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Is a feminist and anti-racist Labor Justice System possible?

Uma Justiça do Trabalho feminista e antirracista é possível?

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Abstract

This article aims to examine the historical context in which labor law arises and the discourse that underlies it. The objective is to demonstrate how labor rights, despite the social commitment, reproduces a rationality attached to a white and masculine view of the world. It is also analyzed how much this rationality compromises the jurisdictional response to different conflicts involving different bodies. It demonstrates how actions such as the Protocol for Judgment with a Gender Perspective signed by the National Council of Justice have the merit of shedding a light on issues whose potential for a change in rationality cannot be neglected. It proposes, however, to go further, encouraging the creation of spaces for the academic discussion of sensitive topics and the resignification of legal institutes, from a perspective contaminated by decolonial, anti-racist and feminist readings.

Keywords: Labor law; Feminism; Anti-racist; Decolonial.

Resumo

Este artigo tem por objetivo examinar o contexto histórico em que o direito do trabalho surge e o discurso que o fundamenta. O objetivo é demonstrar como esse direito, apesar do compromisso social, reproduz uma racionalidade comprometida com uma visão branca e masculina de mundo. Analisa-se, também, o quanto essa racionalidade compromete a resposta jurisdicional para diferentes conflitos envolvendo diferentes corpos. Demonstra-se como ações como o Protocolo para Julgamento com Perspectiva de Gênero firmado pelo Conselho Nacional de Justiça têm o mérito de colocar luz em questões, cujo potencial para uma mudança de racionalidade não pode ser desprezado. Propõe, porém, ir adiante, fomentando a criação de espaços para a discussão acadêmica de temas sensíveis e a ressignificação de institutos jurídicos, desde uma perspectiva contaminada pelas leituras decoloniais, antirracistas e feministas de mundo.

Palavras-chave: Direito do trabalho; Feminismo; Antirracismo; Decolonialismo.

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1. Introduction

We currently live in a reality where judicial decisions are issued without being possible to understand, from its content, whether the issue involves a woman, an indigenous or black person, someone young or old, with full physical capacity or affected by some debilitating health condition. This also occurs with Labor Law. The analysis of judicial decisions on sensitive issues (*e.g.*, work in conditions analogous to slavery) reveals that Labor Law, as a result of the recognition of the need to impose limits on the capitalist system, also capitulates to the social structure. In this article, we seek to investigate why those who apply a social law, born in the struggle of the working class, seem to ignore the fact that different bodies are affected in different ways by the imposition of exhausting working hours, the reduction of wages, the possibilities of harassment or unemployment.

For this purpose, the article conducts a brief literature review, which aims to demonstrate that the origin of the understanding shared until these days about what is Law in general, and what is Labor Law in particular. After that, it will analyze a concrete case that demonstrates how much Labor Law still remains aligned with a discourse that denies the different forms of oppression.

The process towards a feminist Labor Law and Procedural Labor Law, which is necessary, is long and profound. It depends on following a path that some scholars have already been going through, for whom this issue is considered an urgency. Its transforming power, tough, is not given. A document establishing parameters for trials with a gender perspective is not enough, and despise Labor Law in all its power, due to the obtuseness with it operates, is not necessary. It is necessary a process of change that involves language, the choice of who occupies positions of power (those who administer, decide or approve laws) and the radical change in assumptions for legal action, currently normalized and taught as dogma, in our Law schools.

The proposed path is the analysis of the assumptions that structure Law and Labor Law in particular and then discuss, from a concrete case, the theoretical and practical difficulty in dealing with the differences and recognizing their implications in the dynamics of the social relations. Finally, the article proposes some new steps regarding the path opened by authors who have already thought about the subject, in order to build a feminist, anti-racist, anti-sexist and tensioning legal rationality of the capitalist system, in order to create the possibility of concrete change in the current sociability.

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2. Where does our law come from? Situating Law from the assumptions of capitalist society

The dimension of the cultural and political massacre of native peoples since the arrival of Europeans in Latin America can also be perceived through the study of Law. All social regulation, hierarchy, the way in which social problems were solved around here, were ignored. European regulation was imposed, as well as their language, religion, habits and culture. For this reason, the Philippine Ordinances or the Manueline Code, which were in force in Brazil until the enactment of the first Brazilian Civil Code, in 1916, are still studied. The need for this imposition was mentioned by Hobbes, in his classic Leviathan, published for the first time in 1651. He writes that the "savage peoples of many places in America" have "no government of any kind." Evidently, there was not the slightest concern to understand the social regulation already instituted among the indigenous people. For Hobbes, the “passions that make men tend towards peace” are, among others, “the desire for those things which are necessary for a comfortable life and the hope of obtaining them through work”[1].

The horizontality of decisions, the commonality of goods, the active participation of women and the way of resolving conflicts, used by some indigenous peoples, was understood as a threat. Elsewhere, Hobbes states that:

> “If goods are common to all, controversies will necessarily arise as to who shall most enjoy such goods, and from such controversies will inevitably happen the kind of calamities, which, by natural instinct, every man is taught to shun”.[2]

This was a useful understanding, but above all founded on a theoretical framework according to which the European man (and his institutions) should become the parameter for all people and social organizations, for supposedly representing evolution, development. In another passage, this idea is even clearer:

> “We also know this from the experience of the savage nations that exist today and from the stories of our ancestors, the ancient inhabitants of Germany and other countries now civilized, where we find a reduced and short-lived people, without ornaments and comforts, things usually invented and provided by peace and society”[3].

[1] HOBBES, Thomas; Leviatã, São Paulo: Martins Fontes, 2003, p. 109. Free translation.
[2] HOBBES, Thomas; Do cidadão, São Paulo: Martins Fontes, 2002, p. 28. Free translation.
[3] HOBBES, Thomas; Os elementos da lei natural e política, São Paulo: Martins Fontes, 2010, p. 70. Free translation.

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Montesquieu, in the book The Spirit of the Law, published for the first time in 1748, mentions that slavery occurred in American countries, due to the climate, skin color or hair style. And it was a valid political option given the backwardness of those peoples. However, in "nations where civil liberty is generally established", "as all men are born equal", "slavery is against nature". Only “in certain countries” is it founded “on natural reason”. The author proposes to distinguish such countries where “their own natural reasons reject it” and where enslavement was abolished, from those where this practice should be tolerated. He also states, further on, that “having the peoples of Europe exterminated those of America, they had to enslave those of Africa to use them to open up so many lands”. He describes enslaved people as “black from head to toe”, with “noses so flat that it is almost impossible to feel sorry for them” and adds that “little spirits greatly exaggerate the injustice done to Africans”[4].

In these texts we find explicit the whole basis of the Law still reproduced in schools and practiced in the courts. The idea of fear as a central affection and, therefore, of the State as necessarily repressive. The assumption that property is private and individual, as well as that everything can be consumed as property (animals, plants, rivers, ores). The notion that rationality only exists among human beings and that only men with property are fully capable. The idea of development or progress as assimilation of the European way of social life. And, finally, the ideology of Law as something natural and indispensable.

The dogma of neutrality also results from this rationality. Being neutral or impartial is, after all, being passive before social inequalities and perversities produced by the way we organize ourselves. As Ovídio Baptista mentions, Law “is a science of culture”, produced for a certain type of society with the objective of making exchange possible. It works with contingent truths, “locating itself very far from mathematics and very close to historical sciences”[5]. Despite that, we need to pretend that it is something exact, capable of conferring certainty and, above all, uncommitted to ideology and power.

In her broad study of the situation of women during the process of primitive accumulation, which took place in the period we now call the Middle Ages and

[4] MONTESQUIEU, O Espírito das Leis. São Paulo: Abril Cultural, 1979, p. 258-268. Free translation.
[5] BAPTISTA DA SILVA, Ovídio A. Processo e Ideologia. O Paradigma Racionalista. Rio de Janeiro: Forense, 2004, p. 27-8. Free translation.

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encompasses centuries of much organization and revolt against domination, Silvia Federici presents the hypothesis that capitalism must be understood as the conservative reaction to alternative possibilities of social organization. A reaction materialized through dispossession, mandatory work, the "constitution of the proletarian body in a work machine", the "persecution of women as witches" and the creation of the figure of "savages" and "cannibals". She refers to the episode of the strike of the textile workers of Ypres (Flanders), still in 1377, to affirm that when they "rose up taking up arms against their employers", "not only were they hanged as rebels, but they were also burned by the Inquisition as heretics"[6], which demonstrates the political manipulation of the religious position, which is still present these days.

Hannah Arendt, in her book The Human Condition, states that three events constituted or allowed the constitution of what we understand today as modernity. The discovery of America and the form of exploitation and decimation of indigenous and black populations; the Protestant Reformation and the invention of the telescope, "giving rise to the development of a new science that considers the nature of the Earth from the point of view of the universe"[7]. These are intertwined questions, since scientific discoveries, made possible by the extraction of ores in Latin America, changed the way of understanding the world and made possible the great navigations. They were allied to the need to curb the dissatisfactions arising from the industrialization process of some European cities and, therefore, the overexploitation of those who already depended on work to survive.

The use of religious persecution served the purpose of consolidating the process of transformation of society, avoiding the real confrontation of domination. It was through religion that a strong resistance movement was organized, as Federici demonstrates. The heretics spread among the people a new conception of society that "redefined all aspects of everyday life (work, property, sexual reproduction and the situation of women)". The answer was a holy war, institutionalized by the state. A powerful political instrument to combat these revolts, directed against female and poor bodies. The novelty of Federici's research, in relation to Marx's work, is precisely in demonstrating that the process of primitive accumulation was an "accumulation of

[6] FEDERICI, Silvia. O Calibã e a Bruxa. Mulheres, corpo e acumulação primitiva. Tradução Coletivo Sycorax. São Paulo: Elefante, 2017, p. 73-98. Free translation.
[7] ARENDT, Hannah. A Condição Humana. 10ª edição. Rio de Janeiro, Forense Universitária, 2002, p. 260. Free translation.

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differences, inequalities, hierarchies and divisions that separated workers from each other" and that it acted especially on certain bodies, establishing, as a central element for the maintenance of dominion, the racialization and sexual domination of women. The witch hunt, for example:

> "Destroyed an entire universe of female practices, collective relations and knowledge systems that had been the basis of women's power in pre-capitalist Europe, as well as the necessary condition for their resistance in the struggle against feudalism"[8].

Women mastered medicinal and abortifacient herbs, delivered babies and often organized themselves, produced food and lived collectively without being under the condition of wives or daughters of any man. The institution of the model of exchanging wages for capital, through which even food could only be obtained by purchase, as well as the scientistic rationality that separates and purifies knowledge, demanding methods (created by men) so that social practices (political, medical, economic) were considered valid, went through the spoliation of this feminine knowledge and the subsequent confinement of the largest possible number of women to the domestic space. Those who resisted were burned like witches.

The centralization of domination over feminized bodies was facilitated by a history of male oppression that preceded this historical period and proved to be useful and necessary, as it was mainly women who provoked, with their practices, forms of collective resistance that challenged the power. Law, as we practice it today, is the result of that historical time. Its main categories (private property, subject of rights and contract) legitimize a social interaction that privileges the minority that continued to hold power. As Carole Pateman points out, civil freedom (and we could also add equality) is "a masculine attribute and depends on patriarchal right"[9]. It is enough to think how social relations are disciplined by family law or the fact that slavery was supported, in countries like ours, by extensive regulation that made it legitimate, in such a way that the main legal discussion in 1888 was the need or not for the State to indemnify the owners who would lose their goods with the abolition. Both women and enslaved people of color were bound to men through a contract. They were not subjects with full civil capacity under law[10].

[8] FEDERICI, Silvia. O Calibã e a Bruxa. Mulheres, corpo e acumulação primitiva. Tradução Coletivo Sycorax. São Paulo: Elefante, 2017, p. 205; 259. Free translation.
[9] PATEMAN, Carole. O Contrato Sexual. São Paulo: Paz e Terra, 2008, p. 17. Free translation.
[10] *Idem*, p. 175.

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Legal science was built from this anthropocentric perspective, within which the events pointed out by Hannah Arendt, mentioned above, mutually implied each other to promote profound changes in the way people understood and related to each other in the community. This science assumes as its own the same characteristics attributed to men: reason, power, objectivity, action, culture and universality. While the characteristics that come to be designated as feminine (irrationality, passivity, emotion, sensitivity, concreteness and particularism) need to be expurgated from science in general, and from Law in particular[11]. The notion of truth as something that can be obtained at the end of a judicial procedure and the analysis of legal decisions as right or wrong, from a logical-mathematical perspective that simply does not correspond to what Law really is as a cultural production and power administration, are elements of this rationality[12].

It was necessary to overcome a worldview based on beliefs, on the observation of nature, on the recognition of other beings as equally endowed with reason, understanding and dignity. In other words, there was a deliberate intention to purge the worldview that today many of us seek to rescue through approximation with indigenous, African or Eastern cultures. The truth, which was previously found in beliefs, in the observation of the senses and in tradition, is challenged by scientific discoveries[13]. According to Descartes, who wrote in the first half of the 17th century[14], it is only human thought that allows us to understand our existence. The Cartesian method for discovering the truth of things presupposed the absolute separation between subject and object of study, truth and lies, right and wrong[15].

It is not, therefore, just a rationality constructed by European white men like Descartes, Hobbes and others, although the fact that it is always *them* to explain us what the State and the Law are has significance. It is a perspective that only understands *Man* as a subject and that denies all the peculiarities capable of making exceptions to general rules. The assumption is that if the human mind can only know what it produces and

[11] OLSEN, Frances. El sexo del derecho. In: RUIZ, Alicia (ed.). Identidad feminina y discurso jurídico. Buenos Aires: Biblos, 1990. p. 24-43.
[12] BAPTISTA DA SILVA, Ovídio A. Processo e Ideologia. O Paradigma Racionalista. Rio de Janeiro: Forense, 2004, p. 16-17.
[13] Hannah Arendt refers to the construction of the telescope as something revolutionary, because it made possible to understand that it was not the earth that revolved around the sun, which implied concluding that the human senses were fallible, in order to reach the truth. ARENDT, Hannah. A condição humana. 10ª edição. Rio de Janeiro: Forense Universitária, 2002, p. 289-300.
[14] The Discourse on Method was published for the first time in 1637.
[15] ARENDT, Hannah. A Condição Humana. 10ª edição. Rio de Janeiro, Forense Universitária, 2002, pp. 288-291.

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retains, it must seek mathematical knowledge, “deprived of common sense”[16]. The truth reveals itself when the correct process is applied[17]. Who chooses which is the proper process, however, is this same *Man*. In the so-called exact sciences, such as mathematics, this method is effective. When it comes to culture, the production of knowledge or the regulation of social interaction, the use of this scientific rationalism proves to be problematic and quite pernicious.

There is a kind of self-validation, which perhaps is even one of the root causes for what we now understand as post-truth. But this is a reflection for another article. Here, we point out how much Law and Procedural Law are immersed in this rationalist logic and how much it is viscerally masculine, because it was conceived by and for men and because it aims at maintaining the hegemony and power of this same segment of society. The direct influence of this white and male Cartesian rationalism is perceived in the formulation of the main legal categories. “Natural” rights presuppose transcendence of the historical moment and the society for which they are destined[18]. Class, race and sex are replaced by the Subject of rights. Kelsen states that legal judgments "cannot be reduced to statements about present or future facts of ‘is’ as they do not refer in any way to such facts". Rather, they refer to an “ought”[19]. They are outside the concrete world, like abstract prescriptions that serve all people, which reality easily denies.

Hegel, in turn, states that “law is form” and the form of Law “is determined by the subject form of law”, conceived as “necessarily universal”[20]. Property arises as a result of a freedom that is realized through legal personality. It is a theoretical construction made as a “broader demand for the eradication of all remnants of feudal privileges”. Hegel explicitly affirms that “everything in which the free manifests itself must be the property of the subject of that will”[21].

Although it is not possible to deepen the analysis of Hegel's theory about freedom, it is interesting to see how he theoretically justifies the new conception of Law.

[16] Idem, p. 297. Free translation.
[17] ARENDT, Hannah. A Condição Humana. 10ª edição. Rio de Janeiro, Forense Universitária, 2002, pp. 300-303.
[18] BAPTISTA DA SILVA, Ovídio A. Processo e Ideologia. O Paradigma Racionalista. Rio de Janeiro: Forense, 2004, p. 68.
[19] KELSEN, Hans. Teoria Pura do Direito. São Paulo: Martins Fontes, 1998, p. 52. Free translation.
[20] HEGEL, Georg. Wilhelm Friedrich. Princípios da Filosofia do Direito. São Paulo: Martins Fontes, 1997, p. 46. Free translation.
[21] HEGEL, Georg. Wilhelm Friedrich. Princípios da Filosofia do Direito. São Paulo: Martins Fontes, 1997, p. 94. Free translation.

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Hegel writes that "only through the fullness of one's body and spirit, through self-awareness as free", does one take "possession of oneself and become one's own property in opposition to others". From this perspective, it is therefore justified to "cede to others what is an isolated product of the particular capacities and faculties of my bodily and mental activity", always for a limited time, because in doing so an extrinsic relationship is established "with my totality and universality"[22]. Therefore, he defines the purchase and sale of labor power as an expression of individual freedom and proof of our condition as owners. A new concept of autonomy emerges from that and will influence the way we view social work relations to this day. Similarly, Locke will defend that the first property we possess is the capacity of labor, and only the owner can dispose of it. When they do so, they exercise their freedom[23].

Apparently, what was happening was the overcoming of the caste privileges that characterized the so-called Old Regime. With the new capitalist order, everyone became owners from birth, since they possess labor power. Therefore, everyone is free and equal, since freedom becomes the possibility of negotiating property. It is worth noting that the fact that some people are born without the ability to sell this labor power due to unique physical or psychological characteristics is not even problematized. These people, within the perspective in which the capitalist system is consolidated, are *non-subjects*; the legal and social order simply does not consider them. It is only much later that the construction of social security regulation will attempt to address this issue, without, however, questioning the foundation of the very concepts of freedom and subject of rights. It limits itself to linking the possibility of state assistance to those who are in the condition of *contractors*, sellers of labor power.

This conviction that we are the owners of labor power is what allows us to naturalize the fact that access to food, clothing, medicine or housing comes through exchange for wages. And these wages will only be obtained if private property is negotiated in the market[24]. Even the family, as Carole Pateman reminds us, will come to be understood in the form of a contract in which the owner, not coincidentally, is a man (father, husband, slave owner)[25]. Labor Law will appear at a later stage precisely to

[22] Idem, p. 56. Free translation.
[23] PATEMAN, op. cit., p. 108.
[24] SEVERO, Valdete Souto. Elementos para o uso transgressor do Direito do Trabalho. 2ª edição. E-book, São Paulo: ESA, 2020, p. 27.
[25] PATEMAN, Carole. O Contrato Sexual. São Paulo: Paz e Terra, 2008.

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challenge this disguise. It will also be committed to the Cartesian rationalist discourse in which free and equal subjects are those who hold private property and engage in exchanges through contracts, but it will expose the disguise.

3. Labor Law is immersed in the same capitalist rationality

The theoretical references mentioned above, to which many others could be added, are already sufficient to understand why labor issues such as working hours and wages are not considered from the perspective of those who are responsible for caregiving work. Furthermore, the existence of unpaid domestic tasks assigned to women is not problematized in a society where labor is mandatory. If caregiving work is essential for the reproduction of the workforce and if the system is interested in constructing the idea that it is women who should perform it, it would be intuitive to establish significant differences in the length of the working day for women, for example, from its initial regulation by the State.

The issue is that not only does the assignment of unpaid caregiving work to women confine them to the private sphere, but it also ensures male hegemony, as their survival becomes dependent on the wages earned by their partners. For this purpose, it is crucial to make differences invisible and reinforce the natural female ability for caregiving. At the same time, it is important to maintain the false notion of equality when it comes to regulating working time, whether to discourage female wage labor, promote the exhaustion of women's physical and mental strength and time by juggling labor and caregiving activities, or to keep the centrality of reproductive work unnoticed.

Maintaining women under the control of men, with whom they execute (marriage) contracts that will ensure state coercion if they want to break free from this logic, is therefore a condition for the consolidation and development of the societal model in which we live, where Labor Law exists and is applied. Some feminist authors point to unpaid domestic work as a central form of political domination, consolidated through the redefinition of the concept of family, which takes on a triple function: "sexual,

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reproductive, and socializing (the world of women) embraced by production (the world of men) – precisely a structure that ultimately is determined by the economy"[26].

It is always important to emphasize that women, who are the object of this political project of patriarchal domination, are predominantly white. Indigenous and black women, on the other hand, have their lives intersected by another form of oppression instrumental to the system: enslavement. This does not mean alleviating them from the condition of subjugation within the realm of the sexual contract, nor freeing them from the political role imposed upon them. It means that as enslaved individuals or descendants of enslaved individuals, these non-white women face a contingency that often also puts them in a position of antagonism towards white women.

The process of subjugating female bodies through the redefinition of family and confinement to the domestic sphere, with the imposition of caregiving tasks and submission to the wages received by men, is a reflection of the capitalist reality that cannot simply be transposed to understand the dynamics of work and domination in Brazil. Here, as in other colonized countries, non-white women were treated "like men" when it comes to the exploitation of their labor. They are not included in the myth of female fragility, and their bodies are seen as territories available for the physiological and sexual satisfaction of men, whether they are white or not. Regarding them, the myths surrounding women and black individuals intersect and at times exclude each other.

These myths serve an important ideological function in understanding social relations, particularly under labor relations. They eliminate competitors, "especially in socially valued areas of activity," and serve as a true "functional requirement of class society"[27]. Law (and Labor Law in particular), based on these myths and oriented towards the naturalization of mandatory work, is inherently male and white. This has profound consequences, especially in a society where "being born with black skin and/or other features associated with a black racial type", and sharing the same history of "displacement, slavery, and racial discrimination" as Indigenous peoples, does not even guarantee the construction of an identity. On the contrary, becoming black and "becoming aware of the ideological process that, through a mythical discourse about

[26] MICHELL, Juliet. Mulheres: a Revolução mais longa. Revista Gênero. Niterói, v. 6, n. 2 - v. 7, n. 1, p. 203-232, 1. - 2. sem. 2006, available at https://marxismo21.org/wp-content/uploads/2013/01/G%C3%AAnero-J-Mitchell.pdf. Free translation.

[27] SAFFIOTI, Heleieth. A mulher na sociedade de classes: mito e realidade. São Paulo: Vozes, 1976, p. 72. Free translation.

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oneself, engenders a structure of ignorance that imprisons one in an alienated image" is a painful and lengthy task[28]. The idea that being different, "inferior and subordinate," "the ugly, the bad, the sensitive, the superpowered, and the exotic"[29] belongs to the category of non-white individuals. This allows, for example, the "good citizens" to not be scandalized by the fact that 86% of those killed by the State police in Rio de Janeiro are black and brown, even though they represent just over 50% of the city's population[30].

The myths that reify characteristics of non-white or feminized people allow the dissemination of fear as a political affection and the construction of the ideology that the State, through the Law, must protect white people from these threatening non-subjects. The whitening ideology, emblematically represented by the arrival of European workers after the formal abolition of slavery, and the myth of racial democracy, reinforce the supposed white racial and cultural superiority[31], enabling a structurally racist and sexist production, interpretation and application of the legal system.

A recent decision by the Regional Labor Court of the 9th Region is interesting to reflect upon in this context. Andrey dos Santos, a black worker hired as a safety technician, was repeatedly asked to cut his hair, which he wore in a black power style. When he refused to cut his hair a third time, he was fired. This worker filed a lawsuit seeking reinstatement and compensation.

In the sentence, the judge found that the "repeated requirement to cut his hair on three occasions" was proven. As the company claimed that the requirement was due to the difficulty of using the safety helmet, the judge ordered technical evidence to demonstrate that the haircut did not pose any problem for the use of this personal protective equipment (PPE). Based on the expert conclusion and the oral evidence produced, the judge concluded that the employer's imposition on how the worker should wear his hair was "abusive determination, with potential for undue restriction on ethnic identity and body self-determination". The judge did not reinstate the employment but ordered the company to pay compensation in the amount of BRL 35,000. On appeal, the Rapporteur voted to uphold the sentence, reducing the amount of compensation to BRL

[28] SOUZA, Neusa Santos. Tornar-se negro ou as vicissitudes da Identidade do negro brasileiro em ascensão social. 2ª edição. Rio de Janeiro: Edições Graal, 1983, p. 77. Free translation.
[29] Idem, p. 27. Free translation.
[30] https://g1.globo.com/rj/rio-de-janeiro/noticia/2021/12/14/estudo-diz-que-86percent-dos-mortos-em-acoes-policiais-no-rj-sao-negros-apesar-de-grupo-representar-517percent-da-populacao.ghtml, access on 12/1/2022.
[31] Regarding this matter, see GONZALEZ, Lelia. Por um feminismo Afrolatinoamericano. Rio de Janeiro: Zahar, 2020.

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20,000.00. However the dissenting vote by Judge Archimedes Castro Campos Junior stated that "although there was a requirement to cut the hair", the demand was justified "for work safety reasons related to the proper use of PPE", despite the contradictory findings of the expert evidence. Therefore, according to this judge, it was not possible "to conclude that the defendant's attitude was unlawful, as it only took care to ensure the employee's safety, which is its obligation". He adds that “there does not seem to have been embarrassment, since the first two times the author agreed to cut his hair and did the job interview with short hair”. The decision not only excludes the conviction, but also condemns the worker to pay costs of BRL R$9,904.56 and fees of BRL 49,522.81 to the employer's lawyer[32].

The denial of racism in Brazilian society is evident. And it is not just because of the normalization of the absurdity of allowing employers to dictate how workers should wear their hair, followed by the realization that we can't even imagine the opposite scenario: employees demanding that employers conform to a certain hairstyle. Nor is it solely due to the language used in the referenced judicial decision. It is also the disproportionate severity between what would be recognized as harm to the black worker (BRL 35,000.00 or BRL 20,000.00, as voted by the rapporteur) and the financial burden imposed on the worker for accessing Labor Justice (nearly BRL 60,000.00). There are numerous studies highlighting the ideological significance of cultural identification with the black power hairstyle. Hence, there is a history of oppression behind the order imposed on Andrey. But what is crucial to emphasize here is how labor law serves this denialist stance precisely by disregarding race, gender, class, physical condition, and all the factors that differentiate the diverse individuals for whom a judicial decision is issued.

As Ovídio Baptista teaches us when discussing the origin of civil litigation, equality (along with liberty and fraternity) is an abstraction constructed to obscure the perception of domination and how that domination is exercised by the State through Law. The result of this disguise is to "strip the concrete individual of the richness of their individual being", forming and applying legal systems that are based on this abstraction, "in the escape from the individual, as its methodological assumption", assuming that "each individual case is the individual expression of a series of identical cases"[33]. The result is a significant gap

[32] Case Files No. 0000634-56.2019.5.09.0130 (ROT), Regional Labor Court of the 9th Region, available at https://www.trt9.jus.br/portal/, access on 1/12/2022.
[33] BAPTISTA DA SILVA, Ovídio A. Processo e Ideologia. O Paradigma Racionalista. Rio de Janeiro: Forense, 2004, p. 303. Free translation.

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between the justice supposedly pursued by the State through its judicial actions and the reality in which injustices accumulate, particularly when the recipients of the decision are women, poor individuals, or non-white individuals.

Not even when race is the central litigation issue, as in the aforementioned case, can the Judiciary recognize that these differences are structural and determinant for the way we act in different social relationships. On the contrary, the answer is white: the immediate superior was concerned with the use of protective equipment, which makes his interference in the way the worker disposes of his own body justified. The example of a working black man is deliberately chosen to make even clearer the need for the Labor Law process of becoming feminist to include a broad process, which does not focus only on situations involving working women, but also understands the re-signification of the Law and its institutes, from a transversal understanding of oppressions[34].

The Labor Law, which is the result of the organization of the working class, has the merit of highlighting collective exploitation and the perversity of the logic that opposes those with property to those without. It arises by challenging the dogmas of common law, such as the fallacy of neutrality. It is the result of the shared identity stemming from the same situation of forced labor, in which people find the necessary energy for the struggle, leading to the regulation of this social relationship and minimizing its harmful effects. However, this identity is only partially revealed in the condition of being people who rely on labor. The other layers of domination (gender and race) are silenced and naturalized, thereby establishing fatal differences for collective struggle within this group of people, which conditions state regulation. Unions emerge as a product of this historical time and, precisely because they are immersed in the same rationality, have difficulty in perceiving the central importance that sexism and racism assume in class exploitation.

This did not happen due to a lack of activism and denunciation by working women. In 1843, Flora Tristan was already denouncing the fact that working women were treated as outcasts in society. She demanded that the labor movement understand the centrality

[34] As Saffioti taught, stating that "The knot formed by patriarchy-racism-capitalism constitutes a fairly new reality, constructed in the 16th-18th centuries, which is not only contradictory but also governed by an equally contradictory logic. It is not possible to think of the economic detached from the political, and Marx himself was explicit in this regard. Until the political dimension of a social class is constituted, it is not truly a class capable of fighting for its interests. It was, therefore, Marx himself who taught me to think of the knot, although he was not able to do so in his time". SAFFIOTI, Heleieth. Quem tem medo dos esquemas patriarcais de pensamento? Crítica Marxista, São Paulo, Boitempo, v.1, n. 11, 2000, p. 71-75. Free translation.

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of sexism, in order for workers to be able to change the logic of exploitation to which they were subjected[35]. Similarly, Alexandra Kollontai[36] and many other women denounced the patriarchal and racist structure of the exchange society, highlighting the subjugation of feminized and non-white bodies as a central element for a collective struggle that could overcome capitalist exploitation. Their efforts had resonance, but not enough strength to bring about a legal regulation that could address or be applied based on an understanding of these oppressions.

In a text published in 1922, for example, Clara Zetkin postulates a change in the behavior of the collective organization of male and female workers, as a condition for progress[37]. Voices like hers were not enough, until now, to change the aseptic and masculine face of legal prescriptions and not even to extirpate the male chauvinist rationality within union organizations. Even so, they created fissures and formed an important basis for further steps to be taken. In line with Eliane Brum's understanding[38], the production of misery and climate emergency, in a scenario of pathological denialism, imprints an urgency that calls us to act. And when we understand that this exhaustion is founded and naturalized in an ideology supported by the State also through Law, preventing most of us from perceiving the obvious, we understand that "the fight against the destruction of the forest and the fight against the destruction of women is the same fight"[39], just as the fight for another possible form of sociability is necessarily the fight for the deconstruction of this parameter of rationality that imprisons and destroys us.

4. Some perspectives that are already being set to make Labor Law more feminist

There are authors thinking about a law that problematizes and confronts different forms of oppression. Frances Olsen, after asserting that gender division is decisive for the construction of Law, proposes changing the way we examine issues related to

[35] TRISTAN, Flora. União Operária. (published for the first time in June 1843). São Paulo: Editora Fundação Perseu Abramo, 2015, p. 39 e 62.
[36] KOLLONTAI, Alexandra. Os fundamentos sociais da questão feminina. Extratos. Published for the first time in 1907. Available at https://www.marxists.org/portugues/kollontai/1907/mes/fundamentos.htm.
[37] ZETKIN, Clara. Organizando Mulheres Trabalhadoras. Published in 1922. In International Socialism (1st series), No. 96, Março 1977, pp. 22–24. - https://www.marxists.org/archive/zetkin/1922/ci/women.htm.
[38] BRUM, Eliane. Banzeiro Òkòtó. Uma viagem à Amazônia centro do mundo. São Paulo: Companhia das Letras, 2021.
[39] Idem, p. 62. Free translation.

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discrimination and including the domestic sphere in the realm of legal reflections and decisions[40].

Romina Lerussi proposes abandoning the legal fiction of the "universal subject" and to humanize/contextualize instead; reviewing the category of dependency or subordination; rethinking union and associative organization. It also proposes to produce more discussions on the theory of value and the supposed differences between productive and reproductive work and, based on this, address universal income, reformulate social security and the definition of wages, in addition to rethinking the notion of working hours (including care)[41].

The example of outsourcing in Brazil comes to mind. While it reached only non-white and poor women who performed cleaning and maintenance activities, back in the 1960s, it did not seem to concern interpreters and practitioners of Labor Law, nor the legislators. When it began to affect non-white and poor men, in security and surveillance services, its visibility increased, but still did not move a large part of those working in the field of Law, including unions. It was only when information technology and other activities performed by middle-class white people were also affected that the problem seem to have reached the appropriate magnitude.

Romina Rossi also proposes the analysis of harmful markets, such as the exploitation of sex work or drug trafficking. She also suggests examining the feminization of labor as a category of analysis. In other words, conducting a deeper study of the factors that lead women to enter the labor market; the reasons why certain activities are almost exclusively performed by women; why caregiving is considered a feminine work; and the new precarious forms of work that disproportionately affect women. Finally, she proposes vulnerability as a central point of reflection[42]. This concept aligns with the one proposed by Judith Butler, which refers not to the particular or episodic condition of an individual, but rather to a "mode of relation" where it is impossible to think of each body as separate, as its constitution and existence rely on "its dependence on other bodies and support networks"[43]. The idea of the care economy resonates with this perspective, as it suggests

[40] OLSEN, Frances. El sexo del derecho. In: RUIZ, Alicia (ed.). Identidad feminina y discurso jurídico. Buenos Aires: Biblos, 1990.
[41] LERUSSI, Romina Carla. Escritos para una filosofía feminista del derecho laboral. ESTUDIOS DEL TRABAJO N° 56. Julio-Diciembre 2018 Available at http://creativecommons.org/licenses/by-nc-sa/4.0/.
[42] Idem.
[43] BUTLER, Judith. Corpos em aliança e a política das ruas. Notas para uma teoria performativa de assembleia. Rio de Janeiro: Civilização brasileira, 2018, p. 144. Free translation.

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moving beyond the notion that social programs should be directed only at those who fail under the exchange logic. It starts from the assumption that there is a universal right to care and proposes the "protection and education of poor women" and "care as a universal need and right for men and women." Therefore, it considers care as a public policy, which includes recognizing domestic work as labor that should be remunerated.

Regina Stela emphasizes the importance of considering the concepts of care, gender, and social reproduction in all judicial issues to be addressed. She proposes recognizing the implications of unpaid domestic work for employment relationships, discussing, demystifying, recognizing, and regulating sex work. She argues that it is the function of Labor Law to eliminate dichotomies between public and private work or between paid and unpaid work, which systematically disadvantage those who dedicate themselves to care and domestic work and reinforce traditional gender roles. She also highlights the need to overcome the division between work and family, which underpins Labor Law, by recognizing the need to rethink care work, a key mechanism that has allowed male workers to engage in exclusive and unrestricted paid work[44].

It is true that none of this will be strong enough to change the way Law is produced and applied, if we do not understand the intimate imbrication of this model of legal regulation with the capital system. Even so, as Natalia Díaz points out, situating the issue of care from the perspective of indigenous, black, mixed-race women, subaltern in some way, imposes visibility on other points of view. Something, therefore, with the power to pave the way for deeper changes[45].

The assimilation of these demands by Labor Law would imply a radical reformulation of its foundations and a greater potential to challenge the capitalist system. Labor Law already has the function of giving voice to the working class and exposing conflict. The legislative changes implemented in recent years have undermined this purpose, distorting the very historical reason for the existence of labor rules. Such systematic and increasingly aggressive dismantling needs to be countered by a rationality that goes beyond what has already been revealed by social law, as we know it and practice it.

[44] VIEIRA, Regina Stela Corrêa. Teoria feminista do Direito do Trabalho: uma introdução. In Desafios presentes e futuros do direito do trabalho: buscas entre intersecções por um novo alvorecer. Organizadores Regina Stela Corrêa Vieira, Robison Tramontina. Joaçaba: Editora Unoesc, 2020. pp. 85-92.

[45] DÍAZ, Natalia Quiroga. Economía del cuidado. Reflexiones para un feminismo decolonial. In MIÑOSO, Yuderkys Espinosa. CORREAL, Diana Gómez. MUÑOZ, Karina Ochoa. Tejiendo de otro modo: Feminismo, epistemología y apuestas descoloniales en Abya Yala. Popayán: Editorial Universidad del Cauca, 2014.

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Beyond these proposals, it is necessary to make decisions rendered in Labor Courts more feminist. With the advent of democracy and especially with the promulgation of the 1988 Constitution, a discourse was established that, although far from breaking with the disguised domination through the State and the Law, nonetheless committed itself to objectives that at least challenge our sociability. Preserving human dignity, protecting those who rely on work, eradicating poverty, or even reducing inequalities in a state founded on the logic of exploiting female, black, and indigenous bodies to their complete exhaustion is no small feat. That is why, despite the conciliatory transition that kept in power individuals deeply involved with the civil-media-business-military dictatorship, it was possible to witness judicial decisions acknowledging the presence of structural racism and misogyny as elements that structure social relations and need to be addressed.

The advancements, both in the realm of judicial decisions and in legal regulation or the development of public policies for social inclusion, have been significant. For instance, affirmative action policies have transformed public universities and, consequently, the topics of final papers and scientific research. Female, indigenous, black, LGBTQIA+, and economically disadvantaged individuals now occupy school benches, leadership positions, committees, and parliaments. This is not a historical process that can be resolved in just two or three generations, but some of its effects can be felt immediately. However, the path ahead is still long and challenging. Even in sensitive issues where no legislative changes are required to recognize and address oppression, the majority of judicial decisions continue to reproduce a sterile logic that overlooks markers of domination.

In a study on the judicial representation of contemporary slave labor, Daniela Muller shows that the discourse present in the sentences still reproduces “an alleged indolent, brutish nature and little used to the work of the popular classes, which end up conditioning a certain reading of the legal norm”. The judicial representation of slave labor is, even today, “closely linked to the symbolic burden of female and male judges”, related to their social, cultural and economic origin[46]. Therefore, it is possible to find decisions which states that working conditions in rural areas are naturally harsh, in order to justify mistreatment. The claimant describes cases of accommodation without

[46] MULLER, Daniela Valle da Rocha. Representação judicial do trabalho escravo contemporâneo. Rio de Janeiro, Lumen Juris, 2021, p. 185. Free translation.

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bathroom, work for 14 consecutive hours under the sun, beds improvised with bricks and wood, which were not recognized as a situation analogous to slavery[47].

Regarding the ideological profile of judges, the symbolic references made by judges about slavery, as mentioned in Müller's book, also reveal a Eurocentric, male and white perspective[48]. The selection process, the adoption of a "passing score" and the use of objective exams that prioritize the content of precedents and legal texts contribute to a conservative Judiciary. This branch of government is objectively composed, for the most part, of white men. A study conducted in 2008 by sociologists Elina Pessanha and Regina Morel from the Federal University of Rio de Janeiro, along with researcher Angela de Castro Gomes from the Getúlio Vargas Foundation, interviewed 2,746 labor judges in Brazil. The study revealed that 43% of judges were women, but this number dropped to 36.5% in the courts of appeal. Half of the judges were under 40 years old, and 86% identified as white. Only 1.2% identified themselves as black[49]. Eleven years later, the National Council of Justice published a report on women's participation in the Judiciary, which showed that in the Labor Courts, "women accounted for 49.4% of active judges, and in 2018, they exceeded half of the total, reaching 50.5% when considering only active judges." Nevertheless, female judges occupied only "33% to 49% of the positions of President, Vice-President, Inspector-General, or Ombudsman in the past 10 years"[50].

Another study shows that despite Resolution 203 of the National Council of Justice (CNJ) and the 115 public competitions held since 2015, using the affirmative action policy, "the percentage of black judges " rose from 12% in 2013 to 21% in 2021[51]. Although significant, this increase is still minimal for a majority non-white country. Changing this reality is also a necessary step to ensure that judicial decisions are committed to limiting and even overcoming various forms of oppression because those who decide also shape the norm and therefore are able to impact reality. As Severi argues, "the bodies of female judges, by embodying attributes of a gender different from the hegemonic reference,

[47] Idem, p. 93 e 112.
[48] MULLER, Daniela Valle da Rocha. Representação judicial do trabalho escravo contemporâneo. Rio de Janeiro, Lumen Juris, 2021, p. 171.
[49] https://www.conjur.com.br/2008-mai-04/juiz_trabalhista_jovem_branco_progressista, access on 1/14/2022.
[50] https://www.cnj.jus.br/wp-content/uploads/2019/05/cae277dd017bb4d4457755febf5eed9f.pdf, access on 1/14/2022.
[51] https://www.cnj.jus.br/wp-content/uploads/2021/09/rela-negros-negras-no-poder-judiciario-150921.pdf, access on 1/14/2022.

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challenge the rules of professional neutrality"[52]. The same can be said for non-white or non-binary bodies, transgender individuals, and so on.

The Protocol for Gender Perspective in Trials[53] is another initiative aimed at changing this reality. It presents techniques and suggestions for judicial rulings in which gender issues are perceived and problematized. It acknowledges the need for interpretation and application based on the understanding that there are individuals involved in each judicial demand, with pain, suffering, and emotional investment. It proposes, to some extent, the overcoming or at least questioning of dogmas such as neutrality. Therefore, it brings important contributions to highlight the need for change.

In a recent decision by the Labor Court, a public servant had her right to reduced working hours, without a salary reduction, recognized in order to care for her disabled child[54]. This is a result of the feminist movement, which is also expressed through the Protocol executed by CNJ, mentioned by the judge in the aforementioned decision. Undoubtedly, it is an important advancement, especially in a time of obscurantism and social regression like the one we are experiencing. It shows that the path is already being paved, although further progress is needed, including changing the face of Brazilian Judiciary, particularly of Labor Law. And until that happens, sparking academic discussions in Law schools and judicial training institutions about the urgent need to embody legal analyses and remove Law from the pedestal it has been placed upon.

This implies abandoning ready-made formulas, Latin expressions, and a language that distances and standardizes. It also entails investigating, in each specific case, who the individuals involved are, what their reality is, and what circumstances led them to seek a judicial solution. In this sense, preserving the oral nature of the labor process, with the loving and empathetic listening of the judge, is a fundamental point. The examination of witnesses in labor cases is not a means of proof, or at least certainly not only that. It is the procedural moment in which the discussion materializes in the bodies that perform the condition of claimant and defendant. These are individuals whose lives have been affected in different ways by the social relationship of work. Seeing and listening to them is a condition for a feminist and anti-racist interpretation/application of legal norms.

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[52] SEVERI, Fabiana Cristina. O gênero da justiça e a problemática da efetivação dos direitos humanos das mulheres. Revista Direito e Práxis. Rio de Janeiro,Vol.07, N.13, 2016, p. 81-115.

[53] https://www.cnj.jus.br/wp-content/uploads/2021/10/protocolo-18-10-2021-final.pdf, access on 1/11/2022.

[54] https://www.redebrasilatual.com.br/cidadania/2022/01/juiza-de-sc-manda-reduzir-de-jornada-de-mae-de-crianca-com-deficiencia/, access on 1/14/2022.

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Furthermore, petitions also need to be free from models and formulas that convey nothing. They constitute important vehicles for tension that compel judges to recognize the uniqueness of each case. Calling the parties by their names, telling their stories directly and personally, and acknowledging them as unique beings also make a difference.

5. Conclusion

There have been significant advancements stemming from studies in recent decades regarding the need for a critical, feminist, and anti-racist approach in judicial production as an important element for challenging the existing order and facilitating profound and necessary social change. Labor law, both in its material and procedural aspects, remains deeply entrenched in false rationalist assumptions that merely disguise oppressive practices. The selection process for judges, as well as the way lawyers are educated in our Law schools, perpetuates this reality. The focus on meeting targets and the excessive workload contribute to impeding change.

The sterile discourse, which dehumanizes and generalizes the individuals affected by judicial decisions, holds material power. This power determines which bodies certain decisions are rendered for, guaranteeing their rights, and which bodies only experience the oppressive face of the State. In recent years, there has been an explicit reinforcement and deepening of class, race, and gender domination. Consequently, the achievements represented by feminist and anti-racist studies and their impact on judicial production provoke instability and anger among those who, comfortable in their social position, resist change.

In labor courts, the efforts of women who have persistently emphasized the need to make Law feminist, leading, among other things, to the adoption of the Protocol for Gender Perspective in Trials by CNJ, have yielded significant effects. However, there is still a long path ahead, demanding further studies, the creation of spaces for academic discussion on sensitive topics, and the reframing of legal concepts.

A feminist and anti-racist Labor Law is vibrant, painful, and poignant. It is not a choice but an imperative for survival. It is the only way to overcome this self-devouring

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sociability that has reached a point where persisting in it would definitively compromise the future.

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