violence, because a woman may have been the victim of rape without that pregnancy is a result of this sexual event.

The thesis of the causal nexus organizes investigative frameworks foreseen in the normative

documents of the public policy from MOH, but also updates police power with the medical power: the police no longer participate (the woman is not required the Police Report to access the legal abortion service, although one of the services among the five surveyed keep the documentation requirement, as well as a judicial authorization), but that does not mean that the forensic investigation of truth has disappeared. If not all services make use of the jargon “causal link” or “causal relationship”, the expectation that the rape can and should be investigated by the dates and exams for all professionals interviewed.

The genealogy of this category was not explored in the investigation category of the services, even because the memory of the practices is continually revived by the passage of professional residents and in only few services there were professional from the period of the foundation. If, on the one hand, the dispute may be remnant from the 90s, in the first edition of the specification of the MOH, it could also be an expansion to the moral field of investigative practices for medical routine for deciding about the abortion methods to be used.

Many professionals justified the thesis of causal nexus in strictly technical terms for the investigation of the size of the fetus and thus to choose the method of abortion: *“... the ultrasound is important, you have to know the time of pregnancy, because depending on the time of gestation, the form of interruption is different ...”*. The latest version of the technical standard Prevention and Treatment of Injuries Resulting from Sexual Violence against Women and Teens states that *to determine the gestational age is important for the choice of abortion method and to establish the correlation between gestational age and the period of sexual violence*¹⁰, that is, it is possible to read the recommendations and techniques for determining the method to be adopted, although the concept of “agreement” allows readings inspired by the thesis of the “causal nexus”. It would be the agreement that would anticipate the method, but also the truth about the story of the rape of women.

But there is another level of moral justification for the test of “causal link” - it is part of proofs that the service remains itself as exception to the punitive regime of abortion, that is, the team recognizes and respects the border between the referral service for legal abortion and illegal abortion clinics. Thus, the medical records for checking dates, exams and facts to “beat the causal nexus” allow teams to protect continuous external assaults, described as judicial *“because, as we know it does not have the*

requirement of a Police Report, if you indicated an abortion that there was no causal relationship, the prosecutor goes towards the physician for an explanation, and not over the patient who came searching for the legal abortion.... That is, there is an overlap of expert systems (regimes periciais) in progress – from the women to the health teams, from the Judiciary to the health teams. Women and health teams are continually challenged by the moral exception of punitive legal abortion in Brazil.

Veridiction tests applied in women are shared by team members, while recognizing the sovereignty of the medical decision. Social workers and psychologists are the first to reconstruct the history of the event of violence, recovering dates, characters and events. The same story is being played by women for different professionals, because it determines its acceptance as a victim. So the woman is questioned by different professionals at different times - repeating the ritual of confession investigates the two dimensions for the truth of rape: the event of violence and subjectivity as victim.

The sequence of interpellations by veridiction tests is expressed with local variations. One of the professionals summed how it works:

“... The woman goes through psychology, social worker; sometimes we have to point to the medical ultrasound, and if there is a doubt, we perform the beta [blood test]. Normally she has a small delay in the menstrual period, does not know if she is pregnant or not, and from the ultrasound we will verify the causal effect, will listen, check if date violence is close to the age of pregnancy, then this is our routine there ... we will listen, and will reach into a consensus ...”

The consensus not only attests the causal nexus, but also distributes within the team the production of truth for the qualification of the victim. In the case of this service, before the consensus, the woman must go to a police station and register a Police Report on the rape, and then apply for a court order. The consensus thus is a police, judicial and biomedical category.

But being a victim of rape, or attest to the occurrence of violence, is not enough to guarantee to this woman the right for legal abortion: it is still necessary to ensure that the pregnancy was the result of rape. In the words of a professional, *“there are too many cases discharged ... she was violented, but she already was a sexually active woman and in gestational age and the date of violence is not compati-*

ble, so we advise them to the prenatal monitoring...”. In that moment of truth production on the rape, it is no longer the woman who challenges about their victim status, but the pregnancy and the male figure as the author of violence.

This regime of suspicion is particularly put into practice for women in heterosexual matrimonial regime or those described as “liberal” by one of interviewed professional: *“When it is a teenager, when the patient has some style, have a tattoo, piercing or so, you know, a more liberal paradigm, I think that complicates her situation”*. “Complicating the situation”, in forensic terms, means expanding the veridiction tests on the event of violence.

Like any collective practice, there are gaps in its upgrade, including positions of rejection and estrangement. Another professional of the same service who indicated the higher alert to the narrative of “women with more liberal paradigm” ironically affirms: *“A woman needs to come up with a compelling story that fits within the prejudice of the people”*. The rape scene is one of the modulators for the test of truth - if the rape was gory, the greater the chances of a woman to be speaking the truth¹⁴; however, if *“she arrives saying that violence happened inside her home, people have difficulty understanding that sexual violence happens within marital relations”*. The house is relativized according to the civil status of women - whether married, rape is suspect; if it is the daughter and child, rape relativizes compassion and facilitates the construction of the place of victim. Compassion is another active modulator of expert practices and of regimes of truth regarding the rape. The subjectivity of the victim comes into play for the final identification of the fact of rape.

The victims' subjectivity

The causal nexus ensures that the pregnancy was the result of rape - but this is only the first test of truth, the one in which medical technology acts as expert evidence. The ultrasound and the blood test results are forensic records in testing the causal nexus. But it requires that the woman also behaves like the victim. One of the professionals, when contesting the sovereignty of the causal nexus test to the truth of rape, described the sense of “behavior” as a modulator of the truth:

“... There was something on the woman's behavior not consistent with a situation of rape, that would not be to tell a confusing story once this confusion is nor-

mal, that in situations of trauma it happens, that also is not the difference between the date of the last menstrual period and the date of the violence, because not every woman remembers when she had her last period, but it would be something on woman's behavior, it is how she talks about the violence that takes the team to realize that she would be lying ... “.

The professional was keen to stress that in cases of women who lie, that is, that present outside the victim's expected behavior would be rare; yet both made use of the category of trauma to protect women who failed the test of casual nexus as demonstrated to be the absence of a trauma which would raise suspicions about the status of the victim. And precisely because of the ambiguity of the category of trauma that the subjectivity of the victim is ascertained.

The moral trauma as for the realization of social rights category has been analyzed by Didier Fassin¹⁵⁻¹⁷. In his view, the trauma is not simply the result of unbearable experience, which did not manage to negotiate, it is also a resource that can be used to secure a right¹⁵. The trauma is itself a testimony of what happened to the body and it is through him that the woman can be legitimized as a victim.

Suffering converted to trauma becomes possible, it becomes visible to exist and for whom inquires, constituting fundamental element to characterize the subjectivity of the victim¹⁶. The language of trauma, therefore, favors the creation of a specific subjectivity - the behavior of the victim which would rebuild the factuality within the terror of violence, in order that the body of the abused woman often gets to health services without the marks of rape.

The story of an 11 year old girl told by one of the professional demonstrates the tensions between legal determinations - presumption of violence to children under 14, according to the Penal Code¹ - and veridiction practices the truth of rape:

“... What really struck me was an 11 years girl pregnant she got pregnant and the health professionals from two different periods refused to undergo abortion because the girl would not have been physically assaulted in the sexual act, so it was not rape. The staff on duty, refused to make it because they thought she liked, the girl was naughty ... “.

The professional made use of a rhetoric exemplification, usual in the interviews: the more tense cases for the *ethos* of exception were narrated as made in other shifts, by other professionals, such

as what was shared, without the identities of its agents.

The trauma is a psychological category to measure the suffering and for the care of women victims of violence¹⁷. However, here we explore its moral dimension to the construction of the truth of rape and consequently for the passage to the condition of victim. The trauma obliterates the experience. By focusing on the trauma category and their consequences in the body and subjectivity, sovereignty of the testimony, the narrative of the woman would lose legitimacy. The event suffered would not have any importance, but only the trauma.

The truth of the event is replaced by the subjectivity of the victim. In this sense, the story narrated depends on the woman to be considered a victim by the team. In these tensions and even contradictions, Fassin and Rechtman demarcate the moral operations of a trauma, in which good and bad victims were reinvented and define who is or is not legitimate to have the victim status, regardless of the events¹⁷.

Even for those professionals who comprehend the psychic trauma as a nosological category for mental health care, the causality of violence desecrates for a morality of abortion as a crime against life, that is, refreshes the sovereignty of the authoritarian punitive regime: *“It was a pain that did not seem as so. For these women, even though they do not want and wish to terminate the pregnancy, they suffer from it, right? Because a life will be ended. So most of them is fragile ...* “.

In other words, the type of suffering would express the recognition of women that abortion is a moral exception - the weakening of the victim is not only recognized as a result of the violence suffered, but the gesture of challenging the punitive moral order which classifies abortion as a crime against life.

Even in services in which the rhetoric of rights is clearer, the double investigative dimension of the truth of rape - occurrence of violence and subjectivity of the victim - guides the admission of women by health teams. It's like a figure that holds truth that the woman is questioned by the teams - and not just as a victim of a right holder. Her suffering provokes compassion, but also triggers tactics for the search of truth. The woman will become victim if approved in veridiction tests that will be yield. One explanation for this investigative regime is a character exception of punitive law: even those who recognize the right to abortion feel pressured by the stigma imposed on the services, the persecutory threat and the hegemonic morality of abortion as a violation, update tactics and expert practices.

Final Considerations

Data were collected in five reference services in legal abortion in Brazil to know how to build the truth of rape for the woman who presents herself as a victim of sexual violence and have access to legal abortion. Except for one of the services, there is homogeneity of practices and discourses of suspicion. Contrary to what determine the technical standards of the Ministry of Health (MOH), the truth of the rape for access to legal abortion is not just an intimate narrative with presumption of truthfulness, but it is a moral and discursive construction produced by the submission of this woman to regimes of expert services.

Despite of some specific differences between the services, it can be stated that almost all operate under a constant regime of suspicion to the narrative of the woman about rape. This regime is expressed by the *ethos* of exception to the criminal law and the fear that professionals are being deceived. The word woman, in this sense, is placed under suspicion and is not sufficient to access the abortion services. A woman will need to go through the verediction of tests within healthcare teams to verify their right to be legitimized and recognized as a victim. For that, will have to tell a story that shows a causal link

between the event of rape and pregnancy and, in addition, will need to present subjective traits that characterizes her as a victim.

The search for a specific subjectivity of the victim makes the sovereignty of the woman's testimony, that is, their word to lose legitimacy. It is through the interrogation of her body - her gestures, senses, pleasures - and not only the history, that a woman will be recognized as the *real victim*. The fact that the word woman is not enough and that she must go through the health services verediction tests ultimately deprive her of the sovereignty for the truth.

It is therefore that the relationship between women's bodies and the mechanisms of power that investigate it, in here represented by the medical and psychosocial knowledge, services are based. The expert power is required of the teams, not for the need for presenting police reports and court approvals - even when the woman has such documents, she is still challenged to produce truth - but by a moral economy and the authoritarian regime of criminal law towards abortion. As guardians of law and the moral and responsible decision on the right for abortion - the legal abortion services - feel responsible to police not only women's bodies, but also their own regimes of operation and care practices.

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