



Qualis A1 - Direito CAPES

## Editorial

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In face of such uncertain and unpredictable times, with the worsening of political and sanitary crises in Brazil and around the globe, we are glad at least to be able to present now the newest issue of *Direito e Praxis Journal* (Vol. 11 – N. 2, 30<sup>a</sup> edition, 2020, Jun-Sep) containing, as always, twelve brand new articles from renowned Brazilian and international researchers. This issue addresses topics from various fields passing by law and biopolitics, feminism, Marxism, legal theory, constitutionalism, as well as a couple of reviews of debates on critical criminology.

The dossier in this issue was set up by professors **Adriana Dias Vieira** and **Roberto Efreim Filho** from the *Universidade Federal Fluminense* and *Universidade Federal da Paraíba*, respectively. The dossier's themes ponder over the complex relationship between the **Supreme Federal Court and policy issues on sexuality and gender**. Previously, other publications on our Journal have focused on the role of the Supreme Court addressing environmental and urban land disputes, the celebration of the 10th year of judiciary reform in Brazil, and several articles dealing with legal mobilization and strategic litigation. In the context of gender and sexuality, the theme has already been elaborated in the "Law and Gender" dossier in 2016. This time, the selected new articles have been arranged and compiled, in order to discuss complex interactions between the role of the Supreme Court and the multiples forms of "doing gender", as the guest editors presented in their introduction below.

This edition presents two translated articles, from English to Portuguese. First, an article by Peter Hudis, researcher from Oakton Community College (Illinois - USA), titled "Racism and the Logic of Capital: A Fanonian Reconsideration" ("O Racismo e a Lógica do Capital: Uma Reconstrução Fanoniana"). The translation was done by the PhD student Rhaysa



Ruas, from PPGD/UERJ (Rio de Janeiro/Brazil). The second article is titled “The Woman of Legal Discourse” (“*A Mulher no Discurso Jurídico*”) and was translated by the professors Alessandra Ramos de Oliveira Harden and Fernanda de Deus Garcia, members of the Department of Foreign Languages and Translation from the University of Brasília.

Finally, this issue also counts with two reviews. The first summarizes the book “*A Política da Justiça: Blindar as Elites, Criminalizar os Pobres*” (2018), by Luciana Zaffalon Cardoso, and the second reviews the work of the authors Christian Laval and Pierre Dardot “The Common: An Essay on the 21st-Century Revolution” (“*Comum: Ensaio sobre a revolução no Século XXI*”)

We also remind our readers that the editorial policy guidelines for the Journal’ sections are available in our homepage, and that all submissions are welcome. We thank, as always, all of the authors, reviewers and collaborators for the trust they place in our publication.

Enjoy the reading! Team **Direito e Praxis**



## The Supreme Federal Court on Gender and Sexuality Policy: placing thoughts in a legal basis

### **Adriana Dias Vieira**

Universidade Federal Fluminense, Niterói, Rio de Janeiro, Brasil. E-mail:  
a.diasvieira@gmail.com ORCID: <https://orcid.org/0000-0001-8907-7546>.

### **Roberto Efrem Filho**

Universidade Federal da Paraíba, Santa Rita, Paraíba, Brasil. E-mail:  
robertoefremfilho@gmail.com ORCID: <https://orcid.org/0000-0001-9438-0080>.

This current issue's dossier has been brewing on since June 2019, a little over a week after the decision made by the ministry of the Supreme Federal Court about several legal actions targetting homophobia and transphobia (ADO 26 and MI 4733). The days prior to this decision had been punctuated by controversy, mobilizing internal legal departments, members of the LGBTQ group and many political and religious authorities.

At the core of the debate lies a plethora of sensitive issues: the potential criminalization of prejudice based on sexual identity or orientation, the spree of acts of violence against individuals from the LGBTQ, the degree of religious freedoms allowed to such group, among others.

Deep within those topics, yet another polemic has arisen, which brought us to the theme of this dossier: How prominent and present have the members of the Supreme Federal court been, concerning public matters of gender and sexuality?

The level of participation of our constitutional court in said legal procedures has been heavily featured in legal debates all around the world. It has also garnered accusations of "judicial activism" and "judicialization of politics", some even calling for changes in the current legislature.

Throughout the last twenty years, the Supreme Court has developed into a "privileged instance" (despite the contradictory meaning), drawing attention from feminist and



LGBTQ social movements, as well as several state officials, in search of rights to sexual equality, reproduction, gender identity and so on.

For example, among several changes sparked by decisions of the Supreme Court, we have the regulation of same-sex civil unions; the decriminalization of the abortion of anencephalic fetuses; the recognition of the constitutionality of the Maria da Penha Law; the “dispensation of representation” of domestic violence victims in case of minor injury; the replacement of preventive detention to home detention for pregnant defendants, or those with children under the age of 12; the access to changes in the civil records for the transgender population; the criminalization of homophobia; and, most recently, the freedom to present themes of gender and sexuality by teachers in schools. The last one was the result of collective social efforts made against previous municipal laws, known as “muzzle laws” and “gender ideology laws”.

The history of all of those decisions helps us frame the importance of the Supreme Court and its ministers in ensuring the advancement of the gender and sexuality policies in our country. However, it also makes us aware of new problems concerning where those ministers place in our democratic experience. As many studies have shown (Facchini e Sívori, 2017; Aguião, 2014; Leite, 2019; Efreim Filho, 2019; Almeida, 2017), public debate on those themes is drowned in controversy, overflowing into our state lawsuits and sociopolitical conflicts. We can expect that competent men and women, who handle decisions of great impact on such controversies, lie on the center of such judiciary matters.

This dossier will then face towards the comprehension of this scenario. Through it, we present articles that analyze past decisions by ministers of the Supreme Court, and showcase how such verdicts, along with all other actions for this purpose by theme, are plotted in relation to conflicts of gender and sexuality, and how they impact on the consolidation of further controversy related to the above.

In order to craft this dossier, we invited national and foreign researchers to sit down and confer about those decisions, what were their results and how they were seen, displaying it in an instigating collection of articles, diverse in their approaches, objects, theoretical references and methodologies of analysis.

The article “*O rei está nu: gênero e sexualidade nas práticas e decisões do STF*”, by **Adriana Dias Vieira** and **Roberto Efreim Filho**, seeks to picture different ways in how the theme of gender and sexuality drives the decisions and actions in the scope of the Supreme Federal



Court. The article also ponders over the generified practices on constructing the court judgements delivered by the Supreme Court, and how do it's ministers strive to frame the subject of the victim when denying or sanctioning their rights. Through the story whose shares the title with our article, the authors find ways to cast aside the cloak from the decisions of the ministers, in order to find where the Supreme Court stands in this tense relation with the democratic experience.

The article *“O gênero da dignidade: humanismo secular e proibição de tortura para a questão do aborto na ADPF 54”* by **Gabriela Rondon** builds an intriguing analysis on how the notion of human dignity is used by the judiciary powers when dealing with reproductive rights, especially with the rights to abortion. With the sense of dignity on the spotlight, the author exposes a conflict of wills between what she calls “Secular and Catholic Constitutionalisms”. She also investigates the issue in an international scene, by showcasing the legal experience brought by the USA Supreme Court and the German Federal Constitutional Court which, in the 1970s, faced a brand-new challenge in the judicialization of the rights to abortion. Acknowledging how essential became the argument around the notions of human dignity, the author ran through the conditions that allowed for the validation of the ADPF 54, and identified how the Supreme Court ruled on the demand for authorization of early clinical abortion in cases of anencephaly, focusing on the protection of the women’s dignity and the avoidance of torture. Those cases set ourselves at a privileged position to think over the tensions that arise from the discussion around that sort of court judgement.

The article *“A controvérsia constitucional do aborto no Brasil: Inovação na interação entre movimento social e Supremo Tribunal Federal”*, by **Alba Ruibal**, is also dedicated to the controversy that surrounds the constitutional rights to abortion, and enters a rich dialogue with the arguments by Gabriela Rondon. Starting from the specialized literature concerning the rulings of the Supreme Court on abortion, and several interviews with particular political and judicial pro-abortion activists in Brazil, this study describes what we could call a genealogy of the judicial feminist strategies and the resonance they had on the directions of the rule of court. Using the notions of strategic litigation, the author analyzes how a mobilization surrounding the feminist constitutional demand for the liberation of abortion laws allowed the Supreme Federal Court to become the first in all of the Latin America to move forward a petition for legalization of first-trimester abortions, in 2017.



The article “*A queima dos laudos: controvérsias e reconfigurações dos saberes e direitos trans na ADI 4275*”, by **Thiago Coacci**, in turn, investigates the overall conditions that allowed the decision passed by court judgement of the ADI 4275 to occur. As we strive to understand the changes that occurred between the time of the initial petition and the conclusion of the ruling, around 10 years by then, the author invites our reflexion upon the evolution of the *status quo* on the fields of science, gender identity and law itself during this period, which is necessary in order to understand the reasons behind such changes. How did the reports, previously essential, turn into something that would be meant to be burnt and disposed of? Having the body of research composed by all of the documents from said process, as well as some complementary sources, this study contributes to the discussion about the relations between the many fields of knowledge involved in the shaping of it’s subjects, practices and rights.

The article “*Supremo Tribunal Federal e a naturalização da barbárie*”, by **Ana Flauzina** and **Thula Pires**, extends from the key subjects of racism, sexism and juridical colonialism, in order to ponder over the role of the Supreme Court concerning the felon’s rights. With the perspective of what the author calls *Feminismo Ladino Amefricano*, the authors analyze the court rulings on criminal cases, seeking to identify the kind of juridical and political vocabulary employed, and bringing forth an important tool in order to inspect the central role of the Supreme court in the process of replicating the “black genocide”, having decisive impact for women.

The article by **Marília Montenegro Pessoa de Mello** and **Manuela Abath Valença** follows an empirical research delving into custody hearings that occurred in the cities of Recife and Olinda, raising awareness on the issue of the absence of the victims in audiences involving men accused of crimes established by the *Maria da Penha* Law. Through a witty analysis, the authors correlate such absences to certain debates between ministers of the Supreme Court during the ruling of the ADI 4424, where women’s vulnerability and inability to make decisions we assumed. Furthermore, they spotlighted the contraposition, seen in many of the observed hearings, between the image of the “woman beater” and the “burglar and drug dealer”, only the latter to be seen as “outlaws”.

The article “‘Regardless of their sex’ or ‘biological differences’ An analysis of the European Court of Human Rights’s case law on women in prison”, by **Sofia Ciuffoletti**, offers a dialogue with the jurisprudence adopted by the European Court of Human Rights regarding



incarceration of women. The author considers how said court and, though not often, it's judges mobilize essentializing categories of woman and motherhood in order to justify certain norms and practices concerning the protection of the female felon's rights. The argument proposed draws parallels between the studies of imprisonment, studies of gender, and the sensitivities in question when protecting against prejudice, in an european scenario.

The article "*Filhos, família e ambientes honestos: gênero, sexualidade e (des)criminalização do consumo de drogas*" by **Breno Marques de Mello** and **Tuanny Soeiro Sousa** shows us many ways in how themes of gender and sexuality have an effect on votes cast by members of the Supreme Court on the criminalization (or not) of possession of drugs for personal use. At first, Mello and Sousa point at issues on the use of "care" and "suppression", "user" and "drug dealer", all present in the Drug Law and in the judicial narratives shown in the article. Later, the authors discuss about how the ministers mobilize the categories of "families" and "honest environments" when casting their votes, as well as the public stances they present while ratifying the process of criminalization.

The article "*Tramas e interconexões no Supremo Tribunal Federal: Antidiscriminação, gênero e sexualidade*", by **Roger Raupp Rios** investigates the interconnections set between the anti-discrimination categories and the political dynamics of gender and sexuality seen on the Supreme Court rulings on homophobia and transphobia, gender identity and blood donations by homosexual citizens. In order to do that, the author unfolds the concepts of anti-discrimination rights in Brazil, analyzing it's practical function on the field of the law, especially contending with decisions made to protect their rights on conflicts of gender and sexuality, with a modern setting in mind. It creates, therefore, a fascinating dialogue with the previously stated studies by Sofia Ciuffoletti.

The article "*A hegemonia do discurso liberal sobre direitos homossexuais no STF*", by **Eder Fernandes Monica**, finally, asks us to reflect on the limits on the claims to rights, meant as a tool for change to the inner workings of the State law. Starting from the hypothesis, given how traditionally liberal our legal system is, that the homosexual rights agendas are absorbed as a whole by the sovereign liberal precepts, the author performs a qualitative analysis on the management of the abstract constitutionality over the homosexual rights, which were previously inspected by the Supreme Court in order to reflect on the colonization and domestication of critical discourse, and the resulting nullification of divergencies and pluralities in the homosexual agenda.



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