Fabiana Cristina Severi
(Organizer)

FEMINIST JUDGMENTS PROJECT:

The Brazilian Experience

ie] Institute de Estudos Avançados da Universidade de São Paulo

FDRP (USP)

Fabiana Cristina Severi

(Organizer)

FEMINIST JUDGMENTS PROJECTS:

THE BRAZILIAN EXPERIENCE

IEA / FDRP
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TRANSLATOR'S NOTE

Dear Reader,

I am delighted to present this translated edition of "Reescrevendo decisões judiciais em perspectivas feministas: a experiência brasileira", a significant contribution to the "Feminist Judgments Project" – an international endeavor aimed at reimagining legal judgments from a feminist perspective. In this translation, my objective was to strike a delicate balance: the preservation of the Brazilian legal system's intricacies while ensuring the text's accessibility to international students and scholars. To achieve this balance, I retained vital Brazilian legal terms and principles while prioritizing clarity over technicality. I also included explanations or footnotes to clarify cultural references, reflecting the diversity of people in Brazil and acknowledging specific cultural contexts within the judgments. This translation serves as a bridge between the Brazilian legal system, cultural diversity, and feminist perspectives, offering readers a nuanced understanding of the legal analysis while acknowledging the rich cultural and feminist dimensions inherent in the text.

Warm regards,
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SUMMARY

INTRODUCTION

Fabiana Cristina Severi

This book is the result of the project "Rewriting Judicial Decisions from Feminist Perspectives in Brazil," under development since August 2021. It represents a collaborative endeavor involving professors, researchers, and law students from various higher education institutions across all five regions of Brazil, belonging to both public and private institutions. What brought them together was their desire and commitment to rewrite judicial decisions handed down by Brazilian courts using feminist and anti-racist theoretical approaches and legal methods.

This proposal follows a set of current initiatives for over a decade in other countries under the title "Feminist Judg[1]ments Projects - FJPs". The pioneering experience was conceived by a group of Canadian academics, lawyers, and feminist activists in 2006. Their intention was to show that the decisions of the Supreme Court of Canada could have been legitimately written differently and that feminist judgments could stand alongside the original judgments, or even surpass them in persuasiveness (KOSHAN, 2018). They rewrote six significant cases in the history of Canadian precedents on equal rights, and the effort resulted in the production of material that has functioned as a set of parallel legal theories on equality rights that can be used in the argumentation of Canadian Court members in actual cases (RÉAUME, 2018).

Since then, the idea of building collaborative networks of feminist scholars for rewriting court decisions has been developed in several different parts of the world, such as England and Wales[2], Ire-

[1] The project is known by the name "Women's Court of Canada Project".

[2] The book resulting from the England and Wales project is: HUNTER, Rosemary; MCGLYNN, Clare; RACKLEY, Erika. Feminist Judgments: From Theory to Practice. Oxford, UK; Portland, Oregon: Hart Publishing, 2010.

land and Northern Ireland[3], Australia[4], New Zealand[5], United States[6], Mexico[7], Africa[8], India[9], Pakistan[10] and Scotland[11]. In each region or

[3] The resulting book from the Ireland and Northern Ireland project is: ENRIGHT, Máiréad; MCCANDLESS, Julie; O'DONOGHUE, Aoife (org.). Northern/Irish Feminist Judgments: Judges' Troubles and The Gendered Politics of Identity. Oxford, RU; Portland, Oregon: Hart Publishing, 2017.

[4] The resulting book from the Australian project is: BARTLETT, Francesca; DOUGLAS, Heather;
HUNTER, Rosemary; LUKER, Trish. Australian Feminist Judgments: Righting and Rewriting Law. Oxford, RU; Portland, Oregon: Hart Publishing, 2014.

[5] The book resulting from the New Zealand project is: MCDONALD, Elisabeth; POWELL, Rhonda; STEPHENS, Mamari. Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope. Hart Publishing, 2020.

[6] The first book published by the USA about the rewrite project was: STANCHI, Kathryn M.; BERGER, Linda L.; CRAWFORD, Bridget J. (org.). Feminist Judgments: Rewritten Opinions of the United States Supreme Court. New York: Cambridge University Press, 2016.

[7] The resulting book from the Mexican project is: HERNANDEZ, Geraldina González de la Vega; RAMOS, Isabel Montoya (coord.). **Sentencias feministas**: reescribiendo la justicia con perspectiva de género – Proyecto México. Querétaro (México): Instituto de Estudios Constitucionales del Estado de Querétaro, 2022.

[8] The African Feminist Judgments project is coordinated by academics, lawyers and feminist activists from South Africa, Kenya, Uganda and Malawi. As far as we have researched, there are no books published with the results of the project yet. However, it is possible to learn some of the general lines of the proposal from some articles, such as: CARDIFF LAW AND GLOBAL JUSTICE. The African Feminist Judgment Project. *In:* **LAW AND GLOBAL JUSTICE.**

[9] The main book about the project is scheduled to be published later in 2023. But you can get an outline of the Indian initiative from the following texts: CHANDRA, Aparna; SEN, Jhuma; CHAUDHARY, Rachna. Introduction: The Indian feminist judgements project, **Indian Law Review,** 5:3, 261-264, 2021 e https://ohrh.law.ox.ac.uk/the-indian-feminist-judgment-project/

[10] As far as we have been able to research, there is still no book with the results of the work. Still, there is a lot of information on the website: PAKISTANI FEMINIST JUDGMENTS PROJECT. Pakistani Feminist Judgment Project (PFJP). 25 mar. 2021. **Facebook:** PAKFJP. Available in: https://www.facebook.com/PAKFJP/posts/pfbid0wNmfd4tXJjGTkXinmTgPpmN7BoD2DP2UYPEFZw3FK2Mq1vp6N64eyiQSo1PzjGRkl.

[11] The book with the main results of the Scotland project is: COWAN, Sharon; KE-

country, the project has taken on its own characteristics, considering their legal, historical, and cultural specificities; the kinds of political, theoretical, or pedagogical impacts they are expected to produce; the local limits or challenges that need to be addressed; and the distinct layers of complexities produced by issues such as nationalism, racism, imperialism, capitalism, and colonialism.

The first project following the Canadian experience was coordinated by Rosemary Hunter, Erika Rackley and Claire McGlynn and involved decisions from England and Wales[12]. They considered the rewriting as "a new form of critical legal scholarship. They formulated the main parameters that could ensure the plausibility of the work and demonstrate, in a sustained and disciplined way, the results derived from the use of feminist approaches in judicial decisions. To do that, it would be necessary for the authors to subject themselves to the same restrictions as the original judges. In essence, the authors were required to utilize the available legal sources, rely solely on the materials presented in the judicial process, adhere to the writing style of judicial decisions, and uphold the judicial responsibilities of autonomy and impartiality.

The Australian project compiled twenty-four cases[13] rewritten

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NNEY, Chloë; MUNRO, Vanessa E. (org.). **Scottish Feminist Judgments:** (Re) Creating Law from the Outside In. Oxford; New York: Hart Publishing, 2019.

[12] The project conducted in England and Wales brought together academic scholars and commentary judges in a series of workshops to produce 26 cases covering topics such as administrative law, contract law, criminal law, constitutional law, discrimination, labor law, evidence law, housing law, public and private international law, medical law, immigration law, property law, procedural law, human rights, and equity. The rewritten cases are accompanied by commentary that presents the original decision and highlights the differences between them. The project involved academics and students from 30 different institutions, as well as activists and other professionals.

[13] Besides the 24 feminist judgments, there is one case that was dealt with in an essay format written by Irene Watson, where she explains why it was not possible to

by scholars, professionals, and Indigenous authors, exploring the boundaries of the Australian legal system concerning issues of women and Indigenous peoples, encompassing topics such as land rights, discrimination, and criminal justice. The proposal in New Zealand sought to strengthen dialogue with Maori (mana wahine) women[14] in the construction of new, remained Court decisions. This initiative resulted in the production of a book in which 6 of the 19 alternative decisions were written in the Mana Wahine language and from their perspective. The project in Ireland/Northern Ireland was designed to explore issues arising from political processes of an ethno-nationalistic and religious character that mark the life of the two nations.

In addition, it involved the participation of artists and poets in the production of alternative judgments to foster a richer understanding of the context of the cases and to problematize the use of language in the production of judicial decisions. This same perspective was also adopted by the Scottish project, which complemented the 16 published feminist judgments with 8 art pieces and several creative interventions[15]. The first set of published rewrites in the US focused on landmark cases decided by the country's Supreme Court from

write a feminist judgment in it. The case involved aboriginal women and the author used oral tradition to show how the right of aboriginal women was misinterpreted and suppressed. Rewriting this case was impossible, as the methodology of the project would not allow for rejecting Australian Common Law jurisdiction and the sovereignty of the Australian state. Another case involved a feminist trial that was dated in the future, in 2035, but whose original decision was handed down in 1934.

[14] Maori women make up 15% of the population in Aotearoa, New Zealand.

[15] The rewritten rulings and expert commentary were complemented by the work of 8 artists who produced, in a variety of media, works that responded to individual cases or to the idea of a feminist trial more generally. These artistic pieces were exhibited in various locations across Scotland, including art galleries, universities, and the Scottish Parliament. In addition to a scholarly book, the project also has its own website and a virtual art exhibition and is now accompanied by a series of four podcasts produced by Gabrielle Blackburn and Amrita Ahluwalia.

1870 to 2015[16]. A group of international legal experts developed the project by rewriting decisions produced by international courts[17] and supranationals, exploring the collaborative approach in the writing of judgments. The authors of this proposal simulated chambers of feminist judges who were challenged to reach some common ground, expressed in a single judgment, as happens in courts of this nature. More recent experiences in geopolitically situated Global-South countries, such as Mexico, India, and various African nations, have acknowledged the challenges posed by legacies of colonial pasts, including inherited models of legal reasoning. They also use the rewrites as a method of producing memories of local feminist struggle for rights and the legal critique associated with them.

With the multiplication of initiatives, the FJPs have been interpreted as a collective endeavor of knowledge production, in a trans-local dialog structure[18]. This is so despite maintaining the focus on local realities, none of the experiences disregard the existence of others. On the contrary, the participants seek to build spaces for academic exchanges regarding the structuring of proposals and the critical analysis of their outcomes. The so-called feminist methods

[16] The book is a collection of contributions from 3 coordinators and 51 authors. The rewritten decisions are accompanied by commentary by an expert. The cases cover issues of justice and equality, including reproductive rights, privacy, violence against women, sexuality, racial and economic justice, immigration, the commerce clause, and pensions. In addition to this first book, there are several other projects in publication, each focusing on decisions in a particular area or topic of law.

[17] The book resulting from such project is: HODSON, Loveday; LAVERS, Troy. **Feminist Judgments in International Law.** Oxford, RU; Chicago, Illinois: Hart Publishing, 2019, p. 479-493.

[18] In the productions related to the PJFs, the most commonly used term is "global dialogue". Following decolonial feminists' critiques of the terms "global" and "transnational," I suggest that the interactions between academics and activists within the FSPs be interpreted as a "translocal dialogue. This idea is developed in a separate chapter in this book.

used in the rewrites are revisited in light of the results of each of the projects. Instead of the interest in producing new definitive syntheses on the rationality of law, the dialogue proposed by the participants is an invitation to collaborative networking[19] that can favor the production of critical feminist knowledge about law and justice.

A common characteristic of these projects is that the rewrites incorporate feminist approaches and employ languages aligned with local parameters for rendering a decision. Even so, the findings of the projects make explicit how the rewritings end up challenging the dominant forms of common legal sense, especially how law reproduces and reinforces gender stereotypes and norms, most of the time in ways that are very harmful to women[20] and other subalternized social categories. Rewriting has helped demonstrate that the discriminatory effects produced by law are not always a direct result of a law or the lack thereof but rather of patterns of judicial reasoning or the worldviews of those who judge. The act of rewriting also carries a subversive character, as it extends beyond the academic realm and takes place within the actual arena of judicial practice, often utilizing the form of parody. (HUNTER; McGYNN; RACKLEY, 2010; RACKLEY, 2012).

Some authors highlight the foreshadowing character of feminist judgments (CHARLESWORTH, 2019). Foreshadowing is an alternative to social change. It encourages people to operate as if social structures are already transformed and requires suspending the belief

[19] Some authors name the network of FJPs as "solidarity friendship network" (TPI project), or as "global dialogue" (Americans). In chapter 1 of this book, I suggest the concept of trans-local feminist alliances network.

[20] The term women used throughout the text, despite aiming to express the plurality of subjects, has its limits already addressed by various theories, especially queer and transfeminist theories. Still lacking linguistic repertoire to deal with this issue, it would be important to consider the term women here in order to encompass also pregnant people, menstruating people, and feminized bodies.

in the inevitability of current structures and experimenting by putting bold ideas into practice. Instead of hoping, therefore, that we will have more women and greater diversity in courts around the world and that this diversity can materialize in the plurality of perspectives and approaches in the production of justice, the project offers us a practical exercise in an imagined present where this expected diversity already exists, and thus we can test its effects.

Historically, feminist theoretical approaches are associated with producing a partial perspective on reality and are thus incompatible with judicial practice. However, FJP has demonstrated the fragility with which the notion of impartiality has been maintained in most courts, as judicial decisions are often constructed without judges seriously considering the impact of their social position and the flawed universality of legal rules[21]. Alternative decision-makers often draw on a variety of sources to attract greater attention to the context and reality of the lived experience of the women and marginalized groups involved in a claim and the intersections of different systems of oppression in shaping the conflicts that come before the courts (MUNRO, 2023).

The literature on FJPs has also discussed how these initiatives serve as a powerful educational resource in various ways. Many of these projects are implemented in law schools, encouraging students to engage in critical thinking about the judicial decision-making process from perspectives often overlooked in standard curricula. (CRAWFORD; STANCHI; BERGER, 2018). The rewritten judgments invite future legal practitioners to reimagine what law is, what it can be, and how best to deliver on its promises, especially in terms of equality and non-discrimination. In addition to enriching students'

[21] Debates over abstract notions of judicial impartiality and the universality of legal norms have fueled numerous papers by feminist theorists in various regions.

understanding of judicial decision-making, the practices help to address gaps between law and justice, problematize issues left out of most legal courses on gender and racial justice, and provide models of arguments concerning social justice issues in critical and creative ways (HUNTER, 2012; STANCHI; CRAWFORD; BERGER, 2021; CRAWFORD *et al*., 2020).

REWRITING COURT DECISIONS IN FEMINIST PERSPECTIVES IN BRAZIL AS A TRANS-LOCAL POLITICS OF TRANSLATION

Inspired by these initiatives, the Brazilian Project had its formal beginning in a workshop in September 2021, sponsored by the Institute for Advanced Studies of the University of São Paulo (IEA-USP)[22], involving more than 60 people, including professors, activists, graduate and undergraduate students, and the three professors coordinating the English project, Rosemary Hunter, Erika Rackley e Julie McCandless. On this occasion, we were introduced to the main premises, challenges, and the results of the other projects. Based on this knowledge, we defined the objectives and the general lines of the Brazilian project. Before analyzing it, however, it is important to understand some of the contextual elements that made us decide to carry out the project in Brazil.

We were in the midst of the COVID-19 pandemic. Many of us have intensified our analytical efforts to highlight the most aggravated forms of violence against women during the pandemic and to assess how public services were responding to this scenario (SEVERI; JUZO; FIRMINO, 2021; OSMO; FANTI, 2021; FLAUZINA;

[22] The videos of the event can be accessed here: https://youtube.com/playlist?list=PLpEIC3ZIVnRx9mW1OsySdGyaHDJrH_8-v.

PIRES, 2020). Unfortunately, these studies have gathered substantial evidence of how measures implemented to address a global-scale problem, when implemented without critical analysis in a context already characterized by intersecting inequalities, have resulted in specific and disproportionate effects on certain groups of people. These groups were already burdened, prior to the pandemic, with a heavier load of caregiving responsibilities and faced varying levels of insecurity and vulnerability. Among these groups are Black and racialized women, women living in poverty and heading households, domestic workers, informal and unemployed workers, incarcerated populations, LGBTQIAP+ individuals, people with disabilities, and indigenous peoples. It did not seem to be coincindental that the first people to die from COVID-19 in the country, Rosana Aparecida Urbano[23] and Cleonice Gonçalves[24], were poor, or/and black women, domestic workers, and residents of peripheral regions of big metropolises. Likewise, some cases like the death of the boy Miguel, son of Mirtes Renata Santana de Sousa[25], were painfully didactic in the sense that

[23] Rosana was the first fatal victim of Covid-19 in Brazil, on March 12, 2020, at the age of 57. She lived in a low-income neighborhood in the eastern region of the city of São Paulo and worked as a diarist. Five other relatives of hers also died around the same time from the new coronavirus. See: https://inumeraveis.com.br/rosana-aparecida-urbano/

[24] Cleonice Gonçalves was 63 years old, a domestic worker since the age of 13, and was the first fatal victim of the coronavirus in the state of Rio de Janeiro. She died on March 22, 2020. She probably contracted the virus from her employer, who had returned from Italy with symptoms of the disease, where she had spent her vacation. Her employer arrived in Brazil already showing symptoms of the disease, she quarantined herself in her house, located in a noble district of the city, but did not release Cleonice from work during this period. See: https://www.institutowalterleser.org/dossiecovid-vitimas-cleonice. Also: https://www.ufrgs.br/jornal/morte-de-trabalhadora-domestica-por-coronavirus-escancara-falta-de-politicas-para-proteger-a-classe/

[25] Miguel, a 5-year-old boy, died after falling from the building where his mother, Mirtes Renata, worked as a maid. Without being able to count on the school and some support networks that she usually used before the pandemic, such as grand-

they made it explicit that the "stay at home" slogan was not a reality for a large part of the Brazilian population. On the contrary, some groups, such as domestic workers, have had their fragility increased the risk of death (their own and that of their family members) in the name of greater protection of upper and middle-class families.

The analyses on the effects of the health crisis in political and social terms, therefore, left little doubt about the importance of intersectional, decolonial or, quoting Lélia Gonzalez[26], *"ladino-amefricanas"* feminist approaches in the evaluation of all kinds of public policy, including in the field of access to justice. Besides our rapid academic engagement with the production of analyses of the effects of the pandemic on women's lives, our quick and inevitable adaptation to work in a virtual environment made us believe in the viability of executing a project that would connect professionals from different regions of the country and abroad.

In Brazil, the health crisis has been compounded by the political crisis. When the new virus reached the country, we were already in one of the worst scenarios of our recent democracy, which began with the coup against the first woman to occupy the Presidency of the Republic, Dilma Rousseff. It intensified with the election, in 2018, of

mothers, neighbors, etc., Mirtes and many other poor and peripheral women started working, inside and outside the home, with their children with them. Domestic workers, historically one of the most precarious labor categories in the country in terms of legal guarantees, were coerced to keep their jobs, even with the risk of contagion, under penalty of dismissal or discharge. The case makes explicit the multiple forms of violence to which the category of domestic workers has been subjected historically and which were aggravated during the pandemic: racism, moral and sexual harassment, the devaluation of their activities by society, stigmatization, low wages, and overwork. See: https://criola.org.br/artigo-caso-miguel-e--pandemia-expoem-violacoes-de-direitos-das-domesticas/

[26] See, for example, the essay "Por um Feminismo Afrolatinoamericano", originally published in 1988. This and other essays by the author have recently been republished in the book: GONZALEZ, Lélia. **Por um Feminismo Afro-Latino-Americano:** Ensaios, Intervenções e Diálogos. Rio Janeiro: Zahar, 2020.

extreme right-wing groups and people to positions in the Executive and Legislative branches, after they had engaged in campaigns characterized by the proliferation of fake news and hate speech against minorities, against human rights policies, against feminist ideas, and against science and universities. This new scenario was materializing not only in the accelerated dismantling of what we had conquered in terms of recognition of rights and in terms of democracy in the last decades, but also in the renewal of the so-called *políticas de morte* (death politics)[27], especially against the black and peripheral population, indigenous peoples, *quilombolas* and other traditional communities, and the LGBTQIAP+ population. These dismantling and attacks occurred simultaneously with the advance of an ultraliberal and predatory economic policy that has further exacerbated inequalities in the country, made labor rights more precarious, channeled the wealth produced locally to the foreign exchange market and advanced deforestation and illegal mining in the Amazon region and in the lands of indigenous, quilombolas and other traditional communities.

The speed with which far-right autocrats in power promoted this unprecedented destruction of democratic regimes impelled us to intensify efforts to collaborate with the production of models of critical legal thinking that do not disregard the oppressive nature of law, nor underestimate the importance of legal institutions, human rights, constitutional democracies and independent judicial courts against injustice, violence and various systems of oppression and subordination. I have argued before that this has been one of the characteristics of many Brazilian feminist and anti-racist approaches, namely the critical engagement with the law. This does not entail an enthusiastic defense of the law nor a refusal to contest the Constitution (SEVERI, 2018).

[27] The term políticas de morte (death politics), is used, for example, in the works of Ana Luiza Pinheiro Flauzina and Thula Rafaela de Oliveira Pires (2020).

The implementation of the project in Brazil also seemed to be a golden opportunity to imagine a more plural judiciary. This is no small thing, if we consider the persistent over-representation of white, Catholic, middle- and upper-middle class men in the composition of legal careers in the country[28]. In the case of the Judiciary, for example, even with the National Council of Justice's requirement that, from 2015[29], competitive examinations for admission to the judiciary institute the reservation of 20% of vacancies for Black people, the known percentage of Black judges is 8.7%, and the estimate is that between 2016 and 2021, only 3.2% of people who entered the judiciary through competitive examinations did so based on the racial quota policy. In contrast, the number of women taking part in public exams, rather than increasing, has declined slightly in recent years, so if we add up the percentages of women and black people who entered the last exams, they do not exceed 40% of the total. Therefore, imagining a more egalitarian reality was indeed tempting.

Likewise, the opportunity seemed irrefusable to us because it would engage us in building alternative models of legal reasoning that could be used in a variety of real cases, especially cases involving laws that were achievements of local feminist political mobilization. It is important to consider the extensive research and analysis conducted over the years, which has highlighted the challenges faced by the Brazilian Judiciary in understanding and promoting human rights. The Brazilian feminist and anti-racist field has played a crucial role in establishing and defending a comprehensive framework of human rights in Brazil. What would judicial decisions be like if, for example, the Judiciary - and the Brazilian justice system - ex-

[28] Data on the composition of the Judiciary are presented and discussed in a separate chapter in this book, in Part I, written by Maria da Glória Bonelli, Ana Paula Sciammarella and Tharuell Lima Kahwage.

[29] See Resolution No. 203 of 06/23/2015 of the National Council of Justice.

plored more intensively the provision made in the Maria da Penha Law that domestic violence against women and girls is a violation of human rights and that, for this reason, the response to it should be the result of an integrated service, provided through a network of services, aimed at ensuring the investigation, punishment, prevention, and compensation?

At the same time that the practice of rewriting decisions shakes the legal certainties that sustain the original decisions, it can also increase the ethical and political commitments between academics and professionals of the justice system by suggesting other decision models which can be developed through dialogue and alterity. For the rewriting to be feasible, we, as scholars, should seek to place ourselves in the institutional position of real judges. In this place, we experience challenges that are uncommon to the more usual exercise of academic criticism. In the same way, the results achieved through this activity end up functioning as a powerful support for judges to commit themselves to testing feminist and anti-racist approaches in the examination of cases under their responsibility, with less fear that this will result in compromising judicial impartiality or professionalism[30]. The moment when we started the Brazilian project seemed perfect for it, since the National Council of Justice had just approved the *Protocolo para julgamento com perspectiva de gênero* (BRASIL, 2021). The Brazilian protocol experience adopted models that already existed in the superior courts of other Latin American countries[31]. Many of these originated from a intense dialogue between the

[30] Many female judges avoid taking a feminist or gender perspective in the cases under review for fear that this could be interpreted by the legal community as an offense to impartiality or a low level of professionalism because they would be judging more based on their own experience or emotions than on the basis of rules of law (KAWAGE; SEVERI, 2022).

[31] There are protocols like this, for example, in Mexico, Costa Rica, Chile and Argentina.

Judiciary and feminist academics. The document has highlighted the gender issue in the Brazilian Judiciary and generated a surprising increase in the demand for academic studies on law and feminism by legal professionals.

The last factor that favor the development of the project in Brazil is, in fact, the main one: the desire to create academic impact, more especially in terms of changes in the curriculum of Brazilian legal courses and the strengthening of a proper field of feminist and anti-racist legal studies in Brazilian legal academia, where the effects of these approaches are still incipient. The histories of feminist and anti-racist struggles for law in Brazil have been consistently overlooked within existing legal doctrines. Furthermore, the significant influx of women into Brazilian law schools has occurred only recently, and many of us face challenges in maintaining high-quality teaching and research practices due to the vast territorial size of the country and various other obstacles. As a result, our academic contributions have often been modest and underrepresented. The development of the FJPs could be, then, an opportunity for us to collectively engage in changing this scenario in legal courses and in the ways of doing and thinking about teaching and research.

As this book demonstrates, the project has in fact favored a collaborative network among female professors from all over the country that could potentially reinvigorate the critical debate in law. We have built a community, or better said, a sense of community from which we are encouraged to develop academic activities in solidarity. It is an open network driven by a plurality of ideas, subjects and experiences which, undoubtedly, gives rise to dissonances and conflicts at all times. The network made possible by the development of the Brazilian project is a concerted and brave effort to establish "safety zones" (COSTA; DINIZ, 1999), in which we can establish alliances

that make the critical intellectual debate among us viable and, at the same time, favor a greater presence of feminist and anti-racist approaches in the larger legal community. This book is one of the first and most tangible results of this arrangement.

PROCEDURES AND METHODS FOR THE DEVELOPMENT OF THE BRAZILIAN PROJECT

Considering that our focus was on academic impacts, we agreed to carry out the rewrites in the context of some kind of teaching practice, research, extension or internship, involving students in the whole process. Thus, during the execution of the project, we were able to create subjects in the courses in which we were involved, or to rearrange the curriculum of existing courses to accommodate content related to the project. We had the approval of several research and extension scholarships for students, created study groups, supervised academic monographs, and published essays and scientific papers with results we got from the project. We also proposed working groups in important academic events in the country[32], participated in international events[33] presenting the Brazilian project and promoted several debates with professionals from other areas with interest in the theme and in the several multidisciplinary fronts in which it unfolds. Most of the information about these activities can be found on the project's website: https://sites.usp.br/pjf/.

The decision to involve only academics and students in the construction of the rewrites brought some limitations to the project. The

[32] roject. We also proposed working groups in important academic events in the country

[33] Professor Flavia Portella Püschel and I participated in panel discussions at the 2022 Law and Society meeting, presenting partial results from the Brazilian Project.

first one concerns the diversity of the group itself, since women with academic ties are still predominantly white, cisgender, middle-class, from large urban centers, and usually with no disability. We tried to minimize these limitations through an active search for female professors who escaped these markers and who were part of the staff of higher education institutions in the five regions of the country, both public and private. The guests were encouraged to work with other colleagues from the same educational institution to develop the proposal together. Ultimately, this book comprises the collective efforts of 125 authors representing all five regions of the country. Their work resulted in 22 alternative decisions, 4 theoretical-contextual chapters, and 1 translation.

The second limitation refers to the low interaction with other players in the rewriting activities developed so far, such as judges, lawyers, prosecutors, public defenders, activists, and researchers from other fields of knowledge. In several projects in other countries, they were invited, for example, to write comments on the rewrites or to participate in the workshops and events held. Unfortunately, this was not the case with our group, which was really limited to the academic sphere. However, while our primary focus was not on such interactions, we engaged in various forms of dialogue with the described groups, building upon preexisting partnerships between the project's teachers and these professionals. Furthermore, throughout the project, many justice system agents and activists actively sought us out to learn more about the project and express their interest in collaborating with our activities. Consequently, we anticipate that this pluralistic debate will intensify further following the publication of this book.

DECISION SELECTION AND REWRITING METHODOLOGIES

In the context of our project, each group or professor was granted autonomy in selecting the decision to be rewritten, with no restrictions on the theme or type of judgment (lower or higher courts' decisions). Nevertheless, we agreed it would be important to cover topics beyond those most commonly covered by feminist and anti-racist studies. Regarding the resources to be used, the participants were free to use the entire contents of the judicial proceedings when necessary and possible. We suggested the careful handling of the parties' private data. The authors were also free to dare in their use of the language in the rewriting, as long as the result was credible, that is, a judge could actually have produced the final text.

Unlike most other projects before ours, there is no separate commentary accompanying the alternative judgments produced by someone outside the group. From the project's inception, we recognized the audacity in engaging a substantial number of teachers and students in an activity that faced limited support or funding for its execution. The idea of involving even more people and phases seemed to us something that could compromise the project's viability. The authors were required to develop preliminary components that contextualize the academic environment within which the work was undertaken. These components included details about the original decision and the methods or approaches employed in the process.

We did not limit before hand about what we would call feminism or what kind of strand should be used. Still, we decided to take seriously the commitment suggested by intellectuals like Sueli Carneiro to "blacken Brazilian feminism" (2019), exploring the necessary articulation between racism and sexism for the reading and

analysis of the cases. We also wanted the project to be an opportunity to put to use some of the more common feminist approaches in the debates around here, such as decolonial, black, popular, indigenous, and rural feminism.

We took several steps to validate the project's results between 2021 and 2023. In addition to the initial workshop in September 2021, we had two other events bringing together all network members so that we could present and discuss the preliminary results of the project[34]. Most of the authors promoted activities in their universities to discuss the rewrites, bringing together several audiences. After the first draft of the chapters was finished, we did critical readings of each other's work. We also created an editorial board composed mostly of female judges, lawyers, and Brazilian activists from outside the project to evaluate at least one of the chapters, following a script of questions[35]. The board's coordination was undertaken by Ana Cláudia Farranha and Élida Lauris. Additionally, I conducted a critical examination of the chapters with the invaluable assistance of

[34] In April 2022, we held a general internal meeting with the project members to define the general guidelines of the Brazilian project. On January 21st 2022, the Violence Care Clinic (CAV/UFPA) organized the round of conversation " Judgments from a feminist perspective". The 2nd General Meeting of the project was held on October 6th and 7th, 2022.

[35] The board members were asked to evaluate the chapters according to the following questions: Is the original case sufficiently described or presented so the reader can understand it? If not, what did you miss? Is there any information about the relationship between the rewriting and legal education? Is the reason or reasons that make the rewriting a feminist piece made explicit in the description of the procedures or methods? Are the main differences between the original decision and the rewriting made clear? Can you identify the use of intersectional, decolonial, or other feminist approaches that articulate at least gender and race? Could the rewritten decision have been the product of an actual judge, without such a person going through major institutional constraints? If you, the evaluator, are a judge, would you feel comfortable producing such a decision? Or, if you are an activist or an academic working on this issue, how would you critically evaluate this decision considering the subject area it aims to focus on?

post-doctoral fellow Wellington de Souza dos Anjos Costa. Subsequently, the individuals involved in the rewriting process were given an extended timeframe to address any necessary revisions and submit the final version of their work.

The chapters with alternative decisions have the same structure: 1. Introduction (with the academic context in which the rewrite was developed); 2. Case or the original decision; 3. Methods and approaches used in the rewrite. 4. Decision Rewritten. 5. References. They are preceded by paragraphs that contextualize the rewrite and provide information about the original decision.

CHALLENGES ENCOUNTERED IN THE IMPLEMENTATION OF THE BRAZILIAN PROJECT

The challenges of the Brazilian project were too many. One of them was the development of the activities during the pandemic of COVID-19. If, on the one hand, it facilitated the implementation of the work because it made the collaborative effort involving academics from all over Brazil feasible, it made face-to-face meetings of the participants unviable and brought varied personal and institutional burdens for us to perform our tasks.

Another difficulty was carrying out such a large and ambitious project in a scenario with few resources for its funding, a situation resulting from the dismantling of public policies to support science and research in the country in recent years. We had some research grants for students, especially undergraduates, as well as resources for the book's publication.

The third challenge refers to the difficulties in obtaining material, especially books and academic journals that deal with similar projects in other countries. Most of them are books written in

English, with no online version, that have to be purchased internationally, at significant costs. This led us to build ways to share this material among ourselves through reviews, informal translations, the production of partial copies, and bibliographic review studies. This aspect is relevant in comprehending the multifaceted challenges of establishing a productive trans-local dialogue. To address this, we have endeavored to facilitate the translation of English texts into Portuguese and vice versa, thereby fostering linguistic accessibility and enabling cross-cultural exchanges.

OVERVIEW OF THE REWRITTEN DECISIONS AND MAIN RESULTS

Most of the rewritten decisions involve topics that have traditionally held an important place in feminist studies, such as domestic violence, feminicide, reproductive justice, criminalization of abortion, equity in labor relations, custody and alimony, rape, campus violence, transgender and women's rights, and the rights of women and indigenous peoples. Nevertheless, some decisions address issues that are rarely discussed from the point of view of gender inequalities, such as civil liability, urban land conflicts, the right to health, childcare, amnesty, military violence, the prison system, security, outsourcing of labor relations, and administrative law.

Despite the diversity of themes, a significant portion of the cases selected for rewriting in this project revolve around decisions in criminal lawsuits, involving women as both defendants and perpetrators of crimes. In Brazil, criminology has been a field where feminist and anti-racist studies have flourished and made significant contributions to legal studies over the years. The collection of rewritten decisions presented in this book provides a comprehensive critique of

the discriminatory impacts of abortion criminalization and the mass incarceration processes, particularly affecting Black and marginalized communities. It also helps to understand the processes of revictimization of women who suffer multiple forms of violence, even after legislative achievements such as the Maria da Penha Law. Most of the original decisions are from the common justice system, first or second degree, either state or federal. To a lesser extent, there are alternative votes or judgments in cases from Brazil's Supreme Court and the Superior Court of Justice. Furthermore, there are rewrites of decisions from administrative disciplinary procedures and reports from the Inter-American Court of Human Rights. In most instances, the participants utilized the full content of the original proceedings in their analyses, particularly in cases involving decisions from the common justice system. As a result, they provided fresh evaluations of the evidence presented in the process. In most cases, the rewrites led to partial modifications in the reasoning and outcomes of the original decisions.

In terms of the feminist methods employed, many of the decisions delve into the commonly used tools in other FJPs, such as contextualizing the case to accent voices and experiences overlooked in the original version, the concern to avoid reproducing stereotypes or images of control; the utilization of feminist studies and empirical research in constructing the reasoning, more intensive handling of the concept of substantive equality; and the focus on providing a judicial response that generates substantial effects in the lives of women, their communities, or the marginalized groups involved in the case. Some strategies appear less in the projects of other countries, but are common in feminist and anti-racist activism in Brazil and the Americas. One of them is the intensive use of treaties and precedents from international human rights systems in the reasoning of the decisions

to make the idea of control of conventionality be taken seriously. Another strategy was to bring into the reasoning of alternative decisions arguments produced in the cases by the entities that participated as *amici*. This strategy can give visibility to the rich history of participation of feminist and human rights organizations in judicial processes through *amicus curiae* briefs, especially in superior court cases.

A third distinctive approach compared to other projects was the exploration of feminist imagination in the stages of the process preceding the final decision through the utilization of protocols, risk assessment forms, or investigation guidelines. This application during the investigative phase highlights how decisions regarding urgent protective measures in cases of domestic violence, for instance, could have been markedly different if the court had employed specific protocols or norms currently recommended by the court during the investigation phase. Or how would it be if, as the Maria da Penha Law determines, the word of the woman or girl in a situation of violence mattered, in fact, and were sufficient for granting such measure since it is a decision aimed at interrupting and preventing domestic violence.

One of the strongest pieces of evidence produced by our experience concerns the low technical quality of Brazilian judicial decisions. Especially in the case of first-degree decisions of the state courts, the original grounds reproduce varied stereotypes that define an outcome for the case that is quite harmful to women or vulnerable people involved. The analyses produced by the authors end up blurring the aura of "impartiality" and "male wisdom" that hovers over the Brazilian courts.

Another aspect was the questioning of simplistic views that associate the increased presence of women in judicial careers with significant changes in the decision-making model. While the diversity in

the composition of the Brazilian judiciary is a constitutional requirement and a condition for strengthening its democratic legitimacy, the various original judgments rewritten here, rendered initially by women, highlight the importance of advancing this debate. It is crucial to better articulate the demands of plurality in the composition with those related to the production of democratic legal rationalities from feminist and antiracist approaches.

ORGANIZATION OF THE BOOK, POTENTIAL USES OF ITS CONTENT, AND OTHER ONGOING PRODUCTIONS

The chapters in this book have been organized into two parts. Part I gathers texts that offer concepts, analyses, and reflections on the context of the project. In it, there is one chapter in which I refine the analysis of the pedagogical impacts the project focused on, as well as situate the Brazilian experience concerning other FJPs. The second chapter, written by Flávia Puschel, presents conceptual elements that help elucidate the Brazilian legal system and Judiciary and then discusses the challenges of developing a project conceived in common law countries in a legal system of Roman-Germanic tradition. The third chapter, written by Maria da Glória Bonelli, Ana Paula Sciammarella, and Tharuell Kahwage, presents data and studies on the composition of the Brazilian judiciary and its effects in terms of the construction of the ideology of professionalism in this field. The fourth chapter is authored by Ana Cláudia Farranha and Élida Lauris, who offer us a cross-cutting analytical framework for rewritten decisions.

Part II of the book consists of a collection of 22 rewritten decisions, organized according to the type of originating court. We begin with the rewriting of a merits report from the Inter-American Court

of Human Rights. We then proceed with the rewrites of judgments and rulings from the two highest Brazilian courts (Supreme Federal Court and Superior Court of Justice), as well as decisions from federal courts and state-level judiciary (appellate and trial courts). Lastly, there is a rewriting of a decision in an administrative disciplinary process within a public university involving gender-based violence.

The most obvious readership for this book are students and professors in law schools. After all, from a professor's point of view, law schools are responsible for training students to exercise the most varied legal professions. They are, therefore, the most favorable spaces for students to learn concepts that will shape their future practice. Law schools are also key *loci* for the promotion of scientific and technical knowledge about the law.

Evidently, we hope that the texts collected here will also be useful to any legal practitioner interested in incorporating other legal sources, techniques, and reasoning models that take seriously the duties of judicial impartiality and the establishment of the Rule of Law. The expectation, therefore, is that the book will lead students and other people who work in the various legal professions to recognize the richness and complexity of the approaches proposed here and realize the importance of their use in the most diverse cases that come before the courts every day.

In addition to the publication of the present book, two special dossiers in scientific journals are planned, which will explore in more detail the results of the Brazilian rewriting project. The first dossier, coordinated by professors Luanna Tomaz de Souza and Camilla de Magalhães Gomes, was published by *Revista Direito Público* still in 2023, under the title "*Abordagens Teórico-Metodológicas de Análise de Decisões Judiciais em Perspectivas Feministas*". Its purpose was to bring together studies that show different theoretical-methodolog-

ical approaches to the analysis of judicial decisions from a feminist perspective. The second one was coordinated by Professors Thula Pires, Gabriela Barreto de Sá, Priscilla Cardoso Rodrigues, and Fabiana Severi and is expected to be published by *Revista Direito e Práxis* also in 2023. The primary objective of this project is to curate studies that examine the ramifications of patriarchal, cisgender, heteronormative, and racist influences in legal education and court proceedings, with a specific emphasis on the implications for didactic-pedagogical approaches and the training of legal professionals. The research findings will be published in two open-access journals that do not charge any fees for access.

FINAL REMARKS AND TRIBUTES

The relationship between feminists and the law has often been described using terms such as ambivalent and paradoxical (SEVERI, 2018). The FJPs, however, do not necessarily reject these terms but instead contribute to the debate with alternative approaches rooted in a different knowledge production model. Through this project, we critically examine the law from the borderlands between academia and concrete legal practices while acknowledging the previous paths paved by others. We aim to explore the power of law in shaping subalternities and dehumanization. Consequently, concepts and imagery associated with decolonial feminisms, such as trans-local translation, "*Améfrica Ladina"*, and border zones, hold significant relevance within the Brazilian project of rewriting judicial decisions.

During the initial training of the professors who would work in this great network of academic collaboration, our dear Professor Maria Sueli Rodrigues de Souza collaborated with us. Sadly, a few

months later, we were devastated by her untimely death[36]. She was a lawyer, teacher, mother, activist, and a source of great inspiration for many generations of students and professionals. With a degree in Social Sciences from the Federal University of Piauí (1996) and in law from the State University of Piauí (2003), Sueli was a law professor at the Federal University of Piauí and a member of the Research Center on Africanities and Afrodescendence and was also a member of the research group Human Rights and Citizenship.

Born in 1964 in Saco da Ema (now Campestre, in Piauí), Maria Sueli emerged from humble beginnings, hailing from a town deeply affected by the severe drought of the mid-1970s. Throughout her academic journey, she skillfully intertwined her pursuits with active engagement in regional movements fighting against racial inequality, and advocating for women's and rural communities' rights. Her academic endeavors centered around constitutional law, socio-environmental law, territorial law, and human rights. Maria Sueli gained recognition for her groundbreaking research on territoriality, and her profound exploration of the fundamental rights of traditional communities and quilombolas. She became nationally known for her work on Esperança Garcia, the book "*Dossiê Esperança Garcia – Símbolo de Resistência na Luta pelo Direito*," released in 2017. Esperança was recognized by the OAB-PI in 2017[37] as the first female lawyer from Piauí, after two years of research by the State Commission for the Truth of Black Slavery of the local chapter of the Brazilian Bar Association, presided over by Sueli. Such recognition was significant for reaffirming black and female identity and its historical role in the country.

[36] She died from complications of amyotrophic lateral sclerosis.

[37] In 2022, the Federal Council of the OAB also recognized Esperança Garcia as the first Brazilian female lawyer.

In 2021, Maria Sueli released the book: "*Vivências constituintes - Sujeitos desconstitucionalizados*", in which she gathers articles from her social and academic trajectory about deconstitutionalized subjects and the need to re-signify the modern ideal of (dis) involvement. Her latest work was published in 2022, under the title "*Quatro Cantos*", in partnership with Antônio Bispo dos Santos, Ana Mumbuca, and Luiz Rufino. The book, woven from transcribed orality, presents illuminating texts resulting from a quilombist confluence that discusses the imperative of effecting daily transformations[38]. "Where it rarely rains, one must make it rain," as Maria Sueli used to say. This book is an endeavor, in which you play a part, to seek justice where it is seldom served.

[38] These descriptive paragraphs are abbreviated versions of the text published on the rewrite project's website the week of her death. The original text was written by Sabrina Leon and revised by Inara Flora Cipriano Firmino. They had as their main source the texts published at the time in two online newspapers: https://www.migalhas.com.br/amp/quentes/370538/morre-aos-58-anos-a-advogada-e-professora-sueli-rodrigues-de-sousa and https://revistarevestres.com.br/entrevista/vida-nao-e-uma-estrada-em-linha-reta/

PART I

CONCEPTUAL, THEORETICAL, CONTEXTUAL, AND INSPIRATIONAL INSIGHTS

THE FEMINIST JUDGMENTS PROJECT IN BRAZIL: A TRANS-LOCAL TRANSLATION POLICY[39]

Fabiana Cristina Severi

This paper explores the connection between the Brazilian project of rewriting judicial decisions from a feminist perspective and other similar initiatives known as Feminist Judgment Projects (FJPs). As these initiatives multiply across different parts of the world, FJPs are increasingly gaining recognition as collective endeavors in knowledge production, fostering a global dialogue and a network of solidarity among participants. Following decolonial feminist approaches and cultural translation studies, I suggest that the practices and interactions between academics and activists within the FJPs can be interpreted as feminist politics of trans-local translation. This approach allows, among other things, the highlighting of colonial legacies, the hierarchies they engender in the production of academic knowledge, and the ways in which feminist theories have sought to challenge them.

FEMINISMS AS TRAVELING THOUGHT

The term feminism crossed borders from the Old World and arrived in Brazil in the late 19th century. This occurred through the actions of poets, novelists, journalists, and/or educators at a time when the lack of satisfactory formal instruction for girls was the rule. In addition to

[39] I appreciate the critical review and suggestions provided by: Alessandra Harden, Rafael De Tilio, Gislene Santos, Thula Pires, Gabriela Sá, Pia Lotta, Nora Markard, Rosemary Hunter, Clare McGlynn, Fabiane Simioni, Flávia Püschel, and José Rodrigo Rodriguez.

feminism, many of these precursors also embraced or spread other prevailing ideas of that time, such as the ones associated with liberalism, abolitionism, romanticism, the Enlightenment, and positivism. The literary and journalistic production of these pioneers helps us to identify, then, the various ways in which feminisms[40] were initially translated into colonial lands[41] and how they interacted with other philosophies.

According to Gayatri Chakravorty Spivak, every translation is an intertextuality, an "active transaction of meaning"[42] in which the translator establishes a close relationship of affection and solidarity with the original text, extrapolating it to the reading of contexts and of itself. It is a meticulous and incessant ongoing process, like weaving yarn, in which cuts, seams, and repairs are necessary. In the end, the result is a "simulacrum of a supposedly original product"[43]intended to be presented to an audience belonging to a distinct sociocultural ethos and to circulate in a varied context. Despite having content transfer as an initial assumption, the act of translating is a political and creative practice that allows the circulation of ideas, concepts, and theories across different regions.

Beyond a simple movement of migration or assimilation, European feminisms crossed borders and arrived here through what Sonia

[40] "Feminisms" is used in this text as multiple products of trans-local politics, which have extrapolated national and epistemological borders, connecting women and ideas from different continents.

[41] Brazil became independent from Portugal in 1822. The term "colonial" here, then, does not refer to a formal or official status of the country, but to a conceptual category emerging from post-colonial and decolonial studies.

[42] See Gayatri Chakravorty Spivak (2000).

[43] The expression is used by Sandra Regina Goulart Almeida (2011, p. 83) to address the dilemmas and challenges of translation. The full translated passage where the expression is found is: "In this sense, each 'reading' produces a simulacrum of a supposed original, creating a plurality and multiplicity of texts" ("Nesse sentido, cada 'leitura' produz um simulacro de um suposto original perfazendo uma pluralidade e uma multiplicidade textuais.")

Alvarez and Cláudia Lima Costa call a "feminist politics of translation", marked by a "shameless traffic" of ideas and concepts. This translation process is essential to enable insights into the practices, cultures, theories, and policies of Latin American feminisms, and vice versa (COSTA; ALVAREZ, 2013, p. 584). The feminist politics of translation, according to the authors, involves crossing multiple borders on several scales (local, national, regional, global) and with different subject positions (gender, sexual, ethno-racial, class, etc.). A transfer that disturbs common sense in many of the localities but also forms alliances, hence its trans-local characteristic (ALVAREZ, 2009; COSTA, 2010; 2020). To remain in motion, feminist politics of translation must permanently break various migration checkpoints – patriarchal, disciplinary, institutional, capitalist, neoliberal, geopolitical, and sexual. It is, therefore, a never-ending game, a way of life, and a strategy for survival and the creation of multiple epistemologies and feminist alliances.

Let us consider the case of a renowned pioneer – or trafficker – of Brazilian feminism, Nísia Floresta. Her book "*Direito das Mulheres e Injustiça dos Homens*" (Women's Rights and Men's. Injustice), published in 1832, is regarded by many historians as the precursor of feminism in Brazil. However, some uncertainty surrounds the originality of the work, as the author herself acknowledged that it was a free adaptation of Mary Wollstonecraft's *"Vindication of the Rights of Woman"* (1790). A study conducted by Maria Lúcia Garcia Pallares-Burke (1996) has shown that Nísia's text is, in fact, a translation of a version of the book *Woman no inferior to man*, originally published in England in 1738, under the pseudonym of "Sophia, a person of quality"[44]. According to Maria Lúcia, Nísia's "transla-

[44] The identity of "Sophia" is uncertain. The arguments in the book are similar to those of the French feminist François Poulain de la Barre (1647-1725). Lady Mary Wortley Montagu (1689-1762) and Lady Sophia Fermor (1724-1745) are some of the candidates often mentioned in the literature as potentially being Sophia.

tion-plagiarism" is a brilliant "literary trick" used to break the rules of the intellectual world and fight for a noble cause: women's rights.

Following in Maria Lúcia's steps, Catarina Coelho's (2019) research also indicates the closeness between Nísia's work and Sophia's book, but with several differences, including the title. These subtle changes in the translation seem to favor an approximation of its content to the 19th century Brazilian context. Why did Nísia argue that it was a free translation of Mary's famous work? One of the hypotheses indicated by Catarina is that this could have been the author's choice to enhance credibility of her own work and the feminist ideas that she had been disseminating through newspapers at the time, but with little reach until then. In her previous texts, published in newspapers, the writer's intention was to favor the creation of feminist demonstrations in Brazil in favor of equal rights between men and women.

Nísia Floresta dedicated most of her life to teaching. She founded and directed a school in Rio de Janeiro that provided girls with the same educational standards offered to boys at the time. In addition to feminism, she defended abolitionist and republican ideals, having discussed injustices against the indigenous and enslaved population in several works[45]. Her "translation," whether faithful to the original English text or not, contributed to opening pathways for the exchange of ideas and concepts between the Old and the New Continents, negotiated from the translator's site of enunciation[46]. Her book also fa-

[45] Another book by Nísia Floresta, entitled "Páginas de uma vida obscura" (Pages of an obscure life), published in 1856, is a cultural translation of the novel "Uncle Tom's Cabin", written by the American abolitionist Harriet Beecher Stowe and published in 1852. In this book and in other texts of hers, the Brazilian writer expresses the defense of abolitionist ideas, albeit in the form of a progressive abolitionism to be achieved through the actions of future generations (RIBEIRO, 2016).

[46] "Site of enunciation " is being used here to refer to where the speaker places markers within the statement as well in accordance with the formulation of Claudia Lima Costa.

vored the formation of alliances among feminism ideologies. These ideologies aimed at increasing the power of women in relation to men and responding to gender conflicts by guaranteeing women the rights to education, work, and participation in public life on an equal basis with men (MAIA, 2014).

As is often the case in translation, Nísia played a crucial role in facilitating the dissemination of ideas across different geopolitical contexts. However, we can also think of the feminist politics of translation as a practice that is willing to interpret actions and agencies in the most diverse places and social spaces as feminist actions, especially those that have not been recognized by hegemonic strands of feminism. This effort has been crucial to the so-called decolonial, postcolonial, and subaltern feminisms of Latin America[47]. Here, translation practices made it possible to get to know many other experiences, even before Nísia Floresta, as precursors of feminist and anti-racist practices have been present in Brazilian territory and many of them are still overlooked in historical records.

The circulation of ideas that leads to the new and characterizes the typical exchange of transnational politics is understood as delineated by translation as an operation between languages. However, it goes far beyond that. To illustrate this with examples of writers and educators from the 19th century, we can mention Maria Firmina dos Reis, an Afro-descendant from the Northeast of Brazil, who came from humble origins and was self-taught. Her book *Úrsula* (REIS, 1988), published for the first time in 1859, is considered a pioneering work in the abolitionist novel genre in Brazil and in the construction of Black literary characters with feelings, memories, and their own voice. It was also the first novel to be written and published by a Black woman in Brazil.

[47] The expression "Américas Latinas" in the plural follows the proposal of Cláudia Lima Costa and Sonia Alvarez (2013).

There are some similarities between the work of Maria Firmina and celebrated foreign novels at the time, such as Harriet Beecher Stowe's "Uncle Tom's Cabin," published in 1852. However, Maria Firmina's work stands out for presenting Black literary characters who are not mere victims. Her literary production is known for giving marginalized and diasporic groups the opportunity to tell their own stories, narrating their own suffering, emotions, and longing for their ancestral Black Africa. In addition to explicitly depicting the harsh mistreatment suffered by the Black population in the transatlantic diaspora, Maria Firmina's narrative offers a critical perspective of the subordinate position of women in the 19th-century Brazilian society. This includes both white (and therefore considered "free") or enslaved Black women. The author addressed, for example, domestic violence against women at a time when the socially subordinate roles they held in family relationships were strongly normalized (DIOGO; SIMIONI, 2017; MUZART, 1999; MORAIS FILHO, 1975).

At the age of twenty-two, Maria Firmina dos Reis became the first primary school teacher in Maranhão. After her retirement in 1881, she founded the first experience of free and mixed-gender school in Brazil, accepting boys and girls from different social backgrounds, but with a preference for rural workers' children in the region. The school was located in a small village in the state of Maranhão and operated in a shed provided by a landowner, who even enrolled his daughters there. Due to its subversive character for the time, the experience did not last long. Nonetheless, it exemplified her recognition of the transformative power of education and the importance of accessible and high-quality public education that is inclusive, diverse, and founded on principles of equality and anti-racism.

Her writing shows her deep involvement in several themes and struggles that are still central to the agenda of women's movements in

the country, especially black and decolonial feminisms. In an exercise of translation – in this case understood as an analysis of the subject's agency –, it is possible to consider her as a Brazilian educator and writer committed to creating a feminist perspective that addresses racism, sexism, capitalism, and colonial power in an articulated manner in order to problematize the social place of women and the social injustices constituting Brazilian society (CORREIA, 2014; TELLES, 1997; SILVA, 2013; MENDES, 2011; DUARTE, 2009). Seeing Maria Firmina dos Reis as a black or decolonial feminist makes it possible to value her reflections and her forms of agency in the field of feminist theory production.

There is a third reason for the trans-local feminist politics of translation that is worth addressing here: the more symmetric space-time exchanges of knowledge and experiences in critical dialogues and strategic alliances. Since the 1980s, the so-called subaltern feminisms[48] have weakened the hegemonic discourses that dictated the way of writing the history of world feminism until the late 20th century. They have also been crucial for contesting the global division of the type of academic work that reproduces geopolitical logics of a colonial and neoliberal character. A more common display of this logic is the promotion of the Global North as the creator of theories with universal and explanatory pretensions, leaving it to other regions of the world to import them in a relationship of dependence

[48] The term "feminismos subalternos" (subaltern feminisms), according to Luciana Ballestrin, refers to those branches of feminism that exist in a subordinate position within feminism itself, often produced by hegemonic feminisms. These hegemonic feminisms are often associated with elitist, Western, white, universalist and ethnocentric feminist perspectives. The idea of a feminist politics of translation and the concept of translocal dialogue do not ignore the antagonisms and tensions between hegemonic and subaltern feminisms. Instead, they aim to avoid the reproduction of binary essentialisms when discussing the relationships between them (BALLESTRIN, 2017).

(BALLESTRIN, 2017). Challenging this logic has produced multiple effects, including, paradoxically, the reproduction of perspectives based on the affirmation of identities or differences in an essentialist way, or that reinforce problematic dichotomies such as North/South, universal/particular, and local/global. These approaches end up as a kind of customs barrier to the free transit of feminist and anti-racist approaches and alliances.

The idea of trans-local translation proposed by Sonia Alvarez and Cláudia Costa is valuable in this context as it highlights the intersections and multidirectional flows of feminist approaches. The authors argue that translation is politically and theoretically indispensable to forge feminist, anti-racial, and post-colonial epistemologies and political alliances, since they understand that Latin Americas[49] is a trans-locality, a cross-border, and not a territorially delimited cultural formation. The challenge, then, is not to block migratory flows, in the name of any kind of fixed position or binary arrangement but rather to build critical approaches that are attentive to the diversity of "referencial maps" or to the multiple space-time locations of feminist ideas and the relations between theory and power that characterize her production. Likewise, the 'cosmopolitanization' of feminist perspectives cannot be done at the expense of problematic universalities, such as the classic idea of patriarchy itself as a form of oppression common to the experiences of all women or the conception that gender – or women – will always be the primary organizing category of feminist critical reflection.

[49] I use the term in the plural, Latin Americas, as proposed by Sonia Alvarez and Cláudia Costa.

FEMINIST JUDGMENT PROJECTS AS A TRANS-LOCAL DIALOGUE: THE BRAZILIAN EXPERIENCE

Focusing now on the project *Rewriting Judicial Decisions in Feminist Perspectives in Brazil*, we can say that it is an initiative within a trans-local feminist politics of translation, but in the field of law. In the most literal sense, it is inspired by experiences developed in other regions under the title "Feminist Judgment Project". The first experience of this kind was conceived by a group of Canadian feminists[50], in 2006 (MAJURY, 2006). The intention was to show that the decisions of the Supreme Courtof Canada could have been written differently and that the feminist judgments could even surpass the original ones in terms of persuasiveness (KOSHAN, 2018). The Canadians rewrote six significant precedent-setting cases in the history of Canadian judgments regarding equal rights. This effort produced important material about gender equality rights, which can be used as a parameter or reference in arguments in real cases (REÁUME, 2018). After this first experience, academics, lawyers, activists, and other professionals have replicated the idea in several countries and different regions in a global network. In each location, the project takes on its own characteristics and challenges, seeking to influence politically, theoretically, and pedagogically in different ways and at distinct space-time scales.

Following the proposed approach, the Feminist Judgment Projects (FJPs) have been circulating across various locations, enabling trans-local dialogues. This exchange has paved the way for sharing ideas and concepts related to law and feminism. These projects acknowledge their position within global geopolitics and critically reflect on their boundaries and potential hierarchies (MUNRO,

[50] "Women's Court of Canada Project".

2021). They also do not aim to commodify definitive syntheses on legal reasoning. There are no promises of safe paths. The conversation is an invitation to forge strategic alliances that promote the ongoing production of feminist knowledge about law and justice, taking into account our distinct geopolitical and chronological positions. This knowledge aims to envision alternative forms of legal rationality that are mindful of social diversity, political pluralism, and feminist imagination.

At least, this has been how we have been translating our participation in this dialogue from Brazil[51]. Conducting the *Feminist Judgment Project* in Brazil, in addition to improving cosmopolitan transit routes, also offers other opportunities to enhance the capacity of local legal feminism to translate and establish new networks. Inspired by similar experiences, our first effort is to translate the practices of male and female judges in the country by elaborating a legal language closer to existing feminist ethics, utopias, and theoretical-dogmatic constructions. This does not mean renouncing important values such as judicial impartiality and the rule of law. It is about imagining a judiciary that is plural in its composition and that takes the experiences of women in an unequal and multiracial society such as the Brazilian one seriously, in the understanding that they are constituted and crossed by multiple oppressions. A Judiciary that does not mirror itself in the allegories of Olympus, but rather in fallen, cross-border, interracial, trans, polyglot figures, with the ability to manage multilevel legal sources to produce democratic legal rationalities more compatible with the contemporary promises of human rights.

[51] We speak here from the perspective of Brazil, avoiding any claim of false ownership or idea of authenticity, similar to a cultural product such as *caipirinha*, *samba*, or *bossa nova*. Even these cultural icons, we now know, are simulacra of a Brazilian identity forged in the crossings of a broader territoriality, the Atlantic and the edges of the continents it touches.

A second objective of the Brazilian project is to strengthen the network of dialogues between professors and students currently working in dozens of law courses throughout the country and, by doing so, intensify the production of feminist and anti-racist legal critique in academia. This is not a minor objective especially considering that the arrival of a massive number of women in Brazilian law schools occurred very recently, in the last 15 years, and that the circulation of feminist theories in legal courses is still in its early stages. A first generation of pioneering women arrived in legal academia in the second half of the 20th century. In this group, those who dared to discuss feminist and anti-racist approaches went through various types of institutional constraints, among which was the invisibilization of their work[52].

It was only in the first decade of the 2000s that we that there was a substantial increase in the percentage of women in law programs. In 2007, the federal government launched a program of historic expansion in the number of vacancies for professors and students in public higher education, which was added to the expansion of vacancies in private educational institutions also favored by public policies. We took relatively good advantage of this moment, causing a significant increase in the percentage of women in several higher education courses, including law. Despite the increase, we are still not in the same percentage in universities as men, and there is a predominance of white women from the large educational centers in the southeastern region of Brazil.

This second generation of women is more diverse in terms of life trajectories and training experiences. A significant number of them took a hybrid path from undergraduate to graduate school, associating law with other areas of knowledge, such as sociology, phi-

[52] We can mention here the academics Silvia Pimentel and Eunice Prudente.

losophy, anthropology, psychology, history, political science, social work, etc. These migrations were basically a must for those interested in interdisciplinary approaches or research that was not strictly dogmatic in the late 1990s. Other female professors from the same generation already had a history of involvement in feminist and human rights organizations, having participated in important mobilizations for legislative and legal changes in favor of women's rights and vulnerable groups. Some colleagues are currently professors because their right to access higher education was guaranteed by affirmative action policies created in the early 2000s. There are also those who have added to their teaching experience from other legal professions they exercise simultaneously, such as public defenders, prosecutors, judges, district attorneys[53], and lawyers.

This generation of female professors has more favorable political structure in terms of opportunities to spread feminist and anti-racist ideas and concepts compared to our pioneers. The Maria da Penha Law, for example, passed in 2006, brought to the legal world an innovative model of response to one of the most relevant problems on the Latin American feminist agenda, domestic violence against women and girls. Part of this innovation lies in incorporating the concept of gender as a category of analysis of law and social conflicts (SEVERI, 2018). It was necessary to address the law in law courses and understand its purposes and history. Studying the concept of gender or feminist theories could no longer be seen as heresy but as a necessity. The colleagues who followed these goals needed to seek other theoretical sources besides the critical strands

[53] In a way of paying tribute, we mention as an example the Professor Ela Wiecko de Castilho, who was an attorney at the Federal Public Ministry until the beginning of this year, where she became known nationally for her history of engagement in the fight for human rights, especially for historically more vulnerable groups, and for the democratization of justice institutions.

of the legal-academic *malestream*[54], in this case, Brazilian critical criminology. In this journey, they ended up learning about a long history of Brazilian feminist activism that most of us did not even know existed until then. We also discovered that in other countries, feminist theories had already been discussed for decades in law courses in their own field, and there were even trends of critical feminist legal thought.

What about Brazil? Did we have something like this? It is unlikely that the answer would be negative because the achievements in terms of women's rights and anti-discrimination that we have had so far could not have been gratuitous blessings from the constituted powers. We have come a long way in answering these questions through ever-increasing literature in the country. We can say that critical feminist legal thought has been constructed historically on the fringes of legal academia, by women and feminist movements, in alliance with other movements and social actors from Latin America and other continents[55]. Each material or reference found in these experiences has helped us to assemble a wider repertoire of this world that had until then been neglected by the traditional educational program of law courses. This revival has been a powerful antidote to what Susan Gilbert and Simone Gubar (2017) call "influence anxiety," a feeling commonly experienced by people who transit intellectual production spaces where they cannot find evidence of representativeness or know who their precursors are. This is not about building a museum of documents or illustrious personalities, but rather about broadening the sources of insights for legal feminisms from academia and other

[54] The expression is a parody of the term "mainstream," which can be translated as predominant. By replacing "main" with "male," the term suggests that the predominant production is male-dominated. Other Brazilian authors have also used this expression in their texts, such as the feminist legal scholar Carmen Hein Campos.

[55] I have made this argument previously (SEVERI, 2018).

theses that currently also enjoy greater space in legal studies, such as gender, queer, decolonial, postcolonial, and race-critical studies.

In addition to engaging with the past, this current generation of professors has also been reinventing themselves through interactions with younger feminisms represented by students and their organizations in universities. In law schools where there are now courses that address the intersections of law, gender, and feminisms, this development has been the result of alliances between professors and students. It is through listening to students, both inside and outside the classroom, that many of us, as professors, have come to realize that we too have been victims and/or perpetuators of violence and discrimination in our personal and professional relationships.

The choice, therefore, of the Brazilian proposal to privilege the interaction between academics and students to produce the rewrites acknowledges and values these journeys. It was an activist choice, aimed at defending academic environments as autonomous, pluralistic, democratic, and accessible spaces. This decision was made at a crucial moment in the country's history when universities, science, and academic knowledge were under intense attack by populist governments and far-right segments of society.

FEMINIST POLITICS AND THE DILEMMA OF TRANSLATION

In trans-local feminist politics, there are certainly cases of mistranslations. Reflecting on Spivak's perspective (2000), translation is an act of solidarity, which brings the self closer to the other to communicate a message. It is more complex than searching for similarities in relation to the (supposed) original text. Nísia Floresta's translations, for example, offered intelligibility between feminist ideals in

the Global North and women's agency in nineteenth-century slaveholding imperial Brazil. Katharine T. Bartlett's text, "Feminist Legal Methods", originally published in 1989, is one of the best-known works of the author and among those dedicated to discussing the relationship between law and feminist methods. Bartlett argues for the importance of methods in the analysis of law and presents three main techniques that, over the years, many feminists came to use in their dealings with Law: 1) the questioning about women; 2) the feminist practical reasoning; and 3) the consciousness-raising method. This categorization is a major reference in other FJPs, albeit with conceptual reformulations. In this context, for example, Professor Rosemary Hunter has done an incredible job of cataloging and analyzing the tools and models of reasoning that would be characteristic of feminist approaches to judicial decision-making (HUNTER, 2008).

Trans-local dialogues invite us to go beyond transposing methods between realities. Bartlett highlights the epistemological implications of legal methods, discussing the tools used by feminists to produce legal critique. The author does not necessarily suggest a list of techniques, but rather gathers and analyzes what was best known at the time. Hunter expands the debate, based on research done with female judges and the results of ongoing FJs. Following this direction, the Brazilian FJP can be a valuable opportunity for us to catalog the techniques that have been historically used by Latin American feminists in their interaction with the law, to analyze it critically, in dialogue with other repertoires already inventoried within or outside the academia.

To contribute to this challenge, we will briefly illustrate some of these findings, starting with one of the most thorny problems among critical feminist theories: *the relationship between law and feminisms*. There is certainly no definitive or unique answer, but looking at wom-

en's experiences in Brazil, in community networks and, later, in social movements, it seems that only a few have managed to enjoy the privilege of being skeptical towards law. The dichotomies transformation/oppression, political action/legal action, and culture/law are not frequently employed in Brazilian feminist legal thought. It is true that the diagnoses produced in this field have revealed how Brazilian law and its institutions of power have a close affinity with colonial, patriarchal, racist, capitalist and ableist power systems. But feminist thought here has also made explicit how the non-state institutions that have regulated life since the 19th century – family, religion, community, culture – also continue to bear the same marks. The social experiments of libertarian inspiration – *quilombos*, *canudos*, *aldeia*, *roçados, candomblé*, and Maria Firmina dos Reis' school – were targets of annihilation practices promoted by formal institutions of state power and by informal institutions. There is no foreseen victory when the power of law is challenged. Yet, legal disputes have happened and happen every day. Rather than quantifying or evaluating the victories, it seems more interesting to understand the tools used in these disputes and the views on core concepts of law emerging from them.

The **concept of freedom**, for example, inscribed in the first Brazilian Constitution (1824), was inspired by English and French liberal philosophers to mean the right to be able to move around and dispose of one's property according to one's interests, as long as it did not go against the law. But in the legal disputes fought between enslaved black women and the landowners to win their freedom[56], the meaning of freedom was more associated with the interruption of dehumanizing processes. In contemporary judicial processes about domestic violence against women and girls, freedom means "no to

[56] There is a vast literature that analyzes the struggles of enslaved women and slaveholders in the 19th century for rights and freedom (PINHEIRO; MAIA, 2017).

violence", including those acts perpetrated by public agents, the institutional violence.

Similarly, while the classical view of the **right to equality** is based on the idea of difference, many feminist theses have used the concept on behalf of demands that go beyond the ability to compare one individual or group to another. The list is extensive and includes: the right to daycare, to minimum wage, to amnesty for civilian people imprisoned and persecuted by the Brazilian dictatorship, to abortion, to family planning, to food sovereignty, to well-being, to the demarcation of traditional territories, and to free and high-quality education. In all feminist mobilizations advocating for these rights, the principle of equality was evoked as a founding element. However, it is important to note that in almost none of these contexts the concept of equality is framed in relation to "men". Instead, it is formulated in response to various forms of oppression, exploitation, and domination that curtail or exclude the opportunities and rights of marginalized groups, including women, to fully exercise their "right to have rights"[57].

The foreshadowing practice of law has been common in local feminisms, even before FJP became known here. Efforts have focused on **reimagining, not judicial decisions but rather domestic legislation** and international laws and systems. This preference, especially when regarding domestic statutes, can be explained by the Brazilian legal system itself, based on the civil law tradition, which gives centrality to written laws to support judicial decisions. This differs from the common law system, which uses previous judgments, called precedents[58]. In Brazil, it has always been more significant to focus efforts on mobilizing for legal changes. We will not describe

[57] See Hannah Arendt (1989).

[58] Most of the kin FJPs took place in common law countries.

this background but only suggest that Brazilian feminists have been trying to rewrite Brazilian law for many decades based on an exercise of imagination about law and the institutions of justice. Often this exercise combined feminist advocacy strategies with parliamentarians, popular pressure in the streets, and attempts to influence public opinion.

One of the most significant recent examples of this type of foreshadowing praxis was the process of creating the Maria da Penha Law in 2006. Its approval is the result of a proposal elaborated and defended by the Brazilian feminist field. It offers one of the most extensive catalogs of what we can call feminist or gender techniques for producing judicial decisions. Some of these tools would be: a) to take the experiences of women and vulnerable groups seriously; b) to avoid reproducing stereotypes based on gender – and on class, race, ethnicity, sexual orientation, income, culture, educational level, age, and religion – that are prejudicial to women and other subjects in situations of disadvantage or violence; c) not to judge women who seek justice for the choices they make, which are sometimes different from those that the agents of the justice system involved in the case would have made; a d) to analyze cases considering, simultaneously, the general context of the multiple and intersectional inequalities that affect women and the particularities of the case itself; e) to construct a judicial response that is derived not from a solipsistic judgment, but from a dialogue with a larger network of state and non-state actors; and f) that this response expresses, simultaneously, the articulation between state obligations to prevent, investigate, sanction, and repair.

Besides mobilizations for domestic legal changes, Brazilian feminists have long been involved in defining the terms of international human rights treaties. There are specific cases, such as that of the Brazilian feminist and professor Bertha Lutz who participated as

a Brazilian diplomat in the San Francisco Conference (United States) in 1945 and, together with other Latin American women[59], insisted that the expression "equal rights of for men and women" be inserted in the UN Charter[60], the document that gave rise to the United Nations, against the wishes of the British and American delegations. But there is a large amount of academic literature about the performance of feminist movements, especially in the 1990s and 2000s, in numerous conferences that strengthened the normative frameworks of what we now call the rights to equality and non-discrimination. An example here is the performance of Brazilian black feminism at the Durban Conference (CARNEIRO, 2002; FERREIRA, 2020). Latin American feminist and anti-racist organizations have used the judicialization and monitoring mechanisms existing in international human rights systems. Here again, the example is the feminist action defending the Maria da Penha Law. In other words, for many decades, the Brazilian feminist and anti-racist field has used tools that we know by names, such as the multilevel system of norms and jurisdictions and control of conventionality[61].

PICTURING JUSTICE: EXPLORING THE JOURNEY FROM LEGAL IMAGINATION TO REALITY

If, historically, the involvement of the feminist and anti-racist field has been more linked to the impact on laws, why the interest in conducting a project of rewriting judicial decisions? There are at least three arguments that explain this choice. The first is the recog-

[59] The other delegate who supported the inclusion of gender equality in the Charter was Minerva Bernardino from the Dominican Republic.

[60] This was one of the first international treaties to mention gender equality in its text.

[61] We can also mention the case of Alyne Pimentel, brought before the CEDAW Committee (CATOIA; SEVERI; FIRMINO, 2020).

nition that when implemented by autocratic authorities or powers, progressive legal achievements produce frustrating effects, to say the least. Again, the example we offer is that of the Maria da Penha Law, an achievement that has been implemented since 2006 by part of the Brazilian judiciary, but in ways that undermine the more progressive purposes of the law. Although it has not always been easy to make an impact on the Brazilian Legislative Branch, since 2016, with the Coup against President Dilma Roussef and the consequent shift of ultraconservative and far-right forces in the country's state powers, the doors have completely closed and we have started to witness a truly accelerated dismantling of many rights that had been conquered until then. The proposal made by the FJP, to bring judicial decisions into the spotlight, is a great opportunity for us to deepen our critical reflection on the Judiciary and its forms of interaction with the other branches of state and with non-state actors.

The second reason would be to build richer and more symmetrical connections of ideas, people, and concepts involving the Judiciary and academia. There are some signs that this might be a good moment for this. In recent years, groups of female judges, in alliance with other state and non-state actors, have been pushing for the creation of policies to mainstream the gender approach in justice and for gender and racial-ethnic equity in the composition of justice. In 2021, for example, a group of female judges approved, in the National Council of Justice, the Brazilian Protocol for the use of the gender perspective in judicial decision-making *(*BRASIL, 2021). The experience follows protocols already in force in higher courts of other Latin American countries[62].

These protocols are important because they tend to consider judgments in broader connotations than just the final decision. Nu-

[62] There are protocols like this one, for example, in Mexico, Costa Rica, Chile, and Argentina.

merous strategies are described in these documents for judges to pay attention to asymmetrical power relations during all procedural acts. These asymmetries must be addressed so that guarantees such as full defense are not violated. Another aspect is that in most of the courts where a document like this one has already been produced, its elaboration was the result of rich trajectories of partnerships among female judges, academics, and feminist activists to promote gender changes in the justice systems where they work. Many of these protocols have as inspiration the book published by Alda Facio in 1992 under the title *"Cuando el género suena, cambios trae: una metodología para el análisis de género del fenómeno legal"* (1992). It is a manual written with the initial purpose of qualifying feminist lawyers locally for their work before domestic courts and international human rights systems. The text ended up being used in several training activities involving female judges, academics and activists, and inspired the creation of formal documents by higher courts to facilitate the work of male and female judges in reading judicial cases from a gender perspective.

The approval of the Brazilian protocol has drawn significant attention to the gender issue within the judiciary, sparking a remarkable surge in academic interest and research on law and feminism. Our original intention with the Brazilian FJP was to strengthen and amplify the ongoing initiatives within the judiciary, while fostering collaboration and exchange between justice professionals, social movements, and legal scholars. From the very inception of the project, we witnessed an overwhelming response from judges, lawyers, public defenders, prosecutors, and activists who expressed a keen interest in joining the network. With the upcoming publication of the project's book, we anticipate it will further invigorate dialogue and foster stronger interactions among diverse stakeholders.

CONCLUSION

Feminist values have permeated Brazilian society, deeply rooted in its Ladino-African heritage, for centuries. The theories and knowledge derived from feminist perspectives have undergone various mediations, adapting to different audiences, contexts, and historical periods. However, certain spaces have historically posed significant challenges or even prohibited the circulation of these ideas. This is particularly evident within the realm of law, and more specifically, within the academic sphere of legal studies.

The projects of rewriting judicial decisions from feminist perspectives –traveling experiences – invite Brazilian academics to strengthen the actions underway here aimed at dismantling such barriers. It is also an opportunity to strengthen relational knowledge networks among feminists from various places and establish alliances in multiple directions and in many languages.

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BRAZILIAN FEMINIST REWRITING PROJECT: LOCAL TRANSLATION CHALLENGES

Flavia Portella Püschel

INTRODUCTION

There is a fundamental difference between Brazilian law and the laws of the countries where feminist rewriting projects were first carried out: Brazilian law belongs to the Civil Law tradition, while Canadian, British, Australian, U.S., New Zealand, and Scottish law are part of the Common Law tradition. Since this difference involves the role of judges and judicial precedent in the development of the legal system, it inevitably comes to mind when considering the development of a feminist judgments project in Brazil [63].

The concern with adapting a project focused on judicial decisions to a Civil Law system comes from the fact that, in common law, judicial precedents constitute the primary source of law, while, in Civil Law, this role belongs to Statutory Law. This raises both a question regarding the feasibility of implementing the feminist rewriting project within the framework of Civil Law Systems as well as a question of political strategy.

In this sense, two main general questions can be asked. Firstly, what is the sense of critiquing judicial decisions in such systems?

[63] The challenges posed by the development of the feminist rewriting project in Civil Law countries was the topic of one of the roundtables proposed by the "International Research Collaborative (IRC) Feminist Judgments" at the "American Law and Society Association" in a meeting held in Lisbon in 2022, where I presented a first version of the argument of this article. I thank the IRC coordinators Kathryn Stanchi, Bridget Crawford, and Sharon Cowan for organizing the debate, as well as the event participants for their comments.

Secondly, is it worth it, or should we prioritize legislation critique and the legislative process instead?

This article aims at answering these questions and highlighting the main challenges that Brazilian institutions and legal culture impose on us in reference to adapting the rewriting project as a trans-local feminist politics of translating previous experiences (SEVERI, 2023).

In the first part of the article, we present the mechanisms that lead the Judiciary to increasingly occupy a central role in the creation of legal rules and in the definition and enforcement of public policies in Brazil, a characteristic that demands a feminist critique of judicial decisions. In the second part, our concern is to point out what features of the Brazilian Judiciary and legal culture can cause difficulties for those engaged with the Brazilian feminist rewriting project.

JUDGES AS CREATORS OF LEGAL RULES IN A STATUTORY LAW SYSTEM

Anyone who observes closely how the Brazilian legal system operates knows that judges create norms, even though the Brazilian system establishes legislation as its primary source of law[64]. This is partly a result of the very nature of the judicial activity. Applying legal texts to concrete cases always requires an interpretative effort concerning both the statutes and the facts, and interpretation is no stranger to divergence.

The idea of exercising jurisdiction as a simple logical operation

[64] The creative activity performed by judges is often referred to as "creative interpretation", an expression that stresses the fact that what judges do is still interpretation (MOTTA, 2012, p. 39-40). Saying that judges create norms does not mean they do so in the same way as the legislator, as we try to make clear in the next pages. This article argues that even though occurring through the interpretation of legal texts, the creative nature of the judicial activity still remains very significant.

of subsumption disguises the argumentative and persuasive nature (as opposed to logical-deductive) of the application of law. It thus serves as an ideological element for exempting the Judicial Branch from democratic control.

Contrary to what the old notion of judges as apolitical enforcement authorities, a belief conveyed by the expression "bouche de la loi" (the mouthpiece of the law), would have us believe, the concept of legal dogmatics as a "set of reasonings intended to systematically organize, through the use of legal concepts, institutes, and principles, the laws and cases judged in a given legal system" (RODRIGUEZ, 2012a, p. 21) is open to debate when it comes to the application of general and abstract legal texts to concrete legal conflicts. This means that, regardless of its amplitude, judges' creative power is not an exception but rather an element of the normal functioning of the statutory legal system.

The creativity inherent to the enforcement of legislated rules is what enables statutory law systems to adapt to new social facts and even to a new constitutional[65] political order. Moreover, it is crucial in a democratic state. Not coincidentally, the suppression of democratic disputes over the meaning of legal norms is usually one of the first measures taken by authoritarian regimes (RODRIGUEZ, 2011, p. 134-135).

It does not mean that judges are allowed to rule in any direction. On the contrary. In legislated law systems, admitting that judges create norms means that this creative power of theirs is at the center of an important debate. It will certainly sparks off a debate about both the restrains on such power and the nature of the democratic control there should be on it.

[65] The Brazilian Federal Constitution, for example, did not revoke most of the previous statutes in force, which were adapted to the new constitutional order through (re)interpretation.

This control has several dimensions, the first of which is the requirement that judges elucidate the legal reasoning behind their every ruling. This requirement is not satisfied by just any reasoning but is rather an obligation to link the decisions judges make in real cases to statutes and the legal tradition that supports the use of such statutes. This argumentative association of legislation, legal tradition, and the ruling on a specific case is what binds the exercise of the Judicial Branch to the political-legislative choices previously made by the Legislative Branch and embodied in legislation. As a result, the written reasoning present in each judgment is an essential element of the Rule of Law and, therefore, of the democratic legitimacy of the judicial activity[66].

The number of interpretive avenues open to a judge may be higher or lower, depending on whether legislation leaves more or less room for interpretive divergence. However, even in systems in which statutes are written in such a way as to foresee the hypotheses of their application and the respective legal consequences thereof in detail, the very complexity of these legal systems opens the door to the judges' creativity[67].

Upon coming into force, each new legal text becomes part of

[66] According to José Rodrigo Rodriguez (2013a, p. 63), the legitimacy of the Judiciary in Brazil has more to do with its institutional functioning than with the rationality of its judges' argumentation. Recent reforms in the Judiciary seem to want to reinforce legitimacy through efficiency (we will deal more with this in part II of this chapter). This is unacceptable, however, because efficiency alone does not guarantee the Rule of Law. Citizens are not interested in receiving just any kind of judicial resolution (even if it is swift and certain), but a decision based on law (PÜSCHEL; AQUINO, 2019, p. 186-187).

[67] Based on the concept of "rule seeking", formulated by John Braithwaite, José Rodrigo Rodriguez draws attention to the fact that very detailed regulation, because it leads to a proliferation of specific rules, has the paradoxical effect of increasing the possibilities of interpretation rather than restricting them (RODRIGUEZ, 2012b, p. 136-137).

a system formed by countless other legal texts, created by different legislatures over time, with different objectives and political inclinations. The Judiciary is responsible for articulating this set of texts to form a more coherent whole[68]. This aspect of the (typical) functioning of a system based on the separation of powers between the Legislative and the Judiciary gives judges a significant scope for creativity, and their creative power manifests itself through the interpretation of the position each legal text has in relation to other ones in the legal system.

In short, the approval of legal texts is only a stage in the democratic dispute on the rules that regulate life in society, not its end. The dispute process continues in the Judiciary, now over the meaning of such legal texts and the tradition of their interpretation.

Recognizing the Judiciary as a site of dispute has multiple implications for both law and politics. It is not uncommon that, when applied by the Judiciary, a legal text acquires a meaning different from that expressed by the representatives in Congress who presented the bills or by the social movements that fought for its approval. A notorious example is the criminalization of racism in Brazil, mentioned by Fabiana Severi (2023a) in the introduction of this book.

In this case, the systematic application of a new legal text, Law No. 9.459/1997[69], played a fundamental role in frustrating criminal repression of racist practices for a certain period. The new statute in-

[68] On the role of coherence in ensuring the Rule of Law, see Püschel and Aquino (2019, p. 187-192).

[69] The original bill included racial insult in Law No. 7716/89 as an autonomous crime. Its inclusion as an aggravated form of defamation in the Criminal Code was a consequence of the discussions and modifications the bill went through in Congress (MACHADO et al., 2011, p. 314-315). Recently, Law No. 14532/2023 has finally included racial insult as one of the autonomous offenses in Law No. 7716/1989 as a form of the crime of discrimination or prejudice against race, color, ethnicity, religion, or national origin.

cluded the offense 'racial insult' in the system as an aggravated form of defamation, an offense long established by art. 140 of the Brazilian Criminal Code. This made it difficult to accept the legal-dogmatic argument already discussed in Brazil that offenses with racial elements should qualify as a crime of racism by itself and not as some sort of defamation (MACHADO *et al*., 2012, p. 319-321).

In addition, and because of how it came to be in the Brazilian legal system, racial insult was a private-prosecution offense, which means that there was a six-month filing deadline formal requirement. A study of judgments issued by the São Paulo State Court (TJSP) from 1998 to 2005 showed that in several cases, this appellate court revised the classification of facts as crimes of racism to reclassify them as cases of racial insult. The practical consequence of these decisions was either the loss of the right to file a private criminal action after the six-month period (preemption) or the nullity of the proceedings had they been filed as a public criminal action (MACHADO *et al*., 2011, p. 318-321).

This example shows that the mere relation existing between a specific statute and the other legal texts in a legal system can result in room for law-making activity by the Judiciary, which is shown here by the distance separating the declared purpose of the legislator and the outcomes of the court cases.

The possibility judges have to use their creativity has been expanding remarkably in Brazil since the incorporation of social rights in the Brazilian Federal Constitution (CF/1988) and the increasingly frequent adoption of general clauses and indeterminate concepts in infra-constitutional legislation.

This is an ambiguous phenomenon some call "judicialization of politics", an expression that more often than not has a negative sense. On the one hand, the Judiciary has proven to be an important

arena for guaranteeing fundamental rights as well as for the struggle to have the social rights provided for in the Constitution respected and enforced. On the other hand, this increase in the creative power of judges can have some questionable effects on the elaboration and implementation of public policies and, in general, on the separation of powers between the Legislative and Executive branches.

The recent Brazilian experience has several cases of adaptation of law to new social demands in order to guarantee fundamental rights through strategic and structural litigation without legislative change. One example is same-sex marriage, introduced into Brazilian law by a judicial decision (MOREIRA, 2012) (PÜSCHEL, 2019a)[70].

Regardless of the side one takes in this debate, there is no doubt that the Judiciary is currently fundamental for the making of legal rules, and, therefore, deserves attention from feminist critics. The critique of legal reasoning, such as that proposed by the feminist rewriting project, is undoubtedly an essential element (even if not the only one) for dealing with the ambiguities resulting from the creation of legal rules by the Judiciary.

INSTITUTIONAL AND LOCAL LEGAL CULTURE CHALLENGES

The requirement of legal-dogmatic justification of judicial decisions to control the exercise of the Judiciary in a democratic fashion is just one element necessary for the checking of the law-making role played by judges. Indeed, another precondition for the democratization of the Judiciary involves changes in its institutional structure.

A significant challenge faced by the legal scholars when trans-

[70] The debate about strategic and structural litigation and the concerns about harmful effects judicial decisions can have on public policies appears in the rewriting of an opinion on full-time school admissions in this volume (CHASIN et al., 2023).

lating the Feminist Judgments Project into the Brazilian reality is related to a strong characteristic of our justice system, namely the tradition of devaluating judicial decisions' reasonings by the Judiciary itself. A second one is the existing system of *seriatim* opinions, which has significant effects on the use of judicial decisions as a reference for subsequent decisions, as discussed in the following pages.

1. DEVALUATION OF LEGAL REASONING

As José Rodrigo Rodriguez (2013a, p. 63; 107) points out, in Brazil, the reasoning of judicial decisions is a secondary aspect of the functioning of the Judiciary, which is legitimized by its institutional apparatus. This is an aspect of our justice system that can be noted in certain specific features of judicial precedents, notably in the courts' focus on standardizing outcomes rather than reasonings; in the generic and formal grounds on which the decisions are made; and in changes in the courts' positions made without any apparent reason, as the examples below, based on cases from the Brazilian higher courts, demonstrate.

Possibly, one explanation for the flagrant disregard of the legal reasoning in judicial decisions among us is Brazil's authoritarian history and the role played by law and the Judiciary during the years of dictatorial regimes. During the 20th century, such regimes were upheld by legal frameworks established through constitutional reforms. Under the military dictatorship, political repression was often carried out through formal charges of political crimes, and trials conducted by courts which were already part of the judicial system, in a process that resulted in the "judicialization" of the repression (SINHORETTO; ALMEIDA, 2013, p. 200).

According to Jaqueline Sinhoretto and Frederico de Almeida

(2013, p. 200), while this fact enabled parts of the Judiciary to defend the life and rights of political prisoners, it also had the effect of making the entire institution co-responsible for the political repression that happened during those years. This circumstance hindered the democratic reform of the Judiciary at the end of the dictatorship. There was no legislative, organizational, or institutional rupture which would unequivocally indicate the beginning of a democratic era in the judicial system. As a result, the Judiciary's disposition to rule in favor of both the State and its authoritarian policies was perpetuated and continued into the democratic years to come (SINHORETO; ALMEIDA, 2013, p. 200).

In the early 1990s, there was an attempt at reform, headed by legal scholar and politician Hélio Bicudo, who authored Constitutional Amendment Bill (*Projeto de Emenda Constitucional - PEC*) No. 96/1992[71] with the aim of aligning the justice system with the democratic era, among other purposes. However, the bill did not advance in the Congress, and the discussion around the democratization of the Judiciary lost ground in the political debate (SINHORETO; ALMEIDA, 2013, p. 201-202).

From the late 1990s, a new debate over the needed reform of the Judiciary began to take form. It was grounded on a discourse according to which the unpredictability in judicial outcomes and the courts slowness to present such outcomes were negatively affecting the economic development of the country (CUNHA; ALMEIDA, 2012).

This view became then dominant and had a strong influence on the approval of the constitutional amendment of the Judiciary reform, *EC* (Constitutional Amendment) No. 45/2004, through which measures aimed at making the Judiciary work with more celerity and

[71] TN: A *PEC* (*Proposta de Emenda à Constituiçã*o) refers to a specific type of legislative proposal in Brazil that aims to amend or modify the country's Constitution.

uniformity were adopted. The main novelties brought by the EC were the *Súmula Vinculante*[72], the general repercussion, and the external control of the Judiciary (SINHORETO; ALMEIDA, 2013, p. 204), all of which derive from the adoption of a "centralizing and rationalizing" agenda in the Judiciary reform (CUNHA; ALMEI- DA, 2012, p. 361 and 365).

Unfortunately, the rational reasoning grounding judicial decisions has been left out of the debate and of the reform (RODRIGUEZ, 2013a, p. 61).

1.A. FOCUS ON THE STANDARDIZATION OF RESULTS AND ON GENERIC AND FORMAL REASONING

The focus on standardizing results and the existence of generic reasoning (i.e., unrelated to the specific aspects of the case before the court) and formal reasoning (i. e., apparently intended only to fulfill a formal requirement) are features of the Brazilian Judiciary that are widespread and related with each other. The emphasis on obtaining standard case outcomes suggests that the statutory rule which orders courts to pursue precedent uniformity is interpreted as mere predictability, something that courts can attain without any reasoning at all.

An example of how the focus on standardizing outcomes leads to utter disregard for judicial reasoning can be found in the *Embargos*

[72] The "*Súmula Vinculante*" in Brazil is a legal mechanism that the Constitutional Court (*Supremo Tribunal Federal* - STF) can use to achieve uniformity in the interpretation and application of the Constitution. It consists of the official publication by the STF of a rule based on the court's consistent line of judicial decisions on a certain legal matter, which is then binding to every other court in the country. For a "*Súmula Vinculante*" to be created, it must be approved by a two-thirds majority of the justices of the STF.

de Divergência No. 1,159,242. It was filed with the Superior Court of Justice (STJ) in 2014, and aimed at obtaining a unified stance from its 3rd and 4th Panels as to emotional neglect liability (BRASIL, 2014).

The justices of the 4th Panel had adopted, by a majority vote, a position contrary to the possibility of awarding damages due to situations of child emotional neglect when judging Special Appeal (*Recurso Especial*) No. 757,411 (BRASIL, 2005). Among the grounds for doing so is the claim that[73] "it escapes the jurisdiction of any court to force someone either to love another person or to maintain with such a person a relationship based on affection". Additionally, the Panel found that the financial needs children have were already covered and attended to through the obligation to pay child support, and that the Brazilian family law, with its unique set of principles, precludes regulation through the law of obligations. (PÜSCHEL; AQUINO, 2019, p. 195).

The 3rd Panel, also by majority vote, had already admitted the awarding of damages due to child emotional neglect in its ruling delivered for Appeal No. 1,159,242 (BRASIL, 2012b). The Panel's decision was based on the recognition of the existence of a duty of care, which is not to be confused with the duty of providing material support, and that family relationships are not an impediment to the characterization of civil liability. Given that the parents' margin of freedom to decide how to raise their children must be respected, the justices concluded that civil liability for breach of the duty of care exists only when the child is totally abandoned. This means that mere mishaps and failures, which are considered inherent to the process of raising and educating children, would not qualify as a violation of

[73] The judgment contains the votes of three of the four justices who made up the majority. Their votes do not invoke all the arguments presented by the Rapporteur, but elaborate on some of these arguments in a complementary way.

said duty of care (PÜSCHEL; AQUINO, 2019, p. 196-197)[74].

As noted, the positions of the 3rd and 4th Panels of the Superior Court of Justice were not only distinct but logically incompatible (PÜSCHEL; AQUINO, 2019, p. 197). Nevertheless, in the *Embargos de Divergência* No. 1,159,242 (BRASIL, 2014), the 2nd Section of the same court, a group which is composed by the Justices from the 3rd and 4th Panels) decided, by a tight majority of five to four, not to hear the appeal. This means that the Justices understood that there is no divergence between the decisions issued by the two Panels, even though the 3rd Panel recognizes the existence of a duty of care, distinct from the duty to provide financially, which the 4th Panel does not recognize, and that the solution given by the 3rd Panel depends on the application of the rules of civil liability or tort law to family relationships, something the 4th Panel flatly rejects.

The justifications given in the majority opinions are very concise and argue that the 3rd Panel, by recognizing civil liability for child emotional neglect, has only established an exception to the decision of the 4th Panel (BRASIL, 2014, p. 41-43).

The Superior Court of Justice does not answer the question of how it would be possible to establish an exception to a rule that is said not to exist. The Court was satisfied with obtaining a certain result, which was, in this case, the rule that civil liability (and damages) for child emotional neglect is only admissible in exceptional circumstances. However, by doing so, the Court disregards the need to present the legal grounds underlying such a solution, since it answers in a contradictory way the question about the very duty which, if not fulfilled, would entail compensation (PÜSCHEL; AQUINO, 2019, p. 201-202).

[74] The judgment contains the opinions of three of the four justices who made up the majority. Their opinions do not invoke all the arguments presented by the Rapporteur, but elaborate on some of these arguments in a complementary way..

1.B. CHANGES IN THE POSITION OF THE COURTS WITHOUT REASON(ING)

The little importance the Judiciary members attach to the reasoning behind judicial decisions is made evident from the absence of justification when there is a change in the positions of higher courts and their panel or sections concerning some legal issue. This occurs even in landmark cases, what leads one to believe it to be a situation considered normal in the judicial system. A recent and illustrative case is the discussion, held before the Brazilian Federal Supreme Court, on the applicability of imprisonment following a conviction being confirmed on appeal but before the accused having the chance to file an appeal or motion before the highest competent court.

The Court's position on this issue was affected by changes of interpretation on the part of Supreme Court's Justice Gilmar Mendes, a shift that is identifiable when one compares the opinions he issued when judging the following writs of Habeas Corpus: Habeas Corpus No. 84,078, judged in 2009 (BRASIL, 2009); in Habeas Corpus No. 126,292, judged in 2016 (BRASIL, 2016a), and in Habeas Corpus No. 152,752, judged in 2018 (BRASIL, 2018).

Before the 2009 decision, the position of the Supreme Court was for the constitutionality of imprisonment after conviction being confirmed by the appellate court, i.e., after the first appeal was judged. In 2009, when voting to change this position, Justice Gilmar Mendes presented as his justification the occurrence of social changes and the fact that the Brazilian criminal justice system was "a world of horrors". At the time, more than a third of the Habeas Corpus petitions judged by the Supreme Court were granted, even those that had gone through all competent courts, including the Superior Court of Justice (BRASIL, 2009, p. 1183).

Justice Mendes identifies a tension between the ineffectiveness of the Brazilian criminal system and human dignity, a conflict he resolves in favor of human dignity based on a judgment of proportionality. Since the possible objectives of serving a sentence before the pertaining decision becomes *res judicata* (claim preclusion) could be fully achieved through provisional (pretrial) detention, imprisonment to serve a sentence before *res judicata* would be unnecessary and therefore a disproportionate measure that should not be applied (BRASIL, 2009, p. 1196-1200).

In 2016, by changing his analysis and again integrating the majority that changed the court's understanding on the subject, Justice Gilmar Mendes resumed the issue of the ineffectiveness of the criminal justice system, highlighting the problem of procrastinatory appeals which aim at preventing *res judicata* and often result in the expiration of the statute of limitations and in an "embarrassing situation of impunity" (BRASIL, 2016a, p. 64-65). This time, unlike what he declared in his opinion of 2009, Justice Gilmar Mendes was of the view that provisional detention would not be a satisfactory solution because it does not apply to all cases (BRASIL, 2016a, p. 73). In his opinion, he does not explain why the provisional arrest would have ceased to suffice since his 2009 opinion.

Later, in 2018, Justice Mendes gave a different interpretation to the issue once again. This time, he argued that he had encountered many situations of unlawful imprisonment in judicial decisions which were then overruled by the Superior Court of Justice (BRASIL, 2018, p. 111-112).

However, back in 2009, the occurrence of this type of case was already old news. Justice Mendes himself had mentioned in his opinion that more than one-third of the Habeas Corpus petitions analyzed by the Supreme Court were granted after the cases had passed through

all other competent courts in the system, including the Superior Court of Justice (BRASIL, 2009, p. 1183).

Furthermore, among the three examples of injustice quoted by Mendes in his 2018 vote, two were cases in which the Superior Court of Justice had upheld the lower court's judgment regarding the materiality of the crime (i.e., there was indeed an offense committed) and its authorship (the accused was the one who committed it), having only reduced the sentence and recognized the applicable statute of limitations. This means that the cases he used as exemples were actually illustrative of the impunity that motivated his 2016 opinion (PÜSCHEL; GEBARA, 2019, p. 192).

In 2018, Justice Gilmar Mendes's opinion did not lead to a new change in the highest Brazilian court's understanding because Justice Rosa Weber voted against her own conviction.[75]

This example shows that reasoning was a peripheral concern even if we consider Brazil's highest court and its decisions involving the fundamental right to freedom.[76]

2. SYSTEM OF SERIATIM REASONING IN COLLEGIATE DECISIONS

The tendency to disregard the need for legal reasoning to justify judicial decisions, which is characteristic of the Brazilian legal experience, is complicated by the fact that, in trials by panels of justices, cases are decided through a system of *seriatim* opinions, which

[75] The court's position changed again when judging the *Ação Declaratoria de Constitucionalidad*e (action for the declaration of constitutionality of a statute or act of the government) No. 43, on 11/7/2019, when its Justices decided, by a majority vote, for the need of the *res judicata* before the beginning of a sentence serving (BRAZIL, 2019).

[76] This is not to say that the change of position itself is a problem. The criticism is aimed at the reasoning presented by judges.

means that the court's final decisions are based on several opinions. As such, the decision is grounded on as many reasons as the number of justices that make up the court or the panel judging the case.

Conversely, in *per curiam* systems, courts deliver decisions consisting of specific opinions that are considered as representing their reasonings as collegiate bodies, even if they admit dissenting and/or concurring opinions.

In a seriatim-reasoning system, the construction of collective rationalities by the courts is not favored, a fact that makes it even more difficult to identify the reasons for their decisions when they do exist.

In Brazil, the tradition regarding the authority of judicial decisions lies in case law, or "*jurisprudência*" in Portuguese. It encompasses a body of accumulated decisions over time, and these decisions indicate a prevailing tendency that can be further consolidated through the formulation of "*súmulas*". Therefore, previously decided cases are frequently cited as part of a line of similar decisions as a way to reinforce the authority and credibility of the decision-maker when rendering a new judgment (RODRIGUEZ, 2013a, p. 107).

However, the Brazilian Civil Procedure Code (Código de Processo Civil - CPC) of 2015 seems to try to bring Brazilian law closer to the common law tradition by referring to the role of *precedents* in its art. 489 § 1, VI.78 The language used in the article indicates that the Code provides for binding precedents and not simply persuasive ones. In fact, it establishes, in its art. 489 § 1, VI, that a court decision is not considered well-founded (and is, therefore, null and void under the terms of another provision art. 11 of the CPC) when it "fails to follow "súmulas", case law, or precedents invoked by the party without demonstrating the existence of a difference in the case being judged or the overcoming of such judicial understanding" (emphasis added).

There is no legal definition or settled position in the Brazilian legal authoritative texts that define what a precedent is in Brazilian law, nor is there clarity on to what extent courts should obey the rule in the Brazilian Code. Even though it is not our purpose here to go into this debate, it is certainly worth noting that the legislative changes introduced by the Code in 2015 move towards a hierarchical structure within the Judiciary, with the purpose of making the judicial activity more rational and the judicial decisions more predictable. These changes do not consider the difficulties of implementing a vertical hierarchical structure based on the concept of precedent in a system where the argumentative reasoning of judicial decisions is traditionally neglected, as we have seen before.

To complicate things even further, the *seriatim* system encourages the use of individual opinions delivered by one or some members of the courts as precedents, without considering whether they reflect the court's position as a collegiate body (PÜSCHEL, 2019b).

A recent example of this type of situation can be found in the discussion on the termination of pregnancy of anencephalic fetuses, an issue decided by the Brazilian Federal Supreme Court (STF) in the Action Against the Violation of a Constitutional Fundamental Right (*Ação de Descumprimento de Preceito Fundamental - ADPF*) No. 54, adjudged in 2012. In this case, the Brazilian Supreme Court ruled that the termination of pregnancy when the fetus suffers fromanencephaly does not constitute a crime of abortion and is, therefore, a lawful conduct (BRASIL, 2012).

The petition was granted by a large majority of 8 to 2. However, an analysis of the reasons for the justices' opinions shows a great divergence between them. For example, if we look at the view of the justices regarding the legal concept of life — a premise of the reasoning of all of them —, we note that they were very much separated into two groups:

five out of the ten justices who participated in the trial considered that the anencephalic fetus was alive in its mother's womb, while five other justices considered it to be dead (PÜSCHEL, 2019b, p. 553-554).

It is interesting to note that among the majority in the case, there is divergence as to whether the anencephalic fetus is alive or dead in the mother's womb. Some Justices who voted with the majority agreed with the authors of the dissenting opinions regarding the concept of life. This is because, in the majority itself, there are distinct grounds for granting the petition (PÜSCHEL, 2019b, p. 541-548).

Four years after the judgment of ADPF No. 54, the 3rd Panel of the Superior Court of Justice invoked it as a precedent to judge a Special Appeal regarding a civil liability action involving the termination of pregnancy of a fetus carrying another type of serious anomaly, the body stalk syndrome (BRASIL, 2016b).

In her vote, the rapporteur, Justice Nancy Andrighi, resorts to ADPF No. 54 and states that "where there is the same reason, there must be the same ruling" (BRASIL, 2016, p. 16). She adds that her opinion inquires "the reasons for the [Brazilian] Supreme Court decision, given that they will say whether the situations (anencephaly and body stalk syndrome) are similar and, therefore, occasion the same constitutional interpretation" (BRASIL, 2016b, p. 13).

However, to establish the reasons for STF's decision, Justice Andrighi avails herself exclusively of the opinion of the rapporteur of ADPF no. 54, Justice Marco Aurélio Mello, whose text does not mirror the variety of grounds adopted in the opinions of the justices who composed the majority in the judgment (PÜSCHEL, 2019b, p. 557).

Because the reasoning given by Justice Mello differs from the ones of the other Justices who voted with him, one cannot say that Justice Nancy Andrighi used the court's decision as a precedent. She selected one of several individual opinions that formed the basis for

the judgment, but did not offer an analysis of whether it reflected the position of the majority of the justices deciding the case.

Another element that adds to the complication regarding the use of precedents is that Justice Nancy Andrighi adopts, as the basis for her decision, an argument that Justice Marco Aurélio Mello employed really only for the sake of argument, that is, an argument that he explicitly rejected as a basis for his opinion in ADPF No. 54 (BRASIL, 2016b, p. 558).

Given the Brazilian legal culture, the lack of a legal definition of precedent in our legislation, and the absence of a robust precedent theory or doctrine, it seems right to conclude that precedents remain only persuasive in Brazilian law (PÜSCHEL, 2019b, p. 555), with little chance of becoming binding because of the difficulty the Judiciary has to create them, to begin with.

CONCLUSION

The relevance of the Judiciary as a law-making locus in Brazil indicates that a feminist critique regarding its judgments is fundamental. In this sense, the Feminist Rewriting Project proposes to do so by focusing on the legal reasoning that motivates the decisions delivered by Brazilian judges. This fact, given what has been discussed in this chapter so far, makes the Project even more relevant.

Broadly speaking, the Brazilian rewriting project stands against the authoritarian tradition that devalues reasoning in judicial decisions. By doing so with the support of feminist legal theories, the project contributes to the debate on the democratic control of the Judiciary and on the enforcement of the rule of law in the country, and brings the issue of social hierarchies, especially of gendered hierarchies, to the center of this debate.

As to more specific legal issues, the Feminist Rewriting Project promotes advancement in theory and legal interpretation in the various areas of law towards guaranteeing women's rights, valuing their experiences, and the activities socially related to women, as well as opposing interpretations that make the law and the Judiciary instruments of oppression based on gender, race, social class, sexual orientation, and other social markers.

Therefore, it is fair to conclude that the fact that the Brazilian law belongs to the Civil Law tradition does not diminish the relevance of the project's realization. However, this does not mean that the features of Brazilian case law and legal culture do not have important implications for the translation of the original foreign Project, with its Common-law roots, into our local circumstances.

Firstly, there are practical consequences regarding the choice of cases to be rewritten. In Brazil, there are no case books that collect court decisions that have defined the basis of legal concepts and institutions, as in other legal systems. In our case, the judicial decisions tend to be more interesting for a rewriting exercise because of the legal issue involved than for their being a reference in an area of law.

Decisions from the Brazilian Supreme Court and the Superior Court of Justice tend to have greater importance because these courts have the constitutional task of unifying the interpretation of the 1988 Federal Constitution and of the federal legislation that followed it, respectively. However, in a system of precedents with a purely persuasive nature and very autonomous lower courts, the origin of a decision tends to be of little relevance. This explains why this book includes alternative feminist versions of trial court decisions and of state and higher court ones.

It is possible to anticipate that the Brazilian Feminist Rewriting Project will face some incomprehension and resistance from traditional sectors of the legal professions for the mere fact of placing the

legal reasoning that grounds judicial decisions at the center of attention, in addition to the expected resistance from forces linked to the maintenance of social hierarchies.

On the other hand, a system of persuasive precedents built upon decisions with multiple reasonings tends to be more receptive to change than a rigid system of binding precedents, making it less burdensome for judges committed to the enforcement of the constitutional norm of gender equality to draw inspiration from the Feminist Judgments Project.

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GENDER AND RACIAL COMPOSITION OF THE JUDICIARY AND THE PROSPECTS FOR TRANSFORMATIVE DIVERSITY IN THE BRAZILIAN JUSTICE SYSTEM

Maria da Glória Bonelli - Ana Paula Sciammarella - Tharuell Lima Kahwage

INTRODUCTION

March 2023 was marked by debates and pressure on the Brazilian federal government regarding the appointment of a Black woman to one of the forthcoming vacancies within the Brazilian Federal Supreme Court (*STF*). Since its inception, the Court has only seen three women and one Black judge appointed (something which occurred following the period of re-democratization). The underrepresentation of both women and Black individuals within the justice system extends beyond the highest courts, as it is also evident across all levels of the country's judiciary. A case in point is the historic announcement in February 2022, when Justice Iris Helena Medeiros Nogueira became the first Black woman to be announced as the President of the Court of Justice of Rio Grande do Sul.[78].

News articles on the subject point out the absence of women and Black people in high positions in the Brazilian judicial system: "Women are a minority in high-ranking positions in the Judiciary" [79]; "Women are still a minority in the Judiciary, data show"; "Female

[78] JURINEWS. *Empossada primeira mulher e primeira negra na presidência do TJ-RS.* February 02nd, 2022. Available at: https://jurinews.com.br/brasil/primeira-mulher-eleita-presidente-do-tj-rs-toma-posse/. Access on: Mar. 27th, 2023.

[79] R7. *Mulheres são minoria nos cargos de alto escalão do Judiciário*, April 26th, 2019. Available at: https://noticias.r7.com/brasil/mulheres-sao-minoria-nos-car-

representation grows in the Judiciary, but women are still a minority in leadership positions"[80]. The diversity in the courts (or lack thereof) constitutes an important element for the legitimacy of the justice system and its institutions. Perhaps for no other reason, its composition has been the topic of various empirical studies.

The Brazilian justice system has traditionally been structured around the hegemony of white males within the legal professions. Until the beginning of the 20th century, there was a consensus that women lacked legal reasoning, and that feminine characteristics, such as purity and emotional impulses, were inadequate qualifications for the legal sphere (RHODE, 2001). As competence and excellence were considered inherent traces of the racially dominant group, hegemony in positions of authority and power became normalized within society. Consequently, the presence of a Black individual in such spaces often causes astonishment, which always points to a sense of non-belonging, strangeness, and an "out-of-place condition" (CARNEIRO, 2019).

Brazilian studies on legal careers in the justice system have highlighted the pathways through which women and Black individuals have entered and advanced within the legal profession. The increased number of women in the field primarily stems from societal shifts rather than gender-inclusive institutional policies or quotas for occupying positions of professional power in institutions (CHAVES, 2021; BONELLI; OLIVEIRA, 2020; LEITE, 2020; SCIAMMARELLA, 2020; KAHWAGE; SEVERI, 2019; CAMPOS, 2015; BERTOLINI, 2017; FRAGALE; MOREIRA; SCIAMMARELLA, 2015). As

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[80] MIGALHAS. *Mulheres ainda são minoria em todo Poder Judiciário, apontam dados*. November 24th, 2020. Available at: https://www.migalhas.com.br/quentes/336640/mulheres-ainda-sao-minoria-em-todo-poder-judiciario--apontam-dados. Accessed on: Mar. 27th, 2023.

to the reservation of openings or quotas for positions in state legal careers for Black men and women, although there is public policy in this direction, the impacts on legal careers are still low (BONELLI; OLIVEIRA, 2023; GOMES, 2020; MONTEIRO; BERTOLLO, 2021; SEGURO, 2021; CARVALHO, 2021, WIECKO; CAMPOS, 2022; SILVA; FLAUZINA, 2021).

Access to public legal careers through competitive examinations is an integral part of women's progress, and it has earned Brazil international notoriety in terms of women's participation in the legal professions.[81] As an example, the Judiciary reached 2021 with 38% female judges (total of 18,000 members), the Public Prosecutor's Office with 41% (total of 13,000 members), and the Public Defender's Office with 51% female participation in 2021 (total of 7,000 members).[82]

Even in the case of public positions, which are subject to the discourse of progression regulated by the same criteria of seniority and merit, as well as by the principle of impartiality (SEVERI; FILHO, 2022), the entry of women into the Brazilian justice system, as in other countries, has not been a linear or straightforward process. Neither has it been homogeneous as to roles, areas of practice, or positions within the legal professions. (KAHWAGE; SEVERI, 2019; SCHULTZ; SHAW, 2002; SCIAMMARELLA, 2020). The gradual and stratified access to public legal careers is influenced by barriers and discriminatory practices that impede the professional advancement of women. Consequently, it creates asymmetrical, unequal,

[81] Access to law schools and the re-democratization of the country are some of the decisive factors for this expansion.

[82] The sources are: for the legal profession, the Legal Bar Association's Table of Lawyers, 2022; for the Judiciary, the CNJ's Black Men and Women in the Judiciary survey, 2021; for the public defenders, the National Survey of the Public Defender's Office, 2022; and for the Public Prosecutor's Office, the Ministry of the Economy's RAIS statistical base, 2021.

and hierarchical dynamics within the legal professions (SCHULTZ; SHAW, 2003; GASTIAZORO, 2010; MENKEL-MEADOW, 2013; SEVERI, 2016; SCIAMMARELLA, 2020).

Despite having to face this scenario of difficulties in accessing legal careers, women and Black individuals are more and more present in judicial institutions, and this has resulted in greater diversity in these spaces. Albeit timidly, this has produced ruptures with the potential to transform the justice system altogether through the formation of women's and anti-racist groups, institutional or otherwise. Our goal here is to present some of the changes resulting from professional insertion, judicial policies, and mobilization for gender and racial diversity in the Brazilian justice system in recent years, focusing on the careers of judges, prosecutors, and public defenders.

DATA AND REFLECTIONS ON GENDER AND RACIAL DIVERSITY WITHIN THE JUSTICE SYSTEM

In order to understand the public legal careers mentioned in this paper, it is necessary to understand that they are based on how the justice system is organized in Brazil. The Brazilian Judiciary is divided into ordinary courts (State and Federal Justice) and specialized courts (Labor Justice, Electoral Justice, and Military Justice). These institutions are structured in three levels: first-degree (lower, trial courts), second-degree (appellate courts), and higher courts. Among the public careers that are part of and operate within this system are the Public Prosecutor's Office and the Public Defender's Office. The Public Prosecutor's Office is organized similarly to the Prosecutor's Offices of the states and the Federal Prosecutor's Office (which includes the Federal, Labor, Military, and the Prosecutor's Office of Federal District and Territories). The Public Defense System com-

prises the Office of the Federal Public Defender, the Office of the Public Defender for the Federal District and Territories, as well as the Office of the State Public Defender. It operates at multiple levels, including territorial-based jurisdiction.

Regarding the Judiciary[83], data crossing on race and gender of the CNJ surveys conducted by Alves (2019) reveals that, in the Census of the Judiciary (CNJ, 2014), the number of white female judges represented 30.8%, while the number of Black female judges in the Brazilian Judiciary was only 5.1%. In the profile drawn up in 2018, the percentage of Black female judges has changed to 6.5%, while the percentage of white female judges has increased to 31.5%.[84].

Inequalities also extend to the career of Public Prosecutors. In 2018, the Strategic Planning Commission of the National Council of the Public Prosecution conducted a research titled *Cenários de Gênero* (Gender Scenarios) (2018), which indicates that the personnel of the four branches of the Public Prosecution system (Federal, Labor, Military, and the Public Prosecutor's Office of the Federal District) consists of 40% women and 60% men. Furthermore, since the enactment of the Federal Constitution in force, in 1988, only 73 women have been appointed Attorney General, in contrast to 413 male prosecutors, numbers which represent 15% of women against 85% men in leadership roles.

In contrast to the gender composition of the Judiciary and the Public Prosecution, the study *Cartografia da Defensoria Pública no Brasil*" (Cartography of the Public Defender's Office in Brazil) (ES-

[83] In Brazil, academic studies on judges and lawyers predominate over other legal careers. Research on female judges and lawyers stands out, reflecting the persistence of the structure and autonomy achieved by these groups.

[84] In 2014, the total number of Black male judges was 10.5%, and the number of white male judges was 53.6%. In 2018, Black male judges reached a percentage of 11.5%, and white male judges accounted for 49.5%. (ALVES, 2019).

TEVES *et al*., 2022a) reveals that this institution is primarily composed of women, who are 51% of the total of the defenders, a fact that aligns statistically with the gender distribution in the population. Regarding color or race/ethnicity, 74% of public defenders identified as white, while individuals of mixed race represented 19.3%, Black individuals 3%, Asians 1.4%, and Indigenous people 0.1% of the total, in a blatant disparity from Brazil' demographic profile. The above-mentioned research establishes a clear correlation between societal inequalities based on color or race/ethnicity and the replicative patterns found in the group formed by the public defenders. These patterns underscore the unequal access the population has to enter public positions, and emphasize the urgent need for the implementation of new affirmative institutional actions. Such measures aim at promoting social equality and at addressing the pressing requirement for a comprehensive societal transformation (ESTEVES *et al*., 2022a, p. 73).

Wiecko and Campos (2022) carried out a systematization of studies on the entrance of Black men and women into public legal careers. One aspect to be highlighted is the low availability of data both from surveys that have already been conducted (for example, on the Judiciary) and from studies that have been only partially concluded, as it is the case with the one on the Brazilian Public Prosecutor's Office. Obtaining information on race/ethnicity in the Public Prosecutor's Office were only possible due to an affirmative action policy implemented in the Office setting aside 20% of vacancies for Black and mixed-race candidates in public competitions in 2015. According to the authors, the Public Defender's Office is 74.0% white and 22.3% Black (19.3% brown), making it the most racially diverse group among those considered. A paper titled *Negros e Negras no Poder Judiciário* (male and female Black people in the Judiciary),

by the National Council of Justice (CNJ), in 2021 contributed to the acknowledgment of the problem and the concern with the absence of data on race for 31.9% of the cases (WIECKO; CAMPOS, 2022).

Qualitative research[85] on gender and race inequalities in Brazilian legal careers helps to explain the data presented here. In the judiciary, the literature has shown that gender and race shape the careers of male and female judges, with a generational and racialized career path in the Judiciary (BONELLI, 2023). There are several examples of how gender and race relations shape the legal professional culture. An important outcome of gender studies concerning careers is the recognition that the basis of professional identities is remarkably durable and is not easily modified by the simple insertion of women into occupational groups. Therefore, the formal allowance for the inclusion of a group does not adequately consider the enduring nature of gender-based associations concerning professions.

Gomes (2020) analyzes the intersection of race and gender experienced by Black female judges. The interviews conducted by the author shed light on how the daily work is marked by the attention given to the body of Black women who do not correspond to the general expectations and the notion that judges should be white men. Gomes (2020) notes that, although these stereotypes are more common among people outside the judicial environment who do not identify these women as judges, sometimes even a lawyer or a judge will not recog-

[85] In Latin America, this discussion gained prominence in the 1990s due to the increasing number of women in higher education and the professionalization process of entering public service careers within the justice system, mainly through public examinations (see BERGALLO, 2007; GASTIAZORO, 2008, 2010, 2016; BONELLI, 2010, 2013, 2016; SEVERI, 2016; SCIAMMARELLA, 2020). Maria Teresa Sadek has conducted significant research on the democratization of the justice system in Brazil, while researchers such as Eliane Junqueira, Maria da Glória Bonelli, Patrícia Bertolini, Ana Paula Sciammarella, and Fabiana Severi have conducted empirical legal studies focused on gender-related issues within legal careers.
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nize a Black woman as a judge or colleague. This mirrors what studies on law and race relations point out about the absence of Black women in spaces of power being perceived as natural (ALVES, 2019; FÓRUM JUSTIÇA; CRIOLA, 2020; GOMES, 2020; FIRMINO, 2020).

The Public Defender's Offices of Rio de Janeiro and Bahia were analyzed by Silva and Flauzina (2021). The authors believe that this institution, as a guarantor of access to justice for people in social vulnerability situations, should bear points of resemblance with the people it defends in terms of social identification/representation. This is necessary because social representations can give people the possibility of self-definition, self-identification, and of expressing themselves, even if through symbolic mechanisms, besides having expanded the chances institution have of incorporating people from a more diverse background in their staff and of adopting new perspectives. Although the composition of women is considerable, according to the authors, the institutional profile still preserves privileges and maintains inequalities. Sexist practices persist within the institution, seen in the unequal occupation of positions of power, as is the case of the Superior Councils, occupied mostly by white men. The authors conclude that "racism and sexism distort the identity dimension of the Public Defender's Office and create discrepancies that affect the population's rights" (FLAUZINA; SILVA, 2021, p. 318).

The data presented herein provide evidence that, notwithstanding progress in career diversification over the past few decades, the legal profession in Brazil continues to exhibit a predominantly masculine orientation in terms of work patterns and prevailing culture, and is marked by discriminatory practices against non-white professionals (SOMMERLAD *et al*., 2010). While the increased presence of women within the profession may have posed challenges to the dominant professional ideology, the notion of professional neutrality endures.

Built throughout the 19th and 20th centuries, in a context in which the legal professions were composed of white, elite, upper-middle-class males, civil service (HALLIDAY, 1999) was constituted on the basis of class, race, and gender similarities, a move which reinforced the belief in expertise as some kind of neutral knowledge which was above specific interests and provided quality specialized services in defense of society. It is known that expertise is built in contrast to differences and conventional politics. As an ideology, it guides the values established in the legal world, forming a receptive environment for those who share such views.

The hegemonic ideology constructed by the professional elite is faced with the presence of different bodies and dissenting views in the profession. Through the process of gendering and racializing, differences are naturalized and expertise is promoted to support decision-making as neutral. Transformative diversity, therefore, challenges such a perception. The constitution of subjects who are different in terms of gender and race destabilizes established hegemony (SOMMERLAD, 2013) with a plurality of meanings where previously the affirmation of a will to cohesion through sameness prevailed. This diversity is receptive to professionalism in the environment of differences, recognizing the quality of justice it can dispose to society that is not reduced to the singular.

Drawing on studies of women in the judiciary, Hunter (2015) maps six arguments mentioned in the literature on diversity in the Judiciary: three are symbolic, two are practical, and one is substantive. The symbolic arguments highlight the democratic legitimacy of a more diverse Judiciary System; the practical reasons refer to the empathy of difference with the diversity of litigants and witnesses, influencing the Judiciary in general; the substantive argument emphasizes how a court composed by people from a diverse origin brings

this sensitivity to the decision-making process. Although the number of women has expanded, the data show a justice system lacking substantive diversity in court decisions and deficient in the visibility of racial difference in all three dimensions.

Nevertheless, it is imperative to inquire about the potential for a distinct juridical performance within a domain that continues to resist gender and racial diversity, as illustrated by the Brazilian Judiciary. Kahwage and Severi (2019) affirm that it is not enough to increase the numerical visibility of women and Black individuals in the Judiciary; it is necessary to analyze what such presence means. The symbolic aspect of this participation can lead to a diverse and more legitimate Judiciary, but it does not change the ways of judging and working. In order to collaborate with this change, Rackley (2013) uses the distinction between "inclusive diversity" and "transformative diversity". In the former, the author reinforces the perspective of letting different people join in, and of including them in the judicial and legal careers. In the latter, she highlights substantive institutional change, challenging images of uniformity in terms of ideas and understanding that plural experiences and views matter. Rather than denying this, as neutral ideology claims, transformative diversity seeks to see its effects on judges and judgments (BONELLI; OLIVEIRA, 2023).

Next, we will outline several institutional and non-institutional endeavors organized and implemented to give voice and purpose to a movement for diversity within the justice system across various professions and careers recently.

JUDICIAL POLICIES AND MOBILIZATION FOR DIVERSITY WITHIN THE JUSTICE SYSTEM

The institutional effort to create judicial policies aimed at implementing greater diversity in the composition of the justice system works in different ways. While the increase in the incorporation of Black individuals occurs through racial quotas, the participation of women occurs through incentives. About the Judiciary, Bonelli and Oliveira (2023) observed that for the analysis of diversity and the quantitative distinction between the participation of women and Black individuals, it is necessary to consider the various forms of entry into legal careers. According to the authors, this reflects difference as an identity, since women apply for a vacancy in a process of general selection (no affirmative action for women). At the same time, Black people can choose to be selected through affirmative policy processes, in which this difference is explicitly stated.

The fact that the inclusion of women in public legal careers which occurred without an affirmative action policy had distinct results in terms of the perception of difference as identity. The female judges (and prosecutors and defenders) participated in competitive examinations without gender identification incentives, reinforcing professionalism as similarity even if their experience in the career pointed in another direction. The reservation of seats raised questions for Black female and male judges regarding the perception of racial differences. The method of entry for women facilitated the effacement of gender distinctions, which are embedded in subjectivity, constituting an experiential and social relationship that often goes unnoticed as an identity that provides personal significance. (BRAH, 2006 *apud* BONELLI; OLIVEIRA, 2023).[86]

[86] Regarding these differences, we can note the resolutions of the CNJ (Resolu-

On the other hand, in her research on the judiciary, Sciammarella (2020) concluded that "profession does not erase gender". Due to socially constructed sex stereotypes, even with the adoption of behavior patterns based on masculine paradigms as a professional strategy, being a woman significantly alters professional trajectories and the conditions for exercising the profession. This occurs despite the discourse of equality common among female judges, especially the pioneers in the career. However, the research also identified a movement of political mobilization for gender equality in the judiciary, which has deconstructed this discourse of equality.

The organization of groups comprising "militant" female judges, who have entered the legal profession more recently, has begun to embrace new strategies. These professionals believe that the judiciary needs a fundamental reinvention, with due recognition of women as an integral part of this professional group. Despite the optimistic outlook regarding progress toward gender equality in terms of numbers, they acknowledge that this transformation will not occur gradually or spontaneously. According to them, the professional standing of women is intricately tied to gender dynamics within institutional structures. However, despite this acknowledgment, the adoption of quota policies for women has not proven to be a viable alternative for female judges due to the significant political costs involved. The gender equality strategies proposed by these women's groups not only aim to improve entry conditions and career advancement but also seek to encourage greater participation in selection committees (SCIAMMARELLA, 2020).

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tion 203/2015) and CNMP (Resolution 170/2017) that institute racial quotas and the CNJ Resolution on encouraging female participation (Resolution 255/2018). As Bonelli and Oliveira (2023) indicate, public policies for racial equality can be universalist and difference-oriented, and in Brazil, these are connected to the universalist model.

Soon after the survey results on female participation in the judiciary were released, the National Council of Justice (CNJ) issued Resolution No. 255/2018, which established the National Policy to Encourage Women's Participation in the Judiciary. The content of the resolution sought to indicate measures that the Judiciary should adopt to ensure gender equality in the institutional environment, such as mechanisms to encourage the participation of women in leadership positions, advisory positions, competition boards, and institutional events. In addition, a working group was created to carry out studies, scenario analyses, training events, and dialogue with the courts.

Data on the feminization and racialization of legal careers is not new. Their production has even corroborated the adoption of a series of institutional policies to encourage new analyses and greater participation of women and Black individuals in the different justice system institutions. The innovation lies in the active engagement of professionals within these fields in advocating for an agenda of political mobilization aimed at achieving institutional diversity. Initially observed within professional associations, this mobilization has gained momentum through forming informal groups and collectives comprising judges, defenders, and prosecutors. These groups have emerged to acknowledge existing differences and the resulting inequalities, and to voice demands in a proactive and inclusive manner around issues of gender and racial disparities within the justice system. In these groups/spaces, professionals not only seem to have a greater understanding and discernment of the discrimination suffered, but have also taken the risk of verbalizing and problematizing such experiences.

Although Campos (2015), at the time of her research on women in the Judiciary, concluded that there was no kind of collective agency leading to the feminization of the judiciary and that this process

took place in an individualized manner, without any stimulus from political or feminist movements, a change in this dynamic seems to be in progress. The formation of the mobilized professional groups indicates the conformation of a collective agency for the achievement of greater gender equality and racial diversity in the different institutions of the justice system guided by its own agents.

In the judiciary context, an increasing number of women judges have become aware of the influence of gender inequalities on their professional journeys. They not only identify themselves as women within the legal profession but also assert this identity to advocate for institutional adjustments that acknowledge the profound implications of gender dynamics on their career advancement. The efforts of these groups of female judges have been made to provoke the justice system itself, especially the CNJ, to produce data that can highlight the inequalities already experienced by female judges due to their professional status. The members of these groups present a concrete work agenda highlighting the gender difference as an organizing factor of a negative hierarchization for female judges.

An example of this organization at the associative level in the judiciary is the *Frente das Mulheres Magistradas* (Women Judges' Front), created from the commitment made by 28 judge associations in Brazil to discuss female participation in the judiciary and formulate a common agenda for action. The group aims to identify points of convergence among the judges' class entities in favor of their female associates and of the increase of their participation in the public space, guaranteeing the autonomy of each entity in deliberations about the theme but also establishing an ideal of cooperation and production of quality information.

The significance of political mobilization among Black judges becomes evident through the formation of an organized group of

judges in 2017, with the purpose of promoting the National Meeting of Black Judges (ENAJUN). As Judge Flávia Pinto Martins de Carvalho has mentioned, the meeting represents a true "Quilombo" where experiences and challenges common to judges can be shared (BONELLI; OLIVEIRA, 2023). Similarly, in her study, Gomes (2020) examines the experiences of Black female judges and their socialization within the professional realm. She uncovers narratives that shed light on the journey of self-discovery as a Black woman in the legal profession and the transformative effects of affirmative policies, even for judges who entered the field prior to their implementation. According to Gomes, the professional trajectories of these women undergo a process of transitioning "from 'survival' to an awakening." (BONELLI; OLIVEIRA, 2023, p. 29).

In the Public Prosecutor's Office, the *National Movement of Women in Public Prosecution* was created[87], a joint effort to formulate and implement actions aimed at valuing women members Public Prosecution women members and their representativeness. The goal is to build an effective policy with mechanisms and strategies to ensure institutional gender equality with the full participation of women in the institution throughout their careers. This movement has also been promoting national meetings. Still, in this professional field, another example is the project *Tecendo a Diversidade* (Weaving Diversity project), which understood the need for "a web of efforts to make the quota system effective and include Black women in the Public Labor Prosecutor's Office" (SANTOS; ANABUKI, 2021, p. 81). The project brings together female labor prosecutors who select, through questionnaires open to the public, Black women with a bachelor's degree in law who are interested in joining the career as a

[87] Available at: https://www.conjur.com.br/dl/promotoras-criam-movimento-nacional.pdf/. Accessed on: 28 mar. 2023.

labor prosecutor. This is a voluntary group with no institutional ties, whose objective is to increase the representation of Black women in the institution, seeking to fulfill the needs of the candidates by raising and distributing scholarships for preparatory courses for competitive examinations, providing voluntary classes on topics that are essential for passing the examination, psychological support with social values, among other procedures of similar content. The project is organized and carried out by the prosecutors themselves.

In the Public Defender's Office, the *Group for Women Public Defenders of Brazil*[88] created in 2016 as a horizontal space for debates aims to expand and stimulate reflections and the construction of common agendas and national meetings, with meetings, testimonials, proposing measures that identify and overcome the unequal treatment of women in the institution to propose common solutions and greater empowerment and participation of female public defenders in institutional spaces of power.

These were just a few examples, since there are different groups mobilized, national and regional, with different dynamics and organizations. What we want to demonstrate is that there is a change in progress, marked by the protagonism of judges, prosecutors, and public defenders who, through groups, networks, and associative entities, have begun to place the theme on the agenda in different spaces of the justice system with the organization of events, manifestos, meetings, and the collection and dissemination of data related to gender and racial inequality in the justice system. Besides institutional policies, what we can see is that actors in the justice system have been engaging in disputes within the institutions for the recognition of gender and race inequalities.

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[88] Available at: https://forumjustica.com.br/coletivo-de-mulheres-defensoras-publicas-do-brasil/. Accessed on: 28. mar. 2023.

Thus, the political mobilization of numerous individuals within the judiciary to promote greater gender and racial diversity can be examined through at least three key aspects. The first aspect concerns the implementation of public policies by the judiciary aimed at promoting gender and racial diversity within its ranks. Reserved positions, training and awareness programs, anti-harassment and anti-discrimination policies, among others, attest to these policies. The difficulties and resistance faced in the implementation of such measures can also be considered. Another aspect to be analyzed is the social dynamics that lead to political mobilization around gender and racial diversity in the justice system. Aspects such as the role of social movements, the influence of leaders, the articulation between different actors and institutions, and the actions of the media, among others, are considered. The tensions and conflicts generated by these mobilizations, both within the justice system itself and in society in general, are also highlighted.

The central concern is the potential impact of increased female and Black participation on legal institutions, discourses, and practices. In order to undertake this analysis, it is crucial to consider the intricate and diverse nature of institutions in different national and local contexts while also acknowledging the intersectionality of these social markers.

CONCLUSION

The significance of a proposal to rewrite judicial decisions aligns with an emerging area of research that is still undergoing consolidation, contributing to the inclusion of gender and race issues within the realm of law. This field has developed distinct approaches to incorporate these discussions and influence the production of judicial decisions. However, further research is required to examine the

inequalities and diversity within the composition of legal institutions and assess the extent to which this diversity can (or cannot) engender transformative changes in current practices. Initiatives like this can have a positive impact not only in identifying and changing the inequalities in the composition of the justice system, but also in making its actors aware that discrimination against women and Black people is not an isolated or abstract phenomenon. It is configured through symbolic and objective violence fed in social and professional interactions that must be changed. The political mobilization promoted through the groups and initiatives mentioned here and others spread nationally can be consistent opportunities for change in these institutional spaces, with repercussions in society in general. It is observed that there are already voices of transforming diversity, and not only of inclusive diversity, which is not reflected in the decision-making processes. The voices advocating for transformative diversity can be observed within these groups that aim to foster a positive sense of gender and racial/ethnic identity, where individuals acknowledge and affirm their sense of belonging.

The potential for a diverse and inclusive judicial composition alone has not been proven effective in transforming entrenched stereotypes that manifest in judicial deliberations. This has been shown in studies that indicate the limited impact of numerical representation alone, highlighting the significance of a transformative view that challenges the dominant professionalism that obscures diverse perspectives. Through this lens, the invisibility of dissimilar viewpoints can be addressed. This is what the commitments made by these groups of mobilized professionals seem to reveal. Their actions have pointed to the achievement of a transformative diversity capable of amplifying the voice of dissenting groups in the justice system, bringing different perspectives and experiences to the institutional scenario, which could

contribute to a better perception of these groups' needs and adequate care. This could lead to greater trust in justice and its decisions.

Additionally, the political mobilization of these professionals can result in an increased representation of women and Black people in positions of power and influence, leading to their voices being heard and their concerns being more effectively addressed. Transformative diversity is also evident in the production of the book. This act of rewriting serves as evidence that there are colleagues within the judiciary who resonate with this perspective, which goes beyond mere inclusion.

The organization of this book has the potential to provide guidance for the new pathways being forged by these professionals who are dedicated to addressing gender and race issues within the justice system. The reflections on alternative approaches to case adjudication can contribute to higher quality and depth in intersectional discussions within judicial practices. It is crucial to acknowledge that, alongside these advancements, there is still a pressing need for improved numerical representation of women and Black people within the justice system. To envision a transformative jurisdictional performance, we need to reflect on the structure of the legal profession and explore the potential for amplifying diverse voices beyond those over-represented in the hegemonic profile of these careers.

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THE REWRITING OF JUDICIAL DECISIONS: WHAT WE HAVE LEARNED, FROM THEORY TO PRACTICE

Élida Lauris - Ana Claudia Farranha

RAISING THE VOICE: EMERGING FROM SILENCE TO CONFRONT THE CONFINEMENT OF FEMINIST LEGAL THINKERS' DISCOURSES AND INTERPRETATIONS

This article explores the insights derived from the practice of re-writing judicial decisions from feminist perspectives. It is an activity of legal-political engagement and imaginative reflection inspired by one of the core tenets of feminist activism: speaking up and raising one's voice. In the essay "Talking Back: thinking feminist, thinking black", bell hooks (2015/1998) discusses an act that embodies power and pain for women: "talking back", as an equal, to authority figures. hooks emphasizes that, for those who are not always seen and, when seen, are not heard, merely disagreeing or having an opinion is an act of daring. For people who are not usually talked about, talking is a risk, bell hooks reminds. The ignored and silence people carry the burden to master the art of disappearing and making themselves visible in the most different languages. Being proficient in the various techniques of expressing oneself, knowing when to speak and when to be silent, and becoming expert in using the necessary tools to empower existence and surviving between what is considered public and private, are part of what has always been a survival mechanism for women.

bell hooks brings out insights about her experience of growing up in a household where women actively engaged in conver-

sation and expression, and she highlights the significance of rich and poetic language used by Black women. She tells us that, while certain strands of white feminism view silence as a tool of sexist control, the issue faced by Black women is not the imposition of silence as such. In Black communities, says bell hooks, women are not silent. Their struggle is not to get rid of silence but rather to change the nature and the direction of their discourse, that is, to formulate a discourse that binds and engages those who listen, a speech that is heard. Here, bell hooks challenges the famous question of whether subaltern individuals can speak.[92] Transforming the equation, it focuses on the effort undertaken and the mastery acquired by subaltern people in a way that is simultaneously precise, rigorous, plastic, and flexible, so that they can be heard. The greater the intersectional layers of subalternization, the greater the effort required to be able to pronounce words, and create pedagogies, languages, discourses, and interpretations that are heard, considered, and remembered.

Feelings of confusion, anxiety, of being violated, discredited, and exposed accompany those who decide to take the challenge and question the acceptable ways of speaking, writing, and being heard. It is a complex process in which, while some forms or moments of expression may be prized and valued; ultimately, women's speech is confined. Speech that challenges authorities and raises inappropriate issues is unsuitable, should not reach larger audiences, and can bring pain and punishment, as bell hooks recalls.

[92] See Gayatri Spivak's (1988) precursor text that poses the question whether subaltern people can speak.

FEMINIST TRIALS: MASTERING TOOLS, SUBVERTING DISCOURSES, AND EXPOSING THE PERFORMANCE AND LIMITATIONS OF POWER LORDS

Our reality is one in which feminism and women's movements have raised their voices. As women came to master various tools, and express themselves through a wide diversity of resources and styles, the discourses on and the readings of their reality have formulated and guided changes in new directions, towards a world of dignity and of respect for the rights of us all. This book is written by women who speak and master languages, styles, formats, and tools. The authors who contribute to this volume, like so many other women, feminists and non-feminists, excel in the art of teaching, learning, and discussing law in the most varied forms, and before the most diverse audiences. Despite this favorable background, which results from their struggle, women's discourses are still confined, confused, and discredited. Although they have overcome silence, they have to learn how to use different tools and adapt their messages to reach a wider audience. They need to engage with people who may not be familiar with women's issues or feminism.

The main practice pertaining to the various feminist judgments projects found in in different countries is this: expressing the body of knowledge brought about by feminist legal theories in a distinctive form of discourse and use of language. In the feminist versions, feminist thinkers adapt their discourses to fit a specific hegemonic model taken by the exercise of power, namely court decisions. By adhering to this format or genre, they aim at making their interpretations be acknowledged and treated with seriousness by more and more groups of people. Resorting to a text and discourse format which is more palatable and more accepted by the legal common sense, the feminist

judgment projects seek not only to reach new audiences but also to present new elements to those law professionals and legal thinkers who systematically ignore, discredit, or punish the women who dare to speak in equal conditions about other methods of thinking and interpreting the law. By applying feminist theory in the transformation of judicial decisions, even while acknowledging its limitations, feminist authors have demonstrated the possibility for alternative approaches in the adjudicatory process. It is possible to attain outcomes aligned with women's rights by employing legitimate judicial decisions that are founded, in an objective and proper manner, on existing statutory and precedential rules.

Feminist judgments question power relations at play in a field from which women have been structurally excluded. Despite ever-increasing numbers of women entering the judiciary, legal careers continue to be dominated by the white male conception of the application of law, in particular at the highest hierarchical levels of the justice system.[93] If women themselves and the fundamentals of gender equality have historically been ignored in the decision-making processes of justice, feminist and women's movements have taught us that we ought to turn to political imagination and collective action. Judgments rewriting lifts up women so that they can occupy, as equals, the space reserved for white men by the dynamics of power and authority. Hunter, McGlynn, and Rackley (2010) point out that the projects of rewriting judgments from feminist perspectives are "a political intervention which seeks to challenge the ongoing exclusion of women from legal subjectivity". Whether as legal scholars or as influential judges who shape prevailing precedents, or as individuals

[93] See, in this book, the chapter written by Maria da Glória Bonelli, Ana Paula Sciammarella and Tharuell Lima Kahwage, "Gender and Racial Composition of the Judiciary and the Prospects for Transformative Diversity in the Brazilian Justice System".

whose experiences, realities, and knowledge should be the basis for the application of law, women have remained largely invisible within the legal sphere. When they are acknowledged, they either reproduce the dominant canons, or are segregated into areas or branches of the law deemed as typically feminine, such as family law, gender and law, or violence against women.

Hunter, McGlynn, and Rackley (2010) emphasize how slow the pace at which women have been acknowledged in the legal professions is, noting that, despite increased representation and despite the appointment of women to prominent judicial roles, the overall dominance of men in the legal field remains largely unaltered. For these authors, the feminist rewriting of court decisions shows that women are tired of waiting and have decided, literally, to "*take justice into their own hands*" (HUNTER; MCGLYNN; RACKLEY, 2010, p. 8, emphasis added). For these authors, the feminist judgments projects use collective agency to "tackle" the invisibility and powerlessness reserved for women in the legal world. Feminist judgments resist legal power and authority at their own game and, by appropriating hegemonic tools, prove how feminist legal scholars very much excel in emulating, parodying, subverting, and expertly playing the dominant roles of the legal field.

Feminist judgments provide evidence that a feminist approach to law is credible, impartial, objective, and anchored in methods capable of generating fairer and more upstanding judicial proceedings. Hunter (2010) argues that rewriting judicial decisions from a feminist perspective is an opportunity to compile strong evidence against the fallacy, according to which applying feminism to judging is a demonstration of politicization and judicial bias, besides being a threat to the independence all judges should enjoy. As the rewritten decisions in this book prove, the fact that a judge anchors her decision-making

process in her political, social, or philosophical beliefs that are theoretically feminist does not make them any different from any other male judge, nor does it make their decision a subjective document without legal value (HUNTER, 2010). Quite the opposite: in judgments rewritten from feminist perspectives we see the outcome of an exercise in making those who judge even more rigorous and transparent about their preconceptions and values, as they place less emphasis on the traditional notion of impartiality as their sole objective.

The rewritten judgments are characterized by being based on feminist values and conceptions, and by having strong legal reasonings anchored in legislation, precedents, and human rights standards. They demonstrate that, if it is true that the justice system has systematically failed to recognize women's rights, this has little to do with a lack of legal or jurisprudential grounding. In fact, there is a conservative regime of personal beliefs and conceptions held by both male and female judges which is hidden behind the formal idea of impartiality and independence. In this system, personal values and convictions operate in a clandestine, non-transparent way, and impose themselves, even to the detriment of existing statute and case-law standards, a process that turns the justice system into a system of punishment for women[94]. By placing themselves on equal footing with real judges, feminist legal scholars unmask our judicial authorities' performances. The rewritten judgments show how the judiciary chooses one among many possible performances (HUNTER, 2010). They unveil the errors, shortcomings, and limitations found in the original decisions, confronting them with our demands for the compliance of minimum standards regarding gender equality and women's rights.

[94] On the systematic punishment of women as a structural form of gender and racial violence, see Santos (2022).

POLITICAL POTENTIAL AND LIMITATIONS OF THE FEMINIST JUDGMENTS PROJECT

The Brazilian chapter of the project of feminist judgments gave emphasis to the goal of improving legal education, and involved scholars of different higher education institutions, with professors working with their students in teaching, research, and extension activities relating to the project. At the core of this work was the discussion of how the rewriting contributes to the development of new pedagogies in legal education. It is important to note that these pedagogies are not limited to the production of knowledge inherent to the process of elaboration of judicial decisions, but have to do with the way in which law is taught and practiced in schools dedicated to legal education.

From this perspective, based on bell hooks' essay "Teaching to transgress: Education as a practice of freedom" (2013), it is possible to write in a way that goes beyond the black letter of the law — which is mediated by a notion of impartiality —, and is all about the experience of producing judgments that amplify the voice of women and of other groups which have been placed in subaltern positions in society. Of what does such new pedagogies and practices consist?

In this regard, the concept of connection put forth by bell hooks also encompasses elements of an engaged pedagogy that extends beyond a narrow legal interpretation detached from social and political struggles. It involves adopting perspectives that acknowledge the surrounding social, political, and economic context, and foster the use of legal instruments not as absolute truths, but as contributions that warrant application beyond strict adherence to the letter of the law. With the use of these lenses, established stereotypes can be dismantled, and attention can be drawn to how gender, race, and class

oppression intersect in the justice system, most of the time working together to maintain the regime of submission that deprives women of their place in society. Many of the decisions rewritten by the authors in this volume demonstrate that rising to the challenge of giving a case an interpretation that promotes gender, race, and class equity can, in many ways, produce decisions capable of changing paths, histories, and repeated situations of prejudice and discrimination against women, blacks, and LGBTQIAP+ people, among many other forms of inequality that run through Brazilian society.

On the other hand, it should be stressed that, in Brazil, precedents that could be considered feminist have yet to be turned into settled case law. In other countries that sheltered groups that were part to the rewriting project, the ambition of establishing feminist precedents (case law) in the real world is mirrored by the actual work of some female judges, who have become important exponents and true icons of the production of feminist discourses on law, being the opinions of US Supreme Court Justice Ruth Ginzburg perfect examples. In contrast, in the Brazilian justice system promoting feminist thought is still an act of courage and boldness by some female legal professionals who dare to speak out, and who, for this reason, may come to receive some kind of informal punishment, in the form of peer pressure, or may even be shunned and ostracized by the system. The task of this book is to fight institutional solitude, a malady that causes feminist thought to be produced in isolated islands within the spaces of power, a circumstance that limits its reach. Our goal is for women to be the protagonists of their own stories, without fear of retaliation. We want them to be able to network, to strengthen themselves collectively, and to reach an ever-growing audience. As portrayed in following rewritten judgments, women are the subjects of judicial decisions, and this brings the facts of the case and the way women

are judged to the center of the discussion, a process that shows that it is possible, and fairer, for any person to start using whatever legal instruments available to them to promote applications of law that respect values such as dignity, equality, and non-discrimination.

In order to reimagine the dimension of power, we must interpret judicial and statutory rules taking into consideration the existence of gender and racial asymmetries. What can we anticipate from such an approach? Most likely, a justice system that generates decisions that are more engaged in dialogues and that reflect the diversity of actors and actresses that coexist within the social realm with more accuracy. Practice (praxis) then ceases to be associated only with form. It enters the world of real conflicts, a world where women are deprived of many resources (of various kinds: material, social, of power) and are present in legal relationships as unequal subjects. Creating a feminist case law is an attempt to correct this situation and reach decisions that actually improve women's lives.

While part of women's relentless effort to raise their voices, the strategy of rewriting feminist judgments has limitations[95]. A political one, already identified by Fabiana Severi in the introductory chapter, is that the project also suffered with the political, symbolic, and epistemological constraints posed by the barriers faced by Black women when it comes to accessing permanent jobs in law schools. The political reimagination experiments found in this compilation's chapters

[95] In the introductory chapter to this volume, Fabiana Severi discusses the methodological limitations inherent to giving women protagonist roles if one follows a set of rules put in place by the hegemonic game. The rewritten judgments must respect the form and the limits intrinsic to the formality typical of a judicial decision, and that includes respecting legislation, precedents, and authoritative texts (interpretation) available at the time a specific decision is issued. This principle aims at making the new, rewritten judgment an alternative that is pedagogically and methodologically comparable to the original judgment, thus resulting in learning that can be used for the improvement of the application of law. Besides these methodological restrictions, the strategy of rewriting judgments has also political limits.

have been significantly affected by the underrepresentation of Black women among faculty in higher education institutions, particularly in law schools.

Nonetheless, the project's political commitment to working with judicial decisions reinforces the fact that, if legal reasoning and judgments are partially responsible for the exclusion of women and for the structural violence they face, they can also be part of the solution (HUNTER; MCGLYNN; RACKLEY, 2010). The project ultimately confirms our confidence in law itself and in legal reform as important means for social change[96]. Based on Carol Smart's work, Hunter, McGlynn, and Rackley (2010) emphasize that, rather than questioning the validity of the image of law, feminist reformist perspectives end up reinforcing such image, because they try to correct law's errors and shortcomings. Audrey Lorde (1984) reminds us that the masters' tools "will never dismantle [their] house[s]", the buildings that uphold their power. According to Lorde, even if we defeat our masters at their own game, it does not mean that we have come to be genuinely transformed. Therefore, she claims, the masters' houses should not be our only means of livelihood, nor should the use of their tools our only method of action.

At the same time that feminist approaches reinforce the call to remove the legal phenomenon from its place of political centrality, and to not get carried away by legal fetishism, the rewriting project recognizes that law has a constitutive effect not only on other discourses but also on the legal field itself (HUNTER; MCGLYNN; RACKLEY, 2010). Thus, the political relevance of the project derives from the fact that judicial decisions construct concrete, material meanings in the lives of women, as well as impact their reality, being

[96] For a discussion on the limits of a reformist perspective (law as social engineering) see Santos (2013).

therefore able to potentially change their lives. The power law has to transform women's living and survival conditions, often for the worse, makes it urgent, to work for changes in legal rationality and in the dominant methods of application of law, even if this is not the only strategy in which we should invest.

THE FEMINIST THEORIES THAT WERE INCORPORATED INTO THE NEW JUDGMENTS

An essential resource used for the judgments' rewriting is the combination of feminist theory and legal theory. The new versions help to respond to one of the significant challenges posed to the development of scientific knowledge in our time: how do the major theories of analysis (political theory, sociological theory, general legal theory) deal with phenomena in a way that takes into account social markers that determine differences in people's access to power and resources, such as gender and race? Once they incorporate these categories, to what extent do they redesign their approaches?

The rewritten judgments highlight that an approach to political, legal, social, and economic phenomena that considers women's and other groups' unequal access to resources of power can be in full harmony with the settled methods of constructing legal reasoning and judicial persuasion. If the reimagined judgments are deeply connected to feminist philosophical foundations, of course it is not the abstract feminist theory itself that will be incorporated into the process of constructing a legal reasoning that will point to the best solution for the case. In moving from theory into practice, the new feminist judgments follow the steps required for the convincing of the judge like it happens with any other judgment. Each new version should roughly then have the following portions: statement of the facts of the dispute,

statement of legal issues, and application of statutory, precedential, and authoritative standards to the case.

Feminist theory has a concrete influence on how facts are analyzed, as it inquires into the situation of women and take cognizance of the specificity of their histories; they also contribute to the understanding of facts in a broader context, and may require the production of empirical data as well as a more detailed analysis of the impact of certain policies. Feminist arguments, in the application of law to a case, question the impact rules, procedures, and behaviors have on women, and seek to uncover explicit or surreptitious patterns of discrimination, inequality, and violence. Applying the normative and precedential framework from this perspective is therefore likely to guarantee a non-discriminatory application of statutes and to maximize the rectification of patterns of inequality and disadvantage, in order to ensure equality in a substantive sense. This method of elaborating judicial reasoning is not foreign to the application of law in judicial proceedings and is in direct dialogue with the consolidated national and international standards for the promotion and the defense of the human rights of groups that suffer with structural discrimination.

Hunter (2010) presents the main features of a feminist approach as to writing judgments. For her, feminist thinkers have developed a collection of habits, techniques, concerns, and dispositions that are deployed in rewriting judgments. They include: 1) Investigating the consequences connected to inequality and to the discrimination of women and other excluded groups that result from seemingly neutral rules, practices, and behaviors; 2) Making women visible, not only by paying attention to their experiences, but also by taking cognizance of the empirical evidence and the patterns that unveil the injustices they suffer or will come to suffer with the outcome of the

cases; 3) Uncovering and challenging biased practices, behaviors, and rules that work against women, besides revealing gender biases and stereotypes embedded in legal scholarly authoritative texts and in legal reasoning;4) Reasoning with basis on women's context and life experiences; grounding decisions on the particularities of each situation; avoiding punishing women for making choices that may be considered wrong or reprehensible; 5) Paying attention to injustices, especially to entrenched patterns of abuse, violence, and discrimination, and seeking to remedy them in order to improve women's living conditions; 6) Promoting equality in a substantive manner; and 7) Taking into account feminist legal contributions to improve judicial decisions with the purpose of guaranteeing women equality and enjoyment of their rights as full citizens.

EMPLOYING FEMINIST THEORIES TO OPEN NEW PATHS FOR THE INTERPRETATION AND APPLICATION OF LAW

Hunter, McGlynn, and Rackley (2010) highlight that reimagined judgments, even when referring to diverse sets of feminist theoretical contributions, have in common the fact that they offer an important critique directed at the canons of liberal legalism, the foundations of which still exert enormous on the way people see and construct legal reasonings, from the initial years of law schools. According to these authors, the first aspect of the critique put forward by the rewriting task is that it challenges the individualizing, atomized, and competitive view of those who are subjects of rights. Feminist rewritings, by claiming that women are as subjects of rights, tell stories of deep interconnectedness and interdependence that unites women, the groups of which they are part, and the environment in which they live.

The texts resulting from the rewriting experience stress that it is crucial that the facts concerning the case are seen from a standpoint that considers that women's lives are woven together by a commitment to collective action and to the development of an ethics of care, which works toward collective well-living and well-being. In this sense, the rewritten judgment on the case of the assassination of Margarida Alves is emblematic.[97] It shows that an analysis of the facts should not be limited to considering a women's murder in a manner that is detached from her historical time and from the political and collective action happening in her physical surroundings. It is not only about an individualized woman, disconnected from a specific context. The case is about silencing, through murder, a rural workers' union leader, someone who was a human rights champion deeply engaged in the struggle for the rights of her fellow workers, and whose voice was extinguished during the Brazilian military dictatorship. The authors who rewrote the judgment about her murder highlight the misguided handling of the case. Ms Alves was made into an individual disconnected from her history as a union leader and from the context of the social struggle in Brazilian countryside. This ultimately compromised the investigation, and undermined the inquiries and the punishment of those involved with her death.

Another equally relevant example is the rewriting of the judgment that denied a child access to full-time schooling supposedly because, supposedly, the child had already guaranteed their right to education because they were already attending another school.[98] Ex-

[97] See the chapter "Margarida Maria Alves continues to flourish: a rewriting from a feminist legal perspective of the IACHR's Report on the Merits of Case 12.332", by Gilmara Joane Macêdo de Medeiros, Clarissa Cecília Ferreira Alves, Aléxia Chaves Maia, Julia Gomes da Mota Barreto, and Mirian Narrara Peixoto de Aquino.

[98] See chapter "Unveiling Shared Responsibility: the Full-Time School case", by Ana Carolina da Matta Chasin, Carla Osmo, Fernanda Emy Matsuda, Ísis Boll de Araújo Bastos, Lia Carolina Batista Cintra, and Maíra Cardoso Zapater.

amining the judgment has led the authors to a more comprehensive analysis of the facts. The inequalities that fall on women regarding the responsibility for care work was considered, and the authors emphasize how insufficient is an analysis that isolated the original court decision by taking an individualistic approach to the child's right to education. Indeed, the matter must be seen in a broader, interconnected fashion, since the policy governing daycare centers and full-time schooling for children in different age groups is a crucial welfare policy. It is a way for the state to share with women the care work that they do entirely for the benefit of society as a whole, at the expense of women's chances to work and improve the living conditions of their families and communities.

A further aspect of the critique directed towards the assumptions championed by liberal legal theory revolves around the reservations of the justice system when it comes to acknowledging women as being both autonomous rights-holders and victims. According to Hunter, McGlynn, and Rackley (2010), the tenets of legal liberalism contribute to the formation of the rigid social positions in which individuals are placed, because these people are categorized either as victims or as autonomous, as capable or as vulnerable, as independent or as unprotected, but they never simultaneously embody both poles of the dichotomy. Gender ends up portraying autonomy as a masculine trace, and vulnerability as a feminine element. In practice, if women try to exert their autonomy, suspicion falls on them, and their actions and words are questioned. If their autonomy is recognized, they begin to be seen as people who neither need nor deserve the protection of the state. Gender and racial stereotypes also determine which women are considered victims. As a rule, the profile of a woman needing care and protection is associated with white, middle-class women. Black women are often denied the status of victims. Flauzina and Freitas

(2017) argue that racism blocks solidarity, the recognition of otherness, and empathy from being extended to Black people. Widespread suspicion against Black men and women prevents them from being seen as vulnerable, that is, people to whom the state has protective responsibilities.

The rewriting that analyzes the case of the mother who lost custody of her children due to a court decision determining the search and seizure of the children in Brazil to be given back to their father shows the difficulties faced by mothers in order to have their status as victims of domestic violence recognized by Brazilian courts[99]. Among the various justifications for the original court decision of taking the children from their mother, there was a claim that the woman was completely autonomous, as she was able to move from abroad with her children and come to Brazil. The reimagined version goes back to the debate on the state's obligation to safeguard women who are victims of violence, thus providing a fresh perspective on the decision of the mother to move to another country with the consideration of a wider framework of violence and mistreatment experienced by women.

In the rewriting of rape trials, the gender perspective was a strategy to highlight the difficulties faced by women who suffer this type of violence face in order to be treated as credible victims.[100] As

[99] See chapter "Pilar, the search and seizure of her children, and the rewriting of the decision" by Andreza do Socorro Pantoja de Oliveira Smith, Luanna Tomaz de Souza, Milene Maria Xavier Veloso, Verena Holanda De Mendonça Alves, Beatriz Neder Mattar, Cristiane da Silva Gonçalves, Erika Vitória Ferreira de Andrade, Gabriela Rodrigues Veludo Gouveia, Gabriela Gomes Moura, Hermes Breno da Silva Santos, Jéssica Zouhair Daou, Josué Gomes Pinheiro, Letícia Mendes Silva de Vasconcelos, Laila Vidigal de Souza, Marcella Sousa Cavalcante, and Vitória do Socorro Peixoto Pires.

[100] See chapter "A Gendered Approach to Sexual Exploitation of Vulnerable Adults: Reassessing Evidence and Criminal Definitions", by Mariângela Gama de Magalhães Gomes, Maria Claudia Girotto do Couto, Bruna Rachel de Paula Diniz, Ana

pointed out in the feminist version in this book, which is about re-reading evidence and concepts regarding the rape perpetrated against a vulnerable person, women have to deal with numerous obstacles to get justice for their cases, since they are seen as autonomous individuals with full decision-making capacity. Such difficulties include dealing with the devaluation of their words, judgmental remarks, preconceptions, and the use of stereotypes to classify their behavior; enduring reluctance from the court to analyze evidence attesting to their vulnerability; and facing situations in which they are blamed or seen as responsible for the events leading to the offense.

A third and last aspect of the critique of the hegemonic liberal way of interpreting and applying law concerns the dichotomy between the public and the private spheres (HUNTER; MCGLYNN; RACKLEY, 2010). When it comes to ensuring and enforcing women's rights, we witness a justice system that is reluctant to interfere in the private sphere, even if only to enforce existing legislation. Conversely, when the purpose is to limit women's access to their rights, we get court decisions laden with conservative notions about the role played by family, about the right to life, and about women's freedom and independence as to their sexual and reproductive rights.

The reimagined decisions that have addressed cases of domestic violence, feminicide, and voluntary termination of pregnancy are lavish in demonstrating the contradiction mentioned in the previous paragraph, and they stress the way national legislation, precedent, and international human rights standards were timidly and precariously applied in the original decisions, therefore compromising the enforcement of women's human rights. In these cases, legislators expect that those responsible for applying law resist the temptation

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Paula Bimbato de Araújo Braga, Jaqueline Costal dos Santos, Letícia Russo Videira, Michele Prado do Amaral, Rafaela dos Santos Oliveira, and Sophia Lima.

to analyze the evidence presented in a merely bureaucratic manner, something that would require improving concepts; reviewing evidentiary rules and methods for gathering evidence; investing in mechanisms that ensure that victims are carefully listened to; having personnel skilled in recognizing the various kinds of violence by being able to identify more or less important contextual factors and by employing different and multidisciplinary approaches. Form must be at the service of content to ensure, first and foremost, the lives, the safety, and the well-being of women.

Finally, the rewriting about the decisions of the Brazilian Federal Supreme Court on issues concerning common law marriage (known as stable unions in Brazil) and concubinage for social security purposes demonstrate how the defense of a certain notion of family, associated with monogamy, leaves the realm of the personal beliefs of male and female judges to invade the private sphere, a move that generates injustices falling disproportionately on women. Such notions are invoked to base decisions that restrict women's rights, as it happened when women in common-law marriages were denied the right to a survivor benefit[101].

CONCLUSION

Our considerations derived from the process of rewriting encompassed both the tangible (such as the structure, design, and content of the decision) and the practical (such as the interpretation and the act of rewriting) aspects of the experience of feminist rewriting.

[101] See chapter "Feminist rewriting of the Brazilian Federal Supreme Court (*STF*) themes 526 and 529: social security, affection, and absent women", by Andréa Lasevicius Moutinho, Débora de Araújo Costa, Deise Lilian Lima Martins, Irene Maestro Sarrión dos Santos Guimarães, Júlia Lenzi Silva, Leila Giovana Izidoro, Maria Angélica Albuquerque Moura de Oliveira, Marianna Haug, and Thamíris Evaristo Molitor.

We argued that the rewriting methodology adheres to the format of judicial decisions while simultaneously challenging it, reassessing its content, and transforming feminist theories into actionable practice. Consequently, the rewriting approach amplifies marginalized subjectivities that have so far been disregarded, dismantles barriers that confine feminist movements to specific domains, and confronts unquestioned gender stereotypes that perpetuate oppression and discrimination against women.

In addition, the methodology of rewriting decisions from a feminist perspective helps to strengthen content that can be transformative in teaching, research, and extension practices in law schools. Brazilian law schools have developed a way of teaching law that reproduces many of the individualistic foundations of liberal legalism identified in the original decisions. This liberal discourse perpetuates social exclusion and influences legal education in Brazil. It therefore shapes pedagogical practices in the ongoing training of legal professionals and dictates the prevailing mode of legal reasoning within our justice system. This book allows us to get to a turning point concerning the pedagogical practices dominant in law courses up to now and the results they have produced.

The rewriting experiment leads us to believe that it is possible to build pedagogical alternatives in order to change the direction taken by our national legal reasoning. Telling stories differently, revisiting the facts with a focus on the injustices that emerge from different contexts, applying methodologies of analysis and of application of law that enable the parties to the cases, and third parties, to reach a commitment between the means and substantive equality are elements that can transform legal pedagogical practice.

Therefore, it is particularly relevant that a good part of the rewritten decisions has been the subject of discussion in classrooms

and research groups, breaking the formalism of liberal legalism and bringing to the table a more qualified understanding of the social dimensions of the application of law. This is an element that has been a part of the Feminist Judgment Project since its beginning in Brazil, a practice that opposed the tendency to isolation and connected groups and researchers who have dedicated themselves to the study of the relationship between gender and law in different points of the country.

Our challenge is to find out whether it is possible to decolonize legal approaches in theory and practice, and we seek in the many stories retold the references for a new epistemology, one that translates what it means to live a subaltern life in such a plural and unequal country, and that turns law school classrooms into spaces for transformative dialogues. The project also contributes to learning when taken into the context of extension activities, which have been increasingly incorporated into law school curricula. Court decisions teach us that rewriting them is only good enough if we think of ways to change in reality. And how do we do that? What kind of law degree do we want? What kind of law program is capable of changing our reality? When trying to answer these questions, we may find inspiration in the words of Carolina de Jesus (2007, p. 47), a Black Brazilian writer who came from the *favela* (slums):

Escrevo a miséria e a vida infausta dos favelados. Eu era revoltada, não acreditava em ninguém. Odiava os políticos e os patrões, porque o meu sonho era escrever e o pobre não pode ter ideal nobre. Eu sabia que ia angariar inimigos, porque ninguém está habituado a esse tipo de literatura. Seja o que Deus quiser. Eu escrevi a realidade.[102]

[102] TN. translation: "I write about the misery and the unhappy life of the slum dwellers. I was rebellious, I didn't believe in anyone. I hated politicians and bosses because my dream was to write and the poor can't have noble ideals. I knew I would make enemies because no one is used to this kind of literature. whatever will be, will be! I wrote about the reality."

Embracing this "realidade" (reality) as a significant aspect in the evolution of case law is crucial, as it enables in-depth analyses and perspectives that address issues of inequality and discrimination. This approach can certainly lead to the creation of legal practices unafraid of being rewritten.

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PART II

PART II - REWRITTEN DECISIONS

MARGARIDA MARIA ALVES CONTINUES TO FLOURISH: A REWRITE FROM A FEMINIST LEGAL PERSPECTIVE OF THE IACHR'S REPORT ON THE MERITS OF CASE 12.332

Gilmara Joane Macêdo de Medeiros - Clarissa Cecília Fereira Alves - Aléxia Chaves Maia - Julia Gomes da Mota Barreto - Mirian Narrara Peixoto de Aquino

On August 12, 1983, the Rural Workers Union (STR) leader of Alagoa Grande, Margarida Maria Alves[103], was murdered in front of her house with a twelve-gauge shotgun. Her murderer (a hired killer) came from a red Opala, and before making the fatal shot that would disfigure her face, he made sure that this was the woman he was supposed to execute. Margarida, who was watching her eight-year-old son playing in the street, died instantly, without any chance of survival. The house was covered in blood and the town was literally in the dark[104]. The woman, who had served as the leader of the rural union for twelve years, has tragically passed away. During her tenure as president, she passionately expressed her steadfast commitment to the cause, proclaiming that she would perish in the struggle rather than succumb to hunger.

[103] Margarida was the youngest of eleven children. Like her parents, she was a farmer. She started working in the fields when she was eight years old and studied until the fourth grade, being able to read and write. After becoming literate, she joined the rural workers union as a secretary, and at that time her husband, Severino Cassimiro Alves, was the president. Gradually, she stood out as a union leader and was increasingly politicizing her performance and interlocution with religious sectors of the Catholic Church. (RODRIGUES, 2018).

[104] Soon after the crime occurred, the city of Alagoa Grande was left with no electricity for two hours, which allowed for a quiet escape of its perpetrators and the inaction of the police. The strange lack of power caused the delegate in charge of the investigation to request information from the state agency responsible for the electricity supply, SAELPA (RODRIGUES, 2018).

Like other Brazilian human rights defenders, Margarida's death was not a surprise. She received constant death threats and intimidating messages from local landowners, also known as members of the "Grupo da Várzea"[105] (BRASIL, 2013). Margarida helped workers to claim their rights through labor lawsuits filed against landowners by the union. When she was executed, the STR had seventy-one (71) lawsuits against landowners in the region (RODRIGUES, 2018).

In the two inquiries that investigated her murder, a clear execution, several names of rural landowners were mentioned as people interested in her death[106], that is, as allegedly ordering it. Eyewitnesses have attested to a meeting among the landowners where the decision to execute the union leader was made. Despite multiple testimonies naming several individuals involved, only two individuals were formally charged, and a significant number of the implicated individuals were left uninvestigated. Following two judicial processes and a span of eighteen years of legal proceedings within the state of Paraiba's judiciary, the two primary defendants accused of the crime were ultimately acquitted by the jury. Additionally, the other four individuals involved in the incident benefited from the statute of limitations, resulting in their exemption from prosecution. Three people mentioned in the inquiries were murdered as alleged file burnings. Nobody was arrested, and nobody was convicted[107].

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[105] Expression used to name some families from the State of Paraiba (especially the Veloso Borges, Ribeiro Coutinho, Lundgren, Santiago, Cartaxo, among others) who owned land and sugar cane mills located in the surroundings of the Paraíba River. Some of these families were the heirs of oligarchies that dominate the state politics since the First Republic to the present day (MELO, 2021).

[106] Lino Miranda, Jozemil Miranda, Aguinaldo Velloso Borges, Fernando Cruz de Melo, José Buarque de Gusmão Neto, Antônio Almeida Régis and Antônio Carlos Coutinho Régis (RODRIGUES, 2018).

[107] After the murder of Margarida Maria Alves, the first police investigation was opened in the municipality of Alagoa Grande. This police investigation, which was

Reading the investigation and lawsuit-related documents, her execution, as well as the charges made to the Inter-American Commission on Human Rights and its reports on the merits, shows that the entire investigation and criminal process was marked by a series of flaws and omissions on the part of the Brazilian state, which ended up resulting in the acquittal of the accused and the expiration of time. It should be noted that Margarida was assassinated in the context of the Brazilian civil-military dictatorship. She was subsequently recognized as a political amnesty from the military regime by the Amnesty Commission, through Directive No. 1174/2016.

In 2000, the *Gabinete de Assessoria Jurídica a Organizações Populares (GAJOP)*, the *Centro por la Justicia e Derecho Internacional* (CEJIL), the *Movimento Nacional de Direitos Humanos (MNDH),*

very flawed and criticized by human rights organizations, named the brothers Amaro and Amauri José do Rêgo, who have been on the run ever since, and Antônio Carlos Coutinho Régis (son of the farmer Antônio Régis) as the perpetrators. Criminal Case No. 183/83 was filed by the Public Prosecutor's Office of Paraíba. After several adjournments, requests for retrials and problems between the prosecution and the judge, in 1988 the jury acquitted Antônio Carlos Coutinho Regis. The prosecution appealed the jury's decision, and in 1990, the Court of Justice ordered that it be set aside and that a new jury be impaneled. In the meantime, new testimony would change the course of the case and the prosecution would file a new complaint. Witness Maria do Socorro Neves de Araújo testified that her husband, Severino Carneiro de Araújo, had been murdered in 1986 as "witness elimination" because he had information about Margarida's case. The widow was told of the motive by police officer Aldenis Cunha, who was later murdered (also in 1986). According to her, Margarida's execution was carried out with the participation of the soldier Betânio Carneiro de Araújo and was planned by Aguinaldo Velloso Borges, José Buarque de Gusmão and Edmar Paes de Araújo (Mazinho). The latter was executed in 1986. These new testimonies and investigations led to a new criminal case, parallel to the first, AP n. 372/1995, in which the soldier Betâneo Carneiro dos Santos and, as the planner, José Buarque de Gusmão were accused. Aguinaldo Velloso Borges was not charged because he died in 1990. In 1996, the criminal statute of limitations was applied to the soldier Betâneo Carneiro. In 1998, Antônio Carlos Coutinho Regis was retried and acquitted. In 2001, José Buarque de Gusmão was tried and acquitted. In 2009, the statute of limitations was declared in favor of Amaro and Amauri José do Rêgo.

the *Comissão Pastoral da Terra (CPT)*, and the *Fundação de Defesa dos Direitos Humanos Margarida Maria Alves (FDDH-MMA),* filed a complaint against the Brazilian government in the Inter-American Commission on Human Rights (IACHR). In 2008, the IACHR published Admissibility Report No. 9/2008, continuing its investigations into the case. In 2017, the IACHR published Report No. 133/17 with recommendations to the Brazilian State. In 2018, the IACHR published Report No. 120/2018, dealing with the information provided by the petitioners on the compliance of the recommendations by the Brazilian State. On April 26th, 2020, the IACHR's last Report, No. 31/2020, came out, reaffirming the recommendations previously issued. In line with a feminist legal standpoint, we have undertaken the task of rewriting Report 31/2020, considering gender perspectives and addressing relevant concerns from this framework.

FORTY YEARS WITHOUT AN ANSWER: THE SELECTION OF THE CASE, DIFFICULTIES ENCOUNTERED, AND ARGUMENTATIVE PATHS ADOPTED.

In 2023, forty years will have passed since the execution of Margarida Maria Alves. Forty years without a governmental response to such a cruel crime and without adequate compensation for her family members and her memory. After so much time, it is hardly possible to achieve any measure of punishment in the criminal sphere. Most of those who ordered this crime are dead. As time passes, our ability to deliver justice and preserve the memory of this violation becomes increasingly challenging.

In 2022, for example, the City Council of Campina Grande, State of *Paraiba* decided to honor José Buarque de Gusmão (one

of the minds behind Margarida's execution, now deceased), giving his name to a city street (Municipal Law nº183/2022). Meanwhile, Margarida's son, José de Arimatéia Alves, is still fighting to receive compensation from the Brazilian state for the death of his mother and for all the damage that his early loss caused him (IACHR, 2020).

The rewriting process was organized as an inter-institutional research project, registered at UFPB and UFERSA. We subdivided ourselves into three groups[108], which, in turn, chose to rewrite decisions from a feminist perspective related to an eviction case and a femicide case. In our quest to determine which decision to rewrite, we initially sought a case of historical significance to the states where our universities are located (Paraíba and Rio Grande do Norte) and that also embodies the ongoing struggle of Brazilian women. Given the location of our universities and our working partnerships, we thought that the struggle of rural women needed to be highlighted, with Margarida being one of the main symbols of peasant leadership in Brazil.

Following internal deliberations, we embarked on a quest to investigate the case of Margarida Maria Alves. Through collaboration with the human rights network in the state of Paraíba, we had the opportunity to engage with researcher Luanna Louyse Martins Rodrigues, who extensively studied this case as part of her doctoral thesis. Through her, we had access to the digitalized case file. Next, we tried to read the material. At this stage we noticed the following drawbacks: the digitalization was not good, which made reading difficult; Upon closer examination, we discovered that the scope of our endeavor extended beyond a single case; in fact, there were two cases intertwined, encompassing a lengthy duration of eigh-

[108] One group was coordinated by professor Ana Lia de Almeida and the other by professors Tatyane Guimarães Oliveira and Caroline Sátiro.

teen years. Recognizing the immense challenges associated with selecting a decision to be rewritten, we shifted our focus toward an international case instead.

From this point, we had other questions about the chosen case. Margarida Maria Alves' complaint is still with the Inter-American Commission on Human Rights. That is, the Inter-American Commission on Human Rights has yet to denounce the case to the Inter-American Court of Human Rights[109]. In this sense, what we have so far are the Reports in which the IACHR verifies the contradiction between the petitioners and the State, takes a position on the existence of human rights violations, and adopts recommendations to the accused State. In all, the Merits Report is thirty-two pages long. We opted to rewrite only the content related to the "analysis of law" and "recommendations", merging them with some information present in the first part of the decision. In general, we have modified the entire text, keeping only some passages with wording close to the original.

It is worth noting that on the IACHR webpage, it is only possible to find the reports of the Commission itself, so we did not have access to the complaint, or to the response of the Brazilian State, nor to the documents attached to these manifestations. We understand what was dealt with in these documents from the summary of

[109] Both the Commission and the IA Court are organs that make up the structure of the Inter-American System for the Protection of Human Rights IASPHR. The former has the role of monitoring the human rights situation and compliance with the DHR and the ACHR, inspecting countries, producing special reports, exercising an advisory function, and acting jurisdictionally in receiving individual and collective petitions. It is considered the gateway to the IASPHR, filtering the cases that will become contentious before the IA Court. Only when the Commission's proceedings have been exhausted can the case be submitted by the Commission or by a State party to the IA Court. The IA Court was created by the ACHR and has the function of monitoring compliance with it, exercising a jurisdictional and advisory role vis-à-vis the countries bound by the pact.

the case made by the IACHR. To compensate for the fact that we did not have direct contact with all the documents that formed the basis of the decision, we supplemented our reading with academic works and available reports on the case, as well as resorting to the judicial process that took place in Brazil and the news published by the petitioners.

Given these challenges, we began discussing how to rewrite the decision and what points would be essential to the argument. As we read the IACHR Report, we noted some important issues: a) the analysis of the law is limited, often just listing the articles of the American Convention on Human Rights (ACHR) and the American Declaration of the Rights and Duties of Man (ADRDM) that were violated; b) the IACHR does not reflect in more detail on Margarida's condition as a woman who was murdered at the behest of male landowners, highlighting the existing gender political violence in this context and the silencing of an HR defender; c) international legislation protecting women's rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women[110], was not used d) we understand that the results "acquittal" and the application of the "statute of limitations" in crimes of this nature are not random events, but are planned by the State itself and must be considered a violation of human rights; e) finally, we consider it fundamental to observe the historical and political context in which the case occurred, namely, the annihilation of the peasants' struggle initiated with the *Movimento das Ligas Camponesas (Peasant Leagues Movement)* , as well as the

[110] Although these covenants were ratified by the Brazilian state after Margarida's death, the denial of justice to her relatives was practiced under the legal scope of these instruments, so we understand that they must reach the most recent actions practiced against Margarida's memory and the continued absence of justice.

Civil-Military Dictatorship in which Brazil found itself. In this case, it is important to analyze how such attitudes reflect the patriarchal violence of the Brazilian State.

It is worth pointing out that we do not disagree with the result of the decision made by the IACHR in its Report. Therefore, our rewrite does not modify the decision but instead alters and includes arguments to emphasize the gender condition of Margarida Maria Alves and the gender violence practiced by the Brazilian State in continuing to perpetuate the absence of reparation and the historical injustice against her memory. In this sense, we drew inspiration from the feminist legal method known as "feminist narrative," which consists of retelling procedural history emphasizing women and its impacts on their lives. We also adopted methodological stances such as contextualization, the use of legal and extra-legal materials in the reasoning of the decision, and an interpretation that privileges concrete over abstract reasoning (feminist practical reasoning) (SILVA, 2023). We sought to interweave the multiple dimensions that can be observed in the case, such as gender, race, and class, seeking to promote an intersectional understanding.

Thus, we agreed on the following strategies for the rewrite: (a) the adoption of gender-neutral, direct, and contextualized language; (b) the use of legal arguments that reflect on Margarida's status as a woman leader and that reconstruct the historical importance of her political participation; (c) the adoption of a narrative that highlights the centrality of women's experiences and their life stories and the impacts on their family members; (d) the adoption of a gender bias in the interpretation of the various state omissions that resulted in the application of the criminal statute of limitations and the consequent acquittal of the ones responsible for the offense.

IACHR'S REPORT NO. 132/2020 REWRITTEN FROM A LEGAL-FEMINIST PERSPECTIVE.

IV. LEGAL ANALYSIS

96. The Commission points out that the assassination of trade unionist Margarida Maria Alves, which occurred on August 12, 1983, and a considerable part of the investigations into her murder and prosecution took place before Brazil acceded to the Inter-American Convention on September 25, 1992. For this reason, in determining the responsibility of the Brazilian State, the Commission will consider in its analysis of the law both the American Declaration of the Rights and Duties of Man (ADRDM) and the American Convention on Human Rights (ACHR).

97. The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention), whose adhesion occurred in 1995, will also be considered. This norm will be used to determine the responsibility of the Brazilian State for the facts committed after the year of its adhesion.

A. THE RIGHT TO JUSTICE, JUDICIAL GUARANTEES, JUDICIAL PROTECTION, AND THE DUTY OF THE STATE TO INVESTIGATE AND PUNISH VIOLENCE AGAINST WOMEN

1. GENERAL CONSIDERATIONS

98. The IACHR considers that the right to justice (Art. XVIII of the ADRDM) and the right to judicial protection (Art. 25 of the ACHR) have equivalent content. It is understood that these articles protect the prerogative of women, men, and non-binary people to go

to court when their rights are violated, as well as to have the violation of rights investigated by a competent authority and to obtain reparation for the harm suffered. The right to judicial guarantees (Art. 8 of the ACHR) is understood by the Inter-American Court as the right "to obtain from the competent State organs the clarification of the facts and the establishment of corresponding responsibilities through investigation and trial[111]. It follows, therefore, that states have the duty to investigate a violation of human rights that occurred on their territory, hold the guilty parties accountable, and repair the damage caused to the victims.

99. The duty to investigate obliges the State to use the legal means available to it to reach the truth of the facts. The investigation of a human rights violation is a state responsibility from which it cannot omit itself. Nor can the duty to investigate be treated as a mere formality, that is, as complying with the rites to give the appearance of an investigation.

100. The duty to investigate and punish human rights violations obliges the state to hold both the material and the intellectual authors of human rights violations accountable. In other words, perpetrators and the mastermind behind the crime. It also obliges it to hold accountable those who act to cover up human rights violations, favoring impunity, whether they are private or state agents. The foundation of this duty lies in the right to the truth possessed by the victim's family.

101. The duty to investigate is also supported by the Belém do Pará Convention (Art. 7), which requires the State to "apply due diligence to prevent, investigate and impose penalties for violence against women" And it informs that the State practices violence against women when it (its agents) perpetrates or tolerates it (Art. 2, a).

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[111] Inter-American Court of Human Rights, Barrios Altos Case Vs. Peru. Merits. Judgment of March 14, 2001. Series C No. 75, paragraph 48.

102. The State must demonstrate that it has employed all means at its disposal to reach the truth, exhausting all possible lines of investigation. It must act in a serious and impartial manner, removing any state agents that could hinder the proper conduct of investigations. The State is responsible for ordering, practicing or evaluating evidence that may be fundamental for clarifying the facts[112].

103. When it comes to the violation of a human rights defender, the IACHR understands that the State must investigate whether the violation is related to the defender's political activity, that is, whether the crime against her is related to her activity as a champion of human rights. Therefore, the State must identify, and punish the ones involved in the crime. The investigation must consider the local power structures, the people, and groups that would benefit from her death or had an interest in it, and these analyses must be included in the lines of investigation.

104. The right to judicial protection and justice also includes the reasonable duration of proceedings, which should be analyzed according to the complexity of each case. It must be observed whether the long duration of the process was necessary or was provoked by State action or omission to prevent conviction, thus favoring the incidence of measures such as the statute of limitations.

105. The socio-political context of the State must also be taken into consideration to observe whether there were procedural and judicial guarantees. That is, the democratic normality of the institutions (autonomy, impartiality, legality) are requirements for the respect of procedural and judicial guarantees. In other words, the appearance of institutional autonomy does not mean a guarantee of respect for the

[112] IA Court. Case of "Niños de la Calle" (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 230. See also, IACHR, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser. L/V/II. doc.68, January 20th, 2007, paragraph 41.

judicial process, especially if the State is going through an exceptional regime.

106. The duty to hold the guilty accountable is not exhausted by the state's prosecutorial action. It can be exercised in other ways, such as, for example, in the civil sphere (compensation) or even in the historical recognition of the violation of human rights and the identification of those responsible for preserving the truth and memory.

2. ANALYSIS OF THE PRESENT CASE

107. As previously elucidated, in cases involving the assassination of a human rights advocate, the State must conduct an investigation to ascertain whether her engagement in defending human rights constituted the motive behind the crime. This line of inquiry should be thoroughly pursued, leaving no stone unturned in exploring potential beneficiaries or individuals with vested interests in orchestrating the activist's execution.

108. The socio-political context in which Margarida Maria Alves was active as a trade unionist was hostile. In 1983, Brazil was still living under a military dictatorship that had direct interference in the local judicial instances and that was supported by the landowners of the region. In addition, the region in which the defender worked suffered a broad process of persecution of rural leaders, especially those linked to the Peasant Leagues, with rural workers killed and disappearing at the behest of the military regime and its collaborators. These facts were recognized by the Brazilian State itself through the work of the Amnesty Commission. The Brazilian State, acknowledging the persecution endured by Margarida Maria Alves during the military dictatorship, has granted her amnesty, meaning official recognition of the persecution faced. Furthermore, her name

is documented in the Final Report of the National Truth Commission, affirming her status as a peasant woman affected by dictatorship's persecution.

109.Furthermore, it is crucial to underscore that the socio-political environment was hostile towards women's political participation, particularly in leadership positions. The reports reveal the remnants of a patriarchal society prevailing in the region, where the majority of landowners were men exerting complete control over their properties and the laborers associated with them. Consequently, it can be inferred that the presence of a woman leader in the region caused significant discomfort. It is impossible not to observe the presence of traces of political gender violence against Margarida Maria Alves. Her execution was also a message to the rural workers' movements, especially the rural women - that this was not their place, and that anyone who followed in Margarida's footsteps would face a similar fate.

110. Prior to her murder, Margarida Maria Alves had reported the death threats she received to the police, and she openly discussed them in her political speeches. However, there is no information suggesting that the competent authorities conducted an investigation into these death threats against the human rights activist. The purpose of these threats was to instill fear in Margarida and hinder her political activities in the region, thereby highlighting the failure of the Brazilian state to prevent political violence based on her gender and her role as a human rights activist, as well as the omission to protect her life.

111. According to the documents presented to the Commission, Margarida Maria Alves received death threats from local farmers for being at the forefront of rural workers' mobilization, demanding their rights. During that period, the union leader oversaw seventy-one lawsuits filed by workers who received support from the union against

landowners in the region. On certain occasions, she was even prohibited from entering the properties to communicate with the workers. There are also reports of witnesses who, after filing a labor claim against the landowners or after looking for help from Margarida Maria Alves, were harassed, beaten, and threatened by the landowners. Despite these elements being present in the testimonies of the people heard by the police, the farmers who allegedly threatened her and had an interest in paralyzing her activities as a human rights activist were not initially investigated. The police only concentrated on the investigation of the alleged fugitives. These facts are evidence that the State was not diligent in investigating the crime.

112. The Commission highlights that the involvement of landowners affiliated with the "Varzea Group" was not subject to adequate and comprehensive investigation. Despite indications from police inquiries emphasizing the need to explore the potential participation of these landowners in the crime, this line of inquiry was not sufficiently examined or analyzed.

113. The Commission emphasizes that this type of investigation was required not only because of Margarida Maria Alves' work as a human rights defender but also because of the alleged involvement of public authorities, such as Aguinaldo Velloso Borges (federal deputy), Betâneo Carneiro (soldier), and Aldenis Cunha (sergeant).

114. Regarding Aguinaldo Velloso Borges, despite being identified by witnesses since the initial stages of the investigations in 1983 as one of the individuals with interest in the assassination of Margarida Maria Alves, he was only formally investigated as a party in the supplementary police inquiry that commenced in 1991. This investigation was opened a year after his death in 1990, eight years after the crime. Regarding the other individuals mentioned above, Sergeant Aldenis Cunha was reportedly executed in 1986, allegedly

to destroy evidence. The Public Prosecutor's Office charged private Betâneo Carneiro in the second criminal proceeding initiated to investigate the case, but he benefited from the statute of limitations due to his age.

115. In addition to not having sufficiently explored investigative lines to reach the truth, the Brazilian state failed to conduct the judicial process in several ways. The first procedural inquiry appointed Amaro and Amauri José do Rego as the executors and Antônio Carlos Coutinho Regis as the mind behind the crime. The first two were fugitives from the beginning, and as the years went by, the arrest warrants for them were no longer issued by the magistrate in charge (for ten years). In contrast, the third individual stood trial while remaining at liberty, despite his notable influence in the city of Alagoa Grande. There were indications suggesting that his family was engaging in witness intimidation during the trial proceedings. There is no justification for the arrest warrants not being renewed annually for ten years, which, once again, is an indication of State omission to provoke the result of the criminal statute of limitations and of a failure in the conduction of the proceedings. In turn, the competent authorities also did not investigate evidence of persecution of witnesses in the case.

116. The first jury trial was only scheduled in 1988, after six postponements of the hearing. In the meantime, the judge in charge of the case had a disagreement with the assistant prosecuting attorneys representing the family members of Margarida Maria Alves. Even with this disagreement and suspicions that the local jurors were being influenced to acquit the defendant, the request for a change of venue was denied. In this regard, evidence indicates a lack of impartiality on the part of the judge and external influence on the jurors, which constitute violations of the right to a fair trial and judicial guarantees.

117. The first jury acquitted the defendant Antônio Carlos Coutinho Régis. The Public Prosecutor's Office appealed the decision to the Court of Justice (second instance), on the grounds that the result of the jury was contrary to the procedural evidence. The court accepted the appeal in 1990, determining that a new jury should be held. The new jury would only be held in 1998, ten years after the first. The delay in holding the new jury is yet another indication of the failure of the state to continue the proceedings within a reasonable time.

118. Before the first jury in the case took place in 1988, a new witness, Maria do Socorro Neves de Araújo, testified in front of competent authorities in 1986 about the case. Her husband, Severino Carneiro de Araújo, had been murdered a few months earlier. According to her, the reason for his death was that he had participated in the murder of Margarida Maria Alves together with the soldier Betâneo Carneiro, Aldenis Cunha (sergeant), and Edmar Paes de Araújo, at the behest of Aguinaldo Velloso Borges, her son-in-law José Buarque de Gusmão, and Antônio Carlos Coutinho Régis. Her husband commented about the crime while drinking, leading to mistrust among his associates. Consequently, it is believed that he was murdered to prevent him from disclosing any incriminating information. Still, in 1986, Aldenis Cunha and Edmar Paes de Araújo were also strangely murdered. Even though this statement was made in 1986, and even though the participants in the crime were supposedly executed, this line of investigation was only opened as a complementary inquiry by the Public Prosecutor's Office in 1991, five years after the statement was made. The delay in the conduct of the proceedings, once again, was unjustified, jeopardizing the preservation of evidence and the attainment of the truth about the crime. In 1990, Aguinaldo Velloso Borges, one of the main suspects in ordering the murder of Margarida

Maria Alves, passed away without being formally indicted. Between 1991 and 1995, the case came to a standstill with no progress made by the responsible authorities. Once again, compelling evidence points to a deliberate state omission aimed at undermining the proper progress of the legal proceedings.

119. Faced with the paralysis of the original case, the Public Prosecutor's Office initiated another criminal action parallel to the first, accusing José Buarque de Gusmão as the intellectual author of the crime and Betâneo Carneiro as the material author in 1995. That is, the accusation by the Public Prosecutor's Office occurred four years after the conclusion of the complementary inquiry. In 1996, the statute of limitations was applied in favor of soldier Betâneo Carneiro. The unjustifiable delays in the investigations and procedural proceedings resulted in the expiration due to the statute of limitations. Consequently, it is evident that the State's failures and omissions contributed to the imposition of the criminal statute of limitations, preventing the attainment of justice.

120. In 1998, Antônio Carlos Coutinho Régis went under jury trial again. He was acquitted again in a decision without proper reasoning and with solid suspicions of undue influence over the jurors. In 2001, José Buarque Gusmão Neto was acquitted by a jury, also in a trial where there were suspicions about the impartiality of this jury. The Public Prosecutor's Office appealed the decision, which was reversed by the Court of Appeals. However, through an appeal to the Superior Court of Justice, the jury's decision was upheld, maintaining his acquittal.

121. It can be observed that the Brazilian State was not diligent in exhausting all lines of procedural investigation, which favored the non-indictment of the alleged instigators of the crime and the execution of witnesses and participants in the homicide of Mar-

garida Maria Alves. Nor did it explore the evidence of participation of public agents in the crime. Moreover, the interference in the jury body, the lack of procedural movement, the excessive postponement of hearings, and the inaction of public agents in the investigations, in the filing of charges and in the procedural movement contributed to the penal statute of limitations on the accused, as well as weakening the procedural evidentiary content, facilitating the acquittal of two of them. In this way, we observe the strong presence of evidence that compromises the procedural guarantees, the impartiality of the justice system, and the respect for the right to justice and the truth of the relatives of Margarida Maria Alves.

122. It should be noted that the Brazilian state was under a civil-military dictatorship when Margarida Maria Alves was murdered and during part of the investigation on which her case was based. The historical evidence of the relationship between the alleged perpetrators of the crime of Margarida Maria Alves and the regime of exception is strong, which is another factor that indicates the unwillingness of the state to reach the truth about her crime and hold the responsible people accountable, and corroborates the dysfunctionality of the institutions of the justice system.

123. As for the statute of limitations, the Commission reiterates the jurisprudence of the Inter-American Court concerning crimes committed by state agents and grave human rights violations committed during regimes of exception. According to the Inter-American Court, these crimes are not subject to the statute of limitations[113]. Thus, the application of the criminal statute of limitations to soldier Betâneo Carneiro is another indication of a violation of judicial guarantees, the right to justice, and the Inter-American Court precedent.

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[113] IA Court, Gomes Lund et al. v. Brazil, Preliminary objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219.

124. Finally, we emphasize that by tolerating and collaborating with crimes like the one committed against Margarida Maria Alves, the State strengthens intimidating actions against human rights defenders, generating a frightening effect among those who work to promote such rights. Furthermore, the impunity of violence against women was continuous, since it continued to be practiced even after the Brazilian State signed the Belém do Pará Convention (1995) and embraced the duty to investigate and punish violence against women in its territory.

125. Given the foregoing considerations, the Commission concludes that the State failed to investigate the murder of Margarida Maria Alves with due diligence and, therefore, is responsible for the violation of the rights outlined in Articles XVIII of the American Declaration and 8.1 and 25.1 of the American Convention, with respect to Article 1.1 of the same instrument, to the detriment of her family members identified in this report.

B) RIGHT TO LIFE

1. GENERAL CONSIDERATIONS

126. The right to life is grounded in art. 1 of the ADRDM and art. 3 of the ACHR. The present Commission and the Inter-American Court understand that the right to life is an essential condition for the enjoyment of all other rights and comprises: a) that no person should be deprived of his or her life (negative obligation); b) that States should take appropriate measures to protect and preserve the right to life (positive obligation). The state is responsible for violating the right to life committed by action or omission of its agents. Despite the fact that the crime against the life of Margarida Maria

Alves occurred in 1983, prior to Brazil's adherence to the American Convention on Human Rights (ACHR), the Brazilian State was still obligated to protect the right to life of the human rights defender, in accordance with the Declaration of the American Declaration of the Rights and Duties of Man (ADRDM).

127. Whenever there is evidence of state agents' participation in crimes against life, the state is responsible for conducting a diligent investigation, removing agents from their functions, and holding them accountable. The absence of a diligent investigation is a fundamental element in determining the State's responsibility concerning the right to life.

128. The State cannot be held responsible for every offense against the right to life committed by private agents. However, if the state is aware that someone's life is threatened, it has the duty to take the necessary measures to prevent and protect that person. Such measures are taken into consideration when the state's responsibility is assessed.

2. ANALYSIS OF THE PRESENT CASE

129. As explored in the previous section, the country did not act with due diligence to safeguard the union leader's right to exist, even though Margarida had sought out the police station of Alagoa Grande when she and her son were assaulted by a local miller and publicly denounced the threats she suffered from the farmers that formed the Várzea Group. In other words, the Brazilian state knew that the human rights defender's life was in danger and did not investigate the death threats she had received.

130. Moreover, based on the conducted investigations, compelling evidence points to the involvement of state agents in the murder

of the human rights defender, further reinforcing the responsibility of the Brazilian State for the tragic end of Margarida Maria Alves' life.

131. The Commission again highlights the 2013 report by the Human Rights Secretariat of the Presidency of the Republic entitled *Camponeses mortos e desaparecidos: excluídos da justiça de transição* (Dead and Missing Peasants: Excluded from Transitional Justice). That report documented 75 murders of trade unionists between 1961 and 1988, including Margarida Maria Alves. The report concluded that the territorial amplitude in which the crimes were committed could only be explained by the participation or omission of the institutions of the Brazilian State.

132. Violence against human rights defenders in Brazil is not isolated; on the contrary, the situation is severe and occurs with worrying frequency. Within this context, it becomes imperative to pay special attention to the circumstances faced by women human rights defenders, considering the gender-based vulnerabilities they encounter. The State has the duty to promote equality between women and men, thinking about policies for the protection of women human rights defenders that cover the peculiarities of gender and the specific violence they suffer.

133. The murder of Margarida Maria Alves is linked to a broad and long-lasting context of abuses committed against human rights defenders in Brazil. In this sense, the civil society organizations that make up the Brazilian Committee of Human Rights Defenders registered 66 murders of human rights defenders in 2016 in the country, six of them women (CBDDH, 2017). Also, according to the Committee, most of these murders are linked to conflicts in the countryside. In particular, in the North and Northeast regions, which concentrated 84% of these murders.

134. The Commission considers that the Brazilian State is internationally responsible for its failure to prevent violations of the

right to life, as well as to respect the life of Margarida Maria Alves. As a result, the IACHR concludes that the State has violated Article I of the American Declaration to its detriment.

C) RIGHT OF ASSOCIATION

135. The right of association is protected under the Article XXII of the American Declaration of the Rights and Duties of Man and, according to it, consists of the right to "associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature". The Inter-American Court considers it a fundamental right for communities to achieve the desired objectives of human rights[114] and recognizes it as one of the means through which human rights defenders operate.

136. The Commission understands that, in most cases, attacks against human rights defenders are aimed at silencing or removing certain leaders or activists from the political and social arena and generating fear in the communities with which they work, demobilizing their organizational capacity.

137. The present Commission understands that the free and full exercise of freedom of association imposes a duty on states to create the legal and factual conditions in which Human Rights Defenders can freely develop their function, to prevent attacks on this freedom, to protect those who exercise it and to investigate violations of this freedom. These positive obligations must be adopted, even in the sphere of relations between private individuals, if the case so merits.

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[114] IA Court, Case of Huilca Tecse v. Peru, Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121, para. 70.

138. The IACHR understands that, according to the evidence presented by the parties, in the case of Margarida Maria Alves there is no controversy that her execution was a reprisal for her work as a defender of rural workers' rights in the region.

139. The Commission highlights the case Huilca Tecse v. Peru, heard by the Inter-American Court in 2015, in which the State of Peru was convicted for the execution of trade union leader Pedro Huilca Tecse by a death squad linked to the Fujimori dictatorship. On this occasion, the Court found that the State of Peru violated the right to life and the right to freedom of association of the trade unionist, since his assassination had repercussions on the organization of trade unions and the struggle of workers for their rights.

140. It should be noted, once again, that when Margarida Maria Alves was executed, freedom of association and assembly, as well as other civil and political freedoms in Brazil, were under strong violation and state control, since the country was still living under a civil-military dictatorship. The Brazilian dictatorship systematically targeted trade unions, political parties, and civil society associations, creating a hostile environment that hindered the collective organization of workers. That way, the Commission reinforces the conclusions of the already mentioned report *Camponeses mortos e desaparecidos: excluídos da justiça de transição* (BRASIL, 2013).

142. It is important to acknowledge that Margarida Maria Alves was a woman who challenged the predominantly male local power. Her execution not only violated her right to freedom of association but can also be interpreted as an act of gender-based political violence. In other words, we cannot forget that the execution of a woman political leader, especially in a social context where women's political participation was and continues to be surrounded by obstacles, has an even greater impact on the female community. Margarida's

murder was also a gender violence, intended to cause fear in other female rural workers, sending a clear message that they too could face a similar fate, as well as their family members.

143. Finally, we cannot forget that Margarida Maria Alves was fighting for rural workers' rights, including peasant women's rights, such as maternity leave and rural retirement. In this sense, her murder also affected the freedom of association of peasant women in pursuit of their rights, reinforcing the interpretation that her case can also be characterized as political gender violence.

D) RIGHT TO PERSONAL INTEGRITY

144. The right to personal integrity is provided for in Art. I of the ADRDM and Art. 5 of the ACHR, comprising the right to physical, psychological, and moral integrity.

145. The Inter-American Court recognizes that family members of victims of human rights violations can themselves experience violations of their physical integrity, as they endure the repercussions of the violence inflicted upon their loved ones[115].

146. Thus, it is possible to verify the violation of physical, psychic, and moral integrity of the victims' families, either due to the trauma and violence resulting from the situation in which their loved ones died, or due to the State's lack of diligence in investigating facts, judging the accused and holding the responsible ones accountable[116].

147. In the case of Margarida Maria Alves, her son, José de Arimatéia Alves, was only eight years old when he witnessed the

[115] IA Court, Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection. Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 112.

[116] IA Court, Case of Gomes Lund et al. v. Brazil, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219.

murder of his mother in the house where they lived. José de Arimatéia was playing in the street when his mother was shot in the face with a bullet. He returned home soon after the shot and witnessed the bloodied and dead body lying there, a scene that had a psychological and emotional impact on the child. In his words, "Even today, I still see my mother's bloody body, a trauma that I carry with me very strongly". This constitutes sufficient evidence to establish a violation of the right to personal integrity, considering the psychological and emotional impact on a child who witnesses the murder of their mother, as well as the prevailing impunity surrounding these events.

148. After the death of Margarida Maria Alves, Severino Cassimiro Alves (her husband) and José de Arimatéia Alves (her son) lived for many years in constant fear for their lives, enduring material hardships and health deprivations, without receiving any assistance or support from the Brazilian State. Severino Cassimiro Alves passed away in 2013 without ever obtaining answers from the Brazilian State regarding the murder of his wife.

149. Only in 2016 the Brazilian state granted amnesty to Margarida Maria Alves. However, as of the date of this report, her son has not yet received legal compensation for the damages caused by the Brazilian dictatorship to his mother. The repeated lack of reparation over the years is yet another element indicating the violation of the physical integrity of the defender's family members.

150. Finally, it has been reported to the present Commission that José de Arimatéia Alves is experiencing financial and health difficulties, requiring state assistance.

IX. CONCLUSIONS AND RECOMMENDATIONS

151. Taking into account the aforementioned analysis, the Commission concludes that the Brazilian Government bears responsibility for the violation of the rights protected under articles I (right to life and personal integrity), XVIII (right to justice), XXII (right to association) of the American Declaration of the Rights and Duties of Man, as well as articles 5 (personal integrity), 8.1 (judicial guarantees), and 25.1 (judicial protection) of the American Convention, in relation to article 1.1 of the same instrument, to the detriment of the individuals identified throughout this report.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE STATE OF BRAZIL FOR ITS FULL AND EFFECTIVE COMPLIANCE:

152. Provide full compensation to the relatives of the victim in the present case through measures of pecuniary compensation and satisfaction that include the material and immaterial damages caused by the violations stated in this report.

153. Develop and complete an investigation in a diligent, effective manner and within a reasonable time frame to achieve the truth about the murder of Margarida Maria Alves. Identify and hold accountable all those responsible for her death, including both the material and intellectual authors, by taking appropriate legal measures. It is important to note that the statute of limitations, which resulted from the actions and omissions of the state, should not impede the full implementation of this recommendation.

154. Implement necessary physical and mental health care measures to support the rehabilitation of the family members of Margari-

da Maria Alves, taking into consideration their will and preferences through a mutually agreed-upon approach.

155. Adopt measures to strengthen the Human Rights Defenders Protection Program (PPDDH), legitimating them with the edition of legal measures, reports on the situation of the defenders in the country, as well as other actions that contribute to the non-criminalization of human rights activists.

156. Adopt measures for the comprehensive protection of women human rights defenders to strengthen and encourage their work, combating specific forms of violence against them.

157. Promote the memory of Margarida Maria Alves and the peasant workers' movement so that her history is not forgotten and that human rights violations of this nature are not repeated.

158. Implement non-repetition measures that aim to strengthen National Human Rights Programs and the National Human Rights Education Plan of Brazil at all levels of government.

X. NOTIFICATION

159. As stated above, in accordance with the provisions of Article 51.3 of the American Convention on Human Rights (San José Pact) and Article 47.3 of its Rules of Procedure, the Inter-American Commission on Human Rights decides to publish this report and include it in its annual report to the General Assembly of the Organization of American States. The Inter-American Commission will continue to evaluate, in accordance with the rules established in the instruments governing its mandate, the measures taken by the Brazilian State in response to the above recommendations until it determines that full compliance has been achieved.

Approved by the Inter-American Commission on Human Rights on the 26th day of April, 2020. (Signed:) Gilmara Joane Macêdo de Medeiros), Clarissa Cecília Ferreira Alves, Aléxia Chaves Maia, Julia Gomes da Mota Barreto, Mirian Narrara Peixoto de Aquino.

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THE POWER OF LAW TO SHAPE MEMORY AND HISTORICAL TRUTH: REWRITING THE BRAZILIAN FEDERAL SUPREME COURT'S RULING ON THE AMNESTY LAW[117]

Juliana Cristina Barbosa Silveira - Sarah Beatriz Mota dos Santos - Maria Eduarda Souza Porfírio - Ana Paula Mittelmann Germer - Welington Oliveira de Souza dos Anjos Costa - Patrícia Maeda - Caio Gracco Pinheiro Dias - Fabiana Severi

MOTIVATION

On April 17, 2016, the Chamber of Deputies approved the motion to impeach the then President of the country, Dilma Rousseff[118]. It was a Sunday afternoon, and the public session was broadcast live, spanning nearly 10 hours. Each parliamentarian expressed their vote through the microphone, accompanied by brief justifications. Of the 511 parliamentarians who attended the session (99.6% of the total), 367 voted to accept the report. In the reasons they gave for their votes, the terms "God," "family," and "children" were mentioned hundreds of times.

Jair Bolsonaro, at the time a backbencher congressman, affiliated to a conservative party[119] and with a negligible legislative performance in his 30 years of office, stood out in this historic session for making offensive dedications to various left-wing political groups in the coun-

[117] We thank the reading and suggestions made by: Christian Schallenmuller, Amelinha Teles, Taysa Schiollet, Flávia Martins de Carvalho and Vera Araújo.

[118] Dilma Rousseff was elected president of the Republic in 2010 and reelected in 2014.

[119] The congressman was affiliated to the Christian Social Party - PSC.

try and, specifically, In following passage: "For the memory of Colonel Carlos Alberto Brilhante Ustra, the dread of Dilma Rousseff. In the name of Caxias's Army, and in that of our Armed Force[120], for a Brazil above everything, and for God above all, my vote is yes"[121].

The colonel Ustra mentioned by Bolsonaro headed the DOI-Codi (*Destacamento de Operações de Informação - Centro de Operações de Defesa Interna*) a military unit in São Paulo in the 1970s, where more than 500 people were tortured, including Dilma Rousseff. The São Paulo Court of Justice, in 2012[122], upheld a 2008 judgment, declaring the colonel responsible for the torture of Maria Amélia de Almeida Teles 20[123], her husband César Augusto Teles, and her sister Criméia Schmidt de Almeida.

It is important to mention that Dilma Rousseff was part, in the 1970s, of an opposition´s guerrilla movement and, when captured, was tortured by agents of the Brazilian state. Almost 40 years later, during her first term in office, she approved the law that created the National Truth Commission[124], responsible for investigating crimes committed by State agents during the military regime. She was the

[120] Caxias is a 19th century Brazilian Army General, considered the patron saint of the Force.

[121] See: https://www.bbc.com/portuguese/noticias/2016/04/160419_torturado_ustra_bolsonaro_lgb.

[122] TJ-SP, 1ª Câmara de Direito Público. Processo nº 0347718-08.2009.8.26.0000, Rel. Des. Rui Cascaldi, v.u., j. 14/08/2012.

[123] Maria Amélia de Almeida Teles is popularly known by the feminist movements in the country as Amelinha Teles.

[124] The National Truth Commission (NTC), established by Law 12528/2011, was intended to investigate human rights violations that occurred in Brazil between 1946 and 1988. The NTC heard victims, witnesses, and summoned agents of the repression to testify. The NTC's final report was delivered to the President on 10/12/2014, identifying 434 cases of deaths and disappearances of people under the responsibility of the Brazilian State and identifying 377 public agents involved in violations during the period analyzed.

first woman to take office as President of the Republic in the country. The impeachment request against her began in the Chamber of Deputies, proceeded to the Senate after the aforementioned vote, and was concluded with her ousting on August 31, 2016.

Bolsonaro's praise given to a torturer during the April 17 session did not result in any kind of sanction. In 2018, after a campaign grounded in historical revisionism about the Brazilian dictatorship and an agenda of ultraconservative and far-right values, Bolsonaro was elected President of the Republic. His campaign slogan, also used throughout his presidential term (2018-2022) was "Brazil above everything, God above all."

There are several ongoing analyses of the damage that the Bolsonaro's Administration caused - and continues to cause[125]- to Brazilian democratic institutions and to public policies on human rights, which have been hard to develop in the country in the last decades. Our intention is not to bring this literature up here, but rather to highlight the extensive list of damages, which encompasses the dismantling of women's policies, the criminalization of Brazilian feminist organizations, and the attacks on everything related to what their extremist support bases refer to as "gender ideology".(MACHADO, 2018; FACHINI; FRANÇA, 2020; PASINATO; VENTURA, 2021; ARAGUSUKU, 2022). Bolsonaro's figure and (mis)management in the government are expressions of our unresolved social traumas, and of the multiple violences that still characterize Brazilian society and the way its institutions operate: marked by racism, misogyny, violence, authoritarianism, and phobias against all groups that do not fit the figure of the "upstanding citizen" (COSTA, 2021; JESUS, 2019).

[125] January 8, 2023 will go down in Brazilian history as the day when extreme right-wing groups, demanding military intervention, invaded the headquarters of the three Branches of Power of the Brazilian Republic and carried out a series of acts of depredation and vandalism in the buildings.

The issue of the (in)constitutionality of the Brazilian Amnesty Law invites us to imagine how our recent past might have been different if the Brazilian Federal Supreme Court (*STF*) had construed the re-democratization process that took place in the 1970s differently than it did when it decided, on April 29, 2010, the action against the violation of a constitutional fundamental right (*ADPF*) that discussed the Amnesty Law (Federal Law No. 6863 of August 28, 1979). We want to contribute to the debate about the power of law to shape truths about history.

CASE BRIEFING

In September 2008, the Federal Council of the Brazilian Bar Association (*OAB*) sued *ADPF* No. 153 with the Brazilian Federal Supreme Court. The lawsuit aimed to declare the unconstitutionality of the interpretation of the Amnesty Law that makes it encompass ordinary crimes perpetrated by state agents at the time. The claim was rejected by 7 votes to 2.

The rapporteur, Justice Eros Grau, among other arguments, sustained the need to consider the historical moment of the country's political transition in order to grasp the meaning and purpose of the Amnesty Law. The Amnesty Law resulted from a reciprocal concession between the military regime and its opponents, something fundamental to the democratic transition. Justices Marco Aurélio, Celso de Mello, Cezar Peluso, Gilmar Mendes, as well as Justices Cármen Lúcia and Ellen Gracie voted with the rapporteur. Justices Ricardo Lewandowski and Ayres Britto voted for the partial acceptance of the *ADPF*, arguing that the crimes of torture and kidnappings perpetrated by agents of the State could not be considered political crimes, nor crimes related to politicians, for the amnesty provided by the Law to be extended to them.

The Prosecutor General of the Republic (*PGR*), the Attorney General of the Union (*AGU*), and the National Congress argued for the dismissal of *ADPF* No. 153. The main argument of the *AGU* and the National Congress was that the Amnesty Law had already exhausted its effects. The *PGR* also emphasized the historical importance of the Law. Five entities participated as amicus curiae: the Center for Justice and International Law (*CEJIL*), the Association of Judges for Democracy (*AJD*), the Democratic and Nationalist Association of the Military (*ADNAM*), the Brazilian Press Association (*ABI*), and the Brazilian Association of Political Amnestied (*ABAP*). All of these entities were in favor of the *ADPF* petition.

REWRITING METHODS AND PROCEDURES

The rewrite was prepared by a group from Ribeirão Preto Law School (*FDRP*) who were actively engaged in teaching, academic internships, and research practices related to Feminist Judgment Projects in 2022. Once we selected the decision to be rewritten, we conducted regular meetings over a period of six months to exchange readings, summaries of decisions, and relevant bibliography identified through exploratory literature review techniques. Subsequently, we organized the main issues by topic and distributed the writing tasks among ourselves.

Given that two *STF* Justices at the time did not participate in the trial[126], we decided that our rewrite would be the opinion of a fictional female Justice[127], which would therefore join the others already

[126] Justice Dias Toffoli declared himself disqualified for having acted as the Union's attorney general in the case. Justice Joaquim Barbosa was absent for health reasons.

[127] The name of our imaginary Justice is formed by joining the names of women who appear as victims of the dictatorship in the report of the National Truth Commission: Dinalva Oliveira Teixeira, Luíza Augusta Garlippe, Helenira Resende de

cast in the two trial sessions. It would not have the effect of changing the judgment, already decided by the seven votes against the *OAB*'s request, but we saw this opinion as an opportunity to build a dissenting voice, which would disturb some majority arguments in the decision. Our Justice's opinion would have been the last to be cast, allowing us to establish a critical dialogue with the previous ones.

Having chosen a 2010 decision, we cannot disregard the "crystal ball" effect in the opinion of our imaginary Justice. Inevitably, she will be more aware of issues discussed in the critical literature after the *STF* decision. To reduce this effect, we rely on topics discussed in the dissenting votes and, based on them, we structure our arguments. We also made use of speech strategies adopted in the other votes, such as the use of extra-legal material by the rapporteur Justice and the consideration of the arguments of the amici curiae seen in Justice Cármen Lúcia's vote. In addition, we chose to address only the issues of merit present in the complaint, leaving aside the debate on preliminary issues.

What distinguishes our feminist rewrite is the deliberate employment of two key strategies. The first one involved placing significant emphasis on the control of conventionality and constitutionality. We view the latter as a feminist approach because, throughout history, Latin American feminist activism has actively leveraged international human rights systems to pursue domestic rights[128]. The second was the search for a better historical framework for the case, but in a less "adventurous"[129] way regarding the use of historical re-

Souza Nazareth, and Suely Yumiko Kanayama.

[128] A prime example here is the mobilization effort that gave birth to the Maria da Penha Law (Federal Law nº 11.340/2006) and has sought to ensure its effectiveness (SEVERI, 2018).

[129] We allude here to the expression used by Professor Deisy Ventura, who considered that the *STF*'s decision was based on an "adventurous revision of history"

cords made by the rapporteur Justice.

In the contextualization process, one of the resources we employed was to give more attention to the "low voices" in the process at hand and in the historiography on the political-social mobilization for the Brazilian Amnesty Law. We also tried to interact more with the content coming from the amici, recognizing the expertise of these procedural actors and the effect of their participation in terms of the Court's democratic openness to plurality. We revisit the testimonial accounts that were brought up in the arguments of the other justices, emphasizing, however, the coercive nature of the alleged agreement. Finally, we illustrate the ordinary crimes perpetrated by the military during the Brazilian dictatorship, focusing on cases involving women and individuals from the black population, rural communities, and indigenous peoples. We also seek to make explicit the gender violence that is almost always associated with authoritarian regimes and war contexts.

THE REWRITING OF THE JUDGMENT

OPINION

Justice Dinalda Augusta Nazareth Kanayama,

The primary focus of this *ADPF*, as previously elucidated by my colleagues, revolves around the interpretation of paragraph 1 of Law 6.683/1979. The *OAB* aims to obtain a declaration of unconstitutionality regarding the interpretation of this provision, which extends amnesty to non-political crimes perpetrated by repressive agents against political opponents, considering them to be intertwined with the political offenses covered by the law. The organization asserts that such an interpretation not only contradicts the doctrinal under-

(2010, p. 210).

standing of the concept of nexus but also infringes upon fundamental principles of the Brazilian Federal Constitution.

At this stage, it appears that a majority of the Court has reached a consensus to dismiss the action on its merits. Justices Lewandowski and Ayres Britto, however, have voted in favor of partially granting the request to align the interpretation of the relevant article in a manner that excludes ordinary crimes committed by state agents from the scope of the Amnesty Law. The majority of this Court followed the extensive and sharp opinion of the Rapporteur Justice, according to whom the Law, being "massnahmegesetze" (emergency provisions)[130], must be interpreted in accordance with the context of its approval, which would point to the legislator's wish to grant amnesty also to crimes committed by State agents. The Law would have been a necessary measure for what he called the "reconciled transition" from dictatorship to political democracy because it would have even allowed the people who fought against the regime to overcome their anguish and the risk of death that they were facing. In other words, the Rapporteur Justice argues that the Brazilian Amnesty Law would result from a conciliatory pact that founded the Brazilian State's path toward a democratic future. It would be, together with the other amnesties granted throughout Brazil's republican history, evidence of the "cordial character" of the Brazilian people.

Here I will open a small parenthesis. I must infer that the reference to the famous concept developed by Sérgio Buarque de Holanda (2002) made by the noble Justice is not reproducing the most usual but hasty reading, which sees in the expression only positive char-

[130] Despite mentioning the term in German ("*Massnahmegesetze*"), Justice Eros Grau does not appear to use it in this sense, as in his argument, "*lei-medida*", in portuguese, which we translated to English as "emergency provisions" denotes a statute that has concrete and time-limited effects. Therefore, in the Minister opinion, its interpretation should take into account the historical context of its enactment.

acteristics linked to human warmth, generosity, and friendliness in dealing with the Brazilian people. The concept formulated by the historian is complex and includes dimensions such as the Iberian personality - characterized by the denial of authority, free will and lack of personal responsibility - and the inheritance of a rural Brazilian based on the relationship of dependence between local authorities and enslaved labor.

The *cordial man* referred to by Buarque de Holanda is an artifice embedded in our background as a Brazilian people that seems to hide aspects of the highly authoritarian character of the country's formation and of the alternatives we created over time to put an end to violent political regimes and to renegotiate the terms of our coexistence. This is how, for example, we created the idea of "racial democracy" to designate our ideal of integration of the black population in the country after the abolishment of slavery and try to forget, with this, a part of our past of violence and dehumanization perpetrated by Brazilian state institutions and their elites. What I will highlight later on is that, for a long time now, we have been repeating the formulation of political pacts that have authoritarian bases and that are not always advantageous to all parties. In utilizing the idea of cordiality in the decision of this *ADPF*, we have to consider how this reinforces or not the different dimensions that such a concept encompasses.

Back to the arguments of the majority herein, my colleagues believe that it would not be possible to apply the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and/or Law n° 9.455/1997 retroactively, or even to question the reception of the Amnesty Law by the Federal Constitution (CF/1988), which prohibits the concession of grace and amnesty for the practice of torture. This would be impossible, first of all, because, since the Amnesty Law is a measuring law, its effects have al-

ready been produced at the time of its enactment. Furthermore, even if this were not the case, considering that the crimes committed by the agents of the 1964 regime took place over twenty years ago, the state's ability to pursue legal punishment for these offenses would already be barred by the statute of limitations.

Moreover, the majority believes that it is not up to this Court to revise the Law, even if it is to repair inequities, at the risk of trespassing on the exclusive constitutional competence of the Legislative branch. Finally, in what the rapporteur understands to be the core argument of his opinion - to the point that the rest of his argumentation becomes unnecessary -, he sustains the impossibility of questioning the adequacy of the Amnesty Law to the current constitutional system since the Constitutional Amendment no. 26/1985, which convened the Constituent Assembly, would have constitutionalized the provisions of the Law and, since this amendment was the product of the act of the original constituent that created the Federal Constitution, it would integrate as a fundamental rule the post-1988 legal structure.

These are strong arguments. However, with the deepest respect, I will join Justices Ayres Britto and Ricardo Lewandowski in voting to grant the request in order to deny the benefit of amnesty for ordinary crimes perpetrated by agents of the Brazilian State. There are many points in the rich debate of the preceding votes whose critical examination we could go into in greater depth. I will highlight those that I consider most central in my disagreement with the majority.

THE ISSUE OF THE CONCILIATION PACT AND THE HISTORICAL INTERPRETATION OF THE AMNESTY LAW.

The first aspect that I highlight is the statement that this Court must interpret the Amnesty Law taking into account only

the text of the law and the reality of the time, under the serious risk of, by not doing so, rewriting the Amnesty Law, disregarding its historical function and trespassing on the institutional role of the Legislative Branch.

At first, let us accept the view expressed by the Rapporteur Justice that the Brazilian Amnesty Law is a provisional statute and should be interpreted in the context of its enactment. Understanding the historical context in which the law was issued is crucial for the decision-making. The Justice dedicated significant effort to analyzing the historical period of democratic transition. However, like the two Justices who supported the partial granting of the *ADPF*, I doubt whether the majority's interpretation of history adequately reflects the law's conciliatory nature.

How consensual was the pact around the Amnesty Law? The *OAB* and the entities that participated in this case as friends of the Court sustain that the Law was built under a climate of threat, with no room for groups opposing the regime to propose any changes to the project that was finally approved. They do not deny the mobilization of society in favor of broad, general, and unrestricted amnesty, but they contest, based also on the same evidence invoked by the Rapporteur, that mobilized civil society, when defending broad, general, and unrestricted amnesty, would consider the hypothesis of forgiving serious human rights violations in the name of democratic transition. As recalled by ADNAM, which appears here as a friend of the court, amnesty was a demand first defended by the women's and feminist movements in 1975. The *Brazilian Women's Manifesto in Favor of Amnesty*, a document produced by the Women's Movement for Amnesty (MFPA) and gathered more than 16,000 signatures at the time, leaves little doubt about the intended extension of the amnesty:

> We, Brazilian women, have assumed our respon-

> sibilities as citizens in the national political framework. Throughout history we have proven the solidarity spirit of women, strengthening aspirations of love and justice. **This is why we stand before the destiny of the nation, which will only fulfill its purpose of peace if amnesty is granted broadly and generally to all those who were affected by the acts of exception.** We call on all women to join this movement, seeking the support of all those who identify with the idea of the need for amnesty, having in mind one of the national objectives: the union of the nation (ZERBINI, 1979, p. 27).

With all due respect, this evidence presented by the Entities and the *OAB* has not been adequately addressed in the previous opinions. Historical contextualization of legislation is essential to the process of interpretation. However, it is not a simple task that can be done with the strategies of adversarial rhetoric, invoking only the records that support the version we want to prevail. It is necessary to go beyond, to examine other views and perspectives that are present in the process, in order to build a historical understanding of the period. Otherwise, we run the risk of judging history itself, rather than using historical methods to build legal reasoning on the issue.

See, for example, the statements by Dalmo Dallari and Sepúlveda Pertence, recalled here in an attempt to demonstrate that the Amnesty Law represented a conciliatory pact that should benefit those who committed crimes both on the side of the opposition and of the State. When I read these quoted passages in the light of other references brought up by the *amici*, I think they highlight the unequal and authoritarian basis on which this pact was defined, a compromise that was extorted from the weaker parties by the brute force of those in possession of the pen (or the guns) at the time. In the statement

of Dalmo Dallari, as quoted by the esteemed Rapporteur, it is mentioned that there existed a "superiority of forces" that granted greater bargaining power to military agents. According to Dallari, it was deemed inevitable to acknowledge limitations and accept that individuals involved in the government or protected by it would evade the justice they deserved. Despite recognizing this distortion, it was considered convenient to accept it.

A reading that starts from the conception that human relations take place between individuals who are equally free to dispose of their interests ends up obscuring the view of the concrete inequalities between these actors, legitimizing as a pact what, at times, would only be constituted by violence and inequalities that inevitably result in the exclusion of several social groups from the condition of full subjects of rights. Contemporary democratic states are the result of pressure from these marginalized populations for the revision, in the public and private spheres, of practices that reproduce asymmetries and inequalities. During the early 20th century, women began to attain citizenship through changes in family law that allowed for divorce. These changes acknowledged the unequal power dynamics in marital relationships and recognized that such agreements perpetuated domestic violence against women. Similarly, the fight to recognize structural inequalities in labor contracts has fundamentally shaped Brazilian labor law. Moreover, the concept of private autonomy in Brazilian private law has been critically examined, leading to the establishment of the principle of procedural equality.

Given that even in the opinions of my colleagues, there is eloquent evidence of the violent character of the construction of the conciliatory pact for democratic transition embodied in the Amnesty Law, it seems hard to me not to raise the possibility that this, even as provisional statutes, has origin defect and that, therefore, it may have been

a means for a type of political transition that has not necessarily led us to democracy such as we have come to desire since the FC/1988. Therefore, considering the Amnesty Law as the result of a "conciliatory pact" would reward state violence and the instrumentalization of human rights. In other words, to accept the full validity of provisional statutes for the democratic transition that was validated under authoritarian bases contradicts our entire constitutional system.

The Rapporteur argues that the Amnesty Law and its intentions should be interpreted within the context in which it was enacted rather than the present context in which its application is sought. Even if one acknowledges this argument, the question still remains of how to approach a normative text in the current context, wherein the legislator's intent, based on the circumstances prevailing at the time of its enactment - the national agreement for a bilateral amnesty - appears to violate constitutional principles. Recognizing the validity of acts obtained through violence and coercion seems to contradict the principles of equality and the primacy of human rights. In my view, the solution lies in deeming any interpretation of the Amnesty Law that extends its benefits to ordinary crimes committed by state agents during the military dictatorship as incompatible with the Constitution.

2. THE APPLICABILITY OF INTERPRETATION IN CONFORMITY WITH THE CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS TREATIES

Derived from this argument, the second aspect of my divergence is related to the idea that a request for an interpretation of the Amnesty Law in accordance with the FC/88 and with the international human rights obligations assumed by the Brazilian State would not

be appropriate, since they are posterior to the creation of such Law and the production of its effects.

At first, I understand that amnesty is not something that occurs in the sensible world. The promulgation of the law in 1979 did not make crimes "disappear" that, therefore, would not "exist" today. A law works as an argument to, in a concrete case, extinguish or prevent the initiation of criminal proceedings due to a specific fact. Therefore, amnesty does not produce its effects when a law is promulgated, but when, in deciding a concrete case, a judge recognizes the amnesty as an obstacle to prosecution. Amnesty thus needs to be declared in order to know that a given crime has been amnestied. Once declared, amnesty produces retroactive, or *ex tunc,* effects, but only from the moment it is declared by a competent authority.

The Amnesty Law is currently recognized in the Judiciary as a barrier to initiating criminal proceedings against individuals involved in the dictatorship. The application of the law is happening in the present time, rather than in 1979 when it was enacted. Even if a decision recognizing the amnesty produces retroactive effects, it is being applied by a Judiciary whose actions are constitutionally designed and must be within these limits. Therefore, after October 5, 1988, a decision on the application of the Amnesty Law must necessarily comply with the parameters set by the current Constitution for the actions of the "*Estado-juiz*"(state acting as a judge), which includes not applying legislation prior to the promulgation of the Constitution that conflicts with it. In other words, the Brazilian Amnesty Law is not immune to constitutionality control.

Besides the constitutional limits, by force of what this Court decided in the appeal *RE* 466.343/SP[131], The application of the Am-

[131] In this historic decision, the *STF* ruled that the civil imprisonment of an unfaithful trustee is unconstitutional.

nesty Law must also comply with international human rights treaties to which Brazil is a party, since they have the status of a source, at least supralegal or, at most, constitutional. Therefore, the aforementioned legal diploma cannot evade the control of conventionality. I will discuss this topic further. It is enough to say here that I believe that the controls of constitutionality and of conventionality are obligations of the Brazilian Judiciary. This is in no way to be confused with the review of the law.

3. POLITICAL CRIMES, ORDINARY CRIMES AND THE CONCEPT OF RELATEDNESS

The third aspect that is the object of my divergence is linked to the interpretation of the concept of related crimes employed in the Amnesty Law. An amnesty law defines, ideally, the conducts considered criminal which are no longer allowed to be criminally prosecuted. In this case, political crimes, related crimes to political crimes and electoral crimes were amnestied. Paragraph 1 of Art. 1 of the Amnesty Law defines related crimes as "crimes of any nature related to political crimes or committed for political reasons". The meaning of this provision is not self-evident, and at least two interpretations are possible. The first, sustained in the complaint, is that crimes of repression are not related to political crimes and are excluded from the amnesty. The second, which prevails so far in decisions of the Judiciary and Federal Government agencies (such as the Ministry of Defense), and is the one adopted by the majority in this trial, understands repressive crimes to be related to political crimes and, therefore, to be eligible to amnesty.

I shall adhere to the first of these approaches, as elucidated by the distinguished Justice Lewandowski in his vote, as we are not con-

fronted with any of the instances of procedural connection stipulated in Article 76, clauses I, II, and III of the Criminal Procedure Code, which encompasses objective or material, instrumental or evidentiary, and intersubjective connections. Additionally, in order for a common offense to be deemed connected to a political offense, there must exist a material connection between the offenses, either in the form of formal or material competition or as a continuing offense, as stipulated by Articles 69, 70, and 71 of the Penal Code, in force at the time of the events covered by Amnesty Law 6.683/79.

In the Amnesty Law, the concept of related crimes related to the nature of the crime itself. Thus, in order to be recognized as related, the common crime covered by the amnesty must have the same objectives (for example, national security or established order) and the same criminal act among the agents. In other words, in order for the relation to be established to the point of extending the amnesty to ordinary crimes, it would be necessary to have an objective and subjective connection between the two crimes to the point that the outcome of one depends on the other.

In Brazilian Criminal Law, especially in the Brazilian National Security Laws (Decree-Law No. 314/1967, Decree-Law No. 898/1969, and Law No. 6.620/1978), political crimes have always referred to acts that affect a specific set of protected legal interests: national security, integrity and sovereignty, the representative regime, democracy, the federal system, the rule of law, and the Head of State. In this sense, there are decisions of this Court (ReCrim 1468, re. Justice Maurício Corrêa, Court Register 16.08.2000; HC 73451, opinion of Justice Carlos Velloso, Court Register 06.06.1997; *RE* 160841, opinion of Justice Marco Aurélio, Court Register 22.09.1995).

The National Constituent Assembly, the highest embodiment of the people's will in establishing a new social order, addressed the

issue of torture in Article 5, sections III and XLIII, by proclaiming the prohibition of torture as a fundamental right and declaring its practice as non-prescriptible and ineligible for amnesty. It seems clear that the constituent chose not to extend the amnesty to crimes such as those committed by State agents in situations of abuse of power and disrespect for the very constitutional order that they claimed to defend, precisely because they did not perceive them as political crimes.

Our Constitution only confirmed an understanding already in place during the democratic transition and abroad, even before that, of excluding the possibility of amnesty for acts that violate human dignity in a particularly serious way. This understanding is justified because admitting such acts as political or as having a connection with them, when they are committed in the framework of repression against the contestation of a political regime, would imply legitimizing them as one of the ways in which the State can project its power over society.

It is significant that, when deciding for amnesty for the crimes of the 1964 Regime, my colleagues have not, at any moment, referred to the concrete cruelties that they are sheltering under the magnanimous mantle of amnesty. I think it is important to do so here: these are crimes of rape, aggravated homicide, grievous bodily harm, concealment of a corpse, and torture. So that we are clear about the kind of conduct that this Court is considering eligible for amnesty, I ask my colleagues to recall some of the countless cases that we are aware of.

The dictatorship violated the rights of children and adolescents in many ways. Many were tortured for being considered subversives and communists, or worse, for psychological torture of their parents, as stated in the survey *Direito à Memória e à Verdade: histórias de*

meninas e meninos marcadas pela ditadura (Right to Memory and Truth: stories of girls and boys marked by the dictatorship):

> Children and adolescents were also targets for the dictatorial regime imposed on Brazil between 1964 and 1985. As much as adults, they were targeted and watched. They were not spared from torture. Many were killed. Adolescents who were part of clandestine organizations were treated with the same truculence by the apparatus of repression that spread throughout the country. Children and even babies were used to put pressure on their parents during interrogations under torture. The damage inflicted on parents and children was of a depth still difficult to assess today (BRASIL,2009, p. 14).

Is it possible to qualify such acts as political or as related to political crimes?

To prevent protests organized by male and female workers against the economic and wage-cutting policies of the period, state agents used arbitrary arrests, torture and murder of union leaders, intervention in unions, and violent repression of strikes and workers' manifestations. In this context, even if they did not fit the profile of "opponents of the regime", women and children suffered serious violations of rights. Should these crimes be considered amnestied?

An example is Osvaldo Orlando da Costa, known as Osvaldão, a black man, a political activist who had been living in hiding since 1964. A member of the Communist Party of Brazil (PCdoB), he was one of the first party members to join the so-called Araguaia Guerrilla War. The report Direito à verdade e à memória: *Comissão Especial sobre Mortos e Desaparecidos Políticos* , published in 2007, states that, after being killed in an ambush, in April 1974, his body was

hung from a helicopter by a rope and exhibited in the region. On the way, the rope broke and the body fell into the woods, where it was left, not before the head was severed and exposed to the public. As his remains have not been handed over to his family members, Osvaldo is considered a political disappearance. Should this brutal treatment of the remains of a fallen opponent, similar to medieval practices of putting heads on stakes, be considered amnesty?

It is important here to remember that, under the mask of racial democracy, the military government kept a close watch on the actions of the black movement, considering every kind of organization of black people, including those of cultural expression, such as dances and parties, actions done by "internal enemies" and potentially "subversive". What do we know about the balance of these actions? Still very little. About the indigenous population, for example, it seems that at least 8,300 indigenous people were killed in massacres, forced removals, and torture between 1964 and 1985. Is it possible to consider these actions political crimes or related to political crimes?

We know, on the other hand, numerous records of gender violence against women during the same period, some of them already recognized by lower courts in the country. In a first degree decision, the common justice court of São Paulo, in 2008[132], recognized Colonel Ustra as responsible for the torture of Maria Amélia de Almeida Teles, her husband César Augusto Teles and her sister Criméia Schmidt de Almeida. The physical violence against the couple was carried out in front of their two children, who were less than 10 years old at the time. After spending 15 days with their parents in the cell, the children were taken to a police chief's house and left there for

[132] The decision was handed down in October 2008, by the 23rd Central Civil Court of the São Paulo Court of Justice, by Judge Gustavo Santini Teodoro. Case No. 0347718-08.2009.8.26.0000.

six months without their parents hearing from them. There are many other known cases of physical, psychological, and sexual violence against women in this period, already told by several women who are now public figures in the country, such as the former president, Dilma Rousseff. In other words, the repression had specific torture and violence methods for women.

An example of this can be found in the report compiled in 2007 by the Special Commission on Political Deaths and Disappearances (CEMDP): Zuleika Angel Jones was murdered by agents of the dictatorship because she was seeking news about her son Stuart Angel Jones, who had disappeared on May 14, 1971, and was later found to have been tortured and killed by agents of the military regime, who also hid his body. Zuzu Angel, as she was known, was killed on April 14, 1976, in the Gávea tunnel, in the city of Rio de Janeiro, after her car was thrown off the road. The responsibility was later attributed to Army Major Freddie Perdigão Pereira (BRASIL,2007). A mother from whom the regime had barbarically stolen her son, who was silenced for reporting the crime committed against her and her son. Can this be considered a political crime? Can it be considered connected with a political crime when the only identifiable connection with political crimes is the purpose of concealing a crime and ensuring impunity for its perpetrators?

Examination of international practice can, and should, provide further support to this discussion. In the context of armed conflicts, sexual violence against women and girls has historically served as a strategy to demoralize and dispossess the enemy, with soldiers perpetrating such acts. For instance, rape has been used as a form of "ethnic cleansing," leading to women who survive bearing children of soldiers from the opposing army belonging to a different ethnic group.

Since the Geneva Conventions of 1949, this practice has been progressively recognized as a war crime, which was confirmed by the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda. The International Criminal Tribunal for Rwanda was the first to consider rape as an act of genocide and broadened the concept of sexual violence to include any act of a sexual nature committed upon a person under coercive circumstances, including acts that do not involve sexual penetration or even physical contact. This understanding of the ad hoc Tribunals was enshrined in the Rome Statute of the International Criminal Court (ICC)[133] in 1998, which expressly provides for sexual violence as a war crime and a crime against humanity.

Thus, to understand that acts similar to those mentioned here, flagrant violations of human rights, were committed by State agents for political purposes or to guarantee the execution or effectiveness of a political crime, or even that they would have been included in the amnesty, in an obscure manner, as crimes related to political crimes due to a conciliatory pact toward democracy, with the utmost respect, it seems to me not only to violate our constitutional framework and the norms of International Law applicable to the matter, but also to produce an effect contrary to that which the majority attributes to this so-called pact, i.e., it ends up making it impossible to build a present and a future free from horror and indifference in relation to the objectification of people's lives.

This is also why I have to differ with Justice Ricardo Lewandowski regarding the scope of the decision: delegating to individual judges the decision on the nature of the atrocities committed by agents of the Regime, whether or not they are political crimes or related to them, means admitting that, even if in only a few cases,

[133] In Brazil, the Rome Statute was promulgated by Decree 4.388/2002.

hideous acts such as those recounted here can be justified by political issues; this seems to me to be compatible neither with the principles of the Federal Constitution nor with the international obligations by which Brazil is bound under international law.

4. ANALYZING THE CONSTITUTIONALITY AND CONVENTIONALITY OF THE AMNESTY LAW

My fourth and last point of divergence with the majority has to do with the use of the rules concerning the control of constitutionality and conventionality, which I believe are central to the analysis of the Amnesty Law.

Initially, I resume the argument of the rapporteur justice that the legal rule is not to be confused with the text of a law. Considering the very openness of meanings that every text carries, there are, in fact, multiple possibilities of the interpretation of a text of law. The choice we make here, as the Judiciary, in order not to fall into arbitrariness, must be justified and motivated to allow the decision-making rationality control.

Tércio Sampaio Ferraz Júnior (2003) proposes that the meaning of the legislation text should be determined taking into account the tension between two poles: the subjective meaning that the "author" of the normative text wanted to communicate with it and the objective meaning of the text that, regardless and despite what the "author" wanted, derives from what was actually written, given the rules in force in the context in which the normative communication takes place. Consequently, what was meant by the law is important in defining what was effectively said in its text.

Let us admit, then, which I do only for argument's sake, that the "legislator", in 1979, did indeed wish - even if he avoided making

it explicit in the text - to extend amnesty to the agents of the regime that committed atrocities in the repression of the opposition. The historical record of the period, part of which was recalled by the other votes, would prove it: the regime was so eager to give amnesty to its minions (and its leaders) that, in all the reports brought by the other eminent Justices, we find that this was a non-negotiable condition for the amnesty, which could not be rejected. In order to have the amnesty approved for which it had fought so hard, civil society had to accept, through its representatives in Parliament, such a demand. Not being able to expressly amnesty its agents because it did not want to recognize the criminal character of their actions, the Regime used the artifice of considering them as crimes related to political crimes in order to guarantee them impunity. Unable to grant explicit amnesty to its agents due to its reluctance to acknowledge the criminal nature of their actions, the Regime resorted to the strategy of categorizing them as crimes connected to political offenses, thereby ensuring their impunity. Consequently, the notion of a connection as employed in Article 1 of the Amnesty Law is, as the reporting justice comprehended, a *sui generis* concept, diverging from the one outlined in the doctrine of Criminal Law and Criminal Procedure and deviating from the criteria proposed by said doctrine.

This will, in the light of the 1967 Federal Constitution (CF/1967), could be valid, or at least, it was never declared not to be so. It so happens that CF/1967 was substituted by another Constitution, founded on principles and oriented towards objectives quite different from those which animated the constitutional text of the dictatorship period. In light of the new constitutional text, is the Judiciary still authorized to consider acts of repression during the dictatorship as having been amnestied by the Amnesty Law?

The Brazilian Federal Constitution establishes in its preamble

that the Brazilian State was established to ensure all the exercise of social and individual rights, freedom, security, welfare, development, equality, and justice as supreme values of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, in the internal and international order, to the peaceful settlement of controversies. It also establishes the dignity of the human person as a foundation of the Republic, which has as its objective, among others, the construction of a free, just, and solidary society. Furthermore, the Constitution in force rejects amnesty for the practice of torture, as well as for terrorism and heinous crimes. It is in the light of these precepts that one must analyze whether an interpretation of Article 1 of the Amnesty Law that concludes that it covers the crimes of repression is acceptable.

In the first place, one cannot speak of justice or social harmony while the people violated by the dictatorial regime are not guaranteed justice with the prosecution and accountability of their aggressors. Unlike what the eminent Rapporteur affirms, for whom it cannot be affirmed that the amnesty violates human dignity, it is possible to understand that guaranteeing the perpetrators of atrocities immunity from the consequences of their crimes, under the pretext of "pacifying society," does violate human dignity. This understanding disregards the suffering of the victims - direct and indirect -, instrumentalizing them as a means to achieve a political end that, apart from anything else, as Brazilian history shows, has never been achieved with amnesties.

Furthermore, even though the prohibition of amnesty for torture and heinous crimes is aimed at the future ("The law shall consider..."), it is undeniable that a norm that temporally precedes the Constitution cannot be considered valid in the face of the constitutional principles if it provides the exact opposite of what the Constitution

prescribes. Therefore, a norm establishing amnesty for such crimes cannot be considered to have been received by the Federal Constitution/1988. For these reasons, a norm such as the one that the majority of this Court extracts by interpreting the text of Art. 1, c/c §1, of the Amnesty Law is unconstitutional and must be declared so.

The Constitution also defines the prevalence of human rights as a principle that governs the Federative Republic of Brazil in its international relations, an understanding already endorsed by this Court. According to Art. 5, Paragraphs 2 and 3, the "rights and guarantees expressed in this Constitution do not exclude others resulting (...) from international treaties to which the Federative Republic of Brazil is a party" and international treaties and conventions on human rights that are approved by the National Congress according to the constitutional amendment procedure will be "equivalent to constitutional amendments". In the judgment of Special Appeal No. 466.343, the Court's previous precedent on the subject[134] was overturned, in the sense of recognizing that human rights treaties previously entered into before the enactment of Constitutional Amendment 45/2004 have *supra-legal status*. This introduces into the Brazilian legal system the so-called *conventionality control*, since any antinomy between the provisions of such treaties and legal or non-legal norms of domestic law must be resolved, regardless of the chronology of the issue of these acts, in favor of the treaties, which are *lex superior*.

The thesis of supra-legality is indeed recent (it was only endorsed by this plenary at the end of 2008, when it decided on Special Appeal No. 466.343-SP). Still, it is undeniable that the particular relevance given to human rights treaties by CF/1988 comes since its enactment, with paragraph 2 of Art. 5. What the doctrine of supra-legality does

[134] ADI 1480-DF, Rel. Justice Celso de Mello, j. 04.09.1997, e HC 72131-RJ, Rel. para Acórdão Justice Moreira Alves, j. 23.11.1995.

is solve the dilemmas resulting from the multiplicity of ways of conceiving this "special relevance" in solving concrete cases of conflict between domestic and international norms. It can, therefore, be understood that this House has clarified, 20 years after the enactment of CF/1988, what the status of human rights treaties is in our system.

Hence, the control of conventionality is not merely a duty arising from the American Convention on Human Rights (ACHR) or other international agreements, but rather an inherent aspect enshrined in our Constitution since its promulgation. The Constitution itself establishes the special status of international human rights norms and imposes upon the Judiciary the obligation to refrain from applying domestic norms that contradict them. With its constitutional grounding, the control of conventionality extends beyond the scope of the American Convention and encompasses all human rights treaties to which Brazil is a party, as emphasized by the Inter-American Court and the obligation of States parties to such conventions[135].

Thus, when facing a problem such as the one posed by this *ADPF*, we must verify whether the norms applied are in line with Brazil's international obligations on human rights, obligations that result from norms enshrined in international treaties, but also from custom and the general principles of law accepted by "civilized nations". This was, in fact, the understanding brought by the Center for

[135] Almonacid Arellano et al. v. Chile, "§124. The Court is aware that the internal judges and courts are subject to the rule of law and, therefore, are obliged to apply the provisions in force in the legal system. But when a State ratifies an international treaty such as the American Convention, its judges (') are also subject to it, which obliges them to ensure that the effects of the provisions of the Convention are not diminished by the application of laws that are contrary to its object and purpose and that lack legal effect from the outset. In other words, the Judiciary must exercise a kind of "control of conventionality" between the internal legal norms applied to concrete cases and the American Convention on Human Rights. In this task, the Judiciary must take into account not only the treaty, but also the interpretation that the Inter-American Court, the ultimate interpreter of the American Convention, has made of it."

Justice and International Law (CEJIL) as *amicus*. It is necessary to recognize the important role that such treaties play in enforcing the protection of rights at the national level, as well as the role of the judiciary in incorporating the values and guiding principles of international human rights protection.

Considering only those international norms that, by express or tacit consent, bind Brazil, we can invoke, at first, the Convention on the Prevention and Punishment of the Crime of Genocide (1948).[136] It typifies the crime of genocide internationally, imposing on the States parties the obligation "to take, in accordance with their respective constitutions, the necessary legislative measures to ensure the application of the provisions of this Convention, and in particular to establish effective criminal penalties applicable to individuals guilty of genocide. This provision, read together with Principle II of the Declaration of Principles of International Law recognized in the Charter and the trial of the Nuremberg Tribunal[137], codifies the idea of an international crime, conduct that is criminal under international norms and does not cease to be so due to the fact that it is not foreseen as a crime in the law of the place where it is committed.

This concept of international crime, however, applies to a restricted list of criminal acts that are now defined in the Rome Statute of the ICC (1998)[138], among which is the Crime against Humanity, which includes conduct corresponding to many of those that were committed in the basement of the repression of the military regime,

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[136] Ratified by Brazil on 15.04.1952. Promulgated in Brazil by Decree 30.822, May 6, 1952.

[137] **"**The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

[138] Ratified by Brazil on 20.06.2002. Promulgated in Brazil by Decree nº 4.388, of 09/25/2002.

such as murder of persons, torture, kidnapping, sexual assault, or more broadly, "[p]ersecution of an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds. Such crimes, also by express provision of the Statute, which repeats the Convention on the Non-Application of Statute of Limitation to War Crimes and Crimes Against Humanity (1968) [139], are considered imprescriptible.

Furthermore, the American Convention on Human Rights (1969), as interpreted by the Inter-American Court in cases such as *Barrios Altos, La Cantuta,* and *Almonacid Arellano*, establishes the invalidity of the laws of self-amnesty to the extent that they prevent the appropriate investigation of criminal acts and the adequate prosecution of those responsible, in conflict with the provisions of arts. 8 (Judicial Guarantees) and 25 (Judicial Protection) of the Convention, c/c arts. 1.1 ("Duty to Respect Rights") and 2 ("Duty to Adopt Provisions of Domestic Law") of the Convention.

According to these norms, it can be affirmed that amnesty laws are not valid, and the country cannot avoid prosecuting the most severe human rights violations by claiming that the statute of limitations has expired. Suppose the Brazilian Judiciary, at present, decides on the constitutionality of the Amnesty Law and, as a consequence, judicial efforts to investigate individual accountability for the crimes of the dictatorship remain blocked or the statute of limitations is invoked to impede such proceedings. In that case, it will be considered a valid decision within the framework of domestic law, wherein the Judiciary has the final say on the interpretation of legal texts. However, from the perspective of international law, national courts are not

[139] Brazil is not a party to the Convention, but there is a consensus in the doctrine that the rule of imprescriptibility of these crimes is part of customary international law, due to the abundant international experience in this regard (cf. HENCKAERTS, 2005.)

considered authentic interpreters of the law, but rather a component of the internal organizational structure of the State responsible for upholding international norms. In this regard, such a decision would seriously violate this duty.

It may be objected that Brazil only expressed its consent to be bound by the terms of the American Convention in 1992 and that, in the case of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, it has not yet done so. Firstly, it should be clarified that the ratification of the American Convention merely reaffirmed the provisions already present in the Brazilian Constitution since 1988 regarding the amnesty for crimes committed during the dictatorship. Secondly, the fact that Brazil has not recognized the Convention on the Non-Applicability of Statutory Limitations as binding does not exempt the country from its obligation to abide by it. This is because, in cases where a rule has become customary international law, as is the situation here, a state is bound to observe it even if it is not a party to the treaty that established it.

In the case of imprescriptibility, the customary origin of the rule, according to the Brazilian Supreme Court's precedent, makes it immediately applicable domestically, regardless of its formal incorporation through the traditional mechanisms for inserting the treaty into the internal legal system (legislative decree and presidential decree). This interpretation is evident, for instance, in the Brazilian Federal Supreme Court's decision in ACi 9696-SP (the Geny de Oliveira case), where the Court deemed the international custom on jurisdictional immunity applicable in Brazil without the need for formal incorporation or specific legislation. The Court also considered the jurisprudential evolution of other countries to identify the practice of States in this regard in order to verify the customary norms.

An overly formalistic understanding of the principle of legality, in extreme cases such as crimes against humanity, results in absurd or unjust decisions. It is a fact that one of the foundations of this principle, on which modern criminal law has been based since the 18th century, the principle of legality, ensures that the State cannot unjustly target individuals by criminalizing conduct that is not explicitly prohibited by law, thereby preventing arbitrary persecution and imprisonment of individuals deemed undesirable. However, in view of the abundant international normative production, especially after the atrocities of World War II, which indicates an international consensus about the centrality of human rights protection, it is questionable whether any of the perpetrators of the crimes of repression were not aware of the illegality of their acts.

Moreover, this restrictive reading of the principle of legality also generates aporias in cases of transitional justice, since it would be enough for an authoritarian regime, once installed, to revoke all the rules that allow the prosecution of its crimes so that, once the democratic regime is restored, nothing can be done against the criminals, so that the principles of legality and non-retroactivity of the most severe criminal law are not violated, which is absurd. Knowing that international crimes are distinguished from ordinary crimes by the characteristic of statehood (AMBOS, 2008), that is, they are committed through the use of state structures, conditioning their repression to mechanisms that, in the final analysis, are subject to the discretion of that same state, is certainly guaranteeing their impunity.

Moreover, the Inter-American Court of Human Rights has extensively ruled that amnesty laws are incompatible with the American Convention on Human Rights, holding that states cannot fail in their duty to investigate, prosecute, and punish those responsible for

serious human rights violations by applying amnesty laws or other domestic regulations.

For all the above reasons, the Amnesty Law cannot be interpreted in such a manner that it becomes an obstacle to the investigation and prosecution of serious human rights violations that occurred during the military regime. Likewise, it cannot be interpreted and applied to benefit those agents of the military regime who committed atrocities against individuals identified as "political criminals. By adhering to international treaties, signing and ratifying them, Brazil assumes the responsibility of adapting its internal legislation. With this in mind, the interpretation of Article 1, § 1 of Law 6.683/79 in the sense of extending amnesty to common crimes is not admitted by the Brazilian Federal Constitution, and is also incompatible with international treaties.

OPINION

I express my deep sorrow during this session as I witness Brazil, once again, failing to confront its history and acknowledge its mistakes in order to learn from them and prevent their repetition. It deeply troubles me to note that the majority here, perhaps unwittingly, by extending amnesty to the crimes committed during the dictatorship, distorts the very essence of the term. The courageous struggle for amnesty initiated by the women's movement in Brazil never intended for the term to encompass the atrocities mentioned here and thus be used to deny the errors and horrors of the dictatorship or to rehabilitate the economic, political, and particularly social calamity that the 1964 Regime brought upon Brazil. My opinion sought here, at least, to leave on record that another path could have been taken by us today.

Based on the aforementioned reasons, I comprehend that the current legal action against the violation of a constitutional right ought to be upheld to establish an interpretation consistent with the Brazilian Federal Constitution and §1 of Art. 1 of Law No. 6.683/1979. This means that common crimes committed by agents of the 1964-1985 dictatorship cannot be covered by the amnesty.

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FEMINIST REWRITING OF THE BRAZILIAN FEDERAL SUPREME COURT (STF) THEMES 526 AND 529: SOCIAL SECURITY, AFFECTION, AND ABSENT WOMEN

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The present chapter proposes to perform a feminist rewriting of the Supreme Court themes numbers 526[139] and 529[140], which deal, in brief, with issues regarding common-law marriage and "concubinage" in the context of social security. Its construction was developed as a postgraduate research activity coordinated by Prof. Júlia Lenzi Silva (Department of Labor and Social Security Law, Law School, University of São Paulo) during the second semester of 2022, constituting our first approach to the methodology of rewriting judicial decisions from a gender perspective.

The development of our rewriting occurred through online meetings that included guided readings and debates on national and international scientific production about the methodology of feminist rewriting. We also had propositional dialogues about potential cases. After collectively accumulating theoretical knowledge and focusing on the centrality of work in our research group, we decided to re-

[139] BRAZIL. Brazilian Supreme Court. Theme 526 - **Possibility of concubinage of long duration creating social security effects**. Reporting Justice Dias Toffoli. Date of Judgment: 03 Mar. 2021. Date of Publication 07 Oct. 2021. online.

[140] BRAZIL. Brazilian Supreme Court. Theme 529 - **Possibility of legal recognition of concurrent common-law and same-sex marriage, with the consequent apportionment of death pensions**. Plenary. RE 1045273 Rel. Min Alexandre de Moraes. Judgment Date: Dec. 21, 2020. Publication Date: April 9, 2021, online.

write the two aforementioned judgments. Our choice was based on our perception of the lack of feminist approaches and interpretations in social security law. This area still strongly supports a hegemonic legal discourse that unites technique with neutrality.

Symptomatically, in a set of social relations in which gender is specifically determinant, its first appearance, in the light of the judgments, is in the form of an absence. This absence materializes in the fact that, in both cases, gender issues were present, but not directly addressed by the Justices. It seems symbolical to us that the debate about women, who are the main "target" of the judgments, considered in the general repercussion - that is, those that will be effective for everybody (*erga omnes)* and have a binding effect on the bodies of the Judiciary, thus affecting all insured women/dependents (and insured men) - does not appear at any time in the judgments.

In our analysis, we found that the survivor's benefit may be one of the main "gateways" to the gender debate in social security, since it is a benefit mostly requested by women. Through it, both in what is explicit and what is absent, it is possible to consider the place occupied by gender within social security law and its relations, focusing on the fact that law, in its practices, not only reproduces and reinforces gender stereotypes, but also presents itself as a powerful discourse that effectively constructs gender, most of the times (as in the cases under analysis), in a very harmful way to women (HUNTER, MCGLYNN; RACKLEY, 2010).

BRIEF PRESENTATION OF THE SELECTED JUDGMENTS

The first case analyzed is Appeal No. 1.045.273 to the Brazilian Federal Supreme Court. This case discussed, in light of articles 1, III;

3, IV; 5, I of the Brazilian Federal Constitution (*CF*), the possibility of legal validation, by the State, of the coexistence of two parallel common-law marriage with the consequent division of the survivor's benefit among the surviving partners - regardless of whether they are heterosexual or same-sex relationships.

After 6 votes in favor and 5 against, the Supreme Court dismissed the appeal, establishing the following General Repercussion Theme:

> The pre-existence of marriage or common-law marriage, apart from the exception provided for in Article 1723, paragraph 1 of the Civil Code, prevents the recognition of a new bond related to the same period, also for social security purposes, due to the establishment of the duty of fidelity and monogamy by the Brazilian legal-constitutional system (STF, Theme No. 529).

It was argued that the recognition of concomitant relationships would constitute "concubinage", which would be forbidden by Brazilian law due to its longstanding tradition of upholding monogamy, recognizing it as the guiding principle of family law, even to the detriment of private autonomy. Still according to this interpretation, neither the law nor the legal precedents would admit the concomitant existence of marriage and common-law marriage, nor would they admit the concomitant existence of two different non-marital unions, regardless of whether they were heterosexual or a same-sex union. According to Justice Dias Toffoli:

> Now, if a married person cannot marry, in accordance with article 1.521, VI of the Civil Code; if a married person cannot have a concomitant common-law marriage recognized, in accordance with article 1.723, § 1º, c/c article 1.521, VI, of the Ci-

> vil Code; following this line of argument, a person who is living in a common-law marriage cannot have another common-law marriage recognized simultaneously.

The Rapporteur Justice Alexandre de Moraes stated that, although art. 226, § 3 of the Federal Constitution has removed prejudice and discrimination in relation to common-law marriage, recognizing the "[...] advances in the dynamics and in the form of treatment given to the most nuanced family units, driven by affection, understanding of differences, mutual respect, the pursuit of happiness and individual freedom of each of the members, among other features [...]", there would be no legal support for the recognition of simultaneous common-law marriage. This is because it would subsist "[...] in our constitutional legal system the monogamous ideals for the recognition of marriage and common-law marriage, being, inclusively, foreseen as duties to the spouses, as basis in the monogamous regime, the requirement of reciprocal fidelity during the nuptial pact (Art. 1.566, I, of the Civil Code)".

In summary, the nature of the bond existing between the deceased insured and the appellant was not recognized as a common-law marriage, but rather as "concubinage", based on the existence of an impeditive cause, namely, a marriage previously celebrated and in effect. As a consequence, the right to receive a survivor's benefit from the simultaneous partner was denied.

The second judgment refers to Appeal No. 883.168, also judged with general repercussion, with Justice Dias Toffoli as the presiding judge. The judgment was based on the analysis of what had already been decided in Theme No. 529, given the similarity between the cases, as stated in the decision itself:

> [...] the thesis established herein, concerning the possibility of legal recognition of concomitant common law marriages, with the consequent division of survivor's benefit, may be applied indistinctly to both disputes, since the same-sex nature of a given legal relationship is irrelevant to the examination of this case.

This is a case in which the plaintiff claimed to receive a survivor's benefit for maintaining a long-term and family-like relationship with the insured, a married man. It was discussed, therefore, the possibility or not of the so-called "long-term concubinage" generating social security effects and, in this case, the obligation to divide the survivor's benefit between the wife and the common-law partner.

The constitutionality of the matter was analyzed based on articles 201, V, and 226, § 3 of the Federal Constitution, and the thesis was established as having general repercussion by the majority of votes, with Justice Edson Fachin dissenting, as follows:

> The recognition of social security rights (survivor's benefit) to a person who has maintained, for a long period of time and in a family-like relationship with another married person is incompatible with the Federal Constitution, because concubinage is not equivalent, for the purposes of state protection, to affective unions resulting from marriage and common-law marriage.

On the other hand, the *amicus curiae* opinion, the Brazilian Institute of Social Security Law (IBDP, by the Portuguese acronym), pointed out (i) that, in this case, proof of cohabitation and economic dependence would be enough to be entitled to the benefit's share; and (ii) that the matter would be restricted to the legality

of article 45 of Law 8213/1991 and, therefore, would not involve constitutional violation.

The dissenting opinion of Justice Edson Fachin argued in favor of the possibility of granting, focusing the controversy on the social security field, in order to understand "whether this family simultaneity is covered by social security legal effects". For him, although there are connections with the constitutional provisions on families and their rights and duties, the core of the case under trial rests on three main aspects: "a) social security benefit; b) dependency; c) posthumous effectiveness of personal relationships whose scope is sought to be included under the protection of a good-faith common-law marriage". Thus, based on the existence of objective good faith of the concomitant wife and the partner, the Justice positioned himself for the legal recognition of the common-law marriage simultaneous to the marriage. This recognition would lead to the resulting social security effects (the division of the survivor's benefit between them).

The rapporteur Justice Dias Toffoli expressed his opinion again on the " enforcement of the duty of fidelity and monogamy by the Brazilian constitutional legal system". His opinion was largely based on Theme No. 529, as already mentioned, understanding the impossibility of recognizing a new bond concomitant to marriage or common-law marriage and denying, therefore, the right of the simultaneous companion to receive a survivor's benefit.

REWRITING METHODS AND APPROACHES

The analysis of the legal reasoning and the line of argument adopted in both cases led us to elect the methods of (1) asking about injustice, (2) contextualization, and (3) challenging stereotypes, as

well as the adoption of scientific data in the construction of the arguments of our rewriting proposal.

Both the contextualization and the question of injustice are related to the technical-legal armor erected around social security law in Brazil, especially in cases where the right to the benefit is denied. The truncated normative network, composed of decrees, regulations, and other administrative acts, prohibits the debate on social security from the legal and constitutional boundaries, distancing it from the concept of social security system[141] and imprisoning it within the narrow limits of the security system. This diagnosis also underlies the choice to use scientific data in constructing the arguments, technically thickening the feminist rewriting and revealing the legal viability of the theses sustained therein.

The methodological approach of confronting gender stereotypes serves as a framework for organizing the textual construction and shaping the exercise of imaginative proposals. Through feminist (and constitutional, it is important to note) perspectives, we can reframe the analyzed decisions, shedding light on the obligation to challenge legal principles to ensure greater substantive equality. Moreover, it emphasizes the responsibility of judges in addressing the persistence of various forms of gender-based violence.

In this sense, the terminology “simultaneous relationships” was adopted as opposed to “concubine” and “concubinage”, which are

[141] N."*Previdência social*"(social security) and "*seguridade social*" (social security system) are two related but distinct terms in Portuguese:
Previdência Social: This term refers specifically to the social security system that provides benefits to individuals in situations such as retirement, disability, and survivorship. The main focus is on providing financial protection for individuals and their families in times of need.
Seguridade Social: This term encompasses a broader concept that includes not only the social security system (previdência social) but also health care and assistance programs. It's a comprehensive approach to social welfare that covers various aspects of social well-being, including health services and social assistance.

used by the Justices in their votes and considered highly prejudicial to women because they reproduce gender stereotypes[142]. Placing a woman in the vulnerable and discriminatory condition of "concubine", especially when this "place" is occupied in long-term relationships harms democracy and the principle of freedom, especially when these relationships are recognized as a family. It is essential to refrain from judging women who pursue justice for their choices, which may differ from those made by the individuals within the justice system involved in the case.

Still regarding the methodologies employed, we emphasize the significance of the *amicus curiae* argumentation, specifically in our rewriting, represented by the Brazilian Institute of Family Law (*IBDFAM*). We believe that this inclusion enhances the effectiveness of a genuinely dialogical process. Regardless of whether they are accepted or not, the Court's genuine consideration of the inputs provided by these third-party entities has the potential to enrich the decision-making process. Moreover, it brings visibility to the legal advocacy for women's human rights by civil organizations.

And, in relation to the chosen issues for analysis, we would like to clarify that the process that led to Theme no. 529 was kept confidential by the court, unlike what occurred with Theme no. 526. It is certainly intriguing that only the cases involving concurrent relationships, including a same-sex union, were subjected to secrecy. Nevertheless, due to this restriction, we have decided not to delve into this particular aspect, primarily because we cannot ascertain

[142] The Brazilian Institute of Family Law (IBDFAM), in a note in which it points out the use of inappropriate terms in the judgments on simultaneous relationships, states that "the use of the word 'mistress' (the media, reporting the judgment), as well as the term 'concubinage' (the rapporteur himself does it), which has long been out of use, is highly charged with sexism and, used in this context, expresses stigmas that provoke hostile reactions and contributes to the depreciation of women." (IBDFAM, 2022, online).

whether the surviving partner requested judicial confidentiality themselves.

As to the format of the rewriting, the two cases have many similarities, dealing, in essence, with the same controversy, so much so that some Justices made references to Theme no. 529 in their votes during the trial of Theme no. 526. For this reason, we will do a joint rewriting of the decisions chosen by writing a single dissenting opinion that contains a proposal for the thesis of general repercussion at the end, following the model of Justice Edson Fachin's opinion in the trial of Theme no. 526. As regards the parties, as Theme no. 529 was handled in secret, to avoid any restatement, we will adopt the legal relationship exposed in Theme no. 526, that is, an Appeal filed by the Federal Government, through its Attorney General, against a decision that ensured the possibility of apportioning the benefit to a cohabitant in a common-law marriage.

One last word about the format. We have avoided the more formal language characteristic of opinion writing, opting instead to insert a sense of playfulness and poetry by naming the component parts of our dissenting opinion with song titles by the pianist, singer, songwriter, and civil rights activist for Black people in the United States of America, Nina Simone (Eunice Kathleen Waymon). The character Nina Simoni Silva is thus a tribute that takes part in the contemporary feminist agenda for the nomination of a Black woman to fill a vacancy on the Supreme Court.[143].

[143] ARTICULATION FOR BLACK STF JUSTICE Advances with shielding of potential candidates. Portal Geledés, March 11, 2023, online.

SUPREME COURT THEMES 526 AND 529 REWRITTEN FROM A LEGAL-FEMINIST PERSPECTIVE

OPINION

JUSTICE NINA SIMONI SILVA: The constitutional matter presented to the Supreme Court necessitates the introduction of preliminary elements that provide insight into the social security legal framework concerning survivor benefits.[144].

1. *"Don´t let me be misunderstood"* – Social security beneficiaries encompass both the insured individuals and their dependents, as outlined in Article 10. The insured individuals are those who maintain a contributory connection with social security through paid employment or through optional contributions, establishing a direct legal relationship with the social security system. Dependents, on the other hand, are defined by their familial ties to the insured individuals and are not required to make social security contributions themselves. As stated in Article 16, dependents are categorized into various classes. Specifically, for the present cases, it is important to note that the first class comprises the spouse, partner, and unemancipated child of any condition who is under the age of twenty-one or presents intellectual disability, intellectual or mental impairment, or severe disability.

Social security, therefore, protects the insured due to the social security contribution (art. 201 of the Federal Constitution) and dependents due to the family ties established with the insured. Especially in the case of survivors' benefits, social security protection is related to the dignity and social support of those who had family ties with the insured, considering that their absence unbalances the

[144] All normative provisions mentioned refer to Law n. 8.213/1991, known as the Benefit Plan of Social Security, avoiding the repetition of its mention in order to assure fluidity in the text.

relations of the family group both in the social/emotional and in the economic perspective.

Furthermore, the legislation mandates that the insured individuals have certain obligations, including the maintenance of their insured status, as stated in Article 15. In the case of survivor's benefits, dependents are required to demonstrate that the deceased insured individual fulfilled these obligations (as per Article 74) in order to access the benefits. Consequently, once the insured individual has fulfilled their obligations (maintaining their insured status) and the triggering event (their death) occurs, the right to benefits for the dependents objectively arises (payment of the benefit).

That said, considering the specificities of the cases under analysis, I attest that the fact that the insured does not fulfill a referred "duty of fidelity" does not extinguish the need for social support of those who have a family tie with him/her. I would also like to point out that children born out of wedlock are equally considered as dependents, entitled to a benefit due to death, as can be seen in the very wording of article 16, I ("child of any condition"). In the same way, the simultaneous companions have a bond with the insured that instituted the benefit, composing, in theory, the same class of dependents, which should assure them social security coverage in the event of death.

Even if we were to assume that there was a breach of the "duty of fidelity" of the marriage, conduct that can be practiced by those who have entered into a marriage, such violation would occur on the part of the insured worker and not by the simultaneous companion. Any interpretation different from this ends up imputing to him or her the absence of the right to the social security benefit due to a behavior performed by the insured instituting the marriage, in a sort of analysis of "extensive fault". It would be, then, in an analogous

manner, the social security equivalent of allowing the transcendence of the "penalty", transferring to others (dependents) the "penalty" of the reprehensible practice performed by the insured. Now, the mere observance of the objectives and principles that govern social security (articles 1 and 2) leads to the certainty that morally reprehensible behavior on the part of the insured that passed away should not jeopardize the payment of benefits upon death by the simultaneous companion, considering his/her condition of having a family tie with the insured that instituted the benefit and the maintenance nature of the benefit in question.

To prevent economic and actuarial projections that are both catastrophic and insensitive, it is crucial to underscore the vital importance of the benefit for the reproductive capacity of families in Brazil, particularly with a focus on gender dynamics. The research conducted by the Portrait of Gender and Race Inequalities (IPEA, 2015) demonstrated a significant increase in the number of households headed by women. In 1995, the figure stood at 23%, but by 2015, it had risen to 40%. Moreover, among age groups over 60 years, 50% of families are now led by women. In this context, it is noteworthy that in 2017, out of the 7.6 million active survivor benefits in the Brazilian Social Security Institute (*INSS*) (accounting for 27% of the total), 84% had women as beneficiaries. Among the benefits granted to women, 46.4% were up to 1 minimum wage, and 35% fell within the range of 1 to 2 minimum wages. Consequently, over 80% of the benefits received by women did not exceed two minimum wages (DIEESE, 2019). These statistics prompt us to reflect on the potential impact of the forthcoming decision by this Court on the sustainability of family units, considering that the survivor's benefit plays a vital role in the maintenance and reproduction of life in numerous households across Brazil.

2. "*I wish I knew how It would feel to be free*" – As for the dissenting opinion presented by Justice Edson Fachin, which recognizes the possibility of simultaneous marriage and common-law marriage having social security effects, provided that objective good faith is proven, I note a major absence: the definition of the concept of objective good faith to be applied in the social security field. Given this gap, in accordance with the orientation of "fighting fraud" expressed in recent changes in the legislation related to Social Security - for example, Law No. 13135/2015, which amended several provisions relating to the survivors' benefit itself - and as a logical consequence, I can only understand that the determining content of objective good faith (i.e., its meaning, interpretative horizon) should be linked to ***unequivocal proof that the simultaneous union was formed with the sole and exclusive purpose of receiving the survivors' benefit.***

Thus, moral questions about whether the concurrent partner knew of the existence of a previous and current marriage or common-law marriage are totally irrelevant: *objectivity* must be tied to the proof that the concurrent marriage or common-law marriage constitutes a simulation with the sole purpose of defrauding social security. As I see it, this is the only interpretative line capable of breaking with the mobilization of gender stereotypes to justify the denial of access to social security protection by women, and it is relevant to point out that allegations around eventual "difficulty regarding the production of proof" are important indicators to demonstrate how, when it comes to women, the presumption of good faith is not a structuring element of today's legal reasoning.

In light of the above, I reinforce that the right to receive a benefit due to death must be based on the continued collection of contributions by the deceased insured, not crossing, at any time, the moralistic analysis about the "legal quality" of the family ties instituted by him/

her or by classifications of family entities with a patrimonial bias, which disregards the principle of affection as an interpretative canon of contemporary Family Law[145].

Therefore, differently from the votes already cast in this judgment, I believe that the constitutional legal system is not centered on "monogamous ideas". The Constitution does not establish monogamy as a "principle" of family law; it is the Civil Code that does so in its article 1.566, I, which provides on the duties of marriage. It is also the Civil Code, in article 1.727, which states that the non-incidental relations between a man and a woman, who are prevented from marrying, constitute "concubinage", a term that, already 20 years ago, when the legal diploma was written, and with even greater force now, carries a strong pejorative and discriminatory charge against women. Indeed, the opening clause of Article 226 of the Federal Constitution embraces the principle of the plurality of family entities, and common-law marriage serves as an inclusive provision encompassing various forms of family arrangements. As highlighted by Marcos Alves da Silva in his statement as *amicus curiae* on behalf of IBDFAM, emphasizing the principle of monogamy tends to exclude individuals, particularly vulnerable women, thereby undermining the principles of secularism

[145] "New family models are emerging that are more egalitarian in gender and age relations, more flexible in their temporalities and in their components, less subject to the rule and more to desire." This evolution caused by the Brazilian Institute of Family Law (IBDFAM) installed a new legal order for the family, assigning legal value to affection. Even the Maria da Penha Law (Law 11.340/2006, 5th II) defines family as an intimate relationship of affection. As João Baptista Villela says, family relationships, formal or informal, indigenous or exotic, yesterday and today, however complex they may appear, are all nourished by trivial substances that are limitlessly available to whoever wants to take from them affection, forgiveness, solidarity, patience, devotion, compromise, in short, everything that, in one way or another, can be brought back to the art and virtue of living together. The theory and practice of family institutions depend, in the last analysis, on our competence in giving and receiving love. Perhaps nothing more needs to be said to show that the founding element of Family Law is the principle of affection" (DIAS, 2021. p. 77).

and democracy. Consequently, the recognition of a family and the act of forming a family should fundamentally be an exercise of freedom.

These are my reasons for sustaining that the right to the payment of the benefit on behalf of the concurrent partner, with the consequent apportionment, in equal parts, of the benefit instituted by the deceased insured is, without a doubt, the interpretation in conformity with the Constitution, since it honors the function of protection performed by the social security policy conceived as part of the constitutional system of social security. Moreover, such interpretation affirms freedom and affection as the organizing and interpretative basis of family law, closing the door to moralistic legal constructions that, in addition to causing mental suffering to women, represent, in fact, a real danger to their survival.

3. "*Ain't Got No / I Got Life*" – The debate that permeates the judgment of both issues also has a historical connotation that should not be disregarded[146]. For a significant period, certain intimate relationships were excluded from the realm of Family Law and Inheritance, with partners being regarded merely as "business associates" (DIAS, 2021). Under the provisions of the 1916 Civil Code, marriage was the sole means of establishing a "family entity," and legal scholars recognized "pure concubinage" as an enduring emotional bond between a man and a woman without a simultaneous marital bond. Likewise, they labeled "impure concubinage" as a lasting emotional relationship between a man and a woman unable to marry due to the presence of an existing marital bond.

[146] Throughout the historical presentation, I will use the terms "concubine" and "concubinage", always in quotation marks and related to the occupation by women of these social places, in opposition to men and from the perspective of heteronormative relations. This choice is based on the purpose of effectively "translating" the theoretical accumulation existing at the time and the way prejudices and gender stereotypes were mobilized in the interpretative construction of law by Brazilian judges and courts.

The legal recognition of the affectionate relationships encompassed by the concept of "concubinage" occurred firstly through jurisprudence, based on Precedent 380, from 1964, of the Brazilian Federal Supreme Court[147]. However, due to the criteria that the parties should prove economic contribution (common effort) for the construction of the common patrimony, this tended to be concentrated on the man when dividing the property, since, many times, the women legally classified as "concubines" were also qualified as "housewives", performing unpaid domestic work.

As a result, the most favorable jurisprudence for the "concubine" began to show that the domestic work done by the woman contributed proportionally to the reduction of the man's expenses, and this work came to be understood as part of the couple's "common effort". Thus, the free provision of domestic services became a sufficient element to recognize the existence of a *de facto* society and, many times, to award compensation to the "concubine" for the services rendered[148] at the end of the relationship (ABRANTES; SILVA ABRANTES, 2021). However, this division of assets did not encompass any additional obligations, such as the payment of alimony or the guarantee of inheritance rights, the "concubine" still understood to be a provider of services rather than part of a "family entity" based on affection.

[147] Precedent 380 of the STF. Once the existence of a *de facto* society between the cohabitants is proven, its judicial dissolution is applicable, with the sharing of the assets acquired by common effort.

[148] It is interesting to note how the jurisprudential construction itself is based on, corroborates and reproduces the primacy of the sexual division of labor, which reinforces women's responsibility for all activities related to the reproduction of the members of the family nucleus, especially when she does not work outside the domestic environment. This material ideological construction is still present in the dissemination of the idea that men that have paid jobs have no obligation to take responsibility for the planning or execution of activities that are indispensable to their survival, which are delegated to their affective partners or outsourced via paid domestic work.

In light of the above, I note that the matrimonial legal order, based on monogamous marriage, is considered a legal interest to be protected by the State, so that in Brazil, Family and Inheritance Law, throughout its development, has solidified a strong understanding in the sense of excluding the "concubine" from the concept of family, which is constituted by marriage, with all the legal formalities. The "impure concubinage" was, at most, understood as a *de facto* society, for purposes of dissolution and succession guarantee, by means of an action for recognition and dissolution of the *de facto* society, under the jurisdiction of the Civil Court, without any possibility of having effects in the social security field.

4. "*Tomorrow Is My Turn"* – The doctrinaire definitions of "pure concubinage" and "impure concubinage" lost their meaning with the advent of the Brazilian Federal Constitution, which recognized the common-law marriage as a family entity, even though it prioritized its conversion into marriage. Law 9.278/1996 established the competence of the family courts to judge disputes involving common-law marriages. As a result of the normative force of the Constitution - even if patrimonial remnants are present - the family model adopted in the Brazilian Civil Code of 2002 is that of the eudemonist family, based on the idea of seeking the full realization of its members and of reciprocal affection regardless of biological bonds (MADALENO, 2019).

The entire interpretation of this category is based on affection as a guiding principle of family law from Article 227, §6 of the Federal Constitution, although this is not explicitly stated in that provision (TEOBALDO, 2016). According to Pereira, "affection is a constitutional principle of the category of non-expressed principles", being "implicit and contained in constitutional rules, because there are their essential foundations". (PEREIRA, 2021)[149]. Affection is then

[149] These principles are: "the principle of human dignity (Art. 1, III), of solidarity

considered the "guiding and catalyzing principle of family relations" (PEREIRA, 2021), constituting, along with the principles of human dignity, solidarity and responsibility, "the basis of support" (PEREIRA, 2021) of family law. This means that affection is "the principle that grounds family law in the stability of socio-affective relationships and in the common life, with primacy over considerations of patrimonial or biological nature" (LOBO, 2011, p. 70).

This new conception brings some potentialities and, at the same time, some problems. On the one hand, affection has historically been evoked as a strategy to de-characterize certain relationships as employment relationships. This is what happens, for example, with the not-rare cases of domestic workers found in modern slavery, without receiving the proper wages or labor rights, based on the idea that they are working "for love", or "affection" for that family.

On the other hand, as in the cases in question, even if there is the characterization of an emotional bond in concurrent relationships, this is not recognized as an element that can ensure social security rights, according to the majoritarian understanding, which gives greater weight to monogamous exclusivity. Given that this case concerns the access to fundamental rights, it is necessary to emphasize that the interpretation at hand leans towards a patrimonial perspective. By prioritizing the preservation of family assets within an exclusive lineage, it undermines the recognition of the factual circumstances and affection that exist within these relationships. This approach runs counter to the direction set by the constitutional text of 1988, which sought to promote inclusivity and acknowledge the diverse forms of

(Art. 3, I), of equality among children, regardless of their origin (Art. 227, paragraph 6), adoption as an affective choice (Art. 227, paragraphs 5º and 6º), protection of the one-parent family, whether based on blood ties or by adoption (Art. 226, paragraph 4), the common-law marriage (Art. 226, paragraph 3), family cohabitation assured to children and adolescents, regardless of biological origin (Art. 227)" (PEREIRA, 2021)

family relationships based on principles of equality and human dignity. "*Biological truth and registry truth are increasingly giving way to the reality of life, which privileges bonds of affection as generators of rights and obligations.*" (DIAS, 2021, p.178).

It is interesting to observe how this failure to recognize the principle of affectivity in the civil law framework diverges from a dogmatic interpretation, bringing a moralistic bias that concretely affects the lives of women who live in simultaneous relationships, who have had their right to receive a survivor's benefit denied. In the end, the most vulnerable part of the relationship, the "concubine", by not having any social security rights arising from the relationship recognized by the State, is left unprotected, since the assets of the man who perpetuates simultaneous relationships[150] remain protected under the monogamy precept that guides the concept of family. Furthermore, apart from the evident material harm and the potential infringement upon the right to a dignified existence, the refusal to grant legal recognition to these coexisting family formations represents a violation of the freedom and autonomy of both women and men involved in such relationships, since it is not possible to determine "obligations of affection" (DIAS, 2021, p. 178).

Together with the doctrine that is more in line with the progressive character of the Brazilian Federal Constitution, I assert that monogamy (and its duties of fidelity and loyalty) does not constitute a principle of family law and is based solely on a moral, not ethical, judgment against simultaneous unions (DIAS, 2021, p. 642). I also affirm the status of affection as the guiding legal principle of family, parental and conjugal relationships in Brazilian law - which entails

[150] In this particular context, the use of "man" does not arise from oversight but rather reflects the common scenario where simultaneous marriage and common-law marriages occur, typically involving the same man who is actively involved in two separate family units.

the recognition of a plurality of family forms and which supported, for example, the interpretation in conformity with the Constitution made by this Court to ensure legal recognition to same-sex common-law marriages (*ADPF* nº 132)[151] – emerges as a way to overcome the "concubinage stigma". (EFREM FILHO, 2014, p. 22).

In accordance with the above, I support the dismissal of the appeal, recognizing the legal possibility that cohabitants in simultaneous common-law marriages have the right to share the social security payment in case of death, provided that the objective legal requirements for its concession are present.

Proposed thesis: *The recognition of posthumous social security effects to widows, widowers, and concurrent partners is possible as long as the objective requirements for the concession of a survivor's benefit are present.*

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ARTICULAÇÃO por ministra negra no STF avança com blindagem a potenciais candidatas. **Portal Geledés**, 11 de março de 2023, *on-*

[151] Ten years ago, the then Justice Ayres Britto, rapporteur of *ADPF* 132, said in his vote: "And so it is that, once again, the Federal Constitution does not make the slightest differentiation between the family formally constituted and that existing on the face of the facts. Just as it does not distinguish between the family formed by hetero-affective subjects and that formed by people in a same-sex union. That's why, without any mental gymnastics or interpretative alchemy, we can understand that our Magna Carta did not lend the noun 'family' any orthodox meaning or that of the legal technique itself. It gathered it with the practically open colloquial sense that it has always carried as a reality of the world of being". (STF, Justice. Ayres Britto, *ADPF* 132, 2011, p. 24).

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FEMINIST REWRITING OF A LABOR DECISION: THE JUDGMENT OF UNRESTRICTED OUTSOURCING BY THE BRAZILIAN FEDERAL SUPREME COURT

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INTRODUCTION

In this paper, we introduce the initial exploration of rewriting a labor-related judicial decision undertaken by Capibariba - Research Collective on Social Rights, Labor, and Subalternities. Our collective comprises researchers from the Federal University of Pernambuco School of Law, collaborating with a professor from Mackenzie Presbyterian University. Our analysis focuses on a paradigmatic decision from the Brazilian Federal Supreme Court (STF) in 2018, addressing the constitutionality of outsourcing in various forms of labor hiring. This case is documented in the records of the Extraordinary Appeal (RE) 958.252 records, with general repercussion[152].

This judgment changed the established precedent of the Brazilian Superior Labor Court (TST), represented by Precedent No. 331,

[152] According to the Brazilian Federal Supreme Court (*STF*), the general repercussion is a procedural institute that aims to reserve for the consideration of the *STF*, within the scope of extraordinary appeals, the judgment of issues with economic, social, political, legal relevance, or that go beyond the subjective interests of the case. Once the general repercussion is recognized, the matter will be transformed into a theme of general repercussion, and the appeal will be treated as a paradigm, while the other appeals and cases dealing with the same matter will have their proceedings suspended until the merits of the paradigmatic appeal are decided, whose thesis will then be replicated in the other cases (*STF*, 2021).

which held that it was illegal to hire workers through an intermediary company, except in cases of outsourcing of intermediary activities, i.e., services that were not part of the company's corporate purpose, such as cleaning, conservation, and security. Therefore, applying this type of contract was prohibited for the execution of the company's main activities.

With the new understanding of the *STF*, added to the legislative reforms that occurred in the same year - especially with Law No. 13,429/2017 - there was a significant change in the labor scenario in Brazil, gaining strength to the thesis that the Labor Law would be an obstacle to the growth of economic activity and the supply of job vacancies. Five years after this deregulatory initiative, we know that there has not been expansion in the labor market, on the contrary, unemployment has not decreased and the available vacancies have become precarious, with a significant reduction in wages (IBGE, 2022).

In this context, the most vulnerable social groups have undergone even more severe impacts in their lives, including increased hunger, not to mention the number of people who have resorted to gigs to earn some income for their subsistence. Women, particularly those belonging to lower socioeconomic classes and non-white backgrounds, are among the most affected groups when it comes to job insecurity and economic downturn. Gender inequality[153] significantly hampers their participation in formal employment, often placing them in undervalued sectors of the economy. This, in turn, leads to high turnover rates, low wages, and a prevalence of part-time positions (IBGE, 2022).

[153] The concept known as the "feminization of poverty" refers to the increase in poverty levels among women compared to men or among households headed by women on the one hand, and by men or couples on the other. The term can also indicate an increase in poverty due to gender inequalities, according to the *International Poverty Centre*, em *What Do We Mean by "Feminization of Poverty?"* (2008), Available at http://www.ipc-undp.org/pub/IPCOnePager58.pdf.

Judicial decisions, especially those that modify interpretations and applications of social rights, directly impact working women's lives. This is why judgments with a gender perspective - as well as race, class, sexuality, origin etc. - are fundamental to democracy and justice. In light of the universalistic and supposedly neutral treatment printed in the STF decision on unrestricted outsourcing, we chose to rewrite it, based on the hypothesis that the feminist lens can reveal aspects that were not discussed in the opinions of the Justices, being able to alter even the content of the judgment.

In order to better structure the rewriting proposed here, we have divided this text into five parts: this introduction; a topic in which we present the steps for the collective construction of the rewriting, including the choice of judgment and the methodology employed; a summary of the case on which we focused; the highlights of the rewriting and our conclusions about the process; and the presentation of the rewriting itself, in the format of a complementary dissenting opinion, by a fictional black female Justice of the Federal Supreme Court[154] who would integrate the judgment analyzed.

COMPOSING THE FEMINIST REWRITING

The Feminist Judgments Project at the Recife School of Law of the Federal University of Pernambuco (*Faculdade de Direito do Recife da Universidade Federal de Pernambuco*) took place in the process of connection and strengthening of ties between professors, students, and recent law graduates. The kinship among the research

[154] We join, here, the chorus of social voices that, in 2023, have been clamoring for the appointment of a black woman to the next seat on the STF, to be opened by the retirement of Justice Lewandowski. This demand was verbalized in the STF plenary on March 8th of this same year, when Justice Fachin greeted the Justices present, as well as "(...) a 4th Justice, who, hopefully, the future will place in this court. A black woman". (FACHIN, 2023, 21'44").

interests was responsible for bringing together the group that signs this text, having as a starting point the subject "Labor Law and Gender Studies", taught as an elective discipline during law school graduation. The will of the participants to pursue the project together led us to found the Capibariba - Collective for Research in Social Rights, Labor, and Subalternities -, at UFPE, later joined by some Mackenzie Presbyterian University faculty to the academic partnership bond between the coordinating professors.

The development of the theme took place throughout 2022, with the group organizing itself horizontally and holding periodic meetings for training, debates, and writing. As all the members had previous knowledge about gender theory, the training stage focused on readings related to the Brazilian project of rewriting judicial decisions from a feminist perspective, creating a collective understanding of what a feminist analysis of law is, about neutrality and impartiality in the judiciary, and the techniques of a feminist approach to laws and judicial decisions. With this grounding, we set out to choose the decision to be rewritten, with the previous definition that, due to the common fields of study, we would choose one related to labor.

We decided to rewrite the STF's landmark decision on outsourcing because of its socio-legal impact and the apparent absence of a specific gender bias in the Supreme Court's consideration. From our perspective, outsourcing intersects with the core issues advocated by feminist movements. By engaging in a constructive dialogue with the Court's decision, we aim to broaden the analysis of this topic, shedding light on the distinct ramifications of employing outsourcing contracts when hiring both male and female workers in Brazil.

The next step was a detailed reading of the decision and rounds of debates among the members, in which we analyzed the arguments,

positions, convergences, and divergences between the opinions and thought about possible strategies for the rewriting. The plurality of understandings about the legality or not of outsourcing, the presentation of divergent data and information among the justices, and the absence of gender issues made us choose to prepare a separate opinion - the 12th opinion, by a female Justice of the Federal Supreme Court who does not exist - following the understanding of the Justice Court Rosa Weber and the other dissenting justices, but placing the feminist lens at the center of the argument.

With this in mind, we set out to define the legal-feminist methods for our rewriting (BARTLETT, 1990; HUNTER, 2008). The techniques applied were: (1) "asking the woman question"[155], since the opinions do not focus on the allocation of female workers in the outsourcing examples brought by the justices - especially Luiz Fux and Luís Roberto Barroso - which makes them disregard the fact that women are concentrated in the most precarious outsourced activities, such as cleaning and telemarketing (IBGE, 2021); (2) valuing care[156]; (3) reviewing of the system of references and citations, with the inclusion of women, which was done taking as a starting point the opinion of a female justice, Rosa Weber, added to the choice of using preferentially female theoretical references, with the incorporation of competent authors in the most diverse fields of knowledge, in order

[155] "Asking the woman question" is one of the techniques of the feminist legal method created by Bartlett (1990), grounded in women's experiences of exclusion.

[156] Applying a feminist perspective, the concept of "care" gains prominence in rewriting, allowing us to bring attention to the devaluation of domestic and care work within the legal framework, particularly labor standards. These standards often perceive such work as belonging to the private sphere and as a familial responsibility primarily placed upon women rather than recognizing its collective nature (VIEIRA, 2018). However, it is crucial to acknowledge that care is essential for the overall well-being and sustainability of life, and its significance should not be disregarded when making judicial decisions.

to give them a voice, bring concrete experiences to the debate, and avoid reproducing academic sexism.

In addition to the mentioned techniques, we incorporated critical legal-labor theory, a key reference in Labor Law, and the origin of the dialectical-discursive method of inquiry within the discipline (ANDRADE, 2022). This allowed us to incorporate historically constructed perspectives on outsourcing, which were largely overlooked in the prevailing arguments presented in the Judgment.

It is also worth highlighting the choice to write the opinion in an approachable and direct language without using technical terms and the legalese common to legal documents. The concern with language should accompany the exercise of feminist rewriting of judicial decisions, ensuring the production of understandable texts for a broader audience and contributing to democratizing access to justice.

CASE BRIEF

As previously mentioned, the decision was rendered by the STF on August 30, 2018, in Extraordinary Appeal No. 958.252 - Minas Gerais, and constitutes Topic No. 725 with General Repercussion, entitled "Outsourcing of services for the achievement of the company's main activity". On that occasion, the Brazilian Supreme Court established that "outsourcing or any other form of division of labor between distinct legal entities would be lawful, regardless of the corporate purpose of the companies involved, maintaining the subsidiary liability of the contracting company".

The appellant was Celulose Nipo Brasileira S/A (Cenibra), a pulp producer in the state of Minas Gerais, and the respondents were the Labor Prosecution Office (MPT) and the Union of Workers in the Extractive Industries of Ganhães and Region (Sitiextra). This was a

Public - Interest Civil Action filed by the MPT against the outsourcing of main activities carried out by Cenibra.

The company was defeated at every level of the Labor Court and appealed to the Supreme Court, which, even with the opposing opinion of the Attorney General's Office, declared the constitutionality, with general repercussion, of the practice of outsourcing main activities. With this approach, the previous understanding that limited outsourcing in Brazil to only the intermediary activities of companies was effectively challenged.

The discussion in the Labor Court about outsourcing dates back to the 1990s, a period of productive restructuring and pressure for the implementation of the neoliberal model, which began with the privatization process of telecommunications in Brazil, and subsequently spread in both the private and public sectors (ANTUNES; BRAGA, 2009). In this context, Precedent No. 331 of the TST, which prohibited the outsourcing of end-activities, represented the consolidation of the labor jurisprudence produced from the comparison of labor protection norms with the factual reality of the growth of labor intermediation.

It is important to acknowledge that Precedent No. 331 has been a subject of controversy since its inception, as legal scholars hold different interpretations regarding the compatibility of Labor Law with outsourcing. On the one hand, some argue that the institute is incompatible with the national legal system in all cases, as it conceals the protective structure provided by the employment relationship and disperses labor responsibilities (SOUTO MAIOR; SEVERO, 2019). On the other hand, those who support the legality of outsourcing have criticized the Precedent for establishing an unsuccessful distinction between core and non-core activities, failing to consider the complexities of contemporary work arrangements (SILVA, 2021).

In 2017, a series of changes in Brazilian labor legislation were approved by the National Congress in order to relax rules under the argument of increasing the productivity of companies and reducing unemployment in the country. Among the legal changes, in addition to Law No. 13,467/2017 - which became known as Labor Reform -, Law No. 13,429/2017 was also issued, focusing on regulating and expanding the possibilities of labor intermediation. With the approved changes, it became legal to authorize the outsourcing of any type of activity, regardless of the branch of the contractor, providing for its subsidiary liability in relation to the labor obligations of the contractor.

It is in this same context of reducing labor rights under the justification of modernizing the Consolidation of Labor Laws (CLT) and reducing burdens for employers that the decision analyzed here is inserted, relating precisely to the constitutionality of unrestricted outsourcing in the country, challenging the consolidated understanding of the TST. Undoubtedly, and as will be demonstrated later, the STF decision contributed greatly to legitimizing the weakening of social rights and strengthening the precariousness of work conditions in Brazil.

The Rapporteur of the Judgment was Justice Luiz Fux, whose winning opinion argued for the constitutionality of unrestricted outsourcing, and his arguments were reproduced in the Summary:

> EXTRAORDINARY APPEAL INVOLVING A CONTROVERSY WITH GENERAL REPERCUSSIONS. CONSTITUTIONAL LAW. LABOR LAW. CONSTITUTIONALITY OF "OUTSOURCING". ADMISSIBILITY. DIRECT INFRINGEMENT. SOCIAL VALUES OF WORK AND OF FREE ENTERPRISE (ART. 1, IV, OF THE BRAZILIAN FEDERAL CONSTITUTION). COMPLEMENTARY AND DIALOGICAL RELATIONSHIP, NOT CONFLICTING. PRINCIPLE

OF LEGAL FREEDOM (ART. 5, II, CRFB). THE DIGNITY OF THE HUMAN PERSON (ART. 1, III, CRFB). PROHIBITION OF ARBITRARY RESTRICTIONS INCOMPATIBLE WITH THE PRINCIPLE OF PROPORTIONALITY. EMPIRICAL PROOF OF THE NECESSITY, APPROPRIATENESS AND STRICT PROPORTIONALITY OF THE RESTRICTIVE MEASURE AS A BURDEN ON THE PLAINTIFF. STRICT SCRUTINY COMMENSURATE WITH THE SERIOUSNESS OF THE MEASURE. RESTRICTION OF LIBERTY ESTABLISHED BY PRECEDENT. MAXIMUM DEGREE OF SECURITY REQUIRED. DEMOCRATIC IMPERATIVE. LEGISLATIVE BODY AS THE APPROPRIATE PLACE FOR DISCRETIONARY POLITICAL DECISIONS. *SÚMULA 331 TST*. PROHIBITION OF OUTSOURCING. EXAMINATION OF THE REASONS. NO WEAKENING OF THE TRADE UNION MOVEMENT. THE DIVISION BETWEEN "CORE BUSINESS" AND "INTERMEDIATE BUSINESS" IS IMPRECISE, ARTIFICIAL AND INCOMPATIBLE WITH THE MODERN ECONOMY. DIVISION OF ACTIVITIES BETWEEN DIFFERENT LEGAL ENTITIES. ORGANIZATIONAL STRATEGY. NO FRAUDULENT NATURE. CONSTITUTIONAL PROTECTION OF FREEDOM OF BUSINESS ORGANIZATION (ARTICLES 1, IV AND 170). ECONOMICS AND MANAGEMENT THEORY. EXTENSIVE LITERATURE ON THE POSITIVE EFFECTS OF OUTSOURCING. COMPLIANCE WITH LABOR REGULATIONS BY EACH COMPANY WITH RESPECT TO THE EMPLOYEES IT HIRES. PRACTICAL EFFECTS OF OUTSOURCING. EMPIRICAL RESEARCH. NECESSARY RESPECT FOR SCIENTIFIC METHODOLOGY. STUDIES SHOWING THE POSITIVE EFFECTS

> OF OUTSOURCING ON EMPLOYMENT, WAGES, SALES AND ECONOMIC GROWTH. THE PREMISES OF THE LEGAL PROHIBITION OF OUTSOURCING ARE UNFOUNDED. UNCONSTITUTIONALITY OF POINTS I, III, IV AND VI OF THE SUMMARY OF ARTICLE 331 OF THE TST. REJECTION OF THE CONTRACTOR'S SUBSIDIARY LIABILITY FOR THE CONTRACTOR'S OBLIGATIONS. EXTRAORDINARY APPEAL GRANTED.

Justices of the Federal Supreme Court Luís Roberto Barroso, Alexandre de Moraes, Dias Toffoli, Gilmar Mendes, Celso de Mello, and Carmen Lúcia followed the rapporteur, constituting a majority. The dissenting opinions, with dissenting opinions, were those of Justice Rosa Weber and Justices Edson Fachin, Ricardo Lewandowski, and Marco Aurélio Mello, who understood the validity of TST jurisprudence prohibiting outsourcing of a company's main activities.

KEY POINTS OF THE REWRITING

Since it is a 248-page judgment composed of complex and divergent opinions, it was not feasible to rewrite it. Because of this, we opted to write a complementary opinion by a fictional Justice of the Federal Supreme Court, which allowed us to stitch together arguments already used by the STF Justices, highlighting feminist rewriting techniques.

Thus, our initial paradigm is the opinion of the Rapporteur, with which we disagree because we understand, based on the theoretical constructions of decades in Labor Law, that outsourcing effectively hurts principles and the very structure of the field. That is because, in capitalism, the unrestricted contractual freedom of labor "leads to the pure and simple organization of the rule of the strongest," gener-

ating deplorable consequences for the working class, which has had to fight for mandatory norms of minimum working conditions. Consequently, any setback in labor legal protection is an affront to the historical construction of human and social rights.

On the other hand, the rewriting had as its primary reference the opinion of Justice of the Federal Supreme Court Rosa Weber because, from the collective perspective, it was the one that brought together the most robust arguments against the thesis of unrestricted outsourcing, defended by the opinion of the Rapporteur Justice. In this way, the opposition of the two opinions allowed, at the same time, to understand the starting points of each line of argument and the theoretical and legal grounds that made up each of the positions adopted.

The narratives developed by these two interpretative lines, which emerged in the discussion on the topic, were evident in the opinions of Justice Luiz Fux and Justice Rosa Weber. Therefore, choosing these opinions for analysis was our strategy. In addition to illustrating the tensions surrounding the issue of outsourcing, these opinions also signal opposed positions regarding Labor Law itself, particularly regarding the possibility of relaxing its protective boundaries.

With this scope, in the rewritten opinion, we underline the place of women in the context of outsourcing by seeking elements from the labor sexual division theory that can highlight both the gender inequality behind the labor market insertion and in the processes by which family responsibilities increase professional barriers, often keeping women away from productive activities. This is seen, above all, when the care of children or other dependents is interpreted by employers as an obstacle to the commitment to work and career. Therefore, shedding light on these events, almost always covered up by universalistic discourses, becomes essential to the process of rethinking the role played by legal decisions in perpetuating inequalities.

This allows us, more broadly, to question arguments that prove to be fallacious when viewed through the lens of gender, social class, and race. We highlight, in this sense, the following situation: if, on the one hand, Justice Luiz Fux makes no mention of such issues in his extensive opinion, on the other hand, he honors a supposed concern with the maintenance of the established economic order, freedom of contracting, and free enterprise. To defend outsourcing, he also uses arguments such as specialization and the division of tasks aiming at boosting greater production efficiency of large global companies, or even, as he himself says, entrepreneurship, which would have made obsolete the difference between intermediate activities and main activities.

The alienation of the arguments brought by the reporter to the reality of most Brazilian workers attests to the limits of infertile categories and makes one question 1) who are the recipients and social actors of the mentioned progress brought about, according to him, by the new forms of business contracting; 2) how the intense specialization in the division of labor, praised by the Justice as part of the dynamics of the modern economy, works to keep women out of the labor market and the activities typically assigned to them; 3) the impacts of precarious hiring on the measurement of competition levels and competitiveness among companies; and, finally, 4) who are the people left behind by the neoliberal liturgy.

Finally, what the feminist rewriting reveals is that the absence of plural points of view, the disconnection between the reality of the Court and the class that lives off work, and the lack of sensitivity towards precariousness generate serious consequences for the lives of female and male workers in Brazil. The prevalence of judicial interpretations that favor economic interests also creates an imbalance between the social values of labor and free enterprise (art. 1, III, Fed-

eral Constitution), setting aside the protective principle and hurting the foundations of Labor Law. All this reinforces the responsibility of the Judiciary, which has the potential to change the collective and individual living conditions of workers.

THE REWRITTEN DECISION

JUSTICE OF THE FEDERAL SUPREME COURT MADALENA GORDIANO[157]: Madam President, Justices, distinguished representatives of the Public Prosecution Service, and others present.

This is an Appeal against the decision handed down by the 8th Panel of the Superior Labor Court, which denied the Interlocutory Appeal in a Motion for Review filed in the public-interest civil action filed by the Labor Prosecution Office, sustaining the illegality of outsourcing contracts for the performance of main activities, here understood as those expressly included in the articles of association of the contracting company.

The understanding summarized in Precedent no. 331 of the TST, which limits the possibility of outsourcing to intermediary activities, and its constitutionality in light of Article 5, II, of the Constitution of the Republic, is being questioned.

General repercussion acknowledged.

[157] The choice of name for the fictional Justiceis in honor of Madalena Gordiano, a black woman who was freed from a condition analogous to slavery in 2021, in Minas Gerais. She spent four decades providing unpaid services for her employing family, in whose home she arrived at the age of 8. She, as well as many other domestic workers, was denied childhood, study, family life, friendship, and self-determination. With this, we want to put on the tangible horizon the ideal of a Brazil in which Magdalenas have access to studies, live their lives to the fullest, reach high public and private positions, independent of gender, race, family origin, or any other social marker. See: GORTÁZAR, 2021.

Well then.

To this moment, Justices Luís Roberto Barroso, Alexandre de Moraes, Dias Toffoli, Gilmar Mendes, Celso de Mello, and Carmen Lúcia have followed the rapporteur. On the other hand, the opinions of Justice Rosa Weber and those of Justices Edson Fachin, Ricardo Lewandowski, and Marco Aurélio Mello have diverged. It is with the second group that I align myself, for the reasons I will explain below.

According to the interpretations of Justices Luiz Fux and Roberto Barroso, in particular, the issue of outsourcing and its material compatibility with the Constitution of the Republic should be viewed solely in economic terms. They argue that this form of hiring is merely a business organization method. Therefore, they believe that it is the employer's free choice, and it is not the role of the State to restrict freedom of enterprise and freedom of productive organization. According to these Justices, this applies even in light of the duty to protect workers, as they consider that there is no evidence linking precariousness, substandard working conditions, and outsourcing.

The opinions of Justices Fux and Barroso, with all due respect, seem to be far removed from the factual reality faced by outsourced workers in Brazil. The other opinions that, likewise, opined for the constitutionality of unrestricted outsourcing largely reproduced the arguments developed by the aforementioned Justices so that they deserve the two major highlights in the present divergence.

By making use of data produced in inaccurate research carried out in Europe and, therefore, mapping social contexts that are very different from those experienced here, the Justices focus their analysis on the financial and productive benefits of outsourcing for the companies that adopt it. However, they pay little attention to the national reality, in which it is easy to find complaints to labor inspectors or labor claims in which outsourced workers claim payment of

salaries in arrears, the observance of vacations and other basic guarantees, which were denied to them because the interposed company "disappeared" or rehired them under a new corporate name[158].

This analytical detachment from Brazilian reality implies a distancing from the labor repercussions associated with outsourcing that are already occurring in Brazil, translating into an argumentative construction that fails to evaluate the impacts that the expansion of outsourcing offers from the perspective of making the lives of working men and women more precarious, while giving unrestricted constitutional validation to a practice that has already been imposing severe restrictions on social rights - in direct confrontation with the precepts enshrined in the Federal Constitution, notably in articles 3 and 7.

I consider, on the other hand, that Justice Rosa Weber was very clever in the construction of her opinion, on which I take this opportunity to follow.

As emphasized by the Justice, outsourcing is inherently constituted by a precarious bond when compared to the traditional employment relationship. This is because the outsourcing company is placed between the worker and the company that needs the service, manipulating the direct employment bond and the subordination relationship between the parties, removing - even if only formally - the directive power and, consequently, the responsibility for the employment contract from the employer (inserted in the relationship as the service taker).

We understand that outsourcing, in practice, is an arrangement characterized by artificiality; it is the attribution of a legal distinc-

[158] Unions, labor judges, and members of the Labor Prosecutions Office report that it is common for outsourcing companies to "disappear" - as well as their partners - when asked to pay the rights of outsourced workers. They thus leave outsourced employees without receiving wages, severance pay, and/or compensation, depending on the case. See: OLIVEIRA; KOMETANI, 2012; REPÓRTER BRASIL, 2014; CONTRAF, 2017.

tion that differentiates workers within the same work environment between those who are direct employees or servants of the company and those who provide services allocated spatially within the company, but who are legally bound to a third legal entity.

This differentiation leads to tensions within the work environment, as outsourced workers are not part of the formal employment pool of the company for which they provide services.

Although they exercise their functions in the same physical space and in direct contact with the other employees, they are part of a "different class of workers", distinguished by the precariousness of their jobs, by the feeling of disposability, and, on a legal-economic level, by the irresponsibility of the companies that take them on, even though these are the ones that profit directly from their labor force.

Outsourcing also weakens the union structure of male and female workers, in addition to imposing barriers to the implementation of protest movements, since those who provide the service are divided into different workplaces, in addition to occupying different sectors, depending on the performance of the company that takes the service. This is the case of outsourced sewers that provide services in small clothing factories or at home, isolated from the others, who have greater difficulty in identifying their problems as a collective in relation to direct employees who sew in textile companies warehouses and live with their colleagues daily, facilitating their organization[159].

Furthermore, outsourcing prioritizes cost reduction for contractors and the increase of their productivity and competitiveness to the detriment of labor rights. As already expressed by Justice Rosa

[159] As a concrete example, we have the seamstresses of the textile centers of Caruaru and Santa Cruz do Capibaribe, who have sought other forms of organization to ensure better working conditions in Pernambuco, as reported by Brasil de Fato (BEZERRA, 2022).

Weber, outsourcing removes from the service takers the condition of employers, separating the employment contract from the provision of services - since the company that hires the employee is not the same company that receives the products of his work. This restricts the liability and assumption of the risks of the economic activity of the takers, unbalancing power and responsibility.

Historically, the Labor Code has been resistant to the proposition that indirect or intermediated forms of hiring become the rule, rather being aligned with the International Labor Organization (ILO) that, since 1944, through the Philadelphia Declaration, defends that human labor is not merchandise and, thus, cannot be negotiated or intermediated, and must, therefore, only be hired directly by the interested party and its holder, the worker.

I again refer to the reasoning of Justice Rosa Weber when I point out that imposing the concept of freedom of contract and free enterprise to the regulation resulting from the employment contract represents the negation of both this contract and of Labor Law itself which, as an autonomous branch of law, calls for the enforcement of the social rights established in Article 7 of the Federal Constitution.

Even if it is admitted that outsourcing does not completely eliminate the employment contract, it certainly restricts the rights guaranteed to outsourced workers compared to those directly employed, as Judge Rosa Weber has already pointed out in her opinion.

Outsourcing enables the precariousness of work from several perspectives if opposed to work within a bilateral relationship: there is greater precariousness in market insertion, worse working conditions and wages, higher rates of work accidents, more fragmentation of the working class, and weakening of unions, in addition to a low rate of enforceability of outsourced companies, which often fail to meet their labor obligations.

Such information and arguments brought by Justice Rosa Weber, in opposition to the opinions in favor of unrestricted outsourcing, however, miss important data and approaches for understanding the impact that the decision reached by this Court will have on workers, especially women.

According to the Brazilian Institute of Geography and Statistics (IBGE), in the year 2018, 22% of employees with an employment contract in Brazil worked in an outsourcing regime (IBGE, 2022). This percentage tends to be even higher, to the extent that, according to the Covid-19 Survey of People Management in the Crisis, conducted by the Institute of Administration Foundation (FIA, 2021), most companies are inclined to hire more outsourced workers in the economic recovery phase.

Analyzing the combined data found in the Annual Social Information Report (RAIS) with the sectors included in the National Classification of Economic Activities (CNAE)[160], one can arrive at a mapping of typically outsourced services that indicate that, by 2018, 41.3% of the people employed in these areas were women, which represented, at the time, 23.9% of all female workers with an employment contract in Brazil. Considering the current profile of outsourced workers in the country, the centrality of female outsourced work is evident, a fact that, however, was absent in the voting manifestations preceding mine.

In other words, to start thinking about the compatibility of the text inserted in Precedent no. 331 of the TST with the Federal Constitution, it is necessary to analyze the issue of outsourcing under several aspects, among which the insertion of women in these activities stands out.

It is important to highlight that women's participation in the labor market is influenced by various significant social factors. These

[160] Information about Rais is available at: <http://portal.mte.gov.br/rais>. About the CNAE, at: <https://concla.ibge.gov.br/busca-online-cnae.html>.

factors often lead to divergent paths for men and women, as well as for white and black women, and for rich and poor women, when it comes to job opportunities.

Furthermore, I refer to Lélia Gonzalez, according to whom work in Brazil is intersected by a racial and gender division that prioritizes the occupation by white men of more specialized and better-paid jobs. At the same time, it delegates to black women low-paid and invisible jobs in precarious conditions, making even more vulnerable a part of the population that is already marginalized.

Since outsourcing is already so imbricated in Brazilian labor relations, it is certain that the aforementioned dynamics do not escape it either, but, on the contrary, seem to intensify precariousness and social vulnerability that require legal attention.

Areas that have historically been outsourced, such as cleaning[161] and telemarketing services[162], serve as entry points for economically disadvantaged black women in the labor market. These sectors are often seen as extensions of roles traditionally associated with femininity, such as domestic work and caregiving. This perpetuates the sexual and racial division of labor, reinforcing existing inequalities.

By the way, the labor market segmentation is also reflected in the outsourced positions, which in practical terms means, for example, that men are concentrated in construction, security services, and condominium services. At the same time, women are hired in the garment, food, financial, health, education, cleaning, and customer service sectors. (KREIN; CASTRO, 2015).

It is worth emphasizing the paradigmatic nature of outsourcing in the cleaning sector within the Brazilian context. This is primarily

[161] *ASSUNÇÃO, Diana. A Precarização Tem Rosto de Mulher: A luta das trabalhadoras e trabalhadores terceirizados da USP. São Paulo: Iskra, 2020.*

[162] *VENCO, Selma. As engrenagens do telemarketing: vida e trabalho na contemporaneidade. Campinas: Arte Escrita, 2009.*

due to the significant employment of women in roles associated with life maintenance, which can be seen as forms of care work. These activities, focused on social reproduction rather than the production of goods, contribute to the continuity of the capitalist system by providing essential elements for the maintenance of the labor force. (CARRASCO, 2013).

Cleaning services, maintenance, and conservation of business and industrial environments are usually seen as intermediate activities for outsourcing purposes. In this scope, they are treated as inferior in comparison with the main activities, called "productive", which are directly responsible for the companies' profits.

In addition, the cleaning service is understood as an activity that supposedly waives professional training or specific knowledge, which is why their wages are generally lower and employee turnover is high. This perspective, however, reproduces gender stereotypes and reinforces the hierarchization of jobs socially assigned to women, disregarding the informal qualifications and efforts required for their exercise and devaluing the people who perform them.

We must also add that invisibility also characterizes reproductive work in our society. Since these tasks are notable more for their absence, which is an intrinsic characteristic of caregiving activities in general, little value is placed on the result of the work itself and on the individual who performs it. In a study conducted with outsourced cleaning workers who provided services to the Federal University of Bahia (UFBA), it was found that among their main complaints is the social invisibility of the work they do, a kind of dehumanization that affects both their personal dimension - the ignorance of their names by employees and students, for example - and the very appreciation of their results - the feeling of disregard in relation to the work done (DUTRA; COELHO, 2020).

The typical structure of outsourcing, which de-characterizes the employer-employee relationship by creating the figure of an intermediary between the poles, accentuates and highlights, even more, the tensions that historically permeate the allocation of female labor power in society. Subalternized and relegated to lower levels of recognition, female workers, in this scenario, are even more precarious since exclusion from formal employment or marginal insertion in the labor market means a reduction in rights and subjection to less beneficial conditions.

Equipped with a keen awareness of social complexities, the hierarchization of labor activities, through their invisibility and devaluation, reproduces gender inequalities. Outsourced cleaning activities, for example, are seen by companies as mere "means" to achieve the desired "end," as if the well-being of individuals in the workplace or the cleanliness of spaces as a sanitary measure were not essential for maintaining productivity.

This twisted logic was, to a certain extent, incorporated into Labor Law, which, by legalizing outsourcing, attests to the fact that there are "inferior" categories of workers, deserving of less protection, contrary to the Federal Constitution regarding the commitment to reduce inequalities (art. 3º, clause IV).

Regarding the downgrading of the services performed mostly by women in the context of outsourcing, one can notice in the very definition of intermediate and main activities a certain distinction between intellectual work and manual work, to the extent that, in the Brazilian reality, the usually outsourced sectors work in repetitive, mechanical, scripted services, such as telephone answering, cleaning, and civil construction. Even with the unavoidable constitutional determination that no differentiated treatment could be given to a given category, or even to a certain type of work, the reality of outsourcing

in Brazil, by categorizing people and activities in this way, disrespects the provisions of art. 7, XXXII, of the Federal Constitution [163], which prohibits any hierarchy between manual, technical, and intellectual jobs, protecting all male and female workers.

This is why I emphasize the congenital contradiction in conceptualizing main and intermediate activities in the Federal Constitution. By segmenting in such a way the types of work and, even more, the categories destined to perform them, outsourcing makes use of binary codes, efficient in everything to the objectives of narrowing the protective levels: "inclusion-exclusion", "valorization-devaluation", "visibility-invisibility". Such patterns, which inform and relate intimately to the world of work, are connected to the increasingly fierce attempt to relegate women, non-white and poor people to the historical social positions to which they are subjugated.

Therefore, confronted with the exploitation of an extremely precarious workforce, the reinforcement of the sexual division of labor, and the perpetuation of oppressive racial relationships, it is crucial to highlight the multiple ways in which an overtly discriminatory system operates, with inequality as its very foundation. The concept of outsourcing, as currently conceived, inherently encompasses gender, class, and race inequalities, perpetuating and exacerbating them at various levels within the working class and, particularly, among women.

In order to provide the possibility of a dignified existence, work, whatever it may be, cannot be separated from the rights that apply to it, understood here as imminently human, and from the fundamental guarantees of equality and non-discrimination, under pen-

[163] "Article 7. The following are rights of urban and rural workers, among others that aim to improve their social conditions… XXXII – prohibition of any distinction between manual, technical, and intellectual work or among the respective professionals". (BRASIL, 1988)

alty of resulting in the reproduction of the various vulnerabilities that precarious work can create, reproduce, and aggravate. The way it is established today, the unacceptable creation of "classes of workers" directly affronts the constitutional precepts of valorization of labor and equality of opportunities and treatment in matters of employment or profession.

Based on data compiled by the Inter-Union Department of Statistics and Socioeconomic Studies (DIEESE), using information from the Annual Social Information Report (RAIS) and the General Register of Employed and Unemployed (CAGED), it was found that between 2007 and 2014, the ratio of terminated employment contracts to active contracts was higher in typically outsourced sectors compared to typically contracting companies. Specifically, for typically contracting companies, there were four terminations for every ten active contracts, whereas in typically outsourced sectors, the ratio was higher, with eight terminations for every ten active contracts (DIEESE, 2011).

The high turnover rate in outsourced sectors corroborates the notion of disposability of these workers, which is added to lower salaries and reduced labor guarantees, since they are not covered by the collective norms of direct employees. Such conditions also encourage greater leniency when the direct employer fails to respect labor norms because the fear of losing their jobs is always present. In this regard, the research mentioned above at UFBA showed that the recurrence of multiple dismissals was indicated as one of the reasons why outsourced workers stopped presenting medical certificates, for example, suggesting the fear of retaliation by supervisors with a dismissal (DUTRA; COELHO, 2020).

At this point, it should also be considered that studies by DIEESE (2011) indicate that outsourced workers have more prob-

lems related to work accidents, work-related diseases, and commuting accidents when compared to directly hired workers. This corroborates the feeling of unprotection reported by UFBA workers to the extent that, even though they are more susceptible to health problems arising from the work environment in a broad sense, they do not have the necessary institutional support for their protection - and here, not only should the service providers be held accountable, but also the sub-contractors, as subsidiary responsible parties.

For the reasons stated above, it is essential to highlight that the increase in precariousness within outsourcing relationships disproportionately affects women. These work relationships, already marked by cultural and historical processes exacerbating gender inequalities, have an even more detrimental impact on racialized women. Indeed, the consequences of the flexibilization of labor contracts can be described as perverse, as they undermine the principles of dignity and the protection of both female and male workers. The consequences of such flexibilization result in a degradation of working conditions and a disregard for the well-being and rights of workers.

Therefore, I dismiss the Appeal, understanding that the established jurisprudence by Precedent No. 331 of the Superior Labor Court does not violate the constitutional principle of legality by restricting, based on the labor legal system in force, the hiring of outsourced labor only to specialized services related to the main activities of the contractor. However, I disagree with the plenary session because I understand that, on the contrary, the constitutional guidelines for the protection of labor forbid any type of outsourcing, and a direct bond must be formed between the worker and the employer that needs his service, whatever it may be.

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GENDER (IN)JUSTICE IN THE ABSENCE OF A DECISION IN THE DIRECT ACTION OF UNCONSTITUTIONALITY CUMULATED WITH THE ACTION AGAINST THE VIOLATION OF A CONSTITUTIONAL FUNDAMENTAL RIGHT NO. 5.581

Melina Girardi Fachin - Estefânia Maria de Queiroz Barboza - Christine Peter - Marina Bonatto - Catarina Mendes Valente Ramos

INTRODUCTION

Women are encouraged to use their skills, abilities, knowledge, and experience to express their opinions and provide innovative and genuine solutions to the challenges that drive decision-making processes.

Judgment rewriting is a method that proposes *ex post facto* analysis of collegiate and/or single-judge judgments that are relevant and paradigmatic for consolidating the legal, social, and political canons of a nation or geopolitical location.

The absence of women in most of the power experiences of the 19th and 20th centuries is the main reason why judicial decisions that have been established as precedents on specific issues in particular localities need to be critically reexamined. This critical analysis is essential to challenge power structures and work towards achieving a more inclusive and equitable democracy.

For this purpose, it is imperative to deconstruct legal arguments present in real decisions, which can be done using legal dogmatics to reconstruct fundamental rights, so that the law contributes to gender equality.

Judgment rewriting, in this sense, is about giving voice and drawing attention to the absence of women's voices and opinions in power structures, the dominant doctrine, and the interpretation of constitutional norms in different countries.

The Brazilian Democratic State of Law, by recognizing in the Constitution and in different laws the formal equality between men and women, strengthens material equality (PIOVESAN, 2005), a goal that constitutes and is constituted by the idea of parity democracy (ONU MULHERES, 2018)[164].

Material equality among the citizens of a nation has consequences for the whole society because, in terms of individual rights, collective rights, and public policies, gender equality is a decisive factor for sustainable development, from both an economic and a socio-cultural point of view.

Regarding the difference between material and formal equality, it is important to recall the lessons of Flávia Piovesan, about the three aspects concerning the conception of equality, which are: "a. formal equality, reduced to the formula "everyone is equal before the law" (which in its time was crucial to the abolition of privileges); b. material equality, corresponding to the ideal of social and distributive justice (equality guided by socioeconomic criteria); and c. material equality, corresponding to the ideal of justice as recognition of identities (equality guided by the criteria of gender, sexual orientation, age, race, ethnicity, and other criteria)"(PIOVESAN, 2005).

This highlights the importance of the equality component, which must respond not only to formal criteria or the orientation of

[164] In 2015, in Panama City, the Regulatory Framework to Consolidate Parity Democracy was approved by the General Assembly of Parlatino - Latin American and Caribbean Parliament, a normative document whose purpose is to be a reference for "the implementation of institutional and political reforms that promote and ensure substantive equality between men and women in all spheres of decision-making."

socioeconomic criteria but also meet the aspirations of isonomic justice in an effort to guarantee the recognition of identities. Therefore, the two-dimensional character (FRASER, 2000; 2001) of the material equality that is formulated then stands out: redistribution must be added to recognition.

In the same way that is necessary to think about material inequality, it is necessary to think about structural inequality, because the latter embraces the existence of factors that place people in historically marginalized and subjugated groups, such as women, black people, migrants, and economically disadvantaged people.

The importance of this analysis lies in recognizing the marginalized position and historical denial of rights faced by certain groups. Consequently, the state is responsible for implementing measures that address the systemic factors contributing to their legal, social, cultural, and economic exclusion (Supreme Court of Justice of Mexico, 2013). This transformative obligation is also provided for in Article 8 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women[165].

According to Nancy Fraser (2000; 2001), justice requires both redistribution and recognition of identities. The author emphasizes that recognition cannot be reduced to distribution, nor can distribution be reduced to recognition[166].

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[165] "The States Parties agree to undertake progressively specific measures, including programs: (...) to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.

[166] In the author's remarkable passage: "El reconocimiento no se puede reducir a la distribución porque el estatus en la sociedad no es simplemente función de la clase. Tomemos el ejemplo de un banquero afroamericano de Wall Street que no puede conseguir un taxi. En este caso, la injusticia de la falta de reconocimiento

In order to avoid patronizing the vulnerable but instead foster their emancipation, it is crucial to take into account the specific realities and include identity aspects such as gender. The enduring inequalities[167] (UNDP, 2010, p.70) should be incorporated into the political agenda and social initiatives, allowing the oppressed to have a voice. Only through empowerment and constructive dialogue, a just outcome can be attained.

Human dignity is also presented as an unavoidable premise of

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tiene poco que ver con la mala distribución; es, más bien, consecuencia de patrones de valores institucionalizados que hacen a las gentes de color comparativamente poco merecedoras de respeto y estima. Para tratar estos casos, una teoría de la justicia debe ir más allá de la distribución de recursos y bienes y examinar patrones de valores culturales. Es preciso considerar si dichos patrones institucionalizados hacen que ciertos actores sean actores menos plenos en las interacciones sociales. Recíprocamente, la distribución no se puede reducir al reconocimiento, porque el acceso a los recursos no es simplemente función del estatus. Tomemos como ejemplo a un trabajador industrial especializado, varón, que cae en el paro porque la fábrica cierra debido a una fusión corporativa especulativa. En este caso, la injusticia de la mala distribución tiene poco que ver con la falta de reconocimiento; es, más bien, consecuencia de imperativos intrínsecos de un orden de relaciones económicas especializadas, cuya razón de ser es la acumulación de beneficios. Para tratar tales casos, una teoría de la justicia debe ir más allá de los patrones de valores culturales y examinar la estructura económica de la sociedad. Hay que considerar si los mecanismos económicos que están relativamente desvinculados de los patrones de valores culturales y que operan de forma relativamente impersonal, privan a ciertos actores sociales de los recursos que necesitan para participar plenamente en la vida social".

[167] Gender inequality clearly demonstrates the persistence of this: "Women have made some major strides in filling political office, becoming heads of state and high-ranking legislators. About one in five countries has a quota imposed by law or the constitution reserving a percentage of parliamentary seats for women, contributing to a rise in women's share from less than 11 percent in 1975 to 19 percent in 2010 (see chapter 5). And in some cases the prominence of gender issues has risen in tandem. But evidence suggests low female participation at the local level – for instance, in both Latin America and Europe women held about a tenth of mayoralties and less than a fourth of local council seats. An exception is India, where 30 percent of local government (panchayat) seats are reserved for women – with evident effects on patterns of social spending".

the Rule of Law, with material equality, in this context, as a guarantor of the inclusion of all those who have been excluded from the process of its consolidation.

THE CASE OR ORIGINAL JUDGMENT

The decision that the authors intend to rewrite is the one handed down by the Brazilian Federal Supreme Court in the Direct Action of Unconstitutionality coupled with the Action Against the Violation of a Constitutional Fundamental Right No. 5.581, on May 4th, 2020, presided over by Justice Cármen Lúcia.

This lawsuit, filed by the National Association of Public Defenders (*ANADEP*) on August 24th, 2016, encompasses both a Direct Action of Unconstitutionality (*ADI*) and an Action Against the Violation of a Constitutional Fundamental Right (*ADPF*). The aim is to seek an interpretation in accordance with the Constitution for paragraphs 2 and 3 of Article 18 of Law No. 13.301/2016. Additionally, the lawsuit requests an interpretation in line with the Constitution for Articles 124, 126, and 128 of the Penal Code, along with the declaration of the unconstitutionality of the interpretation that deems the termination of pregnancy, in cases where a woman is infected with the *zika* virus and chooses this option, as conduct falling under Articles 124 and 126 of the Penal Code.

In the Against the Violation of a Constitutional Fundamental Right, *ANADEP* pointed out several omissions of the public authorities in the access to information, family planning care, and health services, in addition to the omission of the possibility of pregnancy termination in state health policies for pregnant women infected by the *zika* virus.

Accordingly, the request was to determine the government to adopt several public policies aiming to remedy such omissions,

among them the guarantee of treatment to children with microcephaly in specialized rehabilitation centers, distant at most 50 km from their homes, the delivery of informative material and the distribution of long-term contraceptives to women in vulnerable situations. *ANADEP* also asked for a statement declaring the unconstitutionality of the framing of the interruption of pregnancy in relation to women infected by the *zika* virus in Article 124 of the Brazilian Penal Code.

Alternatively, the request was to consider the interruption in these cases constitutional, "due to the state of necessity with current danger of health damage caused by the zika epidemic and aggravated by the negligence of the Brazilian State in eliminating the vector". This would entail the suspension of police investigations, arrests made in *flagrante delicto*, and ongoing legal proceedings related to the interruption of pregnancy when there is evidence of infection in pregnant women.

However, these claims were not even analyzed in their merits. The *ADI* was dismissed due to the express revocation of Law 13.301/2016 by provisional presidential decree 894/2019 and the *ADPF* was not considered due to the plaintiff's alleged lack of standing.

The formal reasons for not hearing the cases - as opposed to the evolution of the Court's own jurisprudence on the active standing to sue for concentrated control - attract attention as an alternative route to not deciding the case rather than a procedural inadequacy. This occurs in the context of growing neoconservatism in the country in relation to issues on the customs agenda, which have abortion as a central theme in this power struggle.

Due to the failure to address an extremely relevant issue in the Brazilian context, we intend to rewrite the decision as if it had been judged on its merits. For didactic purposes and the proposed activity,

special focus will be given to the issue discussed in the *ADPF*, regarding the interpretation of articles 124, 126, and 128 of the Brazilian Penal Code in conformity with the Brazilian Federal Constitution.

Tackling the issue requires not only a gender perspective, but also an intersectional perspective that considers the different vulnerabilities that are intertwined when it comes to the *zika* virus epidemic and the right to abortion.

REWRITING METHODS AND APPROACHES

The methodological paths that show data about the protagonism of women in social, economic, political, and legal life are being built, even though we are still far from the goals of equal chances and opportunities between genders in all these fields.

The Protocol for Judging with a Gender Perspective of the National Council of Justice - *CNJ* (BRASIL, 2021) is welcome, in the Brazilian experience, as an administrative guideline for the members of the Judiciary, as an important step in the methodological path towards the concretization of the fundamental right to gender equality, expressly recognized by the 1987-1988 constituents. The protocol is designed with the aim of promoting the principles of equality and non-discrimination. It emphasizes the importance of deconstructing stereotypes and provides a list of categories that are considered problematic in the context of judicial decision-making. This list serves to alert judges to the need for heightened attention when interpreting cases and understanding the specific context in which the matter under consideration is situated.

The woman's question, alongside the rewriting of decisions and multi-level constitutional dialogues, can be considered one of the most important vectors, at the level of constitutional methodol-

ogy, to judgments with a gender perspective, as a collective constitutional goal.

The woman question emerges from Katherine Bartlett's doctrine, already in the late 1980s and early 1990s, as a methodology that considers women's voices and opinions as relevant democratic expressions, which deserves to be taken seriously, especially in the sphere of the concretization of their fundamental rights. The interpretative method proposed by Professor Katharine Bartlett (1990, p. 837), "the woman question", verifies and exposes the impact of legal norms on women, which seeks to identify the gender implications in legal norms and practices that may appear neutral or objective. For her, this possibility can bring interpretative alternatives that promote a more just and equitable allocation of social outcomes.

The feminist legal method presupposes the woman's perspective, aiming to identify and challenge elements of legal doctrine that discriminate based on gender. It involves reasoning from a theoretical framework that views legal and constitutional norms as pragmatic responses to the concrete dilemmas faced by real women, rather than static choices between opposing subjects or divergent thoughts. It also seeks to enhance opportunities for collaboration among diverse viewpoints and lived experiences, both from men and women, who are engaged and committed to gender equality (BARTLETT, 1990, p.833).

The roads are not paved, there are still unfamiliar shortcuts, labyrinths that confuse us, and crossroads that challenge our positions, but what is certain, among those who were willing to face the collective path, is that new paths are available for us to experience this process together.

REWRITING THE DECISION

The methodological proposal of rewriting judicial decisions from a feminist perspective may have as a guiding thread a set of ideas from feminist theories. To exemplify some of the possible critical premises of rewriting, the theoretical pillars of feminist constitutionalism are presented, namely, i) material gender equality; ii) visibility of women's rights issues; iii) valorization of women's opinions in decision-making and power spaces; iv) feminist public policies; v) multi-level constitutionalism; and vi) intersectionalities. The rewriting is being developed in the research project "Feminist Constitutionalism", coordinated by professors Christine Oliveira Peter da Silva, Estefânia Maria de Queiroz Barboza, and Melina Girardi Fachin, and developed together with members of the Center for Constitutional Studies of the Federal University of Paraná *(CCONS - UFPR)*, and undergraduate and graduate students of the Federal University of Parana.

Material equality is the primary and essential guiding principle for the decisions of those in power that actualize fundamental rights, binding all members and institutions of power across their territorial and functional domains. It goes beyond mere rhetorical acknowledgment of equality and instead serves as an inherent prerequisite for all considerations, actions, and events associated with exercises of power.

The political model known as the Rule of Law is now primarily and preferably informed by the material equality of all individuals who constitute the social fabric. As such, equality ceases to be a mere abstract idea or value and becomes translated into legal rights and obligations, political acts and events, judicial and administrative decisions, contracts, and acts of private life. Equality moves away from the realm of idealized intent and becomes a lived reality pursued by Brazilian citizens, both men and women.

The visibility of women's issues is a practical consequence of the commitment to respect others and to what is different, as well as to a methodology that brings women, in its broadest sense, closer to the full exercise of their constitutional citizenship.

It is necessary to move issues that were once considered of minor relevance for constitutional law and were confined along with women to the walls of domestic and private spaces, to the center of the most relevant constitutional debates.

Fundamental rights related to women's health, domestic work, jobs linked to care practices, reproductive rights, family planning, childhood and maternity care, social and welfare rights, domestic violence, and obstetric violence, among others, must be put on the agenda of the nation's constitutional decisions.

The chapters of contemporary constitutional law must be rewritten from the perspective of those who were marginalized from this debate in its original version. Thus, it becomes necessary to (re) read constitutional law through gender lenses.

And rereading means, as an action, rewriting the doctrine from a feminist perspective, considering women as central to the demands and decisions of power. The perception that all constitutional doctrine is androcentric must be present so that gender pluralism can make the dynamics of concretization of legal norms diverse and complex. Constitutionalist doctrine written and commented by women should be naturalized in national and foreign bibliographies.

Seeing constitutional law through feminist lenses brings an epistemological turn that expands the latitude and foundations of constitutional theory, proposing a critical review of its structures.

As for latitude, feminist constitutionalism represents a global challenge to the state-only view of constitutionalism, opening it up to a complex, integrated, comparative, and multi-level view. This does

not mean that there is a constitutional universality around the globe. Still, dialogues between different constitutional experiences allow us to demonstrate the structural character of oppression and to give a broader perspective through comparisons.

As for the foundations of constitutional theory, the principles of equality and non-discrimination are given new contours with the central idea of difference and otherness. The focus on diversity is one of the most notable aspects of a feminist approach to constitutionalism.

Therefore, in order to reestablish classical constitutionalism, it is necessary to include the voices, thoughts, lived experiences, and perspectives of all those who were excluded from the initial process of this movement. Thus, considering global and comparative perspectives as premises entails embracing open, pluralistic, inclusive, and sustainable methodologies in the study of feminist constitutionalism.

It is crucial to acknowledge that women continue to be marginalized from power structures worldwide. Even in countries deemed most progressive in terms of gender equality, such as in the realm of political representation, women persistently engage in historic struggles to combat various other forms of inequality and discrimination.

History tells that along with women, everything concerning the feminine was also marginalized and confined to the domestic and private environments, being left out of the public and political arena. Thus, the exclusions of classical constitutionalism also addressed the female gender and sexual orientation diverse from patriarchal heterogamy.

Based on an understanding of constitutionalism that relates humanism and feminism as coinciding movements in their origins, it is necessary to acknowledge that they draw from the same historical and cultural sources, and they are challenged by the same detractors. Sexism, racism, elitism, and imperialism/colonialism are forms of vi-

olence and oppression against others and a disregard for differences. This must undoubtedly be reexamined when they are present, even if subtly, in judicial decisions.

As for the formulation of public policies, this is fundamental for the activist struggles to have wider and longer-lasting effects. One cannot think only in subjective rights, when we are dealing with fundamental rights that materialize equality, especially gender equality. By involving institutions and creating institutes that promote the inclusion of minorities and/or non-hegemonic majorities in power spheres, the risk of setbacks is lower and the victory of society as a whole is more sustainable.

Public and political agents, in an unwavering commitment, must consider and respect the Constitution in all their acts of power because it is necessary to naturalize the respect for gender equality as a premise of the Rule of Law.

Hence, the justification rests on the need to analyze a matter not addressed in the judgment, but that directly affects women in the Brazilian scenario, which criminalizes the termination of pregnancy, except for very specific cases provided by law (and expanded by the STF). Considering the precedent of the anencephalic fetus, the broadening interpretation of this list is of special importance from the standpoint of feminist constitutionalism, which seeks to prioritize - and often introduce - the gender perspective in judgments.

We intend to demonstrate the basic need for feminist constitutionalism and an intersectional perspective so that rights violations against women are not perpetrated in spaces that should defend them, such as the Judiciary, under a perspective that is not only formal equality, as constitutionally provided for, but also material and structural.

Finally, with regard to procedural issues, in her opinion on *ADI* 5581, combined with *ADPF,* the rapporteur, the Justice of the Federal

Supreme Court Carmen Lúcia, dismissed the case declaring the unconstitutionality of the article already revoked and denied hearing the action against the violation of a constitutional fundamental right, on the grounds that the plaintiff *(ANADEP*) had no *ad causam* standing. As for the lack of legal standing, the Justice argued that there was not enough legal interest on the part of *ANADEP* for it to be considered a plaintiff in the *ADPF*, considering that the association has as its objective the protection of its members and the protection of the objectives of the institution itself, while the matter dealt with in the case concerns all Brazilians.

Therefore, it was understood that the functions of the Public Defender's Office should not be confused with the responsibilities of the representative association of its members, thus avoiding any nexus of affinity between *ANADEP* and the matter addressed in the lawsuit.

Although all Justices followed the opinion of the Rapporteur, Justice Luís Roberto Barroso had reservations regarding the illegitimacy of the plaintiff in filing the *ADPF.* For the Justice, the Court itself has already set precedents in which the interested parties are not part of the plaintiff association, but are the object of its professional activity. This is the case of *ADI* No. 3691-AgR, which recognized the legitimacy of the National Association of Labor Judges (*ANAMATRA*) to challenge rules that affect the interests of workers under labor contracts.

Article 103 of the Federal Constitution lists those who have the prerogative to propose declaratory actions of constitutionality and unconstitutionality, as well as action against the violation of a constitutional fundamental right. This restrictive list relies on the interpretation of the STF, so that it can contemplate a large part of the population that is vulnerable and without sufficient representation in the Legislative or Executive branches.

By denying *ANADEP*'s standing on the grounds that it does not have sufficient connection with the matter, this restricted list is further restricted and prevents those who need access to justice, in addition to contradicting the precedents of the Court itself, which has interpreted the Constitution several times in such a way as to be able to contemplate the most vulnerable part.

In addition to the precedent presented by Justice Barroso, which shows the Supreme Court's previous understanding regarding the legitimacy of associations to file lawsuits on behalf of those who are the subject of their professional activities, *ADI* No. 4.066, with Justice Rosa Weber as the rapporteur, also adopted a similar interpretation by declaring *ANAMATRA* and *ANTP* as legitimate plaintiffs in a lawsuit regarding the extraction of chrysotile asbestos in Brazil, a matter that clearly does not have a direct connection to the statutory objectives of the plaintiffs.

The rapporteur also pointed out that she considers unconstitutional the limitation of the list of those who can propose actions for constitutionality control, but follows the understanding of the Court: "I make this exception exclusively to point out, in this line of understanding, that I do not see how to interpret restrictively what in itself - the requirement of thematic pertinence - is already a restriction that does not derive from an express text of the Constitution". (BRASIL, 2017, p. 3).

The Brazilian Supreme Federal Court is responsible, through its decisions, for guaranteeing the visibility of the most vulnerable groups, since material equality must be measurable in human experience, presenting itself, in this context, as an inevitable premise of all reflections, all actions, all acts and events related to power decisions. Thus, equality ceases to be an idea or a value and starts to be translated into legal rights and duties, political acts and events, judicial and

administrative decisions, contracts, and acts of private life. Equality leaves the idealized place of will and becomes a reality experienced by Brazilian citizens.

Based on the aforementioned, it becomes a constitutional obligation to provide support to hyper-vulnerable individuals by considering the contextual circumstances surrounding their decisions, including procedural challenges and obstacles. This does not imply disregarding the law, but rather, when a dynamic and evolving interpretation permits, it is necessary to prioritize constitutional protection for those whose access to justice is already impeded by numerous barriers.

An example of this inclusive look is the Extraordinary Appeal No. 576.967, which ruled for the inclusion of maternity leave in the calculation basis of the Social Security Contribution on remuneration. Although this is a tax issue, the Justices interpreted it in light of women's rights, considering the position in which they find themselves and the greater exposure of the group. The judgment of *ADI* no. 5.617/*DF* is also an example, in guaranteeing that at least 30% of the party fund be destined to finance women's political campaigns.

It is important to highlight the great vulnerability of the group m*ost affected by the matter of ADI No. 5.581. The vast majority of women affected by the zika* virus epidemic would not be able to take care of their children in a dignified manner, considering the geographic and socioeconomic factors that affect them, as well as the fact that they no longer have sufficient representation in positions of power. It is therefore essential that the STF decides in a way that facilitates the protection of these women and ensures their visibility (BRASIL, 2020).

ANADEP, when filing *ADI* no. 5.581, makes use of its relationship with people who are underprivileged (and its respective

legitimacy) to bring to light the afflictions experienced by them; to deny the thematic pertinence is to deny this group the protection of its rights. The thematic relevance has a strongly subjective load, however, whether by precedents directly on active illegitimacy or by precedents on the inclusive interpretation of the Court, it is not possible to speak of an understanding contrary to the existence of the link between *ANADEP* and the subject matter of the action. Therefore, we conclude the legal standing of the National Association of Public Defenders and the Court's responsibility to recognize it in this case.

In this regard, it is necessary to emphasize that beyond a discussion on the beginning of life, or even on the right to life itself, the issue of decriminalization of abortion requires a systematic constitutional interpretation that allows the compatibilization and weighting of all fundamental rights involved. The Supreme Court, thus, with the paralysis in the preliminary analysis whose discussion above has already been exposed, failed to engage in the relevant public debate - in the face of its counter-majoritarian position protecting vulnerabilities.

The criminalization of abortion in the first twelve weeks represents the mistaken assumption that the only way to protect a right would be through the criminal threat of imprisonment or detention (SILVA, 2021, p. 159). Unlike this, the author argues that a considerable part of the fundamental rights are protected in other ways, which do not involve criminal punishment, and points out that this is exactly why there is no "necessary correlation between the decriminalization of abortion until a certain moment of pregnancy and an increase in the number of abortions" (SILVA, 2021, p. 159).

The constitutional perspective is essential for comprehending the right to abortion as a fundamental human right of women, which imposes obligations on the state to ensure its fulfillment.

Moreover, the legislation's review is a constitutional imperative, noting that "the dissuasive effects of the repressive legislation are minimal: almost no woman stops practicing voluntary abortion because of legal prohibition" (SARMENTO, 2005, p. 2). Instead of safeguarding the potential life of the fetus, professor Daniel Sarmento points out, the current legislation "takes the life and compromises the health of many women". Sarmento also concludes that the main consequence of the criminalization of abortion has been the "exposure of the health and life of Brazilian women of child-bearing age, especially the poorest, to very serious risks, which could be perfectly avoided through the adoption of a more rational public policy (SARMENTO, 2005, p. 2)".

The right to health is constitutionally guaranteed in Brazil, as are the rights to equality, life, non-discrimination, and freedom. However, Brazilian reality is still far from the constitutional promises.

Regarding the reality still affected by violence, inequality, and precarious social conditions, the effects of the criminalization of abortion come together, as highlighted by Flávia Biroli, being necessary "to consider the omission of the State in the construction of policies to ensure autonomous planning and safe motherhood, when this is the women's choice" (BIROLI, 2018, p. 145). According to the author, "complications arising from unsafe abortion persist in a context of improved access of women to health rights and services in Latin American countries. According to the author, despite the improved access of women to healthcare rights and services in Latin American countries, complications resulting from unsafe abortions continue to persist. While internationally recognized as a public health matter, these complications take on distinctive characteristics in a continent where abortion is heavily criminalized (BIROLI, 2018, p. 145).

Edna Roland, inspired by Rosalind Petchesky's ideas, argues that the focus should shift from the notion of choice to the transformation of social conditions surrounding work and reproduction. According to Roland (1995), even when women appear to have the freedom to make choices, they often do so within limitations and under social conditions that they have little power to alter as individuals. (ROLAND, 1995).

And it is exactly for this reason that the report "Between death and prison" highlights the need for intersectional analysis of the issue, because it is the intersectional lens that "allows us to see that black women in poverty are affected preferentially and, above all, unprotected in their right to life because of the criminal intervention in the decision to have an abortion" (RIO DE JANEIRO, 2018, p. 71). Therefore, as pointed out, the criminalization outlined in the Penal Code reflects a discriminatory criminal policy from the perspective not only of gender but also race and social aspects.

In a similar vein, Flávia Biroli asserts that the denial of the right to abortion perpetuates varying notions of individuality, bodily autonomy, physical and psychological well-being, and human dignity within legal frameworks. This is primarily due to the fact that access to these fundamental rights diverges based on an individual's gender, as highlighted in the existing legislation. This disparity further exacerbates the existing distinctions of class and race, as it disproportionately affects the physical and psychological well-being of women from marginalized communities, particularly black and economically disadvantaged women. "This social differentiation, which is not restricted to abortion policies, also exists when legislation is silent about differences and inequalities that continue to marginalize groups of the population, thus failing to act to reduce or overcome them." (BIROLI, 2018, p. 139).

It is also necessary to emphasize that, due to the opening clause of §2º of art. 5º of the Federal Constitution, the systematic constitutional interpretation concerning the decriminalization of abortion must also encompass women's human rights foreseen in different international treaties ratified by Brazil.

These should have been the interpretative lenses to guide the analysis of the case submitted to the constitutional jurisdiction assuming the gender lenses and the woman's issues as central to the case. This would allow, in this way, the advance of the analysis of public policies that involve the theme and the specific peculiarities in instances of pregnancy by pregnant women infected by the *zika* virus.

It can be seen that the *zika* epidemic unequally reached women from lower social classes and, in a larger number, black women. These data are part of a Fiocruz study because although mosquitoes are democratic and reach all social classes, in the case of diseases spread by the *aedes aegypti*, "they are more frequent among residents of poorer neighborhoods and among black and brown people" (LÖWY, 2019, p. 1081). Also, according to the study, although complete statistical data on the disease is not available, partial data indicates that "63.5% of pregnant women diagnosed with *zika* during the 2015-2106 epidemics were described as black or primarily brown." (LÖWY, 2019, p. 1081). Moreover, in one of the first articles on the epidemic, of the 40 infected women who gave birth to children with microcephaly, all were low-income (LÖWY, 2019, p. 1082), which demonstrates the need for an intersectional focus on the issue at hand, since they are low-income women who need to stop working to care for their sons or daughters with microcephaly. Therefore, the importance of state public policies for the care of children with microcephaly.

As for analyzing the public policies required in the Direct Action of Unconstitutionality combined with the Action Against the Vi-

olation of a Constitutional Fundamental Right nº 5881, some points should be revisited.

In the first place, the opinion of the Rapporteur Justice implies that it would not be possible to extract the necessary legal interest concerning the plaintiff and the questioned norms and public policies.

In the opinion of Justice Roberto Barroso, one reads that abortion would be an undesirable fact, and the role of the State and society should be to seek to prevent it, giving the necessary support to women, despite stating that the treatment of abortion as a crime has not produced the result of raising the protection to the life of the fetus. Thus, "the kind of public policy that is more welcoming and less repressive makes the practice of abortion rarer and safer for the woman's life." (BRASIL, 2020, p. 20).

However, the aforementioned issue of restriction of fundamental rights in the preliminary question of ANADEP's standing is repeated, even though the higher courts are unanimous in considering the possibility of the Judiciary monitoring the due planning and execution of public policies, as mentioned in the MPF's report in the records.

In this sense, the Federal Prosecution Office understood that the "judicial finding of deficient protection of fundamental rights in public policies, especially regarding the protection of the existential minimum, may authorize the Judiciary to impose its compliance by state entities" (BRASIL, 2020, p. 4), as long as the ineffectiveness of the programs to meet the constitutional guideline is proven. Precisely because it is a policy that guarantees the existential minimum, the *reserva do possível*[168] should not be invoked.

[168] TN. "*Reserva do possível*" is a Brazilian legal doctrine that recognizes the limitations of the government in providing resources for social and economic rights due to budgetary constraints. It recognizes that governments can't always meet all rights obligations due to competing priorities and limited resources. This doctrine

However, public policies concerning: i) prevention, information, and health care; and ii) pregnancy termination in case of *zika* virus infection were not addressed at all by the opinion.

Regarding the first aspect of public policies, it was argued that the Protocol for Health Care and Response to the Occurrence of Microcephaly is insufficient to guarantee the rights of women and children affected by the *zika* epidemic because it only summarizes current policies of contraceptive distribution. Therefore, it would be necessary the promotion of effective public policy with delivery of material about *zika* virus in health clinics and schools, with information about transmission, effects and contraceptive methods needed and made available in the national health system.

Furthermore, the determination to create public policies of medical assistance to women of reproductive age to the Federal Executive, especially to those in vulnerable situations, to distribute long-acting contraceptives, mainly based on art. 1, caput and § 1, II, of Law No. 13.301/2016, to recognize the duty of the full authority of the Unified Health System (SUS).

As for the second, *ANADEP* requested an interpretation in conformity with the Constitution of articles 124, 126, and 128, I and II of the Penal Code, as well as the application of articles 23, I, and 24 of the Penal Code, as generic justification causes, and the fundamental constitutional precepts of human dignity (art. 1, III, CF/1988), of freedom (personal self-determination and reproductive autonomy) and of the protection of physical and psychological integrity (art. 5, caput, CF/1988), of women's health and reproductive rights (arts. 6 and 226, § 7, both Constitution).

The requests, besides being intrinsically connected - since

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has generated debate as it balances the importance of rights with practical constraints.

sexual and reproductive rights encompass the right to information - are also within the scope of protection of fundamental rights that is sought in an *ADI*. This is because the right to safe termination of pregnancy not only concerns the very freedom of the body and the sexual division of labor, but is also a matter of public policy (DIXON, 2012, p. 71-72)[169].

Women's right to safe abortion is only one aspect of reproductive freedom, which also involves reducing inequalities, the right to information, and family planning, among others. The UN Committee on the Rights of the Child has reported that about 92% of deaths during childbirth are considered preventable, and has established that the need for sexual and reproductive health services begins in childhood, including education and guidance on sexual health, contraception, and safe abortion (CIDH, 2011, p. 37).

In addition, unsafe abortions affect more girls who belong to other vulnerable groups. Even during the pandemic, this remained the largest cause of maternal deaths in Brazil (APÚBLICA, 2021) with a specific profile of women: black, indigenous, with low education, under 14 years old and over 40, mainly in the North, Northeast, and Midwest regions of the country, and without a partner.

It is recognized in the Inter-American Human Rights System, of which Brazil is a signatory, that the countries must adapt their internal regulations regarding practices and public policies concerning health with appropriate, complete, accessible, reliable, and unofficial information on sexual and reproductive matters, massive dissemination of awareness to adolescent girls and indigenous, Afro-descendent and peasant women, to ensure informed decisions on their reproductive health (CIDH, 2011, p. 37).

[169] Arguments such as the dignity of the fetus being contingent on the provision of affirmative support from a woman, or the right to safe abortion guaranteeing the dignity of that woman, as the right to health is essential for it.

Likewise, it is important to highlight that the Inter-American Commission on Human Rights has already stated that abortion, within the context of sexual health, is encompassed by the protection of the right to life, particularly in cases of danger to the woman's life, the fetus's viability to survive, and instances of sexual violence, incest, and forced insemination. Women should have immediate access to contraceptive methods.

This is because the IACHR recognizes the close relationship between poverty, unsafe abortions and high maternal mortality rates, and other structural factors, such as inequality, racism, discrimination, and violence, that prevent women from enjoying their fundamental rights, such as the right to health, equality and non-discrimination, personal integrity, dignity, and access to information, among others[170].

Finally, considering the woman's question (BARTLETT, 1990, p. 837), we realize that the case in question needed to be answered from the impact that the maintenance of the pregnancy[171] and the birth of a child with microcephaly produces in the life of the woman. This includes the significant commitment required to provide ongoing support and engagement in stimulation activities for the child, as well as the absence of comprehensive public policies to support children with microcephaly adequately.

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[170] According to cases: IACHR Court, "Caso Artavia Murillo y otros (Fertilización in vitro) Vs. Costa Rica. Sentencia de 28 noviembre de 2012. Excepciones Preliminares, Fondo, Reparaciones y Costas". Serie C No. 264; Corte IDH. "Caso Gelman Vs. Uruguay. Sentencia de 24 de febrero de 2011. Fondo y Reparaciones". Série C No. 221, párr. 97; Corte IDH. "Caso Xákmok Kásek Vs. Paraguay. Sentencia de 24 de agosto de 2010. Fondo y Reparaciones". Serie C No. 214.

[171] As, for example, studies show the increase of depression among women who are mothers of children with microcephaly. (AGÊNCIABRASIL, 2019) or the fact that children with microcephaly by *zika* would be unlearning to speak and eat during the pandemic period (BBC BRASIL, 2021).

Thus, the entire material analysis of the content of a public policy of health and information for women and girls of reproductive age was prejudiced by the lack of procedural interest, as well as by the excessive value judgment as to whether an abortion was objectively undesirable or not.

Feminist movements had hoped for precisely this kind of analysis to be reflected in the Supreme Court's ruling regarding the question at hand. Unfortunately, it seems that procedural obstacles, which in our opinion, were not adequately addressed, prevented this from occurring.

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"WHORE" AND "SLUT": DOES THE USE OF THESE TERMS BETWEEN SISTERS CONSTITUTE GENDER-BASED VIOLENCE?

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INTRODUCTION

In 2008, two years after the establishment of the Maria da Penha Law, the Brazilian Superior Court of Justice (STJ) trailed the Conflict of Jurisdiction No. 88.027 - MG (2007/0171806-1), establishing the initial judicial interpretations for the concept of "gender motivation" in cases involving domestic and family violence against women. The conflict of jurisdiction arose from a case brought before the Small Criminal Court of Governador Valadares/MG, concerning violence perpetrated by one sister against another.

According to the victim's account, on the day of the incident, her sister - with whom she has a strained and difficult relationship — allegedly went to their residence to pick up the victim's daughter for a walk. In response to the victim's refusal, the aggressor proceeded to hurl insults at the victim from the gate of the house, loudly and repeatedly, thereby causing psychological harm by referring to her as a "whore and slut" and subsequently asserting that she "does not deserve to live on the island[172]." The situation created by the offender attracted the attention of the owner of the property where the victim and her daughter reside, who requested the victim to vacate the property.

[172] Although the decision did not bring elements that allow us to state the exact meaning of the insult, the context in which the facts occurred suggest that the offender's intention was to question the victim's belonging. When referring to the 'island', she possibly mentioned the place (territorial) where both resided.

In an attempt to determine whether the case should be processed in the Small Criminal Claims Court (of Governador Valadares, MG) or in a Criminal Court[173] within the same judicial district, the judges examined the facts presented by the victim and concluded that there was no gender-based motivation. They stated that Law No. 11.340/2006 (Maria da Penha Law) did not apply to this case, as it involved mere disagreements and insults between sisters, without any gender-based motivation or vulnerability that would characterize a situation of intimate relationship or domestic and family violence against women.

This is one of the first decisions in which the Brazilian Superior Court of Justice (STJ) defines that in a case consisted of gender-based violence, the woman has to be "in conditions of vulnerability or physical and economic inferiority" (BRASIL, 2008, p.1). However, this requirement lacks legal support. Therefore, the reevaluation of the decision and the interpretation made by the STJ regarding what should be understood as the context of gender-based violence is crucial. Considering that the imposition of requirements such as vulnerability, inferiority, economic or emotional dependence, among others, greatly restricts the scope of protection provided by the law, limiting what the legislator itself did not restrict or intend to restrict, considering the historical context that led to the development of the Maria da Penha Law.

However, it is important to underline that in a recent decision published in Newsletter No. 732 of 2022[174], STJ acknowledged the

[173] T.N: In Brazil, what we understand in English as "defamation" is divided into three different types of conduct: *calúnia* (imputation of a criminal act), *injúria* (verbal abuse; swearing), and *difamação* (imputation of non-criminal but disreputable conduct), and are considered crimes.

[174] BRAZIL. SUPERIOR COURT OF JUSTICE (6th Panel). Case under seal. Domestic violence against trans woman. Application of Law No. 11.340/2006. Maria da Penha Law. Removal of application of the exclusively biological criterion. Dis-

applicability of the Maria da Penha Law to transgender women. The court emphasized the importance of overcoming the exclusively biological criterion and understanding the distinction between the concepts of "sex" and "gender" and the need for adequate comprehension of the latter, under penalty of inadequate reduction of the scope of legal protection. The STJ decision underscored the necessity of recognizing gender as a result of an unequal power structure, where men are often positioned as superior, leading to aggression against women solely because of their gender.

The proposal for a feminist rewriting of judicial decisions in the Human Rights Clinic of UniRitter's Law School emerged from the finding that the Maria da Penha Law (*LMP*) has not been interpreted in accordance with its original gender perspective. This initiative took place between 2020 and 2022. During this period, students from the clinic participated in the reworking of court decisions involving cases of domestic violence. Through this collaborative process, it became evident that there was a need to revisit the initial decisions that shaped the courts' understanding of gender-based violence as defined by the Maria da Penha Law. The decision currently undergoing the rewriting process serves as an illustrative example of this endeavor.

THE ORIGINAL DECISION

Sixteen years after the publication of the Maria da Penha Law, the ongoing debate surrounding the issue of jurisdiction persists, as the limiting parameters set forth in the law remain unchanged. The repeated use of such interpretations by the STJ and other courts contradicts the protective and comprehensive perspective of the law, as

tinction between sex and gender. Identity. Power relationship and modus operandi. Teleological scope of the law. Rapporteur: Justice Rogerio Schietti Cruz, unanimously, judged on 04/05/2022.

well as the concept of gender-based violence that guided the formulation of the Maria da Penha Law.

One of the significant obstacles hindering the effective protection provided by the Maria da Penha Law is the lack of a proper understanding of the concept of gender and gender-based violence (GBV), which has been narrowly interpreted through criteria not based on the law, as several studies have demonstrated (ÁVILA; MESQUITA, 2020; MACHADO; GUARANHA, 2020; ÁVILA; JATENE, 2019; SEVERI; NASCIMENTO, 2019; GOMES; SANTOS, 2019; SILVA; CARLOS, 2018).

The decision rendered by the STJ was based on the following arguments: 1. Defamation ("*difamação"*) offenses involving sisters do not fall within the scope of Law No. 11.340/2006, which aims to protect women from a gender perspective, in conditions of vulnerability or physical and economic inferiority. 2. The subject of domestic violence, as targeted by the aforementioned law, is women. The perpetrator can be either a man or a woman, as long as there is a recognized domestic, family, or affective relationship. 3. In the case at hand, where there were only disagreements and insults between sisters, there was no gender-based motivation or vulnerability that would characterize an intimate relationship capable of causing domestic or family violence against women. 4. Law No. 11.340/2006 does not apply.

According to the court, the Maria da Penha Law "takes into account women from a gender perspective, in conditions of vulnerability or physical and economic inferiority in patriarchal relationships", and the law's purpose is to protect women who are in a situation of fragility in relation to men (or women) due to any intimate relationship, with or without cohabitation, in which acts of violence against women may occur (BRASIL, 2008, p. 4-5).

The rapporteur also states that "the victim of the offense is the woman, given that the violence committed assumes a relationship characterized by power and submission over women", safeguarding the primacy of the woman only as a victim, "since it would be unacceptable that, in the same domestic or family environment, the grandson who attacks the grandmother is subject to the rules of the Maria da Penha Law, while the granddaughter who practices the same acts is not subject to the same rules" (BRASIL, 2008, p. 4-5).

Finally, he asserts that "the circumstances of the case do not demonstrate any relationship of vulnerability, inferiority, physical or economic disadvantage between the perpetrator and the victim," and that the alleged offense does not involve any gender-based motivation, but rather consists of discussions and insults between two sisters with pre-existing problems (BRASIL, 2008, p.7).

The misunderstanding of the concept of gender and gender-based violence extends beyond the application of the Maria da Penha Law and is part of a larger context of neglecting the gender perspective in judicial decisions. This has been a concern of the Brazilian National Council of Justice (CNJ), which, following the Latin American movement initiated by Mexico[175], published the Protocol for Judging with a Gender Perspective (BRASIL, 2021), recommending its implementation by all Brazilian courts through CNJ Recommendation No. 128 of February 2022.

The Protocol aims to discuss the notion of neutrality and impartiality in judgments, by highlighting the power imbalance in society and its impact on judicial decisions. It distinguishes sex and gender (a difference often overlooked) and provides a range of concepts and examples that judges can use to adopt a gender-sensitive perspective

[175] Available at: https://biblioteca.corteidh.or.cr/tablas/r31196.pdf. Accessed on: 28 Dec 2022.

in their jurisdiction. The protocol is committed to taking the principles of impartiality and equality more seriously, seeking to train its members and staff, and dismantling gender stereotypes that are often perpetuated in judicial practice.

In light of this guideline, we question whether the perspective adopted by the judges in the Jurisdictional Conflict could be changed by the use of the Protocol. Would the approach to the issue under analysis be different? Therefore, despite not being in effect at the time of the decision, the use of the Protocol is relevant, considering recent decisions by the STJ which reveal that the understanding persists, contradicting the gender perspective adopted by the Protocol and demonstrating a clear resistance to incorporating the instrument into legal practice.

The decision explicitly shows a hermeneutic reduction, to the evident detriment of women, since it excludes violence committed in non-intimate domestic relationships, thus hindering access to justice. Similar cases involving property violence or violence between siblings, uncles and nephews, grandsons and grandmothers, etc., have also been interpreted as falling outside the scope of the Maria da Penha Law.

But what exactly constitutes gender-based violence? Can "minor" offenses and disputes between individuals who have "relationship problems" (as mentioned in the decision) be part of a context of structural oppression? How deep can we delve into uncovering the roots of the structural power asymmetries that underpin this form of violence? Is it possible for a woman to commit gender-based violence against another woman, or does their shared experience of oppression resulting from their gender prevent them from gender-based behaviors?

These questions inspired our decision to rewrite the STJ decision, aiming to broaden the scope of the Maria da Penha Law's pro-

tective measures by fostering a deeper comprehension of the structural context within which gender violence is situated.

FEMINIST METHODOLOGIES AND APPROACHES

Based on this, we sought to identify the initial decisions of the Supreme Court of Justice (STJ) that shaped the tribunal's understanding of gender-based violence. Although pinpointing the absolute first decision proved challenging, we carefully selected this particular one as one of the most representative among those found shortly after the law's publication.

Considering the rationale behind the decision, our objective while rewriting the process was to offer a fresh perspective on the underlying structural context surrounding the offenses committed by the offending sister. We start from the assumption that violence between sisters can also find its foundation in the deep power asymmetry between men and women that structures patriarchal society, which means expanding the scope of protection provided by the Maria da Penha Law.

Our observations challenge the foundations of the decision, emphasize the need to understand the concept of gender-based violence, and incorporate international human rights conventions for women as well as the Protocol for Judging with a Gender Perspective. These are the main arguments presented in the rewriting.

It must be noted that the proper understanding of the parameters that invoke the application of the Maria da Penha Law and the context in which it operates enabled an expansion of legal protection, as it eliminates the need to verify the presence of criteria such as 'vulnerability,' 'fragility,' 'powerlessness,' 'physical or economic inferiority' — often invoked by the Judiciary — by demonstrating

that the characteristic disparity of gender-based violence is rooted in the very social structure. Thus, it rejects the adoption of gender stereotypes — such as those mentioned — to justify the exclusion of protective legislation.

The proposed rewriting also impacts the alteration of how narratives, experiences, and lived realities are assessed, bringing the judge closer to the process and the parties (as recommended by the Protocol) and preventing the victim's accounts from being a priori disregarded or disqualified. This new way of perceiving the facts ultimately brings judges closer to realities previously overlooked, revealing hidden barriers to women's effective access to justice. In this particular decision, this proximity made it possible to overcome the preconception that women in "turbulent relationships" (as referred to in the decision by the rapporteur) did not deserve legal protection, a conception associated with the normalization of gender-based violence. The broader the legal understanding and the multiple and diverse realities behind each of these forms of violence, the greater the extent of the protection achieved.

We also sought to promote a control of conventionality of the decision's foundations by aligning the understanding of gender-based violence with the international treaties and norms ratified by Brazil, such as the Belém do Pará Convention and the CEDAW Convention, as well as the General Recommendations of the latter.

Finally, we aimed to utilize the Protocol for Judging with a Gender Perspective (BRASIL, 2021), applying its concepts and guidelines.

Among the difficulties encountered, we emphasize that the judgment provided few details about the facts, which is an important obstacle that must be considered in the analysis and rewriting of appellate court decisions.

The presented rewriting demonstrates the power and relevance of the methodology in facilitating dialogue between academia and the Judiciary. Understanding the complexity of gender-based violence and its structure through the effective use of the international framework for analyzing the specific case and the domestic legislation significantly expands the scope of women's protection and thus promotes access to justice.

THE REWRITTEN DECISION

JURISDICTION CONFLICT
NO. 88.027-MG (2007/0171806-1)

REPORT

MINISTER-RAPPORTEUR: This is a jurisdiction conflict case involving the Court of the 1st Criminal Court of the Judicial District of Governador Valadares/MG (first court) and the Small Criminal Claims Court of the same Judicial District (second court).

Both courts rejected jurisdiction over the present case, which involves a criminal complaint by M.S.O. against her sister, alleging that the offender verbally assaulted her at the entrance of her residence. According to the complainant, her sister, with whom she has a difficult and troubled relationship, came to her house to pick up her stepdaughter (the complainant's daughter) so they could spend the day together. After the victim's refusal, the alleged offender, who was in a car in front of the house, allegedly insulted her psychological integrity by calling her a "whore and slut", stating afterwards that she "was not worthy of living on the island". The insults were reportedly shouted, accompanied by honking and witnessed by the owner of the

property where the victim resides. The complaint states that as a result of the experienced violence, the owner of the residence solicited her to leave the property. The complaint indicates that the alleged offender committed the offenses provided for in Articles 139 and 140 of the Penal Code.

The Small Criminal Claims Court, accepting the opinion expressed by the Public Prosecutor's Office, argues that the facts reported by the victim would entail the application of Law No. 11.340/2006, which excludes the jurisdiction of the Small Criminal Claims Court, as explicitly provided by law.

On the other hand, the Court of the 1st Criminal Court understood that the factual situation presented does not fit exhaustively into the legal hypotheses described in Article 5 of the same law, making it possible for the case to be processed and judged by the Small Criminal Claims Court. Thus, a conflict was raised.

The Federal Public Prosecutor's Office expressed its opinion on pages 13-17 in favor of the jurisdiction of the Small Criminal Claims Court of the Judicial District of Governador Valadares/MG.

OPINION

THE HONORABLE MINISTER-RAPPORTEUR: Firstly, I note that the issue under consideration will be examined in light of the Protocol for Judging with a Gender Perspective of the National Council of Justice (CNJ), in compliance with CNJ Recommendation No. 128/2022[176]. Furthermore, in accordance with CNJ Recommendation No. 123/2022[177], it will observe the international guidelines

[176] RECOMMENDATION Nº 128, OF FEBRUARY 15, 2022. Recommends the adoption of the "Protocol for Judgment with a Gender Perspective" within the Brazilian Judiciary.

[177] RECOMMENDATION Nº. 123, OF JANUARY 7, 2022. Recommends to the

ratified by Brazil, in particular, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[178] and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention)[179].

After this clarification, it is important to transcribe the victim's account of events in order to better understand the context of the criminal act:

> The victim reports that the perpetrator is her sister and that they are constantly in conflict. On February 28, 2007, the perpetrator went to the victim's house to pick up the victim's daughter and take her to the perpetrator's house. The victim had not authorized her daughter to go to her aunt's house. Because the victim's daughter did not go, the perpetrator started honking and shouting at the victim's doorstep, verbally insulting her by saying, "whore, slut, you are not worthy of living on the island", causing emotional distress to the victim. The victim also states that the owner of the property where she lives asked her to leave due to the incident (emphasis added).

The event allegedly took place in front of the house, where the victim's sister, with whom she has a relationship characterized by conflicts, allegedly insulted her psychological integrity by calling her a "whore and slut", stating afterwards that she "was not worthy of liv-

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members of the Brazilian Judiciary the observance of international human rights treaties and conventions and the use of the jurisprudence of the Inter-American Court of Human Rights.

[178] DECREE Nº. 4.377, OF SEPTEMBER 13, 2002. Promulgates the 1979 Convention on the Elimination of All Forms of Discrimination against Women and repeals Decree No. 89.460 of March 20, 1984.

[179] DECREE Nº. 1.973, OF AUGUST 1, 1996. Promulgates the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, concluded in Belém do Pará on June 9, 1994.

ing on the island". The insults were reportedly shouted, accompanied by honking and witnessed by the owner of the property where the victim resides, who asked her to leave the residence due to the incident.

At this point, it is relevant to note that the determination of whether or not the event occurred as described is a question of merit that requires prior evidentiary proceedings. In the context of determining jurisdiction, as in the present case, the victim's statement is sufficient to guide the intended analysis.

With this in mind, and analyzing the information gathered so far, it can be inferred from the transcribed account that there is a possibility of an **action based on gender** (the insults uttered by the perpetrator), causing **psychological suffering** (emotional distress) and **injury** (the request from the property owner for the victim to vacate the house), as required by Article 5 of the Law on domestic and family violence against women (*LMP*), which states:

> Article 5: For the purposes of this Law, domestic and family violence against women is understood as any action or omission based on gender that causes death, injury, physical, sexual, or psychological suffering, as well as emotional distress or patrimonial damage.

Furthermore, the reported violence was committed by the victim's sister, which falls within the familial context required by the provisions of Article 5[180], and is consistent with what Article 7, sections II and V, described as "psychological suffering":

[180] I - in the scope of the domestic unit, understood as the permanent space shared by people, with or without family ties, including people sporadically aggregated;
II - in the scope of the family, understood as the community formed by individuals that are or consider themselves related, joined by natural ties, by affinity or by express will;
III - in any intimate relationship of affection, in which the aggressor lives or has lived with the abused woman, regardless of cohabitation.

> Article 7: Forms of domestic and family violence against women include, among others:
> (...)
> II - psychological violence, understood as any conduct that causes emotional harm, diminishes self-esteem, hinders full development, aims to degrade or control actions, behaviors, beliefs, and decisions through threats, coercion, humiliation, manipulation, isolation, constant surveillance, persistent persecution, insult, blackmail, violation of privacy, ridicule, exploitation, and restriction of the right to come and go or any other means that causes psychological harm and limits self-determination; (Amended by Law No. 13.772, 2018)
> V - personal injury, understood as any conduct that constitutes libel or defamation.

Thus, having established the feature of domestic violence, I will now discuss the concept of gender-based violence or gender violence against women.

THE CONCEPT OF GENDER-BASED VIOLENCE

The Law No. 11.340/2006 (Maria da Penha Law - *LMP*), stemming from proposals by feminist organizations and women's movements, establishes gender as a legal paradigm. Based on the gender paradigm and gender-based violence (hereafter referred to as GBV), the *LMP* created a new normative framework and an autonomous legal system with its own rules of interpretation, application, and enforcement, grounded in women's human rights (CAMPOS; CARVALHO, 2011).

The Maria da Penha Law, in its preamble, references the Convention on the Elimination of All Forms of Discrimination against

Women (CEDAW) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention), affirming its conformity with international conventions and indicating that the normative concepts enshrined in these conventions are part of its interpretative framework, including the concept of gender-based violence. Therefore, for a proper understanding of the scope of protection provided by the *LMP,* it is essential to consider the definitions established and promoted by these international norms to which Brazil is a signatory, which I will now discuss.

CEDAW Committee General Recommendation No. 33 on women's access to justice defines gender as "socially constructed identities, attributes and roles for women and men and the cultural meaning imposed by society on to biological differences, which are consistently reflected within the justice system and its institutions" (UN, 2015, par. 7, p.4). The concept of gender, therefore, rejects biological determinism (CAMPOS, 2017) by asserting that the socially attributed differences between sexes are a result of social and cultural construction, which can be deconstructed. This understanding also guides the Protocol for Judging with a Gender Perspective developed by the National Council of Justice (CNJ) when presenting the concept of gender (BRASIL, 2021).

The social construction of gender does not occur in a cultural vacuum; rather, roles, identities, and attributes are influenced by the severe power asymmetries that structure society, generally placing men in a hierarchically superior position and women in a position of subordination. It is within this social context that gender-based violence is embedded.

According to the Beijing Declaration and Platform for Action (1995), gender-based violence can be understood as "any act of

violence that results in or is likely to result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (UN, 1995, p. 189).

Thus, gender-based violence is a concept associated with gender as it explains the asymmetry in gender relations and the use of violence as a mechanism to maintain women's subordinate and inferior positions. The concepts of gender and gender-based violence are, therefore, inseparable.

In CEDAW Committee General Recommendation No. 19 (GR 19) on violence against women, discrimination against women (Article 1 of the CEDAW Convention) includes gender-based violence (UN, 1992), making it a form of discrimination, since disproportionately affects women simply because they are women and is often rooted in gender stereotypes. Hence, the CEDAW Convention stipulates in its General Recommendations No. 19 and No. 35 that this form of violence (as a form of discrimination) severely limits women's ability to enjoy their rights and freedoms on an equal basis with men, thus obligating State parties to adopt all measures for the elimination of discrimination and violence against women (Articles 2 and 3 of the Convention).

Proceeding with these concepts, the Belém do Pará Convention, in its Article 1, defines domestic and family violence against women as any act or conduct based on gender that causes death, physical, sexual, or psychological harm or suffering to women, both in the public and private spheres.

As known, gender-based violence affects women throughout their lives (including girls) and takes various forms, including "acts or omissions that cause or may cause physical, sexual, psychological, or economic harm or suffering to women, threats of such acts,

harassment, coercion, and arbitrary deprivation of liberty" (UN, 2017, par. 14).

To prevent the revictimization of women, the CEDAW Committee recommends that States adopt, among other preventive measures, "mandatory, recurrent, and effective training, education, and capacity-building for members of the judiciary, lawyers, and police officers" (UN, 2017, par. 30, e), aiming to promote an understanding of "how gender stereotypes and biases lead to gender-based violence against women and inadequate responses to it" (UN, 2017, par. 30, e, i).

These international norms underpin the Maria da Penha Law and its definition of domestic and family violence as "any action or omission based on gender that causes death, injury, physical, sexual or psychological suffering, emotional distress, or patrimonial damage," which can occur in the domestic environment, family, and intimate partner relationships (Article 5, I, II, III). As legal categories, gender and gender-based violence must be adequately understood.

Gender (which structures hierarchical relations) underlies gender-based violence, namely violence inflicted upon female and feminized bodies due to asymmetrical power relations. Therefore, any violence perpetrated against women in domestic, family, and intimate relationships is gender-based violence because it reflects the asymmetrical power relations that confer a supposed "authority" or supremacy to men and a supposed "obedience" or inferiority to women (MACHADO, 2016, p. 169).

These asymmetrical power relations can also be present in relationships among women when one of them assumes, through projection displacement, the patriarchal male power, positioning herself as a patriarch. For example, violence from a daughter-in-law against a mother-in-law, or vice versa, from a daughter against a mother, or from a sister against a sister. The displacement occurs through differ-

ent forms of projection or extension of patriarchal/paternal authority (MACHADO, 2016, p. 169).

Thus, if a woman acts in the projection of patriarchal male power, we can speak of gender-based violence. This is what happens in the present case, with the violence perpetrated by the sister who, by calling M.S.O. a "whore" and "slut", employs words traditionally used by men to insult women. By doing so, the sister is acting as a male representative, exerting control over sexuality by labeling her as a "slut" and questioning her belonging by stating she cannot "live on the island".

This projection of patriarchal male power becomes evident, for example, in the appropriation of gender stereotypes and the associated derogatory adjectives used to humiliate, ridicule, belittle, or violate another woman, as in the present case and as emphasized in General Recommendation No. 19:

> 11. Traditional attitudes by which **women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence** (...) Such prejudices and practices may justify **gender-based violence** as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms (…). (emphasis added)

It is a social, cultural, and structural phenomenon of violence against women, as evidenced by General Recommendation No. 35 on gender-based violence against women (CEDAW, 2017), with item 19 deserving spotlight, *ipsis litteris*:

> The Committee regards gender-based violence against women as being rooted in gender-related factors, such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behavior. Those factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered a private matter, and to the widespread impunity in that regard.

It is evident, therefore, that the Committee emphasizes the challenges faced by women, and it is the responsibility of states to promote the deconstruction of these guiding principles rather than fortifying them, as observed in the mentioned decisions of the Brazilian Superior Court of Justice.

Regarding gender-based violence, the Protocol for Judging with a Gender Perspective highlights that the distinctive character of gender-based violence lies not in the fact that the victim is a woman but rather in the fact that it is committed due to gender inequalities. The document also points out that when a woman experiences domestic violence, it occurs within a structural power asymmetry that creates material, cultural, and ideological conditions for this type of violence (BRASIL, 2021, p. 30).

In the current case, the victim's statements provide crucial insight into the circumstances surrounding the alleged insults. It is important to highlight that the alleged aggressor, reportedly employing the terms "whore" and "slut," appropriated historically ingrained attributes assigned to women who defy conventional social norms, consequently experiencing subjugation. This observation further strengthens the preliminary conclusion.

Therefore, if it is evidenced that the narrated events correspond to gender-based violence, the Maria da Penha law should be applied in lieu of the general law (CPP).

THE CRITERIA OF VULNERABILITY, LACK OF RESOURCES, DEPENDENCE, SUBORDINATION, ETC.

It is important to highlight that the *LMP* (Maria da Penha Law) does not establish criteria of vulnerability, lack of resources, dependence, subordination, physical inferiority, or any other criteria to characterize gender-based violence (GBV). I consider these criteria to be exclusionary and potentially restrictive to the comprehensive protective perspective of the law since the broad protection sought is independent of economic, social, or cultural conditions. Therefore, conditions of vulnerability, lack of resources, dependence, etc., should be analyzed to ensure greater protection for women, never to limit legal protection. Similarly, it should be understood that the gender motivation in domestic and family violence is structural and not an individual condition, as it reflects the structural violence of a patriarchal society present in asymmetrical gender relations, perpetuated by both men and women.

Violence against women is based on the power disparity between genders, even if the perpetrator of the offense is not a man. This is because women, as individuals embedded in a society founded on sexism, can also act violently toward other women, as stated in the sole paragraph of Article 5 of the *LMP*. This is also the case with the use of expressions and stereotypes constructed and perpetuated to belittle, humiliate, and demean women.

This understanding is essential to grasp the true magnitude of patriarchy in our society and address it appropriately. The mere "ar-

guments and offenses between two sisters with preexisting relationship problems," far from justifying the inapplicability of the *LMP* or a lack of attention to the case by public authorities, signifies the urgency of intervention due to the deep roots of the problem. It is precisely this particularity (the profound gender motivation) that triggers the special protection of the *LMP*, excluding the jurisdiction of the Small Criminal Claims Court, in light of the principle of specificity.

Based on these considerations, I dismiss the jurisdictional conflict and declare the jurisdiction of the 1st Criminal Court of Governador Valadares-MG for the processing and judgment of the case.

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PILAR, THE PLACEMENT OF HER CHILDREN OUT OF THEIR HOME, AND THE REWRITING PROCESS OF THE DECISION

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THE VIOLENCE CARE CENTER AND THE REWRITING PROCESS

The Violence Care Clinic (*CAV/UFPA*) operates within the Federal University of Para Law School, offering support to individuals experiencing violence. It also conducts research, provides human rights education, and engages in strategic litigation. This initiative aligns with the New Curricular Guidelines outlined in Regulation No. 5/2018, which promotes the expansion of the course's practical field, including the establishment of clinics. (SOUZA et al, 2020).

In the Clinic there are extension projects underway (focused on victim assistance), but also research and teaching projects[181]. The Clinic is a multidisciplinary initiative that brings together professionals of Law, Psychology, and Social Work. For the rewriting process, professors, professionals, and students who work at the *CAV* met to

[181] Resolution no. 6/2017 from UFPA's Law School authorizes the mandatory internship to be fulfilled beyond the NPJ- Legal Practice Center, in Legal Clinics.

discuss the court order requiring that the children be returned. The decision was discussed in groups and divided into central aspects.

Pilar's case was assisted by the *CAV*, where legal and psychosocial assistance was provided. This article is based on this experience, following the exercise of "collective agency" that seeks to demonstrate, "in practice", the effects that plural perspectives can have on the decision-making process (HUNTER *et al*, 2010). Based on this, we began to question how the feminist perspectives can give new directions to the Pilar case. It starts from a feminist methodology of analysis based on the perspective of transforming reality for the defense and promotion of women's rights (SOUZA et al, 2019). We break with the vision of neutrality by assuming the confrontation with discriminatory logic and by choosing a case that registers our personal involvement and our commitment to the defense of women's rights. According to Donna Haraway (1995), feminist theories question the view of objectivity of science by presenting a territorially, socially, and temporally located gaze, and therefore embodied, localized, and partial knowledge.

SUMMARY OF THE CASE AND THE DECISION

Pilar[182] divorced her ex-husband and gained joint custody of their three children[183]. She decided to leave her home country[184] and move to Brazil in 2015, under allegations of domestic violence and

[182] The name has been changed to maintain confidentiality, under the terms of the General Law of Personal Data Protection (LGPD), Law No. 13,709/2018. The names are inspired by the Spanish film "Te doy mis ojos". Year: 2003. Country: Spain. Direction: Iciar Bollaín. The film deals with conjugal violence, highlighting the difficulty of perceiving women's perspective.

[183] Born in 2009, 2011 e 2012.

[184] The name of the country will not be disclosed to ensure confidentiality.

lack of action by local authorities. In addition to inertia, all her questioning about the violence her ex-partner inflicted on their three children ended up reducing her custody rights and extending the time the children stayed with their father.

In 2017, her application for asylum was filed[185], and was temporarily granted due to the recognition that violence against women constitutes a violation of human rights under the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also known as the "Convention of Belém do Pará."[186], which states: "Violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms" and the Maria da Penha Law, Law n. 11.340/2006[187] (SOUZA; SMITH, 2018).

In 2018, however, her refugee status was denied due to a lack of legal grounds. On March 20, 2018, a request for her arrest and extradition was made[188]. On March 27 of the same year, the search and seizure of the children was ordered at the request of the ex-husband, in accordance with the 1980 Hague Convention, Convention on the Civil Aspects of International Child Abduction[189], with the children being handed over to their father and sent back to their home country.

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[185] The term "refugee" refers toan ancient institute granted as a form of protection to people who have suffered human rights violations in their home countries since the Convention Relating to the Status of Refugees (1951).

[186] Decree no. 1,973, of August 1, 1996, promulgates the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, concluded in Belem do Para, on June 9, 1994.

[187] Art. 6 Domestic and family violence against women constitutes human rights violation.

[188] The revocation of the arrest and right to await trial at liberty was determined on 05/22/2018.

[189] Decree No. 3413 of April 14, 2000 promulgates the Convention.

In 2019, the extradition request was finally denied, taking into account that the alleged fact does not correspond in Brazilian law to the conduct provided for in art. 249 of the Criminal Code[190]. Thus, it does not meet the requirement in art. 82, II of Law No. 13,445/2017[191].

The placement of her children out of their home was authorized by a federal court judge in the Pará Judiciary Section. The judge based his decision on the following grounds: (a) he held that the Hague Convention favors the return of children to their home country and that the exceptions to immediate return were not applicable in this case; (b) he considered that the father had custody of the children due to the difficulties the mother presented in allowing them to live with him, and the fact that she had fled with the children; (c) he concluded that maintaining contact with the customs and family members of the children's home country would be more beneficial for their psychological development and overall well-being than remaining in Brazil with their mother; (d) The judge considered that the prompt return of the children to their home country was of utmost urgency, taking precedence over matters such as the right to due process or the necessity of a comprehensive psychosocial evaluation of the case. Since it was a request for interlocutory relief, the decision did not thoroughly investigate the case with the required level of scrutiny.

Until the present moment, Pilar is still in Brazil. She works as a teacher and is fighting for her naturalization process in Brazil. She has not seen her children since they were removed from the country. She fears returning to her country of origin because of possible im-

[190] Article 249 - Abducting a minor under the age of eighteen or a person under legal guardianship: Penalty - detention, from two months to two years, if the fact does not constitute an element of another crime.

[191] Art. 82 Extradition will not be granted when: (...) II - the fact that justifies the request is not considered a crime in Brazil or in the requesting State.

prisonment. In an interview[192] it was possible to identify some of the consequences caused by the judicial intervention before, during, and after it. She also stressed that the children and she were never heard and that the three children are sheltered in an institution because their genitor has not yet shown that he is capable of looking after them.

> Pilar: He (the judge) completely disregarded the Hague Convention in his ruling because the children had been in the country for over a year, spoke fluent Portuguese, and were integrated into society. As a result, the judge's failure to comply with the Hague Convention had enormous consequences for my children. They were taken away from a country where their mother was always with them and placed in their country of birth, in a social institution where they still reside today. I constantly think about how far away I am from my children and their lives. I am distant, so when they need me, I am not there... (...).

In the Brazilian legal context, it was evident that the justice system's role in protecting and guaranteeing the rights of this particular group was flawed in this specific case, as it was influenced by sexist perspectives. The reinforcement of gender stereotypes, perpetuating the subordination of women, was clearly observed. This mindset has far-reaching consequences, leading to unjust judicial decisions that negatively impact other women and children.

Regarding shared custody and the Hague Convention, both have often been used as a "weapon against women". The father's presence is imposed as a way of tensioning the mother's power and even diminishing the father's responsibility, demanding from the mother a supposedly collaborative behavior by not questioning the dynamics

[192] Interview given on 11/9/2022.

of the relationship. This has several consequences for the children, as it intensifies the conflict without any support from the state.

In the end, exercises such as rewriting contribute to the strengthening of legal feminism. This presents more strategic horizons for the use of law and changes in mentality in the justice system as a whole, giving institutes a more gendered look (SEVERI, 2016). It is understood that the rewriting of the preliminary injunction decision can give new forms to decisions in similar cases, to the point of influencing future legal results, serving as an interpretative tool for judges.

REWRITING METHODS AND APPROACHES

For the production of the research, besides the bibliographical research in texts that addressed the content of the decision and the rewriting process, a semi-structured interview was conducted with Pilar as a way to understand the sentencing phase, as well as its consequences on her life and her children's.

Documentary research was also conducted with qualitative content analysis of the judicial decision, whose objective is the search for the meanings and contradictions of such document (BARDIN, 2011), considering the feminist perspective of decision analysis elaborated by Alda Facio (2009). According to the writer, three components should be considered in decision analysis: 1) the formal norm component; 2) the structural component; 3) the political-cultural component. In the present case, it is possible to identify in the structuring component points, such as judicial authoritarianism and explore potential alternatives to address the structural inequalities within the law. This begins with a re-analysis of the formal norm component, including the examination of The Hague Convention and the Shared Guardianship Law. Furthermore, attention is drawn to the

political-cultural component, which sheds light on the subordination of women and how it influences legal and social interpretations.

Based on this analysis, we move towards rewriting as a way to face the violent decision process and bet on new ways of doing it. For Linda Alcoff (2016), an important decolonial feminist author, we must go beyond criticism and deconstruction and risk the normative project of improving the process of knowing.

To produce the rewritten text, the Protocol for Judgment with Gender Perspective (BRASIL, 2021) was taken into consideration. The Protocol was approved by the National Council of Justice with the goal of guiding judges to ensure women's access to justice and to address gender-based violence. According to the Protocol, the first step is to identify the social markers of difference[193] that are imbricated in the context of the conflict. At this point, it emphasizes the importance of questioning gender asymmetries from an intersectional[194] perspective. In fact, there is no way to propose political, social, and legal discussions without simultaneously highlighting issues of race, gender, class, and geographic location, among other markers for the analysis of conflicts and reality.

After that, the judge must evaluate if the woman is in a vulnerable situation and take the necessary measures to assure equal justice for her. Another essential step highlighted in the Protocol concerns

[193] This is a field of studies allocated in the social sciences that take as its central axis the debate about the way in which inequalities and hierarchies between subjects are socially constituted, as well as how they operate in social life, based on the production and reproduction of difference (ALMEIDA, 2012).

[194] The term "intersectionality" which was coined in 1989 by the American civil rights advocate Kimberlé Crenshaw, after black feminists criticized the tendency to approach race and gender as mutually exclusive categories of experience and analysis. Crenshaw (2002) conceives social reality as constituted by several systems of discrimination that interact with each other in different ways, composing multiple dimensions of experience.

the Procedural rules, since if they are not in line with the gender perspective, they may create an environment of institutional violence, as in the cases in which the the woman's maternal attributes or her behavior are questioned, based on gender roles in society.

Regarding the assessment of evidence, it should be based on the following question: could evidence that was actually missing have been produced? This question should guide, especially, conflicts that occur in private places where the production of evidence is more difficult, such as cases of domestic violence. Once the evidence is analyzed, we move on to the identification of the normative framework and national or international precedents involving women, at their intersections with other markers of difference. In view of these assumptions, the Protocol was used as a methodological apparatus in the rewriting of the preliminary decision in Pilar's case. Using it as a basis, the decision was rewritten taking into consideration the elements presented, in addition to the critical analysis of the original decision.

The rewriting process was rich and elucidates the importance of addressing discrimination in the sentencing phase from the factual reconstruction to the claims, that is, rethinking its entire structure. The factual narration, for example, can be made to reproduce a discourse permeated with stereotypes and social expectations. The evidence collection process can also lead the proceeding to another direction. Finally, the conclusion of the sentence should include as much concern as possible with the concrete reality of the people involved.

Before getting into the rewriting, it was important for the team to analyze the decision itself from a multidisciplinary perspective, bringing together legal, social, and psychological analysis. In this sense, four controversial aspects were identified in the decision: 1)

the enforcement of the Hague Convention with the return of the children, even in the face of a complaint of violence; 2) the denial of adversarial proceedings to Pilar; 3) the reiterated defense of shared custody; 4) the denial of a psychosocial evaluation. These aspects will be presented in more detail below.

In cases where women have left their home countries with their children without judicial authorization, they are subject to search and seizure proceedings under the Hague Convention. It governs that the removal or retention of a child is considered wrongful where it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention and at the time of removal or retention those rights were actually exercised (art. 3).

In such cases, the possibility arises to request the return of the children to their home country, which can be done in the form of article 12. In most cases, these requests to return children leave the women in a situation of extreme vulnerability. However, there are exceptions provided for in Article 13, such as when there is a grave risk that the child, upon return, will be subjected to physical or psychological harm or otherwise placed in an intolerable situation.

The court in question, however, assessed that "in the present case: a) custody of the children belongs to the father; b) the Convention favors the return of the children to their country of origin, including through the adoption of urgent judicial measures; c) the exceptions to the return are not present, and 'the immediate return of the children is an appropriate and necessary measure to effectively and efficiently fulfill the purposes of the Convention and to effectively comply with the judicial decision'."

The decision disregards the Hague Convention by ignoring the

integration of children into the new reality experienced and the situation of violence reported, also placing the rights of children and adolescents in a position of confrontation with the rights of the mother. It is also possible to observe that the aforementioned decision is in disagreement with the 1979 Convention on the Elimination of All Forms of Discrimination against Women - CEDAW[195], the Convention on the Rights of the Child of 1990[196] , and the Convention relating to the Status of Refugees of 1951[197], which provide for protection mechanisms for women and children. For all the above arguments, it can be observed that the decision to immediately return the children did not express the best interpretation of International Law.

One of the most controversial aspects of the decision was also the restriction of Pilar's participation in the legal proceedings, violating two fundamental principles of the Constitution: the right to the opportunity to be heard and the principle of adversarial proceedings, as provided for in Article 5, Section LV. However, according to the judicial decision, the principle of adversarial proceedings should be flexible in this case, as "nothing in the law is absolute," which justifies the adoption of "reasonable restrictive measures."[198], given the "likelihood of the right being claimed and the danger of harm or risk to the effective outcome of the proceeding," and considering the "possibility that the judge is fully convinced of the urgency of the request and believes that further clarifications are unnecessary."

Among the many rights and prerogatives that could be considered non-absolute, the judge, in a very symbolic way, chooses the

[195] Promulgated through Decree no. 89.460/1984, later ratified by Decree no. 4.377/2002.

[196] Promulgated by Brazil through Decree No. 99.710 of November 21, 1990.

[197] Promulgated by Brazil through Decree 50.215 of January 28, 1961.

[198] It is worth noting that her arrest for extradition purposes also occurred without an interrogation. This is therefore, a repeated form of silencing.

right of the victim of domestic violence to speak as the one that can and should be made more flexible. He justifies such action on the generic grounds of "reasons of public interest", which makes evident the misogynistic character of the mitigation of the principle.

Historically, the action of silencing women in their right to speak has represented a public action aimed at maintaining patriarchal interests. For this group, the existence of inequality in the scope of laws is the mark that crosses history, reserving a silent space, far from the microphones or the attention of those present, usually deposited in the dock or in insane asylums.

Once again, it becomes evident that there is no room for incorporating the woman's experience or fostering a critical understanding within the legal proceedings. The judge in question, who evidently perceives himself as the embodiment of jurisdiction, dismisses any notion of submission or even listening to a woman regarding the future of her children. With unwavering certainty, he considers himself more knowledgeable than the woman herself, assuming the authority to silence the victim's voice, reducing it to an inhuman cry that he deems unworthy of being heard. Adversarial arguments end up being used as a tool for men to assert and self-referentialize themselves. For a woman to occupy such a space, she must agree with the prevailing order; disagreements are marginalized and silenced. The law does not remain unscathed by patriarchy and gender symbolism. It is not about altering the norm itself but rather subjecting it to the scrutiny of the muted voices of those who formally have their rights at stake.

Another contentious aspect of the decision was the strong emphasis placed on preserving shared custody, a concept that has been recognized in Brazil since 2002, when the current Civil Code was enacted. However, it was only with the introduction of Law 11.698/2008 that the application of shared custody was explicitly provided for in

Articles 1583 and 1584 of the Civil Code.[199]. Until then, a low percentage of judges applied shared custody, and unilateral custody prevailed for women. Since the new legal provision, shared custody can be applied between the parents even if there is no peaceful relationship between them.[200]. Shared custody becomes the rule, with unilateral custody remaining the exception[201].

This was, without a doubt, one of the most controversial points of the law. This is because, in most family situations, the mother is responsible for taking care of the children. Moreover, the moment of separation generates innumerous conflicts, including those related to alimony or care mechanics. Thus, it is not uncommon for family courts to hear claims of shared custody with the sole and exclusive motivation of non-payment of alimony or even as a subterfuge to prevent a change of domicile (LEE, 2016).

The debate on shared custody thus becomes a gender weapon against women. The paternal presence is imposed as a way of tensing the mothers' power and even diminishing paternal responsibilities, demanding from the mother a supposedly collaborative behavior, by not questioning the dynamics of the relationship. This still brings sev-

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[199] Art. 1.583. Custody can be sole or shared. Paragraph 1: Sole custody refers to custody granted to one parent or a substitute (Article 1584, Paragraph 5), and shared custody refers to the joint responsibility and exercise of rights and duties of the father and mother who do not live together, concerning the parental authority over their common children. Paragraph 2: In shared custody, the time spent with the children should be divided equally between the mother and father, taking into account the factual circumstances and the best interests of the children (...).

[200] Article 1584, Paragraph 2 of the Civil Code: "When there is no agreement between the mother and the father regarding the custody of the child, shared custody shall be applied whenever possible."

[201] UOL. **IBGE: Guarda compartilhada após separação aumenta; guarda só de mãe cai.** Available at: https://www.uol.com.br/universa/noticias/redacao/2023/02/16/ibge-guarda-compartilhada-de-pais-separados-aumenta-guarda-so-da-mae-cai.htm.

eral impacts on the children by potentiating the conflict without any state support.

In the decision, the concern with shared custody is particularly noteworthy. This appears in the narrative of the facts as: "difficulties presented by the mother in allowing the children to live with the father" and that "the mother's behavior prevents the shared custody regime". In the grounds of the decision, the stereotype of a "runaway mother" who left the country only to not comply with the "shared custody decision" is reinforced:

> She simply imposed her will unilaterally, having fled illicitly from that country with the sole purpose of preventing the children from having contact with their genitor.
>
> The flight undertaken by the children's mother undermined the "social contract"!" and the children's right to maintain contact and live with both parents, since both are equally important in the formation of their character and personality.

At various points, the decision makes moral judgments about the mother, associating her with attributes such as "cunning" and "maliciousness," which have historically been attributed to women.

> Have you ever considered what would happen if everyone who received an unfavorable decision from the state were to act in the same way as the defendant in this case? The criteria for distributing life's goods would be based on cunning, shrewdness, and strength, rather than on the principles of justice and the rule of law.
>
> It is a legal principle that no one should benefit from their own wrongdoing, therefore it is not defensible to prevent the child from returning to live

> with the parent to whom custody has been granted, especially when the other parent fled to prevent the materialization of this factual situation.

It can be seen in the decision that the application of shared custody is wrapped up in a series of gender stereotypes. Throughout history, many stereotypes have been related to women, including the idea of cunning, lying, and sin (SILVA; ANDRADE, 2009). On the other hand, there is the opposing and idealized notion of a devoted and submissive "mother". The role of women within the nuclear and middle-class family was for a long time associated with submission, domesticity, and motherhood as part of a social imagination built by culture (KEHL, 2008). Therefore, Pilar, by "escaping" to break free from the cycle of violence perpetrated by her intimate partner and protecting her children, transgressed the expected behavior and was deemed incapable of caring for and raising her dependents from the court's perspective. The evaluation regarding custody navigates between such stereotypes. The debate about shared custody arises with the expectation of sharing responsibilities for care but does not break away from maternal expectations.

Part of the judicial perspectives expressed is based on possible impacts on the children with their permanence in Brazil and the mother's behavior. Without the evaluation of other professionals, the judge states that "there is no risk that the children, upon return, will be subject to physical or psychological danger, or in any other way be placed in an intolerable situation" and that "the return to the country of origin, with all the care that will be provided, and contact with their customs and family will bring infinitely more benefits to the psychological development and the physical and emotional balance of the children.

The Eurocentric and colonial perception that children would

be better off if raised in their home country needs to be problematized. According to Petersen and Koller (2006), there are multiple factors that influence human development. What stands out is the lack of a psychosocial evaluation of Pilar and her children. A forensic psychosocial study would have the main objective of assisting the decision-making process by providing a report with information that can facilitate a broader understanding of the situation in which the individuals, especially the children, are involved. (GRANJEIRO; COSTA, 2008). Moreover, it is important to remember that violence is a social, historical, and individual phenomenon, which presents social unfoldings and psychological repercussions. Therefore, the psychosocial effects are recognized as a dimension of analysis and intervention, which shows how in Pilar's case so many voices and knowledge were silenced.

During litigation in Brazil, the lack of a psychosocial study of the parties involved has prevented more in-depth information about the family structure. The dynamics of affective and emotional relationships is an important object of analysis to be considered in the judicial decision-making process, especially in cases involving children and adolescents, in order to understand the functioning and distortions of the existing parental functions (COSTA *et al*, 2009).

In this regard, the abrupt and truculent removal of her children by the agents of the Brazilian justice system was a risk to the children's physical and psychological integrity, as it did not take into consideration the view of the psychosocial professionals and much less the opinion of the children and their mother. It can be noticed, then, in this case of Pilar, that the children's right to be heard was also denied and the violence branched out in an institutional way, being practiced by public agencies and agents who exercised the Brazilian legislation in a discriminatory and omissive manner.

This also brings up the need to consider gender bias, which affects not only legal professionals but also other participants in this process. It is important to expand the feminist perspective to the field of psychological and social knowledge. In this sense, the psychosocial evaluation of the case requires an analysis that considers the cultural and historical crossings that affect family relations, as well as the judicial decisions, and cannot be done only from the perspective of the professionals who assisted the children and the mother in the country of origin, without understanding the context in which this evaluation was done.

THE REWRITTEN DECISION

The factual summary

The Federal Government, acting as the central authority, initiated this action for the search and seizure of children under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, which was concluded on October 25, 1980, and incorporated into the legal system through Decree No. 3414/2000. It has claimed that in January 2018, it received a request from the country of origin for the return of three children who were residing in Brazil with their mother, who is the defendant in the current proceedings. The children had fled their country of origin in 2015.

It argues that in 2015, the Judiciary of the country of origin temporarily revoked shared custody and awarded sole custody of the children to the father, based on the mother's alleged refusal to allow the father to visit the children and her unauthorized departure to Brazil with the children. As a result, the country of origin contacted the Brazilian Central Authority and requested international legal cooperation under Article 33 of the 1980 Hague Convention.

Notified, the mother presented her answer under the following allegations 1) the children are already integrated into the local environment, speak Portuguese fluently, and are enrolled in a regular school; 2) the children have always resided with their mother and when they came to Brazil they were under shared custody; 3) there is a serious risk of the children, upon their return, being exposed to physical or psychological danger, which prevents their return according to art. 13, of the Hague Convention; (4) since July 2017 they have been in the condition of refugees, and their delivery may violate the principle of non-refoulment.

In view of this factual context, the Federal Government, in a protective order, pleads for the search, seizure, and return of the children, so that they can be delivered to a representative of their home country, considering that the right of custody is currently held by the father.

The children's father expressed his position in the case and reiterated the requests made by the Attorney General's Office regarding the precautionary request for search and seizure and immediate return of the children, in accordance with the Hague Convention.

The defendant spontaneously appeared in court yesterday, so that it was considered served, pursuant to art. 239, § 1 of the *CPC*.

Based on the information presented, I hereby render my decision.

THE LEGAL REASONING

It was identified that the mother, after the marital dissolution, relocated with her children to a center for family crisis, due to accusations of domestic violence perpetrated by her ex-husband and father of the children. This same accusation is alleged for her escape from her country.

Taking into account the gender issues related to this case, this decision will be based on the Gender Perspective Judgment Protocol (BRASIL, 2021). This document is of utmost importance as it guides judges in the decision-making process and prevents the reproduction of stigmas and discrimination. In the present case, a woman is being accused of international child abduction by fleeing to Brazil with her three children, and it should be noted that:

The mother had shared custody of the children in the home country until she left. Custody was only changed when she left the country. Since then, however, she has had de facto custody of the children;

The children have been in the country for more than three years;

The mother claims domestic and family violence by the father as the reason for fleeing the country, which has not been confirmed by local authorities;

In this case, it is necessary to take into account that:

Concerning the Hague Convention, under its Article 12[202], only

[202] Art 12: Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall

where a child has been wrongfully transferred or retained pursuant to Article 13[203] and a period of less than one year has elapsed would it be a case of the immediate return of the child. Under Article 13 of the Hague Convention, it is not a case of immediate return if the person, institution, or organization that had the care of the child's person did not effectively exercise the right of custody at the time of the transfer, which prevents the return.

From the documentary analysis, however, it is possible to identify that: a) the children were integrated into the local environment, as stated in Article 12 of the Hague Convention, as they have been residing in the city since July 2015 and attending school in the area; b) the father was not actively exercising custody rights at the time of the transfer, which prevents the immediate return under Article 13(a) of the Hague Convention, as the children have always resided with the mother and were in a shared custody arrangement when they came to Brazil; c) there was a report of serious risk of physical or psychological harm if the children were to return, which also prevents their immediate return under Article 13 of the Hague Convention; d) the children have been in a refugee status since July 2017, and their return could violate the principle of non-refoulment.

In the case in question, the children have always resided with

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also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[203] Art. 13: Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

their mother and when they came to Brazil they were under shared custody. Concerning the allegation of serious risk for the children upon their return, this is a reason that prevents their immediate return as per art.13, b of the Hague Convention, and must be investigated. The Hague Convention must be read in accordance with the principle of the best interests of the child. This principle is embodied in the 1989 International Convention on the Rights of the Child, to which Brazil is a signatory through Decree no. 99.710/1990, in the Federal Constitution, and in the Statute of the Child and Adolescent (Law no. 8.069/1990).

According to the Statute, article 100: "the intervention must prioritize the interests and rights of the child and adolescent, without prejudice to the consideration that is due to other legitimate interests within the plurality of interests present in the analyzed case". According to Digiácomo and Digiácomo (2013), it is essential that the courts act responsibly, analyzing the case from an interdisciplinary perspective and respecting the principles and normative parameters in force, understanding that the goal of their intervention should be the integral protection of these children. In this case, it must be evaluated whether it is better for the children to remain in Brazil or return to their home country in order to avoid further violations, especially considering that they have already adapted to our country.

In addition, the 1979 CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women requires states to take all appropriate measures to confront practices that constitute discrimination against women and to adopt special measures to protect maternity from discriminatory actions (Art. 2). The Convention on the Rights of the Child also provides for the special protection of children and the duty of states to ensure the primacy of their best interests, even in cases of families living in different countries, and

should not cause adverse consequences for the individuals concerned.

The granting of shared custody in the country of origin cannot be a reason per se for the moral judgment of the mother's conduct. Shared custody cannot be used to discredit the women's claims or to force a supposedly harmonious relationship, so it is necessary to assess whether there is a situation of violence being covered up in the particular case.

Shared custody should be carefully analyzed in situations of domestic violence. While the benefits achieved are real, this arrangement can create hostile environments, trapping women, mothers, with abusive fathers who victimize them and their children. This reality goes beyond the "loving" and egalitarian expectations of raising children together for people who are not in a conjugal relationship.

According to the Protocol, when conflicts arise in private settings where obtaining evidence is challenging, it is crucial to explore the potential for gathering additional evidence. Hence, it becomes essential to ensure that the mother's testimony is heard, enabling a comprehensive understanding of her reasons for leaving the country of origin. This is vital for ensuring both a fair hearing and an adversarial process. Such symmetrical participation of all relevant parties is indispensable from a democratic perspective. In complex cases such as this one, involving the rights of several people, the adversarial process is crucial and must be respected even to ensure a criminal investigation with a gender perspective, according to the Protocol for Trial with a Gender Perspective (BRASIL,2021).

The psychosocial investigation in legal proceedings of this nature also becomes indispensable to contributing to a coherent, fair, and feasible decision. In litigations involving children or adolescents, the psychological evaluation is one of the possibilities of investigation of the facts and consequences, providing subsidies to the final decision.

Therefore, it is necessary for the Psychology professional to consider the circumstances and the affective and emotional bonds present in each case (CFP, 2019), and also admit the preventive character in the psychological evaluation of children and adolescents regarding the repercussions on their development throughout their lives, in addition to specificities of the technical process.

The investigation would start from a reflective attitude, in which the human element would override the demands of legal formalism (GRANJEIRO; COSTA, 2008). In litigation involving children or adolescents, the psychological evaluation is one of the possibilities of investigating the facts and consequences providing support for the final decision (CFP, 2019).

The principle of the best interests of the child has a global scope, present in the Convention on the Rights of the Child. It intends to ensure that the authorities, public and private institutions, and legislative bodies act to provide protection and care (UN, 1989). To this end, the psychological and social evaluation of the case in question becomes a priority in order to understand the family structure, its risks, and possibilities.

It is also worth noting that Federal Law No. 13.431/2017 amended the Statute of the Child and Adolescent and began to regulate the way in which children and adolescent witnesses or victims of violence should be received and heard by the System of Rights Guarantee ensuring the Specialized Listening and Special Testimony. These devices emphasize the need to avoid re-victimization of the children assisted by the protection and accountability network and could be used to give greater legitimacy to the process.

CONCLUSION

In light of all these reasons, I hereby deny the immediate return of the children. I order a psychosocial assessment to be conducted on both the mother and the children, with the aim of determining their current circumstances in Brazil, including their integration into the local environment and the potential risks associated with their return to the country of origin.

Afterward, in accordance with the constitutional principles of the right to a fair hearing and adversary proceedings, I schedule a hearing to listen to the mother, the father, and the children. In this instance, the hearing will follow the guidelines set forth in Resolution No. 299/2019 of the National Council of Justice (*CNJ*), which includes special testimony procedures. Regarding the children, the evaluation must be conducted with respect to specialized listening techniques

I authorize the father to have supervised visits with the children at the location where they are currently residing for the duration of the legal proceedings.

Federal Judge

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REIMAGINING REPOSSESSION ACTIONS: THE CASE OF THE 'MULHERES GUERREIRAS' OCCUPATION IN JOÃO PESSOA/PB

Ana Lia Almeida - Maria Eduarda Rodrigues dos Santos Pessoa - Renata Alves de Oliveira Barbosa

INTRODUCTION

The following paper presents the result of the rewriting of a repossession decision rendered in 2017 against an urban occupation — *Mulheres Guerreiras (*Warrior Women*)* — led by peripheral and mostly black or brown women, in the city of João Pessoa, the capital of the Brazilian state of Paraíba (PB).

This reimagining exercise occurred within the scope of the inter-institutional research project "*Julgamentos em perspectiva crítica feminista: reescrevendo decisões judiciais do Nordeste brasileiro*[204]", which involves researchers (professors and students) from different educational institutions in Paraíba and Rio Grande do Norte — Federal University of Paraíba (UFPB), Federal Institute of Paraíba (IFPB), and Federal University of the Semi-arid Region (UFERSA). In line with the national initiative of the project "Feminist Judgments, the Brazilian Experience", coordinated by the University of São Paulo (USP) in Ribeirão Preto, our main objective is to "strengthen feminist legal theory within the spaces of power through intervention in judicial discourse and practice" (SILVA et al., 2021).

In our view, reshaping judicial decisions fall within the field of "feminist legal methods", as Katharine T. Bartlett (2020) asserts it. In

[204] TN. In English: "Judgments from a Feminist Critical Perspective: Rewriting Judicial Decisions from Northeastern Brazil".

Brazil, such endeavors follow the production of legal feminism that seek to connect the interdisciplinary field of "women's studies" with "feminist strategies of political-legal mobilization for the affirmation of women's human rights" (CAMPOS; SEVERI, 2019).

In this project, in force since January 2022, we are dedicated to reframing three judicial decisions in the Northeast Region of the country considering aspects such as race/ethnicity, class, and territoriality, besides, of course, gender and sexuality.

One of the project teams, coordinated by Professors Tatyane Guimarães Oliveira and Caroline Sátiro de Holanda, both from UFPB, is dedicated to rethinking a femicide decision articulated with the *Marias* Group of extension and research in gender, popular education, and access to justice (UFPB). Such decision originates from the 1st Court of the Juiz João Navarro Filho Forum in the city of Santa Rita/PB, in the scope of case number 000073 - 62.2017.815.0331, with regard to the murder of Vivianny Crisley Viana Salvino by three men, which was motivated by her request to be driven home while they were together in a car after leaving a bar in João Pessoa.

Another team, coordinated by Professors Gilmara Medeiros (UFERSA) and Clarissa Alves (IFPB), focuses on a historic decision made by a jury in the city of João Pessoa/PB, in case number 003.1995.0001432/1995: the trial of the ones that planned and of those who perpetrated the murder of rural labor union leader Margarida Maria Alves in 1983.

The decision rewritten and presented in this paper consists of the repossession of the *Mulheres Guerreiras* Occupation, located in the city of João Pessoa/PB, which suffered eviction in the year 2018 due to a decision handed down by the judge of the 3rd Federal Court in the records of Case No. 0807918-88.2017.4.05.8200. Participating in this team are Professor Ana Lia Almeida, as an advisor, and the stu-

dents Maria Eduarda Rodrigues dos Santos Pessoa and Renata Alves de Oliveira Barbosa, both from UFPB.

After the initial stage of joint theoretical training between the teams (in the methodological framework of rewriting and immersion in feminist theories) and the selection of judicial decisions, our group turned its attention to the study of the case of the eviction of *Mulheres Guerreiras*. We examined the entire process, prepared summaries, and discussed key pleadings from both the defense and the prosecution. We analyzed the gender dynamics in this territorial conflict, which is also shaped by racial and class inequalities. Finally, we defined the approach for the reimagining process. We drafted the first version, engaged in discussions and revisions, and now we present it for the consideration of those who may be interested in this theme.

CASE AND DECISION SUMMARY

1. CASE BACKGROUND

In mid-2017, three hundred families occupied an abandoned building in the neighborhood of *Indústrias*, in the city of João Pessoa. It was the *Conjunto Residencial Vista do Verde*, an unfinished property under the responsibility of *Caixa Econômica Federal*[205], as part of the housing project *Minha Casa, Minha Vida*[206]. The urban occupation that would be baptized years later as *Mulheres Guerreiras* was

[205] TN. *Caixa Econômica Federal*, often simply referred to as *Caixa*, is a major government-owned financial institution in Brazil. It is one of the largest banks in the country and It plays a significant role in Brazil's banking and financial system.

[206] TN. The "*Minha Casa, Minha Vida*" program, often abbreviated as MCMV, is a housing program in Brazil aimed at increasing access to affordable dwellings for low and middle-income families. The program was launched in 2009 by the Brazilian government as a response to the country's housing deficit and to stimulate economic growth and job creation in the construction and real estate sectors.

born when a group of women took over the leadership of the movement, the very name that indicate their protagonism in the struggle for the Right to Housing. In a statement registered in *Jornal Brasil de Fato*, a member of the movement explains: "The importance of women here is fundamental because we were the ones who took the lead. We decided to have only women on the commission. I think that women have to take the lead in everything" (BACO, 2018).

A few months after the occupants arrived, *Caixa* filed an action to recover possession of the land quickly obtaining a preliminary injunction for immediate eviction. The injunction, however, was only enforced in June 2018 and was upheld in a final decision in 2019, after which it became *res judicata*.

The decision was delayed and it was difficult to be enforced by the police since there was a strong determination by the families to resist, which was bolstered by the solidarity of other groups. The occupation received organizational support from the *Movimento Terra Livre*[207] (Free Land Movement) and, after they began to resist the ousting, several organizations linked to the popular struggle and human rights also began to help it. *Mulheres Guerreiras* even participated in a visiting agenda of the Chamber of Deputies Human Rights Commission in August 2018, along with other urban occupations. After the lawsuit was filed, the occupation received assistance from the Public Defender's Office (*DPU*), as well as the collaboration of lawyers and law students affiliated with university legal aid programs. The media extensively covered the expulsion, presenting a narrative that was sympathetic to the movement and critical of the actions taken by the security forces.

Even after the eviction, the *Mulheres Guerreiras* Occupation continued to receive media visibility and legal attention. About 60

[207] TN.The "*Movimento Terra Livre*" (MTL) refers to a social movement in Brazil, often associated with indigenous and environmental activism.

families, with more than 30 children, were temporarily sheltered in a sports court located in a nearby square. Without hygiene, sanitation, or health infrastructure, they had to survive in shacks, receiving voluntary donations while they waited for the public authorities to come up with solutions to the social problem amplified by the removal Organizations expressed solidarity through public notes. Authorities made visible the need to solve the housing issue. Lawyers continued petitioning in defense of the rights of displaced families. The *DPU* met with representatives of the occupation and committed itself to investigating the excesses reported during the enforcement of the warrant. Currently, in the year 2023, the last families that were evicted from the occupation have conquered dwellings through a housing program of the Municipality of João Pessoa, according to the *Movimento Terra Livre* (2023).

In addition to the significant female protagonism, which highlights the salience of "gender" as a crucial element in understanding this struggle, there are other factors that compel us to critically examine the gender aspect of this conflict, which has now become entangled in legal proceedings. Particularly noteworthy is the manner in which the concept of "family" was invoked in defense of the resistance to eviction: "We have nowhere else to go, and yet the police treat us like criminals? That's not true. We are men and women with families, and if we are here, it is out of necessity." (BACO, 2018). Furthermore, we noticed that the presence of a large number of elderly and children in the occupation, and the consequent need to protect them as more vulnerable subjects, became a strong element in the disputes that postponed the eviction several times. Recognizing the duty of care for the children and elderly as socially attributed to women, we understand in this postponement another gender element in the conflict.

Of course, gender does not operate alone here — it is done in classes (in the face of the experiences of criminalization and of the resistance of working women), in processes of racialization (which make the lives of black and brown women "less worthy"), in relations that make up the territories of this conflict (inscribed in the periphery of a city, claiming "housing," that is, a place to live), as well as in generational relations (which differentiate adult women, who can be held responsible for a struggle, from children and elderlies, whom must be protected from the consequences of this struggle), among other social relations that can be analyzed as constitutive of gender in this specific conflict.

Therefore, the eviction of the *Mulheres Guerreiras* Occupation represents an emblematic case in the fight for the right to housing in Paraíba. The gender dynamics inherent in this territorial conflict have inspired us to undertake the task of rewriting the repossession decision.

2. REVISITING THE ORIGINAL DECISION: AN ALTERNATIVE PERSPECTIVE

In Case No. 0807918-88.2017.4.05.8200, the judge of the 3rd Court of the Federal Justice of Paraíba — a woman — granted the preliminary injunction request *inaudita altera pars*, that is, without hearing the defendants, in the repossession action aimed at evicting the *Mulheres Guerreiras* Occupation. The final decision was handed down on October 30, 2019. It practically reproduced the terms of the preliminary injunction that ordered the eviction (on October 4, 2017), and it was rendered after the order was fulfilled and the buildings were consequently vacated in favor of *Caixa Econômica Federal* (which occurred on July 12, 2018).

It is a standard decision in terms of possessory actions, which focuses on the justification of property rights. The judge, however, demonstrated some sensitivity to the requests made by the defense and the Federal Public Ministry to postpone the eviction and granted two extensions. Nevertheless, in regard to the request from the Public Defender's Office (*DPU*) for some of the former occupants to "return to the property to retrieve belongings that they were unable to take with them while the execution of the eviction order issued in these proceedings," the judge denied the request, stating that it goes beyond the scope of the possessory action. In the same direction, it rejects the defense's requests not yet examined to safeguard the occupants' right to housing (such as the inclusion of the families in housing programs and housing assistance). Having overcome these issues, which are considered peripheral, the core of the sentence characterizes the occupation as trespass and guarantees the right to repossession under the terms of articles 560, 561, and 562 of the Brazilian Civil Procedure Code. In the sentencing section, in addition to procedural provisions that are not relevant here, the judge 1) grants the repossession claim, upholding the preliminary injunction, and 2) condemns the defendants to pay the costs of loss of suit. But, the enforceability of this order is contingent upon the defendants overcoming the justifying condition of financial insufficiency required to qualify for free legal assistance.

In our approach to rewrite it, we initially determined that the final decision would revoke the preliminary injunction. However, to provide a different temporal context for the events, we altered the reality to consider that the expulsion had not yet taken place. Therefore, in the realm of our rewritten decision, we revoked the yet-to-be-enforced injunction for eviction, ensuring that the families would continue to reside in the building until suitable housing was provided for them.

Furthermore, we identified the need to reformulate certain elements of the narrative of the facts that reinforced criminalizing class stereotypes — in which we eliminated, for example, terms such as "invaders", "squatters" — and generifying the expressions that identified the defendants, with the words "women", "families", "the occupants", making visible the real women in charge of an urban occupation in defense of the right to housing.

The final part of our decision, therefore, revokes the injunction and determines the allocation of the families to proper housing, with the cooperation of the entities responsible for housing policy. We also determined that a survey of the vulnerability condition of the families occupying the property should be carried out, with the supervision of civil society entities and due referral to the agencies responsible for the necessary public services. We granted the defendant, the *Mulheres Guerreiras*, legal aid, upholding, in this respect, the judge's decision, as well as her position regarding the costs of the suit, reduced, however, from 10% to 1% of the amount in controversy. Finally, we determined that responsibility should be determined for the delay in delivering the building, which had already been at a standstill for four years when it was occupied.

REWRITING METHODS AND APPROACHES

In deciding to rewrite this decision, we considered the connections between gender, race, class, and territory implicated in the case, above all because of the argument that there were many family's children, and elderly people in the *Mulheres Guerreiras* Occupation ended up playing an important role in managing the conflict. It affects the decision of postponing the eviction. Due to the impact of the case and the difficulty of the judicial/police authorities in complying with

the order in the face of the women's resistance, several entities were involved in the negotiation process.

The methodological-theoretical matrix that drives our rewriting process dialogues with the "intersectional" and "consubstantial" approaches of feminism, seeking, in the field of gender and sexuality studies, formulations that value experience. We understand, as Anne McClintock (2010) notes, that there is a "dynamic, shifting, and intimate interdependence" between gender, sexuality, race, class, and territory; whereby these social relations "converge, intermingle, and overdetermine each other in intricate and often contradictory ways" (MCCLINTOCK, 2010, p. 457). These relations are realized in each other, in "constitutive reciprocity," in the words of Roberto Efrem Filho (2017). Here, it is worth noting that there is an effort to bring together intellectual investments that value experience.

In the case of the Mulheres Guerreiras Occupation, these intersections stand out with strong clarity, that is, the way "gender" is made up of "class" — not for nothing, the "women" call themselves "warriors", which indicates a struggle that is a battle for housing (disputing "territory"), evidently also a fight that mobilizes economic inequality (they are women made vulnerable by poverty), all this process intersected by elements of racialization — black women, in their majority, and all the more black the poorer and more peripheral. Therefore, in this methodological exercise, we have been busy with the disputes around elaborating a judicial policy that can address social inequalities at the intersections of gender, sexuality, class, race, and territory relations. The rewritten decision follows.

REWRITING THE DECISION

CASE Nº: 0807918-88.2017.4.05.8200 - ACTION TO RECOVER POSSESSION OF THE LAND

PLAINTIFF: CAIXA ECONOMICA FEDERAL

DEFENDANT: ADALBERTO PASCOAL DOS SANTOS and others

ATTORNEY AT LAW: Thais da Rocha Cruz Tomaz and other

PROSECUTION: PUBLIC DEFENDER'S OFFICE

FEDERAL COURT - STATE OF PARAÍBA (ACTING JUDGE)

JUDGMENT

INTRODUCTION

This is a repossession action, with a request for an injunction, filed by *CAIXA ECONÔMICA FEDERAL* against ADALBERTO PASCOAL DOS SANTOS and OTHERS — which include, in general, women, children, and elderly people in vulnerable situations —, with the purpose of reinstating possession of the Vista Verde Residential Development, located at Av. Florestal with Av. Cidade de Jericó, s / n, Bairro das Indústrias, in this capital city.

The complaint describes the allegedly irregular occupation of properties under construction within the scope of the *Minha Casa, Minha Vida* Program, executed by the Federal Government in partnership with *CAIXA ECONÔMICA FEDERAL*. These properties include the *VISTA DO VERDE* I and II Housing Complex, located at Av. Florestal intersected with Av. Cidade de Jericó, s/n, Bairro das Indústrias, João Pessoa/PB, where the plaintiff has been building 192

housing units for those selected by the João Pessoa City Hall. These housing units are intended for families meeting the requirements set out in Ordinance No. 140 of the Ministry of Cities, with triage conducted by *G3 CONSTRUTORA E IMOBILIÁRIA LTDA.*

1. The properties were built with the resources from the Residential Lease Fund (FAR), a financial fund represented legally by *CAIXA*, which was created by this public company in accordance with the provisions of Article 2 of Law No. 10,188/2001 and its respective amendments, as well as Law No. 11,977/2009.

2. These properties were acquired through Private Instruments of Contract for the Purchase and Sale of Real Estate and Production of Housing Development in the *Minha Casa, Minha Vida PMCMV* Program — 0 to 3 SM FAR Resources, with payment in installments, and the Seller and Constructor — *G3 CONSTRUTORA E IMOBILIÁRIA LTDA*, was initially contracted to build housing units in an area acquired by *Caixa Econômica Federal*, at the value of BRL 1,268,000. (one million two hundred sixty-eight thousand reais) for each of the projects.

3. However, *CAIXA* became aware of irregular occupations by individuals, some identified and some unidentified, and believing that the legal requirements were met, requested the issuance of the preliminary injunction for the repossession of the property without hearing the defendants.

A decision issued on October 4, 2017 partially granted the injunction requested, "to determine the reinstatement of *Caixa Econômica Federal* in possession of the units of the *VISTA DO VERDE* I and II Residential Complex, exclusively in relation to the unknown and uncertain defendants". Exceptionally, a period of ten days was granted for the spontaneous eviction of the families not identified by the plaintiff.

Dispatch in document ID 4058200.1843548 ordered *CAIXA* to make this lawsuit public (Article 564, § 3, of the CPC), as well as notify the Federal Prosecution Office (MPF) and the Public Defender's Office (DPU).

After *CAIXA*'s request for reconsideration, the decision in document ID 4058200.1851117 extended the effects of the preliminary injunction granted *ex parte* to the defendants who were specifically identified in the initial pleading.

It is worth emphasizing that there was no assessment of the vulnerability status of the families in question, disregarding the presence of elderly individuals, people with disabilities, and children, most of whom are under the care of single mothers.

It would have been ideal for the previous court to have granted the defense's petition of DJACKSON HERISSON AND OTHERS, as stated on pages 69 and 70 of this case, requesting the Public Authorities to conduct an individualized census of the families, with the support of social assistance services and the involvement of civil society organizations and rights advocacy entities, in order to provide a plan for the allocation, even if temporary, of the socially vulnerable families present in that situation.

Certificate of attachment of a copy of the news published on the Portal of the Federal Court of the 5th Region (JFPB) regarding the granted injunction in the case (id4058200.1883323). The request for an extension of the eviction deadline submitted by the DPU (id4058200.1920649) has been granted, extending the deadline to December 1st, 2017.

In the answer submitted in id4058200.1951588, the DPU argues that:

> The 357 families occupying the area are in a situation of extreme vulnerability, pointing out that the occupants are people who survive with the help of

> social benefits such as *Bolsa Família* and Continuous Cash Benefit Programme (BPC) and occasional informal jobs.
> The practice of forced evictions exacerbates the degree of social vulnerability of people experiencing displacement and generates violations of other human rights.
> Must be upheld and respected the norm issued by the United Nations Committee on Economic, Social and Cultural Rights stipulates that "where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available" and must be respected (General Comment No. 7).
> In contrast to the request for compliance with the decision by the MPF, the removal should take place only "after the relocation agreed between the families to a suitable location, which is the responsibility of the public authorities (Executive and Judiciary), since, in the set of fundamental rights enshrined in the Brazilian Federal Constitution, it should be noted that such families are victims of the State itself, which has not fulfilled its obligation to provide basic rights (the right to housing, the right to work, the right to food security, among many other absolutely primordial positions associated with the protection of human dignity)".

After a request from the *MPF* and the *DPU*, a decision was issued (id4058200.1966501) granting an extension of the deadline for eviction until January 4, 2018. Considering the partial eviction of the properties, it was ordered (id4058200.2150699) to enforce the previously issued repossession order.

Due to the difficulties faced by the Bailiffs in complying with the repossession warrant, arising from the social tension existing in the place (cf. documented in these records), meetings were held with the authorities involved in the operationalization of compliance with the court order, under an institutional cooperation regime, in order to effectuate the judicial measure, as recorded in the order in id4058200.2394893.

This is what is important to report.

ANALYSIS AND REASONING

Initially, I GRANT the defendants' request for free legal aid.

Judgment upon the merits

I refute the grounds of the decision that granted the injunction (ids4058200.1828767 and 4058200.1851117), revoking it.

As evident, *CAIXA* aims to regain possession of the units comprising the VISTA DO VERDE I and II Housing Complex, which were constructed using resources from the Residential Lease Fund-FAR, specifically for the *Minha Casa, Minha Vida* Program. *CAIXA* serves as the legal representative of this financial fund and holds the legal ownership and direct possession of the property until the formalization of the "Contract by Private Instrument of Sale and Direct Purchase of Residential Property with Installment Payment and Fiduciary Alienation in Guarantee of the *Minha Casa, Minha Vida* Program — PMCMV — FAR Resource." The operational criteria of this program are characterized as a public service, as stated in Article 4, sole paragraph, of Law No. 10,188/2001.

> The acquisition, construction, repairs, leasing, and sale operations of properties shall comply with criteria established by *CAIXA*, while respecting the

> principles of legality, purpose, reasonableness, administrative morality, public interest, and efficiency. They are exempt from observing the specific provisions of the general bidding law.

Hely Lopes Meirelles (1994, p. 294) teaches that "public service is all that provided by the Administration or its delegates, under state rules and control, to satisfy essential or secondary needs of the community or simple convenience of the State".

The requirements of the public service must always be ensured by the Administration, hence, still according to the lesson of Meirelles, "lacking any of these requirements [principles of permanence, generality, efficiency, and courtesy] in a public service or public utility, it is the duty of the Administration to intervene to restore its regular operation or resume its provision".

It should be noted that the work was not completed in the agreed period, failing to comply with the structural and financial schedule with its interruption due to the abandonment of the constructor, at about 40% of its completion. Only then *CAIXA* formalized a bidding procedure, in order to hire a new construction company that would assume the completion of the work — *ENGEMAT*. In the meantime, however, the families occupied the building.

The plaintiff is linked to the Government, the purpose of its activities is to serve the public interest, and it is its duty, in this case, to supervise. However, it fails to meet the requirement of efficiency by leaving the construction in question paralyzed for four years, and it is necessary to investigate liability.

Clearly, in the present case, we cannot disregard the right to property held by the plaintiff. As stipulated by Articles 560, 561, and 562 of the Brazilian Civil Procedure Code - CPC:

> Article 560. The possessor has the right to be kept in possession in the event of nuisance and to be reinstated in the event of usurpation
> Art. 561. It is the burden of the plaintiff to prove:
> I - their possession;
> Il - the nuisance or usurpation practiced by the defendant;
> III - the date of nuisance or usurpation;
> IV - the continuation of the possession, even though it was disturbed, in the action for the maintenance of possession; the loss of the possession, in the action for repossession.

Agreeing, however, with the argument presented by the *DPU* in their defense (4058200.1951586), we cannot simply disregard the facts and grant repossession to *CAIXA* without ensuring that these families have their right to housing effectively respected, as they do not have any concrete alternative housing options. Failure to do so could exacerbate a social problem with far-reaching consequences. Hence, the argument presented in the defense, stating that the right to housing should be considered a fundamental requirement and that all three branches of government have an obligation, as enshrined in the Federal Constitution, to safeguard these rights, is indeed valid.

As a fundamental right, this right has a guiding effectiveness towards state institutions, as taught by Ingo Wolfgang Sarlet (2006, p. 171):

> In this context, it is said that fundamental rights contain an order addressed to the State, in the sense that it has a permanent obligation to implement and fulfill fundamental rights.

The Right to Housing is constitutionally advocated by the very foundations and objectives of the Republic, namely, the dignity of the human person (art. 1, III, CF/1988) and the creation of a free, fair, and solidary society (art. 3, I, CF/1988). Specifically, the delimitation of the competence for the implementation of this right is established by the Federal Constitution in Art. 23, IX, in the following terms:

> Art. 23: It is the shared responsibility of the Union, the States, the Federal District, and the Municipalities to
> IX - to promote housing construction programs and the improvement of housing conditions and basic sanitation;
> Sole Paragraph. Complementary laws shall establish rules for cooperation between the Union and the States, the Federal District, and the Municipalities, aiming to balance development and well-being nationwide.

In the normative framework, it is also worth mentioning the constitutional opening clause provided for in § 2 of Art. 5, allowing the constitutional incorporation of rights arising from the international system for the protection of human rights, such as the provisions of Art. 25, item 1, of the Universal Declaration of Human Rights and Art. 11 of the International Covenant on Economic, Social and Cultural Rights, *in verbis*:

> Art. 25 - 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control
> Art. 11 - 1. The States Parties to the present Cove-

> nant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The right to decent housing, therefore, is recognized as a fundamental human right by the International Covenant on Economic, Social and Cultural Rights (*ICESCR*) and incorporated into the Brazilian domestic legal system by Decree No. 591 of 6 July 1992, in addition to being provided for in Article 6 of the Brazilian Federal Constitution as a social right.

It is worth bringing up other international regulations related to the case, since the main residents of the *Mulheres Guerreiras* Occupation are families led by black or brown women, responsible for the care of children and older people: the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (art. V); International Convention on the Elimination of All Forms of Discrimination against Women, 1979 — art. 14.2, item h; Convention on the Rights of the Child, 1989 — art. 21, item 01; Vancouver Declaration on Human Settlements, 1976 — Section III "8" and Chapter II "A.3"; Agenda 21 on Environment and Development, 1992 — Chapter 7, item 6).

In the realm of international law, General Comment No. 7 issued by the United Nations Committee on Economic, Social and Cultural Rights, which addresses the Right to Adequate Housing and Forced Evictions, highlights that women are disproportionately affected in cases of forced evictions due to various forms of discrimi-

nation. These include barriers in accessing property rights, increased vulnerability in their private lives, and acts of violence and sexual abuse when they become homeless. In light of this Comment, governments are required to take appropriate measures to address the vulnerabilities faced by women in forced eviction actions[208].

The defense has presented several photographs of children, either alone or with their mothers, which clearly demonstrate the presence of a significant number of minors. In light of this, and in accordance with Article 24 of Decree No. 592/1992, it is imperative to reject the injunction requested by the plaintiff in order to ensure the necessary protective measures that the well-being of these minors demands from the State. It is crucial to recognize the efforts made by families, particularly mothers, in their fight for a safe and dignified home for their dependents.

Within the scope of Brazilian legislation, it is necessary to highlight Law No. 11.977/2009, which establishes the *Minha Casa, Minha Vida* Program (*PMCMV*) and serves as the legal basis for the contract in question. Considering the specific case at hand, it becomes evident that the right to housing in Brazil is uniquely intertwined with considerations of gender, race, and class. Law No. 11.977/2009 acknowledges this reality in its wording, as it states:

> Article 3: In order to determine the beneficiaries of the *Minha Casa, Minha Vida* Program, the following requirements shall be observed:
> I - Verification that the interested party belongs to a family with a monthly income of up to BRL 4,650 (four thousand, six hundred and fifty Brazilian reais);

[208] *16º período de sesiones (1997) * Observación general nº 7, El derecho a una vivienda adecuada (párrafo 1 del artículo 11 del Pacto): los desalojos forzosos.* Available at: <https://www.mpf.mp.br/pfdc/temas/legislacao/internacional/ComentarioGeral7_DESC/view>.

> II - Income brackets defined by the Federal Executive Power for each of the program's modalities;
> III - Priority given to families residing in high-risk or unhealthy areas, those who have been displaced or have lost their homes due to floods, inundations, overflow, or any other natural disasters of similar nature;
> IV - Priority given to families with women as the head of the household; and
> V - Priority given to families with members with disabilities.

By stipulating that priority should be given to families with women as the head of the household, as well as families with members with disabilities, the law recognizes the struggle for housing by women in Brazil, which is evident in the case of the *Mulheres Guerreiras* Occupation. These are single mothers, guardians, and working women who occupy the *Vista Verde* I and II Housing Complex, living in unsanitary territorial conditions. Therefore, this Court cannot reinstate *CAIXA*'s possession of the properties before the public authorities direct these families to suitable accommodation, as they are a priority in the Housing Program.

As a basis for this decision, we also invoke international norms protecting against the practice of forced evictions[209], in line with the determination of the United Nations Committee on Economic, Social and Cultural Rights, established under the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee states that "where those affected are unable to provide for themselves,

[209] Forced eviction means "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection" (General Comment No. 7, UN Committee on Economic, Social and Cultural Rights).

the State party must take all appropriate measures... to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available" (General Comment No. 7).

As Letícia Osório teaches (2006, p. 36):

> Indeed, States must ensure access to legal remedies — free of charge, for the low-income population — in order to remedy evictions or other forms of violation of the right to housing, which includes — among others — the adoption of measures that ensure that those affected by forced evictions can exercise their possession and housing in a dignified place.

Therefore, the conclusion of this judgment is to protect the minimum human needs of the vulnerable families residing in *Residencial Vista Verde* I and II, which includes the right to housing. Thus, if the eviction in favor of *Caixa Econômica Federal* is necessary to protect the right to property, it can only be enforced after the relocation of the families to suitable housing, through cooperation among the federal entities.

Based on these grounds, I DENY the requested preliminary injunction.

DECISION

I grant the benefit of
free legal aid.

I rule PARTIALLY in favor of the plaintiff's request to restore their possession of the buildings of *Residencial Vista do Verde* I and II. However, only after the relocation of the families to suitable housing through cooperation among the federal entities.

I vacate the preliminary injunction previously granted.

I order an assessment of the vulnerability condition of the families, with proper referral to the authorities responsible for implementing necessary public policies under the supervision of civil society organizations.

I order an investigation into the plaintiff's liability for the delay in completing the construction project.

I assess court costs, and fees of counsel against the defendants, the fees of counsel are fixed at 1% of the amount in dispute, but these obligations are suspended because the defendants were allowed to proceed *in forma pauperis*. These obligations can only be enforced if, within 5 (five) years following the final and unappealable transit of this decision, the plaintiff demonstrates that the situation that justified it has changed. After this period, such obligations are extinguished (Art. 98, § 3, of the Brazilian Civil Procedure Code).

Publication and registration will automatically result from the validation of this sentence in the electronic system. In case of a voluntary appeal, the respondent party shall be notified to submit counterarguments within the legal deadline, and thereafter, the case file shall be sent to the *TRF*/5th Region, regardless of any assessment of admissibility concerning the appeal that may have been filed (article 1,010, §3 of the Brazilian Civil Procedure Code).

Notify the parties.

João Pessoa/PB, April 15th, 2023.

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THE MOURNING AND STRUGGLE OF MOTHERS LEFT BEHIND: A FEMINIST REWRITING ON STATE LIABILITY FOR POLICE LETHALITY[210]

Flavia Portella Püschel - Luisa Mozetic Plastino - Irene Jacomini Bonetti

INTRODUCTION

This work emerges from a pedagogical experiment conducted within the framework of the postgraduate course 'Feminist Rewriting of Judicial Decisions' during the second semester of 2021, under the guidance of Flavia Portella Püschel, the professor and author of this paper, at FGV São Paulo School of Law. The collaborative efforts of the researchers and co-authors Irene Bonetti and Luisa Plastino, who were students of the course, have contributed to the collective nature of this project. It originated in the classroom and flourished through academic exchanges in various settings, including the Gender and Law Center of FGV-SP, the XI Meeting of Empirical Research in Law organized by the Network of Empirical Studies in Law, and the Seventh Global Meeting of the Law & Society Association (LSA).

The co-author Irene Bonetti contributed to the drafting of the complaint for the action in question during her internship at the Specialized Center for Citizenship and Human Rights of the Public Defender's Office of São Paulo in 2018. Rewriting presents an opportunity to challenge the previously adopted legal solution and envision

[210] The authors would like to thank Camila de Jesus Mello Gonçalves, Catarina Helena Cortada Barbieri, and Lia Carolina Batista Cintra, as well as the participants of the Feminist Judgments Project - Brazil for their generous comments that contributed to the improvement of this work.

alternative outcomes not only for this particular lawsuit but also for the broader realms of state accountability and the mobilization of law in cases of police lethality through a critical lens of gender.

THE CASE

This is a feminist rewriting of a ruling by the 9th Chamber of Public Law of the São Paulo Court of Justice (TJSP)[211], which judged the appeal in a tort case brought against the State Treasury of São Paulo (appellee) by Arminda (appellant), assisted by the Public Defender's Office of the State of São Paulo. The objective of the appeal was to seek compensation for both material loss and emotional distress, as well as a mandatory injunction, following the death of Arminda's son, Joaquim.

The lawsuit filed in 2019 refers to events that occurred in 2014, when Joaquim, 19, was killed by two off-duty police officers in the Morumbi neighborhood in São Paulo.

According to the complaint, Joaquim was on the back of the motorcycle driven by his friend Escobar on his way to a party in the Paraisópolis neighborhood when they got lost. They stopped by a car parked on the street to ask for information when two plainclothes policemen, who were unofficially working as private security guards in the area, opened fire on Joaquim and Escobar. They fled on foot. Pursued by the police, Joaquim ended up dead, and Escobar was seriously injured.

The officers claim they had parked their car because they got

[211] The case file and judgment are public and accessible through the e-saj portal: <https://esaj.tjsp.jus.br/esaj/portal.do?servico=740000>. Despite this, we have chosen not to include its identification in this article, in order to protect the privacy of those involved. The authors are willing to provide case identification to persons interested in accessing the case file for research purposes.

lost on their way to a date with women they had met on a dating app when Joaquim and Escobar tried to rob them, and shots were fired in self-defense.

Three requests were made: (i) to order the State of São Paulo to pay the funeral expenses and a monthly minimum wage as material compensation for the loss of Joaquim's contribution to family support; (ii) to order the State of São Paulo to compensate for non-pecuniary damage suffered by Joaquim's mother as a result of her son's death; and (iii) condemnation of the state of São Paulo to issue a formal and public apology for the death of Joaquim and the inadequacies in the investigation of the case. However, none of those requests were granted at first instance. The mother's appeal to the São Paulo Court of Justice (TJSP), was unanimously rejected, with all judges concurring with the rapporteur's opinion and affirming the decision of the lower court, albeit on different legal grounds. The judgment in the appeal was rendered on March 3, 2021.

REWRITING METHODS AND APPROACHES

Before moving on to the rewriting itself, it is necessary to briefly justify the choice of this court decision and clarify some methodological choices made.

The selection of this particular case for a feminist rewriting may seem unconventional since it is not immediately apparent how gender issues are connected to it. It turns out that often the gender problem lies precisely in the invisibilization that the apparent neutrality of the law causes when applied to situations in which social hierarchies are relevant[212]. In these cases, the supposed neutrality of

[212] In US law, Martha Chamallas and Jennifer B. Wriggins (2010) have shown how civil liability, with its apparently neutral formulation, has incorporated rules with sexist and racist effects. There is even a book with feminist rewritings of US court

the law, in addition to masking hierarchies of gender, race and class, legitimizes and reinforces such hierarchies, which is the case of civil liability in deaths by police violence.

In 2020, Brazil reached the highest number of deaths resulting from police interventions since the indicator began to be monitored by the Brazilian Public Security Forum. On average, the daily total amount, 17.6 people died as a result of interventions carried out by active-duty civilian and military state police officers, both on and off duty (BUENO; MARQUES; PACHECO, 2021).

According to a study by Samira Bueno (2018), in the period between 1994 and 2016, more than 13,300 fatalities attributed to the actions of the Military Police occurred in the state of São Paulo, under poorly investigated circumstances. According to Bueno, these fatalities are often labeled as "resisted actions," which results in them not being classified as homicides. This classification is based on the assumption that police officers acted in self-defense or were strictly performing their legal duties. This pattern aligns with the official narrative surrounding the deaths of Joaquim and the severe injuries inflicted upon Escobar.

According to the 2020 Public Security Yearbook, 98% of victims involved in police interventions resulting in deaths were men. Furthermore, within this group, 78.9% were identified as black individuals. When considering the racial composition of the Brazilian population, the rate of police lethality among black individuals stands at 4.2 victims per 100,000 inhabitants, whereas among white individuals, it is 1.5 victims per 100,000 inhabitants. This indicates that the rate of police lethality among black individuals is 2.8 times higher

decisions dealing exclusively with civil liability, organized by Martha Chamallas and Lucinda M. Finley (2020). In relation to Brazilian law, Flavia Portella Püschel (2020, p. 1-21) has already pointed out the occurrence of sexist arguments in STJ decisions in tort cases for emotional neglect of children.

than that among white individuals. Consequently, the 2020 Brazilian Public Security Yearbook asserts that racial inequality is deeply entrenched in police lethality over the past few decades. (BUENO; MARQUES; PACHECO, 2021).

Those data reveal the influence of racial and gender factors on the number of police killings. In terms of gender, while the dead are predominantly men, the groups that remain and deal with mourning are mostly made up of women.

Building upon the studies of Luciane de Oliveira Rocha (2014), Débora Quintela (2021, p. 868) highlights that the grief caused by state violence and the accompanying emotions of outrage give rise to a collective force among women. It is within this context that political action and collective identification emerge, particularly in marginalized neighborhoods and favelas. It is not surprising, then, that these groups are commonly referred to as "*movimento de mães*" ("mothers' movements")[213].

According to Quintela (2021), the most common way for the mothers' movement to attract new participants is for an activist to be aware of a police execution and contact the victim's mother. In the first moment, the older mothers share their knowledge on how to proceed in court, offer emotional support, and then present the movement's goals and actions, inviting the mother to join the social fight.

Above all, the pain caused by police action is strongly related to issues of motherhood and gender. Interviews conducted by Quintela (2021) identify that activists share the understanding that, as mothers, they were primarily responsible for their children, so the fight

[213] Quintela (2021, p. 869) points out that the activism of mothers against police violence began in Brazil from the so-called "Mothers of Acari", formed in Rio de Janeiro in 1990 after the disappearance of eleven young residents of the Favela de Acari. According to the author, faced with the inefficiency of the police in solving the case and certain involvement of state security agents in the disappearance, the mothers of the young people came together to investigate the crime on their own.

for justice in relation to their deaths is interpreted as an act of love, but also as an extension of their maternal obligations. In this sense, Quintela (2021) points out that political engagement often appears in discourses less as a choice and more as a kind of moral duty from which they, as mothers, could not shirk.

Similarly, Adriana Vianna and Juliana Farias (2011), through their ethnographic study of mothers' movements in Rio de Janeiro, identify a repertoire of experiences and political resources that emerge from personal pain and the narrative of disrupted affectionate relationships. Through solidarity, these experiences create a collective subject: "we, the mothers." Grief, in this context, transforms into a struggle for recognition that their right to motherhood has been taken away from them. However, as the researchers highlight, public reparation "almost never arrives"(VIANNA; FARIAS, 2011, p. 84).

Among the mechanisms that hinder public reparation, one prominent factor is the legal concept of self-defense (FERREIRA, 2021, p. 115; 153), as a shield for the police officers who commit killings. This concept will be central, as we will see, in the denial of the right to reparation in the case of Arminda and Joaquim.

Indeed, it is a grave social issue involving severe human rights violations, which in the Brazilian context clearly has intersected gender, race, and class components. Disregarding the social context of these cases implies adopting a conception of civil responsibility that disproportionately affects women as a group, particularly black women and those from lower social classes. It signifies the devaluation and illegitimate limitation of these women's exercise of motherhood.

Practices with a disproportionately negative effect on women as a group without legitimate justification and the devaluation of interests, activities, harms, etc., socially associated with women are examples of discriminatory gender biases that need to be identified and

eliminated from legal practice (CHAMALLAS; WRIGGINS, 2010, p. 24), since they contribute to the maintenance or increase of social hierarchies. (CHAMALLAS, 2013, p. 28-29).

In the case of the rewritten decision, the gender, race, and class biases were not manifested through overtly discriminatory arguments in its reasoning but through the biased assessment of the evidence, the disregard of legal norms applicable to the case (notably those of the Inter-American Human Rights System) and the interpretation of the rules of civil liability and civil procedural law in disagreement with the prevailing doctrine and jurisprudence. Had the fatal victim and his mother had different social markers, the application of the law to the case would possibly have been different.

In the following rewriting, we occupy the position of a judge from the São Paulo State Court of Appeals (TJSP). We employ in our alternative decision only what the judges themselves could have used in the original decision, both in relation to the law and the evidence presented in the case file, while also respecting the limits of the requests made by the parties involved. Thus, we accept the limitations to which the judges were subjected to in the actual decision. Our objective is to demonstrate concretely that the outcome of the judicial decision is not predetermined or inevitable (CRAWFORD; STANCHI; BERGER, 2018) and that another decision, one that is sensitive to the social reality of police violence and its effects on women as a social group, would have been not only possible but also more in accordance with the law.

As in our system, there is no legal reasoning that can be attributed to the court itself in collegiate decisions (but only opinions of the judges), we present our rewriting as a dissenting opinion, which in our view, has the advantage of explicitly contrasting the rewrite with the actual decision, dialoguing with it.

THE REWRITTEN DECISION

The Rapporteur dismissed the appeal, a decision from which I respectfully dissent for the following reasons.

1. The Rapporteur's decision was based on the notion of res judicata in two respects: It stated that, since Escobar – Joaquim's friend – had been convicted in a criminal action for attempted robbery followed by death and since that conviction had become final, "the facts permeating the dispute brought to light were covered by the rule of res judicata" (p. 1704), and it was impossible for the court to re-examine them in the present tort suit.

2. It considers that, since the police investigation opened to investigate the conduct of the police officers was closed based on the conclusion that they acted in self-defense, "such order of closure has the effects of substantive res judicata" (page 1706).

There appears to be a misunderstanding of the concept of res judicata and, above all, its subjective limitations.

According to Liebman's definition (1984, p. 6), res judicata is an attribute of the judgment and pertains to the immutability of its effects (in this sense, expressly stated in Article 502 of the Civil Procedure Code - CPC). It is true, therefore, that the formation of substantive res judicata prevents the subject matter of a case from being re-litigated, but only in another case involving **the same parties**.

As Gustavo Henrique Badaró describes:

> (...) the judgment, as a state act, is effective and has effects on all individuals, whether or not they were parties to the process. It is, therefore, binding. However, these effects will only become immutable, that is, they will only be subject to substantive res judi-

> cata for those who were parties to the process. The authority of res judicata **only affects the parties to the process** (...), without prejudicing or benefiting third parties (Code of Criminal Procedure, Article 3, in conjunction with the Civil Procedure Code, Article 506). The limitation of res judicata to those who were parties to the process is nothing more than a **consequence of the principle of adversarial proceedings. Only those who were parties to the process had the opportunity to present their arguments and produce their evidence, which could influence the judicial conviction. Thus, only for them will the decision be immutable.** For those who were not part of the process and therefore did not participate in the adversarial proceedings, the judgment will not be immutable (BADARÓ, 2021, p. 938, emphasis added).

The facts analyzed and the content decided in the criminal case that had Escobar (a friend of the appellant's son) as the processed and convicted defendant pertain only to Mr. Escobar and cannot be extended to reach Joaquim, under penalty of a grave violation of due process of law and the constitutional principle of adversarial proceedings (Article 5, LIV, of the Federal Constitution - CF/1988). After all, the victim Joaquim - who was killed even before the start of the criminal proceedings - never had the opportunity to present his arguments and produce evidence in his defense. Extending the effects of res judicata from the decision in the case against Escobar would amount to a posthumous criminalization of Joaquim, which cannot be accepted.

Regarding the effects of the closure of a police investigation, I respectfully believe that the Rapporteur's opinion contradicts the legal provisions of the Code of Criminal Procedure (CPP) and a precedent set by the Federal Supreme Court (STF).

The criminal procedural legislation expressly provides for the possibility of reopening the investigative procedure to carry out research in the face of news of new evidence, according to the provisions of article 18 of the CPP, which clearly contradicts the understanding that the filing of the police inquiry would occur in substantive res judicata.

The STF, when discussing the interpretation of this provision, concluded that: "**the closure of a police investigation does not become res judicata or cause preclusion, since it is a decision taken *rebus sic stantibus***" (BRASIL, 2017).

Similarly, it is worth noting that the closure of a police investigation cannot prevent the filing of a civil action, as expressly stated in Article 67, I of the Brazilian Code of Criminal Procedure (CPP), which determines that "the decision to close the investigation or the case files" does not preclude the filing of a civil action.

Therefore, with due respect to the eminent Rapporteur, I understand that the closure of the police investigation does not have the power to operate the effects of res judicata, especially when the closure is based on a hypothesis of justifiable crime (self-defense), not preventing the filing of a civil action by the plaintiff.

With the issue of res judicata resolved, both regarding the criminal case in which the appellant's son was not a party and the closed police investigation, establishing the possibility of a civil trial, we now turn to the analysis of the State's civil liability for the death of the appellant's son.

The judgment under appeal correctly recognized the State's strict liability, and its requirements are the unlawful conduct of the State agent, the causation factor, and the existence of harm. As the judgment also correctly established, the conduct (firing of a gun by police officers) and the harm (death of the appellant's son) are undisputed.

However, the judgment under appeal is wrong in its analysis of causation and self-defense, aspects in which it should be overturned. According to the judgment, the causal link would have been interrupted since: "the author's son together with Escobar refused to follow the police officers' order, so the State agents' conduct was motivated by Escobar and Joaquim's reaction" ("p. 1635").

There is clear confusion between causation and self-defense. The question, in this case, is not whether the shots fired by the police officers **caused** Joaquim's death. The police officers involved themselves admitted to having fired the shots that hit Joaquim (pages 187-188), and the necroscopic examination report (page 81) attests that his "death occurred due to hemorrhagic shock as a result of the injuries produced by bullets from a gun".

Moreover, the causation between the conduct of the police officers and Joaquim's death is **not disputed**, since the State Treasury does not claim that the police officers did not shoot Joaquim, but that they did so in self-defense.

Therefore, the controversy, in this case, is limited to the question of self-defense, which constitutes a **cause of justification**, as stated in Article 188, I of the Brazilian Civil Code (CC), which determines that acts committed in self-defense or in the lawful exercise of a recognized right are not considered unlawful.

Self-defense characterizes a special circumstance in which the legislator understood that **despite the presence of all the tort requirements** (including the causal link, therefore), the act would be considered justified.

In this regard, Pontes de Miranda (1970, p. 275) states: "[in self-defense], once the violation of rights is excluded, the factual basis, which would have been **sufficient to establish the entry into the legal realm (an unlawful act)**, is no longer sufficient."

In summary, causation and self-defense are not to be confused. It wouldn't even make sense to argue self-defense if there was no causation since, without the presence of all the requirements for civil liability, there would be no wrongful act from which to exclude unlawfulness.

Therefore, it is up to this court to judge only whether the shots that victimized the appellantt's son were made in a justified manner, in self-defense, so as to exclude the civil liability of the State, as the Treasury claims

It is important to consider that the burden of proof of self-defense lies with the Public Treasury, since it constitutes a fact impeding the appellant's right, and the requirements of the State's civil liability (unlawful conduct of State agents, causation and damage) which support the appellant's claim are undeniable (art. 373, I and II of the CPC).

This is an application of the fundamental rule of burden of proof. In the words of Pontes de Miranda (1970, p. 278): "The burden of proof of self-defense lies with the one who alleges it because, by causing harm, the act they committed is ordinarily contrary to the law. **The absence of unlawfulness must be alleged and proven**." This is also the precedent of this Court[214].

The Civil Code does not define self-defense, nor does it establish its requirements. For its definition, we turn to art. 25 of the Criminal Code (CP):

> Art. 25. It shall be considered acting in self-defense whoever, using moderately necessary means, repels an unjust aggression, current or imminent, against their own or another person's right

[214] In this sense: Ap. Civ. nº 107.809-5/0-00 (BRASIL, 2001); Ap. Civ. nº 1056707-62.2018.8.26.0576 (BRASIL, 2022); Ap. Civ. nº 1008081-49.2016.8.26.0554 (BRASIL, 2018a); Ap. nº 9159349- 08.2008.8.26.0000 (BRASIL, 2018b); Ap. nº 0015788-47.2011.8.26.0009 (BRASIL, 2015b); Ap. Civ. com Rev. nº 500.033-4/0-00 (BRASIL, 2008); Ap. Civ. nº 079.779-4/1-00 (BRASIL, 2010).

Based on the legal text, it can be concluded that there are three requirements for self-defense: the existence of ongoing or imminent aggression, the unjust nature of such aggression, and the use of proportional and adequate means to repel the aggression.

As the burden of proof lies with the Public Treasury, it is their responsibility to demonstrate the presence of the three requirements that constitute self-defense. It is not enough for the Public Treasury to simply assert, as it did in its counter-arguments to the appeal, that "*regarding self-defense and the lawful exercise of a right, their occurrence cannot be dismissed, as it is an obvious conclusion from the narrative of the facts that the public officials acted in accordance with the law*" (p. 1672).

To prove the regularity of the actions of state agents, the Treasury should first prove the existence of ongoing or imminent aggression. It turns out that the evidence brought to court does not allow a reliable and definitive verification of the existence of this requirement.

Corroborating the allegation of ongoing or imminent aggression are: (i) the statements of the police officers involved in the facts; (ii) a simulated firearm and a Taurus handgun found by the police officers and taken by them to the police station, whose expert report indicated recent shots; and (iii) the statement of a doorman close to the facts who indicated that he had seen the young men pointing "something" at the car. On the other hand, we have: (i) forensics performed on the car in which the police officers were, indicating at least 16 shots fired from inside the vehicle to the outside and no shots fired from the outside to the inside; (ii) video attached to the case file indicating that the shots started only two seconds after the pairing of the motorcycle on which the young men were, so that it is doubtful that there was time for them to announce a robbery and for the police officers to identify themselves, as they claim; (iii) the same video shows that Joaquim

and Escobar survived the first shots and ran away, and in the images it is not possible to see weapons in their hands, nor is there any indication that they fired at the police officers, who are seen running after the young men; (iv) expert report on the images indicating a shot fired while Joaquim was lying down.[215].

The weighing of the evidence does not allow an unequivocal conclusion of the existence of ongoing or imminent aggression. To begin with, it should be noted that the doctrine has long warned about the caution required to evaluate statements made by police officers involved in the facts as those under judicial review. In this sense, Aury Lopes Júnior:

> Obviously, the judge should be very cautious in evaluating these statements, as the police officers are naturally contaminated by the actions they had in the repression and investigation of the fact. In addition to prejudices and the immense burden of psychological factors associated with the activity developed, it is evident that the involvement of the police with the investigation (and arrests) generates the need to justify and legitimize the acts (and possible abuses) practiced. (LOPES JÚNIOR, 2020, p. 749-750).

If caution must be present in the evaluation of any testimony of police officers involved in the facts brought to trial, even greater care must be taken in cases where the action resulted in the death of someone, as is the case here.

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[215] According to the expert report attached (pp. 667-668), the analysis reveals the following observations: "At 03:51:45, it appears that in this frame, the party observes that the other robber is on the ground. At 03:51:55, there is a brightness between the party and the fallen robber in this image." Based on this analysis, it is plausible to consider that, despite being lying down, Joaquim may have been subjected to another shot (it is worth noting that the police officer involved did not suffer any injuries during the incident)

As a signatory to the American Convention on Human Rights, it is up to Brazil not only to implement the provisions of the Charter at the domestic level, but also to observe the jurisprudence of the court established by the Pact of San José, Costa Rica, which was even recognized as binding by the Federal Supreme Court in the context of the Action Against The Violation of a Constitutional Fundamental Right *(Arguição de Descumprimento de Preceito Fundamental - ADPF*) 635 (BRASIL, 2020). In this sense, the Inter-American Court of Human Rights (IACHR) determined, in the *Favela Nova Brasília* case (IACHR, 2017), that cases of extrajudicial executions that contain the participation of state officials must must be treated with the full rigor of the law to guarantee an objective and impartial investigation. In this regard, the Court highlights the following:

> 88. The Inter-American Court referred to the case--law of the European Court of Human Rights 3 and identified a number of circumstances in which the independence of investigators may be affected in the event of death resulting from State intervention. Among them, the Court highlighted the following features: (i) **the investigating police themselves are potentially suspect**, are colleagues of the accused or have a hierarchical relationship with the accused; (ii) the conduct of the investigating bodies indicates a lack of independence, such as a failure to take certain key steps to clarify the case and, where appropriate, punish those responsible; (iii) excessive weight is accorded to the accused's version of the events; (iv) there has been a failure to explore certain lines of investigation that were clearly necessary; or (v) **there has been excessive inertia** (emphasis added).

If the investigation cannot give excessive weight to the version of the accused, neither should the court. In the case of a death resulting from police intervention, the actions of state agents must be subject to strong scrutiny by the Judiciary. In addition, the fact that the weapons allegedly attributed to the young men were removed from the scene by the police officers involved in the events also undermines the analysis of the presence of such weapons in the dynamics of the facts. In addition to being a violation of the provisions of Article 169 of the Brazilian Code of Criminal Procedure (CPP), the removal breaks the necessary chain of custody and demonstrates that the case was not investigated with the necessary diligence. Once again, the IA Court explains the appropriate procedures in cases such as this (IACHR, 2017):

> 182. In addition, **due diligence in the medico-legal death investigation system requires maintaining the chain of custody of all forensic evidence**, which includes keeping an accurate written record, supplemented by photographs and other graphic elements as appropriate, to document the history of the forensic evidence as it passes through the hands of the various investigators assigned to the case.

After carefully weighing the two pieces of evidence, there remains only one testimony that does not assert having seen the young individuals carrying a weapon. Therefore, instead of establishing the existence of an imminent aggression, the evidence in the case points to a deficient investigation of the facts by the police, i.e., by the State itself. Given the weakness of the evidence presented by the Public Prosecution, it is not possible to conclude that there was a current or imminent aggression that justified the actions of the police officers.

This would be enough to conclude that the State Treasury has not adequately discharged its burden of proof, but, in addition, there is no evidence of the proportionality of the methods employed.

At this point, it is necessary to reaffirm the general rule that the use of lethal force is prohibited and unacceptable, as set out in art. 4 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[216] (UNITED NATIONS ORGANIZATION, 1979) and by jurisprudential parameters of the Inter-American Court of Human Rights on Public Order and Use of Force (IACHR, 2022).

Regarding proportionality, the IA Court defined it well in the case of *Hermanos Landaeta Mejías y otros v. Venezuela* (IACHR, 2014), as follows:

> 134. If the use of force becomes unavoidable, it must be used in accordance with the
> principles of legitimate purpose, absolute necessity, and proportionality: iii. Proportionality: the level of force used must be in accordance with the level of resistance offered which implies establishing a balance between the situation that the agent is facing and his response, considering the potential harm that could be caused. Thus, agents must apply a standard of differentiated use of force, determining the level of cooperation, resistance, or aggressiveness of the person involved and, on this basis, set tactics of negotiation, control or use of force, as appropriate [In the same sense: Case of Nadege Dorzema et al. Merits, Reparations and Costs. Judgment of October 24, 2012 Series C No 251, para. 85].

[216] "4. of the Basic Principles: "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means are deemed ineffective or without any promise of achieving the intended result" (UNITED NATIONS ORGANIZATION, 1979).

The forensic examination carried out on the car found that all shots were fired from inside the vehicle and no shots were fired from outside the vehicle, i.e. at the first moment of contact between the state security agents and Joaquim and Escobar there is no strong evidence of violence (shots fired) by the teenagers on the motorcycle. Nor does the video in the case file show any weapons in the hands of Joaquim or Escobar. In addition, the expert report on the images concluded that, after they ran away on foot, Joaquim was lying down, a body position that indicates fragility and not resistance.

According to the rules of *"Tiro Defensivo na Preservação da Vida: Método Giraldi"* (Defensive Shooting in the Preservation of Life: Giraldi Method) (GIRALDI, n.d.) applied by the Military Police of the state of São Paulo, security officers should remain calm and prioritize verbal communication, negotiation and the use of external support.

For cases classified as "e. aggressor on his back running away, holding a firearm, but not attempting to kill someone" (GIRALDI, n.d., p. 47 and p. 91), the instruction is for the police officer to take cover, keep his finger off the trigger and verbalize an order for the person to surrender. Even in cases where police officers are shot at, the instruction is not to chase the "aggressor", but to take cover so that the officer can then fire "two rapid, semi-intuitive or intuitive shots in the direction of the aggressor's mass" (GIRALDI, n.d., p. 47 and p. 91). In addition, there is a clear instruction that police officers must "q) constantly guarantee his life and physical integrity if he gives up his attempt and surrenders". (GIRALDI, n.d., p.50 and p.90).

The necroscopic report (folio 81) states that Joaquim suffered four wounds with characteristics of firearm projectile entry: one in the head (nasal region), two in the chest (hitting the lung and heart), and one in the forearm. In addition, as already pointed out, the expert

report (pages 667-668) informs that "there is a brightness between the party and the fallen robber", that is, there are strong indications that shots continued to be fired even when Joaquim was already surrendered and under control of the security agents.

Thus, even if the version of the state agents is considered true, there was non-compliance with the rules of defensive shooting recommended in the training of the military police of the state of São Paulo when they did not guarantee the physical integrity of Joaquim even when he was already surrendered, characterizing an excess in the use of force.

The judiciary should not ignore the substantive results of the facts at stake here. On the one hand, a 19-year-old civilian was shot in the head and chest. On the other hand, there are unharmed military police officers who, even though trained by the State to act through restraint, shot several times, hitting vital areas of the victim's body. Since this was the outcome of the events that occurred, it was incumbent on the State to demonstrate unequivocally that the use of force by its agents was legitimate and not arbitrary. To this end, it should have carried out an adequate investigation of the fact capable of presenting unequivocal evidence to support the State's action. This was not the case in these proceedings and, therefore, the State is liable.

Having established the State's civil liability, I shall now decide on compensation in accordance with the appellant's claims.

As for moral damages, they are presumed in cases where a mother loses her child. For their calculation, the two-phase method advocated by the Superior Court of Justice is adopted. (STJ) (BRASIL, 2015a, p. 41):

> In the first phase, the basic or initial amount of compensation is determined, taking into account the violated legal interest, in accordance with precedents on the matter (...). This ensures a reasona-

> ble equality of treatment for similar cases, as well as allowing different situations to be treated unequally according to their differences. In the second phase, the final determination of compensation is made, adjusting the amount to the specificities of the case (...).

The values set by this Court in cases of State's civil liability for wrongful death have a highly unequal distribution, ranging from approximately R$ 21,000 to R$ 250,000, with a concentration of cases in the range between R$ 37,000 and R$ 70,000 (PÜSCHEL; PLASTINO et al., 2022). Such values are very low for the event of death, which is the most serious harm that can occur, thus requiring a review of the jurisprudence of the São Paulo Court of Justice. Therefore, in the first phase of determining the amount of moral damage, the STJ's precedents will be invoked, a court whose function is to standardize the precedents and which controls the amounts of damages for the pain and suffering that are insignificant or excessive. According to Justice Paulo de Tarso Sanseverino (BRASIL,2015a, p. 44-53), the Superior Court of Justice (STJ) typically awards damages for pain and suffering resulting from wrongful death in the range of 200 to 600 minimum wages, with a significant number of cases falling within the range of 300 to 500 minimum wages. Given this, it is appropriate to set the basic compensation amount, considering the violated legal interest (death), at an equivalent of 400 minimum wages.

Starting from the basic amount of 400 minimum wages, we move on to adjust the amount to the circumstances of the specific case. Suffering for the loss of a young child, who had his whole life ahead of him, is possibly the worst suffering that can be inflicted on a mother. In the present case, it must also be considered that the appellant's son was murdered by those who were supposed to protect

him and that the appellant had to face not only the failures in the police investigation into the circumstances of the death but also the criminalization of her deceased son, without evidence and without the possibility of defence. This exacerbates the suffering, adding to it the humiliation and a sense of powerlessness before the State. These factors further aggravate the harm suffered by the appellant, leading me to award damages for the pain and suffering in the amount of 600 minimum wages.

There is no violation of the prohibition of unjust enrichment in this case. Firstly, the fact that the victim is of low income cannot be a criterion to devalue the legal interest of life, which is equal for all, rich and poor. Secondly, there is a legal cause, namely the extremely serious harm consisting of the death of the appellant's son at the age of 19 at the hands of the State, followed by a flawed police investigation and his posthumous criminalization.

Regarding the claim for compensation for pecuniary damage, in accordance with Article 948 of the Civil Code, this includes the amount of R$ 4,083.00, relating to the funeral expenses of the appellant's son, and the payment of a monthly pension in the amount of ⅔ of the minimum wage until the date on which the deceased would turn 25 years old, the age at which it is presumed that he would form a family of his own. Thereafter, the pension will be ⅓ of the minimum wage until the date on which the deceased reaches the age of 65 or the appellant's death, whichever comes first.

Finally, as part of the rightful compensation, the formal and public presentation of an apology by the head of the State Executive Power for the death of the son and for the failures in the investigation is also required.

In this case, it is not appropriate to argue the absence of a specific provision for such an obligation, as claimed by the appellant. Firstly,

because restitution in kind is accepted in Brazilian law. Additionally, there are several cases from the Inter-American Court of Human Rights that recognize the importance of positive measures to be adopted by the State to ensure that harmful acts against life, such as those in the present case, are not repeated[217], which often include a public act of acknowledgement of state liability for the rights violations it has perpetrated[218]. As for the apology, this has already been expressly admitted in the Ximenes Lopes v. Brazil case (IACHR, 2006).

In view of the above, I grant the appeal to order the State Treasury to compensate the appellant for pecuniary damage in the amount of R$ 4.083.00 (four thousand and eighty-three reais), plus a monthly pension in the amount of ⅔ (two-thirds) of the minimum wage until the date on which the deceased would turn 25 years old, when it becomes ⅓ (one third) of the minimum wage until the date on which the deceased would turn 65 years old or the death of the appellant, whichever comes first. The payment of the amounts related to material damages should be made through the payment system of the State Treasury Department, as requested in the complaint, in order to guarantee monthly and regular payment of the arbitrated amounts, avoiding the negative effects of the slowness of the precatory payment queue.

Regarding the award of pain and suffering damages, I hereby order the State Treasury to issue a formal and public apology, to be performed by the head of the State Executive Branch, as a form of restitution. Additionally, the State is ordered to pay compensation of 600 (six hundred) minimum wages.

This is how I vote.

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[217] Among others, see: Case of Juan Humberto Sánchez Vs. Honduras (COURT IDH, 2003).

[218] Among others, see: Case of the Serrano Cruz Sisters Vs. El Salvador (Ct. IDH, 2005).

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UNVEILING SHARED RESPONSIBILITY: THE FULL-TIME SCHOOL CASE

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INTRODUCTION

The rewriting of judicial decisions from feminist perspectives is one of the areas of focus of the Human Rights Clinic, an extension project of the Osasco Campus of Unifesp[219].This text results from an early activity of this project, which involved all the female professors of the Department of Law from Unifesp. During this activity, it was possible to carry out a joint reflection on methods for critical analysis and rewriting of judicial decisions and experience the co-production of a new, reimagined version. Based on this experience, the objective is to structure a more comprehensive plan of activities, involving students linked to the project, the creation of a research group and, possibly, the offer of undergraduate courses.

ORIGINAL DECISION

The rewritten decision is an appellate ruling[220] from the São

[219] Available at: https://clinicadireitoshumanos.unifesp.br/.

[220] *SÃO PAULO. Tribunal de Justiça do Estado de São Paulo.* ***Remessa Necessária Cível nº 1000668-72.2021.8.26.0533****. Relatora: Desembargadora Ana Luiza Villa Nova. São Paulo, 6 jul. 202*1. Although the case file is not public, the judgment is public and contains elements that we consider sufficient for rewriting and can be consulted on the TJSP website.

Paulo Court of Justice (TJSP)[221] in 2021. This decision pertains to a writ of mandamus in which the appellant - a child (a student in the first year of elementary school) - sought enrollment in a full-time municipal public school unit near their residence (or the provision of free public transportation, if the available school was more than two kilometers from their address). The Trial court decision had "partially granted" the application, compelling the enforcing authority - the Education Department of the Municipality of *Santa Bárbara d'Oeste* - to provide the applicant with a place in a part-time elementary school, considering the aforementioned distance. The Appellate court decision overturned the original sentence and completely denied the application, arguing that the child was already enrolled part-time in a school located less than two kilometers from their home. According to the judgment, there is no current obligation on the part of the municipal government to provide full-time schooling. This decision relies on provisions within the Law on National Education Guidelines and Framework (*Lei de Diretrizes e Bases da Educação*) and the Brazilian National Education Plan (*Plano Nacional de Educação*), which stipulate a gradual government obligation to progressively provide full-time education for elementary school children. Specifically, it is based on a specific provision of the National Education Plan (Law 13.005, June 25, 2014), which sets a ten-year deadline from June 26, 2014, for the implementation of the policy to provide full-time education in a minimum of 50% of public schools (meaning access to such terms for at least 25% of basic education students).

[221] In terms of court profile, women represent less than 10% of the total number of justices of the São Paulo Court of Justice. Such inequality was recently reported by the São Paulo press after it was found that there are more judges named Luiz in this court than women judges. In February 2020, there were 31 women, out of a total of 360 justices, a proportion that is significantly lower than the average of 37.5% female composition in the state judiciary (MARQUES e FARIA, 2020).

CRITICAL ANALYSIS OF THE DECISION AND PROPOSED APPROACH

The first point to be noted about the decision is the jurisdiction of the court in which the case was filed: the application for a writ of mandamus was made in the 2nd Criminal Court of Santa Bárbara d'Oeste, which typically handles cases involving children and youth[222]. This classification of the case as pertaining to "childhood" is, in our perspective, the first question that a feminist approach should raise. Although the demand appears to be related to children's rights, a closer examination at gender issues allows us to realize that this is not the central issue of the litigation, as we will try to demonstrate in the following section. The discussion prompted by the judgment is not solely about the right to education: this right is guaranteed to the child even with part-time attendance. What is also at stake is the right to assistance that the school provides as a public policy, facilitating the insertion of family members, especially the child's mother, in the labor market.[223]

The judgment of the TJSP employs an ostensibly neutral legal reasoning, which focuses exclusively on the terms of education policy legislation. It does so without addressing the issue of who bears

[222] Available at: https://www.tjsp.jus.br/Noticias/Noticia?codigoNoticia=26092. Accessed on: 1 Dec. 2022.

[223] In this case, the family is formed, according to the information contained in the decision, by the father, mother, and child. For the purpose of presenting the ideas that guided the rewriting of the judicial decision, this text addresses the sexual division of domestic labor and, therefore, of care tasks, considering the inequality between men and women. This does not ignore the existence of other possible family configurations, including same-sex relationships and single parenthood. Although the text sheds light on the inequality between men and women in the context of marital and family relationships, it is believed that the considerations made can serve to reflect on the assumption of care tasks in other family formats, especially with regard to the need for articulation with public policies.

the responsibility for childcare in the absence of a public policy, recognizing that mothers can, and very often need to, work full time. According to the rapporteur, the argument that the appellant's "parents" work full time to support the household and, having no one to entrust the child to, would need her to remain in school, would not apply to the case. This is because the school's welfare connotation would only apply to children in early childhood education, rather than those in elementary school. The lack of necessity is invoked as a formal argument to justify the absence of caregiving support, even though we are referring to a child who was only 7 years old when the case was adjudicated by the court.

Another important point is that the original judgment treated the case as if it were an individual dispute and never addressed the structural issue underlying the dispute, namely the naturalization of the unequal distribution of care tasks that significantly burdens women who are both workers and mothers.

In the following section, we will present the theoretical approach (item 3.1) and the historical and empirical data (item 3.2) utilized for the critical analysis of the judgment and its subsequent rewriting. Additionally, we will provide an overview of the issue of judicialization of vacancies in nurseries and schools, which is also taken into consideration for the proposed solution in the rewriting (item 3.3).

THE FEMINIST PERSPECTIVE OF LAW: THE THEORETICAL PROPOSAL OF KATHERINE T. BARTLETT

In order to demonstrate the gender perspective that is intrinsic to the demand for the right to a place in comprehensive education, we

will analyze the case theoretically based on the *feminist doing in law*, proposed by Katharine T. Bartlett (1990).

According to the author, feminism can be described as a self-consciously critical stance toward the existing order with respect to the various ways it affects different women "as women". Thus, 'being feminist is a political choice about one's positions on a variety of contestable social issues" (BARTLETT, 1990, p. 833).

From this notion of feminism as an attitude and a possibility of political action, Bartlett proposes a method of analysis and practice of law, called *feminist doing in law* (BARTLETT, 2020, p. 836) and which consists of *asking the woman question* concerning the object or category of analysis. In her words:

> The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way? How might that omission be corrected? What difference would make to do so?
> […]
> In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also "male" in a specific sense. The purpose of the woman question is to expose those features and how they operate. and to suggest how they might be corrected (BARTLETT, 1990, p. 837, emphasis added).

The case selected by us for rewriting consists of a judgment in a writ of mandamus in which the need for a full-time school place is

discussed from the perspective of the right to education - that is, a first analysis does not allow us to identify that there is in the decision (or in the debate raised by it) a relevant gender issue or that places women at a social or legal disadvantage.

The selected judgment does not mention the personal motivation that led the child's caregivers to request a full-time place in court. Two hypotheses can be considered:

(i) the fact that motivated the caregivers to file the claim relates solely and exclusively to pedagogical issues, such as greater and better access to education; or

(ii) there is a pragmatic need to have a place available where to leave the child under the care of a responsible adult, due to the impossibility of his/her mother and/or father (or another person from the immediate or extended family) to be responsible for his/her care during a certain period.

For the purposes proposed in this text, we apply the method of *asking the woman question* elaborated by Bartlett, seeking to offer possibilities for reflection and paths of analysis based on the sexual division of labor and the social and cultural valuation of productive work (that is, exploited and remunerated by capital) and reproductive work (related to the reproduction and maintenance of domestic life, including children and elderly care), also affecting cleavages of other social markers of difference, such as race and class.[224]

[224] "If, historically, the sexual division of labor based on a hierarchy and a separation that assigns to women reproductive activities and to men productive activities [...] has been established in capitalist/patriarchal society. This division also affects the value of men's and women's work, expressed in the differentiated value of wages and the devaluation of domestic work [...]. Coexisting with this division is inequality and discrimination based on race in the sphere of productive and reproductive work, which historically in Brazil is founded on the slave labor relations imposed on the black population, which was violently trafficked from the African continent to become an enslaved labor force in colonial Brazil." (ÁVILA, 2013, p. 232-233).

WHY FULL-TIME SCHOOL VACANCIES ARE A WOMEN'S RIGHTS ISSUE: HISTORICAL AND EMPIRICAL EVIDENCE

Data on gender discrimination and on the struggles of women's movements in Brazil corroborate the perception that the controversy present in the case under examination concerns women's rights. In this section, some of them will be briefly exposed: the struggle for day care as a historical agenda of women's movements and its connection to advocating for the availability of full-time school placements. This theme extends beyond the realm of education, as it also intersects with social assistance. Additionally, we will present information that confirms the current attribution of childcare tasks to women.

Childcare is a historical demand of Brazilian women's movements,[225] carried out initially by working women linked to the trade union movement and women living in the peripheries and belonging to mothers' clubs, which were organized in the 1970s, still under the military dictatorship, and incorporated into the agenda of feminists, such as those active in newspapers such as *Brasil Mulher*, *Nós Mulheres,* and *Mulherio*. It was also from the 1970s that the sexual division of labor became the object of analysis and theorization by feminist thought, which revealed the existence of reproductive or domestic work, overshadowed by the concept of work

[225] On the history of feminist movements in Brazil, see Teles (2017) and Pinto (2003). There is a distinction made in the literature between women's movements and feminist movements, according to which some movements led by women - such as the movement against famine and the movement for amnesty - would not directly question the condition of women in society (see PINTO, 2003, p. 11), or would not directly combat discrimination and the subalternity of women (TELES, 2017, p. 23), as is characteristic of feminisms, although political action itself with protagonism was a way of challenging the social roles attributed to women. Later, part of these women's movements also began to recognize themselves as feminists (ROSEMBERG, 1989, p. 96).

then exclusively focused on production and remuneration (ÁVILA; FERREIRA, 2014, p. 14).

As Maria Amélia de Almeida Teles, who played an important role in the Daycare Movement, recalls, this social mobilization conceived daycare as "a space for the education and care of young children, from a social and pedagogical perspective" (TELES, 2017, p. 181), providing quality education for young children and adequate working conditions for women. The First Congress of Women of São Paulo, organized in 1979 jointly by feminist movements and popular women's movements, to demand a network of public and free daycare centers, close to the places of residence and work, with full-time care and participation of mothers and fathers in pedagogical orientation, is considered as the foundation of the *Movimento de Luta por Creche* (Movement of Struggle for Daycare) (TELES, 2017, p. 111-112; 187-190; 2018).

This struggle, according to Maria Amélia de Almeida Teles (2015; 2017; 2018), unified the various strands of feminism in Brazil and brought Brazilian feminists closer to the popular field. At the same time, it gave visibility to the situation of children from working families and led to a debate on the sexual division of labor and the naturalization of motherhood - that is, the view that women are born to be mothers and caregivers -, provoking questions about the role assigned to women in childcare. In fact, the public guarantee of childcare centers would make it possible for women to have a job away from home and to participate in political activities, while sons and daughters would remain under the care and education responsibility of the State. Feminists thus advocated the assumption of motherhood by society as a whole, as a political and social project: "Maternity is a social responsibility, it concerns the whole society, which must be politically and emotionally prepared to receive, care for, educate, and

socialize young children. Childcare is not an individual problem, it is a social matter" (TELES, 2015, p. 25), which is in fact recognized by the Federal Constitution (Art. 227) and the Statute of the Child and Adolescent (Art. 4), when they attribute responsibility for children not only to the family, but also to the State and society. Working with the National Council for Women's Rights, created in 1985, and in the Constituent Assembly, feminists in defense of daycare adopted the slogan "*o filho não é só da mãe*" (the child is not only the mother's) (TELES, 2017, p. 111; 2018, p. 166).

The idea, according to Joana El-Jaick Andrade (2018), was already raised in the nineteenth century by revolutionary feminists linked to the socialist movement, who questioned the view that staying at home and caring for children was a natural mother's role and defended the socialization of this care as fundamental to the female emancipatory project, through the creation of public institutions responsible for the maintenance and education of children. In Brazil, the absence of such a policy has consistently disproportionately affected marginalized groups, particularly low-income and black women. These women often work in distant locations from their homes and, in the absence of comprehensive childcare policies, rely on informal family arrangements to care for their sons and daughters (RIBEIRO, 2018). Delegation, a privilege enjoyed by women from wealthier backgrounds, is not a viable option for them. The delegation model consists of the transfer of care tasks by women to other women who perform (poorly) paid domestic work, thus allowing the 'conciliation' of private and professional life, subject to all sorts of contradictions and conflicts (HIRATA; KERGOAT, 2007).

Thus, postulating a more consistent presence of the public authorities in the provision of full-time education that enables the presence of women in the labor market is of fundamental importance for

the dissolution of a contradiction that deeply characterizes social relations in Brazil and in other countries where the insertion of women in the labor market is not associated with a redistribution of care tasks between men and women: the delegation of care tasks by white, middle- and upper-class women to lower-class black women, who in turn use often precarious arrangements to be able to work[226].

In addition, the very insertion of women in the labor market is greatly hampered by this arrangement since the need to reconcile work and family imposes limits on professional development and decreases the possibilities of employment and throughout their career, setting occupational trajectories marked by intermittency, flexible working hours accompanied by lower wages and positions with fewer guarantees and labor rights (TEIXEIRA, 2017).

The struggle for daycare resulted in the structuring of the first Brazilian municipal network of daycare centers, implemented in São Paulo, and then in the provision of a right to daycare as a right of workers under Article 7, XXV, and as a right to education under Article 208, VI, Constitution[227].

[226] Regarding the precariousness of these arrangements, it is worth mentioning that leaving the child(ren) alone at home to work ends up being an alternative for many women, conduct that may give rise to criminalization, as provided for in article 133 of the Penal Code. Although we have not collected data on convictions for this crime, it is possible to state that it is a conduct that is imputed more to women than to men, according to a logic that reiterates social expectations regarding the role that should be played by women. An indication of this is the fact that, in an intervention and research study carried out in two prison units in the municipality of São Paulo, a certain number of women found committing a crime and arrested, mainly for the crime of theft, were also accused of committing the crime of abandonment of an infant, which was not found in relation to men in the same situation (BLANES *et al*., 2012).

[227] Art. 7º These are urban and rural workers' rights, in addition to others aimed at improving their social condition: [...] XXV - free assistance to children and dependents from birth to 5 (five) years old in daycare centers and preschools; Art. 208. The State's duty to education shall be implemented by ensuring: [...] IV - early childhood education, in daycare and preschool, for children up to 5 (five) years old.

Within the scope of this historical defense of daycare as a public policy, the approach of daycare through the bias of social assistance is criticized, based on the understanding that this would favor the vision of daycare centers as a "storage" of children, without greater concern for the quality of education offered by them, and would also strengthen a logic centered on adults rather than concerned with the rights of children (see TELES, 2017, p. 210; 2018, p. 169-170). In this regard, it was argued that daycare should be treated as a matter of children's right to education, which would prioritize a focus on the educational dimension and the promotion of child development, rather than an approach centered solely on caregiving, hygiene, nutrition, and safety aspects (CAMPOS, 1989; ROSEMBERG, 1989). It was further argued that placing daycare within the realm of social welfare policies would marginalize its importance, treating it as a lesser priority, whereas if daycare were conceived as a child's educational right, it would be given greater significance (see KRAMER, 1989, p. 27).

This argument has had significant developments if historically contextualized, especially with regard to the recognition of the pedagogical dimension of early childhood education and the consequent appreciation of the work of those who perform this function. This interpretation does not mean, however, that we should lose sight of the welfare character that educational entities provide as a public policy that enables the insertion and permanence of family members (especially mothers of children) in the labor market. Although this welfare character is often recognized when looking at early childhood education, it is not always highlighted when it comes to primary education.

A framework that does not oppose, but recognizes that the right to education and the right to assistance go hand in hand would allow a feminist approach to what the literature on children's rights calls "the best interests of the child". If the child is inserted in the family en-

vironment, it must be understood that his or her well-being depends, above all, on the conditions and support that the family is able to offer him or her: "the best interests of the child cannot be in conflict with the best interests of all the individuals who make up a family, which would be a contradiction."(GROENINGA, 2001, p. 83).

In this context, it is recognized that the availability of full-time school has significant implications not only for children's right to education but also for individuals, particularly mothers, who are responsible for caregiving tasks and their right to work. To restore the constitutional protection of childhood, it becomes imperative to strengthen the supportive aspect of full-time school, recognizing their role in supporting both children and caregivers.

For all these reasons, although it appears to be a neutral decision in terms of gender inequality, the centrality of the case lies in the right to assistance that the school provides as a public policy that enables the insertion of people in charge of caretaking, and especially women, into the labor market. The issue is treated as an individual one - the existence or not of a child's right to enroll in full-time education - when in fact the problem is structural and, despite this, is invisibilized in the decision. In essence, what is at issue is the unequal distribution of domestic and care tasks, which makes the demand for full-time education predominantly from women and, therefore, the burden of the lack of public policies addressed to this issue falls especially on women. In this sense, it is not a neutral decision, as the losses arising from the denial of the request will not fall equally on the mother and father. *Asking the woman question* in the case we have chosen reveals a social reality in which three characteristics are lacking:

(i) The equitable distribution of childcare tasks between mothers and fathers (dimension of private life);

(ii) Work routines compatible with the experience of parenthood (dimension of social and work life);

(iii) Adequate provision of public services as not only a dimension of women's and men's right to work but also of children's right to comprehensive protection, as outlined in the Statute of the Child and Adolescent and the Federal Constitution, which jointly assign this legal duty to the family, society, and the state (and therefore enforceable against public authorities).

The role of schools is distorted by the failure to acknowledge that children of all ages require care, which often falls disproportionately on women, particularly mothers, at the expense of their personal and professional lives. The absence of these three elements highlights systemic gender inequality issues, resulting in social disadvantages for women.

PROBLEMS IN THE JUDICIALIZATION OF SCHOOL VACANCIES

As highlighted in the previous sections, although an individual claim has been filed, we are dealing with a case that has collective dimensions beyond the individual scope. This is a structural problem that affects not only the child's perspective but also the perspective of working women. Despite its systemic nature, it still has an impact on the individual sphere of many people.

In such cases, under the structure of the Brazilian system of judicial protection of rights, it is possible to file both individual and class actions. Although both types of claims address the same underlying issue, which is the need for full-time school vacancies, their objects (i.e., the formulation of the request that identifies the claim) differ. The individual claim seeks to address the problem faced by

an individual family or, in some cases, a group of families joining the claim. On the other hand, class actions, which have a more pronounced structural character, aim to address the issue faced by individuals in analogous situations.

This scenario gives rise to a series of relevant procedural controversies. Specifically, it is worth noting, for the purposes of this text, that in an empirical study on the issue of daycare vacancies in the Municipality of São Paulo, Susana Henriques da Costa found that only 7.73% (2016, p. 55)[228] of individuals in need of a spot filed individual claims. Additionally, it was observed that the São Paulo Judiciary tends to grant relief in individual claims but not in collective claims (COSTA, 2016, p. 56 and 62; OLIVEIRA, SILVA, MARCHETTI, 2018, p. 662). This phenomenon is both intriguing - considering it involves the same right under discussion - and regrettable, as aptly observed by Maria Cecília de Araújo Asperti (2021, p. 276-277, footnote 41). She notes that class actions enhance access to justice due to their inclusive potential.

The fact is that the judicial discussion about vacancies in public schools - whether in daycare centers or in early childhood education - is a classic example of the well-known phenomenon of the judicialization of public policies, which occurs when the Judiciary is required to decide in the face of omissions by the Executive and Legislative Branches.

In an article that aims to investigate the relationship between the Judiciary and the Executive Branch in relation to early childhood education policy, Vanessa Oliveira, Mariana Silva, and Vitor Machetti state that, although there is controversy regarding the performance

[228] Due to this very low percentage, it is not correct to say that the Judiciary would be an "easily accessible" path (OLIVEIRA, SILVA, MARCHETTI, 2018, p. 662), although enrollments grow in a much greater proportion due to judicial decisions than by actions of the Executive (OLIVEIRA, SILVA, MARCHETTI, 2018, p. 661).

of the Judiciary in this field, interviews with public officials reveal the assessment that the phenomenon would have a positive aspect: "the judicial demand ended up serving as an instrument to put the 'government into action', that is, to generate new actions and public policies" (2018, p. 665).

Recently, Brazilian procedural scholars have started to focus on what has been called the "structural procedure", which can serve as a tool for the judicialization of public policies[229]. The "structural procedure" is relevant to this study as research on this topic advocates for the judiciary's role as a participant in public policy discussions, considering its potential for dialogue. Indeed, if the judiciary becomes a significant actor in the implementation of public policies through its decisions, it appears that not only the outcome of the decision matters but also the reasoning adopted for reaching that outcome. This aligns with the statement made by Katharine T. Bartlett that feminist methods are not only ends in themselves (BARTLETT, 1990, p. 887). Even if it is understood that the right to education is social (and therefore programmatic) and that the legal system has no way of guaranteeing its implementation - especially in full-time education - from the individual perspective, it is possible that the judicial procedure can be seen as an important stage for debate.[230]

As a rule, the label "structural procedure" is used in proceedings in which class actions are discussed. But, properly understood, structural procedure is a set of differentiated techniques to make civ-

[229] The scope of the so-called structural procedure is disputed in the Brazilian literature on civil procedure, but public policy lawsuits are the common denominator among the various currents.

[230] And in this regard, the role of the Judiciary can enhance a public policy. In this sense: "Taking the case of the city of São Paulo as a reference, we can affirm that the agenda was ultimately impacted by judicial decisions, either by compelling governments to do more than they would have done, or by dictating the pace of its implementation" (OLIVEIRA, SILVA, MARCHETTI, 2018, p. 666).

il procedure fit to deal with structural conflicts. After all, traditional techniques - created to deal with individual property conflicts - would hardly be suitable for the solution of structural conflicts. That is why, as Fredie Didier Jr., Hermes Zaneti Jr., and Rafael Alexandria de Oliveira state, "it is possible that a procedure that conveys an individual demand is based on a structural problem and must therefore be treated as a structural procedure" (2020, p. 112).

This is a delicate and controversial issue, especially because the legitimation for individual and collective proceedings is different in Brazil, and it is not allowed for an individual to bring a class action before the courts. Collectivization of individual claims is also not allowed, given the veto of Article 333 of the Code of Civil Procedure, which regulated this technique. Nonetheless, even in individual claims that do not have a collective scope,[231] it seems pertinent the incidence of these techniques in view of the fact that the claim is only apparently fractionable - the judicial decision, after all, does not create a public revenue, so that granting the benefit to one means subtracting it from another if there is no effective expansion of public policy.

More concretely, treating a procedure as structural means, in practice, recognizing the complexity of the problem, expanding dialogue, and encouraging consensus. To achieve these objectives, it is necessary to bring together multiple actors to integrate the procedure.[232] Therefore, even if it does not seem possible to immediately

[231] Fredie Didier Jr., Hermes Zaneti Jr. and Rafael Alexandria de Oliveira restrict the borrowing of the label "structural procedure" to procedures that convey individual demands with collective scope, known as pseudo-individual demands (2020, p. 113). The example given by them is elucidative: "Imagine that a person, with a disability or reduced mobility, files an individual action to, based on the rights guaranteed to him by Law No. 10,098/200029, demand that certain public or private buildings, for collective use, to which he recurrently needs to have access" (2020, p. 112).

[232] It should be noted that in the worst-case scenario, it is the duty of the judge "when faced with several repetitive individual demands, to notify the Public Prose-

grant the measure requested on an individual basis, a simplistic decision of dismissal is avoided and light is shed on this serious social problem that affects women in particular.

REWRITING THE DECISION

The writ of mandamus applied by the child M. F. P. (15/09/2014) and their legal representative sought to obtain a place in a full-time elementary school, preferably the *Eduardo Koiak Dom* School of Early Childhood Education. The court partially granted the application and ordered the coercive authority to provide the applicant with a part-time place in elementary school within two kilometers from his/her residence. If there are no available places within this distance, the coercive authority must provide free public transportation to the establishment.

The Office of the Attorney General of Justice opined that the judgment should be upheld (pp. 62/64).

Even though a claim has been filed by one child, it's evident that this is a widespread issue affecting multiple families, particularly women, with similar requests. The discussion around full-time education must consider both the importance of education for children and the ability for adults to work while their child is at school. However, the conflict being discussed highlights the importance of combining the right to education with the right to assistance. It raises the question of who is responsible for taking care of a child when they are not in school and requires a careful examination from that perspective.

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cutor's Office, the Public Defender's Office, and, as far as possible, other authorized parties as referred to in Article 5 of Law No. 7,347 of July 24, 1985, and Article 82 of Law No. 8,078 of September 11, 1990, to, if applicable, promote the filing of the respective class action" (CPC, Article 139, inc. X).

Hence, it is clear that enrolling a child in full-time school has various effects that not only impact the child but also those responsible for caring for them. Moreover, due to the unequal distribution of domestic and care responsibilities, placing the child in a full-time program has significant consequences for the mother, particularly in terms of their right to work. The demand for daycare centers in Brazil was historically driven by women's movements, particularly those linked to the trade union movement and residents of peripheries. Later, feminist movements also took up the cause, recognizing motherhood as a social function and daycare as a social issue (TELES, 2015, p. 25). Unfortunately, the absence of public policy for childcare has disproportionately impacted black and poor women, who often live far from their jobs (RIBEIRO, 2018) and lack the support that wealthier women possess to delegate care, often depending on precarious arrangements to be able to work (HIRATA; KERGOAT, 2007). Strengthening the care dimension is also crucial for protecting children's rights under the Constitution. By taking care of the mother, we are also taking care of the children.

This case highlights how women's issues can be camouflaged within seemingly neutral norms that aim to regulate aspects that may not initially appear to be related to women's rights. As Bartlett (1990, p. 843-844) cautions, it is important to consider feminist perspectives when creating laws. "Doing law" as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination". Ultimately, "'right' legal analysis never assumes gender neutrality".

Moreover, this supposed possibility of individualizing the problem is false in the sense that judicial decisions do not create public resources, and the judicial granting of a spot certainly implies an

intervention in the waiting list for spots, thus creating another factor of inequality between children (those who can afford to litigate and those who do not have access to this resource). Given this context, the decision to be taken in this case cannot be simplified and reduced to the approval or rejection of an individual request for a place.

Therefore, the best solution is to order the production of more evidence (or other necessary measures) instead of entering judgment, notify the Public Prosecutor's Office of the state of São Paulo and the Public Defender's Office of the state of São Paulo to provide statements. Also, at the federal level, inform the Ministry of Education, the Ministry of Development, Industry, Trade and Services, the Ministry of Social Development, the Ministry of Human Rights and Citizenship, the Ministry of Management and Innovation in Public Services, the Ministry of Women, the Ministry of Labor, and at the state level, involve the Secretariat of Education, the Secretariat of Economic Development, the Secretariat of Social Development, the Secretariat of Justice and Citizenship, the Secretariat of Policies for Women, and finally, at the municipal level, the Secretariat of General Control, the Secretariat of Economic Development, the Secretariat of Education, the Secretariat of Government, the Secretariat of Social Promotion, the Mayor's Office and the Guardianship Council. In addition, a public hearing will be held, in which representatives of civil society will have the opportunity to speak. This will allow the debate to be broadened, with a better understanding of all aspects of this complex problem, and the search for a dialog-based solution, which is always recommended when dealing with a structural problem.

It is the duty of judges, "when faced with various repetitive individual demands, to notify the Public Prosecutor's Office, the Public Defender's Office, and, as far as possible, other legitimate parties referred to in Article 5 of Law No. 7,347 of July 24, 1985, and Article

82 of Law No. 8,078 of September 11, 1990, to promote, if applicable, the filing of the respective class action" (CPC, Article 139, item X), which reinforces the need to widen the debate. Since the issue has already been presented to the Judiciary, it is a more effective measure to expand the debate in these proceedings, as outlined above.

Accordingly, I **order the production of more evidence and other measures, postponing judgment.**

Rapporteur Justice

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INSTITUTIONAL RACISM AND THE INTERVENTIONS AGAINST JANAÍNA QUIRINO: DEHUMANIZATION OF BLACK WOMEN, MOTHERING CONCEPTS AND STATE INTERVENTIONS

Luciana Fernandes - Marcia Nina Bernardes

JUSTIFICATION

The intersection of feminist theory and activism has delved deeply into the topic of women's sexual and reproductive rights, with a particular focus on mothering and the care provided by mothers. However, there have been differing perspectives on this issue. On the one hand, hegemonic feminisms - white, European, privileged, and cisheterocentric - view motherhood as a tool of control utilized throughout history to dominate female bodies, particularly within Western capitalist societies, while others see it as an essential aspect of female empowerment (SCAVONE, 2001). They also reflect on how the concepts of motherhood could operate - and still do - as a strategy to consign women to the private domain (OYÈWÚMI, 2000), purging them from public affairs. The analysis of relations of control and domination over female bodies becomes more complex by incorporating elements related to the markers of race, class, sexuality, and nation; based mainly on the claim of other cosmologies and meanings, especially political ones, around mothering (VIANNA, 2018).

Based on the research we conducted in the study group "Gender, Democracy, and Law" and the discussions held in classroom in the course "Race, Gender, and Law", of the Postgraduate Program

in Law at PUC-Rio, we sought to reflect on how the rewriting of a decision - which overturned a first instance judgment that granted the State the power to perform the compulsory tubal ligation procedure on Janaína Quirino, a black, poor and peripheral Brazilian woman - could contribute to the analysis of social practices that accompany the particular history within a matrix of domination characterized by intersectional oppressions (COLLINS, 2019, p. 63). The lawsuit in question, just one of the successive interventional measures of the State against Janaína, reinforces the "zone of non-being" (FANON, 2008) as the social dimension of complete dehumanization of a body, and is a symbol of how white saviorism, legitimized by legal colonialism (SPIVAK, 2010; BIDASECA, 2011), equips racism, classism and cisheteropatriarchy in our society[233]. By initially identifying the social processes of dehumanization present within a trial, our aim is to contemplate the potential fractures that may arise and how the fight for women's rights in our country can guide the difference "lived as equivalence, no longer as inferiority" (CARNEIRO, 2019, p. 320).

CASE BRIEF

We chose to rewrite the judgment of the Court of Justice of the State of São Paulo, which overturned the judgment handed down in Public Interest Civil Action No. 1001521.57-2017.8.26.0360, deter-

[233] Bidaseca illustrates the characteristic saviorism of legal colonialism through a theory of voices present in a criminal process in which an indigenous person was accused of raping a minor indigenous girl. According to the tradition of that community, it is supposedly the girls who choose their spouses, validated by a council of elders, and therefore there would be no rape. Beyond the debate between relativism and universalism, without intending to assess the moral adequacy of the traditional practice in question, Bidaseca analyzes which voices have high or low intensity in that judicial process. The conclusion is that the voices of women associated with that tradition had very low or no intensity in the judicial process (BIDASECA, 2011).

mining the compulsory tubal ligation procedure on Janaína Aparecida Quirino, a black, poor, and peripheral woman living in the city of Mococa in the state of São Paulo. Before analyzing and rewriting the judgment, it is important to understand the original proceedings and the reasoning behind the overturned decision. This will clearly demonstrate the institutional racism that was not addressed in the appeal.

Back in May 2017, the São Paulo state prosecutor's office filed a Public Interest Civil Action requesting the city of Mococa to provide tubal ligation to Janaína Aparecida Quirino, along with a preliminary injunction. The prosecutor, Frederico Liserre Barruffini, argued that the requirement should be enforced "even against her will" in accordance with Law No. 9,263/1996 and constitutional principles that declare health as a responsibility of the State and a right of all citizens (SÃO PAULO, 2017, p. 06). Previously, in that city, he was responsible for requesting tubal ligation for three other women in similar circumstances (ASSUNÇÃO, 2019).

In the case description, it was emphasized that she was already the mother of five children - although there were seven and she was pregnant with the eighth - who had already been in a shelter in the region and that, because she struggled with alcohol and drug abuse, she would put the children at risk. According to the complaint:

> Given this factual scenario, there is no doubt that only the performance of tubal ligation on the defendant will be effective in safeguarding her life, physical integrity, and that of any potential offspring who could be born and put at risk due to the mother's destructive behavior.

None of the five requests made at the end showed any inclination to listen to or summon Janaína. This is a clear example of the institutional strategy of silencing women, of which this case is

emblematic. The petition was supported by a report from the Specialized Reference Center for Social Assistance, whose coordinator mentioned that all the attempts to have Ms. Janaína undergo a tubal ligation were unsuccessful. The coordinator also added that Ms. Janaína does not adhere to the services or follow the simplest guidelines. (SAO PAULO, 2017, p. 10). Likewise, the care team, consisting of a nurse and two community agents, stated that "she is not in a condition to proceed with the tubal ligation process".

It was also mentioned as evidence of a report from the responsible judicial social worker, produced less than a year ago, concerning the termination of parental rights regarding the five children living with her.[234] In addition to recommending the termination of parental rights, the social worker suggested her compulsory institutionalization for the "treatment" of alcoholism, echoing the recurring and normalized interventions imposed on Janaína that deny Black women the right "to be subjects not only of our speeches but of our own history" (GONZALEZ, 1988, p. 4). The very choice of the type of action, in this case, is indicative of this, as a public-interest civil action, the interest in her uterus can only be portrayed as trans-individual (GITIRANA; SILVA; ROSA, 2020, p. 202), a diffuse interest, affecting the entire society; as it appears entirely inappropriate to understand that the request for Janaína's compulsory tubal ligation would be a way for the Public Prosecutor's Office to "protect" some individual unwaivable right.

[234] The recurring and almost automatic practice in some jurisdictions of removing babies and subsequently terminating the parental rights of homeless and drug-dependent women not only violates the child's right to family life but also perpetuates the denial of these women's right to motherhood. This practice has been denounced by the National Council for the Rights of Children and Adolescents (CONANDA) and the Public Defender's Offices, among other institutions. For example, see the CONANDA's Public Statement (BRASIL, 2017) condemning the compulsory removal of babies from mothers who use psychoactive substances (2017).

Still, regarding the assistant's report, it was informed that, in testimony, Janaína would have stated that "she goes through many financial difficulties, lacking even food, because only with the basic basket that the Promoção offers does not have food for the whole month [...] suffered physical aggressions by her partner Cristiano" (SÃO PAULO, 2017, p. 14-15). However, at no point was it informed that a systemic analysis of Janaína's situation was conducted, with the suggestion of appropriate policies considering the context of the multiple oppressions she experienced. State interventions seem to have always worked in the opposite direction, reinforcing the violence she was already subjected to.

After the filing of the complaint, the judge ordered, *ex officio*, an interview with Janaína by a court psychologist, which was the only moment her voice emerged in the case records, albeit faintly, following Bidaseca's (2011) analysis, as it was suffocated and did not have any impact on the judgment[235]. It is crucial to note that all of her speeches were conveyed through the health professional's account, and the judge did not have any direct interaction with her at any point during the proceedings. Even so, her narratives reveal the intense suffering she is experiencing.

It is also noteworthy that all the intervention measures supposedly aimed at the best interests of the children in the family were directed solely at Janaína. Neither the discourse of the medical professionals nor that of the judge and the prosecutor in the case mentioned a single word about policies or interventions focused on the father[236], who was described by the psychologist simply as someone

[235] We are dialoguing with the perspective of Karina Bidaseca, from the theory of voices, an investigation of the omniscient narrator and the intensities of the speeches: when they appear as their own, they are high; and when they are suffocated, phagocytized, imitated or silenced they are low.

[236] According to Janaína's testimony, they had been living in a monogamous re-

who "does not accept any kind of guidance". The sexist content of state decisions adheres lethally to institutional racism since, in this case, sterilization, as a public policy that reduces black and poor families, works, as Angela Davis suggests, as an "antidote to race suicide"[237] (DAVIS, 2016, p. 212), sewing up the life of a black woman with violence and hatred.

In a two-page decision with extremely abstract content, i.e. without specific reference to the interests of the case[238] and without any intervention from any agency advocating for Janaína's interests, the judge in the case granted the injunction. The decision was not implemented only because, as reported by the municipality, she was pregnant.

The process continued with the formal statement from the prosecution, which renewed the request from the initial petition, and the defense presented by the municipality of Mococa. The municipality was the first to point out possible irregularities in the action, alleging that despite constantly mentioning conditions that lead to the belief

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lationship for eleven years, he was the father of the five children described in the complaint and a user of licit and illicit substances that aggravated the context of the physical aggressions against her.

[237] Angela Davis refers here to the white women's movements in the US South that called for the forced sterilization of black women: "If the suffragists acquiesced to arguments invoking the extension of the ballot to women as the saving grace of white supremacy, then birth control advocates either acquiesced to or supported the new arguments invoking birth control as a means of preventing the proliferation of the "lower classes" and as an antidote to race suicide. Race suicide could be prevented by the introduction of birth control among Black people, immigrants and the poor in general. In this way, the prosperous whites of solid Yankee stock could maintain their superior numbers within the population" (DAVIS, 2016, pp. 212-213)

[238] With exclusive mention of provisions of the Brazilian Federal Constitution relating to the provision of social rights (art. 6); the right to health (art. 196 and 223, I and V) and the *SUS* Law (art. 6, I, d, Law No. 8,080/1990) - without any reference to the legislation regulating the intervention procedure or any specific assessment of health policy aimed at women.

that Janaína may be incapacitated, there was no procedure to establish guardianship of her interests, nor were other documents about her attendance at the Reference Centers presented. However, the municipality's argumentation seems to be aimed at exempting itself from the liability of tubal ligation and payment of the fine imposed for non-compliance, primarily focusing on the economic value of the case.

Despite the arguments, the case was dismissed early. In four pages, two for the case report and only two for the grounds of the decision, the judge made the preliminary injunction final. The judgment's terms can be used in any case involving a request for health services, regardless of the situation, individuals involved, or context. The judgment doesn't even mention the name of the procedure. Instead, it simply states that Janaína needs "treatment" to avoid risking her health. Furthermore, the principle of the financially possible, which was not even raised by the Municipality, is no longer relevant. This is evident from the fact that the judgment does not refer to it (TJSP, 2017, p. 94).

These are the only three arguments brought to definitively sterilize a woman: the need for tubal ligation under penalty of "risks to her health", based on "medical documents"; the obligation of the government to ensure the effectiveness of the right to health for its citizens; the impossibility of arguing for the "*reserva do possível*[239]", an issue that had not been alleged in the case file by the municipality. Janaína does not appear in the judgment as a person. Indeed, your body, imbued with the conditions of race, class, gender, sexuality, and nation, is deprived of its reproductive rights to such an extent

[239] TN: It is a legal principle used in some legal systems, particularly in constitutional law, to indicate that the government is only obliged to provide certain rights and services within the limits of its available resources. It recognizes that the government's ability to fulfill all rights and demands may be constrained by financial and practical limitations.

that they were not even named. Within the realm of availability and the racist, sexist, and imperialist strategy of population control, the decision aligns with Angela Davis' reflection on the viscosity of these interests: "While women of color are urged, at every turn, to become permanently infertile, white women enjoying prosperous economic conditions are urged, by the same forces, to reproduce themselves" (DAVIS, 2016, p. 223).

An appeal was filed against the decision by the Municipality, and before the second-instance decision was even made, it was reported that the procedure had been performed on Janaína. Nevertheless, two second-instance decisions were made, both reversing the decision of the first instance and acknowledging the irregularities in the procedure.

REWRITING METHODS AND PROCEDURES

Regarding the methodology of feminist judgments, we chose to rewrite the appellate court judgment without modifying the conclusion, in agreement with the urgency to reverse the decision of the tubal ligation, but diverging from the reasoning, which erases the conditions of intersectional oppressions that are symptomatic of the pervasive structures of domination within judicial practices. While we concur with the reform of the aforementioned sentence, we understand that both the report of relevant facts and the rationale of the decision contribute to silencing Janaína and invisibilizing the underlying social processes that dehumanize non-white women, denying them the full right to exercise motherhood and their reproductive rights.

With regard to the facts report of the decision, we understand that part of the institutional violence that we want to expose is found

in the presumed asepsis in the description of the procedural phases, without naming the structural conditions that are involved in the history of a lawsuit. This asepsis manifests itself in the framing of what is legally relevant, according to the Court's panel, and was evident in the way in which originally essential parts for the composition of the case were not included in the judgment. In this way, we have brought into the report facts that had previously been ignored, allowing for a legal and social contextualization of the events that is quite different from what was in the original decision. More explicitly, we show how Janaína's voice was erased from the process. She does not appear as the subject of her existence, and we understand that this must be condemned.

This asepsis also remained in the reasoning of the decision. The judgment resorts to the legislation on family planning in Brazil and uses arguments such as "freedom of women" and "dignity of the human person" to reverse the decision *a quo*. It does not address the structural causes related to the severe Brazilian racism, which gives more perverse meanings to sexism and authorizes practices such as the one discussed in the case. Compulsory sterilization of (almost exclusively) black women was a recurrent practice in the country, and not an isolated act, which even justified the creation of the "CPI of Sterilization" in the 1990s (BRASIL, 1993). It is important to highlight the existence of the second judge's dissenting opinion, which agrees with the reversal of the lower court's decision and mentions the eugenic nature of the practice in question but does not connect it to our entire historical - past and present - genocide of the Black population.

We kept in the original writing, however, the identification data of the case and the verbatim transcriptions of documents that comprised the lawsuit, so that those who read our proposal can visualize the conditions of the case that we summarized in the preceding paragraphs.

The analysis of the case allows us to conclude that the dimension of the violence that Janaína Quirino suffered, to be properly apprehended, needs to be confronted with the issue of institutional racism. More than dealing with her reproductive rights, or her health, what this case actually discusses is Janaína's right to be a mother and the meaning that a "correct" mothering should have. Institutional racism, coupled with sexism, is evident in the failure of various State entities - both in the administrative power and the Judiciary - to support Janaína in the multiple contexts of violence she has experienced throughout her life, culminating in the denial of her possibility of being a mother, whether through the termination of her parental rights concerning several children or through the forced sterilization carried out in the present case. We understand that naming these social processes of dehumanization of bodies is essential to confront their structural nature and cannot be obliterated through the invocation of abstract and liberal formulas such as "individual freedom" and "human dignity." This is the contribution we seek to provide with the rewriting of this decision.

REWRITING THE DECISION

DECISION

Appeal No. 1001521-57.2017.8.26.0360, of the District of Mococa
MUNICIPAL PREFEITURE OF MOCOCA (appellant) v. PUBLIC MINISTRY OF THE STATE OF SÃO PAULO (appellee)

"AGREE, in the 8th Chamber of Public Law of the São Paulo Court of Justice, to render the following decision: "The appeal was granted, by unanimous decision, requiring that the documents be sent to the

Office of the Disciplinary Board of the Courts and to the Disciplinary Board of the Public Prosecutor's Office, in accordance with the opinion of the Rapporteur, which is part of this judgment. The judgment was attended by the Honorable Judges Marcia Fernandes (President) and Luciana Bernardes."

Sao Paulo, May 23, 2018.

MARCIA FERNANDES RAPPORTEUR

APPELLATE COURT OF THE STATE OF SAO PAULO

Appeall nº 1001521-57.2017.8.26.0360
Appellant: Municipality of Mococa
Appellee: Public Prosecutor's Office of the State of São Paulo
Interested party: Janaina Aparecida Quirino
Judicial district: Mococa
Opinion nº 23.073

Headnote:

civil lawsuit for the enforcement of collective rights aimed at compelling the Municipality to perform compulsory tubal ligation surgery. Class action and standing to sue "*ad causam*" indicate systemic systems of oppression against black, poor, and peripheral women. The compulsory performance of such a procedure is inadmissible under the national legal system. The defendant did not express full and autonomous consent to the protective network entities. Disregarded vulnerabilities and silenced

> voices. Illegalities. A sequence of intervention measures indicating institutional racism. The decision was based on the presumption of the defendant's incapacity and the suggestion that there should have been an adjudication of mental incapacity. The appeal of the Municipality is granted.

This is a civil lawsuit for the enforcement of collective rights, with a request for a preliminary injunction filed by the Public Prosecutor's Office of the State of São Paulo against the Municipality of Mococa, aiming to compel it to perform the tubal ligation procedure prescribed to Janaína Aparecida Quirino.

The Prosecution argues, in essence, as extracted verbatim from the complaint:

> Janaína has a serious chemical dependency condition, being a frequent user of alcohol and other narcotic substances; for this reason, she has been accompanied by organs of the protective network, such as CAPS AD and has been compulsorily hospitalized several times in institutions for the treatment of her drug addiction; the last action filed in this regard, including, is number 1002667-70. 2016.8.26.0360, in progress before the 2nd Judicial Court, when she had her hospitalization ordered and remained under treatment at the Spiritist Foundation "Américo Bairral Bairral Institute of Psychiatry", in the city of Itapira / SP, in the period from 10/14/2016 to 12/30/2016; Although she has been discharged from the hospital, she refuses to adhere to the available outpatient treatments, despite the efforts made by the entire protective network team, which has long been aware of the situation in which the defendant and her family find themselves. She is already the mother of five

> children (Felipe, Maria Rita, Luan Gabriel, Santiago Henrique, and Antônia Eduarda), all minors, who have previously been in the Bethany Shelter in the city of Mococa. It is evident that she lacks the ability to provide for the basic needs of her children and frequently puts them at potential risk due to her alcohol and drug use; Thus, it was recommended by the health and social assistance facilities of the Municipality to perform tubal ligation as a contraceptive method; she is constantly found wandering the streets of the city with clear signs of alcohol and drug abuse; at certain times, she expresses willingness to perform the sterilization procedure; at others, she shows disinterest by not adhering to treatments and by failing to comply with guidelines from the protective network facilities. In particular, it invokes the provisions of articles 5, caput, 23, item II, 196 and 198 of the Brazilian Federal Constitution, 2, 6, and 7 of Law No. 8,080/1990, and 1 of Law No. 9,263/1996 (TJSP, 2017, pp. 3-7).

The complaint was presented with documents relating to the action for child abandonment, including: a follow-up report from the ESP Santa Rosa; a report from the judicial social services team, drawn up after a visit to the home of Janaína and her family; and a statement from the CAPS AD, confirming her attendance at the unit for the treatment of people who abuse narcotic substances. All these elements relate to the long-standing interference of the State in her private life.

Janaína was interviewed by the judicial psychologist; however, she was not summoned to participate in the action, be represented by a lawyer or Public Defender, or even through a specially designated hearing for this purpose. During the interview, she narrated a sig-

nificant portion of the history of violence she has experienced since childhood.

A preliminary injunction was issued on pages 30/31, based on the generic argument of violation of the right to health (Article 6, 196 of the Brazilian Federal Constitution; 223, I and V of the Constitution of the State of São Paulo; and Article 6 of Law No. 8,080/1990), ordering the Municipality to perform the surgery, under penalty of a daily fine of R$100.00.

Due to the unsuccessful attempt to refer Janaína to a gynecological consultation, the Public Prosecutor's Office requested, at page 50:

> Now, considering that this is an action aiming at the performance of compulsory sterilization surgery, the resistance from the defendant was expected. For this reason, the Public Prosecutor's Office requested and the court ordered the performance of the tubal ligation surgery through a preliminary injunction, even against the defendant's will (TJSP, 2017, p. 50).

Accepting the urgency, the judge of the first instance increased the daily fine to R$ 1,000.00, determining the compliance of the measure in 48 hours (see pp. 51).

On pages 61/63, the state entity responded to the action, informing that the decision could not be fulfilled because Janaína was pregnant.

The Public Prosecutor's Office reiterated the request and terms of the complaint and, seeming to doubt the allegation of pregnancy, requested its proof and information on the expected date of delivery.

The Municipality of Mococa presented a defense (p. 80) claiming in summary that it understood that Janaína was an incapable person, which is why:

> [...] in order to avoid absolute nullity that may taint the proceedings and cause the need for future repetition of procedural acts, the MUNICIPALITY requests Your Honor to kindly, after hearing the DISTINGUISHED REPRESENTATIVE OF THE PUBLIC PROSECUTOR'S OFFICE, summon the local Subsection of the Brazilian Bar Association (Ordem dos Advogados do Brasil - OAB) to appoint a GUARDIAN *AD LITEM* who, according to an agreement with the Public Defender's Office of the State of São Paulo, will present the answer on behalf of JANAINA APARECIDA QUIRINO. Regardless of this, the MUNICIPALITY indicates that it intends to produce evidence, notably PERICIAL evidence consisting of PHYSICAL and PSYCHIATRIC evaluation of the defendant JANAINA APARECIDA QUIRINA, as well as the hearing of witnesses who will be listed at the legal time and manner, as well as the hearing of witnesses who will be listed in time and legal manner. Requires, as documentary evidence, to notify the CAPs (p. 17) to send a copy of the medical record with certificates, reports, and treatments given to the defendant JANAÍNA (TJSP, 2017, p. 82).

The judgment of pages 92/95, issued by Judge Djalma Moreira Gomes Júnior, granted the request to order the Municipality to perform "the treatment", "as soon as the defendant Janaína gives birth, under penalty of a daily fine in the amount of R$ 1,000.00 (one thousand reais), limited to the total amount of R$ 100,000.00 (one hundred thousand reais)"; the preliminary injunction granted was then validated. In this decision, the judge does not mention the term "tubal ligation" and the special legislation governing the procedure, failing to name and discuss the specifics of the rights involved in the claim.

Within the legal deadline, the Municipality of Mococa filed an appeal, arguing, essentially, that:

> (...) the lack of standing of the Public Prosecutor's Office to propose this action is evident, as it violates the provisions of Article 2, sole paragraph, of Law No. 9,263/1996, as well as Article 1, item III, combined with Article 5, caput and item II, of the Federal Constitution; the Unified Health System already provides services for women with guidance on contraceptive methods and even sterilization, if it is the best option for family planning, but never in violation of the woman's right to freedom of choice, as sought in this action; in any case, tubal sterilization of women is an exceptional measure, only permissible when all other possible treatments have been exhausted, including outpatient treatment, never allowing for involuntary sterilization; it provides basic and essential treatments to meet the majority of the population's health needs, which are available to the segments of society that require them, and the represented party already receives outpatient treatment to recover from drug addiction; furthermore, the Judiciary cannot become a co-manager of resources allocated to public health and social assistance, as such a procedure violates the independence between the branches of government, as provided for in Article 2 of the Federal Constitution. Hence, we seek the overturn of the decision (TJSP, 2017, p. 143)

The Public Prosecutor's Office has opposed the appeal.

This is the background.

It is pertinent to state, at the outset, the active standing of the Public Prosecutor's Office and the significance of the specific legal action filed.

This concerns a supposedly transindividual interest-focused public civil action, wherein the legitimacy of the instrument is fashioned through the argument of individual protection of the fundamental rights of an underprivileged person, who presents a severe pattern of chemical dependence, a history of recurring violence in her affective family relationships, and an extreme situation of poverty and lack of social assistance. The aim is then to carry out a "tubal ligation" on a black, poor, and peripheral woman, even against her will, as if i) the interest in performing the procedure could be attributed to civil society; ii) the compulsory sterilization of vulnerable women could operate, within a democracy, as public policy, without reproducing the hygienic and racist content of similar state practices that mark the history of our country.

From articles 127 and 129 of the Federal Constitution, it is deduced that it is the responsibility of the Public Prosecutor's Office to defend social and unwaivable individual interests, a content that needs to be related to the interests involved in a lawsuit. Only by understanding that Janaína's uterus could be considered *transindividual* and that her sexual *rights* could be transformed into *duties*, stripping them of what is most fundamental in them - their relationship with individual freedoms and human dignity - could such an argument succeed.

The closest our country has come to such classification in its history were demographic control policies mainly targeting non-white and non-Southern women (the majority from the Midwest and Northeast regions of Brazil) during the 1990s. The "Sterilization *CPI*[240]"

[240] TN: *CPI* stands for "*Comissão Parlamentar de Inquérito*" in Brazilian legis-

found that 5,900.238 women were permanently sterilized through incentive programs subsidized by foreign governments and international organizations, political blocs, and market lobbying, with reports of companies requiring a sterilization certificate for employment. The oppressive nature of this was emphasized in several passages of the institutional report prepared by the Senate, the content of which deserves attention:

> [...] sterilization in Brazil demands profound reflection, as within it lies the subordination of class, race, and gender, in addition to the State's negligence, collective-level business interests, and private relationships. Reversing this situation is a protracted process, for it entails dismantling it as a life project. The Brazilian reproductive model has long been under the sway of perversion. This perversion is characterized by the deepening of class and gender discrimination in labor relations, impunity, and omission [...] It cannot be overlooked that racism worldwide is one of the most efficient mechanisms for perpetuating social inequalities and political, economic, and social exclusion. Hence, it is asserted that contemporary birth control practices in Brazil, through surgical sterilization, aim to hinder the growth of the poor population, which predominantly comprises Black individuals. (BRAZIL, 1993, pp. 48-50).

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lation, which translates to "Parliamentary Inquiry Commission" in English. It is a special investigative committee established by either the Federal Congress (in the case of the federal level) or by State Legislative Assemblies (state level) in Brazil. A CPI is created to investigate a specific matter of public interest, such as allegations of corruption, or administrative wrongdoing, for example. The committee is composed of members of the legislative body and is empowered to subpoena witnesses, request documents, and gather evidence related to the subject of the investigation.

Thus, historically, the transformation of women's sexual and reproductive rights into a State program of social interest is deeply related to racist, sexist and classist birth control programs in our country. As a representative of society, the Public Prosecutor's Office, in this demand, makes evident the structural and, regrettably, current content of these oppressions, wounding to blood any democratic immanence of its practices.

Indeed, acknowledging the subjective imperfection of the procedural relationship and the chosen procedure, it is necessary to temper the Municipality's appellate claim regarding the need for a guardianship procedure. In fact, it emerges from the records that Janaína Aparecida Quirino is a woman whose journey embodies the distortions produced by the hierarchical society in which we live.

> In this context, it is important to question her situation as a habitual user of narcotic substances, as revealed in the considerations she herself provided during an interview conducted by state agents. In the case of neglect, which predates the current situation, the judicial social worker stated:
> "[...] we have observed that the context of this family is permeated by financial difficulties, primarily surviving on assistance from Social Programs, lack of support from the father of the children, a marital relationship involving physical abuse by the father, alcoholism on the part of the parents, and non-compliance with the recommended treatment." (TJSP, 2017, p. 15).

In this legal proceeding, Janaína continued to share her ongoing struggles of abandonment, lack of support, and suffering. During her interview with the judicial psychologist, she recounted her childhood marked by significant hardships, living with a father who battled al-

cohol abuse and routinely subjected her mother to physical abuse. Currently, she was surviving on limited resources provided by the State and support groups, enduring days of hunger and hardship. Additionally, she revealed that she had been a consistent victim of domestic violence inflicted by her partner, with whom she had been together for eleven years. Interestingly, their relationship experienced intermittent separations followed by reconciliation periods. She openly admitted her strong emotional bond with him and expressed her desire to invest in the relationship again (p. 26).

The contexts of violence against women that were reported, seemingly without any real implication, have become mere formal documents within the lawsuit. An indication of this is that they did not constitute part of the repertoire invoked by the esteemed judge of the first instance and the Prosecution, both of whom were confined to abstract references to specialized legislation and constitutional norms, even using the veneer of law to distort its fundamental essence. The erasure of this history materializes how rights often, in the whitewashed structures of the Judiciary, serve as a subterfuge for the distribution of the realm of non-being (PIRES, 2017).

Furthermore, it is important to identify the compulsory measures she has been subjected to as systemic forms of violence, which were manipulated by the plaintiff and the judge of the first instance to legitimize further control and denial of her human condition. Firstly, she was previously subjected to involuntary hospitalization for substance abuse treatment (case No. 1002667-70.2016.8.26.0360, pending in the Mococa Judicial District), which took place at the "Américo Bairral" Spiritist Foundation, Bairral Institute of Psychiatry, in the city of Itapira/SP, between October 14, 2016, and December 30, 2016. Secondly, the recent acknowledgment of the situation of material neglect and the decision to compulsorily shelter the five chil-

dren who resided with the couple, which initiates the questioning of Janaína's suitability for the role of motherhood, a process developed through the present case. Lastly, this current action, which aligns with others filed by the same prosecutor in that city affecting only vulnerable women in the region, disguises itself as legality while embodying a eugenic and racist policy organized by the State.

As for the latter, it is important to emphasize that in view of the indication of the tubal ligation procedure, the defendant was reluctant and, at times, resistant to its realization. According to an informative report from *CREAS* - Specialized Reference Center for Social Assistance of the Municipality of Mococa, at the end of 2016 she would have received guidance on the procedure, and medical examinations were scheduled for that purpose; on 01/23/2017, she attended the *CAPS-AD* (Center for Psycho-Social Care), withdrawing all requests for exams already scheduled, having been instructed to go to the *PPA* to find the nurse responsible for the "stork network", to guide her and seek the appropriate reference within the service; **after this date, she no longer sought the health service for this purpose, and her adherence to the surgical procedure was not observed** (see pp 09/10).

Searched in March 2017, Janaína Aparecida no longer knew if she had started the process to undergo tubal ligation, stating that she no longer made any contact with the health system; at the time, she would even have e**xpressed interest in performing sterilization** (see pp. 11/12).

During the course of this proceeding, after the urgent preliminary injunction had already been granted at pages 30/31, she was approached by the nurse in charge of the "Stork Network" of the Municipality of Mococa. She was found to be malnourished, with a neglected appearance and lacking hygiene, and she reported daily alcohol consumption. Although a gynecological appointment was

scheduled for July 31, 2017, she **failed to attend** (p. 46).

The information report on page 63, also prepared by the CAPS-AD Coordinator, states the following:

> On August 13, 2017, we visited the residence of Janaína Aparecida Quirino, accompanied by the CREAS team. We informed Janaína about the court order for compulsory sterilization, sensitized her to the situation, and provided guidance regarding her consultation at ESF Santa Rosa on August 14, 2017. On August 14, 2017, we returned to Janaína's residence and accompanied her to the consultation at ESF Santa Rosa with Dr. Ana Paula. During the consultation, all preoperative exams were requested. To facilitate the process and expedite the exams, considering Janaína's non-compliance with any treatment, she was admitted to CAPS-AD on August 15, 2017, where she remains until the present. On August 21, 2017, the patient underwent laboratory tests, and on August 22, 2017, we received the result of the reactive Beta HCG test, confirming an ongoing pregnancy. The ultrasound is scheduled for August 28, 2017, to determine the gestational age (TJSP, 2017, p. 63).

As evident from the above, Janaína Aparecida Quirino does not demonstrate full and autonomous consent regarding the surgical procedure proposed by the Public Prosecutor's Office. Now, compulsory sterilization does not constitute a lawful measure from the perspective of the national legal system, and the free exercise of family planning must be ensured. In this regard, Law No. 9,263/1996 states that:

> Art. 1 Family planning is the right of every citizen, subject to the provisions of this Law. Art. 2 For the purposes of this Law, family planning is understood as the set of actions to regulate fertili-

> ty that guarantees equal rights to the constitution, limitation or increase of offspring by women, men or couples.
> Sole Paragraph - It is forbidden to use the actions referred to in the caput for any type of demographic control.
> Art. 5 - It is the duty of the State, through the Unified Health System, in association, where appropriate, with the component instances of the educational system, to promote conditions and informational, educational, technical and scientific resources that ensure the free exercise of family planning. (BRASIL, 1996).

In fact, as well pointed out by the Attorney of the Union, Aline Albuquerque, Law No. 9,263/1996 was enacted even with "the aim of trying to curb the widespread practice of sterilizations in the country and, on the other hand, encourage the use of reversible contraceptive methods." This is because it was a direct result of the reflections arising from the previously described "CPI of sterilization," which exposed how compulsion was implemented in our country through birth control programs that mainly sterilized black, poor, and marginalized women.

The intent behind the regulation is to prevent voluntary sterilization from being favored over less invasive contraceptive methods within the framework of health care programs. This is because, among other reasons, regret after female sterilization is high, "about one in three women who undergo tubal ligation regret it" and there is an incidence of "mass sterilization of women in Brazil".

In addition, the procedure is extremely invasive because it affects women's uterine function. Jurema Werneck, a doctor involved in the Senate report, stated: "in their daily practice, sterilized women

bring complaints of menstrual and nervous system changes, obesity, nervous system (sic), sexual frigidity related to the post-laceration period" (BRASIL, 1993, p. 40).

The aforementioned Law aims to encourage the use of contraceptive methods other than sterilization. Article 9 guarantees the right to family planning through scientifically accepted methods and techniques that do not pose a risk to people's health or life. The Unified Health System is responsible for providing inputs and medicines that enable people to exercise their autonomy in choosing these methods and techniques. This ensures their freedom of choice in matters of conception and contraception.

Furthermore, Article 10 of this legal framework restricts the circumstances under which medical intervention that eliminates the ability to reproduce or permanently or durably deprives a person of the capacity to procreate can take place, as follows:

> Article 10. Voluntary sterilization is only permitted in the following situations:
>
> I - In men and women with full legal capacity and over twenty-five years of age or, at least, with two living children, provided that a minimum period of sixty days between the expression of will and the surgical procedure is observed, during which the interested person will have access to a fertility regulation service, including counseling by a multidisciplinary team, aiming to discourage early sterilization;
>
> II - Risk to the life or health of the woman or the future conceptus, witnessed in a written report signed by two doctors.
>
> § 1. It is a condition for sterilization to be performed that there is a record of an express manifestation of will in a written document, signed after

> information about the risks of the surgery, possible side effects, difficulties of its reversal, and existing options for reversible contraception.
> § 2. Surgical sterilization in women during childbirth or abortion periods is prohibited, except in cases of proven necessity due to previous successive cesarean sections.
> § **3. The expression of will as provided in § 1 shall not be considered during occurrences of impaired discernment due to the influence of alcohol, drugs, altered emotional states, or temporary or permanent mental incapacity.**
> § 4. Surgical sterilization as a contraceptive method will only be performed through tubal ligation, vasectomy, or other scientifically accepted methods, and is prohibited through hysterectomy and oophorectomy.
> § 5. In the presence of a conjugal relationship, sterilization depends on the express consent of both spouses.
> **§ 6. Surgical sterilization in persons who are absolutely incapable can only occur with judicial authorization, regulated according to the Law**. (emphasis added) (BRAZIL, 1996)

Therefore, in our legal system, the so-called compulsory sterilization cannot be allowed. In other words, no individual can be forced to undergo sterilization, as it involves an invasive medical procedure that irreversibly damages physical integrity.

Furthermore, this legislation aligns with the significant gains made through feminist advocacy, establishing policies that advocate for women's sexual and reproductive rights. However, there is an urgent need to extend these policies to encompass the inter-

connected aspects of race, class, gender, sexuality, and nationality that shape these individuals' experiences. This becomes particularly evident in the case at hand, where an option that resembles how privileged white women from the affluent southeast region access sterilization is distorted into a compulsory obligation for Janaína, negating her autonomy and turning it into an enforced responsibility rather than a choice.

With regard to the validity of the defendant's expression of her will, which has been debated, especially in the municipality, we must ask ourselves whether the state, by doubting the expression of Janaína's will - who had refused to consent to the procedure, both explicitly and implicitly, when she did not comply with the legal requirements even after the insistence of the care centers - is participating in the historical strategies of invisibilization of black women. In this case, we believe that the fact that she abuses alcohol in no way diminishes her ability to express herself. The judicial interdiction, which was questioned at first instance, would certainly represent another violation of the State, an institutional strategy of historical silences, invisibilities and absences caused by patriarchal racism (PIEDADE, 2017).

Lastly, I give voice to a reflection that I believe underscores even more prominently the racist framework underlying the argumentation initiated by the prosecutor and endorsed by the esteemed judge. I present it through a question: what could be the reasons for the continued determination of state institutions to scrutinize, through the legal machinery, Janaína's maternal capability with such unwavering certainty[241]? I understand that this strategy underlies the rein-

[241] This inquiry arises from statements that constitute the proceedings, for illustrative purposes: "(...) only the performance of tubal ligation on the defendant will be effective in safeguarding her life, her physical integrity, and that of any potential offspring that could be born and placed at serious risk by the mother's destructive

forcement of the systemic annihilation of forms of black resistance in racist countries since slavery[242], including the encounter with the self in mothering. As Patricia Collins explains:

> The tensions we see today are the result, on the one hand, of efforts to shape Black motherhood for the benefit of intersecting oppressions of race, gender, class, sexuality, and nation, and, on the other, of efforts by African Americans to define and value their own experiences as mothers (COLLINS, 2019, p. 296).

Janaína refers to motherhood, according to p. 25, as a "dream", and speaks with sadness about "losing her children to adoption". In the interview with the forensic psychologist from which I draw these statements, she recognizes the lack of conditions in which she finds herself, due to poverty, domestic violence, and loneliness[243]. But this must be linked to the structure of violence produced by the racist state in which we live, which offers women like Janaína nothing more

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behavior." (complaint - p. 04); "given the mother's alcoholism, she is unable to properly fulfill her maternal responsibilities, putting the children in a vulnerable situation and significantly worsening the family situation." (social worker's statement, p.15); "the defendant is a capable person, although she does not have the means to provide the necessary care for the future offspring." (judge, p. 94); "we suggest compulsory hospitalization and tubal ligation since the pregnant woman does not demonstrate the minimum conditions to provide for her own care and that of a baby." (CREAS coordination, p.115).

[242] As Angela Davis puts it: "Within the confines of their family and community life, therefore, Black people managed to accomplish a magnificent feat. They transformed that negative equality which emanated from the equal oppression they suffered as slaves into a positive quality: the egalitarianism characterizing their social relations." (DAVIS, 2016, p. 30.)

[243] As a sign of intersection, Janaína's loneliness was also expressed when she said that "despite having a mother and five other siblings, she only has a good relationship with one sister who is also in a vulnerable situation and who does not have a network of positive friendships (TJSP, 2017, p. 27).

than the annihilation of dreams and the increase of the experience of loneliness and aggression.

The Judiciary's performance, therefore, reflects the adherence to the program of distribution of the meanings of non-being to the black population in our country, under the guise of law and procedure and represented, once again, in the vilification ordered to the *"lombo das pretas"* ("loins of black women") (FLAUZINA, 2016, p. 101). Through the denial, in this case, of the possibility of non-hegemonic motherhood and the non-involvement of the state apparatuses in social policies that could transform Janaína's state of lack of support, the values inherent to white and patriarchal supremacy are ultimately reinforced.

Therefore, the dismissal of the complaint is appropriate, with the revocation of the preliminary injunction granted. In light of the foregoing, the appeal of the Municipality of Mococa is granted.

Marcia Fernandes (Rapporteur)

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A GENDERED APPROACH TO SEXUAL EXPLOITATION OF VULNERABLE ADULTS: REASSESSING EVIDENCE AND CRIMINAL DEFINITIONS

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INTRODUCTION

All writing is political. The exercise proposed in this paper is to highlight this circumstance through a textual review of a judgment from a gender-sensitive perspective. It is assumed that the feminist view is an epistemological path valid not only academically, and it is imperative that this trench expands beyond the academy's walls and reaches Criminal Law in its practical applications.

The academic activity that gave rise to this article was carried out within the scope of the Research Group "*Direito Penal e Estado Democrático de Direito*", of the Law School of the University of Sao Paulo (USP), and was called "Feminist Judgments (*JuFem*)".

The task set by the group involves rewriting a judgment that reinforces gender stereotypes relativizing female dignity. Examples of this practice (including in the media) are not uncommon. Criminal law often operates to keep women in positions of diminished autonomy, reaffirming the precariousness of their rights. The activity of rewriting proves to be a suitable (and methodologically solid) way to not only symbolically repair these damages but to indicate the de-

mand for a constant concern not to naturalize discrimination in the Justice System.

SUMMARY OF THE CASE AND THE ORIGINAL DECISION

On February 24, 2017, the victim, T.C.S., was at a bar with her friends, where she consumed a significant amount of alcoholic beverages. After reaching an advanced state of intoxication, T.C.S. was placed inside a rideshare car by her friends and the establishment's security guard. Upon arriving at the destination, the driver disembarked along with the victim, entering her residence with her. The defendant took advantage of the victim's highly intoxicated state and engaged in sexual intercourse with her. Afterward, the accused left the scene, taking the victim's cell phone and ending the ride on the application. According to the decision's report, several witnesses were heard, and a medical examination provided positive evidence of violence and sexual intercourse. Based on the victim's testimony and the presented evidence, the defendant was sentenced to ten years of imprisonment in the first instance. He appealed the sentence, and the acquitting judgment followed - the subject of the rewriting.

In light of the above, all the arguments developed by the Rapporteur Judge to justify the appellant's acquittal facilitated the examination of the decision and the identification of points that deserved a gender-sensitive perspective. As will be seen below, the justifications found to support the decision express the significant and frequent difficulty that judges face in assessing the victim's testimony in sexual crimes, the tendency to stereotype women based on their behavior before, during, and after the crime; the reluctance to adequately assess important evidence regarding the degree of intoxication and vul-

nerability of the victim, and consequently her consent; and the recurrence, during the legal process, of blaming and revictimizing women who are victims of sexual crimes.

More specifically, a new look was sought at the following points that underpinned the acquittal decision: the fact that the offended had voluntarily consumed alcohol on the day of the facts would exclude vulnerability; the fact that the witnesses confirmed that the victim was drunk, without specifying the degree of intoxication, does not allow to affirm that she was in fact intoxicated; the fact that the victim's friends did not accompany her to her home demonstrates that the victim was not so intoxicated as to be unable to consent to the sexual act; since the victim did not remember what had occurred, any conviction of the defendant would be based on mere presumptions; there was no proof of the victim's intoxication; the fact that the victim had already been inebriated on other occasions, "putting herself in this type of risky situation", does not allow consent to be excluded; the defendant was in good faith, because (i) it was through him that the victim, in theory, would have discovered what had happened, (ii) he collaborated in the production of the evidence, offering his genetic material for analysis even though he knew he had ejaculated on the victim, and (iii) he sought her out to clarify the facts when he learned that he was being accused of rape; the bruises found in the forensic examination could have resulted from the sexual act itself; the principle of in dubio pro reo must be guaranteed.

As we tackled these challenging issues, our approach was informed by a range of significant theoretical references. Initially, we drew insights from works by authors who had engaged in other feminist rewritings, both within Brazil (PENTEADO, 2020) and internationally (RACKLEY, 2012). This literature played a crucial role in shaping our understanding of the expected outcomes and guiding

us toward potential avenues of exploration. Subsequently, during the research phase for crafting the new decision, we sought additional literature that addressed the theoretical complexities from a feminist and rights-based perspective within the realms of criminal law and criminal procedure law (PORTUGAL, 2018; GRUBB; TURNER, 2014; MENDES, 2020)[244].

METHODS AND APPROACHES USED

The group's first contact with the rewriting process was based on the reading of descriptive texts of similar experiences by other national and international work teams. The appropriation of the process took place through debates on the guidelines for a rewrite, although there is no single formula for this activity. Once familiarized with the scope, the group began to identify the decisions it might face.

From the beginning, given the academic background of the authors, it had already been established that the decision to be rewritten would involve criminal law. In this context, one of the possibilities raised was to explore a "gender-based crime" case, which involves offenses inherently associated with women, such as rape, domestic violence, femicide, abortion, and infanticide; Another possibility would be to rewrite a decision that concerned crimes that do not necessarily involve gender issues, but could illustrate how gender biases and stereotypes infiltrate criminal justice, which is evident when women are convicted of drug trafficking, for example.

It is important to note that, from the outset, it was considered that a potential focus on sexual crimes could encounter challenges due to the strict confidentiality imposed on most of these cases. This

[244] The Protocol for Judgment with a Gender Perspective of 2021 of the Brazilian National Council of Justice (CNJ), prepared by the Working Group established by CNJ Ordinance No. 27 of February 2, 2021 (BRASIL, 2021), is also worth mentioning.

circumstance might hinder the identification of suitable judgments for rewriting or even accessing other documents in the case, if required for a thorough analysis.

It is worth mentioning that one of the group's principles was to adopt a rights-based perspective in the rewritten decision. This means that the group did not find it appropriate or relevant to commit in advance to convictions of male offenders or acquittals of female defendants as a way to achieve a sense of justice. Beyond the outcomes (conviction or acquittal), the focus was on reflecting upon the reasoning process leading the judge to their decision.

In order to choose the decision to be rewritten, a survey of decisions involving women in at least one of the parties was conducted. At that initial stage, the only limitation imposed was that it had to be a decision from the Brazilian judiciary. There were no restrictions regarding the type of decision or the court of origin (first or second instance, or superior courts). This almost unrestricted approach aimed to gather the highest possible number and diversity of judgments, assuming that any type of decision, at any level, could be subject to gender stereotypes. After searching the jurisprudence pages of different courts, fourteen decisions were submitted to the group, and one was ultimately selected.

The decision chosen for rewriting is an appellate decision (Criminal Appeal No. 70080574668), issued by the 5th Criminal Chamber of the Court of Justice of Rio Grande do Sul and judged on July 17, 2019, which deals with the alleged crime of sexual exploitation of a woman in a vulnerable condition. At first, there was doubt about the appropriateness of this choice. The uncertainty was due to the fact that, in principle, this would be an "easier" and "obvious" type of decision to be worked on, since, in general, it contains more evident sexist components and stereotypes. On the other hand,

it was considered that this is a relatively common decision in Brazilian justice (either because of the frequency with which it occurs or because of the stereotyped approach adopted), showing that it is necessary to face the entrenched sexist view (also in the Justice System) and propose a different way of acting in the countless cases that are daily brought to the Judiciary. Finally, the decisive factor in the choice was the depth of the decision, as the appellate court essentially copied the first-instance judgment (with rich details about the facts and evidence) and, moreover, developed a lengthy argumentation that deserved to be challenged. It is important to clarify that the rewriting was based on the mentioned appellate decision and all the information contained therein, without analyzing the complete case file, given the impossibility due to the case being closed to the public.

After identifying the points to be addressed, the group split up to research, in doctrine and case law, material that could point to the current understanding of the theses to be developed and that could better support the decision to be rewritten.

It is also important to note that the group chose to rewrite the decision in the form of a dissenting opinion in the judgment of the appeal, which even made it possible to contest arguments used by the Rapporteur Judge of the case.

Finally, it is important to clarify that the group chose not to disclose the names of the parties and the witnesses in the process. Although the decision is public and available for consultation, replacing the names with initials was a way to protect the identity of the individuals involved in the events. In this regard, although there were few interventions, the names that appear in full within the testimonies of the witnesses were also replaced - this differs from what is stated in the original decision that has been rewritten.

Concerning the feminist techniques employed in the rewriting (SEVERI; SILVA, 2022), the following are highlighted: (i) the particular relevance of women's testimony in situations of violence, which does not imply abandoning the guarantees provided by the legal system, as will be described in the rewriting; (ii) the vehement rejection of gender stereotypes; (iii) the grounding of the decision on legal and egalitarian parameters, not imposing on the victim the requirement of specific behaviors traditionally associated with women in order to be considered a victim worthy of protection.

REWRITING THE DECISION FROM A GENDER PERSPECTIVE

Background

The defendant F. B. M. is accused of committing the offense provided for in article 217-A, paragraph 1, combined with article 61, item II, paragraph "f", both of the Brazilian Criminal Code, as on February 24, 2017, at around 03:30 am, he had maintained sexual intercourse with the victim T. C. S., who at the time did not have the necessary discernment for the practice of the act and could not resist him.

After the production of evidence phase, the criminal complaint was partially granted, and F. B. M. was sentenced to 10 (ten) years of imprisonment, initially under full-time custody.

In view of the judgment rendered, an appeal was filed by the Defense, which requested, on a preliminary basis, the recognition of the nullity of the technical analysis performed, due to violation of the adversarial process. On the merits, he argued for acquittal for lack of evidence and, alternatively, for the exclusion of the aggravating factor provided for in article 61, item II, paragraph "f", of the Crimi-

nal Code, reduction of sentence and establishment of the less severe regime for the fulfillment of sentence.

Appeal filed timely, with the Prosecutor's Office's opinion for its rejection.

After the opinion of the Rapporteur Judge CRISTINA PEREIRA GONZALES, with full support to the defense appeal for acquittal of the accused, I move to the DECLARATION OF DISSENTING OPINION, with the utmost respect to the honorable Rapporteur.

Dissenting Opinion
The Merits

In 2005, the term "honest woman" was deleted from the legal text, which no longer discriminates against women on the basis of their "sexual honesty" - a criterion of inconsistent meaning through which the patrolling of female sexual autonomy is exercised even today. The fact is that, after the amendment, it became incontestable that all women deserve equal protection of sexual freedom by the legal system, regardless of their current or past behavior or sexual preferences.

In 2009, the amendment of Title VI of the Criminal Code, which ceased to protect "customs" and began to deal with sexual dignity, was another important milestone in the protection of women victims of sexual crimes. With this change, the criminal legislation was adapted to the legal values that are effectively capable of being the object of criminal protection under the 1988 Federal Constitution, specifically sexual freedom to choose whether and under what circumstances a person wants to experience their sexuality.

If it is true that these changes were only possible at the beginning of the 21st century due to the great social resistance to accept

them previously, it is equally true that, although they mean an important step for axiological evolution in this matter, they are still insufficient to impact the way society sees women victims of sexual crimes. Discrimination persists, even in the decisions of the Judiciary, which do not always align with constitutional values in their interpretation of the law when related to this matter.

Hence, the harm to women and the interference with the administration of justice are apparent, particularly in sexual crimes, as deeply ingrained gender stereotypes in the (un)consciousness of individuals subtly influence legal practice, leading to inconsistencies between positive law and its application to the cases.

In this case, there is a clear conflict between an outdated conception of the role of women and their sexual autonomy in our society and the constitutional values of the Democratic Rule of Law. It is on the basis of this second way of understanding women, as subjects of rights and worthy of respect in all areas of life, that this case should be analyzed.

As stated in the case file, the evidence produced indicates that the occurrence of sexual intercourse between the defendant and the victim is incontrovertible.

According to the complaint, the defendant F. B. M., a driver of the Cabify transportation app, received a call to pick up the victim near the bar "Silêncio". Arriving at the place, the victim T. C. S., who was in an advanced stage of alcoholic intoxication, was embarked on the vehicle, and he took her to the destination informed in the application, that is, the victim's residence. Once there, he disembarked with her and entered her residence. Once at the place, taking advantage of the advanced state of alcoholic intoxication of the victim, he practiced sexual intercourse with her, as evidenced by the content of DNA Report No. 31927/2017 (p.p. 09/11), causing her the injuries

described in the Expert Report of Auto de Exame de Corpo de Delito No. 29400 (p. 07)

The defendant himself, in his testimony, admitted to having engaged in sexual activity. He stated that upon arriving at the victim's house, she invited him in, and he accepted. Once they were in her room, the door was closed, and "*the victim allegedly lay down on the bed and then removed her underwear. He started undressing, placed his clothes on a chair beside the bed, and lay down next to the victim. They began to kiss and engage in the act."* Similarly, the defense witness, D. S. R., the defendant's wife, learned about the incident from the defendant's account. He confessed to her, describing the same story told in court. Later that night, upon returning home, the defendant *"felt guilty for having cheated on her and, on the way, stopped at a McDonald's to buy her a meal."* Another defense witness, M. E. S. R., the defendant's father-in-law, stated that *"F. told him that he had picked up a passenger and taken her to his house, and during the journey, they began to talk, and she invited him to go upstairs, and then they had sexual relations."*

In cases where the sexual act is disputed, the prosecution and defense may disagree on whether the victim consented. The Rapporteur judge determined that there was not enough evidence to prove that the victim was unable to resist due to being drunk. The conclusion was based on several factors, including the victim's admission that she consumed alcohol voluntarily and the lack of testimony from witnesses indicating that the victim was so intoxicated that she lost consciousness; if the victim had been in a stage where she needed to be carried, certainly one of her friends would have accompanied her to her residence; there are serious doubts as to what happened in the car or even at the victim's residence, and it cannot be excluded that the defendant is telling the truth, since the victim said she did

not remember anything and one cannot be convicted on the basis of mere presumptions; there is no toxicological test in the case file that would attest to the level of alcohol in the victim's blood or the use of any other substance; the victim admitted that there had already been a situation in which, after drinking, she did not remember what had happened; the victim would have found out from the accused himself that she had had sexual intercourse with him, when they spoke by phone and F. asked her if she had any sexually transmitted diseases; the possibility that the marks on the victim's neck and legs resulted from the sexual act itself cannot be ruled out; the accused did not refuse to provide genetic material for DNA testing, even though he knew he had ejaculated inside the victim's vagina; the appellant, after learning that he was being accused of rape, sought out the victim and her family to try to clarify the facts.

It is precisely on this point that I would like to express my disagreement.

I believe that, in the present case, there is sufficient evidence of the victim's vulnerability due to the state of alcohol intoxication. In spite of the absence of a toxicological test, article 167 of the Brazilian Code of Criminal Procedure states that "if the forensic examination is not possible because the traces have disappeared, testimonial evidence may be used to make up for the lack of evidence". I begin by referring to the parts of the judgment in which this is clear:

> Witness S.A.F.L. reported that they were at a party and the victim was completely intoxicated. The witness said that T. became ill and the venue's security guard had to help her out of the establishment. Once outside the party, she and her friend F. took some time to figure out T.'s cell phone password so they could access the app and call a car to take her home. She and her friend F. put the victim in the back seat of the car.

> [...] The witness F. D. S. A. reported being at a party and having to leave because the victim had fallen ill. T. was so unwell that she couldn't even unlock her cell phone, so the witness called a car through the app to take her home. When the car arrived, they put the victim in the back seat and she laid down.

As it can be seen, although the witnesses did not explicitly state that the victim was in an intoxicated state "to the point of losing consciousness," they reported that she was unable to unlock her phone, feeling unwell, and unable to call for a ride through a transportation app, needing to be laid in the backseat of the car. Now, what the witnesses described was the condition of a person who had practically lost consciousness, was heavily intoxicated, and clearly lacked the capacity to resist or exercise self-determination.

Despite the absence of a toxicological test, the knowledge of science about the effects of alcohol on the human body allows us to affirm the high degree of intoxication of the victim. Given that the witnesses were unanimous in stating that the victim lacked balance and had severe motor coordination disorders (tendency to stagger and fall frequently), it is possible to state that the blood alcohol level was between 1.6 and 2.9 g/L. If we add to this scenario the victim's report, which states that she does not remember what happened, that is, that she was in a state of deep lethargy and loss of consciousness, it can be said that the degree of intoxication was even higher, at the level of 3.0 - 3.9g / L. (RACHKORSKY; ZERBINI; CINTRA, 2012).

It follows, therefore, that it would not be possible for the victim to consent to anything at that time.

With regard to the criminal doctrine, concerning the state of vulnerability, as pointed out in the first instance judgment, Cleber Masson explains that:

> "... Vulnerable are those individuals who, even though over 14 years of age and without any illness or mental disability, due to any other cause, cannot offer resistance to the sexual act. ... It matters little whether the victim was placed in a state of inability to resist by the perpetrator, such as in the case of someone who completely intoxicates another person using alcohol or similar substances to engage in sexual intercourse or other lewd acts, or if the individual simply takes advantage of the circumstance that the victim was already unable to resist the sexual act ..."(2014).

Here, it is important to remember that the Criminal Code defines "rape of a vulnerable person" as the conduct of "having sexual intercourse or practicing another libidinous act with a minor under 14 (fourteen) years of age", equating to such a situation those who practice the same acts "with someone who, due to illness or mental disability, does not have the necessary discernment for the practice of the act, *or who, for any other cause, cannot offer resistance*" (art. 217-A, § 1).

I also emphasize that Precedent No. 593 of the Superior Court of Justice determines that in cases of rape of a vulnerable person, any consent of the victim is irrelevant. This is because it is not even possible to speak of consent when there is no possibility of the victim offering resistance[245]. Although this Precedent deals with minors under 14 years of age, the fact is that §1 of article 217-A of the Criminal Code equates the conduct when practiced against those who, for any other cause, cannot offer resistance, as in the case of alcohol intoxication.

[245] STJ, Precedent No. 593: The crime of rape of a vulnerable person is established with the sexual intercourse or practice of a libidinous act with a minor under 14 years of age, being irrelevant any consent of the victim for the practice of the act, her previous sexual experience or existence of a romantic relationship with the agent.

Although the legal text itself suggests that the victim's vulnerability due to drunkenness can already lead to the conclusion that she was unable to consent to the sexual acts, there are additional elements in the records that further support the finding that there was no consent on the part of the victim, leaving no room for a different interpretation.

In the victim's own testimony, she describes that after drinking hard liquor,

> "at some stage she would have felt sick, but then she does not remember what happened. She said that her friend F. thought it would be better to call a car via the app to take her away, but that she does not remember getting home. The next day, when she woke up, she found her cell phone missing and did not know what had happened. She went to take a shower and reported feeling a lot of pain in her body, at that moment she had "flashes" of the fact, but she was not sure about the veracity. She contacted her friend S. and said that she thought something had happened (...) Later, she looked in the mirror and realized that there were purple spots on her body, at which point she was a little more sure of what could have happened (...) T. answered the phone and, at that moment, F. asked if she remembered what had happened and that for his safety, he asked if she had any sexually transmitted diseases. T. answered no and he stated that he was married, had children and that this could harm him. Very nervous, the victim could no longer hear the defendant, as she was sure of what had happened and passed the phone to her friend".

Witness S., a friend of the victim, reported that:

> had been in contact with T. throughout the day and that she had reported that something wrong had happened, including the presence of bruises on her body. She said that the victim also contacted the defendant and talked to him. Later, both realized that the race had taken about an hour to reach T.'s residence, which according to the witness would not normally take fifteen minutes. He mentioned that when the victim contacted the defendant, he asked her if she was on birth control. The witness then advised her to go to the police station as it was possible that she had been sexually assaulted while unconscious. Finally, she said that the victim did not remember having sexual intercourse with the defendant.

In addition to the eyewitnesses present at the date and location of the incident, testimonies were also taken from individuals who witnessed the victim's condition on the day following the rape and who accompanied her during subsequent events. These accounts further support the assertion that the victim was unable to offer resistance or provide consent to the sexual act. As aptly emphasized in the judgment of the first instance:

Witness J. O. F. M. reported that:

> became aware of what had happened on the day of the incident. Informing that she was traveling and that on her return the victim had reported the fact, but that she did not remember exactly what had happened. She mentioned that the victim said that the defendant was with her during the drive and then at her residence. She stated that on the day of the incident, she was at home, sleeping with the door closed. Later, the defendant went to her house to ask the victim to withdraw the report she had made, claiming that he was married and had a family to

support. Finally, she reported that she took T. to the police station to report what had happened.

With all due respect, it can be seen that the conclusions reached by the Honorable Rapporteur are not sustained. By all accounts, there is clear evidence of the complete drunkenness of the victim and her consequent lack of consent in relation to the events that occurred, as will be set out below.

Thus, it is clear that the testimonies of the victim and the aforementioned defense witnesses are absolutely consistent, with no discrepancies between them.

The subsequent conversation the victim had with the defendant provided significant insight into the events that had transpired. The fact that the victim acquired essential information during this conversation does not diminish the validity of her conclusions. On the contrary, the defendant's own admission of a sexual act during that exchange serves as clear evidence that she was indeed a victim of rape as a vulnerable person, given her complete state of inebriation and subsequent memory loss.

Moreover, the fact that the victim does not remember the facts precisely, having only memory lapses, does not diminish the importance of her testimony. In fact, it corroborates the version of the advanced state of drunkenness and the consequent impossibility of offering resistance. It should be emphasized that the defendant admitted to having had sexual intercourse with the victim, who, as demonstrated, was unable to consent at that time.

Contrary to what was stated by the Rapporteur in her opinion, the question about the sexually transmitted disease did not "shock" the victim but gave her the certainty that the appellant had maintained intimate relations with her. At no point had the victim said that she

was upset or had her sensibilities affected by the question, or shown any kind of regret. On the contrary, the question clarified her uncertainty as to whether she had been raped.

The defendant's submission to the forensic examination (DNA) does not absolve them of the offense. It is important to note that the accused never denied engaging in sexual acts with the victim, and the question at hand is whether these acts were consensual, given the victim's state of vulnerability.

Furthermore, there is no evidence in the case file that the victim was interested in harming the accused with a false accusation, not to mention that he was an unknown man. If the relationship was indeed casual and punctual, it would be indifferent to her whether he was married or not. The Rapporteur should have been aware of the possibility of gender stereotypes when analyzing the facts and evaluating them, especially in sexual crimes, where the figure of the "honest" or "dishonest woman" still persists.

In this regard, Fabiana Severi (2016, p. 576) points out that,

> It is based on stereotypes that women are often portrayed as a kind of " suspect category " by public authorities: the beliefs that women exaggerate their reports of violence or lie, that they use the law for revenge or to gain undue advantage, that they are co--responsible for sexual crimes because of inappropriate dress or conduct, for example, are often taken into account to a greater extent than constitutional principles such as isonomy, good faith, due process of law, fair hearing in the analysis of procedural evidence and in the drafting of the judicial decision.

With all this in mind, I highlight that the Brazilian National Council of Justice has developed guidelines for Gender-Sensitive Judging, which provides as follows:

> In the investigation of crimes against sexual dignity, it is essential to judge with a historical and social perspective of the behaviors understood as acceptable and valid for women and men, otherwise important violations will be left aside, and androcentric law will be implemented, unable to differentiate between the absence of consent of the victim, non-consent and dissent.
> Stereotypes and social expectations for men and women influence what is understood as the absence of consent for sexual acts, which can lead to important distortions in the investigation of the facts. If campaigns ("no means no", #metoo) emerge as a social response, the intention to protect women also resounds in the Criminal Law that protects sexual dignity, and, for its violation, it is not necessary the dissent of the woman and only the lack of consent.
> On the other hand, the evaluative shift also interferes with the characterization of the absence of consent when the victim lacks the capacity to consciously understand and accept the sexual act (BRASIL, 2021, p. 91).

Another important aspect to be addressed in this decision concerns the credit we should give the victim's word. Let us not forget that sexual crimes are characterized by being committed in hiding, and often leave no trace. Not for another reason, in these cases, the victim's word gains greater relevance, as has been the settled understanding of the Brazilian Superior Court of Justice:

> In sexual offenses, commonly committed in secret, the victim's word has special relevance, provided that it is in line with the other evidence in the case file. Judgments: *AgRg no AREsp 1275114/DF, Rel. Ministro ROGERIO SCHIETTI CRUZ,*

SEXTA TURMA, Julgado em 21/08/2018,DJE 03/09/2018; AgRg no AREsp 1245796/SC, Rel. Ministro JORGE MUSSI, QUINTA TURMA, Julgado em 07/08/2018,DJE 17/08/2018; AgRg nos EDcl no AREsp 1147225/MG,Rel. Ministro FELIX FISCHER, QUINTA TURMA, Julgado em 02/08/2018,DJE 15/08/2018; AgRg no AREsp 1263422/PR,Rel. Ministra MARIA THEREZA DE ASSIS MOURA, SEXTA TURMA, Julgado em 12/06/2018,DJE 22/06/2018; AgRg no AREsp 1258176/MS, Rel. Ministro RIBEIRO DANTAS, QUINTA TURMA, Julgado em 07/06/2018,DJE 15/06/2018; AgRg no AREsp 1265107/MS, Rel. Ministro JOEL ILAN PACIORNIK, QUINTA TURMA, Julgado em 15/05/2018, DJE 28/05/2018.

It is important to emphasize that, in the case under analysis, we are not facing just conflicting versions between the accused and the victim, when the victim's word should be especially valued. According to all the evidence produced, we do not have only opposing versions to the point of applying the maxim of *in dubio pro reo*, but we glimpse a version offered by the victim that is *corroborated by the other elements of evidence in the records*, especially the testimonial evidence, which is sufficient to authorize the condemnatory decree. In cases such as the present one, it is essential to consider all existing evidence, even if they do not relate to the exact moment when the sexual violence took place, in order to ensure the elimination of any "blind spot", which could characterize what Miranda Fricker (2007) describes as testimonial injustice, which would be the valuation in different degrees of the oral evidence collected according to veiled prejudices, reproducing stereotypes that must be removed from the judicial activity.

Finally, it should be noted that the victim cannot be held responsible for the events that happened to her after going out with

friends and drinking alcohol. It is undeniable that, moments before the aggression, the victim was in a nightclub and had consumed a significant amount of alcohol. The analysis of her consent to the sexual act, however, cannot be placed in the background, and the victim's previous behavior cannot disqualify her as a suitable victim.

On this topic, Amy Grubb and Emily Turner (2012) have already pointed out that drunk victims tend to be held more responsible for rape episodes than victims who have not consumed alcohol. In addition, rape defendants are considered "less guilty" when the victim is drunk, confirming a tendency for judges to believe that the mere consumption of alcohol represents consent to subsequent sexual acts.

We cannot, as representatives of the Judiciary, produce institutional violence against women victims of rape based on a misogynistic interpretation of their behavior and of the legal system itself. It is not justified, for example, to state that "the person who got drunk for fun cannot be a victim of rape"; it is not possible to associate criminal liability in the case of willful drunkenness (art. 28, II, CP) with the automatic consent of the intoxicated victim to sexual intercourse, "for the sake of isonomy"; it is offensive to women to suggest that "if after the sexual intercourse, she came to her senses and did not like the result, the agent cannot be punished because of that".

Regarding this, Vera Regina Pereira de Andrade (1996) teaches that the trial of a sexual crime, much more than in any other kind of crime, is "an arena where the persons of the author and the victim are judged simultaneously", and it is up to the latter to prove the non-simulation of the complaint in the face of arguments that suppose she has "consented, liked or had pleasure, caused, forged the rape".

In the same sense, the lesson of Daniela Portugal (2018) stands out, according to which:

> a feminist perspective is essential for a new victimological study, in which the social behavior of women is not interpreted as a practice of stimulation or inducement to criminal practice, especially regarding crimes of domestic violence and against sexual dignity.

It can be seen, therefore, that cases such as the one analyzed here are good opportunities to overcome the finding of Silvia Pimentel, Ana Lúcia Schritzmeyer, and Valeria Pandjiarjian (1998), according to which rape is "the only crime in the world in which the victim is accused and considered guilty of the violence practiced against her".

Given the above, I support the dismissal of the appeal, upholding in full the first instance judgment.

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JUDGING THROUGH TRANSFEMINIST PERSPECTIVES: REWRINTING A CASE OF TRANS WOMEN AND TRAVESTIES IN THE PRISON SYSTEM

Camilla de Magalhães Gomes - Claudia Paiva Carvalho – Julia Ávila Franzoni

INTRODUCTION

Body, family, school, communication, resistance, mobility, and housing. Many stories can be told from the threads inspired by the words chosen to open our workshops of the extension course on Feminist Rewritings. Which stories should be told and with whom do we tell which stories? From April to August 2022, the research groups *Corpografias - Gênero, Raça e Direito* (FND and IPPUR-UFRJ)[246] and *Labá – Direito, Espaço & Política* (FND-UFRJ)[247], held, together with the Olga Benário Women's Movement, training workshops on gender and violence against women, at Casa Almerinda Gama. The House is an occupation organized by the Olga Benário Women's Movement and is structured as a reference center for women victims of violence, a place of shelter and housing, and also as a space for cultural and educational activities.

[246] *Corpografias - Gênero, Raça, e Direito* (Corpographies - Gender, Race, and Law) is a research group co-coordinated by Professors Camilla Magalhães and Claudia Carvalho and develops its activities around themes related to the production of gender and race meanings in the context of legal and state phenomena.

[247] *O Labá - Direito, Espaço & Política* (Labá - Law, Space & Politics) is a research group coordinated by Professor Julia Ávila Franzoni, based at the Faculty of Law of the Federal University of Rio de Janeiro (UFRJ), whose projects focus on reflections and actions involving the production of law and the production of space, body, and territory.

Over the course of five months, as part of the research and extension projects involved in the Feminist Rewritings course, professors and students from Law and Public Management majors met on Saturdays with the residents and coordinators of Casa Almerinda Gama to design and develop workshops and educational programs. The activities were collaboratively organized (content, references, logistics, methodology, and funding) through internal training for project members (faculty, researchers, students, and partner social movements) to establish a shared understanding of producing rewritings from feminist perspectives.

More than a mere result or product, the rewriting served as a guide for the educational programs: our exercise involved weaving together the objectives of Casa Almerinda Gama, the personal stories of the participants, and the directions of the research-extension projects to compose the rewritings as a process of multiplying perspectives that allowed for repositioning and rearranging the plots of the chosen jurisdictional cases - what are the different positions of the State, rights, and subjects in the case? How do they appear (which legislation, arguments, evidences, and meanings support them)? We worked with three situations, one of which was the decision regarding the imprisonment of *trans women* and *travestis*, which we rewrote with the aim of reinterpreting its elements (factual, evidentiary, argumentative, social) and addressing the aforementioned questions.

In order to develop political-epistemic methods of rewriting from transfeminist perspectives, supported by authors such as Letícia Nascimento, Jaqueline Jesus, Beatriz Pagliarini, and Viviane Vergueiro, the work with a collective *habeas corpus* that makes the traditional legal debate on gender more complex, centered more on the discussions around the disputes over the production of order and subjects, than on the effectiveness of a specific legal framework around

the protection of "women". The extension experience in the rewriting process also allowed us to improve the analysis references, such as the mobilization of situated knowledge as a method (HARAWAY, 1995; HARDING, 1993) promoted by storytelling. It involves humanizing the individuals involved in legal processes and decisions, promoting a diversity of perspectives, and encouraging the exploration of issues. This multifaceted approach aims to formulate transfeminist legal approaches to address these complex issues.

Moreover, the repercussions that the chosen case had during the extension project activities indicated several theoretical, legal, and political layers that require reflections capable of offering answers to the different problems identified: how does law produce bodies and subjectivities? What are the limits of the traditional understanding of gender policies for the realization of human rights? How does the case in question expose the weaknesses of legal responses that create closed parameters to ensure rights? What other more inclusive responses would be possible and feasible in our current context?

THE ORIGINAL CASE: WHERE ARE TRANS WOMEN AND TRAVESTIS INCARCERATED?

In a judgment of April 4, 2019, the Federal District Court of Appeal (TJDFT) rejected the appeal filed against the judgment of the Federal District Court of Penal Executions (VEP-DF) in Case No. 00022531720188070015, of May 15, 2018, which dismissed the requests made in a collective *Habeas Corpus* and denied the transfer of 11 transsexual women and *travestis* placed in a male prison unit in the Federal District to a female prison. For the purposes of this research, the information on the case was taken from the decisions handed down in preliminary injunction and on the merits, at trial and

appellate courts, and from two *Habeas Corpus* petitions filed with the *TJDFT* against the rejection of the preliminary injunction[248]. We did not have access to the full case file: although it is not under seal, the case is not available on the court's consulting system.

In the petition for collective *Habeas Corpus*, the lawyers argued that the permanence in a male prison unit did not protect the dignity inherent to the prisoners' gender identity and appointed as a coercive act the Service Order No. 345/2017, of the Undersecretariat of the Penitentiary System of the Federal District (SESIPE), which, in its articles 9 and 10, (i) provides for the imprisonment of transsexual people who have undergone male-to-female sex reassignment surgery in the Women's Penitentiary of the Federal District; (ii) establishes that "inmates of the male biological sex who have female characteristics" and who have not undergone surgery must serve time "preferably in a separate cell in a male penitentiary" (iii) Article 4(1) states that, in case of risk to the inmate's physical integrity or to the security of the prison unit, the placement of "trans inmates" will be decided at the discretion of the prison administration. The petition also used the decision of *Habeas Corpus* No. 152.491/SP, issued by the Justice of the Brazilian Federal Supreme Court (*STF*), Luís Roberto Barroso, on 14 February 2018, which authorized the transfer of two *travestis* who were in male cells to "a prison establishment compatible with their respective sexual orientations", under the terms of the decision.

When deciding on the merits of the HC's, the judge from the Penal Execution Court (*VEP*) rejected the transfer request based on two main arguments: (i) on the one hand, there would be no illegal.

[248] Although we did not locate the case in the consultation system, we had access to the Petition for Writ of Habeas Corpus because the plaintiffs, by apparent mistake, filed the action, at first, with the Court of Justice, and not with the Criminal Executions Court. This is case no. 0702525-15.2018.8.07.0000. The *HC* was denied, due to lack of jurisdiction.

Coercion or disrespect for the dignity of the petitioners, who, unlike the case judged by Justice Barroso, would be placed in a separate cell in the men's prison, which would comply with the requirement of Resolution No. 1/2014 of the Brazilian National Council for Fighting Discrimination, which deals with the situation of LGBTI persons deprived of liberty and guarantees "specific living spaces"; (ii) On the other hand, the transfer of the petitioners to the women's prison would pose a risk or threat to the other cis women held in the facility, given the biological differences between them, which, according to the judge, in addition to the high libido of the prisoners, mostly young women, could lead to non-consensual sexual relations and other coercion. "The possibility of forced sexual intercourse is not insignificant in percentage terms", she concluded.

In the TJDFT's ruling on the appeal, the rapporteur's opinion, which was unanimously followed by the other members, upheld the decision's conclusion that there was no illegal coercion, since "the appellants are well treated in the men's prison and do not suffer violations of their physical or psychological integrity, and all their rights are respected". In addition, it found that the same reason of isonomy for which men and women are separated by the prison administration justifies the separation of cis women and trans women who have not undergone surgery.

The Rapporteur, in the appeal, claimed that there was no disregard for the Inter-American Court of Human Rights' (IACHR) Advisory Opinion OC-24/7 since it was not proven that any discriminatory act had taken place. Furthermore, the Rapporteur contended that there was no violation of the Brazilian Supreme Court's decision in Direct Action of Unconstitutionality (ADI) No. 4275. According to the Rapporteur, the decision only addressed transgender people and not the prison system, regarding the subjectivity of recognizing their identity.

We note, therefore, that the first and second instance judges considered: that the coercive act is legal when using a criterion considered isonomic (biological) to define the place of imprisonment of trans women; that the existence of a segregated cell is sufficient to guarantee the rights of LGBT people established in the Joint Resolution and in the decision of Justice Barroso; that the denial of transfer to a women's prison does not constitute discrimination or an offense against the subjectivity and identity of petitioners, based on the understandings of the IA Court and the STF.

Having examined the legal theses and the response provided by the justice system, we now proceed to explain the reasons for selecting this case for the rewriting exercise: where it allows us to direct our focus and how we can approach it with a fresh perspective?

TRANSFEMINIST THEORETICAL AND METHODOLOGICAL REMARKS[249]

We have chosen the case of the imprisonment of trans women and *travestis* as the object of our rewriting for several reasons. First, we believe that part of a critical and feminist theory and methodology should be to think about regimes of invisibility maintained by law and the State, and the ways in which this control produces the limits of the (un)livable. Some intersections of these regimes of invisibility are present in the case described, namely transgenderism and the situation of incarceration. We propose this broadening of perspective based on the theoretical-methodological framework of transfeminism, which itself is subject to regimes of invisibility within the areas of gender and feminism, especially those produced in legal research

[249] We will present the methodological paths we followed for this rewriting in a later and full article to be published. What we describe here is just a summary of the methodology and the questions used as a method.

and legal practice. This framework allows us to think about law from the discipline and resistance of bodies, their subjectivities, and histories, based on the intellectual production and experiences of trans people and *travestis*.

We take transfeminism as a reference because "[this approach] is for everyone," since it is "primarily a movement by and for trans women who see their emancipation as inseparable from the emancipation of all women (and beyond)" (KOYAMA, 2001). Therefore, "the proposal is for a strategic coalition, not fragmentation" (NASCIMENTO, 2021), which means that when we mobilize these theoretical references, we are talking about applying them to every form and every time that gender is at stake. When discussing matters concerning trans women, we are inherently addressing all women and all individuals. As Jaqueline de Jesus points out, this inclusive approach validates the contributions of every person, regardless of whether they are transgender or cisgender. This inclusivity highlights the significance of transfeminism as a valuable perspective for anyone who challenges or doesn't conform to the sexist societal model we currently live in, extending its relevance beyond transgender individuals (JESUS, 2013, p. 5).

The described state of invisibility creates an ambiguity in the enforcement of rights for the transgender population (and LGBTI+ community in general) by the Judiciary, as observed by Mario Gomes, Sara York, and Leandro Colling: "in constitutional actions with *erga omnes* effectiveness, the Judiciary demonstrates a progressive approach"; however, when handling cases involving the lived experiences of specific groups within this population, "the Judiciary tends to strip away the rights of those who do not conform to a binary and cisnormative gender expression at the individual level". The research demonstrates that the proximity of the member of the justice

system to the transgender body is a fact that alters the way he/she interprets and applies rights, and this needs to be taken into account" (GOMES, YORK, COLLING, 2022, p. 1129).

It is possible to identify ambiguity in the decision under review. In one passage, the judge mentions that "regarding the argument that the contested decision violates *ADI* No. 4,275, it is worth noting that it ruled on transgender individuals, but said nothing about the prison system and encompasses the subjectivity of recognizing their identity," which implies that when discussing the rights of transgender individuals that involve "the implementation of concrete actions that would force them to coexist with transgender bodies or require others to tolerate them," such as the incarceration of transgender women and *travestis*, the message seems to be: "Transgender people have rights, but keep them away from me or the children," or, we might add, away from cisgender women (GOMES; YORK; COLLING, 2022, p. 1120).

Based on the transfeminist theoretical matrix, our rewriting methodology combines the tools of situated knowledge and the woman and gender question to evaluate the construction of arguments, the mobilization of normative frameworks, and the evidence. By subjecting the grounds of the decision to the woman and gender question, we carry out an exercise of expanding the logic of rights through transfeminist perspectives. First, following Katherine Bartlett's method (2020), we examine the question of where the woman is, inquiring how the decision perceives her, how it treats her, and from which perspective it considers her for legal purposes. In a second step, we inquire about gender, considering how the meanings of womanhood are constructed and mobilized in the decision, how gender is understood or from which gender perspective the decision is written, how the decision comprehends (or not) what gender is, and how its discursive

language mobilizes gender without necessarily explicitly stating it. In this process, we will reconstruct the legal theses of the decision in a manner more appropriate to the case, but not necessarily definitive normative positions for the rights of transgender individuals.

When evaluating how each question would function as a method, we realize that using the woman question, without assuming gender as a basis, would constitute a closed category already filled with meaning, instead of an open question. When we use "woman" without assuming that this term is defined/constructed/conceptualized by gender, what are we actually talking about or what are we really asking? We perceive, thus, that the use of "woman" as a question can actually have two meanings: in the case of not assuming gender as a basis, we would be talking about the woman question, with the woman being a category previously filled with the meaning given by biological sex. In the second scenario, we would be talking about "woman" as a category filled with meaning given by gender. However, in this latter case, gender as such and as we understand it – based on a notion of decolonial gender performativity – opens up the concepts. As a result, we propose that the method of questioning "woman" does not exist without questioning gender. While the former helps to determine where "woman" is located in the decision, law, or other legal object under examination, the question of gender operates in two stages. First, it helps maintain the category of "woman" as an unfilled category – an actual question, therefore. Second, it displaces concepts, subjects, and positions of state power relevant to the object being examined, while also making visible the theoretical foundations around which "woman" and "gender" are discussed, without assuming either of these as self-evident categories.

The gender question, based on a non-binary logic and the multiple experiences of gender in prisons, recognizes the limits of any

single or definitive solution, whether it is a separate space (cell or wing), or the integration of trans women and travestis in women's prisons. Moreover, from an academic, legal, and judicial perspective, it brings us a stance and an ethic: that in resolving issues like these, it is necessary to know the reality and "listen to those who live the norm, listen to what the subject, in their conditions, believes is necessary for dignity and autonomy, which does not mean a return to the reign of individualism, but the recognition of the one in the multiple, the being in common, the multiplicity of experiences (MAGALHÃES GOMES, 2019, p. 175).

These tools guide us in the exercise of rewriting the case to show what other answers and legal arguments were possible, based on the same elements that were available to the judges, in the factual, normative, and jurisprudential context. To this end, we highlight three points of the judgment that will be the focus of our rewriting:

The **first point** concerns the interpretation and application of the normative framework. Here, it is worth asking beforehand: is it possible to approach the case as an "exclusively legal matter," as the judge intends? This is not about questioning the limits of the production of evidence in an action like *habeas corpus*, but rather about questioning the very assumption: is it possible to conceive of the law as an abstraction, dissociated from the concreteness of facts and life? Understanding the law as an inseparable practice from the factual and social context in which it is situated is constitutive of the very way of interpreting and applying norms.

The legal basis considered in the decisions is mainly formed by two regulations: a Joint Resolution on the rights of LGBTI individuals deprived of their liberty, which guarantees them "specific living spaces," and the Service Order identified as the coercive act that provides for the imprisonment of trans women who underwent surgery

in the women's penitentiary and of those who did not in a separate cell in the men's penitentiary.

How should these normative acts be interpreted in light of the constitutional, international, and local principles and norms that address the execution of the sentence and the rights of transgender and *travestis* people existing at the time of the decision? What is the basis and legitimacy of the argument that defends the biological criterion to determine the place of execution of the sentence? How to reconsider this criterion in view of a rights-based logic that takes gender seriously?

In this exercise of legal review, we also decided to use the pleadings of the action against the violation of a constitutional fundamental right (ADPF) No. 527[250], which precisely concerns the fate of trans women and *travestis* in the penitentiary system and was filed by the Brazilian Association of Lesbians, Gays, Bisexuals, *Travestis*, and Transsexuals. The provisional remedy granted by Justice Barroso is subsequent to the rewritten decision and, for this reason, will not be used. However, the petitions constitute an important manifestation of a group that, in some way, represents the population affected by the decision in question and, thus, becomes a relevant source.

Regarding sources, we emphasize that part of the rewriting process, as discussed in the project, involves investigating which sources are cited in decisions, what literature is relied upon to define concepts and support arguments. We are not necessarily dealing with "formal

[250] The main normative frameworks - constitutional, legal, conventional and jurisprudential - available at the time of the decision are: article 5, XLVIII and XLIX of the Constitution; art. 82, § 1 of the Sentence Execution Act (Law 7210/84); the Yogyakarta Principles; Joint Resolution 1 of the National Council for Combating Discrimination and the National Council for Criminal and Penitentiary Policy, of April 15, 2014; the decision in Direct Action of Unconstitutionality (ADI) No. 4275 of the Brazilian Federal Supreme Court; the decision in Habeas Corpus (HC) 152491 also of the Supreme Court."

sources of law," but with theoretical, literary and knowledge sources . Discussing the use of doctrine, especially its use and characterization as an argument of authority, is therefore a central part of "rewriting" from a feminist perspective. For these reasons, the theoretical sources in our rewriting are primarily the productions of trans and *travesti* scholars.

The *second point* relates to the interpretation and application of legal precedents. The decisions at both the trial court and appellate court levels rejected any non-compliance or inconsistency in relation to Justice Barroso's ruling in HC No. 152.491, the decision of the Supreme Federal Court (STF) in ADI No. 4.275, and the stance of the Inter-American Court of Human Rights (IACHR). However, it is important to note that the factual circumstances in the present case are distinct from those in the cited precedents. While the transfer of *travestis* who were in overcrowded cells with male prisoners was granted in one of the precedents, the other two dealt with the right to identity and subjectivity (STF) and non-discrimination (IACHR), aspects that may not be directly applicable to the case at hand.

But what do these precedents say, and how does what they say matter for the resolution of the case? In a scenario as complex as the prison situation in the country, is it possible to isolate the debate about imprisonment from the debate on the right to identity, subjectivity and non-discrimination of transgender people? Does confinement in a segregated cell exhaust the prison's response to ensuring gender dignity?

Finally, the *third point* addresses the language employed in the decisions. It is not only the content of judicial arguments or the outcome of the judgment that matters, but also the ways of naming and saying what is said. Language produces meanings, produces bodies, produces violence and creates limits to the meanings of freedom and

equality that can be claimed. The supposed neutrality and universality attributed to decisions must be questioned. How can the use of language in judicial discourses be taken seriously and reconsidered on more inclusive grounds? The question of gender terminology use is, therefore, one of the most relevant issues in this rewriting. The identification of the appellants by the male gender, either by using incorrect pronouns (he/ him, etc.) or by using their male birth names in the identification field of the case, draws attention, as well as the use of "*os travestis*", "*os transexuais*" and "*os trânsgeneros*"[251].

Given these issues, a methodological note regarding the anonymization of the names of the involved parties is appropriate. We chose to retain the names of the judges who expressed an opinion in the case as the decisions are public, and judicial authorities who perform a public function are subject to public and academic scrutiny in their capacity as public officials.

In the case of the parties, we opted for anonymization to preserve their identities for ethical reasons. Since there was no contact with the parties in the research process that dealt with how the case would be worked and reviewed, we understand that it is prudent not to identify them. However, the method of anonymization used is in itself a form of rewriting, as we have taken the following approach: we have replaced the names with fictitious names, as is customary; however, we did something more by substituting the names used - the male birth names of the transgender and *travesti* petitioners of the Appeal, commonly known as "dead names" - with fictitious female names, as if they were their chosen social names, recording the appellants as "ANA AND OTHERS" instead of "MALE NAME AND OTHERS". We believe that the social names of the petitioners should

[251] TN: In the Portuguese language, the articles "o" and "os" are used to indicate the masculine gender and can be translated to "the" and "they" in English.

already have been included in the appeal data, which is why our choice of fictitious female names is part of the rewriting process.[252].

Hereafter, we present the rewritten opinion in the format of a dissenting opinion of the TJDFT's rapporteur.

THE REWRITING: A PROPOSAL OF JUDGMENT FROM A TRANSFEMINIST PERSPECTIVE

JUDGMENT - Brazilian Federal District Court of Appeal (TJDFT)

CRIMINAL COURT

STRICT APPEAL

Case nº: 20180110063380RSE (0002253-17.2018.8.07.0015)

Appellant (s): ANA AND OTHERS

Respondent(s): PROSECUTION OFFICE OF THE FEDERAL DISTRICT AND TERRITORIES

Rapporteur: Judge JOÃO BATISTA TEIXEIRA

OPINION

Having met all the criteria for appeal, I hear the appeal and now proceed to analyze its content and judge it.

I dissent from the rapporteur's opinion and understand that

[252] In general, the Judiciary traditionally utilizes the birth name for identifying the parties involved in legal proceedings. However, in December 2018, CNJ Resolution 270/2018 introduced a significant change by enabling the use of a social name for transgender, travestis, and transsexual individuals accessing judicial services, as outlined in Article 1. This social name can not only be established initially but can also be added at any point upon the individual's request (Article 2). Importantly, it must be clearly distinguished from the "name in the civil registry." Among the key provisions, it was stipulated that: "Article 3: The social name shall take precedence in judicial and administrative proceedings before judicial bodies, followed by a reference to the registered name preceded by 'civilly registered as'."

this is a complicated issue that has not yet been properly addressed by Brazilian jurisprudence. It involves deciding the fate of 11 trans women and *travestis* prisoners, determining whether they should be kept in a male prison - as they are at the moment and as the judge decided in the appealed decision - or a female one - as requested in this collective habeas corpus. Thus, I realize that the underlying issue to be discussed is a **gender-related one**.

The main legal and constitutional criteria for this opinion are as follows: The Brazilian Federal Constitution states, in its article 5, item XLVIII, that "the sentence shall be served in separate establishments, according to the nature of the offense, the age, and sex of the convicted person", and in its item XLIX it provides that "prisoners are entitled to respect for their physical and moral integrity". Along the same lines, the Sentence Execution Act (Law 7.210) provides, in paragraph 1 of article 82, that "§ 1, women and persons over sixty years old shall be placed separately in a proper and suitable establishment according to their personal condition".

The combined reading of these rules demonstrates that the first criterion for ensuring the physical and moral integrity of incarcerated individuals lies precisely in respecting their gender and, therefore, in complying with the rule of keeping the person in a prison facility appropriate to their gender and that respects the proper separation between men and women in corresponding prisons. However, this is still not sufficient to address the question raised here.

The main legal - jurisprudential - criterion for the arguments of this opinion lies in the decision of the Federal Supreme Court in Direct Action of Unconstitutionality No. 4.275, in which it was established that:

> 1. The right to equality without discrimination includes gender identity or expression.
>
> 2. Gender identity is a manifestation of the very personality of the human person and as such the

> role of the State is only to recognise it, never to constitute it.
> 3. The transgender person who proves, by self-identification signed in a written declaration of his or her will, that his or her gender identity is dissonant with the one assigned to him or her at birth, has the fundamental subjective right to change his or her name and gender classification in the Civil Registry by administrative or judicial means, regardless of surgical procedures and third party reports, since this is a matter related to the fundamental right to free development of personality.

This decision has consequences not only in the field of civil records but, even more importantly, it sets a legal standard for the entire legal system. Let me explain the issues raised by the decision: considering that there is a difference between biological sex and gender, the way people are identified and socially identify themselves is a matter of gender, not sex. Therefore, when we are discussing individuals and the dignified treatment they deserve, especially when we are identifying them in norms that categorize them as men and women – exactly the case of Law Nº. 7.210 (Brazilian Sentence Execution Act), for instance, in its Article 82, § 1 – this "*man and woman*" is defined by gender and not by sex; it is a matter of **gender**. And gender, as established, is based on self-determination: it is the individual themselves who define it. Gender is established through self-identification, and not by the definition that others may attribute to them. Not even the Judiciary has the power to assign gender; it should only recognize the gender identity presented by each individual.

Indeed, all of this imposes a duty on the State to treat its subjects with respect, which means that it must always be guided by the principle of self-determination, especially in matters related to

gender. This entails adopting a proactive stance and employing appropriate procedures and instruments to actively listen to the individuals involved regarding their identities and the situations and rights that are associated with or arise from these identities. By doing so, the State can ensure that the rights and dignity of all individuals are upheld and protected. The mentioned action, therefore, cannot be regarded as having solely addressed the issue of "subjectivity in the recognition of their identity" and, thus, "decided about transgender individuals, but nothing regarding the prison system," as stated in the Rapporteur's opinion. I believe that it is not possible to decide when we apply and when we do not apply this understanding; otherwise, we would create two or more genders in the legal system: for registration, the gender based on self-declaration, for other legal and judicial procedures and situations, the gender according to the understanding contained in norms prior to the decision. Having *erga omnes* effect and having established the form of definition of gender in and for the Brazilian legal-constitutional order, the decision of ADI No. 4275 should impact all norms and this includes those that organize the criminal system, including the penitentiary system.

The Brazilian Federal Supreme Courts's ruling on gender requires us to ask certain questions to decide the case at hand properly. The Court has not thoroughly examined this issue, aside from the HC mentioned below, so our decision must establish clear parameters and foundations for the organization of gender in the prison system. Failure to do so may result in violating fundamental rights. Therefore, it's crucial to clarify key concepts before proceeding.

For the purposes of this decision, I will consider gender as a concept that takes us "beyond the interpretative limitations imposed by thinking linked to genitalization and sex as biology," as stated by Professor Jaqueline Gomes de Jesus. Following the professor's

guidance in the "*Guia técnico sobre pessoas transexuais, travestis e demais transgêneros, para formadores de opinião*" (2012), gender identity is the

> gender with which a person identifies, which may or may not agree with the gender they were assigned at birth. Different from the person's sexuality. Gender identity and sexual orientation are different dimensions and are not to be confused. Transgender people can be heterosexual, lesbian, gay or bisexual, just as much as cisgender people.

I also add the definition given by the Yogyakarta Principles, considering

> Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Therefore, when I reiterate and emphasize that it is a *gender issue*, I want to point out that a conceptual error presented in Habeas Corpus No. 152.491/SP cannot be a reason for denying a right. This is because the issue, both here and in that Habeas Corpus case decided by the Supreme Court, is about gender and not sexual orientation. In that *Habeas Corpus*, two transgender women requested to appeal at liberty or alternatively, they requested placement in a semi-open regime. Subsidiarily - and this is the request that concerns us here - they requested that "in case of rejection of all requests - the Department

of Penitentiary Administration be instructed to transfer the petitioner to an appropriate location, as she, despite her sexual orientation, is confined in a cell with 31 men, while the capacity is only 12." It is clear that the error originates in the complaint and is repeated, therefore, in the decision of Justice Roberto Barroso, in which he states that *"the news that the claimant is held in a prison incompatible with her sexual orientation authorizes the granting of the order ex officio"*, even though with different terms: sexual choice there, sexual orientation here. But neither is the case, and it is indeed a question of gender. After all, the *Habeas Corpus* discussed the imprisonment of two transgender women, with no mention of their sexual orientation. Just as in that situation, we are dealing with the detention of 11 transgender women and *travestis* here. Therefore, the decision in *HC* No. 152.491 is indeed an applicable precedent for the case being decided, as it involves a similar factual situation.

But we have more terms to define. According to Jaqueline de Jesus, transgender is "an umbrella term that encompasses the diverse group of people who, to varying degrees, do not identify with the behaviors and/or roles expected of the sex assigned at birth". In this context, "transgender people in this context refer to people whose gender identity does not coincide with that assigned at birth", in the lesson of Beatriz Pagliarini Bagagli (2016). When we specify, we refer to transgender women and *travestis*, as is the case with the patients whose fate we are discussing here. In this sense, "transgender women are those who claim social and legal recognition as women"; *travestis*, as explained by Luma Andrade (2015, p. 116), "on the other hand, are not ***exclusively*** men or women, they are both men and women, there is no fixed boundary, they may desire and have affections for men and women, for *travestis* and for transgender people".

These concepts are important because, as Professor Luma Andrade (2015) has shown, the recognition of diverse and plural gender experiences breaks with what the literature identifies as binarism. That is, we are not dealing - socially or legally - with a universe of people categorized in the dichotomous division between men and women. The dissociation between biological sex and gender does not only mean that someone who was born biologically identified as male can identify as a woman, but also that a person identifies neither as a man nor as a woman. This is the case of *travestis* who, in the present judgment, are mentioned either as a group "attached" to transgender people or simply in a place of non-belonging to any space or identity.

In light of these concepts, the constitutional rule of the "*individualização do cumprimento da pena*"[253] and the respect for the physical and moral integrity of incarcerated individuals should be interpreted. In this regard, I disagree with the rapporteur's understanding and consider the Service Order indicated as a coercive act in the HC unconstitutional. This concerns Order of Service No. 345/2017-SESIPE, dated September 22, 2017, issued by the Deputy Secretary of the Penitentiary System of the Secretariat of Public Security and Social Peace of the Federal District, which stipulates that:

> 9. Transsexual inmate who has already undergone male-to-female sex reassignment surgery will be heldin the Female Penitentiary of the Federal District.
>
> 10. Male biologically-sexed inmate with female characteristics but has not undergone sex reassignment surgery will preferably serve their sentence in a separate cell in a male penitentiary and will be

[253] "*Individualização do cumprimento da sentença*" in the Brazilian legal context refers to the process of tailoring the execution or enforcement of a court judgment to the specific circumstances and characteristics of the case and the individuals involved. It involves customizing the enforcement of a sentence to ensure that it is appropriate and just in light of the unique factors at play.

> authorized to use a "top" style bra, without clasps or metal structures, and with elastic straps, in white color, with the purpose of protecting and not exposing their breasts.
> Sole paragraph: In case of risk to the physical integrity of the inmate or the security of the Prison Unit, the placement of the transgender inmate will be at the discretion of the Prison Establishment's management.

If gender is defined by self-declaration, placement in a women's penitentiary cannot be conditioned on biological aspects, such as gender-affirming surgery. Therefore, the Service Order establishes, within the penitentiary administration of the Federal District, discriminatory treatment towards trans women and *travestis* who, on the sole basis of the existence of specific genitalia and supported by biologizing and essentializing arguments, are kept in male prisons, albeit in separate cells, appears to be illegal and abusive. Whether or not the genital organ is present is irrelevant to the law. and does not constitute a legitimate criterion of distinction, especially when supported by assumptions and stigmas that associate a biological fact with the risk of violent sexual behavior.

Having established the unconstitutionality of the coercive act due to its discriminatory content, it becomes necessary to define the place where trans women and *travestis* should serve their sentence, regardless of their genital organs. In other words, the question we have to answer is: how do we interpret the Joint Resolution's call for the guarantee of "specific living spaces" for the LGTBI population in detention? Should all trans women and *travestis* be kept in separate cells? Should they all serve time in women's units? No single, universal answer seems appropriate here. The fact that trans women identify as women does not mean that public policies for women, including

prison policies, should automatically and universally apply to them without taking into account their specific characteristics and multiple gender experiences in prisons.

To address the complexity of the issue, it is worth mentioning the manifestation of the Brazilian Association of Lesbians, Gays, Bisexuals, *Travestis*, and Transgender in ADPF No. 527. The lawsuit, which is still awaiting judgment, deals precisely with the proper definition of the place where transgender and *travestis* inmates are to serve their sentences. The petition requests the Supreme Court to establish the following guidance:

> "I – Female transsexual prisoners may only serve time in a prison facility compatible with the female gender; and II – *Travestis* prisoners who socially identify with the female gender may choose to serve time in a female or male prison facility."

It should be noted that the request made by the Association, which represents and - at least in theory - defends the interests of trans people in prison, distinguishes between the situation of transgender women and *travestis*, and does not impose a closed or definitive solution in either case.

Two elements stand out in the way the request is presented: the first one is the guarantee of the possibility of choice by establishing the right of transgender prisoners ("may" instead of "must") to serve time in an establishment "compatible with the female gender". In my view, the semantic openness here is intentional and necessary: to be in a place compatible with the female gender ensures respect for gender dignity while at the same time not restricting the possibility of being accommodated in female units. It includes various arrangements that may involve separate spaces or adaptations in spaces shared with other groups, taking into account the specificities and respect for the female gender.

The second aspect I emphasize is the different treatment given to transgender and *travestis* inmates, where the latter are provided with the option to choose to serve their sentence in either a male or female gender facility. The distinction addresses the non-binary aspect of *travestis*, as mentioned earlier, and also allows for considering allocation in separate or shared spaces with other groups, compatible with either the female or male gender, according to their choice.

The question, then, which is put to us, possibly goes beyond the limits of a decision made in an Appeal or even in *Habeas Corpus*. This is because determining the allocation of transgender and *travestis* individuals in the prison system would depend on holding hearings with these individuals, given the arguments I presented. Considering all these aspects, I firmly believe that it is not the judiciary's role to establish inflexible and all-encompassing rules, as the consideration of various elements requires careful weighing and adjustments. This approach aligns with the constitutional mandate of the "*individualização do cumprimento da pena*", especially in matters related to gender. It would therefore be up to the enforcement authority to take steps to listen to trans women and *travestis* and to gather more information about the concrete situation in which they are imprisoned.

However, although we lack information about which petitioners are transgender or *travestis*, it seems clear to me that they are all demanding to be transferred to a female prison unit, which is considered appropriate to their dignity and gender identity. In these terms, I believe that the request should be granted and the transfer of the petitioners to a female penitentiary in the Federal District should be authorized, without prejudice to any adaptations that should be made to the accommodation of the detainees.

Given the arguments presented, the appeal is granted in order to overturn the first instance judgment and allow the transfer.

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I BELIEVED HE WOULD CHANGE": FROM VICTIM OF DOMESTIC VIOLENCE TO PERPETRATOR OF INVOLUNTARY MANSLAUGHTER BY OMISSION

Alessandra Brustolin - Sílvia Cristina Carvalho Sampaio - Ela Wiecko Volkmer de Castilho

INTRODUCTION

The course "Special Advanced Topics 1," offered by the third author during the 2021.2 academic term, within the scope of the Postgraduate Programs in Brazilian Human Rights and Citizenship and in Law (*PPGDH* and *PPGD*) at the University of Brasília (*UnB*), delved into content related to the "Feminist Judgments Project", which involves participation from several Brazilian universities.

In this aforementioned course, the rewriting methodology developed by Professors Rosemary Hunter, Clare McGlynn, and Erika Rackley was analyzed. One of the methods of student assessment involved the identification of a legal decision by the students that they believed should be reframed, along with the presentation of a preliminary project containing the reasoning for their choice and the aspects to be raised in a rewriting from a feminist perspective. Two students took on the task of developing the preliminary project and submitting a reframed text of the decision in collaboration with the instructor.

THE CASE AND THE ORIGINAL DECISION

The selected judgment pertains to the trial of Criminal Appeal No. 0170636-96.2017.8.21.7000, held on September 27, 2017, by the

Brazilian Court of Justice of Rio Grande do Sul (*TJRS*), in the First Criminal Chamber, published on November 16, 2017.

The criminal action was maintained in the 2nd Jury Court of the Central Jurisdiction of Porto Alegre and it revolves around the torture and aggravated homicide of a one-year-old child, as well as the ill-treatment inflicted on two other children, by the children's father and mother. The jury consisted entirely of women, the verdict was pronounced by a man, and the appeal was judged by three men.

The chosen decision of the appellate court is significant as it increased the sentence of the mother, who was found guilty of the crimes due to her omission in the role of caregiver. The case sparked controversy and social mobilization. A complaint was lodged with the Inter-American Commission on Human Rights, questioning the grounds for recognizing deliberate omission by a Black, poor woman, mother of three children, and survivor of domestic violence inflicted by her husband.

The case records remain confidential. Journalistic reports, charges, indictment statements, the verdict of the Jury Court, and the decision of the appellate court, that ruled on the appeals filed by the Public Prosecutor's Office and the mother's defense, are available on the Internet[254]. Among the available rulings, we chose to rewrite the decision of the appellate court because it provides a broader set of elements for analysis, albeit with limitations. A more comprehensive assessment would require access to the entirety of the case records, particularly the collected testimonies and expert reports.

[254] We consulted the decisions handed down in Habeas Corpus No. 70060061017 (CNJ (Brazil´s National Council of Justice): 0198664-79.2014.8.21.7000), by the TJRS(Brazilian Court of Justice of Rio Grande do Sul); the indictment and the conviction sentence of the Jury Court, both handed down in case No. 001/2.14.0061634-2 (CNJ.0294440-54.2014.8.21.0001), of the 2nd Jury Court of the Central Forum of the District of Porto Alegre, Rio Grande do Sul. According to McGlynn and Rackley (2010), the analysis extended to other judicial decisions of the same case is often necessary to identify and understand all the complexities involved.

While it is possible to identify the defendants and the victims through documents and news reports, we have chosen to anonymize them in order to preserve the right to privacy of the children. The names mentioned in the judgment will be replaced by "Teresa" (the defendant), "Alceu" (the co-defendant), "minor B," "minor C," "minor D" (the victims).

In the appellate court ruling, it is stated that the charges attributed to Teresa were classified under Article 121, § 2, of the Brazilian Penal Code (aggravated homicide), I (for torpid motives), III (torture/cruel means), and IV (means that hindered the victim's defense), § 4, *in fine* (victim under 14 years old), in conjunction with Article 61, II, e, (descendant) in accordance with Article 29, all of the Brazilian Penal Code; Article 1, II, § 4, II (torture against child victim), of Law No. 9.455/1997, combined with Article 29, caput, of the Brazilian Penal Code; Article 136, caput (ill-treatment) and §3 (victims under 14 years old) (twice), combined with Articles 29 and 61, II, *e*, of the Brazilian Penal Code.

The verdict identifies five separate acts (events) committed on different dates between July and September 2013, always within the time frame of 7 AM to 3 PM. Two of them occurred at 368 Circular Avenue, Vila Jardim neighborhood, in Porto Alegre, and the others first at a house on Alberto Barbosa Avenue, Vila Jardim neighborhood, and later at the house on Circular Avenue. It is noteworthy that, in the legal categorization, Article 69, caput of the Brazilian Penal Code, addressing multiple offenses, has been applied.

The charges and the *sentença de pronúncia*[255] of Alceu and Teresa do not provide information regarding their race, age, education,

[255] ™. In the Brazilian penal system, a "sentença de pronúncia" is a legal decision issued by a judge after a criminal trial's preliminary phase. It is a specific step in the criminal process that determines whether there is enough evidence to put the defendant on trial for a serious criminal offense, typically a felony.

occupation, and place of birth. However, a photo of the defendant, revealing her race and approximate age, was found on the internet.

During the jury trial, the jurors unanimously found the defendant Teresa guilty of all the charges brought against her, only excluding the aggravation of "torpid motive" and "cruel means" in relation to the homicide charge. The presiding judge applied the rule pertaining to multiple offenses and imposed a final sentence of 22 years, 2 months, and 20 days of imprisonment. As for the homicide charge, the judge stated that Alceu was the actual perpetrator, while Teresa failed in her duty to act and prevent the outcome. Two circumstances were considered in determining the base sentence of 13 years for the homicide charge: culpability and the means that hindered the victim's defense.

The prosecution and defense appealed, raising factual and legal issues. Regarding the sentencing, the Brazilian Court of Justice explicitly accepted the defendant's argument of undue negation of culpability as a judicial circumstance in the first phase of sentencing (Article 59 of the Brazilian Penal Code). Culpability was dismissed on the grounds that it was based on an understanding of unlawfulness and the potential for alternative behavior. The *TJRS* (Brazilian Court of Justice of Rio Grande do Sul) noted that comprehending the illicit nature of the conduct is an element of the crime and was considered in establishing authorship. The Court added that the extremely high degree of reprehensibility of the offense was not directed at the defendant personally (RIO GRANDE DO SUL, 2017, p. 25). The circumstance of using means that hindered the victim's defense was also rejected due to insufficient grounds for attributing it to the defendant, without falling into double valuation (RIO GRANDE DO SUL, 2017, p. 28).

On the other hand, the prosecution's argument was accepted, and based on a psychological evaluation, the appellate court diverged

from the judge's ruling, who stated there were insufficient elements to assess the defendant's personality. The base sentence for the charge of aggravated homicide was set at 14 years, applying a fraction of 1/6 to the minimum statutory sentence of 12 years, in line with the jurisprudence of the Brazilian Superior Court of Justice (BRASIL, 2022). Disregarding the personality under the same parameter for each of the crimes resulted in a final sentence of 24 years, 9 months, and 10 days of imprisonment[256].

It is worth noting that we did not identify an appeal from the prosecution against the father to negate his personality, even though he was considered the perpetrator of physical assaults and a violent person. Consequently, there was a disproportionate benefit in his favor when compared to the defendant Teresa.

The appellate decision thoroughly addresses all the issues raised by the parties, and a comprehensive rewriting would require an in-depth review of the case records. Given the restricted access to the full records of the criminal proceedings, we have opted for rewriting the decision partially as outlined in the following passage:

> However, concerning the defendant's personality, the prosecution's argument holds merit.
>
> A psychological evaluation exists, attesting that the defendant exhibits narcissistic personality traits. According to the psychologist, "the defendant's suffering is primarily self-referenced, linked to her own distress over the separation from her children and the hope that reuniting with them would improve her own emotional state. (...) She does not consider the emotional state or the well-being of the children [C and D] in relation to the death of their sibling, nor does she contemplate the emotional impact or benefit to them regarding vi-

[256] The trial court judge, in denying culpability, had increased the minimum sentence by one year, i.e. by less than 1/6.

sits to a correctional facility and encounters with her." This description aligns with what is noted in the individual care plan for [Teresa]: "She has no vices, not even smoking, but there are reports that [Teresa] frequently lies. The issue with that service is her relationship with her husband. In interviews conducted by the Viva Maria team, [the mother] asserts that she would accept anything from her husband (addiction, violence...) claiming sexual compatibility. As per reports, she claims to be with her husband 'for the sex.' Her history with the service includes four instances of seeking assistance. Each time she left along with the children, but sooner or later, she returned to her husband and a relationship where roles were predetermined.

Furthermore, I highlight a concluding passage from the psychological evaluation: "Her account of her child's death reveals a lack of accountability and culpability for what transpired. Even if she may not overtly condone the situation, her stance implies a responsibility that [Teresa] seems not to acknowledge, consistent with her pattern of not recognizing others. While she attributes the responsibility for the violent relationship she maintained with [Alceu] to him, her own account references her own responsibility for sustaining this relationship through her repeated returns to him. This exhibits strong masochistic elements (...). (...) The notion that, despite living in violence with [Alceu], this violence wouldn't affect the children is possibly a defensive mechanism – a denial – concerning the recognition of the reality of violence and risk, a mechanism that kept her in this relationship.

The presented elements are sufficient to factor the defendant's personality into the sentencing calculus. The evaluations conducted indicate that [Teresa] was solely focused on her feelings and well-

> -being, even if that meant daily interaction with a violent individual who abused substances, a clear and perceivable risk to her children. Due to her narcissistic personality traits, [Teresa] consistently rekindled her relationship with [Alceu]. Returning to the defendant's company, "accepting anything from her husband (addiction, violence...)," exposed her children to a dysfunctional family environment, employing psychological defense mechanisms with a clear intent to absolve herself of any responsibility for the defendant's actions, as she attributed the perpetuation of the violent relationship to him (RIO GRANDE DO SUL, 2017, p. 27-28) [...].
>
> Thus, I support upholding partially the defense's appeal to remove the denial of culpability and partially upholding the prosecution's appeal to consider the defendant's personality in determining the sentences. The term of imprisonment is, therefore, set at 24 (twenty-four) years, 09 (nine) months, and 10 (ten) days of confinement. The remaining provisions of the appealed judgment remain intact (RIO GRANDE DO SUL, 2017, p. 34).

METHODS AND APPROACHES USED IN THE REWRITING

The interpretation of the evidence elements, as described and employed in the judge-rapporteur's opinion, can lead to different conclusions when adopting, as we do, a feminist legal methodology.

In terms of the specific "methodological" aspects of feminist thought, Lourdes Bandeira and Deis Siqueira (1997, p. 270) explain that it introduces an ethics "constructed by the female subject who consciously tries to reflect the sociocultural limitations inherent to

them" and, above all, "to propose a critical knowledge in relation to all forms of domination between genders." Thus, feminist methodology is constituted by "existing human beings in the real conditions of domination and subordination. It starts from the lived reality, the everyday experience of women, not as an abstraction, but as individual and social practice" (BANDEIRA; SIQUEIRA, 1997, p. 270).

In the legal realm, when the law is applied devoid of context and in an abstract manner, it can perpetuate structural inequalities (such as gender, race, and class inequalities) under the guise of impartiality, rationality, formal equality, and other principles of Brazilian liberal law (BRASIL, 2021, p. 34). The legal system, as a structure and instrument of power, stems from an androcentric view of the world. Thus, the "universal and abstract legal subject" is based on the "average man," who is a white, heterosexual, adult, and affluent man (BRASIL, 2021, p. 35).

In feminist methodology, there is no "average woman," but rather diverse and plural women. Gender-based violence affects women of different races, including white, black, and indigenous, as well as those who are economically disadvantaged, have lower education levels, elderly, disabled, migrants, and other intersecting social markers, each in varying ways and intensities. Feminist legal methodology seeks to comprehend how inequalities and hierarchies between individuals are formed within societies, how they intersect, and to provide substantively just legal solutions. As highlighted by Borges and Abreu (2021, p. 38), failing to challenge the color, gender, and social class assumptions in male-centric and universal legal discourses can amount to complicity in the violence that has historically criminalized, and made invisible and vulnerable non-white groups in Brazilian society.

The methodology employed here is interdisciplinary, bridging the fields of Law and Psychology. Valdirene Daufemback (2017, p.

25) cautions that her work's focus "is not on the importance or use of Psychology for a better performance of Law," but rather on the "historical and epistemological approximations of the two areas, dilemmas, preferences, interdictions, and intentions." Therefore, it is essential for professionals from these fields to consider these aspects "prior to the indiscriminate use of this knowledge in the legal field." Guided by this alert, we have developed observations about the use of psychological concepts in the examined appellate decision.

We work with systemic theory[257], which within the field of Psychology engages in dialogue with feminist critiques of the Law. Thus, Gláucia Diniz (2003, p. 18) criticizes the fact that gender-related issues are generally ignored in Psychology. Reflecting on how the questions we ask or fail to ask determine the outcomes we find, she draws attention to the fact that "variables like gender, socioeconomic situation, marital status, race, etc., generate diagnostic variations that cannot remain ignored" (DINIZ, 2003, p. 19).

The central basis of the judge-rapporteur's ruling is a "psychological evaluation" that negatively assessed Teresa's personality. There was no complete transcription of the full text, only partial excerpts from the evaluation, which means there are insufficient elements to question the psychologist's conclusions, nor to evaluate the rapporteur's choices in terms of what was transcribed and what was not. Nevertheless, it is undeniable that psychological knowledge was employed to endorse the decision. Cristina Rauter (2003, p. 11) notes that, in the Brazilian context, assessments of an offender's personality (psychiatric, psychological, social, etc.) often result in a straightforward increase in punishment. This is what happened in this case.

During the time of the appellate decision, Resolution No. 7 of

[257] Its premise is the understanding of gender-based violence as a phenomenon that permeates interpersonal, family and social relationships and that it is not only addressed by the law or the judicial system.

2003 from the Brazilian Federal Council of Psychology was in effect, which established the Guidelines for the Elaboration of Written Documents produced by psychologists resulting from psychological evaluation[258]. The Resolution defined a "psychological report or evaluation" as a "descriptive presentation about psychological situations and/or conditions and their historical, social, political, and cultural determinants, researched in the process of psychological assessment" (CFP, 2003, p. 7). Its purpose was to:

> present the procedures and conclusions generated by the psychological assessment process, report on referrals, interventions, diagnosis, prognosis, case progress, guidance, and suggestions for therapeutic plans, as well as, if necessary, requesting psychological follow-up" (CEP, 2003, p. 7).

The document was required to include, at a minimum, sections for identification, description of the request, procedures, analysis, and conclusion. The first section should indicate the requester's name, whether it's a justice system entity, a company, an organization, or a client, as well as the reason for the request (psychological follow-up, extension of the follow-up period, or other reasons relevant to a psychological assessment) (CEP, 2003, p. 7-8).

In the analysis section, the author was not supposed to make unsupported statements based on facts and/or theories. Instead, they were encouraged to use precise language, especially when referring to subjective data, and to express themselves clearly and accurately (CFP, 2003, p. 8).

The judge-rapporteur's opinion does not allow the reader of the appellate decision to identify whether it truly constitutes a report, according to the definition in force at the time. Additionally, since the case was confidential, very few individuals have had or will have

[258] This Resolution was revoked and replaced by CFP Resolution No. 6/2019.

access to the case files or the text of the so-called "report." We do not know when it was produced, who requested it, and for what purpose, nor the techniques used and the theoretical perspective adopted. The rapporteur merely stated that the psychologist "attests that the defendant exhibits narcissistic personality traits" and reveals "strong masochistic elements." In light of this, the rapporteur increased the baseline sentence for each of the alleged crimes.

Therefore, on the one hand, the appellate decision invoked knowledge whose scientific validity, taken for granted by common sense, can and should be questioned. On the other hand, the way in which the evaluation was used and publicized in the ruling had a significant impact on the other members of the Criminal Chamber, who followed the rapporteur's stance without its foundations being scrutinized by the defense and all the judges.

Additionally, it is necessary to reflect on the use of the "personality" factor in the sentencing calculation. Article 59 of the Brazilian Penal Code designates "personality" as one of the judicial circumstances evaluated in the first phase of sentence application. However, personality categorizations often perpetuate stereotypes. In fact, the motives attributed to a narcissistic personality reflect gender biases and stereotypes against Teresa. The excerpt from the appellate decision provided above contains moral judgments and disregards the unique situation of women in cases of domestic violence and the intersecting oppressions that impact black women in Brazilian society. Aside from leading to a severe increase in the sentence, the psychological report stigmatizes the defendant as narcissistic, employing a pathologizing bias that, if taken to its logical conclusion, implies a suggestion of diminished responsibility.

It is worth mentioning the research conducted by Giulia Maycá and Marília Budó (2020, p. 104-105) which explores "whether

processes of criminalization in cases of improper omissive offenses have been occurring differently for mothers and fathers" in the TJRS (Court of Justice of the State of Rio Grande do Sul), from 2005 to 2017. The study categorized rulings into two distinct classifications, tied to the manner in which legal actors perpetuate dominant gender stereotypes prevalent in society through: "a) the rendering of moral judgments upon women, and b) the imposition of maternal responsibility for maintaining an appropriate familial environment" (MAYCÁ; BUDÓ, 2020, p. 106).

One of the 14 judgments identified pursuant to the established parameters of the study is the one currently under analysis. The authors identified a moral judgment in the attribution of culpability to the woman for maintaining a relationship with the aggressor and for exposing her sons and daughter to the company of a violent individual (MAYCÁ; BUDÓ, 2020, p. 108).

Another moral judgment is recognized through the observation that the defendant does not depend financially on her partner, a circumstance considered "quite unusual," thereby revealing a sexist and misogynistic perspective.

REWRITING PROPOSAL

Regarding the defendant's personality, the prosecution's argument lacks merit.

Salo de Carvalho (2001, p. 144) reminds us that in the traditional concept of national legal doctrine, personality is "a complex whole, consisting of inherited and acquired parts, influenced by all the forces that determine or influence human behavior." Carvalho adds that in jurisprudence, "subjective definitions align with doctrinal limitations for assessing personality as a reconstructive act of the defendant's

life values" (CARVALHO, 2001, p. 145). He criticizes the use of this concept for being correctional and enabling the judge to have "broad discretion in an area where it would be illegitimate to opine: the inner self of the individual." Even if minimal conditions were met for establishing such judgment, he argues that such evaluation would be "illegitimate from the perspective of the penal law of guarantees" (CARVALHO, 2001, p. 146).

Ana Paula Zomer Sica (2003, p. 29) highlights the difficulties of defining the concept of personality, "especially when attempting to frame it within a psychopathological context," as the vast heterogeneity of clinical descriptions, both of personality and its pathologies, "leads to significant nosographic disagreement in the definitions and classifications used." Vinícius Machado (2006, p. 88) warns that "as long as the intention to reduce the concept of personality to the molds of classifications and simplifications persists, no progress will be made." He points out that "if the Constitution safeguards individuals' privacy, it is not the judge's place to 'invade the defendant's core' to consider facts entirely unrelated to the criminal act" (Ibidem, 2006, p. 87).

However, despite consistent doctrinal criticism of assessing the personality of a crime's perpetrator, this practice has not been declared unconstitutional, and and higher courts in Brazil have validated it. The Brazilian Superior Court of Justice (BRASIL, 2021) accepts its use but emphasizes the need for substantiation. In its Third Section, it established that: "when considering the judicial circumstances as unfavorable, the Judge must state, in a motivated manner, the reasons for doing so, which must objectively correspond to the characteristics inherent to the unfavorable factor. Non-compliance with this rule implies a violation of the precept contained in Article 93, IX of the Brazilian Constitution of the Republic." Similarly, the Brazilian Su-

preme Court noted that "the analysis of factors that comprise judicial circumstances must allow a legal understanding of the motivations that led the Magistrate to their conclusion" and that the "negative characterization regarding the offender's personality requires a careful examination of concrete probative elements to support it, and the judge must adhere to the analysis of the social environment and the living conditions of the sentenced individual" (BRASIL, 2011).

Keeping these guidelines in mind, I will now analyze the psychological report presented by the prosecution.

The categorizations of personality establish stereotypes that are incompatible with the complexity of human beings. In this ruling, it is essential to consider Teresa's social context. She is a black woman, working in a neighborhood bakery, and had two sons and a daughter with her drug-addicted husband, who subjected her to violence. One of the factors that most influence women's vulnerability to violence, according to Cintia Liara Engel (2020, p. 11), is the *per capita* household income bracket. Women in the income bracket of up to one Brazilian minimum wage are the ones who experience the highest incidences of physical abuse, particularly black women.

The elements in the case are sufficient to prove that Teresa was a victim of domestic violence. The couple frequently had disagreements that escalated into physical fights. The appellant was placed in shelters on multiple occasions, along with her children, and was provided guidance regarding the family's risky situation. In the last sheltering episode, according to Teresa, it was established that she would wait for 10 days after the hearing before returning to the family home. During this period, Alceu was supposed to provide evidence of undergoing detoxification treatment. However, Teresa ended up returning home before the deadline, and the defendant did not undergo treatment.

According to the psychological report, the defendant exhibits a narcissistic personality. According to the subscribing psychologist, "the defendant's suffering is primarily self-referenced, linked to her own distress over the separation from her children and the hope that reuniting with them would improve her own emotional state. (...) She does not consider the emotional state or the well-being of the children [C and D] in relation to the death of their sibling, nor does she contemplate the emotional impact or benefit to them regarding visits to a correctional facility and encounters with her." This is also noted in Teresa's Individual Care Plan: "She has no vices, not even smoking, but there are reports that [Teresa] frequently lies. The issue with that service is her relationship with her husband. In interviews conducted by the Viva Maria team, [the mother] asserts that she would accept anything from her husband (addiction, violence...) claiming sexual compatibility. As per reports, she claims to be with her husband 'for the sex.' Her history with the service includes four instances of seeking assistance. Each time she left along with the children, but sooner or later, she returned to her husband and a relationship where roles were predetermined."

Additionally, it is worth highlighting a concluding passage from the psychological report: "Her account of her child's death reveals a lack of accountability and culpability for what transpired. Even if she may not overtly condone the situation, her stance implies a responsibility that [Teresa] seems not to acknowledge, consistent with her pattern of not recognizing others. While she attributes the responsibility for the violent relationship she maintained with [Alceu] to him, her own account references her own responsibility for sustaining this relationship through her repeated returns to him. This exhibits strong masochistic elements (...). (...) The notion that, despite living in violence with [Alceu], this violence wouldn't affect the children is pos-

sibly a defensive mechanism – a denial – concerning the recognition of the reality of violence and risk, a mechanism that kept her in this relationship."

The report does not explicitly clarify whether the defendant's "narcissistic personality" consists of predominant temperament and character traits, or if it constitutes the pathology known as "narcissistic personality disorder," which would require this Court to address the issue of either insanity or reduced criminal liability. Therefore, I find the report unsatisfactory to serve as a basis for using personality in determining the sentencing guidelines.

Adding to the ambiguity surrounding this classification, it is worth noting that in the psychologist's assessment, the defendant's decision to return to living with her violent husband is motivated by sexual satisfaction, and whenever she wants her children to visit, she only thinks about her own emotional well-being. These motivations would characterize a narcissistic person, that is, someone self-centered with inflated self-esteem.

The psychologist further adds that this is narcissism "with strong masochistic elements," due to the fact that Teresa, on four occasions, received shelter due to violence committed by her partner and yet voluntarily returned to his company.

The report describes the context of violence and vulnerability in which Teresa was immersed, but it blames her for staying with the abuser. According to Noémia Maria Carvalho (2010, p. 31), "female victims are almost always viewed with suspicion and are rarely considered innocent. If they stay in the relationship, they are accused of masochism."

However, existing literature on the cycle of domestic violence points to numerous factors that lead women to stay in abusive relationships: gender dynamics, historical andcultural power imbalances,

emotional dependencies, fear of the abuser, beliefs that a relationship is meant to be forever, hope for a change in the abuser's behavior, fear of being alone, of being considered guilty, of being assaulted, or even shame for staying with a partner despite being subjugated, humiliated, and oppressed, thus repeating behaviors and experiences across generations (SOUZA; COSTA, 2022, p. 13).

In Teresa's case, she testified to the jury that Alceu suspected that the boy was not his child, that she had been in a relationship with the defendant for five years, and that, after episodes of violence, she returned home because she believed Alceu would change.

This is not simply a matter of personality, but a complex issue with multiple factors that prevent women from leaving abusive relationships, as well as factors that explain their return to living with the aggressor (CARVALHO, 2010, p. 31). On one hand, there is the economic factor, where the aggressor is the sole source of income – which was not the case for Teresa. In fact, he depended on her. However, the victim-aggressor relationship involves multiple reciprocal dependencies. Women who endure years of violence from their partners are co-dependent on the man's compulsion, making violence inseparable from the relationship (CARVALHO, 2010; SAFFIOTI, 1999; KOTLIARENCO, 1997).

On the other hand, there are cognitive and emotional aspects as well. Among the emotional aspects, Carvalho mentions factors such as "the woman's infatuation; her emotional dependency, beliefs, personality traits, and psychopathological symptoms," emphasizing that the latter two should be considered more as consequences of the mistreatment endured. She also highlights the characteristics of the aggressor, whose personality type and behavior can influence the victim's decision-making.

In interviews conducted by the Viva Maria team, Teresa al-

legedly stated that she would accept anything from her husband (drug addiction, violence...) citing sexual compatibility. This cannot be immediately considered negative, as it might represent a sign of love.

For Daniely Cristina de Souza Pereira, Vanessa Silva Camargo, and Patricia Cristina Novaki Aoyama (2018), who conducted research on women's stay in abusive relationships, violence challenges hegemonic knowledge in the field of public health, social organization, administrative planning, victim support, and violence detection. For this reason, this problem cannot be seen from an isolated perspective, requiring interdisciplinary action from various sectors of civil society and governmental organizations.

Therefore, the assessment of masochism ignores research on the cycle of violence and the multiple factors that prevent women from leaving abusive relationships.

Regarding the second point, concerning the defendant's desire to receive visits from her children, it does not make sense to label her as narcissistic, as it is a socially expected desire of a mother. Witnesses reported that she was a good mother. The great-grandmother of the children affirmed that Teresa did not hit the children and that "she was always good to her children." She recounted that on some occasions, Alceu prevented Teresa from taking care of the children: "She wanted to breastfeed, and he wouldn't let her." This situation had been occurring for some time, but Teresa did not have the courage to speak up because Alceu threatened her, saying he would kill her and mistreated the mother and the child due to his suspicion that the boy was not his child.

From the evidence presented, including the defendant's narrative, it can be inferred that the child was assaulted on several occasions, and there are no reports of neighbors or relatives intervening to help because the couple frequently changed residences, with the last

address even being unknown to the maternal grandmother. Such a situation is also indicative of a domestic violence context, where the perpetrator of the violence severs or distances the victim from their support network so that they have no one to turn to. In this same vein, the fact that Teresa, who was responsible for the family's livelihood, left the child in the company of Alceu is justified.

Women are assigned the devotion to children as an integral aspect of their female nature, and within this maternal role, responsibilities for childcare are embedded (BADINTER, 1985). From this legitimized and deeply rooted societal notion that motherhood is the natural destiny of all women, moral judgments and gendered stereotypes are constructed. Women who become mothers are assigned a duty of care and vigilance that is not equally expected of fathers.

Although the appellant, in her role as a mother, has the duty of care, protection, and vigilance over her offspring and is subject to all the legal implications that arise from this duty, it cannot be placed solely on the woman, and specifically on the woman, the expectation that she can foresee every bad thing that might happen to her children and prevent it from occurring.

For these reasons, I support partially granting the appeal of the defendant Teresa to set aside the disregard of culpability and deny the appeal of the Public Prosecutor's Office seeking to negate the defendant's personality in the determination of the baseline sentences for all the crimes for which the Jury declared her guilty. The term of imprisonment is therefore set at 18 (eighteen) years, 9 (nine) months, and 10 (ten) days of confinement. The other provisions of the appealed judgment are upheld[259].

[259] It corresponds to 16 years of imprisonment for the crime of aggravated homicide, 5 years and 10 months of imprisonment for the crime of torture, and 8 months of detention for two crimes of ill-treatment.

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REWRITING A SEXUAL VIOLENCE DECISION: THE NEED TO PROVE CONSENT INSTEAD OF RESISTANCE

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INTRODUCTION

The rewriting was developed within the framework of the teaching project "Feminist Judgments," undertaken by the Research Group on Democracy, Justice, and Violence at the Law School of the Federal University of Pampa (UNIPAMPA), between November 2021 and March 2022[260]. Simultaneously, a research project was carried out in collaboration with the Court of Justice of Rio Grande do Sul, aiming to identify relevant patterns concerning stereotypes related to gender and sexuality in criminal decisions involving sexual violence against women. The research is still ongoing. The teaching project was promoted on social media under the name "*Reescrevendo Decisões Judiciais em Perspectivas Feministas – Brasil*" and issued a call for student applications.

With periodic meetings, initially held weekly, the group devoted the initial sessions to grasp the project's proposal and soon after, commenced searching for decisions that could serve as the foundation for the rewriting process. Due to the project's research focus, the decisions chosen pertained to criminal matters. The student group presented three decisions, which were thoroughly discussed during

[260] Currently, the Study and Research Group on Democracy, Justice and Violence (GPDEJUV) has been incorporated into the Pampa Criminology Center (UNIPAMPA/CNPq).

the meetings to identify elements to be addressed in each one. It is noteworthy that, by chance, all decisions selected by the students revolved around crimes against sexual dignity. Subsequently, one decision was chosen for the rewriting process.

THE REWRITTEN DECISION

This is the opinion cast by the Rapporteur in Criminal Appeal No. 70080574668, within the scope of the Court of Justice of Rio Grande do Sul, in 2019, on the crime of rape[261], provided for in art. 217-A, §1º, of the Brazilian Penal Code. In this case, the defendant was convicted at trial court for the crime of art. 217-A, §1, and the conviction was reversed on appeal by the Court of Justice of Rio Grande do Sul. It is this decision that acquitted the defendant, on appeal, that has been rewritten.

In summary of the case, the defendant, as a driver of the transportation app, received a call to pick up the victim near a bar. Arriving at the place, he boarded the woman, who was in an advanced stage of alcoholic intoxication and drove her to the destination informed in the application, that is, the victim's residence. Once there, he disembarked with the victim, without finishing the race in the application in question, and entered the residence with her. Once there, taking advantage of the advanced state of alcoholic intoxication of the victim, he practiced sexual intercourse with her. According to the understanding of the decision of trial court, the defendant had sexual intercourse with the victim, who at the time did not have the necessary discernment for the practice of the act and could not offer him resistance. The decision of the Rapporteur of the Appeal, however,

[261] TN:In Brazil, we have different concepts of rape and sexual assault within the Brazilian Penal Code. The crime described in this article refers to acts committed against someone who could not resist the perpetrator's actions.

reversed the conviction based on the argument that the victim did not prove that she did not consent to the sexual act, although all evidence is consistent in the sense that the victim was in a state of advanced intoxication by alcohol.

The main arguments for the acquittal of the defendant contained in the decision chosen, according to the narrative presented by the Rapporteur in her opinion, are listed below: 1) the offended admitted the consumption of alcohol that day, which occurred of her own free will; 2) the prosecution witnesses who were in the bar and would have accompanied the victim to the transport stated that she was intoxicated, not well, but did not mention that the ethyl stage reached the point of losing consciousness; 3) because if the offended was in a stage that needed to be carried, undoubtedly, one of her friends would have accompanied her to her residence; 4) if the victim drank on her own, within her free will, she cannot be placed in the position of a victim of sexual abuse for the simple fact of being drunk; 7) the victim admitted that sometimes she had put herself in this type of risky situation, that is, drinking and then not remembering what happened; 8) the offended, in theory, would have discovered by the accused himself that she had had sexual intercourse with him, when they spoke on the phone and the defendant asked her if she had any sexually transmitted diseases; 9) one cannot rule out the possibility that the marks presented on the victim's neck and legs arise from the sexual act itself; 10) the victim did not report the facts, only said that she did not remember anything, because she "blacked out" and then found (assumed) to have been sexually abused.

Furthermore, the rewriting team did not identify any references concerning social markers related to the race/ethnicity of the parties involved in the case, although the location where the incident took place suggests indicators of the social marker of class, as it is situated

in a bohemian neighborhood of the city predominantly frequented by middle-class youth. Consequently, there is an omission of significant elements crucial for understanding the case (CARNEIRO, 2019). On the other hand, the gender marker, despite being evident, is addressed in the rewritten decision with stereotypes and particular understandings of the presiding judge, lacking support from specialized technical sources on gender issues and/or violence against women. Furthermore, the reasoning behind the rewritten decision lacks sufficient depth, as a significant portion of the limited arguments presented are poorly developed sentences. As for the judges, the case was considered by two female judges, one of whom was the rapporteur, and one male judge, all of them white.

METHODS AND APPROACHES USED IN THE REWRITING

As a methodology to identify pertinent elements for the rewriting process, the student group listed the primary arguments used in the decision and concurrently presented counter-theses that challenged those arguments. As mentioned earlier, the chosen case revolves around a defense appeal filed subsequent to a conviction at trial court for the crime of rape.

The student group recognized that the decision rendered on appeal, which acquitted the defendant due to lack of evidence, displayed a considered amount of inconsistencies in its reasoning. This was evident because the decision relied on the premise that proof of the victim's non-consent for sexual intercourse (as stated in the decision: *"the absence of consent from the victim, resulting from her inability to resist due to intoxication, was not demonstrated"*) was required. However, all the available evidence (witness testimonies and

expert reports) presented a coherent and concise narrative about the high level of intoxication, indicating the clear impossibility of valid consent for the sexual encounter. Despite this compelling evidence, the decision reached an acquittal based on an argument that seemed inadequate and inconsistent with the overall evidence presented.

In this sense, after transcribing the trial court decision that convicted the defendant, the original decision is limited to listing ten sentences, which would be arguments that would support the thesis of lack of proof of non-consent and, consequently, for the rapporteur would be sufficient for the defendant's acquittal.

The students chose not to confront, one by one, the arguments of the decision, because many of them are based on the inversion of reasoning about the crime of rape. Such crimes have as their fundamental axis the proof of the state of vulnerability of the victim. In the understanding of the project team, this vulnerability was clearly proven by the witnesses and the forensic reports, as there is no contradiction between the evidentiary material and all testimonies are fully coherent.

It was understood, therefore, that the analysis concerning the certainty of judgment should focus on the existence or absence of consent rather than on the victim's resistance at the time of the violence[262]. The principle of "*in dubio pro reo*," therefore, employed by the rapporteur for acquittal, would have been mishandled as the

[262] The judge, rapporteur of the rewritten decision, who completed her law degree at the Federal University of Pelotas in 1987. According to the Court of Justice, she entered the Judiciary in August 1990, and served in the courts of Santa Vitória do Palmar, São Lourenço do Sul, and Caxias do Sul, being promoted to Porto Alegre in 1997, where she was the holder of the second courts of the 12th and 18th Civil Courts, of the second court of the 1st Jury Court. Subsequently, she spent more than six years as the 3rd Rapporteur of the Criminal Appeals Panel and was Judge-Regulator from March 2004 to January 2008. She is currently retired from the judiciary and is a professor of Criminal Procedural Law at the Superior School of Judges of Rio Grande do Sul.

doubts raised by the rapporteur lacked any foundation in the body of evidence. There is no doubt that the victim was unable to comprehend the situation and exercise self-determination, given her condition at the time[263].

Finally, the team working on the rewriting opted to maintain the original decision's format, which is a common strategy in Brazilian judicial decisions. This approach involves transcribing the entire appealed decision and subsequently listing the reasons for either upholding or overturning the decision. Consequently, a significant portion of the text consists of the transcription of the original decision "ad quo," which convicted the defendant under Article 217-A. After the transcription, the team rewrote the section that was actually authored by the rapporteur of the appeal, which was limited to a few sentences. This rewriting strategy was chosen as an exercise where the form, by itself, does not determine the outcome and, moreover, exposes the extremely weak argumentative basis employed to acquit the defendant at the appellate level, in contrast to the richness of details provided in the decision that was overturned.

DECISION REWRITTEN

> CRIMINAL APPEAL. CRIMES AGAINST SEXUAL DIGNITY. RAPE. ARTICLE 217-A, §1º, OF THE PENAL CODE. DEFENSE APPEAL. VULNERABILITY PROVED. CONVICTION UPHELD. The case file contains reliable and sufficient evidence that the victim did not have discernment to consent to sexual intercourse, the upholding of the conviction is the measure that is imposed. DEFENSIVE APPEAL DISMISSED. UPHOLDING OF THE CONVICTION OF THE

[263] The names used in this text are fictitious.

DEFENDANT. CRIMINAL APPEAL FIFTH CRIMINAL COURT No. xxxxxxxxx (CNJ No.: xxxxxxxxxxxxxxxxxxxxx) COURT OF PORTO ALEGRE.

CRIMINAL APPEAL - CRIMINAL APPEAL
FIFTH CRIMINAL COURT
No. xxxxxxxxx (CNJ No.: xxxxxxxxxxxxxxxxxxxxx)
COURT OF PORTO ALEGRE
L.C. - APPELLANT
C.T. - APPELLEE

DECISION

Having read, presented the background of, and discussed this case,

The members of the Fifth Criminal Chamber of the State Court, unanimously, dismiss the defensive appeal, upholding the conviction of the defendant L.C. of the imputation that was made in the complaint for the crime of art. 217-A, §1, of the Penal Code.

Costs as provided by law.

In addition to the undersigned, the Honorable Justices of the Court of Appeal, Mr. Jorge Marques (Presiding Judge and Reviewer) and Ms. Clarissa Portinho, participated in the judgment.

Porto Alegre, July 17, 2019.
JUSTICE Lizbeth Pereira

INTRODUCTION AND BACKGROUND

The Public Prosecutor's Office filed a criminal complaint against L.C., charging him with the offenses under Article 217-A,

paragraph 1, combined with Article 61, item II, subparagraph "f," both of the Brazilian Penal Code, for the commission of the following criminal act:

> On February 24, 2017, around 03:30 am, in the residence located at Rua São Nicolau, number 994/ Casa, Bairro São João, in this Capital, the accused had sexual intercourse with the victim C. T., who at the time did not have the necessary discernment for the practice of the act and could not offer him resistance. At the time, the accused, as a driver of the xxxx transportation app received a call to pick up the victim at Rua João Alfredo, nº xxx, near the bar "Silêncio". Arriving at the place, he embarked the victim C.T., who was in an advanced stage of alcoholic intoxication and led her to the destination informed in the app that is, the victim's residence. When she arrived, the defendant disembarked with the victim, without finishing the ride in the app in question, and entered the residence with her. Once at the location, taking advantage of the advanced state of alcoholic intoxication of the victim, he engaged in sexual intercourse with her, as evidenced by the content of DNA Report No. 31927/2017 (pp 09/11), causing her the injuries described in the Sexual Assault Forensic Exam Report No. 29400 (p. 07). Then, the accused left the place, taking the victim's cell phone with him, and ending the ride in the application around 04:20 am. Upon waking up, the victim observed that she had the indicated bodily injuries and felt pain in her body, as well as realized that her cell phone was missing. For this reason, the victim then called her number, and the defendant answered the call and asked her if she had any sexually transmitted diseases and remembered what happened, refusing to return the victim's cell phone, unless the amount of R$ 50.00

> (fifty reais) was paid for the ride. Subsequently, on March 2, the accused left the victim's cell phone at the headquarters of the *CARROS* company, which disqualified him from the driver's list and returned the device to the victim. Then, the accused appeared in the evening of the same day at the residence of the victim, asking her and her parents not to proceed with the lawsuit related to the fact, arguing that he was married and father of two children, and that the fact would harm him. The defendant committed the act of violence against the woman in the domestic unit, i.e., the residence of the victim.

The charge was accepted on October 30, 2017 (p. 86).

The accused was personally served (p. 99) and submitted an answer to the charges through legal counsel (pp. 101/106).

During the procedural instruction, the victim, the witnesses and the defendant were heard (media of p. 152).

At the end of the investigation, the oral debates were replaced by memorials (pp. 154/161v and 163/174).

The judgment of partial upholding of the criminal action to sentence F. B. M. to 10 (ten) years of imprisonment (p. 175/182v) was rendered.

The defense timely filed an appeal (p. 188). In their argument, they preliminarily sustained the nullity of the forensic evidence attached to pages 88/91v of the case file, since it was produced without observing the adversarial principle. On the merits, he requested acquittal due to insufficient evidence. Subsidiarily, he argued for the exclusion of the aggravation and the reduction of the sentence with the softening of the regime (pp. 204/215).

With the counter-appeals (pp. 216/223), the case file was remitted to this Court.

In this instance, the distinguished Prosecutor expressed her opinion for the rejection of the defense appeal (pp. 224/230).

This Chamber adopted the electronic procedure and art. 613, I, of the Code of Criminal Procedure was observed. The case was held under advisement

This is the introduction and background.

OPINION

Rappourteur

I agree to hear the appeal because it is appropriate and timely.

On the motion for nullity of the document on pages 88/91v for breach of the adversarial principle.

The motion for nullity of the document on pages 88/91v does not deserve support, since it is not a forensic report, but a mere expert opinion prepared by doctors from the Biomedical Service of the Public Prosecutor's Office, at the request of the Prosecutor who filed the complaint. This expert opinion deals with the absorption and effects of alcohol on the human body.

Moreover, there is no mention of any violation of the principles of adversarial procedure and of fair hearing, since the study was attached to the case file even before the defendant was served, and he had the opportunity to express his views on the matter.

Consequently, the motion was rejected.

Merits

I hereby transcribe, for relevance, the sentence starting from the reasoning:

> *Motion for nullity: There is no reason to argue the nullity of the expert opinion filed on pages 89v91v., by the Public Prosecutor's Office. The issue, moreover, has*

already been subject to consideration when analyzing the answer to the charges, on pages 112-3, to which I refer and adopt as a reason for decision, in order to avoid tautology, preclusion has occurred. I reject, therefore, the motion raised.

On the merits, the existence of the fact is demonstrated by the police report (pp 20-1), expert reports (pp 24 and 26-8), sexual violence verification report (pp 109-10), as well as by the oral evidence produced in court. The commission of the crime, although denied, is certain. The defendant L.C., in interrogation, denied the crime. He stated that he received a call through the CARROS application and went to the place to pick up the passenger. Upon arriving at the place, the victim boarded the vehicle and the trip began. He pointed out that during the journey, there were no stops. And as far as he remembers, the ride lasted about fifteen minutes, at most, until they arrived at the victim's residence. He stated that during the journey to the destination, they engaged in conversation, and she showed interest in him. Upon arriving at the final address, she invited him inside, and he accepted. Upon getting out of the car, he left his cellphone on the holder and inadvertently failed to end the ride. He opened the car door for the victim, and they proceeded to the entrance gate. At that moment, he mentioned that she seemed to be having trouble finding her key inside her bag, so she handed him both her key and her phone. Subsequently, he placed the cellphone in his pants pocket. He further described the residence as having two floors, with the victim residing on the upper floor, accessible via an

external staircase. He claimed that T. opened the access gate to the residence, as well as the gate and the door, so they could enter the house. As soon as they entered, she would have signaled the defendant to be silent, until then he did not know who was in the place. They went towards the victim's room and she asked him to wait and then went to the bathroom. When he returned, he questioned if she really wanted him to stay, she replied yes and again signaled to be silent. When closing the bedroom door, the victim would have lain down on the bed and then taken off her panties. He began to undress, put his clothes on the chair next to the bed and lay down next to the victim. They started kissing and began the act. He pointed out that T. already had the purple bruises, before they had intercourse. After the act, he went to the bathroom and when he returned, she was still undressed, lying on the bed. He told her that, if she wanted, he could open the gate and return the key afterwards, but she said no. She got dressed and the man went to the bathroom. So, she got dressed and accompanied him to the exit, where they said goodbye with a kiss at her request. When he got into the car, he realized that he had not ended the ride, at that moment he finished the trip in the application. Feeling guilty for having betrayed his wife, he went to a McDonald's to buy a snack for his companion, at the time of paying he put his hand in his pocket and realized that he had kept the victim's phone. He stated that at no time did it occur to him that T. had no conscience, given her attitude. Finally, he stated that he then returned to the victim's house with the intention of clarifying the situation. The version

presented by the defendant does not stand up to the other evidence in the case file.

The victim C.T. reported that on the day of the fact, she left work and went to the restaurant "Só Comes" with a friend. They arrived around 6:30 pm and started drinking beer, staying at the establishment until about 11 pm. Afterwards, other friends arrived and invited them to go to a party. They accepted the invitation and went to the nightclub "Silence", located in the Cidade Baixa neighborhood. When they arrived at the party, they started drinking distilled beverages. She said that at one point she felt sick, but then she does not remember what happened. She said that her friend Felipe thought it best to call a car through the app to take her home, but that she does not remember getting home. The next day, when she woke up, she found her cell phone missing and did not know what had happened. She went to take a shower and reported feeling a lot of pain in her body, at that moment she had "flashes" of the fact, but she was not sure about the veracity. She contacted her friend Samanta and said she thought something had happened. Samanta then called her cell phone to find out who it was with. The defendant would have answered the call stating that he would only return the phone to the victim and that she was to contact him. The victim stated that she was afraid and preferred not to contact the defendant. Later, she looked in the mirror and realized that there were purple spots on her body, at which point she was a little surer of what might have happened. She waited for her friend Felipe to arrive at her residence and asked him to call her

cell phone in order to get it back. The defendant, who had the device, would have charged the amount of R$ 50.00 to return the phone. The defendant was told that they would not pay the amount, so the defendant stated that he would only return it to the victim, insisting on speaking with her. C.T. answered the phone at which time the defendant asked if she remembered what had happened and that for his safety, he questioned if she had any sexually transmitted diseases. C.T. answered no and he stated that he was married, had children and that it could harm him. Very nervous, the victim could no longer hear the defendant, as she was sure of what had happened and handed the phone to her friend FERNANDO who only informed the accused that the issue would be resolved directly with the company responsible for the app. Afterwards, C.T. went to the Women's Police Station and made a police report. On Thursday, after the fact, she went to the CARROS company to get her phone and showed the police report she had made, as a result of which the defendant was fired from the company. She also stated that on the same day, at night the defendant would have gone to her residence to threaten them. Finally, she informed that as a result of the facts she is undergoing psychological and psychiatric treatment, as well as taking medication.

The witness JOANA reported that they were at a party and the victim was totally intoxicated. She narrated that C.T. became ill, so the help of the local security guard was needed to lead her out of the establishment. Once outside the party, she and her friend Fernando took some time to find out the password of C.T.'s cell phone, so

that they could access the application and thus call a car to take her home. She, along with her friend Fernando, would have put the victim in the back seat of the car. The next day, the victim contacted the witness to say that she had no cell phone and that she thought she had lost it. She stated to the victim that she might have slept in the vehicle and forgotten the device in it. She then called the cell phone and was answered by the app driver. She also mentioned that when answering the phone, the defendant would have been rude to the witness. Then, she would have warned the victim that her cell phone was with the accused, as suspected. She said that she had been in contact with C.T. throughout the day and that she had reported that something wrong had happened, including the presence of bruises on her body. She said that the victim also contacted the defendant and talked to him. Later, both realized that the trip had taken about an hour to reach C.T.'s residence, which according to the witness would normally take no more than fifteen minutes. She mentioned that when the victim contacted the accused, he allegedly asked her if she was on birth control. The witness then advised her to go to the police station as she may have been sexually abused while unconscious. Finally, she said that the victim did not remember having sexual intercourse with the defendant.

The witness LEANDRO reported that he learned about what happened on the day of the incident. He informed that he was traveling and that on his return the victim would have reported the fact, but that she did not remember exactly what had happened. He mentioned that

the victim said that the defendant was with her during the ride and then at her residence. He stated that on the day of the incident, he was at home, sleeping with the door closed. Later, the defendant went to his house to ask the victim to withdraw the report he had made, claiming that he was married and had a family to support. Finally, he reported that he took T. to the police station to report what had happened.

The witness CLARICE reported that she learned about the fact on the day the defendant appeared at the gate of her house wishing to speak to her daughter. The victim became desperate and at that moment told her what had happened. The witness opened the window and asked the defendant to wait. She went downstairs, went to the gate and remained inside, while the defendant was outside. The accused wanted to explain what had happened, that it was all just a misunderstanding. The witness, flustered by the situation, simply asked him to leave. But he insisted that he wanted to talk and began to talk and describe things that were inside the house. Frightened, the witness asked if he was threatening her, he would have said no and he was just talking about what was inside the residence. She mentioned that her daughter had said that she had been sexually abused and that she did not remember anything at all, because she was totally intoxicated at the time. She stated that she had seen purple marks on her daughter's neck, as well as on her legs. Finally, she stated that since the incident, C.T. has been undergoing psychological and psychiatric treatment.

The witness FERNANDO reported that he was at a party and had to leave because the victim had become ill. He stated that C.T. was so unwell that she could not even unlock her cell phone, so she could call a car through the app, in order to take her home. When the car arrived at the scene, they put the victim in the back seat and she would have laid down. The witness informed that he became aware of the facts, when a mutual friend contacted him informing that C.T. wanted to talk to him. He contacted her, and she asked him to come to her house. Upon arriving at her residence, she explained what she suspected had happened, she believed she had forgotten her cell phone inside her car. In order to retrieve it, they called the cell phone and were answered by the defendant. Fernando requested the return of the device, but the accused would have demanded the value of R$ 50.00 to return it or that they go to his house to pick it up. Finally, he insisted on talking to the victim. In view of the statement made by the accused, they found the situation absurd and decided to contact the company xxxx. Subsequently, T. told the witness that Fabio had asked her if she had any sexually transmitted diseases. Thus, the victim would have realized that she had sexual intercourse with the accused. Fernando claimed to have seen the marks on the victim's arms on the day he went to her house.

Witness EDUARDA reported that she learned about the fact two weeks or so after it happened. She said that normally she and the defendant picked up the children from school, but that on that day, he would have asked his mother-in-law to pick them up. On that occasion, she left

straight home from work and when she arrived at her residence the defendant told her what happened. She stated that the defendant's narrative was that he had cheated on her and because of that an accusation of rape arose. She mentioned that the defendant had described the facts in great detail. As reported, he would have picked up a passenger through the CARROS app at a nightclub. During the journey they started talking until their destination. When they arrived, the offended would have invited the defendant to come inside, he said no, because he was working, was married and had children. But she had insisted, claiming that she was alone and just wanted company. He accepted, got out of the car and went towards the gate, when the victim reached for her purse and cell phone and handed them to the defendant, as she was having trouble finding the keys to the house. By locating her key in the bag, he opened the gates and climbed the stairs that gave access to the upper part of the residence, where the victim lived. Upon entering the house, the defendant questioned whether she really wanted him to stay, C.T. answered yes. Subsequently, she went to the bathroom, and when she returned, they started and finished the sexual act. The witness said that when returning home, the defendant felt guilty for having betrayed her and, during the journey, stopped at a McDonald's to buy her a snack. At that moment, when making the payment, he realized that he had kept the victim's phone. Because of the late hour, he preferred not to return to the victim's residence and went straight home. According to the witness, in the first two days that followed, the accused only stated that a

female passenger had forgotten her cell phone in the car and that he had been in contact with her. Regarding the negotiations to return the phone, the witness stated that there were problems but that they agreed that it would be better to leave it at the company where Fábio worked. Finally, she said that the defendant learned about the charges when he went to the CARROS company to return the phone and that she was with him at that time.

The witness JORGE reported that he was in the city of Torres and the defendant called him asking to talk, stating that the matter was serious. He returned to Porto Alegre and met the Defendant; at which time he reported what had happened. He stated that the defendant said he had picked up a passenger and taken her home, on the way they started talking and she would have invited him to go up, then they had sex. He informed that the accused gave details about how the victim's house was, as well as that it was she who opened the gates of the house. He mentioned that when he heard the facts, he went with the accused to the police station to seek clarification.

The evidence supports the conviction. There is no doubt – even admitted by the defendant – that the defendant engaged in sexual intercourse with the victim C.T., and this certainty is not only based on the oral evidence gathered in the case but also on the sexual violence examination report (pages 109-10) - which confirmed the presence of semen in the victim's vaginal secretion - and the expert report on pages 26-8 of the case records, which attested that the male biological material found in the swab collected from C.T.'s vaginal area matches the genetic profile of L.C.

However, the defense's assertion that there is no evidence of the defendant acting with intent is not justified.

By analyzing the evidence in the case file, I believe that it was uncontroversial that the victim was, on the night of the facts, in a state of complete alcohol intoxication, so as to be unable to resist the crime. The assumption is made, although there is no expert report attesting to the state of drunkenness of the victim, by analyzing the other evidence provided in the case file, which demonstrate, safely, the situation of vulnerability to which the victim was subject to on the night of the facts. Otherwise, we shall see: the victim narrated that on the night of the criminal event she had been drinking alcoholic beverages since 6:30 p.m., initially beer, and that after 11:00 p.m., at a party, she began to drink distilled beverages. As a result of the excessive consumption of alcohol, she became ill at the party, which is why her friends, Fernando and Joana, with the help of a security guard, took her outside the establishment and, after many attempts, managed to unlock the victim's cell phone and call a car, through the CARROS application. Although the victim did not remember details about the events that took place between the moment she left the party and the morning after the event, when she woke up, it was clear that, even when she was in doubt about what had happened, she had the feeling that something strange had happened. So much so that, in her testimony, she stated that during the shower, although she could not remember how she had arrived home, she suspected that something bad had happened; when she noticed bruises on her body,

her doubts increased. When, finally, in order to retrieve her cell phone, which had been in the possession of the defendant, she was asked by him if she had any kind of venereal disease, doubt gave way to certainty, thus being able to confirm the veracity of the flashes of memory that since her awakening she had been having. There are no inconsistencies between the victim's testimony and that of other prosecution witnesses. At this point, initially, I rebut the claim that the witnesses listed by the prosecution, because they are friends or relatives of the victim, presented a version favorable to her, especially since they gave a sure and coherent testimony before the court, and there is no indication that they had any motivation to distort the truth and, consequently, falsely implicate the defendant in the crime. As mentioned above, Felipe and Samanta, who accompanied the victim during the events that preceded the crime, confirmed that the victim was completely intoxicated, incapable of managing herself, and needed help to be removed from the establishment (by a security guard) and to unlock her cell phone; even the call for a car through the application was not made by her, but by Fernando, since the victim was incapable of doing so. They were also unanimous in stating that the victim left the scene lying in the back seat of the car, adding to the certainty that his cognitive capacity was impaired. The witnesses Joana and Leandro, who followed the facts after the event described in the complaint, were confident in stating that the victim did not know what had happened until the day after the event, having been sure after a conversation with the defendant in which he had

asked her about her sexual health history. They referred to the fear experienced by the victim when the defendant sought her out at her residence to hand over her cell phone and clarify what had happened, claiming that he could not have problems because he was married and had a family to support. These witnesses were unanimous in stating that the victim said she did not remember details of how she had arrived home on the night of the events, nor anything that had happened between her and the defendant, because she was under the influence of alcohol. On the other hand, it should be noted that the testimonies of the witnesses Eduarda and Jorge did not contribute to the elucidation of the facts, since they did not witness the moments before or after the act, but limited themselves to narrating the version given to them by the defendant. I emphasize that their testimonies should be regarded with caveats, as they are the spouse and father-in-law, respectively. Therefore, one can notice some bias in favor of the accused regarding the unfolding of events.

The evidence in the record, therefore, clearly demonstrates that the victim had no capacity for resistance (vulnerability) in the face of high alcohol intake, not even knowing the precise facts that elapsed between the time she was at the party drinking with friends and waking up the next morning, but recognizing the defendant's actions in the brief moments when she regained consciousness, unable to react, not knowing how to explain how she got home.

I emphasize that in such a traumatic situation, and being under the influence of substances that cause drows-

iness and lethargy, it is understandable that the victim may lose track of time. It is crucial to highlight that the victim's testimony carries significant probative value and should not be discredited, considering the clarity and confidence with which it was provided. Moreover, the victim's account does not appear rehearsed or fabricated; it is consistent with the version given to the Police Authority, making it credible and plausible.

It has been amply demonstrated that the victim's ability to react had been annulled by complete intoxication, to the point that she had to be driven by third parties (security of the establishment), needed the help of friends to unlock her cell phone and call a car, and had to lie down in the back seat of the vehicle, thus not being credible the defense's claim that during the displacement of the place of the party to his house, she would have regained consciousness, to the point of maintaining fluent conversation with the accused, and thus would have consented to sexual intercourse. Also, the expert report on p. 24, reinforced by the photographic images on pp. 12-3, states that the victim had (...) two bruises on the lateral region of the neck on the right, with the largest area of fifty millimeters by twenty-five millimeters. Three bruises on the left thigh. with the largest diameter of ten millimeters (...) also in line with the testimony of the victim and witness Felipe, who also states that he only noticed the marks the day after the fact (that is, when the victim was placed in the defendant's vehicle, she had no apparent bruises). The conviction, therefore, is accurate. In this sense:

CRIMINAL APPEAL. CRIMES AGAINST SEXUAL DIGNITY. RAPE. 1. EXISTENCE OF THE CRIME AND PERPETRATION DEMONSTRATED. *Proven by the statements provided by the victim and witnesses added to documentary evidence, photographs of the naked victim and the scene of the crime, treatment record from the hospital's ambulatory, medical certificate and corpus delicti examination, which leave no doubt of the existence of the crime described in the accusation and its perpetration. 2. JUDGMENT. The conduct practiced fits perfectly the concept of vulnerable inscribed in § 1 of art. 217-A of the Penal Code, because the victim was unconscious, in an alcoholic coma, i.e., in a state of lethargic drunkenness that completely removed her discernment and ability to understand and resist. PRISON REGIME. Changed to semi-open.*[264] *4. JAIL CREDIT. Right recognized.*

[264] TN: "In Brazil, there are three types of prison regimes: closed, semi-open and open. The closed regime is Brazil's most restrictive form of imprisonment, applied to those who have committed serious crimes or have been sentenced to more than eight years in prison. In the closed regime, inmates are confined to a cell, closely supervised and have limited access to work and educational opportunities; The semi-open regime allows inmates some degree of freedom and autonomy. It's generally for those who have been sentenced to four to eight years in prison or have served at least one-sixth of their sentence in the closed regime. In the semi-open regime, inmates can work or study outside the prison during the day but must return to a dormitory-like facility at night. Inmates can also request temporary leave for special occasions." Available at: https://www.brazilcounsel.com/blog/brazils-three-types-of-prison-regimes#:~:text=In%20Brazil%2C%20there%20are%20three,%2C%20semi%2Dopen%20and%20open.&text=The%20closed%20

> *5. other provisions of the judgment upheld. APPEAL GRANTED IN PART. UNANIMOUS. (Criminal Appeal No. 70076108844, Sixth Criminal Chamber, Court of Justice of RS, Rapporteur: Bernadete Coutinho Friedrich, Judged on 05/30/2018.*
>
> *Lastly, I emphasize that the fact that other people were in the victim's house did not prevent the perpetration and consummation of the crime, since the defendant acted as if they were alone in the residence, making use of the bathroom after sex, as he stated, this circumstance is not enough to curb the lascivious instincts of the defendant. However, there is no reason for the prosecution to request the aggravating factor provided for in art. 61, II, f, of the Penal Code, since the crime did not occur with abuse of authority or taking advantage of domestic relations, cohabitation or hospitality or with violence against women in the form of the specific law - which is why the conviction will be partial."*

As it can be seen from the evidence, the victim's consent was impossible since the victim had no discernment to do so, and also offered no resistance due to her drunkenness, making clear the condition of vulnerability provided for in 217-A, § 1, of the Brazilian Penal Code.

> Art. 217-A. Having sexual intercourse or practicing another libidinous act with a minor under 14 (fourteen) years of age:

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regime%20is%20Brazil's,than%20eight%20years%20in%20prison. Accessed on: July 15th, 2023

> § 1. The same penalty applies to those who practice the actions described in the caput with someone who, due to illness or mental deficiency, does not have the necessary discernment for the practice of the act, or who, for any other cause, cannot offer resistance.

It should be noted, however, the need to update the Brazilian legislation regarding crimes against sexual dignity, in order to be in accordance with the understanding of International Human Rights Courts and, in particular, of the Inter-American Court of Human Rights (IACHR), in order to shift the analysis of such crimes from the violence-resistance axis to the core of consent. In this sense:

> "Since at least 2001, international bodies and courts have identified consent as a central element of the crime of rape. Thus, in 2001 the International Criminal Tribunal for the former Yugoslavia (ICTY), in Prosecutor v. Kunarac, Kovac and Vukovic, noted that there was no definition of the crime of rape under international humanitarian law and found that lack of consent was itself a constituent element of rape as a crime under international criminal law and that "force or threat of force provides clear evidence of lack of consent, but force is not a per se element of rape" (Case of J. v. Peru, para. 359, and Case of Women Victims of Sexual Torture in Atenco v. Mexico, para. 182. See also, art. 2 of the Convention of Belém do Pará, and International Criminal Tribunal for Rwanda, Prosecutor v. Jean-Paul Akayesu, judgment of September 2, 1998, case nº ICTR-96-4-T, para. 688) (Text originally in Spanish)[265]

[265] *"Desde al menos el año 2001, organismos y tribunales internacionales han identificado el consentimiento como un elemento central del delito de violación sexual. Así, en 2001 el Tribunal Penal Internacional para la ex Yugoslavia (ICTY), en el caso Fiscal c. Kunarac, Kovac y Vukovic, observó que no existía una definición del delito de violación en el derecho internacional humanitario y determinó que la*

> "In the case MC. Vs. Bulgaria259 in 2003, the European Court of Human Rights established key legal concepts regarding the issue of rape, which contributed significantly to the definition of rape in the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter "Istanbul Convention") that was adopted in 2011261. Indeed, in the case MC. Vs. Bulgaria, the European Court declared the international responsibility of the State for having closed a criminal investigation for a case of sexual violence against a minor, aged 14, by "finding no evidence of the use of force or physical resistance during the assault". The European Court reasoned that "the authorities failed to consider all the circumstances that could have inhibited physical resistance on the part of the victim in this case, considering the particular vulnerability of a minor in rape cases and the coercive environment created by the aggressor." It also determined that lack of consent should be the central aspect of the investigation and its conclusions, since "although in practice it may be difficult to prove lack of consent in the absence of 'direct' evidence of rape, such as traces of violence or direct witnesses, the authorities must explore all the facts and decide on the basis of an assessment of all the related circumstances" (Case M.C. v. Bulgaria, para. 181) (Text originally in Spanish)[266]

falta de consentimiento era por sí mismo un elemento constitutivo de la violación como delito en el derecho penal internacional y que "la fuerza o la amenaza de fuerza proporciona una prueba clara de la falta de consentimiento, pero la fuerza no es un elemento per se de la violación" (Caso J. vs. Perú, parágrafo. 359, e Caso Mujeres Víctimas de Tortura Sexual en Atenco vs. México, parágrafo. 182. Veja-se también, o art. 2 da Convencção de Belém do Pará, e Tribunal Penal Internacional para Ruanda, Fiscalía Vs. Jean-Paul Akayesu, sentença de 2 set.1998, caso nº ICTR-96-4-T, parágrafo. 688).

[266] *"En el caso MC. Vs. Bulgaria259, en 2003, el Tribunal Europeo de Derechos*

It is clear that the victim had robust evidence against the defendant, as she not only presented an expert medical report verifying sexual violence but also oral evidence, which was produced in court. The defendant, however, did not present any evidence capable of contradicting the amount of evidence that attests to the victim's state of vulnerability at the time of the fact.

Illustratively, in his statement, the defendant claims not to have noticed that the victim was unconscious or unable to give consent to the act. However, all the witnesses, except for the defendant's wife and father-in-law, testified in court that it was visibly evident that she was completely intoxicated. Furthermore, it should be emphasized that the witnesses presented by the victim were present during the incident, being with her in person until minutes before and after the violence occurred. In contrast, the defendant presented character witnesses who did not contribute any additional relevant information to the factual evidence.

Moreover, through the expert reports, the sexual violence veri-

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Humanos260 estableció conceptos jurídicos clave respecto al tema de la violación, los cuales contribuyeron de forma significativa para la definición de violación en el Convenio del Consejo de Europa sobre prevención y lucha contra la violencia contra las mujeres y la violencia doméstica (en adelante "Convenio de Estambul") que fue adoptado en el 2011261. En efecto, en el caso MC. Vs. Bulgaria, el Tribunal Europeo declaró la responsabilidad internacional del Estado al haber cerrado una investigación criminal por un caso de violencia sexual contra una menor de edad, de 14 años, al "no encontrar evidencias del uso de la fuerza o resistencia física durante la agresión". El Tribunal Europeo razonó que "las autoridades fallaron en considerar todas las circunstancias que pudieron haber inhibido la resistencia física por parte de la víctima en este caso, considerando la particular vulnerabilidad de una menor de edad en casos de violación y el ambiente de coerción creado por el agresor". Asimismo, determinó que la falta de consentimiento debería ser el aspecto central de la investigación y sus conclusiones, ya que "aunque en la práctica puede ser difícil probar la falta de consentimiento en ausencia de prueba "directa" de una violación, como trazos de violencia o testigos directos, las autoridades deben explorar todos los hechos y decidir en base a una evaluación de todas las circunstancias relacionadas" (Caso M.C. vs. Bulgária, parágrafo. 181)

fication report, and oral evidence, the existence of sexual intercourse associated with sexual violence was verified. In addition, there were several contradictions in the testimony of the defendant, who initially denied the fact and later reported it in great detail, albeit with contradictions.

Furthermore, according to the understanding of higher courts, in sexual crimes, given their occurrence in secrecy, the victim's testimony should be granted special probative value when it is coherent and consistent with the presented facts, as in the case of C.T.'s statement (Agravo Regimental no Agravo em Recurso Especial nº 1.594.455-SP) (2019/0294804-8).

Finally, the crime of rape committed against someone that cannot offer resistance is defined in art. 217-A of the Penal Code, which considers vulnerable: a) a person under 14 years of age; as well as b) one who, due to illness or mental disability, does not have the necessary discernment to perform the act; or c) who, for any other cause, cannot offer resistance. Thus, it can be concluded that the provision covers any circumstance that removes the capacity of discernment in relation to the practice of sexual acts, including intoxication.

It is evident that assessing whether the intoxication was caused by the defendant or if they took advantage of a preexisting situation is irrelevant. It is absolutely inconsequential whether the victim became completely intoxicated on her own or not. Therefore, the fact that the victim drank voluntarily, exercising her free will, does not justify the defendant taking advantage of her condition and engaging in sexual relations without her consent.

Therefore, it is not the victim's resistance that has to be unequivocal; the consent to sexual acts must be unequivocal. There is a crime even if there is no vehement opposition to the sexual act.

The victim in question, when narrating the facts, stated that she had drunk a large quantity of alcoholic beverages and as a result, when she woke up in the morning, she did not remember many details of the previous night. The testimonies of the witnesses presented by the prosecution confirmed what was said by the victim, and there was no disagreement between them. According to the evidence, it is therefore clear that the victim was not in a position to consent, nor was she able to resist.

Thus, in view of the absence of evidence capable of refuting the state of vulnerability of the victim and the absence of discernment for the performance of the act or the impossibility of offering resistance, I uphold the conviction.

CONCLUSION

For these reasons, my opinion is to dismiss the defense appeal to maintain the conviction of L.C. for the crime of art. 217-A, §1, of the Penal Code, sentencing him to ten (10) years of imprisonment, initially in a closed regime.

J. JORGE MARQUES (PRESIDING JUDGE AND REVIEWER) - In agreement with the Rapporteur.

J. CLARISSA PORTINHO - In agreement with the Rapporteur.

J. JORGE MARQUES - President - Criminal Appeal nº xxxxxxx, District of Porto Alegre: "UNANIMOUSLY DISMISSED THE DEFENSE APPEAL, UPHOLDING THE CONVICTION OF THE DEFENDANT L.C. FOR THE CRIME OF ART. 217-A, §1º, OF THE PENAL CODE"

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THE ITINERARY OF THE CRIMINALIZATION OF ABORTION IN BRAZIL: A REWRITING FROM INTERSECTIONAL FEMINIST PERSPECTIVES

Gislene Aparecida dos Santos - Fabiana Cristina Severi - Gabriela Cortez Campos - Juliana Fontana Moyses - Patrícia Oliveira de Carvalho - Thainara da Silva José - Thais Becker Henriques Silveira

THE REWRITING

The rewriting of the court decision presented here was carried out within the framework of the Women's Human Rights Clinic of the University of Sao Paulo (*CDHM/USP*)[267], with the participation of the coordinating professors and students of the Postgraduate Law School of the same university, as a project of teaching, research and extension.

The decision chosen came from the research database[268] "Abortion in Brazil: Substantive and Procedural Flaws in the Criminalization of Women" (USP; COLUMBIA LAW SCHOOL, 2022), which, through the analysis of 167 court cases involving women being prosecuted for "self-induced abortion" in Brazil revealed the frequent use of gender stereotypes to the detriment of women in judicial decisions. The research also found that health professionals were often the ones reporting women for having abortions, and the evidence used against women was often weak, insufficient, and sometimes even obtained illegally.

[267] https://sites.usp.br/clinicadedireitoshumanosdasmulheres/

[268] The study was conducted by the Ribeirão Preto Law School and the School of Arts, Sciences and Humanities at the University of São Paulo, in collaboration with the Human Rights Institute at Columbia Law School and the Clooney Foundation For Justice.

On the basis of these findings, we selected one decision that was representative of the decision-making pattern observed in the study, in order to rewrite it using feminist methods and thus demonstrate other possible ways in which male and female judges might deal with self-induced abortion cases.

THE ORIGINAL CASE

The chosen case delas with a judgment issued on June 7, 2018, by the 15th Chamber of Criminal Law of the São Paulo Court of Justice, in a *Habeas Corpus* writ filed by the state Public Defender's Office. The Public Defender acted in favor of the arrestee charged with self-induced abortion (article 124 of the Brazilian Penal Code), arguing that there was no basis for such a complaint, since there was no evidence that the abortion had been self-managed. He also argued that the evidence contained in the case file was inadmissible, since the communication of the facts to the police was made by a health professional who had treated the woman, in violation of professional secrecy. The defense also argued that the conduct was atypical due to the unconstitutionality of the criminalization of self-induced abortion.

The *Habeas Corpus* was unanimously dismissed. The rapporteur judge argued that it was impossible to analyze the allegation of lack of evidence made in such an instrument since this issue should have been developed in the course of the proceedings. He also did not recognize the unconstitutionality of the criminalization of self-induced abortion, on the grounds that the Brazilian Federal Constitution supports the right to life. Finally, he stated that there was no illegality in the communication of the facts made by the health professional since there would have been no violation of professional secrecy in view of the doctor's

duty. According to the rapporteur judge, the professional would have been based on the oath of Hippocrates, to defend life, including the life of the fetus – to which he refers as "child" ".

METHODOLOGY

The main methodological strategy used was feminist practical reasoning or contextualization (FACIO, 2009). Within this methodology, we used the following techniques in the construction of the rewrite: 1. Criticism of the use of gender stereotypes harmful to women in the construction of the decision; 2. Not judging women who seek justice for the choices they make, choices that may at times diverge from what the justice system actors involved in the case would have chosen; 3. The need to analyze the case while considering the broader context of inequalities affecting women and the particularities of the case itself; 4. The use of an intersectional approach concerning the category of women or women in Brazil, given that an unequal and multiracial society such as the Brazilian one is formed and traversed by multiple oppressions, in order to complexify the analysis of abortion, considering the socioeconomic, cultural, heteronormative, cisnormative and racial context in which women are involved; 5. The use of research and statistics that examine the structural impacts of abortion illegality on women; 6. The adoption of an interdisciplinary perspective, focusing not only on the paradigmatic theories of law, but also in dialogue with other fields of knowledge, such as statistics, and sociology, among others.

The choice to structure the rewrite in the form of a dissenting opinion was due to the possibility of establishing a direct dialogue between this new text and the rapporteur judge of the original decision, which allowed us to name and make clearer the social tensions

present in our base text, as well as the patriarchal, racist and capitalist interests that were also perceptible there.

REWRITING

DISSENTING OPINION

This is a Writ of *Habeas Corpus* filed by the Public Defender's Office of the State of São Paulo, motivated by the fact that the patient R. P. A. is undergoing unlawful restraint, as there is no cause to support the complaint of the alleged crime of self-induced abortion. The Public Defender's Office argues for the conduct's atypicality due to the unconstitutionality of Article 124 of the Penal Code, since this provision violates human dignity and, consequently, the woman's freedom of choice. Furthermore, it asserts the lack of cause for the criminal action, considering the breach of professional medical confidentiality and the absence of criminal materiality, as it has not been demonstrated in the records that the abortion was induced.

The Rapporteur Judge denied the writ on the grounds that the defense theses require an in-depth examination of the evidence, a task that goes beyond the limits of cognition of the constitutional remedy. He argues that the crime of abortion is provided for in the Brazilian Penal Code, under the heading "crimes against life" indicating the prevalence of this before freedom. Thus, according to the Judge, there is no need to speak of unconstitutionality. Finally, he argues that the summary dismissal of the prosecution for lack of cause is possible only if the innocence of the accused or the atypicality of the conduct is very clear and evident in the record, which, in his opinion, is not the case.

Having reviewed the facts, and with all due respect, I disagree, for the reasons set out below:

i. The non-criminal nature of the act and the constitutional control

The first request put forward in this Habeas Corpus concerns the *diffuse control of constitutionality* (judicial review), to recognize the non-reception of the criminalization of abortion by the Federal Constitution. Despite the opposing argument put forth by the distinguished Rapporteur, I respectfully present a dissenting opinion, finding merit in the granting of this request. Let's examine.

This is a case of collision of fundamental rights, and it is up to the Judiciary to carry out the weighting between them. In his opinion, the Rapporteur identifies that the fundamental rights in collision are the right to self-determination, on the part of the pregnant woman, and the right to life, on the part of the unborn child. The Rapporteur responds to this collision by stating that life is a legal interest of insuperable value, even in the case of an unborn child, and that, consequently, the right to self-determination of the pregnant woman does not include the right to abortion.

I have a different understanding of the collision being discussed. First and foremost, I believe in the constitutional principle of equality between men and women (as stated in Article 5, Section 1 of the Federal Constitution). With this in mind, I approach this case with a gender perspective. This means interpreting the law in a way that goes beyond just formal equality and instead aims for true material equality and the full realization of the constitutional provision.

From the outset, I would like to emphasize the appropriateness of this type of legal interpretation. In legal science, the need to interpret and give meaning to legal norms is widely recognized. The literature refers to various hermeneutical methods, such as grammatical, logical, systematic, sociological, historical, evolutionary, teleological and subjective interpretations (FERRAZ JR, 2023). Federal Law No. 11,340/2006 introduced another method of legal interpre-

tation, known as the gender perspective, with the explicit purpose of attributing to legal texts a meaning that promotes substantive equality among individuals. Numerous feminist legal studies support the use of this perspective.

In this particular case, I draw on the insights of the legal scholar Alda Facio (2009). Applying these considerations to specific legal cases, the author's words can be understood as proposing that the feminist interpreter analyze the legal phenomenon with the aim of understanding i) the representations of women and men present in the proceedings, ii) the stereotypes invoked, iii) the perspectives and frameworks about men and women adopted, and iv) the relationship between these perspectives and frameworks within the proceedings (which perspectives and frameworks about men and women are adopted and how they interact). According to Alda Facio, legal interpretation grounded in a feminist perspective is founded on the definition of "discrimination against women" as provided by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which states that it encompasses "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women (...) of human rights (BRASIL, 2002).

The author emphasizes that this definition refers to any act or omission that has "as its object or result" the non-respect of women's human rights. The implication of this definition is that situations of discrimination suffered by women may not necessarily be intentional, but exist as long as an act or omission results in the violation of women's rights. This means that a law or other legal instrument may be discriminatory, and it is then up to the competent authorities to correct the error of the norm - in our case, to declare it unconstitutional.

This is the case with the criminalization of abortion, as it results in a violation of women's rights to autonomy, self-determination, and human dignity. By prohibiting women from making reproductive choices, women are reduced to mere instruments and forced into pregnancy and motherhood against their will. These are not negligible or ineffective circumstances: on the contrary, pregnancy causes a series of changes and restrictions in the body and health of the pregnant woman, and motherhood implies significant life changes. The lives of caregivers, especially mothers, become focused on ensuring not only survival, but the well-being, nurturing, safety, education, and many other elements related to another person. This is an activity and responsibility that places immense and drastic emotional, financial, time, and commitment demands on those who assume the role of caregiver. So one of the problems is forcing such a life change and responsibility on someone who does not want it.

It is in this same sense the argument of Justice of the Brazilian Federal Supreme Court Luís Roberto Barroso, in *Habeas Corpus* No. 124.306/RJ, which recognized the non-reception of the criminalization of abortion:

> Criminalization, first and foremost, violates women's autonomy, which constitutes the core of individual freedom protected by the principle of human dignity (Brazilian Constitution of 1988, Article 1, III). [...]. **How can the State - represented by a police officer, a prosecutor or a judge - impose on a woman, in the first weeks of pregnancy, the obligation to carry it to term, as if she were a uterus at the service of society, rather than an autonomous individual with the full capacity to exist, think and live it own life?** (BRASIL, 2017, emphasis added).

The criminalization of abortion has a disproportionate impact on women compared to men, as only women are forced to continue an unwanted pregnancy and take on the responsibilities that follow. It is important to approach this proposition from what Martha Minow (1990) calls the "dilemma of difference": when analyzing situations of inequality, it is important to avoid essentializing *social* inequalities, as if they were *natural* consequences of the *differences* between people. In this particular context, it's crucial to understand that inequality isn't solely a result of biological distinctions. The criminalization of abortion has a disproportionate impact on women, not merely due to their reproductive capabilities, but because of how the societal framework in Brazil interprets, assigns significance to, and reacts to this biological aspect. To clarify, it's not solely a woman's ability to carry a pregnancy that leads to their disproportionate suffering from the criminalization of abortion. Rather, it's the influence of the patriarchal and oppressive societal structure that forces them to bear the full weight of the consequences stemming from unwanted pregnancy.

Besides the previously mentioned infringement on their independence, various other ramifications are widely acknowledged. Every year, a significant proportion of newborns (6.5% of children born in 2022) are registered without their father's name. According to *IPEA* (The Brazilian Institute for Applied Economic Research) (2011), women spend twice as much time doing household chores compared to men, even if they work outside their homes. Additionally, families headed by women, particularly Black women-led households, face increased economic vulnerability within Brazilian society. These findings highlight that women bear a disproportionate share of responsibilities that come with having children and often face more complicated economic situations.

All of this occurs within a context of oppression against women. Brazilian feminist sociologist Heleieth Saffioti (1987) spoke decades ago about the "capitalism-patriarchy-racism" interlacement that gives rise to the social structures of domination and subordination present in Brazilian society. Within this framework, the criminalization of abortion emerges as a legal element that exacerbates violations of the rights of all women, and once again, the most adversely affected are Black and impoverished women.

Article 5 of CEDAW expressly provides for the elimination of stereotypes based on social gender roles. In this way, I think of oppressions and stereotypes as the various specificities of race, class, and sexuality that make up a collectively constructed subjectivity and reinforce different social positions for each woman. The intersectional perspective indicates that depending on the interaction of different systems of oppression, the symbologies and social functions expected of women change considerably. Therefore, in a society such as Brazil, which is racially and culturally diverse, a discussion on the constitutionality of the criminalization of abortion that considers such intersections is necessary.

Statistical data regarding the demographic of women who undergo abortions reveals that abortion is common among Brazilian women. Within the 2,002 literate women aged 18 to 39 who were surveyed in the *PNA* (National Survey on Abortion) 2016 study, 13% (251) reported having undergone at least one abortion. Nonetheless, despite its prevalence, only some suffer the consequences of criminalization in practice. This is evident from research highlighting that women who suffer fatal outcomes due to abortion tend to fall within certain demographics: aged 20 to 34, unmarried (68%), and of Black ethnicity (70.5%), and often possess relatively limited education, with most having fewer than 7 years of schooling (MARTINS et al.,

2017). In this context, a number of national studies underscore the heightened vulnerability of women who are Black, unmarried, mothers, with limited education and lower income levels (DINIZ; MEDEIROS; MADEIRO, 2017). Other research also reveals racial disparities in the treatment received in the post-abortion period, as black women report having received discriminatory treatment and having greater fear of mistreatment by health professionals and greater transportation difficulties. They also report having realized the abortion at a later stage of pregnancy (GOES *et al*., 2020).

Therefore, the criminalization of abortion imposes a disproportionate burden on women who are already exposed to other situations of social vulnerability, thereby compromising their right to health and life. Moreover, as has also been demonstrated, in the case of self-induced abortion, the protection afforded by the article is not to the life of the fetus, but rather to a particular image of womanhood that conforms to a particular family model. Parts of the judgment of the honorable rapporteur judge which I am currently opposing, help us to understand the formation of such stereotypes against women as a result of the criminalization of abortion:

> The question arises: which of all goods has an inestimable value? Obviously, it is life, followed by liberty, as is expressly stated in the opening clause of Article 5 of the Federal Constitution, which reads (...). This means that women cannot be granted the right to act against it, in other words, against life, even when the child is in the process of formation. Life already exists! Therefore, those who act against it commit a crime (BRASIL, 2018).

It is clear that when the rapporteur judge speaks of the supreme value of life and liberty, he is not referring to the woman in this case,

or even to the fetus, but to the protection of the social function of women as mothers. So much so that the protection is not of life, but of forced motherhood. The woman's life is devalued from the moment the rapporteur judge makes a concession and accepts that she "disposes of her own body", but as soon as she becomes pregnant, it is as if the woman can no longer decide over what seems to no longer belong to her. What is being defended, then, is not life or freedom, but the possession of the woman's body as a necessary element for the compulsory fulfillment of the social function of motherhood.

In another passage of the judgment, I perceive the humanization of the fetus, again through linguistic artifices in the use of words that denote life, innocence, and intimacy with the woman (as a child), at the expense of the dehumanization of the woman who denies motherhood. The decision shows how contradictory and fragile is the defense of the illegality of abortion with the argument of the defense of life, because the relationship that is perceived is that this life seems to be directly conditioned to a certain moment of the formation of the fetus or to certain weeks of gestation.

Another way in which it is important to consider the impact of criminalizing abortion is that the patriarchal social structure constructs violent relationships between men and women. It is not implausible to think that many unwanted pregnancies result from violent relationships, which adds another layer to the disproportionate burden of *forcing* women to continue a pregnancy. Even if it is assumed that in the case of a pregnancy resulting from rape, the woman can legally obtain an abortion, the criminalization and blaming attitudes described above prevent the full exercise of this right, even in the cases permitted by law[269].

[269] According to Beatriz Galli (2020): "However, even in relation to these three situations provided by law, women's access to legal abortion is still precarious. Research on the subject has shown that referral services are at different stages of

Finally, I reinforce that decriminalizing a practice does not mean honoring or encouraging it; it only means recognizing the inapplicability of criminal law to that conduct. It is necessary to consider that Brazilian Criminal Law is governed by the principle of minimum intervention. In this regard, Alessandro Baratta (2003) proposes a series of requirements to define whether a practice should be dealt with within or outside criminal law, such as: (i) verifying that criminal intervention will have some useful effect on the violation of human rights, (ii) verifying that there are no other non-criminal means and ways to address the violation of rights, (iii) verifying that the punishment envisaged considers the effects and social costs on the offender.

In this case, I believe that the criminalization of abortion does not comply with these principles because, on the one hand, there are non-criminal ways of dealing with this behavior, as can be seen in the various countries where it is treated as a public health issue and is not penalized. On the other hand, and related to this, the application of penalties to abortion does not have the power to discourage or prevent the behavior (in fact, countries where abortion is decriminalized have lower abortion rates), but has the consequence of driving poor women, especially black women, into clandestinity, who then perform unsafe abortions and often face the fate of prison or death.

Similarly, in *HC* No. 124.306/RJ, in which Justice Marco Aurélio was the rapporteur judge, Justice Barroso considered that

implementation. According to the data, the procedure is not carried out due to the systematic refusal of healthcare professionals who doubt the authenticity of the victims' accounts" (GALLI, 2020, p. 2). The author is citing the research by Débora Diniz, Vanessa Canabarro Dias, Miryam Mastrella, and Alberto Pereira Madeira, which states "despite some specific differences between the services [analyzed by them], it can be said that almost all operate under a constant regime of suspicion towards women's narratives of rape. This regime is expressed through an ethos of exception to criminal law and the fear that professionals have of being deceived. The woman's word, in this sense, is placed under suspicion and is not sufficient for access to abortion services" (DINIZ et al, 2014, p. 297).

the criminalization of abortion has the direct effect of increasing the number of health complications and deaths resulting from the practice of unsafe abortion, being an ineffective measure in terms of protecting the life of the fetus.

Therefore, it is necessary to recognize the unconstitutionality of the criminalization of abortion, as it leads to disproportionate negative consequences for women while failing to effectively protect the right to life of the fetus. It should be emphasized that, contrary to what the distinguished prosecutor argues, there is no obstacle to such recognition in this Chamber. This is because, in my view, there is no violation of the *cláusula de reserva de plenário* (full bench requirement) or of *Súmula Vinculante*[270] No. 10. Indeed, it is well established that the full bench reservation clause is not violated when the decision of the partial bench is based on the precedents of the Federal Supreme Court. In this regard:

> The precedent of this Court allows for an exception to the full court bench requirement when the lower court declares the unconstitutionality of a norm based on the precedent of the Supreme Federal Court itself. (BRASIL, 2014)

This is what happens in the present case. The current ruling took into account the outcome of *HC* No. 124.306/RJ, in which the Supreme Court explicitly declared the criminalization of abortion in the first trimester unconstitutional. This was considered incompatible with women's sexual and reproductive rights, women's autonomy, the physical and psychological integrity of pregnant persons, and the equality of men and women.

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[270] TN: In Brazil, a "Súmula Vinculante" is a legal concept that aims to provide more predictability and consistency to judicial decisions. It is a rule or principle established by the Supreme Federal Court (Supremo Tribunal Federal, or STF) that must be followed by all lower courts and administrative authorities within the country.

I also emphasize that rejecting the recognition of unconstitutionality in a specific case based on formal aspects is to allow the perpetuation of an unconstitutional situation and to condone the repeated violation of women's human rights, clearly disregarding the principles of the Rule of Law.

The precedent of the higher courts has allowed the possibility of granting habeas corpus ex officio even in cases where the formal requirement is not met. The reasoning is that the immediate unlawful coercion makes it possible to overcome the formal aspect. The examples are manifold: Interlocutory Appeal in Habeas Corpus No. 176.741 (BRASIL, 2020); Habeas Corpus No. 127.911 (BRASIL, 2017); Habeas Corpus No. 109.393 (BRASIL, 2012). The logic applied here is the same: even if one can speak of a possible obstacle for this Chamber to recognize the unconstitutionality of the norm, this aspect must be overcome in favor of the manifest illegality to which the arrestee is subjected.

I, therefore, recognize the unconstitutionality of Article 124 of the Penal Code and, consequently, that the alleged act committed by the arrestee is not unlawful.

ii. Conventionality control

It is also necessary to assess the compatibility of the criminal statute, specifically Article 124 of the Penal Code, with the international human rights treaties ratified by the Brazilian state, conducting a review of conventionality.

Human rights treaties can have the nature of a constitutional amendment when approved according to the procedure provided for in Article 5, §3 of the Federal Constitution or supra-legal status[271]

[271] TN: Supralegal norms are international treaties that have been ratified by Brazil and address various human rights issues. Once ratified, these norms are integrated into the Brazilian legal system and their hierarchy places them below constitutional norms but above infraconstitutional norms.

when ratified by Brazil and prior to Constitutional Amendment No. 45/2004 and/or not subject to required formalities. This understanding was established by the Supreme Federal Court in the judgment of RE No. 466,343/SP (BRASIL, 2008).

This means that international human rights treaties have a supra-legal nature, and there is no exclusive jurisdiction of the Supreme Court in the control of conventionality, which is different from constitutional review. The control of conventionality must be exercised by the entire Judiciary, in order to ensure that the effects of conventions and international treaties are not mitigated or undermined by the application of laws contrary to their purpose.

It is important to note that Brazil is a signatory to important human rights treaties that protect the human rights of women. According to Article 5, paragraph 2, of the Brazilian Federal Constitution, the rights and guarantees established in the constitutional text do not exclude others deriving from the principles adopted by it or from treaties to which Brazil is a party. Therefore, in order to analyze the specific case, we must take into account the rights of women protected by international norms.

Established in 1981, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides for the adoption of measures to ensure equal access to medical services, including those related to family planning, pregnancy, childbirth, and the period following it. Complementing this convention, General Recommendation No. 19 was adopted in 1992, which provided that States should ensure respect for women's sexual and reproductive rights and prevent women from being forced into unsafe medical procedures, such as illegal abortion, due to a lack of appropriate fertility control services.

The Vienna World Conference on Human Rights (UN, 1993) affirmed human rights as inalienable and indivisible. Concerning

women's rights, it recognized violence against girls and women as a violation of these rights and called on member states to adopt a gender perspective in their policies to eliminate violence and discrimination against women. The Conference also explicitly stated that forced pregnancy is incompatible with human dignity and the rights enshrined therein

In the same vein, the International Conference on Population and Development (UN, 1994) and the World Conference on Women (UN, 1995) stated that internationally recognized sexual and reproductive rights include the right to control and decide on matters related to sexuality and reproduction, free from coercion, discrimination or violence. They include respect for the highest standard of reproductive health, understood as "a state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes" (UN, 1994).

In 1999, General Recommendation No. 24 of the CEDAW Committee was approved, which stipulates that Member States should refrain from "obstructing action taken by women in pursuit of their health goals" (CEDAW, 1999). It was emphasized that many states still penalize medical procedures that are exclusively necessary for women, such as abortion. Another important aspect of the Recommendation was the recognition that the violation of professional secrecy negatively affects women's seeking of intimate medical care, for contraception, incomplete abortions, or in cases where they have suffered physical and sexual violence.

The criminalization of abortion violates the treaties and conventions mentioned earlier as it infringes upon women's sexual and reproductive rights, their bodily autonomy, and their freedom of choice. Furthermore, it violates their health and physical integrity

by denying them the right to safe abortion, leading them to undergo risky and dangerous procedures.

The General Recommendation No. 35 of the CEDAW Committee in 2017 explicitly stated that violations of women's sexual and reproductive rights, such as forced pregnancy, the criminalization of abortion, denial or delay of access to safe abortion and post-abortion care, are forms of gender-based violence that, depending on the circumstances, can constitute cruel, inhuman, or degrading treatment. In order to protect women's rights, the recommendation included the rejection of legislative proposals that discriminate against women and criminalize abortion.

In 2016, the United Nations Committee on Economic, Social, and Cultural Rights recommended the decriminalization of abortion through its General Comment No. 22. The General Comment No. 22 asserted that the prohibition of abortion is a violation of life and/or safety, often leading to maternal mortality. The General Comment No. 22 pointed out that States should not limit or deny access to sexual and reproductive health and advocated the need for reforming laws that criminalize abortion and other women's health services, with broad access to information about available procedures. The General Comment No. 20 of the United Nations Committee on the Rights of the Child also made the same observation.

International documents not only provide broad protection for women's sexual and reproductive rights, but also recommend the decriminalization of abortion to ensure effective protection. While it may be argued that these treaties also protect life, it is established internationally that the right to abortion does not constitute a violation of the right to life. In the case of *Baby Boy v. United States*, the Inter-American Commission on Human Rights (OAS, 1981) concluded that although life is protected from conception,

this guarantee is not absolute and must align with the protection of the pregnant woman's human rights. When rights are in conflict, the sexual and reproductive rights of the woman should have priority over the unborn, who only have a potential expectation of rights. As a result, it was concluded that the abortion procedure does not violate the American Convention.

The Court reaffirmed this understanding more recently in the case of *Artavia Murillo v. Costa Rica* (OAS, 2012). When asked about the extent of protection of the right to life, the Court stated that protecting a woman also protects the unborn, thus the right to potential life cannot be considered absolute. Considering the norm as absolute has a disproportionate impact on women and violates equality and other fundamental rights.

Therefore, from every angle that one may analyze, Article 124 of the Brazilian Penal Code contradicts the human rights of women established in the aforementioned international treaties and conventions. Thus, I consider the conduct attributed to the arrestee to be lawful due to the non-conventionality of the penal norm.

iii. Lack of Cause - Illegal evidence obtained through violation of medical confidentiality

In addition to the aforementioned considerations, which lead to the recognition of the penal norm criminalizing abortion as unconstitutional and not in line with international conventions, I will address the other topics raised by the *Habeas Corpus* in a secondary manner.

The petitioner argues that there is no cause for filing the criminal action, since the investigation stems from a police report drawn up based on information provided by municipal guards, who were informed about the abortion by the doctor on duty responsible for the patient's care, calling them to the Hospital. For this reason, the

complaint and the evidence listed in the process would have resulted from the unlawful breach of medical confidentiality, resulting in the nullity of subsequent procedural acts. In the reasoning, it highlights that it is a subjective public right with autonomous constitutional dignity, citing provisions of material and procedural law related to the defense of intimacy, health, reproductive freedom, and ethical professional performance. Differently from how the Rapporteur's opinion, I understand that reason supports the petitioner, and it is imperative to recognize the illegality of the evidence, in view of the offense to professional secrecy.

The 1988 Federal Constitution recognizes the right to privacy and private life as inviolable (art. 5, X), and health as a social right (art. 6) that belongs to everyone and is the duty of the State (art. 196), provided through public policies and services that "integrate a regionalized and hierarchical network and constitute a single system", organized in a decentralized manner, with comprehensive care and community participation (art. 198). It is worth noting that the right to health, from a constitutional perspective, goes beyond the "mere" access to health care itself and requires that it be provided in a respectful manner, taking into account the specificities of each person as well as the social contexts in which they are placed.

In line with this understanding, the public health expert Ruben Mattos (2009) highlights as one of the meanings of the *SUS* integrality guideline, defined in the Constitution, the integral view of health professionals in relation to the person served, without reducing it to their biological system. It is understood, therefore, that health care and prevention involve other aspects that constitute human subjectivity, such as class, race, gender, territory, age, and disability, if any. Furthermore, the author highlights the connection between comprehensiveness and the reorganization of certain "special policies" within

the realm of public health. This second sense is particularly attributed to the articulation made by the Brazilian feminist movement during the country's process of democratization, aiming to expand women's health policies (and consequently, the social roles assigned to these citizens) beyond the context of maternal and child care. Therefore, comprehensiveness is grounded in a rejection of objectifying the individuals seeking healthcare services, which entails viewing women's health from their life perspective, not limiting it to motherhood (MATTOS, 2009, p. 62).

I can thus see that the constitutional text, in recognizing integrality as a guideline of the *SUS* in the terms mentioned, demands that the right to health be applied from a broad and intersectional perspective, which, in the case of women, requires an approach that goes beyond defending the "reproductive role", recognizing them as holders of other rights that also require an expanded health action for their implementation, such as medical care in cases where there is a health problem resulting from an abortion. Comprehensive care in this situation does not only contemplate the recovery of their well-being, but also the certainty that this care will not result in the initiation of criminal prosecution, but, on the contrary, the activation of a protection network that may, depending on the circumstances, refer the person to social assistance (SUAS[272]).

I emphasize that without the guarantee of confidentiality of the interaction between the patient and the health care team, the exchange of facts relevant to the necessary treatment is vulnerable, which reverses the purpose of the existence of the health service. Professional secrecy in the health sector is the basis of trust that governs the relationship between the professional and the patient, protecting the patient from the disclosure of events in their private life that could lead to judgments

[272] TN. *SUAS* stand for the Brazilian "Unified Social Assistance System"

that they wish to avoid. For this reason, confidentiality, especially in the professional context of health care, must be understood as an indispensable condition for the patient to seek and continue treatment, as well as to exercise their autonomy to position themselves and make related therapeutic decisions (VILLAS-BÔAS, 2015, p. 515).

Accordingly, the Code of Medical Ethics (CFM Resolution No. 2,217/2018) prohibits physicians from "disclosing facts of which they are aware in the exercise of their profession, except for a justified reason, legal duty, or written consent of the patient", and the prohibition remains "when testifying as a witness. In this case, the doctor shall appear before the authority and declare their impediment". Also, "in the investigation of suspected crimes, the physician is prevented from revealing secrets that could expose the patient to criminal prosecution" (art. 73, emphasis added). This was the decision of the Regional Council of Medicine of the State of São Paulo, in its response to Consultation No. 24.292/2000, when it stated, as reported by the petitioner in habeas corpus, that "in the case of an abortion, whether natural or induced, the doctor cannot communicate the fact to the police authority, or even to the courts, facing a typical situation of medical confidentiality" (emphasis added).

Similarly, criminal regulations classify as a crime the act of "revealing someone's secret, of which they have knowledge due to their function, ministry, office, or profession, without justified cause, and whose disclosure may cause harm to others" (Art. 154, Penal Code) and prohibit the testimony in court of "persons who, due to their function, ministry, office, or profession, must keep a secret, unless, released by the interested party, they wish to testify" (Art. 207, Code of Criminal Procedure). Corresponding provisions can be found in Article 81 of the Codes of Ethics for Nursing Professionals and Article 9 of the Code of Ethics for Psychologists.

These constitutional provisions and guidelines, unlike what the Rapporteur states in his opinion, point to the commitment of the health professional to guarantee an upright and safe care to patients, committed, above all, to their health, well-being, comfort, and dignity (and not to their criminal prosecution). It is true that the success of the care stems, among other elements, from the sharing of sometimes confidential and private information, which only happens if there is a relationship of trust established between health professional and patient. Thus, I recognize the unlawfulness of the evidence because it arises from the illegal breach of medical confidentiality, which entails the nullity of the procedure and the termination of the criminal action.

iv. Lack of criminal evidence

The petitioner further argues the lack of evidentiary basis as a ground for the termination of the criminal action due to lack of cause. Going beyond the allegation of the illicit nature of the evidentiary documents attached to the case, as discussed above, the petitioner draws attention to the absence of evidence demonstrating that the abortion was induced. This is because both the medical report and the anatomopathological examination only confirm the occurrence of an abortion, which could have been spontaneous or induced.

First and foremost, I emphasize the appropriateness of the petitioner's request, which is based on Article 648, I, of the Code of Criminal Procedure and in no way undermines the nature of *habeas corpus* review. The petitioner does not seek to engage in an extensive examination of evidence, but merely to assess the presence of essential evidentiary support for the criminal action. Lopes Jr. (2014, p. 381) asserts that the analysis of unlawfulness cannot be disregarded in a habeas corpus petition under the pretext of the impossibility of examining evidence, which, according to the author, would constitute a denial of justice.

Based on an analysis of the medical report in the case file, I note that the physician included a handwritten statement indicating that the patient was under observation, that she reported being three months pregnant, had used Cytotec, and had expelled a fetus without vital signs.

The other piece of evidence in the case is the anatomopathology report. An evaluation of this document reveals that it contains a description of the material submitted for examination, namely the placenta and the fetus. This description includes details about the size, appearance, constituent characteristics of the material, the sex of the fetus, and an analysis of the estimated age. Notably absent from the document are any observations regarding irregularities in the material examined or any elements suggesting that the material resulted from an induced abortion.

Given these elements, I now proceed to analyze whether there is sufficient evidence of the existence of the crime of self-induced abortion to support the continuation of the criminal proceedings. In the present case, we are dealing with technical evidence — the anatomopathological examination - which does not point to the commission of the crime, since there is no conclusion as to whether the abortion was induced or spontaneous. I, therefore, conclude that the medical report in question is inconclusive with regard to induced abortion and only conclusive with regard to the existence of a pregnancy.

Regarding the medical report, it contains a statement from the doctor that the defendant had admitted to using an abortion-inducing medication, a statement that is supported by the defendant's confession obtained at the police station. However, according to Article 155 of the Brazilian Code of Criminal Procedure, it is forbidden to base the criminal case solely on elements gathered during the investigation.

I note that in the present case, there is no evidence of the action attributed to the defendant, nor can we speak of causation between action and result. The existence of a fetus expelled without vital signs does not prove the occurrence of an induced abortion. If it were possible to conclude that an induced abortion had occurred, such a circumstance would be expressly stated by the doctors who signed the report.

It is important to mention precedent in this same sense in Criminal Action No. 052.08.4907-0, of the 1st Jury Court of São Paulo (BRASIL, 2011), in which the dismissal of the criminal prosecution for induced abortion due to the lack of technical evidence capable of proving the crime. See the excerpt below:

> In the present case, however, there is no evidence to support this claim, since no medical examination was performed, including the woman and, if possible, the product of conception. There is no indisputable proof of pregnancy, of the existence of fetal life, and even less of its death. There are only forensic reports on the objects confiscated from the defendant's clinic, starting from page 15; this technical evidence does not prove the actual practice of intentional abortion of the three women mentioned in the accusations against the defendant.
>
> And it should be noted that under the terms of the precedent adopted by this Court, the confession of pregnant women and the testimonies of their relatives cannot replace the technical evidence, since only this could instill in the court the certainty of the satisfaction of all the elements of the type for the configuration of the offense, even because the crime is one that leaves traces.
>
> Being imperative the dismissal of the criminal prosecution. Thus, it is unnecessary to analyze the other defense arguments, in particular as regards the allegation of unlawfulness of the evidence (BRASIL, 2018).

Therefore, in light of the aforementioned, the petitioner's claim is well-founded, and the request for the dismissal of the criminal action due to lack of sufficient cause is valid.

For these reasons, and respectfully disagreeing with the Honorable Rapporteur, I GRANT the writ of *habeas corpus* and order the dismissal of the criminal case due to the lack of wrongfulness and cause.

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"WHICH IS THE GREATER GOOD TO BE PROTECTED, THE TEMPORARY SUFFERING OF THE PREGNANT WOMAN OR THE LIFE OF THE UNBORN CHILD?" ABORTION DUE TO SEVERE FETAL MALFORMATION

Fabiane Simioni - Paula Pinhal de Carlos -Vanessa Ramos da Silva

INTRODUCTION

The rewriting was developed within the scope of the Research Groups "Effectiveness of Rights and the Judiciary," linked to the postgraduate program in Law at La Salle University (Canoas/RS), and "INDERI" (Intersectionalities and Decoloniality in International Relations), linked to the International Relations course at the Federal University of Rio Grande (Santa Vitória do Palmar/RS). Undergraduate and postgraduate students from both educational institutions, as well as from the University of Vale do Rio dos Sinos (São Leopoldo/RS), participated in the project during the year 2022.

The project from which this rewriting resulted had as its main methodological focus the promotion of dialogue on reproductive justice in judicial decisions. We chose reproductive justice as a guide in this process because the broad concept of social justice does not provide us with sufficient tools for more complex analysis, in which the intersections between race, sex, sexuality, class, and geopolitics are intertwined (CURIEL, 2020), they are consubstantial (LUGONES, 2014), or intersected (COLLINS, 2019; COLLINS; BILGE, 2021). Reproductive justice stems from the epistemic community that advocates for expanding forms of recognizing the right to health, equality, and maternal safety, beyond its individual dimension, addressing

related structural, social, and economic aspects. Activists and intellectuals originating from transnational movements of Black women drove the idea of reproductive justice, even before the widespread use of this term in academic research.

The term 'reproductive justice' was first introduced at the International Conference on Population and Development in Cairo (1994). The African-American academic and activist Loretta Ross (2017), one of the first interpreters of this concept, explains that the term emerged with the aim of bringing together the experiences of a group of black working-class women who fought for their rights, repeatedly ignored, including within the feminist movement, which prioritized the demands of white women. For the author, "Reproductive Justice is the complete physical, mental, spiritual, political, social and economic well-being of women and girls, based on the full achievement and protection of women's human rights" (ROSS, 2006, p. 14).

We begin with a feminist methodology whose primary scope is to generate situated and articulated reflexivity that makes a concerted effort to "take seriously" the experiences of injustice faced by women and feminized individuals in a plural and politically contextual sense. To this end, we engage in a reflection that requires understanding how different matrices of domination (COLLINS, 2019) are expressed in structures, ideologies, and interpersonal aspects. Ultimately, this understanding leads to the recognition of various forms of systematically organized violations of women's human rights, particularly within the justice system.

Another aspect that deserves to be explained, because it influenced the decision-making for the project, concerns the limits of our analysis. We share the impression that after the Action Against the Violation of a Constitutional Fundamental Right (*ADPF*) No. 54, judged by the Supreme Court on April 12, 2012, judgments would

tend to accommodate similar cases based on that important precedent. However, as evidenced by research conducted between 2018 and 2020 (SILVA, 2020), a surprising trend emerged: cases continued to find their way into the justice system, and the decisions, contrary to expectations, often opposed the rationale of the previous Supreme Court precedent. Women seeking to terminate pregnancies due to fetal malformations remained entangled by epistemic violence within judgments influenced by stereotypes, implying that the choice to not become a mother was neither essential nor obligatory.

The construction of the coercive nature of motherhood in these cases is the central aspect on which the agents of the legal system base their moral and religious assumptions in order to formulate legal and formal justifications for denying access to abortion procedures. Ignoring the voluntary aspect of motherhood is itself a violation of women's rights to human dignity, freedom, self-determination, health, and sexual and reproductive rights. No woman should be "condemned" to carry a pregnancy to term by nullifying her status as a rights-bearing individual, all in the name of upholding familist, racist, and nationalist ideals[273]. This specific form of sexual division of labor (productive x reproductive) imposes inequalities on women and feminized people that arise from culturally conventionalized notions of the feminine. In this sense, we are aware that racialized women disproportionately

[273] According to Anzaldúa (1987) and Mohanty (2020), family and motherhood are central aspects in nationalist discourses that defend the purity of the "race" and the hegemony of dominant groups. These discourses highlight the importance of maintaining family lineage or preserving the "purity" of the nation, often idealizing a certain type of motherhood. Similarly, they emphasize the need to control reproduction and family life in order to maintain the cultural and ethnic homogeneity of the country or national group. This connection between family, motherhood and nationalism engenders policies of exclusion of subalternized groups, such as women who do not want or cannot have children, families that do not fit traditional stereotypes (single-parent, female-headed, etc.) or ethnic groups that are considered "foreign" to the national framework.

experience the effects of the intersectionality of race, gender, social class, and sexuality when subjected to the constraints of an essentialist standard of motherhood and "womanhood"[274] imposed by justice agents, particularly within the Brazilian context[275]. However, in the context of this rewriting, we were unable to delve into the specific impacts of different matrices of domination in this case, primarily due to the limitations of information regarding the individuals involved in the decision under examination.

The process of rewriting the judicial decision required the deconstruction and reinterpretation of the original ruling. The goal was to develop and present an alternative response for the chosen real-life case, specifically, abortion due to fetal malformation. As a result, students, professors, and researchers were challenged to step into the roles of judges and draft alternative decisions, following the Protocol for Judging With a Gender Perspective set forth by the Brazilian National Council of Justice (BRASIL, 2021). The Protocol (2021) serves as a guide to ensure that judicial decisions uphold the right of all individuals to equality and non-discrimination. It aims to shape the exercise of the judicial function in such a way as to prevent the repetition of stereotypes and the perpetuation of differences, thereby creating a space for breaking away from cultures of discrimination and prejudice. This instrument proved to be a valuable tool in guiding

[274] We use the term "womanhood" in an attempt to contrast with the universality (patriarchal, white, Eurocentric and heteronormative) of the category "women". In this sense, womanhood presents itself as a complex and fluid category, shaped and influenced by different elements. We claim here the possibility of de-essentializing femininity and performing the feminine in different bodies, practices and social representations.

[275] xamples of this are the cases of Alyne da Silva Pimentel, Janaína Aparecida Quirino and the Acari Mothers Collective. In all of these cases, because they were black and marginalized women, the voluntary project of motherhood was denied by various social agents and institutions.

both the decision-making process and the subsequent rewriting. It's noteworthy that the Protocol itself (2021) is a product of the epistemic community that advocates for the intersectional approach within judicial practices in Brazil.

The decision chosen for rewriting brings together important elements to discuss two frequent problems in the Brazilian justice system:

1. The lack of national legislation that guarantees legal certainty for requests for abortion in cases of severe fetal malformation - i.e. that makes extra-uterine life impossible;

2. the absence of a gender perspective in the adjudication of cases involving women's human rights.

The decision subject to rewriting is a first-instance judgment rendered on November 13, 2017, in a district within the state of Rio Grande do Sul. The ruling stems from a request for judicial authorization for an abortion of a fetus diagnosed with OEIS complex, involving malformations in multiple organs.

The public prosecutor's office issued a favorable opinion for the abortion. However, the judge in charge of the case refused to grant the authorization, raising the question of "what is the greater good to be protected, the temporary suffering of a few days, weeks or months of the pregnant woman, or the life of the unborn child". In response to this question, the judge asserts that "the physical malformations in question may not regress and the child may die shortly after birth (who knows!), but this does not necessarily mean that the child about to be born does not have a right to life, even if it's only for a few seconds" (RIO GRANDE DO SUL, 2017).

These and other arguments led us to choose to rewrite this decision, precisely because it reiterates a series of stereotypes linked to women's human rights, since (i) the termination of pregnancy is

considered a violation of the right to life of the unborn child and, in this context, the life of the pregnant person, as well as her dignity and autonomy, are disregarded; (ii) the pregnant woman is understood as a person who has a reproductive role that overrides her value as an individual, so that motherhood is considered a compulsory duty; (iii) the arguments used to deny abortion, in this case, ignore the reproductive rights won by women's and feminist movements, especially the right to abortion in case of anencephaly, already decided by the STF in the judgment of *ADPF* No. 54 since 2012.

This work provides a concise context of the specific case, the entire content of the judgment subject to rewriting, a brief overview of the methods and case approach, and finally, our proposal for a legally guided decision influenced by the Protocol (BRASIL, 2021) and the feminist perspective of women's human rights.

We can highlight that one of the lessons learned from this inter-institutional project is that the collective work of students and researchers has allowed a sensitive look at the complexity of experiences in the recognition of women's human rights, especially those related to integrity, health and safety during pregnancy, especially in conditions of extreme vulnerability of physical and mental health. The result achieved is a gender-based rewriting that holds the potential to transcend the boundaries of merely fitting the case into a pre-established legal framework. By employing alternative tools, we have generated a result that genuinely takes into account issues surrounding the social construction of motherhood and related rights. The rewriting aimed to incorporate the feminist perspective and address the specific challenges faced by women and pregnant individuals, seeking to ensure a more comprehensive and effective protection of their rights.

CASE BACKGROUND

This is a plea for judicial consent for the termination of a pregnancy involving a fetus diagnosed with OEIS complex. The request was lodged in a Rio Grande do Sul district on November 10, 2017, on behalf of Paulo and Maria (fictitious names). The case, therefore, occurred after the action against the violation of a constitutional right (ADPF) No. 54, judged by the Federal Supreme Court on April 12, 2012, dealing with a similar situation.

At 20 weeks of pregnancy, Maria received the same diagnosis from two obstetrical ultrasounds: OEIS complex. According to the medical report, this "extremely severe obstetric case" would result in intrauterine demise (page 9 of the case file).

OEIS complex is a group of congenital malformations that includes spinal defects, omphalocele (failure of the umbilical cord to close, leaving the gastrointestinal tract exposed), imperforate anus, and bladder exstrophy (PEREIRA et al., 2018).

Following the confirmation of the diagnosis, Maria and her partner Paulo filed an authorization request with the jury court when Maria was at a gestational stage of 20 weeks and 4 days. They substantiated their plea with comprehensive examination results and a medical report from a reputable maternal and child health institution, endorsing the necessity for pregnancy termination.

The Public Prosecutor's Office expressed its opinion in favor of granting the authorization.

The judge in the case rejected the request on November 13, 2017.

The judgment subject to this rewriting, the complete text of which follows, is based on four arguments:

> the Brazilian Penal Code does not authorize abortion.
> the exceptions (hypotheses of legality exclusions) listed in the Penal Code for abortion do not encompass cases of fetal malformation.
> the request formulated in the initial application is legally impossible;
> this is eugenic abortion.

THE ENTIRE DECISION

Matter is under analysis.

Maria, identified in the case file, through her lawyer, requests a judicial authorization for termination of pregnancy, claiming that she is approximately 20 weeks pregnant with a fetus that "probably has an amniotic band syndrome or OEIS complex". In addition, the examination carried out indicates that "the anatomical alterations described in the examinations are of high intrauterine or postnatal lethality".

Documents are attached.

The case was initially filed at the Regional Court of the district.

Requests the granting of free legal aid, which has already been granted on page 29 of the case file.

The Public Prosecutor's Office stated its opinion for the transfer of jurisdiction from the Jury Court, as well as, on the merits, for the granting of the request, pp. 27/28.

The Court, following the prosecutor's opinion, rejected the jurisdiction, and the present case was reassigned to the 1st Chamber of the 2nd Jury Court of this district.

It's the background.

Decision.

On the Merits.

Under the Brazilian Penal Code, the matter of abortion is regulated in Title I, Crimes against the Person, more specifically in Chapter I of Crimes against Life and Art. 124 et seq. of the said Code.

According to art. 128, the cases in which the conduct is not considered unlawful are: I) when the abortion is performed by a doctor and there is no other way to save the life of the pregnant woman, and in this case the arbitrator, the one who evaluates the situation and verifies the necessity, is the doctor, and judicial authorization is not required. This is not required by the non-incrimination norm, according to Mirabete; and II) when the pregnancy results from rape.

Both forms require the consent of the pregnant woman or her legal representative.

The present case does not fit any of the cases provided in the legal norm as legal.

The requested pregnancy termination aims to eliminate the life of a developing child before birth, at the twentieth week of gestation, which is approximately 5 months into the pregnancy. This is intended to prevent a challenging gestational period or the birth of a child with compromised development.

To decide on this matter, it is necessary to assess which interests are intended to be protected through the act of abortion and which interests are affected by it. In this regard, the former Attorney General of the Republic, Cláudio Fonteles, expressed in an opinion submitted to the Supreme Federal Court, a portion of which I permit myself to quote: “Articles 124 and 126 of the Penal Code criminalize, the abortion induced by the pregnant woman or with her consent (124), and abortion induced by a third party (126). They are sufficient in their statement and are strictly stated as such”.

Article 128 of the Penal Code, as previously mentioned, defines cases of justifiable abortion. However, the claims presented in the pleading do not align with any of the situations outlined in Article 128 of the Penal Code. Cases distinct from those specified in Article 128 fall under both Articles 124 and 126 of the Penal Code, both of which are consistently classified as criminal offenses. Article 128 stands as an exceptional provision, allowing no room for analogical interpretation, and cannot be extended to encompass abortion.

Article 5 of the Federal Constitution stipulates: "All are equal before the law, without any distinction whatsoever, guaranteeing to Brazilians and foreign residents in the country the inviolability of the right to life." This is the foremost of fundamental rights. If there is a process of gestation, and in this case, there is, there exists intrauterine life. The eminent commentator aforementioned expressed the following when providing an opinion on a case of anencephaly: "In the case of anencephaly, there is the normal physical development of the fetus: the eyes, nose, ears, mouth, and hands are formed, enabling it to sense, as well as the arms, legs, feet, lungs, veins, flowing blood, and heart."

Article 2 of the Brazilian Civil Code states: "The legal personality of a person begins at birth with life, but the law safeguards the rights of the unborn from conception."

Article 41 of the American Convention on Human Rights expressly states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception". The Convention on the Rights of the Child acknowledges, in its first article, the inherent right to life possessed by every conceived human being. The preamble of this Convention is explicit: "The child, reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"

Both national and international legislation inherently encompass the concept that life exists from conception. Aurélio Buarque de Holanda defines "unborn" as the human being already conceived, whose birth is anticipated as a future and certain event.

The baby with malformations will likely be born and may live for a period of seconds, minutes, hours, days, or even months; however, it is impossible to definitively predict the future duration.

In his opinion of August 2004, Cláudio Fonteles expresses the following point of view: "The right to life cannot be measured by the time, regardless of its duration, of a visible survival. The right to life is timeless, not measured by the span of human existence. Is the temporal pain of the pregnant woman a sufficient justification to relativize the above understanding of the right to life? What is the greater good to be protected, the temporary suffering of a few days, weeks or months for the pregnant woman, or the life of the unborn child, which enjoys every normative protection, both from the perspective of national and international law? The expectation of a natural death in the near future does not justify its surgical intervention with the specific intention of provoking it".

Jérôme Lejeune, a distinguished French professor and an expert in Fundamental Genetics who discovered the genetics of Down syndrome, was asked if eugenic abortion wasn't for the good of the child. He replied that abortion solves the parents' problem, not the child's. Later, he mentioned that the parents who advocate for this do not want to have a sick child. (Lejeune, J. - The Right to be Born - [interview] Veja, 1991, Sept. 11).

The physical deformities in question may not regress, and the child may die shortly after birth (who knows!), but this does not necessarily mean that the child about to be born does not have a right to life, even if only for a few seconds.

The basis of the initial request for abortion authorization is that the mother, given the diagnosis of physical malformation of the fetus, deems it permissible to shorten the gestation period due to potential risks to the fetus and documented instances of risks to pregnant individuals in analogous situations, which have not been concretely substantiated in this particular case.

Considering that abortion is a deliberate human action that uses various means to achieve a specific result, namely the termination of a dependent life, i.e. the death of the fetus, and that the present case does not fall under any of the circumstances established by law as legal, it lacks legitimate justification, particularly under Article 128 of the Criminal Code. This article has a narrow interpretation and doesn't allow the application of analogy. Therefore, I conclude that the request is not possible due to the lack of legal support.

Nevertheless, I hereby DENY the request, as I consider it impossible, pursuant to art. 487, inc. I, of the Brazilian Code of Criminal Procedure (NCPC), applied subsidiarily in this case.

The costs are waived.

Notify the parties.

After the decision becomes (final and) unappealable, file it.

REWRITING METHODS AND APPROACHES

The primary goal of rewriting judgments is to apply one or more feminist methods and observe the extent to which the result is legally plausible. Therefore, it is crucial to describe or indicate exactly which method or methods are used in the rewriting process. One of the research hypotheses is the persistence and perpetuation of gender stereotypes in abortion litigation.

In the current case, it is possible to discern a perception of motherhood as a compulsory task, one that does not allow for choices by the pregnant individual, even when the medical team explicitly states that the fetus is not viable outside the womb. This merging of the feminine and the maternal serves as a significant mechanism of control over women (BIROLI, 2017) and can be observed in other decisions concerning abortion authorization (SILVA, 2020).

The notion that a woman's role is to endure "temporary suffering" to carry a pregnancy to term, even in the face of severe and diverse fetal malformations, reinforces the idea of sacrifice tied to motherhood. In this context, when women choose to have an abortion, they are asserting control over their reproductive capacity (GONZAGA; ARAS, 2017).

In response, gender stereotypes are used in decisions that, instead of recognizing women's reproductive autonomy, use hegemonic standards of motherhood as an argumentative strategy to deny abortion, leaving aside women's human rights (SILVA, 2020). Such a strategy, which justifies the control of bodies in the name of the sacredness of reproduction and motherhood, can be understood as a violation of women's human rights (BIROLI, 2014).

While analyzing the decision, we encountered specificities of the case that influenced the chosen approach for rewriting. Prior to the rewrite, we already recognized the necessity for a feminist and intersectional perspective, advocated not only by the Protocol (BRASIL, 2021), but also by other works (BARLETT; DOUGLAS; HUNTER; LUKER, 2014; MUNRO, 2021; FERREIRA; BRAGA, 2021). However, the central issue of the decision lies in the (non)recognition and (non)application of the right to abortion in cases of anencephaly and fetal malformations that render extrauterine life unviable, with the primary basis being the prioritization of fetal rights over those of the pregnant woman.

For this reason, despite the crucial need for an intersectional lens to achieve reproductive justice (beyond the individual and social dimensions of sexual and reproductive rights), we chose an approach focused on identifying violations of women's rights, as well as the applicability of the Protocol for Judging With a Gender Perspective (BRASIL, 2021). This option is justified insofar as the subject of the decision did not allow for a methodological approach that would deepen the impact of transversalized discrimination since this debate is not confronted by the chosen case. Therefore, we decided that the rewriting of the decision would be developed from a feminist approach centered on women's human rights.

In this context, our rewriting sought to propose a feminist legal interpretation that overcomes such stereotypes and that conforms to the Brazilian National Council of Justice's Protocol (BRASIL, 2021).

The Protocol was published on October 18, 2021, and was formulated by the Working Group established by Order No. 27 on February 2nd, 2021, by the Brazilian National Council of Justice (*CNJ*). The document aims to contribute to the implementation of national policies already established by *CNJ* Resolutions No. 254 and 255, which pertain to the Judiciary's efforts in Combating Violence Against Women and Promoting Female Participation in the Judiciary across state, federal, labor, military, and electoral jurisdictions.

For the elaboration of the publication, the "Protocolo para Juzgar con perspectiva de género", of Mexico was used as a reference, elaborated after determination by the Inter-American Court of Human Rights (IACHR). In Mexico, the document was drawn up to comply with the reparation measures established by the IACHR in the cases of "González y otras (Campo Algodonero)", "Fernández Ortega y otros" and "Rosendo Cantú y otra",

all against the State of Mexico, due to the seriousness of the institutional and systemic violence to which Mexican women were subjected when they sought justice.

With the Protocol, Mexico intended to materialize a method that incorporates gender as a category of analysis in judgments, highlighting the gender perspective as a fundamental factor for judicial activity.

In Brazil, the main objective of the document is to recognize the influence of discrimination based on gender, race, and sexuality in all areas of law, not only in proceedings related to domestic and family violence against women or those related to racism and homophobia. Consequently, the Protocol also proposes to promote discussions on the intersectionality between these categories. The publication thus serves as a kind of guide for judges, providing guidance on adjudicating cases from an intersectional gender perspective.

The adoption of a gender perspective in the processing and judgment of cases by the justice system is - or at least should be - a logical consequence of Brazil's ratification of international and inter-American treaties on women's human rights, which oblige the State to guarantee equal treatment in the courts, in addition to eliminating all forms of discrimination against girls and women, including the acts and decisions rendered by judges.

In this context, the guidelines of the Protocol for judging with a gender perspective (BRASIL, 2021) were used, which served as a method for rewriting the judicial decision from a feminist perspective, with the aim of presenting a decision free of gender stereotypes.

The rewriting was conducted based on a decision rendered in a case involving a request for authorization for abortion, within a judicial district in Rio Grande do Sul. In order to do so, the entire case file was thoroughly examined, with access authorized by the presiding

judge of the Jury Division. This was facilitated through the initiation of an administrative process followed by the subsequent signing of a commitment agreement.

The commitment agreement explicitly prohibited the dissemination of information that could identify the case or the parties involved, such as names and case numbers, for instance. Consequently, fictitious names were assigned to the petitioner and her spouse, and the case number along with the corresponding judicial district where the case was heard were concealed.

REWRITING THE DECISION

2nd Jury Court
Case No: _____
Parties: Paulo and Maria (fictitious names)
Judge: Esperança Garcia (fictitious name)
Date: March 27th, 2023

Matter is under analysis.

Maria, identified in the case file, requests judicial authorization for the termination of pregnancy.

The petitioner reports that she is currently in her 20th week of pregnancy with a fetus afflicted by a severe malformation that is incompatible with life outside the womb. This condition arises from multiple malformations, diagnosed as OEIS complex.

She included two ultrasound studies clearly confirming the presence of malformations and a medical report stating: "Fetus with restricted movements, secondary arthrogryposis due to anhydramnios, nasal hypoplasia, dilated ventricles, bilateral pleural effusions, altered chest contour suggesting a bell-shaped thorax, pulmonary

hypoplasia, altered cardiac anatomy, extensive omphalocele, ascites, bilateral renal pelvic dilatation (UTD A2/3 type), sacral spine closure defect, concluding that the presented condition is likely amniotic band syndrome or OEIS complex leading to intrauterine demise due to this very severe obstetric case."

She based her request on the preservation of her right to life and mental and physical health, given the impossibility of treatment that could reverse the fetal malformation.

The public prosecutor's office issued a favorable opinion for the abortion.

It's the background.

Decision.

In the present case, the fetus was diagnosed with OEIS complex. According to the medical report on page 09, the case is very serious and may even result in intrauterine death, posing a risk to the physical health of the pregnant woman.

In addition, the result of the ultrasound examination attached on page 11 attests that "the anatomical changes described in the examination are of high intrauterine or postnatal lethality (incompatible with life)".

According to the Protocol for Judging With a Gender Perspective (BRASIL, 2021), in abortion cases, it is necessary to highlight that the classification of the conduct has been under discussion in the Federal Supreme Court for over a decade. The Brazilian Supreme Court ruled in 2012 (*ADPF* nº 54), authorizing the termination of pregnancies involving fetuses with anencephaly, deeming such cases as non-punishable, understanding that the conduct should be considered lawful.

The reason for the authorization is that the prohibition of abortion in cases of anencephaly violates the principles and fundamental

rights of pregnant women, especially with regard to their physical and psychological integrity. Also, with the development of technology, cases of severe fetal malformations that make extrauterine life impossible are diagnosed already in prenatal care, and it is unreasonable to subject the person to carry the pregnancy to term when it is already known that the fetus will not survive after delivery.

In this sense, the Protocol emphasizes the need to eliminate stereotypes about the expected behavior of women in relation to motherhood, in addition to the need to align judicial decisions with the right to physical and mental health of pregnant women (BRASIL, 2021).

It is not ignored that the case on screen does not fit, in a literal way, the understanding of the STF for cases of anencephaly. On the other hand, it is verified that the malformations observed in the fetus are present in several organs, presenting *"absence of amniotic fluid, presence of amniotic membranes surrounding the fetus with restricted movement, secondary arthrogryposis due to anhydramnios, nasal hypoplasia, ventricular system dilation, bilateral pleural effusion, altered chest contour suggestive of "bell-shaped" thorax, pulmonary hypoplasia, altered cardiac anatomy, extensive omphalocele, ascites, bilateral renal pelvis dilation, defect in sacral spine closure"* (fl. 09).

Hence, the described multiple congenital malformations affecting the spine, kidneys, digestive system, as well as the pulmonary and cardiac anatomy of the fetus, align with the understanding observed in the ruling of *ADPF* nº 54, particularly considering the attested inviability of extrauterine life.

In this context, I refer to the opinion given during the trial of *ADPF* nº 54, ruled by the Brazilian Federal Supreeme Court. In the 1930s and 1940s, medicine did not possess the necessary technological and technical resources to diagnose fetal anomalies incompatible with extrauterine life during prenatal care. Therefore, the literal

interpretation of the Penal Code of 1940 is in line with the level of available medical diagnoses at the time, a circumstance that explains the absence of a provision expressly stipulating the atypicality of interrupting the pregnancy of a fetus with severe fetal malformation. (2012, p. 25).

The same legislator, in fact, established in article 128, II, of the Penal Code that induced abortion is not punishable in cases of pregnancy resulting from rape, and whether the fetus has any type of malformation is irrelevant for the procedure. With the aforementioned justification for excluding unlawfulness, the aim was to protect the dignity and health of the woman, clearly demonstrating a greater concern for women's rights than for the fetus, which only holds a prospective right, in accordance with the current civil legislation.

Let's consider the following. In the present case, as well as in the scenario decided in *ADPF* n. 54, there is no potential for extra-uterine life, so there is no legal and penal justification, especially when compared with the fundamental rights of the pregnant woman.

This understanding is also evident in the international legal framework. The text of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, ratified by the Brazilian State on November 27, 1995, includes the human rights of women, such as the right to physical, mental, and moral integrity, freedom, dignity, and freedom from torture. The same text defines violence as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere".

In this context, subjecting the pregnant woman to carry the pregnancy to term knowing that the fetus will not survive birth, and may even result in intrauterine death, violates fundamental women's rights.

I refer again to the ruling in *ADPF* No. 54, which holds that state-imposed continuation of pregnancy contradicts the foundational principles of constitutional law, particularly human dignity, freedom, self-determination, health, and sexual and reproductive rights.

Not authorizing abortion in this case privileges a fetus that doesn't even have the expectation of postnatal life, thus violating the woman's rights and imposing on her a sacrifice that will cause her physical and psychological suffering. Therefore, it is appropriate to grant authorization for the abortion to be performed.

Furthermore, in view of the existence of a life-threatening risk to the pregnant woman, I believe that the situation meets the justifying circumstances described in Article 128, paragraph I, of the Criminal Code. This situation justifies the termination of the pregnancy.

Given the above, I GRANT the request, in accordance with the principles and fundamental rights of human dignity, freedom, self-determination, health, and sexual and reproductive rights, as well as in light of the justifying circumstances provided in Article 128, paragraph I, of the Brazilian Penal Code.

Notify the parties.

After the decision becomes (final and) unappealable, close the case.

Take the necessary legal actions.

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"CRAZY" AND "REBELLIOUS" TEENAGER: FEMINIST REWRITING OF A TEENAGE RAPE DECISION WITHIN THE FAMILY CONTEXT

Adriana Gregorut - Beatriz Pereira - Mônica de Melo

INTRODUCTION

When studying the phenomenon of sexual violence in Brazil, data indicates that the vast majority of victims are female children and adolescents, and the violence is perpetrated by adult men very close to them. This reveals a scenario of vulnerability for girls and young women. Adding to the gravity of the situation, research suggests that there is underreporting. Firstly, children may struggle to understand and report potential abuse they might suffer. Secondly, recorded incidents show that abuse occurs in intimate settings, such as their homes, involving family members, close friends, and adult men. This only makes it more difficult for such situations to come to light and be reported (SILVA, 2020; PLATT et al., 2018). Therefore, its intimate and relational nature of these incidents, coupled with the limited autonomy of individuals to report occurrences, along with the social stigma and sense of shame expressed by victims, hinder the visibility and confrontation of the problem.

The Epidemiological Bulletin of the Health Surveillance Secretariat of the Ministry of Health (2018) emphasizes that violence against children and adolescents is considered not only a public health concern but also a violation of human rights, carrying severe repercussions at both individual and social levels. Data collected in Brazil between 2011 and 2017, focusing on adolescents between 10 and 19 years old, reveals that 184,542 cases of sexual violence were reported

during this period, of which 45% were against adolescents. Sexual violence represents 76.5% of reported cases of violence. Between 2011 and 2017, there was an 83% increase in reports of sexual violence and an 83.2% increase in sexual violence against adolescents.

Sexual violence primarily affects girls and young women, constituting a staggering 92.4% of victims. Among them, 67.8% fall within the 10 to 14 age range, 55.5% self-identify as Black and a significant 58.2% unfold within the confines of their own homes. The alarming pattern persists with 92.4% of perpetrators being male. This glaring disparity, where the majority of sexual violence victims are girls and young women, these traumatic events unfold in intimate family settings, and the perpetrators are overwhelmingly adult males, necessitates a comprehensive analysis of this phenomenon through the lens of gender-based social relations.

The latest data, based on police reports, from the Brazilian Public Security Forum on Sexual Violence against Children and Adolescents, published in 2022, shows the increase in violence against girls and adolescents. In fact, between 2020 and 2021, the number of registered crimes of rape against vulnerable persons increased from 43,427 to 45,994, with 61.3% of the cases involving girls under the age of 13. The circumstances concerning the profile of the perpetrator and the place of the act remain the same: the violence is perpetrated by men (95.4%) who are known to the victim (82.5%), and usually occurs in the victim's own home (76.5%).

In terms of the racial profile of victims, the Public Safety Forum data show an almost equal proportion of black and white girls, which may also be related to a tendency for black victims to be underreported for reasons similar to those mentioned above[276].

[276] This hypothesis is raised in response to a commentary on the research conducted by the Forum for Public Safety: "We know that Black women are the main victims of domestic violence and femicide. I wonder if we are not facing a data point that

Despite these statistical data showing the increase and/or persistence of sexual crimes against girls and adolescents, it seems that the justice system tends to be disconnected from this reality. Recent studies (DIAS, 2018; LIMA, 2022; PEREIRA, RUDOLF, 2014; SILVA, AUGUSTO, 2021; FERREIRA, 2015) point to the presence of gender stereotypes in judges' decisions, as well as expressions by other actors in judicial cases that downplay the vulnerability of girls and adolescent victims of rape, based on arguments such as precocity, behavioral maturity, among others.

Feminist rewriting proposes to engage with this reality by examining the specific case. A judicial decision involves the analysis of a singular situation, unique in its factual aspects, of what has been produced in terms of evidence. However, the feminist methodology of analyzing the legal phenomenon, by encouraging us to reflect on the situation of women in general in the face of these facts and circumstances, can lead to considerations of what has been produced in the process in order to protect women more effectively.

Therefore, the purpose of this article is to contextualize and present an exercise in rewriting from a feminist perspective a decision of the Court of Justice of the State of São Paulo concerning a case of rape committed against a teenage victim in the family environment. The decision was obtained from a database of judicial cases involving sexual violence, which is part of a research project developed by the Gender Discrimination Equality and the Law Research Group of the Pontifical Catholic University of São Paulo (PUC-SP).

This project aims to update the publication "*Estupro: crime ou cortesia? Abordagem sociojurídica de gênero*" (Rape: Crime or Courtesy? A Socio-Legal Gender Approach) (PIMENTEL et al.,

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speaks to a greater underreporting of sexual abuse against vulnerable Black girls compared to white girls, but this is just a conjecture" (TEMER, 2022, p. 6).

1998), whose aim is to understand how Brazilian courts have adjudicated rape cases in the country and what the arguments used by legal actors reveal, particularly concerning stereotypes related to the victim and the defendant.[277]

In the context of the aforementioned project, we conducted a survey of the cases filed in the São Paulo State Court of Justice between 2000 and 2021. We have extracted a sample of thirteen cases that are digital, publicly accessible cases with finalized rulings. Subsequently, we carried out a qualitative analysis of these cases, and the results will be published in an article (PIMENTEL, GREGORUT; PEREIRA, 2022, in press).

The decision to be analyzed and rewritten in this article was obtained from this sample after rounds of analysis and discussion of the cases carried out with the research team. As mentioned, this is a case of rape of an adolescent girl committed in her home by an adult man who is her stepfather, and the adolescent girl's mother and another daughter, who is only her maternal sister, lived in the same house. This case in particular reflects the research produced on sexual violence against children and adolescents and is a standard case.

THE CASE

In this article, we propose to analyze a rape case that occurred in the city of São Paulo in 2013, tracing the process from the initial reporting on crime to police authorities to the final veredict. Among the numerous cases analyzed for the preparation of a forthcoming

[277] The project has a research team composed of undergraduate and graduate students, under the guidance and supervision of the professors who coordinate the research group. Before selecting and studying the cases, the researchers were prepared by reading and discussing specialized literature on the subject of gender stereotypes in the Brazilian justice system.

scientific article (PIMENTEL, GREGORUT; PEREIRA, 2022, in press), this one caught our attention for two aspects: the discrediting of the victim, who was considered a manipulative and mentally unbalanced adolescent, despite evidence to the contrary in the records, and the fact that the crime was committed against a teenager, in a family environment.

Unfortunately, there is nothing new in the choice of aspects to analyze. It is well-known that in crimes of this nature, the downgrading of the victim, whether by the defense or the judiciary, is all too common.

However, our proposal is to focus on - and, within the limits of this work, to delve into - how the judiciary evaluated the evidence presented in the specific case. It's worth mentioning that our intention, before rewriting the judicial decision, is to show how preconceived notions and narratives of a 'crazy and manipulative woman' and of sexual violence in the family context are revealed in a concrete case brought before the judiciary. Let's start with a brief summary of the case.

According to the case file, the then 17-year-old victim reported that her stepfather entered her room, laid on top of her, grabbed her, forced her to kiss him, placed his hands on her body, breasts, and genitals over her panties, and rubbed his erect penis against her body. Faced with her resistance, the defendant quickly left the room, claiming that he was confused. The victim told her mother about the incident the next day and filed a police report four months later.

No physical examination was performed. Despite a two-year delay, the victim underwent a psychological assessment, and the report of this assessment was included in the case file. After the conclusion of the police investigation, the Public Prosecutor's Office filed charges against the defendant for offenses under Article 213 of

the Brazilian Penal Code, combined with Article 1, VI, of Law No. 8,072/1990[278]. Following the proper processing of the case, a verdict was issued that acquitted the defendant due to insufficient evidence:

> In fact, the victim even told the judge that she only told her mother about the events the next day because she was "afraid that it might be her imagination".
>
> Furthermore, according to the psychological report on pages 81 to 87, the examining psychologist affirmed that the victim "showed the potential for the following indicators on the Pfister Color Pyramid Test: excitement, impulsivity, irritability, regression, potential for abrupt and unpredictable outbursts, lack of action control, weakened structure, adjustment difficulties, dissimulation, tendency to create controversy and confusion, signs of disturbed thinking, capacity for extroversion and emotional and social contact, potential for emotional adjustment and adjustment to expectations".
>
> Such considerations alone cast doubt on the veracity of the version presented by the victim.
>
> Moreover, as indicated by the oral evidence reviewed above, and due to the time that elapsed before the relevant police report was filed, no physical examination of the victim was conducted, which hindered the collection of material evidence of the crime.
>
> Moreover, according to the victim's testimony in court, the perpetrator didn't even kiss her in spite of her resistance; he allegedly limited himself to briefly touching her genital area, still over her clothes. This description could be considered weak

[278] Article 213 of the Brazilian Penal Code defines rape as the act of using violence or verbal threat to force someone into having sexual relations, or other libidinous acts, against their will. Article 1, VI of Law No. 8,072/1990 classifies rape as a heinous crime.

> evidence of a completed sexual act, especially given the severe penalties prescribed by law for such a crime.
>
> In addition, consider the content of the testimony of defense witness M.O.F., who stated, “The victim is manipulative and said she would ruin our lives”.
>
> Therefore, it must be concluded that the evidence presented in the case does not categorically establish authorship. Furthermore, it could even be argued that the doctrine of voluntary abandonment[279] could be applied, since the defendant abandoned the acts of execution, in the exact terms of Article 15 of the Penal Code.
>
> It should be noted that the defendant is a first-time offender with a clean criminal record, holds a legitimate job, and according to the victim herself and her mother, has never engaged in similar acts before.

The Public Prosecutor’s Office appealed the judgment. In the Court of Appeals, the Attorney General’s Office issued an opinion in favor of upholding the acquittal, and the São Paulo Court of Appeals upheld the decision[280].

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[279] TN: The doctrine of voluntary abandonment, also known as the "doctrine of desistance" or "renunciation of crime," is a legal principle that applies in criminal law. It states that if a person voluntarily and completely abandons his or her criminal attempt before completing the intended crime, he or she may be relieved of criminal liability for that attempt.

[280] We won't dwell on this decision, but the following excerpt is worth noting as it reveals the disconnect among legal practitioners on the subject discussed: *"(...) If the victim takes a day to tell her mother, even if we tolerate the delay, the explanation given by S. for this time gap was not convincing: '(...) afraid that it might be her imagination' (verbatim). Without prejudice to the fact that, being aware of what had happened, they continued to wait between November 8, 2013 (date of the incident) and March 24, 2014 (page 7, date of the police report). This delay was*

Examining the case from a gender perspective, there are important observations that need to be highlighted. The psychological evaluation, conducted two years after the incident, was used against the victim by diagnosing psychological issues, despite indicating the consistency of her account and the coherence of her thoughts.

In the same assessment, there are far more positive elements about the victim than negative ones. It was also reported that the victim used to stay outside because she "couldn't bear" to look at her stepfather; that she was undergoing psychiatric and psychological treatment (demonstrating her concern for self-care); and that she was concerned about her younger sister, who continued to live with the defendant. On the negative side, the evaluation revealed her conflicts with her mother and also that she considered herself a difficult person, easily irritated, prone to anger, and harboring persistent negative thoughts.

Despite these favorable elements and especially the conclusion of the objective and coherent account consistent with the information in the case, the defense and the Judiciary only highlighted the parts of the evaluation that mentioned the possibility of negative indicators regarding the victim's behavior and mental state.

Another noteworthy point is the narrative provided by the defendant and a witness regarding the victim's disobedience and rebellion. According to the defendant, the victim was seeking revenge for the reprimands she received for attending funk music events. An attempt was made to show that the defendant was a responsible stepfather and that the victim was a rebellious, nervous, and irresponsible girl. In essence, a moral analysis of the adolescent victim's behavior was conducted, portraying her as rebellious without even attempting to understand her family and social environment.

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not even explained, and takes on an air of suspicion when the man comes forward to clarify his version, stating that the young girl was reluctant to fulfill her duties, would not accept admonitions, etc.".

Furthermore, the Judiciary valued, in our view disproportionately, the testimony of the accused's mother, who stated that "The victim is manipulative and said she would ruin our lives". Considering that the witness is the defendant's mother, the degree of bias and partiality in this account is indisputable, yet it was taken as a basis for the acquittal decision. We also emphasize that the defense exploited and the Judiciary accepted the theory of the victim's emotional imbalance because she "merely" recounted the events to her mother the next day out of being 'afraid that it might be her imagination'.

From this analysis, it is clear that the judge's expectation was that the victim would have immediately warned her mother and that she would have reacted immediately and aggressively against the defendant, contrary to all experience and scientific knowledge about the diversity of rape victims' reactions.

It's worth noting that the judge never took into account the explanations contained in the court record for the alleged 'delay' in reporting the crime. According to the case file, this delay occurred because the victim's mother had a 6-year-old daughter with the defendant and needed time to find another home; as well as the victim's fear of disrupting her mother's relationship by reporting the crime. These relevant data were not considered.

As we discussed previously (PIMENTEL; GREGORUT; PEREIRA, 2022, p.18, forthcoming), it is known that in cases of sexual violence, the reactions of the victims are not uniform and often, given the impact of the violence, the unexpected and, above all, the presence or absence of a relationship with the perpetrator (usually someone close), there is a feeling and even doubt that the violence has actually occurred. Confusion, denial, and other psychological consequences of rape are studied elements, even well established, in psychology and other fields of medical sciences.

According to Flavia Bello Costa de Souza et al. (2012, p.1), sexual violence has numerous consequences for the physical and mental health of the victims, who "may suffer from post-traumatic stress disorder (PTSD), depression, anxiety, eating disorders, sexual and mood disorders".

A legal analysis that takes into account the category of gender and attempts to distance itself from stereotypes would consider this fundamental element in the analysis of the victim's discourse as well as in the psychological report. It is expected that rape victims will be confused and have doubts about the incident, that they will be emotionally distressed, and that they will show signs of trauma. This is all the more relevant given that the perpetrator, in this case, was the stepfather, a person who should have ensured the victim's physical and emotional safety. However, this psychological effect on the victim was used against her testimony and was a determining factor in the acquittal of the defendant, even though her narrative remained coherent from the beginning to the end of the judicial process.

Hence the contempt and discrediting of the victim's word, considered emotionally unbalanced and rebellious, which goes back to the classical and historical correlation between women and 'madness'.

The core of the problem, as Silvia Chakian Toledo Santos (2018, p. 26) points out, seems to be related to the historical condition of the inferiority of women, constructed from the most varied conceptions, as dangerous, vindictive, petty, unbalanced, endowed with oral and intellectual inferiority[281].

[281] Considering the limits of this paper, we are not going to delve into the historical construction of female inferiority, which can be observed in the most diverse areas. We believe that it is enough to mention, for all, Michelle Perrot: "First of all on the representation of the female sex: from Aristotle to Freud, the female sex is seen as a lack, a defect, a weakness of nature." (PERROT, 2017, p. 63).

The distrust of women's words is related to the representation of femininity that men have constructed over centuries in different cultures and societies, including the stereotype of the "crazy woman". Given this historical and social framework of the representation of femininity, it is relatively easy to conclude that the Brazilian judiciary is not immune to stereotypes and, even if unconsciously and unintentionally, ends up taking them into account in judgments in general, especially in cases involving sexual crimes.

According to Silvia Pimentel, Ana Lucia P. Schritzmeyer and Valéria Pandjiarjian (1998, p. 203): 'Gender stereotypes, prejudices and discriminations are present in our culture and deeply rooted in the consciousness of individuals, and are therefore absorbed, often unconsciously, by legal practitioners and reflected in their legal practice.'

A direct consequence of the distrust of women's credibility is the excessive scrutiny faced by victims of sexual crimes within the justice system. This often leads to a distressing cycle of revictimization for these women. All the information provided by the victim is usually challenged, even in relation to other evidence, in the pursuit of an elusive absolute coherence (TOLEDO SANTOS, 2018, p. 26).

As we've examined, the selected judicial process reveals the significant influence of the representation of women's inferiority, as evidenced by the discrediting of the victim despite the ensemble of evidence. This discrediting was largely due to the selective focus on unfavorable elements in the psychological evaluation and the perceived 'delay' in reporting the crime. In light of these considerations, we propose a reformulation that takes into account all the elements surrounding sexual violence against women. This approach aims, on the one hand, to deconstruct the stereotype of the 'crazy woman' and,

on the other hand, to evaluate the evidence based on the specific circumstances of this type of crime. Our goal is to avoid discrediting the victim and her testimony.

FEMINIST METHODS AND APPROACHES

The evaluation of the evidence presented, along with the stereotypes of what is ideally or socially expected in a rape case, deserves careful consideration in a feminist rewriting. This is crucial given how the legal system is created and adopted by its interpreters in a patriarchal society. To rewrite from a feminist perspective means to distance oneself from misogynistic, discriminatory, and sexist aspects. Especially in the case under analysis, it is important to confront the stereotypes that are present throughout the process, whether they are explicit or implicit.

Our methodological proposal in this rewrite involves reading the entire case file in order to evaluate, as judges do, all the evidence produced, as well as all the arguments articulated by the prosecution and the defense, using the same legal, doctrinal, and jurisprudential framework as on the date of the trial. It should be considered, despite the reading of the entire case file, that there was no personal interaction on our part with the witnesses, nor with the parties. We only worked with the transcripts of the testimonies given, that is, there is an initial intermediation of the transcriber from the listening and now ours when we read these transcripts. We do not have access to the voice, the gestures, the body positioning of the parties and witnesses, which limits our rewriting.

Below, we will rewrite based on Katharine T. Bartlett's proposal presented in the article 'Feminist Legal Methods (2020).' We also incorporate the insights of Alda Facio from her text '*Cuando*

el género suena cambios trae: una metodología para el análisis de género del fenómeno legal (1992),' in which she suggests a six-step methodology for analyzing the legal phenomenon through a gender lens. In our analysis, the fourth step holds the most significance, as it entails examining the conceptions or stereotypes of women present in the situation under study. Given the prevalence of stereotypes in this case, which are significant and quite persistent in the sentence, this step holds the utmost relevance in the analysis and rewriting process.

Placing the woman who is the victim of violence at the center of the analysis is essential to identify and confront the stereotypes involved. We have utilized the "woman question" method (BARTLETT, 2020, p. 251). The method consists of a series of questions that identifies gender implications and discriminations hidden behind a seemingly neutral, objective, and universal law. This effort comprises more than just addressing visible stereotypes; it also involves reassessing evidence evaluation processes. Without clarity on the method and reasoning behind the choices made, such processes can result in diverse and seemingly acceptable outcomes.

Finally, it is necessary to point out that the intersectional approach was essential for the analysis and rewriting of this case, especially in order to identify certain stereotypes. The first social marker we highlight is age, as indicated by the mentions of the victim's supposed insubordination or rebelliousness, which denote behavior not typically expected from a young girl.

There's also an important class-related issue, which translates into the negative valuation placed on the fact that the victim frequents *bailes funk* (funk music parties). The *Baile Funk* is a Brazilian cultural expression associated with favelas and, predominantly, with black culture (although the victim is noted to be white in the process). Within the world of funk parties, there are identified stereotypes and

representations that link it to "urban violence, socio-cultural practices that 'scandalize morality and good manners,' promote exaggerated eroticism among youth, and center around music of very low quality and alienating content" (FILHO et al., 2004, p. 11).

The combination of these two social markers and the issue of gender creates a structure of discrimination that results in various barriers for victims of sexual violence to access justice and receive equal treatment. The markers are used to construct representations of women who are considered victims of sexual violence, in contrast to those who are not perceived as deserving of protection from the State and its agents due to factors such as their age, social behavior, class, or race.

A new methodological perspective aims to identify and interrupt gender stereotypes that shape legal interpretation, influence analyses of evidence, and impact judicial decisions when dealing with gender issues. This is evident from examining the presented evidence, which supports accusations against the defendant's actions but is downplayed when the facts are interpreted from a discriminatory gender perspective.

REWRITING THE DECISION

A.D.F., as identified in the case file, is accused of perpetrating the violation of Article 213, paragraph one, of the Penal Code. This incident happened on May 10, 2013, at approximately 8 am, at 340 Rua Bento Freitas in República, the capital city. The victim J.T.L., who was 17 years old at the time, was forcibly coerced through violence and serious threat to participate in libidinal acts other than sexual intercourse.

The complaint was received and the accused, duly served, presented an answer through a defense counsel.

During the evidentiary stage, the victim, one prosecution witness, three defense witnesses, and the defendant were questioned.

In the phase of art. 402 of the CPP, nothing was requested by the parties.

In final arguments, the Prosecutor argued in favor of the punitive claim, while the defendant's defense argued for acquittal, based on insufficient evidence.

IT'S THE BACKGROUND. DECISION

As it is known, in crimes against sexual dignity, because they are mostly practiced in a private environment, without witnesses, and often without leaving traces, the gathering of evidences presents complexities, which must be taken into account in the decision-making process.

There are two conflicting versions in the case file: one from the victim and the other from the defendant. This case follows standard procedure. In court, the defendant repeated his initial explanation from the investigation phase and denied the allegations made against him. He claimed that at the time of the incident, he was separating from the victim's mother, A.M.T.L. According to the defendant, the victim exhibited rebellious behavior and frequently attended *bailes funk*, which he disapproved of. He accused the victim of being a manipulative person who refused to take responsibility for her actions and did not accept reprimands, which he believed justified the false accusations made against him.

According to J.T.L., the defendant, with whom she had lived for 9 years, entered her room in the morning and sat on her bed, asking "can I give you a hug?" The defendant had a prior relationship with J.T.L.'s mother. He then leaned over the victim's body, whis-

pered “I love you and I like you very much and I want a kiss” into her ear. He attempted to kiss her but was unable to do so due to her resistance, despite forcing her jaw upwards. Subsequently, he lifted her dress and touched her genitals, breasts, bra, and panties with his hands. He stayed there for approximately two to three minutes. The victim reported feeling molested right from the start; however, she only disclosed the incident to her mother the next day because she was apprehensive it might be her imagination. She filed a police report only two to three months afterwards, upon being informed by the police officer that a medical exam was no longer feasible due to the time elapsed. Two years after the incident, a psychological examination was conducted on her.

The prosecution witness A.M.T.L., the victim’s mother, explained that she did not witness the events in question, which were recounted to her by her daughter only on the morning after. She questioned the defendant about the incident, to which he reportedly remained “speechless and neither denied nor confessed, merely saying ‘you’ll find out down the road.’” She separated from the defendant due to these events. She decided to report the incident to the police about three months later because she felt “very lost,” unsure of what to do.

The defense witnesses who testified in court did not witness the facts. They only testified about the suitability of the accused and the conduct of the victim, which was generically described as “manipulative”. Apart from the testimonial evidence, the case file includes a psychological examination report conducted at the request of the Public Prosecutor’s Office (fl. 51). Such a report must be analyzed within the evidentiary context taking into account the specific conditions that inform cases of intrafamily sexual abuse.

Certain statements by the expert, particularly regarding indicators of the victim’s personality, were used as a basis for the defense’s

argument, aiming to cast doubt on the victim's testimony due to her alleged emotional instability. It's worth noting, regarding this defense argument, that the association of women's image with aspects of mental instability is deeply rooted in history and society. It stems from the social construction around the supposed feminine inferiority, as evidenced by various stereotypes.

Furthermore, the results of the applied test should be analyzed within the context of the victim's account, which has remained consistent and coherent since the stage of the police investigation. What we see is a young woman dealing with the psychological consequences of sexual violence. Even in this context of suffering, it's possible to observe the consistency of her statements, given to the police authority, the psychological expert, and this court, all containing the same information with minimal inconsistencies, attributed to the time that has passed.

It is necessary to remember that the São Paulo State Court of Justice has long established an understanding that the victim's word, in cases of crimes against sexual dignity, due to the aforementioned peculiarities of this type of crime, must be considered sufficient to support a conviction, especially if corroborated by other evidence. In this sense:

> Rape - Crime usually committed in secrecy - The victim's word assumes special evidentiary relevance - Combination with other evidentiary data that reveals criminal authorship and concreteness - Conviction upheld - Penalty and regimes set - Appeal dismissed. (TJSP; Criminal Appeal No. 0064163-82.2013.8.26.0050; Rapporteur (a): Marcelo Gordo; Judging Body: 13th Chamber of Criminal Law; Central Criminal Court Barra Funda - 9th Criminal Court; Date of Judgment: 12/19/2022; Date of Registration: 12/19/2022)
> RAPE OF A VULNERABLE PERSON. CON-

> VICTION IN ORIGIN. ACQUITTAL FOR INSUFFICIENT EVIDENCE. DENIED. CONDEMNATION UPHELD. Crime and authorship are demonstrated in the record. The victim's word deserves prestige, as the crime is commonly practiced without visual witnesses. The coherence and security of the words of the offended when reporting the facts reinforce their credibility. Version supported, in circumstantial aspects, by the witness. Version was supported, in circumstantial aspects, by the witness. Psychological report from the IMESC (Institute of Social Medicine and Criminology) giving credit to the version of the victim. Witnesses listed by the defense, who witnessed nothing and whose versions should be received with caution. Conviction upheld. PENALTY and REGIME. Base maintained at the legal minimum. In the next phase, the penalty remained unchanged, in the absence of aggravating or mitigating factors. In the third phase, was increased by half, because the appellant is the stepfather of the victim (CP, art. 226, II). Maintained the increase of 1/6 (one-sixth) by the continuity of crime. Final punishment set at 14 (fourteen) years in prison. PRISON REGIME. Maintenance of the initial closed regime, before the penalty is concretized, in addition to the concrete gravity of the crime, of heinous character, moreover. Defensive appeal dismissed. (TJSP; Criminal Appeal 1502891-45.2020.8.26.0348; Rapporteur (a): Gilda Alves Barbosa Diodatti; Judging Body: 15th Chamber of Criminal Law; Mauá Forum - 2nd Criminal Court; Judgment Date: 12/20/2022; Record Date: 12/20/2022)

Regarding the current case, the victim's testimony showed both internal consistency and corroboration by her mother's state-

ment, even though her mother was not an eyewitness to the events but confirmed her daughter's account made the following day. J.T.L.'s version is partly supported by the psychological assessment, which concludes that the victim's reports of the suffered abuse are coherent. Despite *indicating* irritability, impulsiveness, and dissimulation, the assessment presents six more positive elements about the victim's personality and behavior than negative aspects.

However, the defendant's version is not supported by any other element of the case records. The accused's mother, witness M.O.F., only repeated the alleged 'manipulative' trait attributed to the victim's personality. However, as is known, this statement constitutes a classic gender stereotype and should be taken with reservations, given the family relationship between the witness and the defendant.

The notion of a defiant young woman who enjoys *bailes funk* parties and, as a result, displays a rebellious and manipulative personality, has long been used to classify victims of sexual crimes as unworthy of state protection. Through the body of evidence presented in the case records, particularly the victim's statements, it becomes apparent that some of this alleged rebelliousness can be attributed to intra-family conflicts, particularly with the stepfather, who is the defendant in this case. According to the psychological report, the victim acknowledges being a nervous and irritable person (which does not discredit her). She has been working since the age of 14, maintains a long-standing relationship with her husband, and has shown concern for her younger sister who still lives with her father. This profile reveals far more characteristics of responsibility than of rebellion.

Another point to consider is that the delay in reporting the facts cannot be evaluated to the detriment of the victim or her mother, especially in cases involving crimes committed by family members. In this type of crime against sexual dignity, where there is an emotional

relationship between the perpetrator and the victim, it is known that there is no uniformity in the reactions of the victims, and the psychological consequences vary from denial to feelings of guilt, depression, and post-traumatic stress.

I understand, therefore, that the set of evidence points to the occurrence of sexual violence. However, the victim's description of the incident demonstrates that there was no penetration, with the defendant limiting himself to attempting to kiss the victim and touching her intimate parts. For this reason, I believe it is necessary to reclassify the offense as sexual harassment, as provided for in Article 215-A of the Brazilian Penal Code. Law No. 13.718/2018, which added this crime to the Penal Code, is a newer and more lenient penal law, and as such, it should be retroactively applied to the date of the incident in favor of the defendant.

For all the above, I judge PARTIALLY GRANTED the complaint to convict the defendant A.D.F., as an offender in article 215-A, of the Brazilian Penal Code. The next step is to determine the sentence. Considering the guideline outlined in Article 59 of the Penal Code, it is noted that the defendant has no previous convictions and therefore is considered a first-time offender. Therefore, the initial sentence is set at 1 year of imprisonment. During the second phase, due to the aggravating circumstance stipulated in Article 61, II, "f", of the Penal Code regarding violence against women in a domestic relationship, the sentence is increased by 1/6, resulting in a total sentence of 1 year and 2 months of imprisonment. During the third phase, the enhancement factor specified in Article 226, item II, of the Penal Code is considered, taking into account that the defendant is the stepfather of the victim. The sentence is increased by half, resulting in 1 year and 9 months of imprisonment. According to Article 33, § 1º, "c" of the Penal Code, the custodial sentence shall begin with an open

regime. Given that the crime was committed against a stepdaughter with whom the defendant had a relationship since early childhood and considering the unfavorable judicial circumstances, the substitution of the custodial sentence with a non-custodial penalty is not feasible. Based on all that has been presented and what is evident from the case records, I find PARTIALLY IN FAVOR of the state's claim for the purpose of CONVICTING A.D.F., as identified in the records, for violation of the provisions of Article 215-A of the Penal Code, to a sentence of 1 (one) year and 9 (nine) months of imprisonment in the open regime. After the judgment becomes final, issue a definitive execution order and send it to the competent court. Publish. Notify.

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THE IMPRISONMENT OF POVERTY IN TIMES OF COVID-19 (OR WHEN AN INSIGNIFICANT PROPERTY CRIME JEOPARDIZES PUBLIC ORDER)

Ana Gabriela Mendes Braga - Isabel de Oliveira Antonio - Leticia Cardoso Ferreira - Maiane Serra - Mariana Pinto Zoccal - Paola Cristina Silva Oliveira - Vitória Garbelline Teloli

INTRODUCTION

This study on Brazil's prison system is part of the Feminist Judgments Project and is the product of collaborative research efforts undertaken by scholars at the *Núcleo de Estudos e Pesquisas em Aprisionamentos e Liberdade*[282] (NEPAL - UNESP). It analyzes the construction of subjectivities within the criminal justice system as its main research focus. In recent years, we have carried out several investigations analyzing the practices and discourses of the characters and institutions of justice from an intersectional perspective (ALVES, 2017; COLLINS; 2019; 2021; AKOTIRENE, 2020; CRENSHAW, 2002).

In this context, we have carried out research into the criminalization of women, especially those who are mothers and are part of the Brazilian justice system. From a research agenda that seeks to provoke the law and the justice system in Brazil, we highlight the emblematic case of Joana[283]. Her arrest was not an isolated incident

[282] Link: dgp.cnpq.br/dgp/espelhogrupo/9550476046634678.

[283] Although this is a case that has been widely covered by the media, and it is pertinent to discuss anonymity and the right to be forgotten, in this text and in accordance with the rules of research ethics and this collective work, the name of the accused has been changed here to preserve her identity.

in which the criminal justice system intersected with her life and the lives of her children. A search for her name on the website of the Court of Justice of the State of São Paulo (TJSP) reveals her trajectory of more than eight years through the justice system. She remained entangled in the justice system due to her criminal cases (all for non-violent and insignificant property crimes) and the civil case, through which she "lost" her youngest daughter. This illustrates how, in this case, the State, particularly the São Paulo judiciary, continued to manage and criminalize poverty, even in times of global health and social pandemic. The documents, decisions, opinions, taken together, form an archive that constitutes the judicial biography of Joana. It portrays the interventions of the State in her life, whether to remove her custody or prosecute her for insignificant property crimes.

For this chapter, we have chosen to rewrite the trial court decision that ratified the detention in *flagrante delicto* and converted it into pretrial detention. This decision is significant for three key reasons: firstly, it marks the debut judicial intervention in the case; secondly, its illustrative value lies in the intricate web of issues concerning the marginalized woman, aspects that often go unaddressed; thus, it offers substantial prospects for reformation and acknowledgement through a revised narrative infused with an intersectional feminist standpoint.

The court decision restated that Joana lacked a permanent residence and did not have any employment, which confirms her impoverished condition, highlights the reason for misappropriating food, and emphasizes that she resorted to unlawful means[284] due to her necessity to survive. The judge's arguments also considered the risk associated with Joana's liberty, which was seen as a threat to

[284] "So that being released at this time (prematurely) would presumably lead to a return to **crime as a means of support**" (emphasis added).

public order due to her past convictions, even more so during the pandemic. Both the COVID-19 pandemic[285] and her homelessness[286] were cited to affirm the need for her arrest. Four factors could justify Joana's permanent and provisional release: the *de minimis doctrine*, the lack of a pre-trial hearing, the defendant's maternal status, and the COVID-19 epidemic. But it was not the case.

The judge used Joana's vulnerable situation, exacerbated by the backdrop of a pandemic, as a justification for her detention, even though these very factors could have been interpreted from an intersectional feminist perspective, arguing in favor of avoiding punitive measures in an individual's life[287].

THE CASE AND THE ORIGINAL DECISION

In September 2021, the world was in the midst of the second year of the COVID-19 pandemic. The country's major media outlets reported[288] the imprisonment of a woman who allegedly stole food items worth R$ 21.69 from a convenience store belonging to a

[285] As in the original highlighted excerpt "Even **taking into account the effects of the health crisi**s, the measure is the most appropriate to guarantee public order, since, in freedom, the accused puts it at risk, **aggravating the situation of instability** in the country" (emphasis added).

[286] The decision even ignores her homeless situation by stating that she was on the street to commit crimes, ignoring the fact that the street was her place of residence. We highlight the following excerpt: "The moment imposes greater rigor in pre-trial detention, because the population is fragile inside their homes, and must be protected by the public authorities **and the Judiciary against those who, instead of going home, take to the streets for the sole purpose of delinquency**." (emphasis added).

[287] The use of the *de minimis doctrine,* in this case, eliminates the possibility of a crime, making the ancillary discussion on pre-trial detention irrelevant.

[288] https://www1.folha.uol.com.br/cotidiano/2021/10/justica-de-sp-nega-duas-vezes-liberdade-a-mae-de-5-filhos-que-furtou-miojo-e-refrigerante-de-mercado.shtml. Accessed on: Feb. 20, 2023.

well-known chain in the southern zone of São Paulo city. The items included two packs of instant noodles, 600 ml of soda, and a pack of powdered drink mix.

Security cameras captured her putting the items in a bag and leaving the store without paying. An employee alerted a passing police patrol, and the suspect was caught on-site. After being caught in the act, she was taken to a health center to receive treatment for head abrasions, which, reportedly, she suffered while attempting to flee at the time of arrest. Subsequently, the suspect was taken to the police station and later to the Female Provisional Detention Center in Franco da Rocha, where she was held in custody for 18 days.

Joana, a 41-year-old with a history of drug dependency, has been living on the streets for ten years. She is the mother of five children. Although Joana is currently unemployed, she has previously worked as a nursing assistant, cleaner, and nail stylist. Joana's mother lives with her three older children whose ages are 6, 8, and 16. Additionally, a 3-year-old boy lives with a cousin in Rio de Janeiro, and Joana claims to have given birth alone on the street to the youngest child, a 2-year-old girl who was subsequently taken by authorities[289].

Joana was arrested in *flagrante delicto* for an offense under Article 155 of the Penal Code: taking, for oneself or for another, movable property belonging to another, punishable by one to four years in prison and a fine. The record contains inconsistent racial identification of Joana. She is identified as white in the judicial process and in her previous criminal record. However, her personal information in the police inquiry indicates her race/color as brown.

The prosecution used Joana's prior theft convictions, lack of a permanent residence, and her children being in the care of their grand-

[289] https://recordtv.r7.com/cidade-alerta/videos/justica-manda-soltar-mulher-que-furtou-comida-para-alimentar-os-filhos-12102022. Accessed on: Feb. 20, 2023.

mother as well as the exceptional circumstances of the pandemic as arguments to justify her unlawful detention. Initially, the failure to hold the pre-trial hearing was justified due to the extraordinary circumstances of the COVID-19 pandemic. After the prosecutor's request, the judge converted Joana's detention in flagrante to pretrial detention.

The first *Habeas Corpus* (HC) was filed by the Public Defender's Office to stop the investigation and release the defendant from prison. However, it was denied by the São Paulo State Court of Justice. The state court upheld the lower court's decision by pointing out that the defendant's repeated criminal behavior would prevent the application of the *de minimis* doctrine. After a change in the prosecution's stance, the Public Prosecutor's Office filed a *Habeas Corpus* requesting the replacement of the pre-trial detention with alternative precautionary measures. The prosecution's argument for the defendant's release was based on the defendant's drug addiction. The grounds do not mention factors like the insignificance of the stolen goods, or the defendant's motherhood or social vulnerability, but rather on the need for Joana's treatment, which could not be provided in prison. While the plea for freedom was in favor of the defendant and in accordance with the principles of criminal law (such as *ultima ratio, subsidiarity, and insignificance*), the narrative of the *habeas corpus* writ was underpinned by a process of pathologizing the defendant and reinforcing a paternalistic attitude on the part of the State. This approach emphasizes individual responsibility and treatment while simultaneously downplaying structural issues such as poverty, hunger, motherhood, and housing.

Joana's freedom was denied twice by the São Paulo Court of Justice (TJSP). In order to have the order granted in a Habeas Corpus writ, the Public Defender's Office had to appeal to the Superior Court of Justice (STJ). It took four judicial decisions involving three

judicial instances to finally recognize that the action of stealing four food items of minimal value by a person suffering from hunger is legally and criminally insignificant. The STJ concluded Joana's criminal case not only by granting her freedom but also by dismissing the criminal proceedings, considering the application of the *de minimis doctrine*.

The current health emergency requires greater rigor in the analysis of the need for precautionary segregation. It is common knowledge that the Brazilian prison system is in an "unconstitutional state of affairs", characterized, among other things, by inadequate and unacceptable living conditions such as overcrowding, insufficient medical care, and lack of access to potable water. These conditions create an environment in which diseases like tuberculosis can easily spread, affecting prisoners at a rate 35 times higher than that of the Brazilian population as a whole (INFOVÍRUS, 2021, p. 8).

In such a scenario, complying with basic COVID-19 prevention measures like social distancing and constant hygiene becomes impossible. Data from the Brazilian National Council of Justice (*CNJ*) reported in the Brazilian Public Security Yearbook indicate that until May 2021, over 57,000 COVID-19 cases were recorded among incarcerated individuals, a rate 3.3% higher than that of the general population, along with 201 deaths. Considering the possibility of underreporting of cases and deaths, these numbers highlight the need for greater attention and care when deciding to incarcerate more individuals during this time. Such a decision should be an exceptionally rare occurrence.

Despite the non-binding nature of *CNJ*'s Recommendation No. 62 of 2020 (BRASIL, 2020), as well as its updates, it is important to consider the implementation of these guidelines in order to achieve a consistent approach within the Brazilian justice system during a

public emergency situation. The *CNJ* recommends the adoption of non-custodial measures, both during precautionary stages and during the execution of sentences, with particular emphasis on vulnerable groups, such as mothers and pregnant individuals. Furthermore, the pandemic context affects the population not only in terms of public health but also economically and socially, and this should be taken into account when assessing the individual responsibility of the accused within their social environment. The view of the Public Prosecutor's Office seems to be in a different direction, which charges Joana and seeks an aggravated sentence precisely due to her action occurring during a health public emergency caused by the pandemic situation, as outlined in Article 65, II, j, of the Brazilian Penal Code.

The case of Joana, which received extensive media coverage, is being used as an example to illustrate the biased, strict, and discriminatory application of the Criminal Law. In this case, the justice system pursued a hungry mother who stole food items of minimal value, exhibiting how the machinery of justice and punitive economy operate. In three decisions issued over two instances, the justice system favored imprisonment despite underlying structural issues, such as insignificance, gender, poverty, housing situation, and addiction. Despite these circumstances and in the face of a trivial act, the persistence of incarceration reveals legal practitioners' manipulations to ensure the continuity of punitive measures, including imprisonment, even in exceptional situations where the legal framework itself should guarantee freedom.

The decision relativized the fact that Joana is a mother of five children, along with the rights that come with it. The decision stated that it was not clear that Joana would be responsible for their care[290].

[290] "Although she is the **mother of four children,** there is no evidence to prove that she is **responsible for their care,** especially since she gave the name of the person responsible" (emphasis added).

Based on this, the judge refrains from granting house arrest and proclaims that the legal provisions outlined in articles 318 and 318-A of the Code of Criminal Procedure are missing, even though they are present in the case.

According to the law, mothers may be subject to measures other than imprisonment. Under such circumstances, it is recommended to apply house arrest or other methods specified in Article 319 of the Brazilian Code of Criminal Procedure (CPP). In this case, besides the lack of grounds for pre-trial detention and the insignificance of the act, the defendant being a mother of children under 12 years old justifies her attending the legal proceedings outside prison. The decision to grant pre-trial release is supported by this argument in conjunction with the constitutional imperative as stipulated in Article 5, Section LXVI of the Brazilian Federal Constitution.

The application of provisional measures aimed solely at removing the accused from social interaction constitutes a form of anticipatory enforcement of a potential sentence, not aligning with the reasons outlined in the Brazilian Code of Criminal Procedure (CPP) for the application of pre-trial detention. This is particularly applicable when dealing with non-criminal conduct that cannot support a subsequent prosecution, as will be explained below.

Furthermore, on the international level, the so-called Bangkok Rules, approved by the United Nations General Assembly in December 2010, established minimum parameters for the treatment of incarcerated women and non-custodial measures for women in conflict with the law. These rules include the suspension of sentences and non-custodial penalties.

Even though caregiving responsibilities are shared with another person, in this case, the maternal grandmother, the accused still holds both duties and rights as a mother. Raising five children on

one's own, without the support of the state, would indeed pose a challenge. Furthermore, motherhood is not solely defined by financial and material support; affection also forms a critical part of it. Therefore, presuming the absence of motherhood due to non-cohabitation represents an understanding of motherhood that disregards other caregiving arrangements and family structures.

METHODS AND APPROACHES

The decision was rephrased to resemble an authentic judgment more closely. This enhancement ensures that the decision can be replicated and used as a practical benchmark for formulating feminist decisions. To achieve this goal, legal practitioners[291] provided valuable input that helped us fine-tune our legal technique and writing style.

In feminist writing, the choice of words and writing style is an important consideration. The analyzed decision sometimes refers to the accused using masculine nouns[292]. The lack of gender inflection in the decision, and in general in the language of justice[293], is one of the answers to the woman question. Feminist movements have traditionally paid close attention to language. Beyond the mere existence and recognition of certain languages, feminist inquiry examines lan-

[291] We would especially like to thank Judges Bárbara Livio and Natália Luchini, and public defender and member of the *Nepal* group Gustavo Santos for their reading and comments.

[292] "According to the *Notice of Flagrante Delicto*, there is no evidence to conclude that there was torture or ill-treatment or failure to comply with the constitutional rights guaranteed **to prisoners**" (emphasis added).

[293] The use of legal language aims to create a discourse that appears objective, universal, and neutral. This is achieved by specific general expressions, including the use of masculine words, as well as neutralizing structures like the passive voice and third person singular.

guage use, including how it is employed to define and restrict personal identities, ways of life, and cultural norms -- and even how it can be weaponized as a tool for shaming, humiliation, colonization, or the legitimization and consolidation of power structures that exclude certain groups.

In the rewriting process, we aimed to retain the structure of the decision and its components while modifying the perspective and argumentation. We added some theses, issues, and important information that were not present in the original text, which was initially 5 pages long. We adhered to the timeline of the decision and referred only to the legal instruments that were in place at that time. We intentionally omitted the Protocol for Judgments with a Gender Perspective published by *CNJ* (BRASIL, 2021), which was released the month following the decision. Furthermore, we considered the procedural stage and the jurisdiction of the judge to define the scope of the decision and the points on which she could express her views regarding the case.

We have adopted an intersectional perspective on the 'woman question' to provide a theoretical and methodological contribution to rewriting the decision. This question, according to Bartlett (2020), encompasses a series of questions[294] posed by feminists with the aim of identifying gender implications embedded in their norms and practices, contesting the elements of existing legal doctrine that can harm or exclude women and members of other vulnerable groups.

Given the limits of an analysis based solely on the category "woman", as well as the overlapping layers of oppression that mark the lives of Brazilian women, we worked on the woman question in-

[294] The author poses some questions that can be addressed to laws, decisions, and legal productions, including: "Were women neglected in this text? If so, how did this happen? How then might that omission be corrected? What difference would it make if the omission was corrected?" (BARTLETT, 1990, p. 837).

tersectionally, also asking about race, class, and other relevant markers, such as Joana's housing situation and drug addiction. We follow Alda Facio (1999) when she proposes identifying which woman is present or invisible in the context by analyzing the effects of different sectors on women.

In a society shaped by the historical *senzala-favela-prison* relationship (ALVES, 2017), factors such as gender, poverty, homelessness, and prior involvement in the criminal justice system were central in characterizing her as a "multi-recidivist" and "highly reprehensible" individual. Thus, Joana's denial of basic human rights like housing, health care, education, and employment were predictable, and imprisonment was regarded as the only suitable solution.

From an intersectional and non-essentialist perspective on gender, we emphasize the relevance of issues related to poverty, homelessness, and drug addiction in the legal narrative about women and in the prison/freedom debate. Motherhood and the right to house arrest, important in gender discussions and feminist struggles in law, were relegated to the background in the discussion, as we identified insignificance and poverty as the elements that underpinned criminal intervention and would justify, on their own, non-intervention and the request for freedom.

The approach resulted in a decision that was completely different from the original. The strategy was to contextualize and humanize the defendant's character by incorporating additional elements from Joana's biography that were not present in the original decision. To answer the question of who is the woman in the decision and guide the line of argument in the rewrite, a longer and more subjective judgment report was created and deemed crucial. The method involves not only posing questions but also shifting the judicial characters to position themselves from the perspectives of the women who are af-

fected by a particular norm or decision (Bartlett, 1990, p. 887). Thus, when rewriting, one of its purposes was to change the format and substance of the original judgment report. This was done not only to offer an instrumental summary but also to provide details of the defendant's life.

These details, more than in the decision, were present in the media coverage of the case. During her initial television interview after being released from prison, Joana stated, "My greatest aspiration is simply to exist as a person. I still don't know what that is, I don't know what it is to be a mother, a daughter, a sister"[295]. Joana's words make it clear that "invisible" mechanisms of discrimination "make some people less equal or less human [...]" than others (ALVES, 2017, p. 117). And this unequal distribution of the status of humanity reverberates in different experiences of access to justice. We understand that judging from a gender perspective involves not just asking about women, but asking about people in their life contexts. Asking about vulnerable people, asking about the injustices and violence they go through.

The Protocol for Judgments with a Gender Perspective published by *CNJ* at the end of 2021 considers it as an interpretative-dogmatic method. It includes questions following Bartlett's recommendations as its steps. To mention some of the questions addressed in the document, could structural inequalities have played a relevant role in this controversy? Also, how can the judge's experience affect fact assessment? (BRASIL, 2021). These and other questions discussed in the document can serve as parameters for the specific application of this methodology.

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[295] *PROGRAMA BRASIL URGENTE*. Available at: https://www.youtube.com/watch?v=MfNyl6rVpTI. Accessed on: 23 Nov. 2022.

REWRITING THE DECISION

COURT OF JUSTICE OF THE STATE OF SÃO PAULO
SÃO PAULO
FORUM - 00TH CJ - CAPITAL
COURT ON DUTY - CRIMINAL
Digital Case No: 111111-11.2021.1.11.1111
IP and Police District no: 22222/2021 - 27º D.P. IBIRAPUERA, 20565613 - 27º D.P.
Class - Subject: Arrest in *Flagrante Delicto* - Theft (COVID-19)
STATE v. JOANA SILVA

DECISION

This is an arrest in flagrante delicto of JOANA SILVA, FEMALE, 41 (forty-one) years of age, mother of 5 (five) children - 4 (four) of whom are under 12 (twelve) years of age, BRAZILIAN nationality, profession UNEMPLOYED, divorced, living on the street/ without a steady residence in the city of SÃO PAULO - SP, with other details in the case file.

The police authority reported the arrest in flagrante delicto of JOANA SILVA, for the alleged commission of the conduct provided for in Article 155 of the Brazilian Penal Code, of PROPERTY NATURE, considering the CRIME OF CONSUMMATED THEFT by the competent Authority, substantiated by the testimonies and other collected evidence.

According to the Arrest Report, on September 29, 2021, JOANA SILVA was taken into custody by the police due to reasonable suspicion of stealing food products from a minimarket chain store during the COVID-19 pandemic period.

In a Declaration Statement, the manager of the establishment XXX reported observing through security cameras that JOANA SILVA took possession of items belonging to the store: "This individual took two 600 ml Coca-Cola sodas, one package of Tang powdered juice, and two packages of instant noodles" (see page 9).

When she was confronted by an employee of the minimarket, the accused allegedly returned a condensed milk product that the complainant had not seen her steal. She then refused to return the rest and fled when she saw the police car.

According to the REPORT OF SEARCH AND SEIZURE, the Competent Authority seized only one non-alcoholic beverage - a 600 ML COCA-COLA soda. The total value of the items seized was R$ 3.80 (three reais and eighty cents).

In a Testimony Statement, two Military Police officers responsible for the arrest in *flagrante delicto* reported that, while on routine patrol, they were alerted by civilians that a person was committing theft inside a minimarket. JOANA SILVA, now identified as the person in question, reportedly fled upon noticing the police vehicle's presence and, purportedly, stumbled and fell twice. During her interview, Joana admitted to committing the offense and stated, "I stole because I was hungry" (page 8).

Captured in flagrante delicto by competent authorities, JOANA SILVA was taken to the hospital due to the injuries she sustained in the alleged falls. The medical record, clinical record, or similar documentation was requested, along with the necessary express authorization, for its disclosure or release to the competent police authority. This information will be used solely, if necessary, for the purpose of conducting a physical examination.

The Honorable Chief of Police made the decision to file legal charges against JOANA SILVA, based on the establishment of the

flagrant state, due to her alleged offense defined in Article 155 of the Penal Code. The defendant was accused of the crime of theft. Despite the stolen goods having minimal value, the defendant's prior involvement in offenses of the same nature was considered. This is indicated by research conducted with PRODESP, found on pages 12 to 31.

The Public Prosecutor's Office wrote in favor of approving the flagrante and converting it into pre-trial detention, in view of the defendant's recidivism.

The Public Defender's Office requested the revocation of the arrest in flagrante delicto and the release of the investigated woman on bail due to the absence of the requirements for a precautionary order. They requested that the measure be replaced with house arrest, even if it necessitated electronic monitoring, arguing that the court could reevaluate this measure once the pandemic is over. The approach maintains the precautionary nature of the measure while also being aligned with the global strategy to combat the pandemic, protecting the physical safety of the applicant (or others with whom she would have contact in the prison environment).

According to Article 310 of the Brazilian Code of Criminal Procedure, when a report of an arrest in *flagrante delicto* is received, the judge must provide the reasons for

> "I - cancel the unlawful arrest; or
> II - convert the arrest in flagrante delicto into pre-trial detention, when the requirements of Article 312 of this Code are present, and the precautionary measures other than imprisonment prove inadequate or insufficient; or
> III - grant provisional release, with or without bail."

THIS IS THE BACKGROUND. JUDGMENT.

Regarding this case, analysis of the file indicates that the defendant is accused of theft from a mini-market chain. The police officers who carried out the act and the representative of the victimized business, along with her confession, have provided sufficient evidence of authorship. Furthermore, the seizure report and the police report have been included in the case file.

Prior to the analysis of elements necessary to convert the arrest to pre-trial detention or applying alternative precautionary measures, the criminal nature of the act will be addressed.

APPLYING THE PRINCIPLE OF DE MINIMIS DOCTRINE

To begin with, given that the crime does not have a high economic impact, the de minimis doctrine can be applied, according to an understanding already consolidated by the Brazilian Federal Supreme Court. In Habeas Corpus numbers 123.108/MG, 123.533/SP and 123.734/MG, all having Justice Roberto Barroso as a rapporteur. The Brazilian Federal Supreme Court established the understanding that the application of the de minimis doctrine must be applied on a case-by-case basis, involving a broader judgment than the specific analysis of the result of the conduct. In this sense, the thesis was established that recidivism does not, in itself, prevent the judge from recognizing the criminal insignificance of the conduct, in light of the elements of the specific case. However, it was noted that it was essential to ascertain the social significance of the action, and the appropriateness of the conduct, so that the purpose of the law could be achieved.

In this case, as extracted from the case records, the accused took two bottles of soda, a package of powdered juice, and two packs of instant noodles from a minimarket chain, amounting to a value of R$ 21.69 (twenty-one reais and sixty-nine centavos). Thus, the non-criminal nature of the conduct is evident when considered from an overarching perspective of Criminal Law (ZAFFARONI, Eugenio Raúl; PIERANGELI, José Henrique. *Manual de direito penal brasileiro: parte geral. 11ª ed., rev. e atual., São Paulo:* RT, 2015, p. 414/415). The objective is to ensure a justifiable level of judicial protection and prevent further burden on an already costly and overburdened penal system, providing a criminal policy justification for the decision.

In this regard, the Brazilian Supreme Court (*STF*) has provided solid guidance to the effect that the de minimis doctrine presupposes, for its application, the existence of certain vectors, such as (a) the minimal offensiveness of the agent's conduct, (b) the lack of social relevance of the act, (c) the very low degree of reprehensibility of the conduct, and (d) the inexpressibility of the legal damage caused (Appeal in Habeas Corpus No. 113.381/RS, Justice Celso de Mello, DJe 20.02.2014). These vectors are very strong in the action carried out by the defendant.

Thus, the *STF* has applied the de minimis doctrine - even in the case of recidivism - in situations where it is evident that the alleged criminal act, although formally illegal, reveals the absence of actual or potential harm to the victim's property due to its minimal harmfulness. This leads to the understanding that this conduct can not be considered criminal, since there is no offensive impact on the legal interest protected by the criminal norm, regardless of the arrestee's recidivism (*Habeas Corpus* No. 176. 564/SP, Rapporteur Justice Rosa Weber, DJe 28.01.2021; *Habeas Corpus* No. 186.374-AgR/SP, Rapporteur Justice Cármen Lúcia, DJe 16.10.2020).

This same perspective has already been adopted by the First Panel of the STF, which, when judging Habeas Corpus Appeal No. 174.784/MS (Justice Alexandre de Moraes) DJe 06.5.2020, recognized the application of the principle in question, in order to overturn the criminal conviction of the defendant, with a criminal record of recidivism, for the theft of a wheelbarrow, valued at twenty-two reais.

In light of the above, the conduct of the defendant in question meets the assumptions demanded by the Supreme Court's case law for the purpose of applying the de minimis doctrine. In addition, for the purposes of recognizing the "petty crime", it should be noted that the theft of property in question was consummated without the use of any kind of violence or serious threat (HC nº 176.564 / SP, Rapporteur, Justice Rosa Weber, DJe 28.01.2021). Therefore, the conduct practiced by the defendant is not sufficiently reprehensible to justify the conversion of the arrest in flagrante into pre-trial detention, which is present in the case of the crime of theft (article 155, caput, of the Brazilian Penal Code).

In addition, the act constitutes larceny justified by hunger, since the accused stole food due to hunger, a situation aggravated by the COVID-19 pandemic, and the exclusion of illegality due to necessity may also be applicable, which would lead to her acquittal, based on art. 23, item I, of the Brazilian Penal Code and art. 386, item VI, of the Criminal Procedure Code. The COVID pandemic affects the population not only in terms of public health, but also in economic and social terms. Therefore, this situation must be taken into account in order to measure the individual responsibility of the accused in relation to the social environment.

Despite having previous criminal convictions (pp. 28/31), it is understood that the prohibition on granting provisional release in these cases provided for in a legal provision (article 310, §2, of the

CPP) is unconstitutional. Justice Cezar Peluso, in his opinion in HC 104.339/SP in 2012, stated that "the legal prohibition on pre-trial release is unconstitutional". In this way, I rule out multi-recidivism as a prohibition on the defendant's pre-trial release.

Article 5, LXVI of the Brazilian Federal Constitution states that "*no one shall be taken to prison or held there, when the law allows for pre-trial release*". Furthermore, the granting of pre-trial release is authorized by Article 310, III of the Brazilian Criminal Procedure Code, when the requirements for pre-trial detention are absent.

The defendant, who is the mother of five children, did not provide a home address and stated that she was homeless. However, an analysis of the case file shows that she is still in contact with her mother, who is responsible for the care of the children and has an updated address. She does not currently have a paid job, although she has a degree in nursing, and she also admitted that she stole the items because she was hungry, indicating that she is in a clear situation of social vulnerability. It should be noted that, together with the de minimis doctrine, there is a need for the State to provide assistance rather than punishment due to the social situation of the defendant.

I understand that pre-trial detention is an excessive measure in this specific case, given the low level of reprehensibility of the conduct (as previously pointed out), as well as the fact that this is a case of petty theft, not committed with violence or serious threat to the person, committed in circumstances that denote the vulnerability of the accused.

For the sake of argument, if it weren't for the understanding of the (repeated) illegality of the precautionary measure, the pre-trial detention would not even be admissible in view of the situation of vulnerability in which the accused finds herself, further emphasized by the current health crisis scenario. Recommendation No. 62 of the

Brazilian National Council of Justice (*CNJ*) determines that judicial decisions that lead to imprisonment should be reviewed and caution adopted at all procedural stages, with emphasis on groups in situations of special vulnerability, such as mothers and pregnant women, as is the case with the defendant, who is the mother of children under the age of 12, in a situation of special vulnerability. Therefore, the procedural detention is unsustainable and the agent's freedom emerges, based on articles 316 and 319, of the Brazilian Criminal Procedure Code, combined with article 4, item I, paragraph 'a', of *CNJ*'s Recommendation No. 62.

Therefore, given the factual and normative assumptions that allow the recognition of the non-criminal nature of the conduct, I **REVOKE**, on the basis of art. 310, I of the Brazilian Penal Code, the arrest *in flagrante* in favor of JOANA DA SILVA, in view of the criminal insignificance of the conduct (theft justified by hunger), in light of the elements of the specific case. Moreover, the arrest was null and void due to the lack of a pre-trial hearing (Article 310 of the Brazilian Penal Code).

IMMEDIATELY ISSUE A RELEASE ORDER, and the defendant should be released unless she is detained for another reason.

In addition, the Department of Social Assistance and Development of the Municipality of São Paulo should be notified so that the defendant can be supported by programs to assist women and their families, taking into account her current situation on the streets.

São Paulo, September 11, 2021.

Document digitally signed under the terms of Law No. 11,419/2006

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EXISTENCE AND RE-EXISTENCE OF INDIGENOUS REFUGEE WOMEN: TOWARDS A FEMINIST, DECOLONIAL, INTERSECTIONAL, AND INTERCULTURAL APPROACH TO THE MARIA DA PENHA LAW

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INTRODUCTION

The present work of rewriting was developed as part of a research and outreach project, the Feminist Judgments Project UFRR (PJF/UFRR), which is a component of the Feminist Judgments Project - Brazil, and was carried out under the scope of the Human Rights Observatory (ODH/UFRR), linked to the Institute of Legal Sciences of the Federal University of Roraima (ICJ/UFRR).

In terms of sociocultural context, the PJF/UFRR project fits into a very unique environment. Roraima is characterized by its immense cultural diversity, resulting from one of the highest percentages of indigenous population in Brazil, as well as a significant influx of migrants, mainly from Venezuela. However, the state also struggles with persistent cases of racism and xenophobia, and has some of the highest rates of domestic violence, sexual violence, and femicide in the country (HRW, 2017; BRASIL, 2019; FBSP, 2022).

To address this context, we have chosen to incorporate into the rewriting a discussion on how the utilization of hegemonic legal methods causes the invisibility of and exacerbates the vulnerability of indigenous, immigrant, and refugee women, denying them proper access to justice and thereby contributing to the escalation of the al-

ready high rates of gender-based violence in the state.

The primary goal is to demonstrate how it is possible to achieve effective judicial decisions for the prevention and tackling of domestic and family violence against women by utilizing existing legislation and adopting a feminist approach rooted in decolonization, intersectionality, and interculturality.

To achieve this goal, the PJF/UFRR team underwent a training process on the concepts and methodologies of feminist epistemologies that included UFRR professors and students, anthropologists, external researchers, and members of the justice system. More than promoting the construction of a practical feminist argumentation (BARTLETT, 2020), this process also left us all with "a memory of affections, images, feelings, but also of words spoken and silences, of analyses shared in days of political reflection" (MIÑOSO, 2020a, p. 105), which were fundamental to understand the needs, desires, and demands of those indigenous refugee women and to translate them into a rewriting.

It is hoped, therefore, that this rewriting will serve as an inspiration for judges working on gender issues, enabling them to escape the pitfalls of both hegemonic legal doctrines and methods still taught in Brazilian public and private universities, and the pitfalls of hegemonic feminism. Both have historically been used to exclude indigenous refugee women – and other groups marginalized by the coloniality of power, coloniality of being, and coloniality of knowledge – from accessing rights and justice.

BRIEF DESCRIPTION OF THE CASE AND OF THE CHOSEN DECISION

The decision chosen to be rewritten is the revocation of Urgent Protective Measures (*MPUs*) that had been granted in favor of two

indigenous refugee women belonging to the *Warao* People, native to Venezuela. The revocation was based on the argument that, during a visit by the Maria da Penha Patrol to their home, the victims would have reported their return to living with their perpetrator. The case that led to the granting of the *MPUs* began in July 2022 when M. and F., both indigenous refugee women, experienced yet another incident of aggression perpetrated by Y., a non-indigenous (*criollo*) Venezuelan male immigrant. The victims had been living with Y. since they arrived in Brazil[296] in 2015.

Overcoming all the linguistic, cultural, and psychological barriers stemming from their indigenous identity and refugee status, the victims went to the *Casa da Mulher Brasileira*[297] with the aim of seeking protection of the State in order to break out of the cycle of violence in which they had been trapped since 2015. After recognizing the cases of Domestic and Family Violence against Women (DFVAW) and the risk of its continuation by the perpetrator, the Specialized Police Station for Women's Assistance (DEAM) submitted a request to the Court of Jurisdiction of Boa Vista[298] asking for Urgent Protective Measures (MPU) in favor of both M. and F.

In response, the following MPUs were issued: a) Removal of the perpetrator from the home; b) Suspension of the perpetrator's right to reside on the same property or within a 500-meter radius of the victims'

[296] Given that the Protection Orders (MPUs) are being processed under seal of confidentiality, we have chosen not to identify the parties, the case, the court, or any other information that could potentially lead to the identification of the specific case.

[297] TN: *Casa da Mulher Brasilieira* is a specialized public service facility in Brazil designed to provide comprehensive support and assistance to women who are victims of violence, including domestic violence, sexual assault, and other forms of gender-based violence. It's a part of Brazil's efforts to address and combat violence against women and provide them with a safe and supportive environment to seek help.

[298] Jurisdiction for granting MPUs in Boa Vista is exercised by the two Specialized Domestic Violence Courts, as well as by the Judges on Duty in the District (TJRR, 2022).

domicile, with immediate evacuation of the premises and surrender of the keys; c) Prohibition of approaching or having any contact with the victims, their family members, and witnesses within a 500-meter radius; d) Prohibition of Y. from frequenting places close to the victims' residence, as well as their workplaces, schools or churches; e) Serve the notice upon the leader / coordinator of the P. shelter to prohibit the entry of the perpetrator and to arrange his transfer to another shelter; f) Granting sole custody of the children to the mother/victim and suspending visitation rights; g) provisionally establishing monthly alimony of R$ 400.00 (four hundred reais) in favor of the victims.

The perpetrator was duly notified and evicted from home, but returned the next day. On the same day, the Human Rights Observatory (ODH/UFRR), which provides support and legal assistance to the indigenous community where the victims and the aggressor live, was contacted by the *aidamos*[299] who were very alarmed. They reported that Y. had violated the restraining order, returning more aggressive, and threatening the victims and the entire community.

The ODH/UFRR team reported the incident to the State Coordinator for Women in Situations of Domestic and Family Violence (CEMVDF), and were then informed that a visit by the Maria da Penha Patrol would soon take place on site. However, this visit did not take place until a week later, and at that time the only action taken was the preparation of an assistance report stating that the victims had returned to live with the perpetrator and had expressed an interest in having the MPUs revoked.

Based on this report, the decision was made to revoke the MPUs, which led to the present rewriting. The following is the transcribed reasoning and dispositif of the decision:

[299] *Aidamo* is the name given to the traditional Warao leader who, as well as being the highest authority within their community, acts as its representative and spokesperson in their relationship with non-indigenous society.

> This provisional remedy was filed because of a report of domestic violence, and a preliminary injunction was granted for urgent protective measures in accordance with Law No. 11.340/2006. During the course of the proceedings, the plaintiff informed the court that she did not wish to continue with the protective measures [the "Maria da Penha Patrol" team attached a report to the case file showing that the plaintiff had expressed an interest in revoking the protective measures granted in her favor].
>
> Therefore, in light of the subsequent change in the factual situation, and in accordance with the *rebus sic stantibus* clause, the urgent protective measures should be revoked, since, according to the plaintiff's statement, they are no longer necessary, and the precautionary measure should be revoked, especially since the conditions that justified it no longer exist.
>
> Therefore, in view of the plaintiff's lack of interest in acting, **I DECLARE THE LACK OF MOTIVATION OF THE ACTION**, **I REVOKE THE URGENT PROTECTIVE MEASURES** preliminarily granted and dismiss the case, without settling on the merits, under the terms of art. 485, VI, of the Brazilian Civil Procedure Code, with the reservation that the plaintiff may, at any time, request new protective measures, should she need them again.

Thus, without any consideration of the intersectional identities of the victims as Indigenous and refugees, as well as the cultural, economic, and social constraints that make them vulnerable, the decision almost mechanically replicates a "template" judg-

ment adopted by judges across the country to revoke protection measures (MPUs).

By acting in a supposedly neutral, objective, and impartial manner, by announcing the dismissal of the case without any concern or accountability for the consequences of such a decision (HARAWAY, 1995), the judge appears to be more focused on closing the case to demonstrate productivity and compliance with the objectives of the National Council of Justice (CNJ) than on ensuring the effective protection of victims.

In this sense, even though this decision may not be emblematic or provoke theoretical discussions on gender issues, or even contain explicitly sexist language and discriminatory gender stereotypes, by replicating mechanistic patterns of behavior reproduced throughout the Brazilian judicial system , inadvertently perpetuates various forms of violence against women, leading to often fatal outcomes.

REWRITING METHODS AND APPROACHES

Before presenting the rewritten decision, we feel it is crucial to clarify the analytical and methodological categories used in its formulation.

Given that this is a rewriting from a feminist perspective, it is important to emphasize which feminisms we are approaching engaging. First, since the intended beneficiaries of the rewritten decision are indigenous refugee women, we draw on *indigenous feminism* – understood in a broad sense that includes *communitarian feminism* (PAREDES, 2010; PAREDES; GUZMÁN, 2014) and the *Indigenous Women's Movement* (SOUSA, 2022) - as well as *decolonial feminism* (LUGONES, 2014; CURIEL, 2019; MIÑOSO, 2020b; SEGATO, 2012). These approaches have allowed us to break away from the

power hierarchies perpetuated by hegemonic forms of legal thought, interpretation, and application.

Through the epistemological decolonization (QUIJANO, 1992) facilitated by these approaches, we have been able to understand the "*cosmoperceptions"* (OYĚWÙMÍ, 2021) and "*cosmo-coexistences"* (HUARACHI, 2011) of indigenous women, as well as their strategies of resistance and re-existence (ESCOBAR, 2008; WALSH, 2009, 2013) in the face of the systematic processes of exclusion and subalternization of their knowledges, ways of life, and subjectivities that have been ongoing for over 500 years. These insights have been incorporated into the rewriting process.

The following analytical and methodological categories were used to operationalize these approaches: *situated knowledges* (HARAWAY, 1995), *standpoint theory* (RIBEIRO, 2019; ALCOFF, 1991), *feminist standpoint theory* (HARDING, 2004), *intersectionality* (CRENSHAW, 2002; MACKINNON, 2013; COLLINS; BILGE, 2020), and *interculturality* (WALSH, 2007, 2009).

Using the categories of situated knowledges, standpoint theory, and feminist standpoint theory, we were able to understand the interests, needs, and demands of indigenous refugee women from their own voices. To achieve this, we conducted interviews with other *Warao* women living with M. and F. in the same community to understand the impact of the analyzed decision on their lives and to explore what measures they felt would have been more effective in achieving comprehensive protection for the victims.

While the initial proposal was to involve M. and F. in the rewriting process, this was not feasible due to the return of the perpetrator to their home. Given Y's aggressive behavior and involvement in local criminal activities, our team's approach could potentially provoke a violent reaction that would threaten not only M. and F.'s

lives and well-being but also ours and those of other members of the indigenous Y.I. community.

Through *intersectionality*, we were able to bring into the rewriting process the social markers that constitute the identity of the victims, especially their race/ethnicity, class, and nationality, which were never taken into account by the judge in his decision. It was as if their generic and essentialist identification as women were considered sufficient to achieve the protection provided by the Maria da Penha Law (MPL).

Interculturality, on the other hand, should serve as a guiding principle for all relationships established between the victims, as indigenous women, and the public authorities, both within and outside the legal process (LIMA, 2022). Its purpose is to achieve an understanding of their cultural specificities that goes beyond mere recognition and tolerance and to ensure an effective, symmetrical, and dialogical relationship with all parties involved. Within the legal process, it should be operationalized through the "adoption of specific routines and procedures to address the sociocultural specificities of these people" (Article 5, CNJ Resolution No. 454/2022).

As feminist legal methods, we have adopted the "*asking the woman question"*, *feminist practical reasoning,* and *positionality*, proposed by Katharine Bartlett (2020), which highlight the need for each case to be analyzed based on its specific circumstances, contexts, and personal experiences.

From this perspective, although in the process of rewriting it was only possible to identify these specificities through interviews with other *Warao* women and bibliographic analysis of existing anthropological production on this indigenous people, we understand that in a real situation, the application of the methods adopted would

make it indispensable for the victims to be heard in court and/or by a specialized multidisciplinary team.

This is because, although the *Warao* cosmoperception of gender defines the way in which members of this people understand gender violence, this does not mean that every *Warao* woman will perceive and experience this type of violence in the same way.

With regard to the format of the rewriting, we opted to maintain the structure of the original text, but to rewrite each of its parts – background, the ratio decidendi, and the decision – using the analytical and methodological categories described above.

Before moving on to the rewritten decision itself, however, we consider it important to highlight the main aspects of the original decision that deserve to be rewritten.

Starting with the *background*, we believe that the original decision, which ordered the revocation of all the *MPUs* that had been granted in favor of the victims without taking into account the specificities of the case, was wrong.

In the rewritten decision, we concluded that the most appropriate thing would be to replace the *MPU* to remove the aggressor from his home (art. 19, § 2, MPL) by the *MPU* of providing *shelter* for the victims and their children/grandchildren and the preventive *detention* of the aggressor for non-compliance with the *MPUs*.

Furthermore, "if there has not been a significant lapse of time since the facts that led to the imposition of the measures and there are elements that currently recommend their maintenance, there is no need to speak of revocation" (TJMG, 2022). In fact, only 10 days elapsed between the perpetrator's notice and the revocation decision, which cannot be considered a reasonable time to demonstrate a "supervening change in the factual situation," as the original decision claims, especially when that situation is

characterized by a worsening risk to the victims' lives and personal integrity.

In addition to the background, we have identified the need to review the following aspects of the original decision:

1. *Invisibilization of the socio-cultural identity of the victims* by assuming that "woman" is a homogeneous analytical category (SMART, 2020; BARTLETT, 2020) and a "universal cultural experience" (BUTLER, 2019, p. 219).

In the case of Indigenous and refugee women, their identities are not mere sociodemographic data points that are inconsequential to the resolution of the case, but rather factors that determine how these women experience and confront gender-based violence (BARTLETT, 2020).

In addition, this omission violates the guidelines and procedures established by Brazilian National Council of Justice (*CNJ*) Resolution No. 454/2022 (especially those set forth in its Article 3, items I to V) to guarantee the right of access to justice for indigenous individuals and communities; the guidelines established by the Protocol for Gender-Perspective Judgments published by the CNJ (BRASIL, 2021); the rights to self-determination and culturally differentiated treatment guaranteed to indigenous peoples by both Brazilian and international legislation in force[300].

2. *Absence of an anthropological evaluation, as well as of a Warao translator/interpreter.*

In the case of indigenous women victims, any decision affecting

[300] In Brazilian law, we highlight Articles 231 and 232 of the Brazilian Federal Constitution and the Indigenous Statute (Law 6.001/1973) (with the exception of the provisions tacitly revoked for affronting the right to indigenous self-determination). In international law, we highlight the ILO Convention No. 169 (C169, 1989), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) and the American Declaration on the Rights of Indigenous Peoples (ADRIP, 2016), all ratified by Brazil.

their way of life must be preceded by an anthropological evaluation, as required by Articles 3, V, and 14 of *CNJ* Resolution No. 454/2022.

Furthermore, in the case of victims who are indigenous and speak the *Warao* language, the participation of a *Warao translator/interpreter chosen by their community members* is required in all proceedings (Articles 3, IV, and 16, § 2 of *CNJ* Resolution No. 454/2022; Article 13.2, UNDRIP). This is because it is common for *Warao* women to speak only their native language (ACNUR; MC, 2019; OTERO; TORELLY; RODRIGUES, 2018), which not only increases their dependence on their perpetrator – who is often the only family member fluent in Spanish and/or Portuguese and thus their only form of communication with society – but also hinders their access to support and resources to address gender-based violence.

3. *Absence of a description of the socio-cultural context and specific circumstances of the case.* When it comes to indigenous refugee women, the conditions in which they live, not only in terms of culture, but also in terms of access to housing, food, income, education, and public services, have a direct impact on how these women will experience and confront domestic gender-based violence, as well as the assessment of the risks of femicide. Therefore, these circumstances must be taken into account both by the judge when deciding on protective measures and by the bodies responsible for implementing, evaluating, and monitoring these measures.

Without this information in the case file, and without making any effort to obtain it, the judge made his decision ignoring not only the obstacles the victims faced in reaching the courts[301], but also the

[301] Obstacles ranging from linguistic and cultural barriers - due to their lack of knowledge of both the Portuguese language and the functioning of the Brazilian justice system, as well as the lack of translators/interpreters in public institutions who can facilitate linguistic and intercultural mediation with them - to psychological barriers stemming from the violence experienced in the migration context (from oppression and persecution starting in Venezuela to various forms of physical, psy-

cycle of violence to which they had been subjected for more than seven years.

4. *Absence of the national risk assessment form.*

While we understand that its implementation may affect "the provision of police assistance by requiring more time for guidance and support to women" (MATOS; SEVERI, 2022, p. 138), its absence not only complicates the assessment and management of risks by the Public Prosecutor's Office and the judiciary system, but also the implementation and monitoring of protection measures by law enforcement agencies, as the form contains information on both the victim's socio-cultural identity and their history of violence.

For this reason, we believe that even if the form was not used during the police intervention that led to the protective measures, its absence should be addressed by the multidisciplinary team, which, after a qualified hearing of the victims, should proceed with its implementation, following the guidelines of Declaration No. 55 of Brazilian National Forum of Judges on Domestic and Family Violence against Women (*FONAVID)* (*CNJ,* 2023) and § 2 of Article 2 of Law No. 14,149/2021.

5. *Delay and ineffectiveness of the measures taken after the perpetrator violated the MPU.*

Even though the judiciary was notified by the ODH/UFRR of the violation of the MPU immediately after it occurred, it took

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chological, sexual, and especially institutional violence suffered during the migratory journey and arrival in Brazil) (YAMADA; TORELLY, 2018; IPEA, 2021), as well as the cycle of gender-based violence that generates "emotional dependence, shame, fear, fear that the perpetrator may escalate the violence or even kill them, economic dependence, depression, passivity due to repeated psychological violence, delays in the judicial process, belief in the abuser's potential to change, low self-esteem, fear of being alone and unable to find another partner, fear of not being able to provide for the children's needs alone, disbelief in the justice system's ability to resolve the conflict, etc". (PIRES, 2011, p. 123-124)

more than a week for the Maria da Penha Patrol to visit the victims' homes.

"The state's inaction in these cases also constitutes violence against women" (MENDES, 2022, p. 152), because, beyond the fear and uncertainty generated by disbelief in the state's action, which was their last hope of breaking the cycle of gender-based violence, the victims felt regret and guilt for their actions, which led to the escalation of violence not only against them, but also against their minor children and their entire community.

In addition to being late, such a visit adds another factor of revictimization for M. and F. that needs to be clarified. In Boa Vista, the Maria da Penha Patrol (*PMP*) is composed of a specialized unit of the Municipal Civil Guard (*GCM*), which is responsible for supervising the execution of the MPUs (TJRR, 2021).

However, the same *GCM* was also responsible for implementing the urban sanitation policy adopted by the municipality of Boa Vista in response to the increased flow of migrants from Venezuela in recent years. In addition to the systematic searches and expulsions of *Warao* people from public spaces, such as certain public squares they used to stay (SARMENTO; RODRIGUES, 2020; YAMADA; TORELLY, 2018), *Warao* women are constantly threatened by the *GCM* with the loss of custody of their children due to their practice of "begging" money in the streets and at traffic lights, often with their minor children[302]

[302] It is important to clarify that, although this practice is commonly seen by public authorities as begging and as mistreatment of children, in the Warao cosmoperception, "the practice of asking for money on the streets is supported by the same logic that guides the hunter-gathering of fruits and small animals in the natural environment. Traditional gathering techniques would have been transported to other spaces. [...] This is an adaptive strategy developed in the urban context. Therefore, it is not understood by indigenous people as a derogatory, embarrassing or unworthy practice, just as, when they are in their communities, it is not unworthy to enter the forests in search of fruits, honey and small animals. [...] For Warao women, although they recognize the risk to themselves and their children, being with children

(SOUZA, 2018; BOTELHO; RAMOS; TARRAGÓ, 2017).

All of this institutional violence was relived by the victims when the PMP arrived at their home because, although it is a specialized unit of *GCM* with specific training to provide a more humane service, when they enter the indigenous community where M. and F. live, they do so without asking the aidamos for permission – which, in itself, violates the right to indigenous self-determination – and wearing the same uniform as the *GCM* and carrying a weapon. That's how they approach the victims and ask them to express whether or not they want the *MPUs* to be maintained.

After that, the PMP´s report is presented to the judge who, assuming that the victims' statements were made without coercion, refrains from using additional evidentiary methods. The judge then decides to revoke the *MPUs*, arguing that "they are no longer necessary" because the conditions that justified them no longer exist.

6. *Absence of a multidisciplinary hearing.*

We believe that any decision, whether to review, replace, or revoke *MPUs,* must be preceded by a *multidisciplinary hearing,* as determined by the *FONAVID* Statement No. 44 *(CNJ, 2023)* and Articles 19 and 30 of the MPL*,* as according to the majority of precedents on the subject:

> COMPLAINT. CRIMINAL. CRIMINAL PROCEEDINGS. DOMESTIC AND FAMILY VIOLENCE AGAINST WOMEN. MULTIDISCIPLINARY HEARING HELD. COMPLAINT DISMISSED.
>
> 1. Domestic and family violence against women is a complex process that encompasses both social and legal aspects and requires interaction between various areas of knowledge in order to eradicate the problem,

on the streets is a way of keeping them safe [...]." (UNHCR, 2021, p. 20)

> beyond the strictly criminal scope of the issue.
> 2. The multidisciplinary hearing serves the purpose of ascertaining the extent of the victim's risk situation in order to adjust the urgent protective measures so that she can be referred to the appropriate services to prevent the cycle of violence. In addition to a more efficient and speedy judicial provision, it enables the social effectiveness of the action, due to the appropriate protection of the victim in the face of a serious social problem.
> 3. Article 30 of Law 11.340/06 makes it possible for the judge to use multidisciplinary assistance to gather information to assess the victim's risk situation during a hearing, verbally. Article 19 provides for protective measures to be granted regardless of the parties' hearing. Therefore, with even greater reason, the judge can set them after hearing the interested parties.
> 4. Complaint dismissed. (TJDFT, 2017)

In addition to the participation of a representative of the Public Prosecutor's Office, the hearing must include the presence of a multidisciplinary team composed of an anthropologist, a psychologist, and a social worker, as well as a *Warao* translator/interpreter. The purpose of this arrangement is to ensure adequate support and to facilitate interethnic and intercultural dialogue, as provided for in Articles 5, 12, and 13 of *CNJ* Resolution No. 454/2022.

Besides that, the hearing should be given sufficient time and space to allow victims to express themselves in an informed manner and free of coercion. This approach ensures "mutual interpretation between different cultures and rationalities in dialogue, as a means of reducing the barriers that impede indigenous women's access to justice" (MENEZES; RODRIGUES, 2021, p. 154).

THE REWRITTEN DECISION

THE STATE OF RORAIMA'S COURT OF JUSTICE
COURT WITH JURISDICTION OVER URGENT PROTECTIVE MEASURES

CASE NO: XXXXXXX-XX.2022.8.23.0010.
PETITIONER(S): M. and F.
RESPONDENT: Y.

DECISION TO MODIFY AN URGENT PROTECTIVE MEASURE

I – BACKGROUND:

The petitioners M. and F., identified in the case file as indigenous women of the *Warao* people, originally from Venezuela, refugees, living and residing in the *Warao Y.I* indigenous community, located in an urban area, in a former multisport gymnasium, went to the *Casa da Mulher Brasileira* at the beginning of July 2022 for domestic violence suffered at the hands of Y., a non-indigenous Venezuelan immigrant man with whom M. has had a marital relationship of about seven years and with whom she has three minor children. F. is M.'s mother and Y.'s mother-in-law and lives with the couple and their children.

After attending to the victims, the Chief of Police, pursuant to art. 19, *caput*, of the *LMP*, sent this Court a request for urgent protective measures against Y., which was accompanied by the following documents: a) Request for Urgent Protective Measures (*MPU*); b) Police Report No. XXXX/2022-A01 - Specialized Women's Police Station in the District of Boa Vista/RR; c) Statement of M. and F.; d) Statement of Representation of M. and F.; e) Civil Identification Form.

On July 16, 2022, protective measures were granted against Y as a preliminary matter, as provided in Article 22, Items II, III, IV and V of the Domestic Violence Act (MPL). On July 17, 2022, Y. was duly served with notice and evicted from the residence in accordance with the protective measures granted.

However, on July 18, 2022, Y. returned to the victims' residence in violation of the granted *MPUs*. This Court was informed of this incident on July 19, 2022, by the *ODH/UFRR*, which provides legal assistance on an ongoing basis to the community where the parties reside.

On July 20, 2022, the multidisciplinary team of the *CEMVDF*, composed of an anthropologist, a psychologist, and a social worker, visited the Y.I. community. They conducted active listening sessions with the victims and filled in the National Risk Assessment Form. They also inspected the community's physical facilities to determine the victims' living conditions, food security, safety, and income. All of these details are meticulously detailed in their service report attached to the case file on page XX.

Given that the victims are indigenous Warao women, in order to understand their cosmoperceptions and the sociocultural reality in which they live, along with its impact on how they experience and cope with domestic violence, an anthropological evaluation was commissioned, in accordance with Articles 3 (item V) and 14 of CNJ Resolution No. 454/2022. The resulting report of the evaluation is attached to the case file on page XX.

A multidisciplinary hearing was held to hear the victims, the perpetrator and the witnesses, in the presence of the representative of the Public Prosecutor's Office, the multidisciplinary team, and the *Warao* translator/interpreter chosen by the *Aidamos* of the Y.I. community.

The Public Prosecutor's Office participated regularly in the proceedings.

This is a brief report. REASONS AND DECISION.

II – REASONING

The protective measures prescribed in the Law on Domestic Violence (MPL), Articles 22 to 24, aim to ensure comprehensive protection of the life and to guarantee physical, psychological and property integrity of victims. These measures should remain in force as long as there is a risk to the victims. However, in the event of violations or threats to the rights provided in the MPL, the judge may at any time replace the granted protective measures with more effective ones (Article 19, § 2, LMP).

The present proceedings were initiated following an incident of domestic violence committed by Y. against his partner M. and his mother-in-law F., who lives with the couple and their three children. Temporary protection measures were immediately granted in accordance with Articles 18 and 19 (Paragraph 1) of the LMP. Among the protective measures granted, the removal of the aggressor from the domicile in the community of Y.I. stands out.

However, less than 24 hours after the notification and eviction of the aggressor, according to the testimonies of the victims and witnesses and the official notification by the ODH/UFRR, Y. returned to the residence and began to threaten the victims and other members of the community with death, blatantly disregarding the imposed protective measures.

According to the information presented in the anthropological report on page XX, the victims and the aggressor currently reside in the Y.I. community, along with approximately 300 other indigenous people, all of whom belong to the Warao people and have refugee

status. The community is located in the urban area of Boa Vista, Roraima, on the site of a former state multisport gymnasium.

Despite its self-identification as an indigenous community, as required by Article 1 of ILO Convention No. 169, Article 231 of the Brazilian Federal Constitution and Article 3 of the Indigenous Statute, the government classifies the community as a spontaneous settlement of immigrants.

This is because, for four years, the site was a humanitarian shelter for indigenous refugees and immigrants run by *Operação Acolhida*[303]. Since March 2022, however, the shelter has been officially closed, leaving its residents without assistance from the agencies responsible for reception and humanitarian aid.

Upon their deactivation, these entities removed all the structures that served as homes for the Warao and stopped providing them with food, resulting in significant social and economic vulnerability, severe child malnutrition, food insecurity, and other forms of violence and violations of their rights as indigenous refugees.

In addition to the circumstances arising from the migratory context, which creates an atypical home environment on its own, the situation is exacerbated by the fact that this is an indigenous community. In such a community, “the scope of the domestic unit goes beyond the confines of individual dwellings and encompasses the entire village, since this is the space of continuous interaction among people” (CASTILHO, 2008, p. 26). Thus, the violence

[303] *Operação Acolhida* (*OA*) is "a large humanitarian task force executed and coordinated by the Federal Government with the support of federal entities, UN agencies, international organizations, civil society organizations and private entities, totaling more than 100 partners, the Operation offers emergency assistance to Venezuelan refugees and migrants who enter Brazil through the border with Roraima" (BRASIL, 2023). The shelters in Roraima are run by the Army, which is set up as the *OA*'s Humanitarian Logistics Task Force, in partnership with the UNHCR, AVSI and other humanitarian agencies.

that occurs within a family has reverberations that affect the entire community.

In the present case, this situation is aggravated by the fact that the aggressor, in addition to being known for his violent temperament and involvement in criminal activities, is a non-indigenous immigrant *(criollo)*. Because he is not a member of the *Warao* community, he systematically disrespects the community's rules and traditional authorities, which he does not recognize as legitimate.

Furthermore, when examining the history of violence described in the national risk assessment form and underscored by witness statements, it becomes clear that the cycle of violence in which the victims and the community are trapped has been ongoing for several years.

This pattern is exemplified by an incident in 2018 in which the aggressor was expelled from the premises by the action of Operação Acolhida, during a period in which the community space functioned as a humanitarian shelter. This expulsion was directly related to his acts of violence and domestic abuse against M. As a result, he had to move to another shelter for immigrants. However, in 2022, after the closure of the shelter, Y. returned to live there. Upon his return, he again subjected the victims to repeated acts of aggression and made violent threats against the entire community. He also misused the premises for drug trafficking.

Considering the context and the specific circumstances of the case, as well as the intersectional vulnerability of the victims, I consider that the MPU to remove the aggressor from home has proven to be ineffective, which is why I consider it essential to revoke it and replace it, as according to the second paragraph, article 19 of the LMP, with the measure to remove the victims from their domestic environment, together with their children/grandchildren, and to maintain the other MPUs granted.

This measure is justified both by the precarious security and living conditions of the victims and by the failure of the authorities responsible for the implementing, monitoring and evaluating the *MPUs* to ensure compliance by the perpetrator. In addition, all the witnesses, who are also *Warao* people living in the same community as M. and F., argued that the only way to protect the lives and physical and psychological integrity of the victims would be to move them to a place unknown to the perpetrator, given that he had stated that if the victims or other members of the community denounced him and he was arrested, his criminal partners would come to kill them.

In addition, considering that the perpetrator violated the MPUs on date after his notification, as provided for in art. 24-A of the LMP, as well as the continuity and aggravation of aggressions and threats against the victims and the entire community, materializing "the *fumus comissi delicti* and the *periculum libertatis*, consisting, the first, in indications of the occurrence of any of the forms of violence against women, defined in articles 5 and 6 of Law no. 11.340/2006, 340/2006, and, the second, in the risk of the requested provision being useless, if the measure is not immediately granted" (TJDFT, 2020), I understand that his pre-trial detention is a necessary measure and proportionate to the offense committed, as well as his psychosocial monitoring and mandatory participation in rehabilitation and re-education programs, according to art. 22, items VI and VII of the MPL.

III - DECISION

In view of the foregoing and pursuant to Article 19 (Item 2) of the LMP, I DECIDE:

1. To revoke the measure of removal from the home of the aggressor Y. and replace it with the measure of removal from the domicile of the victims M. and F., in accordance with article 23, III, of the LMP, and their respective transfer, together with M.'s minor children,

to the shelter Casa-Abrigo, for as long as the risk situation continues;

2. The inclusion of the victims M. and F. in social assistance programs, to be carried out in coordination with the shelter, for the social and psychological care of the victims and their children, as well as for legal advice, and their implementation should be supervised by the multidisciplinary team of the CEMVDF in partnership with the specialized reference center for social assistance (CREAS/BV);

3. The maintenance of the measures provided for in art. 22, items II, III, IV, and V of the LMP, granted in limine against Y., in accordance with the decision of page XX;

4. Preventive detention of the aggressor Y., on the basis of art. 24-A, in addition to his participation in recovery and re-education programs and psychosocial monitoring, which must take place simultaneously and with due supervision by the multidisciplinary team of the CEMVDF.

Notify the aggressor/defendant Y. and the victims M. and F. of this decision.

On this occasion, I also order that the accused be duly served with this decision, so that he may, if he so desires, express his answer within the legal time limit, under penalty of default and confession of the facts.

Inform the representative of the Public Prosecutor's Office of this decision and of the failure to comply with the protective measure previously granted.

Boa Vista-RR, date in the system.

Judge of the District of Boa Vista

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SHE DIED BECAUSE SHE SCREAMED: REWRITING THE INDICTMENT FOR THE FEMINICIDE OF VIVIANNY CRISLEY VIANA SALVINO

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INTRODUCTION

This work is the result of an inter-institutional research project entitled "Judgments from a Feminist Critical Perspective: Rewriting Judicial Decisions from Northeastern Brazil". This project involves the Federal University of Paraíba (UFPB), the Federal University of the Semi-Arid (UFERSA), and the Federal Institute of Paraíba (IFPB), and aims to analyze how critical feminist legal theories can contribute to the development of new theoretical and methodological perspectives for the elaboration of judicial decisions in Brazil, rewriting them from a feminist perspective.

The project is organized into three working groups, each with at least one faculty advisor and law students from the participating universities and institutes. Each group decided to rewrite its own decision, resulting in three rewrites related to the following cases: 1) the eviction in the Women Warriors Occupation; 2) the murder of Margarida Maria Alves; and 3) the feminicide of Viviany Crisley.

This work presents the rewritten decision of the prosecution process related to the feminicide of Vivianny Crisley Viana Salvino, which occurred on October 21, 2016, in the municipality of Santa Rita, in the state of Paraíba. Vivianny was brutally murdered with

a screwdriver and her body was then set on fire by her killers. Despite this brief description of the facts, which speak for themselves, there has been neither an accusation nor a conviction for the crime of feminicide.

THE ORIGINAL CASE

According to the facts described in the Civil Police report and in the complaint filed by the Public Prosecutor's Office[304], on the night of October 20, 2016, Vivianny Crisley Viana Salvino, accompanied by a friend, was at the bar "Beberico's Prime", in the city of João Pessoa. At around 2:30 a.m. on October 21, the friend left the bar accompanied by a boy she was seeing and Vivianny remained in the bar, now in the company of Allex Aurélio Tomaz dos Santos, Fagner das Chagas Silva (Bebe) and Jobson Barbosa da Silva Júnior (Juninho).

According to the complaint, at around 3:18 a.m., Vivianny and the three men left the bar in a black Celta - a stolen vehicle - and drove to the Eitel Santiago neighborhood, in the Santa Rita municipality, in the João Pessoa metropolitan region. The car was driven by Jobson Barbosa da Silva Júnior (Juninho), with Vivianny in the passenger seat and the other two - Allex and Fagner - in the back seat.

During the ride, the driver, known as Juninho, felt unwell and asked to switch driving with Allex. At one point, Vivianny asked to go home, which was not answered. All the defendants and Vivianny went to Juninho's house in the Eitel Santiago neighborhood. When they arrived, the three men got out of the car, but Vivianny stayed in the car. On this occasion, Vivianny continued to insist on going

[304] Case No. 0000073-62.2017.8.15.0331, which was heard by the 1st Mixed Court of the District of Santa Rita, State of Paraíba.

home, "screaming a lot and asking to leave. In the face of her insistence, Jobson said: "Boy, let's kill this girl! This girl is a pain!". The same man then used a screwdriver to strike the victim in the neck and several times in the head. Allex Aurélio, for his part, got into the driver's side of the car and continued to beat Vivianny on the head, also with a star-shaped screwdriver, resulting in her death. The three men then drove into the forest known as "Mata do Xem-Xem", where they left Vivianny's body in a clearing.

After leaving Vivianny in the open field, the three men went back to Juninho's house to get some gasoline and returned to Mata do Xem-Xem. There, Fagner put a motorcycle tire on Vivianny's body and set it on fire. On this occasion, they took Vivianny's cell phone and the sum of R$ 70.00 (seventy reais). It should be added that while Fagner was putting the tire on the body and setting it on fire, the other two were beating Vivianny. After burning Vivianny's body, the men went to Allex's house in the Várzea Nova neighborhood of Santa Rita. There, they set fire to the clothes they had worn during the crime in order to hide evidence. The next day, on October 22, 2016, Allex drove the car into the woods in Tibiri (a neighborhood in the city of Santa Rita) and set it on fire.

Among other crimes, the three men were charged, convicted, and sentenced for double homicide (art. 121, §2, II and III, of the Brazilian Penal Code), i.e. the aggravating factors used were "futile motive" and "cruel means"[305].

[305] The defendants were brought before the jury on different dates. In addition to other crimes, the three men were tried and convicted by the jury of the crime of double aggravated homicide, due to futile motive and cruel means (art. 121, §2, II and III, of the Criminal Code). Allex Aurélio Tomaz dos Santos was sentenced to 26 years imprisonment under a closed regime and did not appeal against the first degree sentence. Fagner das Chagas Silva was sentenced to 22 years in prison, reduced to 20 years on appeal. Jobson Barbosa da Silva Júnior was sentenced to 24 years in a closed regime, reduced to 21 years on appeal.

What stands out in this case of Vivianny's murder is the omission of the justice system in Paraíba regarding the recognition of the aggravating factor of feminicide, given that Law No. 13.104/2015 has been in effect since March 9, 2015. This law precisely amended Article 121, §2º of the Brazilian Penal Code to include feminicide as an aggravating circumstance for the crime of homicide under item VI. As a result, the base penalty for the crime of homicide became 12 to 30 years of imprisonment when the homicide is committed "against a woman because of her condition as a woman". In other words, murder becomes feminicide when a woman is murdered simply because she is a woman.

The aforementioned law also added §2º-A to the same Article 121 of the Penal Code in order to clarify what would constitute "because she is a woman". According to the law, there are two legal scenarios for the occurrence of feminicide: the first is when the crime involves domestic or family violence (§2º-A, I); the second is when the crime occurs due to "contempt or discrimination against the condition of being a woman.

It should be noted that after the defendants had been sent to trial by jury, three feminist lawyers qualified as assistants to the Public Prosecutor's Office and, through a petition in the case file, expressly requested the inclusion of the aggravating factor of feminicide (art. 121, §2º, VI, of the Brazilian Penal Code), more precisely for "contempt or discrimination against the status of women" (art. 121, §2º - A, II, of the Brazilian Penal Code). The Court denied the request on the grounds that, at this stage of the proceedings, it was no longer possible to change the nature of the crime, since the defendants had already been committed for trial by jury. Therefore, the aggravating factor of feminicide was never included in the investigation of Vivianny's death.

It should also be noted that at the time of the investigation, Vivianny Crisley's relatives and organized feminist movements actively demanded the inclusion of the feminicide aggravating factor (JULGAMENTO, 2023). The absence of the aggravating factor was the result of a deliberate choice by the police officer in charge, the members of the Public Prosecutor's Office, and the judge who oversaw the case[306]. In other words, the invisibility of the crime of feminicide was a choice made by the Paraíba justice system (PEREIRA, 2018).

The recognition of feminicide within the Brazilian justice system has met with resistance. Despite this resistance, the first scenario - involving domestic and family violence - has been relatively more accepted, especially due to the Maria da Penha Law. However, the second scenario of feminicide has not been adequately understood and, as a result, has been largely overlooked by the Brazilian justice system.

Deaths and other forms of violence against women in Brazil are deeply rooted in hatred and discrimination against women because of their gender. Reports of violence have long been guided by considerations that take into account the inequality between men and women in their relationships, both within and outside the domestic and family sphere, and the embodiment of these inequalities in acts of violence. The manifestation of violence against women's bodies is a significant sign of control over them, conveying that these bodies are available for use, abuse, and even disposal.

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[306] Jaíne Araújo Pereira's (2018) dissertation analyzed this case and interviewed the police chief, the prosecutor and the judge who acted in Vivianny Crisley's case. Only the deputy and the prosecutor responded directly to the researcher's question about the non-use of the femicide aggravating factor. The judge didn't answer because she said that the case had not yet become final and for this reason she couldn't comment on the case. However, the acceptance of the complaint as a double aggravated homicide and the failure to correct it to classify the crime as femicide in the indictment leads us to say that the judge deliberately chose not to consider femicide, as did the police chief and the prosecutor.

Rita Laura Segato (2005), who examines the case of the feminicides of about 300 women in the city of Juarez in Mexico, notes that acts of violence against women are signatures that show and announce the control that men have over women. For the author, the extermination of women is an important mechanism that explicitly and self-evidently reflects the place and position that the dominated must occupy.

Therefore, the analysis of the manifestations of violence against women cannot do without highlighting the impact that these practices have on society and what they want to communicate. To properly conceptualize gender violence, it is important to acknowledge that it is rooted not only in the unequal power dynamic between men and women, but also in the collective desire for control and domination, as perceived by feminist theories on the subject. This control and domination manifests itself through actions that convey contempt and hatred towards women. Tragically, the most extreme manifestation of this violence is feminicide.

There is no unanimous concept of "feminicide", but there is some consensus that it is a crime that arises in the context of structural inequalities between men and women that perpetuate discrimination and violence against women. In this regard, Wania Pasinato (2011), in a literature review on the subject, notes that feminicide can be understood as a crime characterized by misogyny and contempt for women, committed by men, individually or in groups.

The Model Protocol for the Investigation of Feminicide/feminicide in Latin America (MODEL, 2018) defines feminicide as the violent death of women for gender-related reasons that occurs within the family, domestic unit, or any other relationship, and at the hands of any person. In an analysis of the structural frameworks that lead to acts of violence against women, the same protocol model asserts that

acts of violence share common characteristics and bases, including being part of a culture of violence and gender discrimination, where women's inferiority and subordination are established features. In this context, women's deaths cease to be isolated cases and become emblematic of a structural situation and an entrenched socio-cultural phenomenon.

In this line of reasoning, it can be affirmed that what characterizes the crime of feminicide and distinguishes it from ordinary crimes is the contempt and hatred for the feminine and the condition of being a woman, as well as the fact that its perpetration occurs within the context of unequal power relations between men and women, signifying men's control over women. This contempt is factually evident through the circumstances and manner in which the crime is committed.

Wânia Pasinato, cited in the book "*Feminicídio #InvisibilidadeMata*" (PRADO, SENEMATSU, 2017, p. 157), emphasizes the importance of professionals involved in the investigation being prepared to identify the disregard and gender-based discrimination from the broader context in which the crime took place. According to the author, the number of strikes, the type of weapon used, and the location of the wounds on the victim's body are factors that can help identify the typology.

The hatred and contempt for the condition of being a woman, as characteristics of feminicide, are therefore not subjective elements, but rather objective ones, which are expressions of the social structure of discrimination. Thus, the perpetrator doesn't necessarily have to be aware of the contempt and hatred he feels and acts out against the woman or women involved; indeed, he may not even be consciously aware of it at times, as it reflects the unconscious subjectivization of the sexist culture in which he is situated.

In the context of this study, it is necessary to reflect on the meaning of feminicide when it is committed due to "disregard and discrimination based on the condition of being a woman", as stipulated in Brazilian legislation. As mentioned above, when it comes to the deaths of women within the domestic and family sphere, it is easier for professionals within the justice system to recognize feminicide, despite the resistance, because of the presence of an emotional relationship as a prerequisite for its verification, as outlined by the law. Furthermore, the legal field has reasonably accepted the inherent gender inequality within these emotional relationships. On the other hand, considering the deaths of women outside this sphere, especially when the sexual nature of the crime is not certain, leads the justice system to seek "technical evidence" of the disregard and discrimination based on the condition of being a woman, ignoring that the very manner in which these bodies are violated signals this hatred.

In the case in question, when the police chief in charge of the case tried to explain why he did not classify the crime as feminicide in his report, he replied that the motive for the crime was not known and that he could only use what was in the case file and that the lack of evidence of a sexual crime, given the conditions in which the body was found, did not authorize him to classify it as feminicide. According to an interview (PEREIRA, 2018, p. 57), the prosecutor who brought the charges stated that "the concept of feminicide is very specific, it requires cohabitation. Whether the person lives in the same house or not, but it requires cohabitation, prolonged cohabitation, in addition to the fact that the person is a woman!".

Thus, understanding feminicide as an expression of "contempt for and discrimination against women" depends on understanding how patriarchy works, a system of male domination over women that is maintained, legitimized, and naturalized through social practices,

culture, discourses, and institutions. Patriarchy is also maintained by the real and symbolic violence through which it operates, produces, and reproduces, in deep articulation with racism and capitalism. Feminicide, understood as the murder of a woman because she is a woman, is the result of power differences between men and women. It is easy, natural, and legitimate to despise, hate, violate, and kill women in patriarchy, precisely because there is a system that (re) produces and naturalizes this hatred. Furthermore, in patriarchy, this hatred of women and the feminine is masked and made invisible as a strategy for naturalizing power relations between the sexes. This is why it is so difficult to configure, expose, and condemn practices of feminicide, especially those that take place outside the domestic and family sphere.

In this case, the justice system in Paraíba, despite pressure and demands from social movements, did not recognize the practice of feminicide against Vivianny, practicing what is known as institutional violence and thereby legitimizing - by making invisible - misogyny. In this case, by ignoring the misogyny that supported the feminicide in question, the state was also a reproductive agent of violence against women.

FEMINIST METHODOLOGY AND APPROACHES

As highlighted above, the decision to rewrite a judgment in the trial that convicted the three defendants in the death of Vivianny Crisley stemmed from the publicity surrounding the case and the resistance of the judiciary, from the police station to the judge, to classify the crime as feminicide. This was particularly due to the reference to Article 121, §2-A, Subsection II, which classifies the murder of women due to discrimination and contempt for their gender as feminicide.

The first phase of the rewrite focused on obtaining a complete copy of the trial transcript in order to thoroughly understand the crucial details of the case, which are often only explicit in the case files. We also sought information that would shed light on the judicial system's reluctance to recognize the crime as feminicide.

After obtaining the case file, we contacted researcher Jaíne Araújo Pereira, a graduate of the Law School at the Center for Legal Sciences of the UFPB. She had conducted her final thesis (PEREIRA, 2018) on the case, specifically questioning why the feminicide classification had not been applied. This research proved to be highly relevant to our current work, as the researcher interviewed not only the professionals involved in the trial, but also feminist lawyers who served as assistant prosecutors and explicitly requested the inclusion of the feminicide classification.

While studying the trial proceedings, we began to reflect on the implications of rewriting the conviction judgment and encountered an aspect of the Brazilian criminal process that seemed to pose a challenge to rewriting, especially considering certain methodological choices, such as not changing the facts or disregarding the legal procedural norms in force at the time of the case (HUNTER; MCGLYNN; RACKLEY, 2010).

The obstacle to this rewriting came when we realized that it was legally impossible to rewrite a conviction with a different charge, given that the indictment did not recognize the aggravating factor of feminicide and that there was no legal recapitulation of the facts in the indictment. It was up to the Public Prosecutor's Office at the time of the indictment to change the legal classification contained in the background of the police investigation, which was not done. Subsequently, according to the procedural rules, this change would only be possible in the indictment. There-

fore, rewriting the verdict would mean fictionalizing such procedural events.

In the midst of this impasse, we initially decided to continue with the rewriting of the sentence, adopting a methodological approach that was more flexible with respect to the rules of feminist perspective rewriting applied in other countries, based on the specificities of the Brazilian procedural system and the political significance that this rewriting would have. The "Vivianny Crisley" case generated one of the first movements in Paraíba to advocate for the classification of cases investigating the murder of women as feminicide (PARAÍBA, 2023).

However, after reading the interviews conducted by Jaíne Araújo Pereira (2018), we noted the deliberate resistance of the Paraíba Public Prosecutor's Office to using the feminicide qualifier and considered that it would be more beneficial, from a political point of view, to rewrite the indictment. This choice takes into account that rewriting the indictment has the following impacts: 1) it highlights the importance of the judiciary in recognizing feminicide, especially that which results from contempt and discrimination against women; and 2) it makes it possible to stimulate debate around the justice system's resistance to this qualifier. We also intend, after producing this work, to present it at the *Rede de Atenção às Mulheres em situação de violência doméstica e sexual (Reamcav)*[307], a space that includes all mechanisms for the protection of women, including those within the justice system. The aim is to stimulate discussions about the disregard and discrimination of women's condition beyond the scope of domestic and family violence.

[307] Since 2015, the Marias extension and research group on gender, popular education and access to justice has been a member of *Reamcav* (Network of Care for Women in Situations of Domestic and Sexual Violence), participating in its meetings and actions.

In this sense, we highlight the importance of feminist legal theories in the rewriting process, especially those that deal with methodologies for analyzing the legal phenomenon. Among the available methodologies, we see the importance of the "woman question", pointed out by Bartlett (2020) and Facio (1992), as the question that has the potential to challenge the supposed neutrality of norms, to question the gendered implications of norms and practices, and to reveal "the ways in which political choice and institutional arrangement contribute to women's subordination" (BARTLETT, 2020, p. 256).

By asking the woman question, and rewriting the decision to recognize the violence suffered as an expression of "contempt for and discrimination against women", we intend to provoke the justice system to think about the real nature of the crime when we make visible what the violence committed against Viviany, a woman, communicates to our society, as well as making visible that the violence committed is, in itself, a way of communicating power and control over women's bodies.

We also emphasize the importance of rewriting the decision as a means of generating a debate on the invisibility of feminicide in the case of Vivianny Crisley within the justice system of Paraíba. This approach uses the method of "consciousness-raising 2020), highlighting that Vivianny's experience - the communication of the violence inflicted on her body - can be understood as a collective experience of oppression. This perspective reveals the political nature of the personal experience.

Finally, another issue raised during the rewriting process pertains to the discussion of whether feminicide is an objective or subjective aggravating factor. At the time of the events and the trial, this discussion was still in its early stages, with few publications and vir-

tually no precedents on the subject. It's from 2017 onwards that we find more direct references to this debate, and it's in 2018 that we observe the Brazilian Superior Court of Justice (STJ) addressing the issue in the judgment of *Habeas Corpus* nº 430.222/MG, deeming the feminicide aggravating factor to be of an objective nature. After in-depth discussions, the group considered it more strategic to rewrite the decision in accordance with the doctrinal and jurisprudential elements that existed at the time, precisely to emphasize that there was no justification for the deliberate omission by the Paraíba judiciary, since at that time there was already vast amount of material on the crime of feminicide.

THE ALTERNATIVE FEMINIST JUDGMENT

PARAÍBA JUDICIARY
DISTRICT OF SANTA RITA
JURY COURT

JUDGMENT

CASE N° 0000073-62.2017.8.15.0331
PUBLIC PROSECUTOR'S OFFICE
DEFENDANTS: ALLEX AURÉLIO TOMAS DOS SANTOS AND OTHERS

The Public Prosecutor's Office has brought charges against **ALLEX AURÉLIO TOMAZ DOS SANTOS, FAGNER DAS CHAGAS SILVA, JOBSON BARBOSA DA SILVA JÚNIOR,** and **CRISLÂNEO JOSÉ BARROS DA SILVA**, all of whom have been identified, accusing the first and second defendants of crimes pursu-

ant to art. 121, §2, items II and III, in conjunction with arts. 148, 211, and 155, §4, item IV, all of the Brazilian Penal Code; the third, under the provisions of arts. 121, §2, II, and III, in combination with arts. 148 and 211, all of the Brazilian Penal Code; and finally, the fourth, for violation of art. 180, caput, of the Brazilian Penal Code, because

> "On October 20, 2016, during the night, the victim Vivianny Crisley Viana Salvino, known as "Vivi", was at Beberico's Prime Bar, located on Avenida Sérgio Guerra, Bairro dos Bancários, in João Pessoa. accompanied by the defendants and her friends Débora Dantas and Lucas Valdevino da Silva. At 02:30 the following day, the latter two left and the victim remained at the scene with the defendants. Later, at 03:18, the victim left in the company of the perpetrators in a black GM Celta 4P vehicle, year 2009 and model 2010, chassis 9BGRX481O-AG104558, license plate NPR0155- SP, owned by Luís Augusto Barbosa, in the direction of the Eitel Santiago neighborhood in Santa Rita. During the trip, the third defendant, the driver of the vehicle, began to feel sick because they were all drunk, which caused them to change drivers. In the meantime, the victim began to ask them to take her home or to drop her off at BR 230 because of her mother. When they arrived at the residence of the second and third defendants in the Eitel Santiago neighborhood, they got out while the victim asked them to leave her on the highway. Faced with her insistence, the third defendant went around to the passenger side and, in possession of a screwdriver, struck the victim first on the neck and then on the head. The first defendant then went to the driver's side and struck her several times on the head with a star-shaped screwdriver, killing her. They then drove to Mata do Xenxém, where they left the body in

> a field and returned to the house. There they took gasoline from "Juninho's" motorcycle and returned to the woods, where they placed a motorcycle tire on the body and set it on fire, while both men beat the body. During the crime, they took a cell phone and the sum of R$ 70.00 (seventy reais) from the body. After the crime, the two perpetrators returned to the house where they had spent the day and went to a party with two other women. After the party, the second and third defendants fled to the city of Recife and then to the city of Rio de Janeiro, where they were arrested. The first defendant set fire to the car and exchanged the victim's cell phone with the fourth defendant at a swap meet in Bayeux. He immediately fled to the city of Campina Grande, where he was arrested in the São José da Mata neighborhood. According to the case file, the crime was motivated by the fact that the victim "screamed a lot and asked to leave".

The initial criminal complaint was accompanied by Police Investigation No. 000613/2016/DCCPES (Capital Police Station for Crimes Against the Person - Homicide), which includes: the victim's "disappearance" record (p. 64); the Samsung cell phone seizure report (p. 100); the police investigation against Allex Aurélio Tomaz dos Santos (p. 109); DNA Examination Report (pp. 117/123); Pre-trial Detention Order against the defendants Jobson Barbosa da Silva Júnior and Fagner das Chagas Silva (pp. 142 and 144, respectively); DVD-R Optical Media Recorded Content Analysis Examination Report (pp. 152/157); Report of the Mission ordered to locate the car where the victim was allegedly murdered (pp. 168/160); Final Report of the police investigation (pp. 174/185).

Then there is the Technical Expert Examination Report on

the Location of a Corpse (pp. 208/231); the Fingerprint Survey Report (pp. 232/233); the Flammable Substances Examination Report (pp. 235/237); the Human Blood Examination Report (pp. 240/255, 268/280); the Entomological Expert Report (pp. 240/255, 268/280). 235/237); Human Blood Examination Report (pp. 238/239); Entomological Expert Report (pp. 240/255, 268/280); DNA Examination Report (pp. 256/258); Thanatoscopic Examination Report (pp. 281/285).

Prosecution opinion (pp. 191/193); Charges received on February 8, 2017 (p. 02).

When the defendants were served, they did not present a written defense, which is why a public defender was appointed (pp. 235/240), who proceeded with the answer to the charges (pp. 300/305).

During the hearing, which took place on August 14, 2017 at 2:00 p.m., the witnesses listed in the indictment were heard and the defense witnesses who did not appear were dismissed. The defendants were then questioned, and at the end of the session the final oral statements were made, after which the prosecutor requested the confirmation of the existence of probable cause and the commitment of the defendants for trial by jury, in accordance with the charges, on the grounds that the evidence was sufficient. Finally, it was requested a report on the examination of the bodies and images from cameras in the vicinity of Beberico's Prime Bar.

The defense of Allex Aurélio Tomaz dos Santos argued for the dismissal of the charges on the grounds that there was insufficient evidence of his involvement in the crime. The defense of Fagner das Chagas Silva claims that the other two defendants excluded him from the crime and that he should be dismissed, and finally, the defense of Jobson Barbosa da Silva Júnior claims that the defendant Allex Aurélio Tomaz dos Santos made several contradictory statements.

This is the background. DECISION.

Given that the defendant Crislâneo José Barros da Silva is on parole, this decision refers only to the defendants ALLEX AURÉLIO TOMAZ DOS SANTOS, FAGNER DAS CHAGAS SILVA and JOBSON BARBOSA DA SILVA JÚNIOR.

This concerns the accusation for the crime of homicide with two aggravating factors, kidnapping and unlawful detention, concealment of a corpse, and aggravated theft, the latter being linked by connection.

As is well known, for the defendant to be committed for a trial by jury, it is necessary for the judge to be convinced that there is probable cause, according to the express provision of art. 413 of the Brazilian Penal Code: "the judge shall, on a reasoned basis, commit the defendant for a trial by jury if he is convinced of the materiality of the fact and of the existence of sufficient evidence of authorship or participation".

As for the materiality of the crime of murder, it should be pointed out that it has been duly proven, since the joint analysis of the Thanatoscopic Report with the DNA Examination Report allows us to conclude that the burnt body found in Mata do Xem-Xem is that of the victim Vivianny Crisley Viana Salvino.

As for the authorship, the evidence is sufficient, since the witness Débora Dantas said that Vivianny Crisley was with the defendants when she left the Prime Bar in Beberico, which they did not deny. Furthermore, the images obtained from the internal security camera circuit show that the victim was last seen leaving the bar with the aforementioned defendants.

In this regard, the record contains sufficient evidence of probable cause and the defendants should be subjected to the scrutiny of a jury trial, as the charges involve crimes against life, which fall under

the jurisdiction of a jury. Consequently, the trial of the related offenses must also be conducted by a jury, with the exception of the charge of theft against defendant Jobson, since neither the testimony nor the indictment mentions the defendant's involvement in that particular incident.

Regarding the crime of homicide, the Public Prosecutor's Office charged the aforementioned defendants under Article 121, Sections II and III, of the Brazilian Penal Code, which defines the crime of homicide as aggravated by petty motives and cruel means.

However, the esteemed Public Prosecutor recognizes the existence of both subjective and objective aggravating factors, relating them to the main crime (homicide), under subsections II and III of article 121, referring to petty motive and cruel means. However, it overlooks the *condition of the victim*, who was a woman in a car with three men, one of whom was driving and the others were also in possession of the car. It is important to consider the vulnerable position in which the victim found herself at that moment, **due to her female gender**, and how this aspect is directly related to the motivation and manner of committing the crime. In this context, there are three aggravating factors: the petty motive, the cruel means, and the death resulting from the victim's female condition.

It is clear from the police investigation and the riminal charges that after the four people had left Beberico's Prime, the victim, already in the vehicle driven by Jobson Barbosa da Silva Júnior, asked several times to be left at home or on the BR-230 highway, and that this annoyed the defendants to the point that they cruelly took Vivianny Crisley's life and destroyed her body.

As if the punctures on her neck and head weren't enough, Vivianny was beaten with sticks even after her death, while burning in a fire in the Xem-Xem forest, in the municipality of Bayeux. This rais-

es the question: what is the meaning of Vivianny's silencing (death for insisting / screaming to go home, therefore for saying no) and the destruction of her body after her death?

The aggravating factor of feminicide provided for in Article 121, §2, point VI and §2-A, point II, takes into account that disregard for the status of women is included in the commission of feminicide for reasons of the status of the female sex. How else can what happened to Vivianny Criley be characterized if not as contempt? What else could show hatred against women if not a death of such cruelty?

According to the "Latin American Model Protocol for the investigation of gender-related killings of women", feminicide is committed when the violent death "is to entrench and perpetuate the patterns that have been culturally assigned regarding what it means to be a woman: subordination, weakness, sentimentality, delicateness, femininity, etc". On the other hand, the feminicide perpetrator and his actions express the "draw on cultural patterns rooted in the misogynist ideas of male superiority, discrimination against women, and disrespect toward her and her life" (UN WOMEN, 2014, p. 39).

In this case, the very description of the events and the cruelty of the facts make it possible to see that Vivianny's executioners have internalized the social structures of women's domination, making them feel empowered as men through their actions. The disregard for the victim's status as a woman and, at the same time, the personal pleasure in the violence perpetrated can also be seen in the complete absence of resentment, as evidenced by the description in the complaint of a "party with other women" the day after the crime. Thus, in order to recognize feminicide, it is not necessary that the death occur within the domestic and family sphere; it is sufficient to understand it as part of structural violence.

In the present case, during the interrogation, Allex Aurélio Tomaz dos Santos stated that Jobson Barbosa da Silva Júnior said: "Boy, let's kill this girl! This girl is a pain!" (p. 181), referring to Vivianny's insistence on going home. This was followed by a series of cruel and violent acts that led to Vivianny's death and the subsequent disposal of her body.

The aforementioned "Latin American Model Protocol for

the investigation of gender-related killings of women" lists various forms of feminicide, one of which is referred to as **"systemic sexual feminicide"**, defined as "the killings of women that have been kidnapped, tortured, and/or raped". In these cases, the perpetrators do not need to have a prior emotional relationship with the victim. Furthermore, it is important to note that rape is not a necessary condition for the classification of feminicide. This concept fits perfectly with the murder of Vivianny Crisley.

I understand that in the present case, the method of execution and the identity of the victim clearly establish the necessary criteria for the inclusion of the aggravating factor of feminicide. In this regard, it is evident that the taking of Vivianny Crisley's life was motivated by reasons related to her sex, specifically by disrespect for her status as a woman. Therefore, I also find the defendants guilty of the aggravating factor of feminicide, which is the most appropriate classification. In this regard, the application of the principle of *"emendatio libelli"* is necessary to proceed with the correction of the indictment to include the aggravating factor of feminicide, as defined in article 121, paragraph 2, item VI of the Brazilian Penal Code.

> feminicide
> VI - against a woman for reasons of her condition as a female:
> § 2o-A It is considered that there are reasons for

> the condition of the female sex when the crime involves:
> [...]
> II - contempt for or discrimination against women.

CONCLUSION OF JUDGMENT

NOW, in accordance with Article 413 of the Criminal Procedure Code and all the other elements of the case, I PARTICULARLY ACCEPT the accusation and, consequently, I DECIDE that ALLEX AURÉLIO TOMAZ DOS SANTOS, previously identified, as an offender under Article 121, paragraph 2, items II, III and VI, 148, 211 and 155, paragraph 4, all of the Brazilian Penal Code, and the defendants FAGNER DAS CHAGAS SILVA and JOBSON BARBOSA DA SILVA JÚNIOR, also identified, as being subject to the penalties of Article 121, §2, items II, III and VI, 148 and 211, all of the Penal Code, to be tried by the Jury of this jurisdiction, in an appropriate ordinary session.

João Pessoa, August 14, 2017.
Dr. Lilian Frassinetti Correia Cananéa
Judge of Law

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VIOLENCE AGAINST WOMEN IN BRAZILIAN UNIVERSITIES: THE GENDER PERSPECTIVE IN AN ADMINISTRATIVE DISCIPLINARY PROCEEDING[308]

Sirlene Moreira Fideles - Carolina Costa Ferreira

INTRODUCTION

The rewriting exercise proposed here discusses how universities deal with sexual violence, especially sexual harassment and rape, and the legal limits of an administrative decision in a disciplinary process. This work falls within the research line "Gender, Human Rights and the Justice System" of the Human Rights Observatory Research Group at the Brazilian Institute for Education, Development and Research *(IDP)* and is part of the set of teaching, research and extension activities carried out within the framework of the "Feminist Rewritings" project.

In terms of teaching activities, an elective course called "Gender and the Criminal Justice System" was proposed and structured in the IDP Law undergraduate program in the second semester of 2021, in which analyzing and rewriting administrative and judicial decisions from a gender perspective (CASTILHO; CAMPOS, 2018) were collectively designed and developed. The class analyzed judi-

[308] We would like to thank Professor Eduarda Gindri and the students Aline Ferreira, Ana Luísa Araújo Machado, Débora Nery, Fernanda de Morais Oliveira, Lorrayne Pereira Alves de Souza and Victoria Rachel Lima Santos for the lessons learned and discussions shared in the courses offered and in the extension project. We would also like to thank the team at the Center for Study and Research on Imprisonment and Freedom (NEPAL/Unesp), in the person of Prof. Dr. Ana Gabriela Mendes Braga, for their careful reading of the text and for pointing out such important points for improving the work.

cial decisions related to hazing in universities, sexual violence on campus, and urgent protective measures implemented in university settings, among other issues that required interpretation from a gender perspective. In 2021 and 2022, the extension project "Rewriting Judicial Decisions from a Gender Perspective" *(IDP)* reflected on the importance of the gender perspective in the work of the justice system and in the evaluation of public policies related to (re)victimization in the justice system, the prison reality, among other issues that were the subject of meetings, a doctoral thesis (FIDELES, 2022) and a course final paper (OLIVEIRA, 2022) prepared within the framework of the project.

The rewriting presented here takes as its starting point the thesis of Sirlene Fideles (2022), the first doctoral thesis to work on the methodology of rewriting administrative decisions in Brazil. In the full text, Fideles presents theoretical foundations and empirical data that demonstrate the relevance of discussing guidelines with a gender perspective, aimed at Inquiry Committees in Disciplinary Administrative Proceedings conducted at Higher Education Institutions (*IES*), making comments on the administrative decision and revealing the absence of a gender perspective. In this text, we will focus on the rewriting of an administrative decision issued in a Disciplinary Administrative Proceeding (ADP) that investigated the responsibility of a university professor accused of sexual harassment and rape. Access to the full ADP was authorized by the lawyers of the parties involved and complies with Resolution 215 of the Brazilian National Council of Justice (CNJ) (BRASIL, 2015). In order to avoid re-victimization, the parties involved and the members of the Inquiry Committee will not be identified, and we will use the pseudonyms Antônio, Luísa, João, and Beatriz to refer to the main persons described in the acts

under investigation in the PAD[309]. We also understand that the facts presented here are unfortunately usual and that similar situations can be found on many campuses across the country.

According to Law No. 8,112/1990, the Disciplinary Administrative Proceedings has three stages: initiation, police investigation, and judgment. The initiation takes place when the Commission, composed of three permanent civil servants, is established by order of the competent authority. The committee is responsible for conducting the ADP and preparing the final background report. The second phase, called police investigation, is divided into investigation, defense, and report, and covers the entire process. At this stage, information is gathered to determine whether or not the alleged offense has been committed, and it begins with the summoning of the public servant so that he or she can direct and accompany the hearing of witnesses. The servant or his lawyer will be able to ask the witnesses questions in a way that respects the principles of a fair hearing and the adversarial principle (BRASIL, 1990).

Hiring a lawyer to accompany the public servant is optional for the party; the absence of a defense does not invalidate the proceedings, as the Federal Supreme Court has already ruled[310]. As a result, the civil servant may choose to present a defense prepared by themselves and request additional evidence to substantiate their claims if the evidence produced thus far is insufficient for that purpose.

The Commission will hear the complainant(s), witnesses, the accused employee, and may conduct confrontations between witnesses, request expert opinions, inspections, investigations, and utilize all legally admissible means of evidence to establish the basis for the prepa-

[309] The use of pseudonyms to identify the author, victims, and witnesses was a suggestion of the research group that evaluated the text, with which we agree completely.

[310] *"Súmula Vinculante nº 5:* The lack of technical defense by a lawyer in administrative disciplinary proceedings does not violate the Constitution" (BRASIL, 2008).

ration of the final report. The Commission holds the authority and discretion to decide which evidence will be accepted during the course of the proceedings. After the witness testimonies, it will be the turn for the accused to be interrogated (BRASIL, 1990), who will have 10 (ten) days to present their defense. Once this phase is concluded, the process proceeds to the drafting of the final report, which, in this case, has the nature of an opinion; for this reason, the Commission should express an opinion suggesting to the competent authority what decision to make. The report will outline the steps taken throughout the procedure, summarize the pieces of evidence, and present the proofs that served as the basis for the formation of the conviction. The applicable penalties, according to the opinion, may include warning, suspension, dismissal, pension revocation, removal from a position held in commission, and removal from a commissioned function (BRASIL, 1990).

In this case, both the original decision and the rewritten version are based on the assumption that the entire procedure was properly followed from a formal point of view. For the purposes of this text, what matters is the substantive part of the decision, its reasoning. Thus, the present rewriting aims to contribute to the debate on the drafting of decisions from a feminist perspective in administrative processes within higher education institutions (HEIs), and to encourage further studies and rewriting exercises on the subject. In particular, it seeks to emphasize the responsibility of the university as an educational institution to protect women and promote gender equality as a human right.

THE CASE AND ORIGINAL DECISION

This concerns the final report of an Administrative Disciplinary Proceeding (ADP) that resulted in the dismissal of a university pro-

fessor from the public service. The decision was based on the professor's involvement in the crimes of sexual assault and harassment of two students from the same university. These students were part of his research group and under his supervision during a research team trip to a conference. The reports of these actions were received through the university ombudsman's office. Given the seriousness of the allegations, an ADP was initiated, during which the accused faculty member, the victims (students from the same university), and more than twenty witnesses were interviewed. The proceedings were initiated under Article 143 of Law No. 8,112/1990, which guaranteed a fair hearing for the party under investigation. Although the commission indicated only Article 143 of Law 8.112/1990 as its legal basis, other regulations were used, such as Decree-Law 3.689/1941 (Brazilian Penal Code) and Law 9.784/1999. However, there was no basis in norms with a gender perspective, and the legislation indicated in the CGU manual itself was used (BRASIL, 2021).

The final report is divided into nine sections: background, initiation, legal basis, proceedings, indictment, defense arguments, merits, statute of limitations, conclusion, and final recommendations. During the proceedings, 32 persons were heard, including the accused, witnesses and victims. As documentary evidence, copies of the statements made by the victims and witnesses to the Specialized Police Station for Women's Assistance (DEAM) and the ongoing criminal case were submitted. The defense of the accused, identified as Antonio, submitted a petition requesting the challenge of a witness, one of the professors of the department, citing her bias due to her social media activity and her signature, along with other female professors, on a statement of condemnation issued by feminist movements (ADP 2017, p. 226, original emphasis). The committee concluded that "the mere allegation of participation in ideological groups is not a suffi-

cient reason to deem someone biased, nor is the simple act of reporting a fact for investigation" (ADP 2017, p. 297).

Thus, the challenge was denied. The committee also addressed the allegations of bias and disqualification of witnesses due to their participation in manifestations of "ideological groups" (ADP 2017, p. 297). The clothing worn by the students at the time of the crime was also recorded and discussed in the ADP[311]. In his statements, the defendant suggests that Luísa made the accusation as a form of revenge because she was emotionally rejected by him. In addition, Antônio tries to link the actions of Luísa and Beatriz on December 3 and 4, 2016, to the use of alcohol[312].

The conclusion of the investigative process ended with the indictment of the professor (pp. 978-1003), with the accusation of "sexual harassment against the students of the department where he worked" (ADP, 2017, p. 1215), and in relation to Luísa, due to the events that took place in the apartment where they stayed during an academic conference in 2016. In its review of the merits, the Committee found that the claims of nullity regarding the use of borrowed

[311] "[...]. From the bar to the apartment, Luísa shared the bench with Antônio and wore a short skirt" (ADP 2017, pp. 91-93). "[...]. On the way back from the bar to the apartment, Luísa shared the bench with Antônio and he ran his hands over Luísa's legs and she took his hands off her twice. [...]. She was wearing a loose skirt and blouse and her legs were half exposed" (ADP 2017, pp. 98-100). "I always witnessed jokes about the clothes of the girls who worked in the sector, compliments about my legs, my hips, asking me when I would call him to drink at my house, among other behaviors that are not worthy of a teacher and counselor who is in a university" (ADP 2017, p. 155). ????

[312] "Beatriz had recently started consuming alcohol, and therefore, her altered state due to intoxication was evident" (ADP 2017, p. 737). The student "was not out of her mind, but she was 'dizzy' and 'cheerful.'" For this reason, "she lied to her boyfriend several times when he called, saying she was at the accommodation. Every time he called, she would run to the corner of the bar to answer him and make up a new lie" (ADP 2017, p. 737). She also stated that her boyfriend "couldn't have known that she was there at that time because she had told him that she was already at the accommodation" (ADP 2017, p. 737).

evidence, the denial of the defense due to the refusal to hear an informant (who would have been the accused's spouse), and the nullity of the proceedings due to excessive delay lacked factual or legal grounds. Finally, the Committee found that there were sufficient elements to charge the accused. The actions attributed to him were deemed to involve the abuse of his position and influence as a faculty member, taking advantage of the teacher-student relationship within or related to the workplace, with a serious violation of public morality. These actions were considered to fall under the violations established in Article 116, Article IX, Article 117, and Article 132, sections IV and V, all of Law No. 8,112/1990.

With regard to Article 132, section IV, the conduct is consistent with the provisions of Article 11 of Law No. 8,429/1992 (Administrative Misconduct Law) (ADP, 2017, p. 1216). The report also indicated violations of Article 132, Section V of Law No. 8,112/1990, which states: "Public indecency and scandalous behavior in the workplace" (BRASIL, 2021, p. 251). According to the Manual of the Office of the Federal Controller General (*CGU*), "indecency is the lack of moderation, of restraint", "[...] 'an unrestrained way of living'. It refers to a depraved person, a vulgar and scandalous behavior that shocks moral values and customs" (BRASIL, 2021, p. 251).

The Commission pointed out that Antonio committed rape against Beatriz since she had consumed alcohol combined with "several hours without sleep; from everyday experience, it is known that this circumstance increases the effect of the substance when entering a state of sleep. Therefore, it is concluded that Luísa was indeed unconscious during the sexual act with the accused" (ADP, 2017, p. 1248). Furthermore, "the acts committed by the accused also qualify as administrative misconduct, since they violate the principles of public administration, in this case with regard to the classification

of Section IV, combined with the main clause of Article 11 of Law 8,429/1992" (ADP, 2017, p. 1249).

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REWRITING METHODS AND APPROACHES

In order to carry out the rewriting, we chose to analyze the merits of the final decision from a gender perspective (CAMPOS; CASTILHO, 2018; BRASIL, 2021). Although most protocols recommending the use of a gender perspective refer to judicial decisions, we understand that it can and should be applied to administrative bodies as well. Thus, we understand that in the case in question, the judgment would involve a different kind of decision, that is, it would be possible to think and decide in a different way (HUNTER, 2012, p. 215), with the same evidence and documents available at the time of the decision. In the rewriting, we will also describe the facts that led to the initiation of the ADP, just so that the analysis of the merits makes more sense and is closer to the evidence analyzed.

THE REWRITING

THE FACTS AND EVIDENCE

In December 2016, students from University "X," accompanied by two professors in a vehicle belonging to the institution, traveled to a neighboring city to attend a conference. The students would be staying in the accommodation associated with the event, and the professors, Antônio and João, were responsible for transporting the students to and from the event. At the end of the first day, they agreed to meet at a bar for a social gathering. During the gathering, Luísa felt uncomfortable around Antônio, who kept trying to sit next to her. As a result, she needed one of the students to help her switch seats[313]. Leaving the bar, the students couldn't get into the accommodation, so they went to João's apartment, where there were eight people. As soon as they arrived at the apartment, João recommended that everyone go to sleep and that he would do the same because he had to work early in the morning.

Beatriz says that she woke up around 4 a.m. and felt Professor Antônio embracing her and kissing her neck. She tried to get out of the situation, but she couldn't, because he held her tightly and began to undress her, running his hands all over her body, even on her breasts and private parts. When Beatriz stopped pushing, so did Antônio, and so she managed to get up and go to the bedroom, which was occupied by João and two other students.

At around 9.40 a.m, they woke up to find that Luísa had woken up shouting for Antônio not to touch her or talk to her. As a re-

[313] [...]. That in the bar Luísa sat between the witness and his colleague; THAT the witness remembers that at a certain point, he (the witness) got up to go to the bathroom and when he returned, the accused was sitting in his place, that is, next to Luísa; THAT they then rearranged the places and Luísa again sat next to the witness (ADP 2017, p. 187).

sult, Luísa and Leonardo, another student who was in the apartment, went to their accommodation, while Antônio and João went on to the event. Beatriz also said that she woke up at around 6am and realized that she was on the single mattress in the living room, without panties, with her skirt up to her waist, with Antônio on top of her and that, at that moment, sexual intercourse was taking place between them, without her consent. When she realized this, she shouted and pushed the man away, then got up and went out into the hallway of the building. Antônio went there, asking her to return to the apartment, as this could "end his marriage and his career".

Immediately after the crimes, the students didn't have the courage to report their attacker, an influential professor at the university with many professional contacts[314]. Luísa initially stayed in the department, doing her work remotely and emailing her work to Antônio. Beatriz left her internship. In 2017, the students filed a complaint with the Complaints Office, through the e-Ouv electronic system, and with the university administration. The table below summarizes a timeline of the dates, authorities, and answers to the complaints:

[314] According to the records, the teacher told Beatriz, "[...] forget this story because I have many academic plans for you, I plan a successful academic life for you, if you turn your back on all this, you will end up being negatively affected" (ADP 2017, p. 180).

Date (exact or approximate) of institutional contacts	Authority	Answer
27/Feb/2017	Complaints office	Unanswered
First week of March	Complaints office	Unanswered - Received information: The email was not received.
5/Mar/2017	Complaints office	We hereby inform you that your request will be forwarded to the Office of the Chancellor (memo Complaints office/[university] No. 013/2017) for acknowledgement and/or action with the urgency that the case requires." (ADP 2017, p. 15).
6/Mar/2017	e-Ouv electronic system	Received information that a response would be provided by April 26, 2017. This deadline was not met. (ADP 2017, p. 15).
10/Mar/2017	Complaints office	"I want to report the repeated sexual harassment by Professor [1]. He has been harassing female students for years. Some female students have complained, but nothing seems to have been done. He is even continuing his illegal activities, tomorrow he is even teaching a private course within the faculty [part crossed out in black, it is not possible to read]. It seems to me that the lectures and conversations I see about women in this university are just propaganda - people are still subjected to humiliation." (ADP 2017, p. 38). The demand was submitted on May 4, 2017. (ADP 2017, p. 39).
27/Mar/2017	Complaints office	New e-mail to Complaints office; no reply.

5/Apr/2017	Complaints office	"We have not received an email from you with a complaint. Our records only show the contact made on March 20 regarding the existence of an 0800 number." (ADP 2017, p. 145).
10/Apr/2017	Administration	Request for a meeting with the administration, which was scheduled for April 11. (ADP 2017, p. 146).
11/Apr/2017	Administration	Request for the number of the administrative process or inquiry, for follow-up. No reply
18/Apr/2017	Complaints office	"A committee will review the case and you will be heard during the process. In order for the process to proceed, it is necessary for you to respond to this email and inform us of the procedures to be followed." (ADP 2017, p. 149).
20/Apr/2017	Administration	On April 24, they received the following response: "To this day, we have not received any official document from the management regarding the institution of the administrative process" (ADP 2017, p. 150).
27/Apr/2017	Chancellor's Office Vice Chancellor's Office Head of the Chancellor's Office Executive Secretariat	"**In light of the above, I respectfully request that you respond to my request at your earliest convenience. My intent in obtaining the case number is to enable my attorney to formally file a THIRD PARTY INTEREST REQUEST with the University regarding the investigation of the incidents I have reported in the Complaint, and to promptly provide other documents to the University. (Emphasis in original)** (ADP 2017, p. 152-153). Unanswered

4/May/2017	Complaints office	Information on the opening of administrative proceedings on April 20, 2017 (ADP 2017, p. 144).
5/May/2017	Complaints office	Forwarding comments from the Chancellor's Office for consideration (ADP 2017, p. 22).

Source: Made by the author, based on data from ADP 2017, p. 15-16; p. 22; p. 38-39; p. 143-150.

The table above illustrates the journey of victims to obtain something very simple: the number of their case and access to justice. In this regard, it will be necessary, in the final part of this decision, to recommend to this university the implementation of measures to create a protocol and an efficient and secure system for handling reports of sexual violence. This is essential to protect the confidentiality and integrity of victims and to ensure that due process of law is respected.

Luísa pointed to a series of incidents that indicated harassment, persecution, and behavior incompatible with the role of an educator[315]. Female professors interviewed in the administrative process

[315] [...] I started to see some uncomfortable situations when he started to send me messages complaining about his marriage. So our conversations were about how he liked talking to me, about my presence in the department, and he would mention that he thought I was mature for my age, basic things like that, like "you look nice today," things like that. It escalated to some messages of a different nature, like "my wife is traveling, do you want to come to my house, have a drink, talk". It started from there. I would either deflect, say I couldn't go, or I would delay my responses a lot, saying things like "oh, I just saw this now, no, I didn't see it before," it was always something like that (ADP 2017, pp. 503-504). [...] That's how it started, right, but then these invitations to go to his house increased when his wife was out of town. Like little things, him traveling and saying "I miss you," like you don't tell me you miss me too, that I'm not missed in the department, things like that. **Yeah, I think the first time I felt really harassed, I thought it was before I thought it was his way, everyone had a case to tell about him**; I joined the department already knowing that he, we had a habit of talking like this, **that he used to talk like that to the trainees; so that was already normal; but I think the first time I was really bothered, after an academic event there in [city], in 2015**,that we

also highlighted the professor's abusive behavior and expressed regret for not supporting the students due to their lack of awareness of the seriousness of the problem (Administrative Process Document, 2017, pp. 354-355). Other female students interviewed as witnesses also reported abusive and harassing behavior by Antônio, indicating that his actions were known by fellow students, staff, and other faculty members in the department[316]. Students reported abandoning the

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were organizing, and it ended, the event ended and we went to the Department to return data show, extensions, these things; and when it was time to leave, it was just me and him in the car, he stopped the car on that narrow road and **said you're only going to leave when you give me a kiss; and then it became a scene inside the car, because I told him I wasn't going to go** [...] And then he, there was a fuss, I said I wasn't going to kiss him; he even put his arm around me, as if he was going to hug me, and pull me close, and then it turned into a fight inside the car; and then he moved on after that. [...] (ADP 2017, p. 505, emphasis added). [...]

Like, even saying clearly, I want to be with you, questioning why I, why I didn't want to, because I never had anything with him, because I didn't want anything with him [...]" (ADP 2017, p. 506).

There was a day when I was with this guy, and I needed to go back to the University the next day at six in the morning because it was the two days of [the accused's] course. So, I set my alarm for 5:30, I told him, "You have to leave at 5:30 because I need to get ready, but he's picking me up here at six." And he left at 5:30. Then, [the accused], he told me, [the accused] was at your door. It wasn't even 5:30, it was more like around 5:20 in the morning. And then I... well, I didn't stay. When [the accused] came to pick me up, I didn't know about this yet. [The accused] got in, I got into the car, he didn't mention anything. It was in the late afternoon when the guy said something like that.; **something very strange happened today that I wanted to tell you about, I left your house at a little past five in the morning, and the [accused] was standing outside your house; and then; I never even questioned it, but it's something that really caught my attention, like why this guy was standing outside my house, at a time like this?** (ADP 2017, p. 521)". (Emphasis in original).

[316] [...]. In the first year of college, she was an intern and stayed for almost a year. [...]. I have witnessed inappropriate behavior where the accused tried to establish a level of intimacy with the students, and when rejected, he attempted to impose himself on the students, pressuring them to engage with him. Another student from the department also experienced harassment. [...]. The accused even sent messages to the deponent, but due to the fact that he was married and her professor, the student avoided giving any attention. [...]. The accused would oppress the student if she didn't know how to answer questions in practical classes. He would belittle students in front of others

internship experience because they were frightened by the teacher's harassment[317].

Regarding the accusations of rape, Antônio insisted on the argument of "consent" in his statements, claiming that the sexual encounter was consensual. According to the defendant, Luísa spontaneously expressed interest in a "more intimate relationship" and then began to scream and make a "scene". Regarding Beatriz, he claims that "it's normal for a married man to embrace his wife or to playfully put his legs over her. I might have done that instinctively" (Administrative Process Document, 2017, p. 738), but it was a misunderstanding and he had "great respect" for the student and "apologized."

Addressing the defense's assertion of prolonged duration in the progression of the Disciplinary Administrative Proceedings, it's noteworthy that the duration of the administrative procedure aligns with the established timelines in both administrative and judicial spheres, thus eliminating any grounds for annulment. Furthermore, it is incumbent upon this Commission to prioritize the physical and psychological well-being of the victims, who are students within this university. The responsibility to ensure protection rests squarely with the Administration, aiming to preclude any potential revictimization of these students. Consequently, the protracted delay in the proceedings unnecessarily extends the anguish, suffering, anxiety, and sense

and even in front of farm owners. He initially did this to me and then reduced it. [...]. When the accused sent the message, his wife was away. She informs that another friend [friend's name] experienced harassment as well. [...]. I don't find it normal for the professor to have the freedom to message me and have an intimate connection with me. I felt embarrassed. The thought of filing a complaint crossed my mind, but my mother wouldn't allow it. [...]. (ADP 2017, pp. 376-377).

317 [...]. Three students left the department because of the invasion of their personal life. And he insisted a lot on having something with Luísa (ADP 2017, p. 373-387). [...]. The professor would always hug and get close to give examples in class. This bothered the deponent and she never said anything to the accused, out of fear and concern of losing professional opportunities. [...] (ADP 2017, pp. 112-114).

of injustice endured by the women affected by these incidents. The reasonable timeframe for the process, recognized as a fundamental right under Article 5, LXXVIII of the Constitution (BRASIL, 1988), must be interpreted through a gender-sensitive lens, guarding against its transformation into a source of revictimization for women.

Frederico, a professor designated as a witness for Antônio, stated in his testimony that he witnessed the distress experienced by Luísa following the incidents of violence[318]. It is evident that the delay in the progress of the ADP exacerbates the suffering of the complainants, their families and the academic community. Finally, since there is no evidence of prejudice to the defense, the preliminary objection raised is not sustained.

MERITS

On the merits, the defense argues that the charges exceed the scope of the events of December 4, 2016. The memorandum from the Office of Complaints states that two students filed a complaint against Antonio, alleging "an alleged rape, as well as possible instances of sexual harassment, threats, and stalking" (ADP 2017, p. 2). Subsequently, on April 7, 2017, another complaint was received from an anonymous complainant regarding the same incident, which was also attached to the memorandum. However, one of the complainants further reported another instance of possible sexual harassment by the faculty member against [name], who was an undergraduate student at the time (ADP 2017, p. 2).

The person who filed the anonymous complaint, which is attached to the memorandum from the Grievance Office, provides

[318] The professor explained that Luísa "[...] needs mental stability to move forward. He informs that Luísa has ups and downs, some days the student is very tense, absent. [...]. He reports the suffering of the students, everything is very strange, very anxious, crying. The students are suffering with this [...]" (ADP 2017, p. 452).

accounts of conversations with students who allegedly revealed instances of harassment they had experienced during their academic lives perpetrated by Antonio (ADP 2017, pp. 10-12). The document highlights three specific cases, including the names of the students involved and witnesses to the incidents. Thus, along with the memorandum, there were three complaints against Professor Antonio, including allegations of rape, sexual harassment, threats, and stalking (ADP 2017, pp. 3-12; 15-18).

The Brazilian Superior Court of Justice[319] understands that the appointment notice for the committee does not require a detailed description of events; it is sufficient to indicate the staff members who will be part of the committee and which one of them will serve as the president. Yana Linhares and Carolina Laurenti (2018) indicate that in cases of sexual harassment in the university context, it is common for a public complaint to encourage other victims to come forward and report other cases of the same (or other) conduct. Therefore, the fact that two students used the same approach – and the same entry point for reporting, as in the case of the Complaints Office – demonstrates the importance of proper procedures for handling reports of sexual violence.

The defense also worked with the argument that Luísa took the opportunity to "take revenge" on Antônio because he disagreed with the topic of the research project she wanted to pursue. Regarding this type of argumentation, the Protocol for Trial with a Gender Perspec-

[319] "[...]. 8. There is no basis for the annulment of the dismissal order because of the alleged lack of individualization of the acts committed by the accused, since, according to the understanding of the Brazilian Supreme Court, a detailed description of the facts is necessary only when the employee is formally charged after the investigation phase, during which the facts are actually established, and not in the initial investigation order or in the initial notice (Writ of Mandamus no. 12.927/DF, Justice Felix Fischer, DJU 12.2.2008). [...]. 13. After the analysis of the entire controversy presented in the Request, the internal interlocutory appeal presented on pages 758/763 becomes irrelevant. 14. The writ of mandamus is denied." (BRAZIL, 2013).

tive of the National Council of Justice (BRASIL, 2021) can provide important insights that should be incorporated into administrative decisions. In the section on the evidentiary process, the Protocol poses the question: "Could I assign importance to an event that only seems important because of preconceived notions that shape my worldview? (For example, testimony that suggests that a woman accuses her ex-husband out of revenge for infidelity, an idea that resides in the popular imagination?)" (BRASIL, 2021, p. 49).

It is important to note that one of the elements that led to the formalization of the complaint was the psychological support that the victims began receiving from the university in February 2017[320]. The testimonies revealed the importance of institutional support for the formalization of complaints.

According to the 2017 Manual of Disciplinary Administrative Proceedings of the Office of the Federal Controller General, the authority conducting the ADP may, ex officio, order the removal of the civil servant "at any stage of the administrative process" (ADP 2017, p. 938), a determination that must be complied with, in cases of sexual violence, as soon as the process is initiated, in order to protect the physical and psychological integrity of the victims and to cease any form of exercise of power due to the teaching function.

In addition, another aspect of power relations in cases of sexual violence is to value the victim's word, "expanding it to the extent of due process, free from representations that are often brought to court through images marked by stereotypes and discrimination" (LAVIGNE; PERLINGEIRO, 2011, p. 297). It is necessary to establish procedural mech-

[320] Beatriz "says she wanted to report it, but she was insecure. After psychological care, she had the courage to report it. What led her to postpone reporting it? To build up the courage after the psychological care. Before, I didn't think it would come to anything" and that "[...]. I didn't do it before because of the fear I felt" (ADP 2017, p. 86).

anisms to protect the evidentiary value of the victim's word because of the discredit it suffers from the sexist, patriarchal culture from which, unfortunately, the justice system is not free. For this to be effective, it is essential that the woman is not subjected to humiliating practices or prejudices during the proceedings, especially when giving evidence. A legal provision that can be applied by analogy to administrative disciplinary proceedings is Art. 10-A of Law 11.340/2006, which provides for the humane and non-victimizing treatment of victims.

It is important to note that in this case, the women's accounts are remarkably similar, indicating a standardized pattern of behavior. As the professional relationship grew closer, Antonio initiated both moral and sexual harassment, according to the witnesses. The testimonies reveal a consistent pattern of behavior: invitations for the women to come to his house, to consume alcoholic beverages, to watch movies, to spend the night when his wife was away, along with personal compliments, control over their private lives (relationships, parties), and other behaviors that are completely incompatible with the role of a faculty member.

The analyzed Disciplinary Administrative Proceedings demonstrate that the accused engaged in the forms of harassment mentioned by Alice Monteiro de Barros (2017): verbal, physical, and non-verbal. He extended invitations to Luísa, demanding a certain level of loyalty, even though they had no type of relationship beyond that of a student and professor[321]. Witness testimony and the text messages

[321] Messages from 28/09/2016: [Antônio]: You love me... (ADP 2017, p. 514). I keep looking... I want to be with you, give me a chance... / You just ignore me, don't you / I want to be with you... you know that... / Give it a chance... / Can I invite you? (ADP 2017, p. 511).
Messages from 10/10/2016: [Antônio]: Good morning... I was partying in the bar yesterday huh... if you want to [sic] answer me...
[Luísa]: I didn't leave you without an answer (student) [...]
[Antônio]: Did you cheat on me yesterday? I was jealous of you... you looked so

attached to the disciplinary proceedings show that the professor took advantage of the teacher-student relationship to try to obtain sexual favors. Thus, the practice of sexual harassment was evident in various accounts provided by women/students.

In addition to the criminal implications, the actions carried out by Antônio can also be classified under Law No. 8,112/1990, Articles 117, IX and XVIII[322]. On the other hand, the civil servant fails to fulfill his duties, such as loyalty to the institution in which he works, "conduct compatible with administrative morality"[323] On the other hand, the civil servant does not comply with his duties, such as loyalty to the institution in which he works, "conduct compatible with administrative morality" and "treating people with urbanity" (Art. 116, II, IX and XI, Law 8.112/1990) (BRASIL, 1990). In its decision on Special Appeal No. 1.255.120/SC, the Superior Court of Justice ruled that the sexual harassment of a teacher-public servant against his female students constituted misconduct in public office and, that such conduct also violates the principle of morality[324]. This principle

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beautiful
[Luísa] ??? (ADP 2017, p. 515).
Message from 20/10/2016: "[Antônio]: We're going away / To disappear for two days... / Without anyone knowing...
[Luísa] No way
[Antônio] Then we'll come back (ADP 2017, p. 516).
Messages from 11/04/2016: "[Antônio]: Let me come over...
[Luísa]: Of course not (student)
[Antônio]: I miss you... it's so bad there without you (ADP 2017, p. 517).

[322] In the ADP, the prosecuting committee only pointed to Article 117, IX, of Law 8.112/1990.

[323] "The principle of morality requires that a public administrator does not disregard the ethical principles that should be present in their conduct. They should not only evaluate the criteria of appropriateness, opportunity and fairness in their actions, but also distinguish between what is honest and what is dishonest" (CAMPANELLA, 2013).

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should guide the relationship between teachers and students, for it is reprehensible for a teacher to take advantage of his position of influence over students. Instead of teaching and guiding them to independent learning, it is deplorable to use this power of superiority for personal gain, especially sexual advantage.

Based on this understanding of the Brazilian Superior Court of Justice (STJ), Antônio's behavior harmed the complainants' personality rights and did not act in accordance with what is expected of a teacher. On the other hand, his actions also affected the image of the institution, putting the academic community at risk and violating Chapter I of the Code of Professional Ethics for Civil Servants of the Federal Executive Branch (BRASIL, 1994).

CONCLUSION

REGARDING TEACHER CONDUCT

In light of the foregoing, based on the entire factual and evidentiary record attached to the case, particularly the testimonies of the complainants, the accused, and the witnesses, the final arguments presented by the defense are UNFUNDED. Therefore, Antonio should be condemned to dismissal from public service for engaging in the behaviors established in Article 132, V of Law No. 8.112/1990. Furthermore, the actions of the faculty member constituted acts of administrative misconduct as defined in Article 11, paragraph one, of Law No. 8.429/1992.

MISCONDUCT. HARASSMENT BY A PUBLIC SCHOOL PROFESSOR. SUFFICIENT TESTIMONIAL EVIDENCE. VIOLATION OF THE PRINCIPLES OF PUBLIC ADMINISTRATION. ABSENCE OF PREQUESTIONING. SÚMULA 282/STF. CONSTITUTIONAL MATTER. COMPETENCE OF THE SUPREME COURT. INTENT OF THE AGENT. IMPROPER ACT. CHARACTERIZATION. Rapporteur: Justice Herman Benjamin. REsp 1255120 / SC, DJe 28/05/2013". (BRASIL, 2013)

The penalty of dismissal from the public service is based on Article 116, III of Law No. 8,112/1990, since the evidence presented in the ADP shows that the teacher did not comply with the legal norms and engaged in moral and sexual harassment of the students. Furthermore, he violated Article 117, IX of the same law, since he used his position to seek personal satisfaction at the expense of the "dignity of public service" (BRASIL, 1990).

Antônio also violated the Code of Professional Ethics for Federal Executive Branch Officials (BRASIL, 1994), which establishes duties such as honesty, decency, dignity, courtesy, ethics, integrity in public service, refraining from causing moral harm, refraining from using the position for personal convenience and gain. He also violated several laws with his behavior towards the students, including Articles 1, III and 37 of the Brazilian Federal Constitution, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), ratified by Brazil by Decree No. 1.973 of August 1, 1996, especially its Article 2.

RECOMMENDATIONS FOR ADDRESSING ALL FORMS OF VIOLENCE AND DISCRIMINATION AGAINST WOMEN IN THE UNIVERSITY ENVIRONMENT

IIt is important to note that Antonio's actions/violence caused students Luisa and Beatriz to withdraw from their internships, thus damaging the university's service purpose of providing quality education, research, and extension. Therefore, this action caused a series of damages to the credibility of higher education. As an aggravating factor, Antonio was the head of the department where he engaged in various forms of harassment and where students began to experience violence. In addition, he had been a member of the university facul-

ty for more than fifteen years and had not been subject to any other disciplinary proceedings. Thus, it is important for this Commission to make recommendations to the University to prevent systematic failures, such as those that occurred in this case, from causing such significant individual and collective harm.

This Commission recognizes that the Disciplinary Administrative Proceedings, in any case within the public service, must follow a procedure that is consistent with the human rights of women. In particular, it should comply with international and national norms relating to the duty of due diligence on the part of public servants to investigate, sanction, redress and prevent all forms of violence against women. In this context, sanctioning is addressed with the punishment to be applied to Antonio. However, it is the University's responsibility to provide redress to the complainants who have suffered violence incompatible with the purpose of fostering an environment of education, care and support.

In cases of sexual violence occurring in an educational setting (even if not related to a university), the Inter-American Court of Human Rights in Case No. 12.678 (Paola del Rosario Guzmán Albarracín and Family vs. Ecuador) recommended comprehensive reparation for the human rights violations found. This includes providing access to medical and psychological treatment for the victim; conducting investigations with due diligence to identify, prosecute, and hold accountable the perpetrators; implementing administrative, disciplinary, or criminal measures to ensure that victims do not face a "denial of justice" response; and adopting **non-repetition measures**. Among these measures is the recommendation to develop protocols within the education and health sectors, whether public or private, to facilitate reporting, confidentiality, and support for victims or witnesses of sexual violence. In addition, educational and training ma-

terials to prevent and combat all forms of violence against women should be incorporated, and it is crucial to ensure that all components of the justice system that deal with sexual violence matters receive adequate training and institutional strengthening to investigate with a gender perspective and due diligence. Educational campaigns should also be carried out to address the issues related to sexual violence in educational and health settings (CIDH, 2018, pp. 43-44).

In this regard, the Commission recommends the following to the University:

a) The possibility of creating a working group to propose a protocol for the reception, processing and adjudication of cases of sexual violence, based on international and national norms for the protection of women;

b) The creation of an institutional space whose mission is to design, implement, evaluate and execute actions to welcome, value and promote gender equality and the defense of human rights[325];

c) The inclusion of content related to gender, race-ethnicity, human rights and gender-based violence in the curricula of undergraduate and graduate programs within the Unit, as provided for in Article 8 of the Maria da Penha Law;

d) Ensure access to psychological support and counseling services for women who report cases of violence in the university environment, with representation from both faculty and students;

e) Organize events, seminars, courses, etc. on harassment, gender-based violence, and human rights within the institution;

f) Provide training to faculty members within the institution on best practices for creating a safe and violence-free university environment, and ensure that any faculty member participating in an

325 An example of this type of sector is the *Diretoria de Diversidade da Universidade de Brasília* (Diversity Board at the University of Brasilia0 (UnB).

investigative or processing committee can analyze cases of sexual violence from a gender perspective.

Regarding the obligation to make reparations, we also recommend that the University contact the complainant by official means to inform her of the conclusion of the process and its outcome, with due respect for the rights of the professor.

The Commission for Administrative Disciplinary Proceedings will submit the case file to the Executive Secretariat, in accordance with Art. 166 of Law no. 8.112/1990.

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Este livro foi composto em Times New Roman e
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This book is the first outcome of the project "Rewriting Judgments from Feminist Perspectives in Brazil," which has been running since August 2021. The project has brought together a collaborative effort involving professors, researchers, and law students from various higher education institutions all over Brazil. What unites these people is their commitment and dedication to rewrite judgments handed down by Brazilian courts of different types of jurisdiction now through the lens of feminist and anti-racist legal theoretical approaches and methodologies. With five chapters dedicated to presenting the conceptual frameworks and the context analyses underlying the project, followed by 22 rewritten judgment, this book's aim is to broaden the understanding of and appreciation for the proposed approaches. It is our hope that this work will inspire students and professionals in the legal field to recognize the depth and intricacy of the perspectives presented herein and to acknowledge their relevance in the multitude of cases brought before court on a daily basis. By offering alternative perspectives and interpretations, the authors of the rewritten judgment seek to challenge existing biases and norms embedded in the Brazilian legal system. From a feminist and anti-racist perspective, they critically examine and rewrite selected judgments, shedding light on the complex issues of gender inequality and racial discrimination within the Brazilian judicial system. The collaborative nature of the project reflects the contributors' desire to foster dialogue and generate transformative change within the legal field. Ultimately, it is our aspiration that this book sparks ongoing discussions, inspires further research, and contributes to the advancement of a more just and inclusive legal system in Brazil, one which upholds the principles of equality, justice, and respect for all individuals, regardless of their gender or race.

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