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Reimagining Antisubordination from the Global South: Towards a Joint Venture Theory of Legal Interpretation

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Abstract: The present article is dedicated to showing how subordination is multifaceted and, as such, how legal decisions based on the antisubordination principle should be attentive to the diverse ways in which inequalities can permeate the law, in order to be properly addressed by it. By using the case in which the Brazilian Supreme Court criminalized LGBTQphobia as a focal point, I argue that equality considerations must guide how concepts are framed, how problems are defined, which solutions are proposed, as well as reflections about what a decision comes to mean for a determined place's jurisprudence and political context. In my exercise, I also highlight complications that might arise when the antisubordination principle is legally mobilized. Subordination is not static and power relations are dynamic. As such, intersectionalities (in the case at hand, involving mostly gender identity, sexuality, race and class) might pose challenges for the identification of problems that should be addressed and for the choice of adequate emancipatory decisions, particularly when subordinate groups' interests conflict. In the same vein, subordination happens through multiple overlapping practices, such as violence, deprivation, and exclusion, and addressing one does not always lead to a unitary all-encompassing antisubordinatory direction. I try to offer a provisional solution for these complications, based on the inclusion of civil society participation considerations on legal interpretation, through what I call the "*Joint Venture Theory of Legal Interpretation*". The envisioned interpretation would be animated by the "demosprudential" assumption that legal meanings are created by courts, but also by people on the ground and asserts that, as such, the process of legal reasoning should give weight to the latter. The paper is part of a broader project of fully theorizing antisubordination, which includes the articulation of the antisubordination principle, concretizing its application, trying to solve its shortcomings, and establishing the political and constitutional theories that constitute its normative underpinning.

Keywords: Antisubordination – Equality – Legal Interpretation – Demosprudence - Brazil

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INTRODUCTION[1]

This article is about the relationship between power asymmetries and the law, the complexities that arise in legal (in its theoretical, doctrinal, and political dimensions) analysis that considers such power relations and, most importantly, about how we can find–re-imagine– ways to overcome challenges and make equality legal claims more emancipatory and stronger.

In the pages that follow, I sketch a doctrinal approach that could make the promises of the antisubordination principle concrete. As I will explain below, the antisubordination principle is a framework intended at directing legal interpretation towards the dismantling of structural inequalities. Having the Brazilian case in which the Brazilian Supreme Court criminalized LGBTQphobia as a focal point, I try to unearth the multiple considerations that should be taken into account by courts in equality claims. As I will argue, the criminalization of LGBTQphobia case elucidates how antisubordination considerations must guide the construction of concepts and categories, the identification of problems and their framing, the decision as to what solution brings about antisubordination, and the place a decision should have in a determinate context's jurisprudence and political landscape.[2]

In my exercise, however, I have noticed–and highlight in this paper–that the proposed endeavor is complicated. Society is complex, power relations are dynamic, contextual, and contingent and social movements are not unitary in the diagnosis of problems and proposition of solutions. As such, the way different systems of oppression interact with each other must be considered.[3] Besides that, subordination manifests itself in different, yet interconnected ways.

Disadvantage, violence, marginalization, humiliation, and stereotyping are some of these ways, and, even if they have hierarchy as common denominator, they cannot be reduced to one another: addressing one aspect might contribute to mitigating another factor, but there can also be clashes–apparent and material ones.[4]

As such, a full theorization of the antisubordination principle as framework and its correlate doctrine must include not only an articulation of the principle and a systematization of the multiple ways in which subordination can permeate law, but also, a solution for the conflicts that might arise in its application. Here, I do not intend to provide a final solution for this problem, but I do advance a provisional path, by arguing that the answer may be grounded on a new way of interpreting the law in which judges and social movements act collaboratively in finding legal meanings. I call this "joint venture theory of legal interpretation." The idea of interpretation as a joint venture has, in its foundation, the "demosprudential" assumption that law is interpreted by courts, but also by people on the ground.[5]

The argument is developed as follows: in Part I, I position the paper within equality theory, with special attention to how it fits and furthers the antisubordination tradition. Part II presents the decision which will serve as a focal point for my analysis. Part III is dedicated to presenting and applying a doctrinal approach able to grasp and deal with the multifaceted character of antisubordination – directing its attention to how inequalities permeate law in non-obvious ways. This part also explores the complications that arise from the application of the principle as framework. In Part IV, I advance my provisional solution for the problems identified in Part III. I conclude the paper in Part V.

My theorization is grounded on a Brazilian example but this, by no means, means that the contributions I try to present are confined to Brazil. Rather, my goal is to provide theoretical and

methodological insights that could productively influence the way equality law is developed and interpreted elsewhere. From places like the U.S., where antisubordination theorization in scholarship has flourished, to jurisdictions such as Canada, which has historically been linked to ideals of substantive equality, or developing countries–like India, Brazil, South Africa, Colombia, and other contexts of "transformative constitutionalism" for instance–where the idea of antisubordination has started to make its way into the law.[6]

In a sense, this work furthers the multiple initiatives of protocols for gender inequality-sensitive adjudication that have been adopted around the world by providing a doctrinal guide for concrete equality-based legal interpretation (that could go beyond gender cases).[7] In the same vein, this work provides tools for the multiple exercises of reimagining law undertaken by scholars around the world in initiatives such as feminist rewritings of legal opinions, for example.[8] In fact, this work is, by itself, a project of reimagination.

I. ANTISUBORDINATION AS FRAMEWORK

Traditionally, the Aristotelian notion of equality–that is, the postulate that equals should be treated equally, and unequals unequally–has been adopted as a mediating principle (the "antidiscrimination principle") of interpretation to give content for abstract concept of equality in many jurisdictions.[9] However, for many years now it has been challenged for having a very limited potential to deal with some of the most common and invidious types of inequalities that happen on the ground: those that arise not from different treatment by laws and policies, but from social hierarchies.[10]

The first main article to explicitly advance this critique has been "Groups and the Equal Protection Clause," published by Owen Fiss in 1976. In his article, Professor Fiss tries to de-naturalize the idea that there is a necessary connection between the antidiscrimination principle

and the equal protection clause, arguing that it is only one possible way of conferring meaning to equality, and not the ultimate way. In view of these limitations, Professor Fiss advances an alternative mediating principle which he calls the "group-disadvantaging principle."[11] This principle is defined as a postulate that prohibits laws that aggravate or perpetuate the "the subordinate status of a specially disadvantaged group."[12]

"Groups and the Equal Protection Clause" is seen by many as the first articulation of the antisubordination principle and has, since then, been adopted and further elaborated by many authors, particularly those associated with "Outsider Jurisprudence"(a scholarship tradition that encompasses branches of critical theories of law that share methodological as well as substantive insights). [13] Catharine MacKinnon has furthered the concept to argue that promoting antisubordination would demand breaking with oppressive social structures, not including or assimilating groups in the world as it is.[14] Kimberlé Crenshaw went on to highlight the intersectional dimension of oppressions that can emerge through and antisubordination analysis and that should be addressed by legal changes.[15] Reva Siegel, in her turn, highlighted the dynamic character of subordination–to which, as she argues, an antisubordination-based analysis has to be attentive.[16] These are only examples.

As much as its original formulation as postulate proposed by Fiss has offered unprecedented contributions, the antisubordination principle goes (or should go) beyond a postulate (such as *norms and policies that disadvantage groups violate equality*) and can more completely serve its antisubordinatory drive by being understood as a framework.[17] The framework includes both method and substance that act synergistically (the method is substantive and the substance, methodological), providing a lens to scan reality in search of subordination-related issues and solving issues. The method is the critical method of looking at

how the legal system arises from, is permeated by, and perpetuates inequalities. The substance comprises both what we understand as inequality–in the specific case, social hierarchies–and the normative animus of dismantling such hierarchies.[18] Part of the substance is the recognition that subordination is multidimensional and dynamic. Finally, to understand antisubordination as a framework does not deny its character of *legal principle*. In fact, the principled character of antisubordination (and its corresponding doctrine for application), which constitutes a ground for operating and arguing within the law, is one of the dimensions of the framework envisioned here.

The framework is very open–detaching the antisubordination principle from a single postulate–and it is purposefully so. However, what exactly does an antisubordination-based legal reasoning entail in concrete cases? Which arguments fit the "antisubordination" umbrella? How exactly can the law arise from, be permeated by, and perpetuate subordination? Multiple authors have written on the subject or carried out antisubordination-based analyses of different issues.[19] However, nowhere have I found a unified articulation of antisubordination (as framework) as a *legal* principle and *doctrine*, attentive to the complexity of how subordination happens in the real world. [20] This is what the present paper aims to do. After presenting the case in Part II, Part III advances a guide that could direct the application of the antisubordination principle by providing a step-by-step of what should be considered by judges and other actors in their mobilization of the principle. In the exercise, I also highlight complications that might arise.

II. CRIMINALIZING LGBTQPHOBIA IN BRAZIL: ADO 26'S BACKGROUND AND DECISION

In 2013, a political party presented before the Brazilian Supreme Court a lawsuit aimed at the declaration of omission of the Congress in promulgating laws criminalizing homophobic/transphobic conducts ("ADO 26").[21] The main claims of the lawsuit were that:

(i) Homophobia and transphobia fit in the concept of racism established previously by the Brazilian Supreme Court, and, as such, these conducts – described as "all forms of homophobia and transphobia, especially (but not exclusively) offenses (individual and collective), homicide, aggression, threats, and discrimination motivated by the sexual orientation and/or gender identity, real or alleged, of the victim" – should be subject to criminalization, just like racism is criminalized[22], and

(ii) Homophobia/transphobia constitute discrimination that attempts "against fundamental rights and liberties" and, as such, should be criminalized in accordance to the constitutional provision[23] that establishes that "the law shall punish all discrimination which may attempt against fundamental rights and liberties".[24]

The case was ruled in 2019. Among other things, the court unanimously recognized the delay of the Congress in promulgating protective legislation, declared the unconstitutionality of such omission, and established that, until the enactment of specific legislation, homophobia and transphobia had to be considered either racism or a violation of fundamental rights and liberties and, as such, the crime of racism should apply to homophobic and transphobic conducts.[25]

The Justice-Rapporteur (Justice Celso de Mello) divides his individual vote into sections. Sections 1 through 7 are dedicated to clarifying terms and tackling procedural issues, such as the impossibility of the "creation" of a new crime by the Supreme Court. The substantive arguments are presented in sections 8 through 9.

The broader claim that underlies the decision is that homophobia and transphobia constitute racism in its "social dimension." The social dimension of racism refers to its character as a "manifestation of power that…aims at enabling the majority group domination over members of vulnerable groups (as the lgbti+ community), establishing, through hateful (and

unacceptable) inferiorization, situation of unfair political order of a legal and social exclusion."[26] Because racism is seen as a manifestation of power aimed at inferiorization and exclusion, the Justice argues that homophobia and transphobia should be considered a species of the genre.

In section 8, the Justices proposes a reflection about the "historical records and contemporary social practices, which reveal the prejudiced, exclusionary and discriminatory treatment"[27] of the LGBT community in Brazil. Section 9 is entitled "Violence against members of the LGBT community" or "The banality of homophobic and transphobic evil."[28] In this section, the Justice exposes data brought by Amici Curiae showing that the community suffers, constantly, all sorts of aggressions, "motivated, solely and exclusively, by the sexual orientation and/or gender identity of the individuals."[29] This situation, according to him, is the concretization of racist behavior directed at this group that deviates from heteronormativity. The Justice equates this behavior to what the lawyer of the lawsuit called "The Banality of the Homophobic and Transphobic Evil," which he characterizes as the situation in which "common people" feel they hold "a pseudo 'right' to attack, offend, discriminate and even kill people for their mere homosexual/bisexual sexual orientation or transgender gender identity."[30]

Sections 10 through 13 are devoted to showing the nexus connection between the constitutional mandates of criminalization and the problems of the omission of the Congress.[31] The lawsuit that aims for the declaration of omission is established as being a way of making constitutional provisions concrete. In the specific case, the constitutional provisions that mandate criminalization of conducts with the aim of protecting groups against acts of discrimination founded in the sexual orientation or gender identity of the victim.[32] Section 11 is, in this context, devoted at showing the inertia of the Congress in promulgating such protective laws.[33]

Section 12 deals with the "possible solutions" for the problem of omission.[34] The solutions established are "(i) the need to inform the Congress so it can adopt the necessary measures for the concretization of the mandates and (ii) immediate recognition, by this Court, that homophobia and transphobia, whatever the forms in which they are manifested, fit in the conceptual notion of racism"[35] inscribed in the law that typifies its manifestations.[36] Regarding the latter, the Justice is cautious because the Brazilian legal system does not allow imputation of crimes through analogy. The court could not say that homophobia and transphobia *are like* racism and, as such, deserve the same treatment; so, the argument is that homophobia and transphobia *are* racism.

The Justice's reasoning is based on the comparison between LGBTQphobia and racism and, to do so, he necessarily adopts a vision of what racism is. One of the aspects that should be considered in antisubordination-based analysis is precisely the way one defines the problem to be faced (in this case, LGBTQphobia *as racism*). And, as I will argue, an antisubordination-based analysis, in this case, could have led to a different conceptualization. As such, it is important to dive into what the Justice means by racism. The Justice cites many sources when trying to define racism, which makes it hard to pinpoint one definition. However, from the reading of the pages in which he deals with the theme, some common elements–part of a "lexicon," let's say–can be identified. First, racism is seen as a behavior or conduct.[37] Second, racism is understood not as a neutral behavior, but as one with the specific aim to exclude or marginalize.[38] One word that comes up in this context is prejudice, which is defined as the translation of "a mistaken understanding of existential phenomena, supported by opinions and beliefs formed without the necessary and adequate knowledge of the facts."[39] Part of the lexicon of the description of racism are also the ideas that it is a "distorted view of the world,"[40] a form of "discrimination,"[41] a

manifestation of "ignorance"[42] or "intolerance,"[43] and an "unjust denegation of dignity and mutual respect."[44] Racism is also described as an ideology "founded on pseudo-scientific criteria, which seeks to justify the practice of discrimination and exclusion, reflecting the distorted worldview of those who seek to build, in an arbitrary way, hierarchies."[45] It is also described as being "motivated by subaltern motivations."[46] Finally, it is also seen as an "instrument of ideological control, political domination, social subjugation and denial of otherness, dignity and humanity."[47] Because homophobia and transphobia are essentially the same as racism, the affected groups are considered to be covered by the same criminal law protection.[48]

III. ANTISUBORDINATION-BASED ANALYSIS (AND ITS COMPLICATIONS)

As argued above, antisubordination should be understood as a framework composed of three interrelated elements: substance (dismantling hierarchical structures), method (reflecting at law in context), and legal principle (tool to translate theoretical considerations into legal arguments). Its legal principle character demands the development of a correlated doctrinal approach. In this section, the principle is applied to ADO 26. This exercise unearths how an antisubordination-based approach enables us to see the multifaceted way in which inequalities permeate the law–namely, how legal concepts and categories are framed, how problems are defined, which measures are chosen to deal with them, and the multiple ways subordination can be perpetuated going beyond the direct result of a certain measure. Consequently, an equality-based analysis should be attentive to all these dimensions if the antisubordination drive is to become concrete. That is, such dimensions should provide a doctrinal guide for legal analysis. The exercise also shows how complex this kind of analysis is, revealing that the antisubordinatory path is not always obvious or unidimensional.

A. How concepts are framed

Critical perspectives on law have shown over the years that in a world of inequalities, legal rules, concepts and values are established by the point of view of those in power.[49] This means not only the exclusion of the perspective of those who are affected by norms, but also the fact that such constructions serve power in a way that needs no motivation.

The problem is seen as not limited to how law is mobilized, but instead, how it is constructed.[50] Over the years, many have engaged in the exercise of destabilizing concepts and doctrines from the perspective of those at "the bottom."[51] Examples include challenges to the idea of "consent,"[52] the views of pregnancy that underlie the prohibition of abortion,[53] the conceptualization of "hierarchy" in the work place or of what constitutes sexual harassment,[54] and how procedural rules are framed in a way that exclude groups that do not record events in a way that would fit traditional evidence rules.[55]

The case of the criminalization of LGBTQphobia in Brazil provides a clear example of how concepts can be permeated by the point of view of power in a way that perpetuates that same power. The strategy used in the case of the criminalization of LGBTQphobia was based, first and foremost, on the definition of a concept: racism. The problem is that the contrast between the conceptualization of racism adopted and the way it actually operates shows that the definition is too narrow and does not capture the pervasive ways in which racism operates.

ADO 26 adopted a view of racism that considers it a practice or behavior that causes damages (discrimination, violence) to a determined group of people based on inaccurate, ignorant ideas about the inferior character of the group, with the result of interiorizing the group. Racism is not reducible to differentiated treatment by laws or policies; racism is about people being kept in a second-class position by social structures. This view reflects the category Neil Gotanda describes as "historical-race," which, in his words, "embodies past and continuing racial

subordination."[56] However, the view of racism adopted still considers it to be a behavior practiced by someone, and a behavior that is motivated by wrong and irrational ideas aimed at subordinating. This way of reflecting about the issue poses some problems.

Despite recognizing that racism happens due to racialized ideas, the framework adopted individualizes the problem. Racism is attached to the idea that it is something someone *does*. However, looking at racism in context, we can see that the problem is not a behavioral one, but a systemic one. Racism manifests through, among other things, democratic underrepresentation, economic disadvantage, lack of opportunities, precarity, mass incarceration, and police violence.[57] Racism is a system of oppression that operates in many ways. Through behaviors – yes–but, more than that: through the way society is structured. Racial domination is a system of oppression and racist "behavior" is symptom of the system–a "diagnostic device."[58]

The systemic nature of racism is also obscured by the adoption of an idealist conception of racism. In the decision, racism as a behavior is seen as being attached to something someone *believes* in. It is an ideology or a set of ideas.[59] To think about racism as an idea prevents us from reflecting about its foundational character in Brazil, something that constitutes society, rather than a set of ideas that flow in a neutral structure.[60] It also leads us to psychological inquiries about those who "engage" in racism, drawing out attention to the racist individual.[61] In this context, the focus on the "irrationality" of the conduct, its "mistaken" character, and its relationship to "ignorance" also helps to obscure the systemic nature of the problem. As exposed on Part II, the definition of racism adopted by the decision relies on all these aspects. It focuses on beliefs and individual behaviors deemed deviant and irrational. In doing so, it creates the idea that racism is a set of occurrences that deviate from an otherwise good system. In other words, to consider racism as a distorted worldview has as its premise the idea that, in general, the current

worldview that prevails in society is neutral and unproblematic, when, in fact, the reproduction of racism is the rule.[62] And, because of that, we must abandon the idea that racism is something atypical.[63]

Instead, we should work with the idea that racism is everywhere, reproducing itself in ways that go beyond individual behaviors, beliefs and, even less, irrational beliefs. This is what lived experiences of Black people show–even if they are not homogenous.[64] Racism is experienced as an *interlocking* system of oppression, as it is constituted by–as well as constitutes–other systems, such as heteropatriarchy and heteronormativity, for instance.[65] As such, the subordination that flows from those systems is multidimensional and complex.[66]

None of the ideas presented here are new. However, the point is not to discuss how racism operates, but to show how its conceptualization can be made in a way that is not attentive to how people experience subordination and privileges that arise from a racial system. This is something that must be scrutinized in antisubordination-based inquiries of the law, not only for purposes of accuracy (i.e. let's describe racism properly, in a socio-historically grounded way), but, because of the normative consequences the description can have for a case–such as, for instance, how it impacts in how problems are defined and, consequently, the solution.

B. How damages are perceived

Inequalities can also permeate the way in which problems are perceived in a legal dispute and then translated into the language of law. In the present case, the decision frames LGBTQphobia as racism, which, as exposed above, is conceptualized in a narrow way, focused on hateful irrational behaviors. Behaviors are acts, directed at people and groups and, as such, the damage in question becomes the victimization of individuals or groups. The framework adopted in the decision parallels the one advanced in the petition, which describes those acts as

being “reprehensible behavior that stems from the conviction that there is hierarchy among human groups, sufficient to justify acts of segregation, inferiorization, and even the elimination of people.”[67]

If racism had been conceptualized differently–as an interlocking system of oppression, as suggested above–maybe the damage would have been framed differently. Violence would have been seen as a problem, but a problem that is not only problematic *per se* (members of a determinate group are beaten up, killed, humiliated), but also, as a symptom of subordination, which manifests itself as a “an interconnected web that stretches across civil society and the state.”[68]

To adopt Cherryl Harris's terminology, LGBTQphobia is a way of reinforcing heterosexuality as *property*.[69] Hate violence against this community is a way of re-establishing the “deviant” character of those who do not conform to heterocisnormativity, keeping intact the very idea of the existence of a “normal” sexuality. Heterocisnormativy is built through the exclusion of others. As non-normative groups are invisibilized and demonized, normative groups gain status. In this context, institutional inaction in dealing with this kind of violence not only leaves individuals unprotected, but also keeps a whole system of oppression alive.[70]

Seen this way, the focus could have shifted from the violence to the subordinatory structure. This problem is so deep that it leads, in its output, to the erosion of the rule of law in its substantive dimension. Consequently, although victimhood would still be a problem to be addressed, the problem of inequality would emerge as the root to be tackled. In other words, the damage to be addressed would have been perceived as being the status of the group and not personal injuries.

One issue, however, remains: although the problem would have been seen as subordination, subordination not only permeates violence directed at a disadvantaged group, but it is also constituted by it. Subordination is not an abstract system. It is composed by actual social dynamics. That is, violence can be seen not as a symptom of a broader problem (subordination), but rather as subordination itself. In this sense, violence could also be seen as a damage per se, not only for its material consequences, but also for the place it occupies in maintaining subordination. As such, it is not simple to define which framing of the damage would be more aligned to an antisubordination perspective.

C. How the solution is defined – does it advantage or disadvantage groups?

The moment of defining what solution should be taken and if it could be taken is the one in which antisubordination considerations are the most salient. However, this is complex and probably less straightforward than we may think. How do we define what advantage means? A classic example of this discussion is laid down by Derrick Bell in "*Serving Two Masters*."[71] There, Bell proposes a discussion about what would truly advantage the Black community in the United States during the civil rights quest. Brown v. Board of education became the paradigmatic case back then. The decision de-segregated schools under an argument attentive to the fact that the Black community was not being treated differently, but worse. However, Bell puts forth the question: is that what Black kids needed? To be assimilated in the school system as it existed? Or would it be better for equality that Black schools got more funding, to improve their conditions?

The dilemma presented by Bell–which is at the background of the concrete discussion about conflicts between lawyers and clients–is underlined by a broader discussion related to what one considers what is the problem and damages at play and how to address them. The same thing happens in the decision on ADO 26. The criminalization was found as a solution because of how

racism was framed–a behavior–and how the damage was, consequently, defined–as personal injury. An antisubordination analysis should, then, be attentive to the fact that deciding what is advantaging or disadvantaging is a complex endeavor and can lead to different results.

For a long time now, authors working within outsider jurisprudence have been critical of hate crime legislation. In the context of the US, for instance, criminalization has been considered bad for a few reasons. First, because it is animated by an "assimilationist" drive–meaning that what the criminalization actually does is include a part of the population in a system, without questioning the system. Particularly in the case of criminal law-based solutions, such authors argue that this will for assimilation is a fruit of a non-intersectional view on the problem of homophobia and transphobia, to the extent that it turns to openly racists and selective institutions such as the police and the carceral system.[72] Criminalization would serve to incarcerate more Black people[73] while, at the same time, protecting more white upper class members of the community to be protected.[74]

Another criticism is related to the fact already discussed above that criminalization individualizes conducts, obscuring the systemic aspects of the interlocking systems of power.[75] In other words, it makes society associate racism or homophobia with blatantly discriminatory acts–more or less how most part of society imagines racism or homophobia–when, in fact, subordination occurs through less obvious means. Finally, the LGBT identity is reified as something unitary and static, without accounting for intragroup differences.[76] The critical view towards criminalization of hate crimes is part of the broader critique of the criminal system as a whole.

The analysis of cases from the perspective of the antisubordination principle here envisioned demands a look at the concrete reality lived by groups. And this is, of course,

contingent to contexts. This means, then, that criticism developed in the context of the United States cannot be automatically imported to Brazil. The question then becomes: is criminalization group-advantaging or group disadvantaging in view of the context? The purpose of the present paper is not to give a final answer to this specific problem, but we can highlight a few considerations that could be considered in a committed application of the principle of antisubordination.

First, one can think about the relationship between racism and the penal system (a similar reflection as to the one North American scholars have been proposing). In Brazil, the legal system, as well as institutions such as the police are colonial inheritances, were originally conceived as ways of controlling sectors of the population. Black people, for instance, have been particularly targeted by the Brazilian Penal State.[77] And, once in the system, the group experiences sub-human conditions.[78] In this sense, turning to the penal system could in fact be seen as an acritical assimilation of the LGBT community to a racist system.

Some authors would suggest that the conflict we have at hand here (protect LGBTQ people at the expense of Black people) is fruit of an insensitivity to intersectionalities in the decision, which adopts an essentialist view of the LGBT community forgetting to account that some members of the community are also victims of the criminal system, and, in that sense, criminalization would not protect them and, in a structural level, would exponentiate inequalities.[79] Another argument would be that homophobia and racism are not united by the commonalities of how they occur–through behaviors intended at inferiorizing–but rather by the fact that they both stem for an interlocking system of power in which race, gender, and sexual orientation are mutually constitutive of one another and, as such, sustaining a racist system would not help in the emancipation of sexual minorities.[80]

Another factor to be considered is the effectivity of the penal system in promoting emancipation. The experience with race-related hate crimes in the years since their adoption in the Brazilian system shows that such measures are not effective. For instance, almost 30 years after the promulgation of Law 7716 (which defines racism for purpose of criminalization), the antiracist promise of the law is still not being achieved due to the fact that its categories do not match how Black people actually experience racism in Brazil–that is, in subtle ways, in which it is not really easy to identify a racist "animus" in the conduct of the person that commits the act.[81] In the same vein, the myth of racial democracy still pervades decisions involving the crime of racism as judges tend to minimize the importance of insults and stigma.[82] Because these problems are related to structural racism, there is no reason to imagine that structural inequalities involving LGBT would not play a role in law enforcement. In this sense, it is interesting to notice that criminalization is the wrong solution for the *protection* the decision aimed to promote.

However, there is yet another aspect to be considered: in view of the systematic exclusion of subordinated groups from the law, could the inclusion in a system–even if ineffective, selective and, at the end of the day, subordinatory–nevertheless have emancipatory effects? For instance, could the decision have a legacy promoting changes in the vocabulary we use to talk about a certain problem, how society comes to think about inequality and how social movements come to think about themselves?[83] The effects that decisions have–particularly effects that go beyond what is mandated in the decision–are contested. Some authors are more skeptical about social change through law,[84] others are more optimistic regarding law's impact.[85] And, such considerations depend on the context.

In the context of Brazil, the history groups have of exclusion from legal protection, what that exclusion has meant and, consequently, what inclusion (even if precarious) comes to mean all have significant legal implications. Law has, after all, a symbolic effect. The possession of rights sends a message of belonging.[86] Black people, for instance, have been left at the margins of the law–criminal law included–and it is within the space where the law does not reach that lies, for instance, the indiscriminate killing of Black people and the lack of law enforcement in prosecutions against police violence.[87] It is no wonder, then, that social movements and radical scholars have historically invested in legal change, having the criminalization of racism been one of the major foci of mobilizations.[88] At least since the 1950's Black movements have fought for the criminalization of racism in Brazil, which eventually happened in 1988, with the promulgation of the Constitution.[89]

In that context, criminalization was not a top-down measure or a capture of the elite, but, instead, a process of deliberation fueled by social movements.[90] The law has been considered, historically, a field to be disputed by Black Social Movements and the criminalization, backed by the constitutional recognition of racism in the Brazilian society is no exception.[91]

This is not to say, of course, that, in Brazil, the turn to criminalization-based strategies is unanimously accepted. To the contrary, authors and social movements have denounced such strategies, posing arguments based on the individualization of conducts and demonization of those who commit the crime, inefficiency in preventing the occurrence of crimes, selectivity of the system, oppressions that occur within the carceral system, the fact that criminalization is not necessarily pedagogic and hierarchization of oppressions.[92] Also, the polarization between criminalizing is good and criminalizing is bad is also a simplification of how the Brazilian debate has been unfolding.[93] The reflections proposed here are examples of what considerations about

the advantaging or disadvantaging character of measures would look like and to show how complicated they can be when there is not really a "community of consent."[94]

I say all this not to position myself as pro-criminalization, but only to show that dismissing criminalization as a strategy for antisubordination is simplistic in view of the dynamics of how criminalization of racism (or other criminal law-based demands, such as domestic violence) happened in Brazil and of what it means in the context of inequality. It is a view, that, for instance, obscures the critical capabilities of movements such as the LGBT movement.[95]

The further articulation of a method to resolve conflicts that arise in antisubordination-based analysis should be part of a fuller articulation of the antisubordination principle. A provisional idea is developing a doctrine that privileges the claim of the petitioner by establishing an assumption that the claim resulted from a thorough process of deliberation. This, however, would demand a broader participation of the population affected in the decision-making process to avoid elite capture. That should happen, for instance, through the admittance of equally progressive groups with different positions on the solution being asked. I develop this idea below.

D. Legacy and Place in the Broader Jurisprudence

The principle of antisubordination also demands a reflection about the place a decision can have in the legal system. Not in symbolic terms, but in material terms. Considering which legal culture is being created, and, even more importantly, what is becoming law is paramount. Afterall, a decision creates case-law that will, eventually, serve as guide for new decisions.

A decision might not have an immediate effect–let's say, the criminalization of LGBTQphobia might do little to protect the LGBT community–or no spillover effect at all in

empowering groups, and, as such, have no real emancipatory effect. However, a decision can strengthen and entrench legal understandings on equality or concepts such as racism. In other words, it creates a legal architecture or jurisprudence of a place. Besides which law is created, one can go beyond the institutional level to argue that such understandings could eventually be mobilized by social movements in legislature or future litigation.[96]

Should a court consider that in deciding? The answer is yes. Social transformation cannot be limited to the short term and an interpreter committed to antisubordination must have that in mind. This means that antisubordination considerations should go beyond the result of a case to permeate the reasoning of a decision. In the specific case of the criminalization of homophobia, the result–criminalization of a conduct–is only one aspect of the decision. Perhaps more important is the road taken to get there that translates in the choice of reasoning. A road that began before, in other cases, and that will surely continue afterwards.

Part of this inquiry is to reflect about which precedent to use. First, we can question how precedents are used. Is there a "natural," "ultimate," and "self-evident" precedent? The answer is no. It ultimately depends on how the problem is framed.

In the decision, violence against the LGBTQ community is seen as problematic because of pre-existing inequalities related to power relations. Among other things, the violence is generated by prejudiced behavior against a specific group. However, the focus on the behavior has been established as central, at least partly, because of the choice of precedent. The strategy adopted in the lawsuit was based on one of the first fundamental-rights related cases, ruled by the Court in the early 2000s, in which the court ruled that an antisemitic publication denying the Holocaust fit in the concept of racism. The reasoning was basically the same in ADO 26. Antisemitism was considered racism in its social dimension. Of course, the similarities between

the conducts are evident. However, had the court perceived racism as a system instead of behavior, probably another case would have stood out as relevant: the case in which the Supreme Court has ruled for the constitutionality of race-based affirmative actions (ADPF 186). There, the court focused on the historical subordination of Black people, instead of behaviors or prejudices. In this context, the idea of power has been linked to structures that operate in ways that go beyond prejudice.[97]

To bring ADPF 186 into the picture would pose another question that was not addressed–instead, it was taken for granted. Is racism against Black people equal to racism against the Jewish community in Brazil? What about racism against LGBTQphobia? In a first glance, I can see both similarities and differences.

The similarities were well pointed out in the decision: discrimination and violence against these groups is based on prejudice. The differences, however, complicate the decision. Racism against Black people in Brazil is a structural problem that began with enslavement. The Brazilian society is *constituted* by racism against Black people. The whole economy is based on Black people's precarity to keep going through, for instance, the availability of domestic workers that perform reproductive work in the houses of the white workforce. Or the availability of Black and Brown women to work in precarious outsourced positions. Black bodies are surveilled at a structural level and constantly targeted by institutions such as the police.[98] Although antisemitism is also a reality to be acknowledged and fought, discrimination against Jewish people has different sources, manifests in different ways, and has different outcomes. Regarding LGBTQphobia, violence, and discrimination are systemic–as well pointed out in the decision, Brazil is the leader in the ranking of murders of trans folks[99] we can also find distributive problems. For instance, the trans community finds few work opportunities outside sex work.

Recent data shows that "In Brazil, where prostitution is legal, about 90% of trans women are sex workers, according to TransVest, a local non-profit that helps trans women in Minas Gerais."[100] However, assuming that LGBTQphobia and racism against Black people are the same in Brazil is not something to be taken for granted.

Bringing ADPF 186 to the discussion would have demanded the proper elaboration of these issues that are far from trivial. Maybe the court would have reached the conclusion that the Constitution aimed to target racism against Black people and, as such, LGBTQphobia is an evil to be fought, but not the same. Or maybe the court would have stuck to the similarities between the cases, focusing on power asymmetries, rather than prejudices–even if it recognized that power manifests differently in both cases. In the second case, the defense of LGBTQphobia would have strengthened and entrenched the subordination-based jurisprudence, instead of the prejudice-based one. And this is also not trivial.

E. The Broader Political Landscape

The principle of antisubordination demands a look to a case within the broader political context. Subordination is not static it has a dynamic character. Society is a site of power struggles and dispute, law being one of those sites. Transformative changes can trigger conservative responses that come in the form of the revamping of subordination tools. This has been called the preservation through transformation phenomenon.[101] Part of the substance of the antisubordination principle is the recognition of this social dynamic and the concretization of antisubordination then demands attention to it, when on scans reality. The guiding dimension of antisubordination, in turn, demands the exercise of disrupting this movement.

In the case of the criminalization of LGBTQphobia, this kind of analysis could lead to a few inquiries. For instance, the prevailing ideology in Brazil has been that of the "racial

democracy," which sees racism as something inexistent in Brazil due to the miscegenation and the synthetization of cultural differences that took place for many years.[102] This idea has long been challenged and discredited as reality shows that, in Brazil, hierarchization is the rule.[103] The idea that Brazil is not a racist place still circulates, but the vision that has been adopted by the law–or at least some laws–is that racism exists and is something to be fought. However, how we conceptualize racism can create filters to how we see inequality. In the case of ADO 26, in which we find the ideas of behavior, motivation and irrationality are central, such restriction might be a sign that the perpetuation of subordinatory legal tools is taking place. I am not defending that this is necessarily the case in the decision, but it is something that should be considered in an antisubordination-based analysis.

Moreover, there is a very concrete matter of institutional arrangement (in the specific case, the relationship courts have with the other powers) that would have emerged as relevant had the court adopted an equality perspective that demanded attention to the place of jurisprudence in the specific context of Brazil. In ADO 26, the court has understood that LBTQphobia is a crime. Does granting this power to a court serve the antisubordination drive?

In the specific case of LGBTQphobia, the decision was well-received by progressive sectors. However, the constitution of the court was a big part in adopting the claimant's understanding. This constitution is, of course, not fixed. Justices retire and then the President of the Republic has the power of appointing the new one, which can shift the ideological inclinations of the court. An example of this was the new appointments made by President Bolsonaro, who openly expressed his intention of appointing a "terribly evangelical" person–a religious group that, in Brazil, is very conservative.

The appointment is then confirmed or not by the legislature–who also has the power of influencing the composition of the court, by having the power of changing the number of justices through the promulgation of Constitutional Amendments or impeaching justices. After the 2022 elections, Brazilian legislature took a very conservative turn, which could have an effect in the composition of the court.

Criminalization has been used as a tool for the oppression of groups and granting power to the court for the inclusion of conducts in preexisting crimes can turn against subordinate groups in the future and these groups have little control over what can happen. As such, the antisubordination lens could have led to the understanding that a more "activist" posture from the court (which is generally associated with progressivism) in this specific case could eventually be weaponized by conservative agendas. Maybe, a more Ulysses-like self-restraint, in this case, could have emerged as better serving equality.

IV. SOLVING THE COMPLICATIONS OF ANTISUBORDINATION: TOWARDS A JOINT VENTURE THEORY OF INTERPRETATION

The application of the doctrine I propose has shown how antisubordination-based analysis can be complicated. This became particularly salient in two settings. First, in the discussion about the similarity of antisemitism and LGBTQphobia to race-based racism. The questions posed were: Are the oppressions really the same? Or, despite the similarities, do they occupy different places in the Brazilian society? Secondly, complications also arise in the discussion about the solution proposed to solve the problem of LGBTQphobia. Would criminalization serve the purpose of emancipation? Or would it entrench an otherwise unfair system that, in a broader sense, serves to oppress all subordinate groups? In that point it was argued that, although U.S.–based critical queer/race theorist have long positioned themselves

against the resort to criminalization, the automatic transposition of this conclusion to the Brazilian context is too simplistic because of the concrete meaning criminalization has had for social movements struggles in the Brazilian history. Had the court approached the case through the lens of intersectionality, it would have seen the place criminalization has in the oppression of both Black and LGBTQ communities, and, as such, not good for anybody. However, in Brazil, claims for criminalization are part of the culture of social movements (Black movements, Women's movements, etc), which, in the past, have always paired those claims to critical reflections about limits and evils of criminal law. As such, it is at least plausible to defend both criminalization and not criminalization as having an antisubordinatory component to them.

These dichotomies, as I have argued, complicate the antisubordination principle–or, at least, its application to concrete cases–to the extent the antisubordinatory resolution of a case is not obvious, ultimate, or unitary.

Such conclusions can be paralyzing. It has been argued by many critical legal theorists that the way power relations interact with law makes it inherently problematic and useless. Solutions, in this context, would be only superficial. However, it seems almost self-indulgent to argue that law is doomed and that it has no place in the lives of people that are constantly affected by it or by its lack.[104] Legal protection is, adopting Gayatri Spivak's famous words, something we "cannot not want."[105]

So, how can we solve the problems that emerged? This paper suggests a tentative new path for further investigation based on a new method for legal interpretation: interpretation as a *joint venture*. This interpretative method envisioned here is one in which legal meanings are co-constructed by courts and social movements in formal proceedings.

Adjudication is interpretation, and interpretation is neither fully discretionary nor mechanical.[106] In this understanding, the law requires some objectivity that becomes a reality when legal interpretation can be measured against standards that "transcend the particular vantage point" of the interpreter.[107] As a champion of the possibility of objectivity in law (and, in fact, law itself), Owen Fiss advances two standards that, from his perspective, constrain interpretation, enabling objectivity: First, the idea of disciplining rules, understood as those that provide standards for conferring weight and relevance to materials considered in decision-making processes, define concepts and establish procedural rules. Second, the idea of an interpretative community, which recognizes rules as authoritative.[108]

In the case at hand, the disciplining rules would be material rules, such as constitutional provisions and case law, and procedural rules, such as those applying to cases that, like ADO 26, are related to an abstract analysis of the law. The material rules–in the specific case, the antisubordination principle–do not provide a final and unitary answer, but some routes of possible interpretations. To ascertain that such routes would comply with objectivity, however, does not say much about how to decide.

One possible alternative path would be to look at procedural rules. In Brazil, for lawsuits like ADO 26 there are strict rules as to who is considered legitimate to propose the lawsuit in the first place. For such far reaching claims, the legislator (complemented by the court) has used as main criterion the "representability" of the claimant–which would include some elected officials, national unions, parties and, more recently, civil society organizations.[109] This rule is a way to confer democratic legitimacy decisions taken by unelected officials, such as judges. Having in mind that representability has been incorporated as a value in designing these lawsuits, one

answer to our conundrum of what to do when multiple routes fulfill the substance of a principle would be deference to what the claimant is asking.

This answer, however, is insufficient. Just as what happens in politics in general, some groups have more power than others, which creates imbalances in mobilization capacity and, consequently, in the influence they can exert. Social movements that arrive in decision-making places are usually the ones with more resources and the more marginalized end up being excluded from discussions. As such, the deference alternative would just reproduce inequalities– usually produced by how systems of oppression (i.e. heteropatriarchy) intersect with systems of privilege (whiteness, economic privilege, etc).[110] The conference of content to legal meanings, in this setting, becomes a zero-sum game, involving not conservatives vs. progressives, but progressives vs. progressives.

An alternative to deference could be found at the inevitable intersection that exists between both material and procedural disciplining rules. But, more importantly, it would lie in the intersection that exists between disciplining rules and the interpretative community, which are not (or should not be seen as) two different and separate things.

My proposal is a new way of interpreting the law in which judges would still play the role of interpreting the law in consonance with public reason, but only after a more thorough investigation of what the most equality-enhancing decision would be. This would be done through active engagement with social movements in a real exercise of co-construction of the law. In this scenario, social movements would come to formally occupy center-stage in the interpretative community (to go back to Fiss's terminology) that constrains judges' decision-making processes. On the other hand, judges would have a central role in granting active material participation of such groups in legal proceedings.

I adopt, as a point of departure, the idea that law is created by those who experience it on the ground as much as by legislatures and courts. This is the premise that animates the "demosprudence" framework, proposed by Lani Guinier and Gerald Torres, as a mode of social analysis.[111] The central idea is that social movements create an "authoritative meaning within a democratic polity."[112] This approach to law has also been adopted by other authors, such as Jack Balkin and Reva Siegel, who link the meaning of legal principles to shared "background understandings" about "areas of life to which they properly apply."[113] For them, constitutional principle's understandings are largely shaped by political contestations that happen on the ground.[114]

These ideas describe what happens in the real world. Demosprudence, for instance, is a methodology for studying how the interaction between social movements and law works. In Guinier and Torres's formulation, the framework directs us towards investigating how and when minorities mobilize rights and if such mobilization has a democracy-enhancing effect.[115] It has also been used as a way to scrutinize the democracy-enhancing character of judicial decisions, by looking at their potential engagement with substantive views of democracy, uses of disruptive methodologies, or adoption of a more overarching view of problem-resolution.[116]

In a recent work, Monica Bell, Stephanie Garlock and Alaxander Nabavi-Noori survey the multiple ways in which demosprudence as a framework has been applied and try to expand it.[117] First, they propose that demosprudence should be taken into account in reflections about the role judges have. Particularly, they argue that judges should be seen as actors, whose purposes could include "acknowledging the harms at the root of the dispute, educating the public about various harms, recognizing the human interests at the root of the case, and engaging discursively with contemporary social movements."[118] Central to this plea is the idea that while judicial

orders are constrained by doctrine, judicial language is not. Secondly, they propose that judges should act as managers, particularly through the adoption of a more active posture intended to enhance the voices of marginalized litigants and to more actively seek proximity and real-world experience with communities they deal with.[119] Finally, demosprudence could also be enhanced in the judge's role as rule-makers in what regards court's operations and judge's behaviors.[120] Bell, Garlock and Nabavi-Noori insights are interesting, but I would like to push them one step further in approximating demosprudence and more traditional jurisprudence by arguing that the idea of demosprudence could constitute the normative underpinning of the joint venture theory of legal interpretation.[121]

A joint venture interpretation would be highly dependent on the participation of different social movements on legal procedures that concern them, which could demand, among other things, institutional reform directed at material inclusion. The problem raised by the LGBTQphobia criminalization case is precisely the inexistence of a shared meaning as to the emancipatory potential of criminalization and, even by looking at the ground, to the interaction between social movements and the law, the conflict would still be there at the end of the day. And this would happen in multiple other cases involving rights. However, if the solution is not in the possibility of one ultimate truth about what would be the final "group-advantaging" solution, maybe it can be found in procedural changes that would enhance the "conditions for a community of consent" (to use Guinier and Torres's terminology).[122]

In Brazil, one institutional way in which democracy infiltrates legal decisions is through the institute of *Amici Curiae*. The presence of *amici curiae* is usually justified as a means of educating the tribunal, democratizing the tribunal, legitimating decisions and create a space for social debate.[123]

As it stands, amici are characterized by their role in serving the court or creating legitimacy of decisions. But it could also serve the purpose of providing a space for deliberation between conflicting social movements that would then result in one shared interpretation that could be adopted by courts. This would demand, of course, a more active role from judges to ensure plural participation. In the way things stand now, the process of acceptance of *amici curiae* is not transparent and maybe the insertion of a requirement that the court includes–maybe even actively search for–dissenting opinion within different social movements would be possible.[124]

A solution would also demand measures that are not dependent on institutional change. For instance, groups that propose changes as drastic as the criminalization of LGBTQphobia–and which are, in general, deeply aware of all the complexities involved in the matter and, presumably, in touch with opposing social movements–could also make an effort to bring these groups into institutional settings, supporting their inclusion as *amici curiae,* for instance, even if they disagree with the cause.

Bell, Garlock and Nabavi-Noori argue that the underlying premise of Demosprudence-based proposals is the idea that judges "can ethically act to promote participatory public dialogue even if current legal doctrine or process do not permit direct intervention."[125] I would go further to say that the adoption of the antisubordination principle imposes legal duties on judges to act positively towards arriving at the most antisubordinatory decision. This would include, inevitably, a more positive posture in searching for it and the acceptance that legal reasoning should be a joint venture process.

This proposal demands a more active role of courts, which has often been criticized by those that defend a more rigid theory of separation of powers that commands taking politics

away from judges and placing it in elected branches. Adhering to the preliminary ideas advanced here would demand a more imaginative posture–one that privileges thinking about measures that could make the judiciary more democratic, particularly through direct, rather than indirect participation. Separation of Powers does not exist in abstract. It is deeply contextual and adapts according to different social demands. It evolves over time–as it should. Good examples come from Global South Jurisdictions in which boundaries between powers expand or retract according to what is needed to promote the social changes demanded by transformative constitutionalism.[126] In this sense, instead of importing detached ideals of rigidity to evaluate which changes are or are not possible, perhaps it would be more useful to re-theorize avenues for change from the possibilities transformative constitutionalism offers. In other words, if we are to expand the idea of antisubordination, maybe the Global South might be a good place to start.

V. CONCLUSION: RE-THEORIZING ANTISUBORDINATION AS A JOINT (AD)VENTURE

The present paper was dedicated to showing how subordination is multifaceted and, as such, how legal decisions based on the antisubordination principle should be attentive to the diverse ways in which inequalities can permeate the law. Particularly, I argued that equality considerations must guide how concepts are framed, how problems are defined, which solutions are proposed, as well as reflections about what a decision comes to mean for a determined place's jurisprudence and political context. In my exercise, I have also highlighted complications that might arise when one applies the antisubordination principle and tried to offer a provisional solution for these complications. A proper solution would demand not only an analysis of how to deal with the problem of determining which view should prevail in conflicts where the antisubordinatory result is not obvious, but also–and maybe more importantly–about the role the judiciary can and should have in this process of dismantling hierarchies. This includes, of course,

thinking about the place of courts in constitutionalism and their relation to social movements that seek social change.

I would like to end the paper by pointing out that it is part of a broader project of proposing a full theorization of antisubordination–which, from my perspective, would include the articulation of the principle as a framework, showing what its application would look like in different settings (the criminalization of LGBTQphobia make some of the needed considerations emerge, but, other cases bring others to the forefront) and, broadly speaking, establishing the constitutional theory that should constitute the normative underpinning of antisubordination as legal principle.[127] Reimaging antisubordination is a long-term project and, hopefully, it will not be a solitary one. It should also be a joint venture. Or, better yet, a joint adventure.

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[2] My analysis is supposed to be understood as an exercise that could be replicated in many other cases involving inequalities. Each different case can unearth different dimensions of how law arise from, is permeated by and perpetuate social hierarchies. The broader project of which this paper is a part of involves digging deep into other cases that could make my claims stronger and my proposals more useful.

[3] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

[4] Shreya Atrey, *The Intersectional Case of Poverty in Discrimination Law*, 18 HUM. RTS. L. REV. 411, 415 (2018).

[5] For demosprudence, see Part IV.

[6] See, for instance, the way some South African decisions apply grounded methods for legal analysis, which I will defend as core to antisubordination analysis (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (2000) (2) SA 1 at [35] (South African Constitutional Court)). The same happens in Canada (Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497). A comprehensive analysis of these and other cases from anglophone countries can be found in Shreya Atrey, *supra* note 3. For the way transformative constitutions open space for more radical equality analysis, see Oscar Vilhena Vieira and Dimitri Dimoulis, *Transformative Constitutions as a Tool for Social Development*, FGV DIREITO SP RESEARCH PAPER SERIES N. 154 (2018).

[7] Examples include Argentina (*Guía de actuación en casos de violencia doméstica contra las mujeres*, Ministerio Público Fiscal, 2016), Bolivia (*Protocolo para juzgar com perspectiva de género*, Comité de Género, Órgano Judicial de Bolivia, 2017), Mexico (*Protocolo para juzgar com perspectiva de género*, Suprema Corte de Justicia de la Nación, 2020), Peru (*Protocolo de Administración de Justicia con Enfoque de Género del Poder Judicial*, La Comisión de Justicia de Género, 2022), Spain (Guías y protocolos de actuación. Violencia doméstica y de género, Consejo General del Poder Judicial).

[8] See, for instance, FABIANA SAVIERI (ED.), REESCREVENDO DECISÕES JUDICIAIS EM PERSPECTIVAS FEMINISTAS: A EXPERIÊNCIA BRASILEIRA (Faculdade de Direito da Universidade de Ribeirão Preto, 2023); Aparna Chandra, Jhuma Sem & Rachna Chaudhary, *Introduction: the Indian Feminist Judgments Project*, 5 INDIAN LAW REVIEW, 261 (2021). KATHRYN M. STANCHI, LINDA

L. BERGER & BRIDGET J. CRAWFORD (EDS), FEMINIST JUDGEMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (FEMINIST JUDGEMENT SERIES: REWRITTEN JUDICIAL OPINIONS) (Cambridge University Press, 2016).

[9] Because of its focus on different treatment, this mediating principle has been called, by many commentators, the antidiscrimination principle.

[10] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976), in general.

[11] *Id.* 147 onwards.

[12] *Id.* at 157.

[13] FRANCISCO VALDES & STEVEN W. BENDER, LATCRIT 19 (New York University Press, 2021). Balkin and Siegel identify, in a non-exhaustive fashion, authors like Derrick Bell, Kenneth Karst, Catharine MacKinnon and themselves. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* 58 U. MIA L. REV. 9 (2003). To this list, I would add Ruth Colker (Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection,* 61 N.Y.U L. REV. 1003, 1007 (1986). Another prominent author to work within the antisubordination framework is Kimberlé Crenshaw, who brought one of the main contributions to the field: the idea that subordination is not unitary – it is derived from different systems of oppression that intersect. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). See Section I. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

[14] Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

[15] Crenshaw, *supra* note 2.

[16] Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YLJ 2118, 2120 (1996).

[17] Taís Penteado, Re-Theorizing Antisubordination: Articulating the Principle as Framework (manuscript with author).

[18] Multiple authors have provided accounts of what substantive equality should entail. A comprehensive one was put forth by Sandra Fredman, who argues that substantive equality demands addressing redistribution, recognition, transformation and participation, which target the multidimensional and interacting way inequalities operate. SANDRA FREDMAN, DISCRIMINATION LAW 25 (2011).

[19] Examples include Gerald Torres & Kathryn Milun, *TranslatingYonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 4 625 (1990); Angela P. Harris & Aysha Pamucku, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality,* 67 U.C.L.A. L. Rev 758 (2020), and Taís Penteado, *Terceirizadas, Centered: A Critical Analysis of Outsourcing and Gender and Racial Inequalities in Brazil*, 34 Yale Journal of Law and Feminism, 246 (2023).

[20] Around the world, many countries have developed doctrines that offer "roadmaps" to deal with inequalities. Dimoulis presents a roadmap for the constitutional assessment of inequalities in different countries: In Germany, the Constitutional Tribunal developed a three-phase analysis. In

the U.S. the Supreme Court developed the levels of scrutiny doctrine. The United Kingdom's Equality act also offers criteria to determine if discrimination is in place DIMOULIS, DIREITO DE IGUALDADE 335 – 346 (Almedina, 2021). Oscar Vilhena Vieira also presents an analysis of the criteria established in the Brazilian Constitution. He identifies (and criticizes) the ideas of merit, universality, and necessity. Oscar Vilhena Vieira, *Igualdade, in* DIREITOS FUNDAMENTAIS: UMA LEITURA DA JURISPRUDÊNCIA DO STF (Oscar Vilhena Vieira et al eds., 2017). My interpretation considers recent caselaw developments unavailable after the last edition of Vieira's analysis.

[21] S.T.F., Ação Direta de Inconstitucionalidade por Omissão No. 26, Relator: Ministro Celso de Mello, Diário de Justiça Eletrônico [D.j.e] 13.06.2019 [hereinafter, Decision].

[22] Art. 5o, inc. XLI, Brazilian Federal Constitution (CF).

[23] Initial Petition, 94.

[24] Art. 5o, inc. XLI, CF.

[25] Decision, at 10 (PDF).

[26] In the original "**As várias dimensões conceituais de racismo**. **O racismo**, *que não se resume a aspectos estritamente fenotípicos*, **constitui** *manifestação de poder* que, **ao buscar justificação** na desigualdade, *objetiva viabilizar a dominação* do grupo majoritário **sobre integrantes** de grupos vulneráveis (*como a comunidade lgbti+*), **fazendo instaurar**, *mediante odiosa* (*e inaceitável*) *inferiorização*, **situação de injusta exclusão** de ordem política e de natureza jurídico-social". Summary, at 6 (PDF).

[27] *Id.* at 64 (PDF).

[28] *Id.* at 71 (PDF).

[29] *Id.* at 72 (PDF).

[30] *Id.* at 76 (PDF).

[31] *Id.* at 81 (PDF).

[32] *Id.* (PDF). The provisions are: art 5th XLI – the law shall punish any discrimination which may attempt against fundamental rights and liberties and XLII – the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law.

[33] *Id.* (PDF).

[34] *Decision*, 93 (PDF).

[35] *Id.* at 100 (PDF).

[36] Lei 7.716, de 5 de janeiro de 1989.

[37] Decision, at 120 (PDF).

[38] "The view exposed by the Federal Public Ministry is also shared by eminent authors (…) who consider constitutionally lawful to proceed (…) to the framing of homophobic and transphobic acts in the concept of racism, in order to prevent and repress behaviors that aim to exclude and marginalize, in the context of social practices and the legal system, a certain group." Decision at 106 (PDF).

[39] *Id.* at 107 (PDF).

[40] *Id.* at 113 (PDF).

[41] *Id.* at 115 (PDF).

[42] *Id.* at 107 (PDF).

[43] *Id.* at 122 (PDF).

[44] *Id.* at 115 (PDF). "The practice of racism – eliminating the artificial and mistaken construction of the concept of "race" – translates the expression of the dogma of inequality between human beings, resulting from the exploitation of prejudice and ignorance, meaning, in its concrete expression, the unjust denial of essential dignity and mutual respect that guide human relationships."

[45] *Id.* at 112-113 (PDF).

[46] *Id.* at 125 (PDF).

[47] *Id.* at 130 (PDF).

[48] The following sections deal with the collision of rights (protection of the LGBT community X free speech or religious freedom (Decision, Sections 14 and 15, respectively). Section 16 establishes the view of the Supreme Court as a counter majoritarian force (Decision, Section 16, at 177).

[49] Catharine A. MacKinnon, *Toward a Feminist Theory Of The State*, 163 (Harvard University Press, 1989).

[50] Catharine A MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1300 (1991).

[51] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).

[52] Catharine A. MacKinnon, *Rape Redefined*, 10 HARV.L&POL'Y REV. 431, 435 (2016).

[53] MacKinnon, *supra* note 48, at 1281, 1300, 1309.

[54] Vicky Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1692 (1998).

[55] Torres & Milun, *supra* note 18, at 629.

[56] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STANFORD LAW REV. 1 (1991).

[57] For data on how racial inequalities manifest in different settings in Brazil (politics, economy, public security), see Núcleo de Justiça Racial e Direito da FGV Direito SP website <https://justicaracialedireito.com.br/publicacoes>

[58] LANI GUINIER & GERALD TORRES, THE MINER'S CANARY 14 (Harvard University Press, 2002).

[59] The Initial Petition describes racism as a "'reprehensible behavior that stems from the conviction that there is hierarchy among human groups, sufficient to justify acts of segregation, inferiorization, and even the elimination of people", Initial Petition, at 22. Homophobia, on its turn, is defined as "Homophobia is a prejudice and ignorance that consists in believing in the supremacy of heterosexuality".

[60] Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AMERICAN SOCIOLOGICAL REVIEW 467 (1997).

[61] *Id.*

[62] Adilson Moreira does a thorough job in illustrating how racism tends to operate in Brazil, in all its facets. ADILSON MOREIRA, TRATADO DE DIREITO ANTIDISCRIMINATÓRIO (Editora Contracorrente, 2020).

[63] *Id,* at 468.

[64] A storytelling-based account can be found in ADILSON MOREIRA, PENSANDO COMO UM NEGRO: ENSAIO DE HERMENÊUTICA JURÍDICA (EDITORA CONTRACORRENTE 2019)

[65] Combahee River Collective, A Black Feminist Statement (1977).

[66] Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination,* 6 MICH. J. RACE & L. 285, 288 (2001).

[67] Initial Petition, at 22.

[68] Harris & Pamucku, *supra* note 18, at 758.

[69] Cheryl L. Harris, *Whiteness as Property,* 106 HARV. LAW REV. 1707 (1993).

[70] Oscar Vilhena Vieira, *A Desigualdade e a Subversão do Estado de Direito*, 6 REVISTA INTERNACIONAL DE DIREITOS HUMANOS 29, 43-45 (2007).

[71] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470 (1976).

[72] Dean Spade and Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique* 21 CHICANO-LATINO L. REV. 38, 43 (2000).

[73] Lisa A. Crooms, *"Everywhere There's War": A Racial Realist's Reconsideration of Hate Crimes Statutes,* INAUGURAL ISSUE GEO. J. GENDER & L 41, 44 (1999).

[74] Spade & Willse, *supra* note 69, at 44.

[75] *Id.*, at 45.

[76] I*d.*, at 47.

[77] Thiago de Souza Amparo, *A Carne Mais Barata do Direito: Decolonizando respostas Jurídicas à Necropolítica*, 8 Revista Culturas Jurídicas 345, 351 (2021); Guilherme Leite Teixeira, *O fenômeno do elo geográfico e o encarceramento em massa da população negra no Brasil*, *in* DIREITO ANTIDISCRIMINATÓRIO E DIREITO PENAL: UMA HISTÓRIA TRÁGICA EM NOVE ATOS 79 (Adilson José Moreira ed., 2021); Beatriz Porto Strifezzi, *Julgando a partir de estereótipos: arbitrariedades nas decisões judiciais contra minorias raciais*, *in* DIREITO ANTIDISCRIMINATÓRIO E DIREITO PENAL: UMA HISTÓRIA TRÁGICA EM NOVE ATOS 135 (Adilson José Moreira ed., 2021).

[78] Maíra Rocha Machado, *Quando o Estado de Coisas é Inconstitucional: Sobre o Lugar do Poder Judiciário No Problema Carcerário*, 7 JOURNAL OF CONSTITUTIONAL RESEARCH 631, 636 (2020).

[79] Hutchinson, *supra* note 63, at 288.

[80] In Hutchinson's words, "Multidimensionality argues for the inclusion of sexual identity within civil rights jurisprudence and theory not because gays and lesbians are "like" persons of color but because racism and sexuality hierarchies sustain one another. Under a multidimensional approach, a progressive sexual politics becomes critical to the advancement of persons of color because heterosexism contributes to the subordinate status of racially oppressed communities.'". *Id.*, at 316.

[81] Marta Machado, Marcia Lima & Natalia Neris, *Racismo e Insulto Racial Na Sociedade Brasileira: Dinâmicas de Reconhecimento e Invisibilização A Partir do Direito,* 35 NOVOS ESTUDOS CEBRAP 11, 17 (2016).

[82] Marta Machado, Marcia Lima & Natalia Neris, *Anti-racism Legislation in Brazil: the Role of Courts in the Reproduction of the Myth of Racial Democracy*, 6 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 267, 290 (2019).

[83] Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. VER. OF L. & SOC. SCI. 34 (2006).

[84] Gerald N. Rosenberg is famously categorical in his skepticism, supporting his claim that courts have too limited of a power on empirical studies of the aftermath of Brown v. Board of Education and Roe v. Wade. GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (University of Chicago Press 1991).

[85] See, for instance, MARY ZIEGLER, BEYOND ABORTION: ROE V. WADE AND THE BATTLE FOR PRIVACY (Harvard University Press 2018).

[86] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (Harvard University Press 2000).

[87] SILVIO ALMEIDA, O QUE É RACISMO ESTRUTURAL? 80 (Editora Jandaíra, 2018).

[88] Machado, Lima & Neris, supra note 78, at 12.

[89] *Id.*

[90] As Machado, Melo and Silva point out, "A Convention entitled "The Black and the Constituent" was held in Brasília in 1986 with a view to formalizing the demands the various sectors of the Black movement would make upon the promulgation of the new constitution.". Marta Machado, Rurion S. Melo & Felipe Silva, The Public Sphere and the Anti-Racism Legal Protections in Brazil, 1 SOCIAL SCIENCE RESEARCH 1, 5 (2008).

[91] NATALIA NERIS, A VOZ E A PALAVRA DO MOVIMENTO NEGRO NA ASSEMBLEIA NACIONAL CONSTITUINTE (1987/1988): UM ESTUDO DAS DEMANDAS POR DIREITOS 179 (M.A. Dissertation, FGV Law School of São Paulo, 2015).

[92] Aline Passos, *Criminalização das Opressões: A Que Estamos Sendo Levados a Servir*, REVISTA REVER (Jan. 23, 2014), < https://revistarever.wordpress.com/2014/01/23/criminalizacao-das-opressoes-a-que-estamos-sendo-levados-a-servir/>.

[93] Bruno Medinilla de Castilho & Paulo César Corrêa Borges, *Entre a Criminalização da LGBTfobia e a Responsabilização Não-Criminal*, 8 REVISTA VERTENTES DO DIREITO 410 (2021).

[94] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L. J. l 2740, 2743 (2014).

[95] Roger Raupp Rios & Lawrence Estivalet de Mello, *Direito da Antidiscriminação, Criminalização da Homofobia e Abolicionismo Penal*, 65 REVISTA CRÍTICA DO DIREITO (2015).

[96] Marta Machado, *Mobilizing Roe: The Political Life of a Decision, Beyond Abortion and Beyond Courts'*, 55 TULSA L. REV. 231, 232 (2020).

[97] Adilson Moreira, *Discourses of Citizenship in American and Brazilian Affirmative Actions Court Decisions*, 64 AM. J. COMP. L. 455, 491 (2016).

[98] See Ciara Nugent, 'We Can't Take It Anymore.' How the Death of a 5-Year-Old Boy Has Spurred Brazil's Black Domestic Workers to Fight for Better Treatment (Time Magazine, 07.17.2020) Available at: <https://time.com/5867784/black-domestic-workers-treatment-brazil/>; Ciara Nugent & Thaís Regina, How Black Brazilians Are Looking to a Slavery-Era Form of Resistance to Fight Racial Injustice Today (Time Magazine, 12.16.2020) Available at <https://time.com/5915902/brazil-racism-quilombos/>

[99] Ester Pinheiro, Brazil continues to be the country with the largest number of trans people killed (Brasil de Fato, 01.23.2022).

[100] Oscar Lopez & Fabio Teixeira, As Latin America locks down, trans sex workers struggle to survive (Reuters, 04.24.2020) Available at: https://www.reuters.com/article/idUSKCN22613Y/)

[101] Reva Siegel, *supra* note 15, at 2120.

[102] GILBERTO FREYRE, CASA GRANDE E SENZALA: FORMAÇÃO DA FAMÍLIA BRASILEIRA SOB O REGIME DA ECONOMIA PATRIARCAL (RECORD, 1933).

[103] See ROGER BASTIDE & FLORESTAN FERNANDES, RELAÇÕES RACIAIS ENTRE NEGROS E BRANCOS EM SÃO PAULO (EDITORA ANHEMBI, 1955).

[104] Owen M. Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 10 (1986); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 301, 302 (1987).

[105] GAYATRI C. SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 172 (Harvard University Press, 1999).

[106] Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

[107] *Id.* at 744.

[108] *Id.* at 745.

[109] Art. 103, CF.

[110] Nancy Ehrenreich, *Subordinationand Symbiosis: Mechanisms of Mutual Support Between SubordinatingSystems*, 71 UMKC L. REV. 251, 277 (2002).

[111] Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 16 (2008); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2749 (2014).

[112] *Id.*

[113] Jack M. Balkin & Reva B. Siegel, *Principles, Practices and Social Movements*, 154 U. OF PA. L. REV. 927, 928 (2006).

[114] *Id.*

[115] Guinier & Torres, *supra* note at 105.

[116] Guinier, *supra* note 105 at 16.

[117] Monica C. Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE LAW JOURNAL 1473, 1510 (2020).

[118] *Id.* at 1511.

[119] *Id.* at 1518-1519.

[120] *Id.* at 1520.

[121] Demosprudence was born as a framework for the description of how law and social movements interact on the ground. However, we can also see that excluding people's participation in conferring meaning to the law in institutional settings is arbitrary. We can make a parallel here with the theory of intersectionality. Intersectionality is a framework for looking and understanding the world, but it has also become a normative ground for legal interpretation. For intersectionality as a research paradigm, see Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5 PERSPECTIVES ON POLITICS 63 (2007). For intersectionality as methodology for legal interpretation, see Catharine A. MacKinnon, *Intersectionality as Method: A Note,* 38 SIGNS 1019 (2013).

[122] Guinier & Torres, *supra* note 105, at 2744.

[123] Livia Gil Guimarães, *Participação Social no STF: Repensando o Papel das Audiências Públicas*, 11 REVISTA DIREITO E PRÁXIS 236, 253 (2020).

[124] For instance, in ADO 26, the organizations accepted as *amici* were: Against: "Frente Parlamentar 'Mista' da Família e Apoio à Vida" ("Mixed Parliamentary Front of Family and Support of Life"), "Convenção Brasileira de Igrejas Evangélicas Irmãos Menonitas – COBIM" ("Brazilian Convention of Evangelic Churches Menoitas Brothers" and "Associação Nacional de Juristas Evangélicos – ANAJURE" ("National Association of Evangelic Lawyers"). Pro: "Grupo Dignidade – Pela Cidadania de Gays, Lésbicas e Transgêneros" ("Dignity Group – For Gay, Lesbian and Transgender people Citizenship"), "Partido Socialista dos Trabalhadores Unificados – PSTU" ("Socialist Party of Unified Workers"), "Conselho Federal de Psicologia, Associação Nacional de Travestis e Transsexuais – ANTRA" ("Federal Psychology Counsel, National Association of Transvestis and Transsexuals"), "Grupo Gay da Bahia – GGB" ("Bahia Gay Group"), "Associação de Lésbicas, Gays, Bissexuais, Travestis e Transexuais – ABGLT" ("Lesbian, Gay, Bissexual, Transvestis and Transsexuals Association") and "Grupo de Advogados pela Diversidade Sexual – GADVS" ("Group of Lawyers for Sexual Diversity"). Further investigation in this point is needed, but an analysis animated by the antisubordination principle would suggest that the absence of organizations devoted to Black movements rights or LGBT organizations against the criminalization of LGBTQphobia – for reasons such as abolitionism, for instance - raises a red flag. The LGBT community is not homogeneous internally and neither is necessarily aligned with other groups. As such, an antisubordination-based analysis would demand a more inclusive procedure. Decision, at 11 (PDF).

[125] Bell, Garlock & Nabavi-Noori, *supra* note 111 at 1511.

[126] See, for instance, DAVID BILCHITZ & DAVID LANDAU (EDS.) THE EVOLUTION OF THE SEPARATION OF POWERS. BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH (ELGAR, 2018).

[127] According to Vieira and Dimoulis, "Transformative Constitutions impose a *substantive notion of collective and social justice through development and social transformation."* Oscar Vilhena Vieira & Dimitri Dimoulis, *Transformative Constitutions as a Tool for Social Development*, FGV DIREITO SP RESEARCH PAPER SERIES N. 154 10 (2018). The transformative impetus of the Brazilian Constitution, for instance, is evident, even if not necessarily effective (particularly in the last few years) and even if the new political landscape might lean towards liberal and conservative reforms. This paper aims to provide tools for progressive transformation to keep happening, even if in a piecemeal fashion, to make the aim concrete.