

Decolonial perspectives on the democratic family: initial contributions to the analysis of recognition and implementation of transparency*

Perspectivas decoloniais à família democrática: aportes iniciais para a análise do reconhecimento e da efetivação das transparentalidades

Perspectivas decoloniales a la familia democrática: aportes iniciales para análisis del reconocimiento y de la concreción de las transparentalidades

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Abstract

This work offers an overview of trends, benefits, and limitations regarding the potential use of behavioral biometric recognition technologies to increase the fight against crime, whether in criminal activities mediated by information technology or in the monitoring of people in public and private environments. As a theoretical framework (place of speech), "Critical Criminology" is considered because it is the science that seeks to explain the operationality and actual functions of the penal system, which can offer elements to guide the use of information technologies in the field. Carried out based on a bibliographical review, the work is structured into three units. The first explores aspects regarding corporeality as an expressive dimension of individual personality. The second part covers general technical aspects of behavioral biometrics. Finally, the third unit proposes reflections on the use of this technology for surveillance purposes in the criminal system.

Keywords: family law; democratic family; decoloniality; transparentalities.

Resumo



O presente artigo busca aportar perspectivas decoloniais ao direito contemporâneo das famílias, em um movimento experimental de radicalização da crítica ao estatuto excludente e à moralidade colonial do discurso jurídico nesse campo. Para tanto, recorre-se à decolonialidade enquanto chave de pensamento capaz de fornecer críticas a concepções hegemônicas sobre gênero e sexualidade, adicionando igualmente tais perspectivas à seara dos direitos humanos para questionar percepções sobre o humano para o direito. Traz-se à baila o exemplo das parentalidades exercidas por pessoas trans (transparentalidades) para corporificar essas considerações e analisar de que forma o exercício do projeto parental que foge à cis-heteronormatividade é acolhido pelas categorias familiaristas atuais. Ao final, pretende-se contribuir para uma possível releitura do paradigma da família democrática, a fim de se reimaginar teorizações e práticas comprometidas com o humano em seu aspecto mais concreto.



Palavras-chave: direito das famílias; família democrática; decolonialidade; transparentalidades.

Resumen

El presente artículo busca aportar perspectivas decoloniales al derecho de las familias contemporáneo, en un movimiento experimental de radicalización de la crítica al estatuto excluyente y a la moralidad colonial del discurso jurídico en este campo. Para tanto, recurrir a la decolonialidad mientras clave de pensamiento capaz de ofrecer críticas a concepciones hegemónicas sobre género y sexualidad, adicionando igualmente tales perspectivas

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a los entendimientos de los derechos humanos para cuestionar percepciones sobre el humano para el derecho. Se trae, a propósito, el ejemplo de las parentalidades ejercidas por personas trans (transparentalidades) para corporificar estas consideraciones y analizar de qué forma el ejercicio del proyecto parental que huye a la cis-heteronormatividad es acogido por las categorías familistas actuales. Al final, se pretende contribuir para una posible relectura del paradigma de la familia democrática, con el objetivo de se re-imaginar teorizaciones y prácticas comprometidas con el humano en su aspecto más concreto.

Palabras clave: *derecho de las familias; familia democrática; decolonialidad; transparentalidad.*

1 Introduction

Affectivity, care, equality, inclusion, plurality. Throughout the first decades of the twenty-first century, the cadence of elaboration and reference to such signifiers in the legal literature affects family law – a field that is now written in the plural, demarcating the openness to diversity – shows that the criticism of the exclusionary character of law has been, at least formally, incorporated into the legal discourse".

In the Brazilian context, the rigid family profile that the law once required in its regulatory perspective for the attribution of effects to the relationships arising from conjugality and parenthood has yielded to the valorization of the human person¹.

The constitutional order established with the Magna Carta of 1988, the result of the post-liberal constitutionalist movement that gained strength with the Universal Declaration of Human Rights², in addition to having consolidated values and principles essential to the realization of a freer, fairer and more solidary society, was characterized as a propeller for the rereading of civil law and, more specifically, of the functional profile, instrumental and promotional of its foundational institutes³: contracts, properties and, certainly, families.

In the family field, a milestone in this range of transformations was the joint judgment of Direct Action of Unconstitutionality 4277 and the Allegation of Non-Compliance with a Fundamental Precept 132, by the Federal Supreme Court (STF), in 2011, which conferred recognition and legitimacy to unions between people of the same gender. The judgment has rightly become representative of the materialization of the plurality of family entities. On the other hand, despite being a relevant milestone in the realization of rights, especially of LGBTI+ people, the reasoning presented in the leading vote of those constitutional actions sometimes centrally evokes elements of the traditional notion of family⁴,

¹ MORAES, Maria Celina Bodin de. The new family, again – Structures and function of contemporary families. **Pensar Magazine**, Fortaleza, v. 18, n. 2, mai./ago. 2013, p. 588-589.

² PIMENTEL, Ana Beatriz Lima. The normative force of constitutional principles as modulators in the new families. *In fashion*: MATOS, Ana Carla Harmatiuk; MENEZES, Joyceane Bezerra de. **Family Law by Brazilian Jurists**, 2nd ed. Indaiatuba: Foco, 2022. p. 17.

³ FACHIN, Luiz Edson. **Civil law**: meanings, transformations and end. Rio de Janeiro: Renovar, 2015. p. 11.

⁴ SANTOS, Andressa Regina Bissolotti dos; LIMA, Francielle Elisabet Nogueira. LGBTI+ families. *In fashion*: MATOS, Ana Carla Harmatiuk; MENEZES, Joyceane Bezerra de (coords). **Family Law by Brazilian Jurists**, 2nd ed. Indaiatuba: Foco, 2022. p. 236.

as being "the elementary cell of society"; Likewise, in a more detailed analysis of the ruling, a constant reinforcement of the gender binary can be inferred and the biologization of the sexes⁵.

In this sense, it can be inferred that contemporary family law has been guided, to a large extent, by the discourse of affectivity and the repersonalization of civil law, allied to the conception of the eudaimonist family aimed at prioritizing the development and protection of the personality of family members, as opposed to the classic family model already mentioned.

It is not by chance that the argumentative resource of homoaffectivity (updated to homotransaffectivity, in some circumstances) has become central, for the result of merit, the constitutional actions mentioned above, gaining greater social circulation⁶.

However, this emphasis on affectivity is limited when the objective is to problematize the naturalization of legal categorizations and signifiers in the context of family relationships, which are centered on hegemonic structures and dynamics related to gender and sexuality.

The exercise of parenting by trans people (or transparentalities)⁷ seems to exemplify such Implications. The recognition and effectiveness of these parental projects encounters obstacles from the field registry: in a decision issued within the scope of ADPF 787, an injunction was granted obliging the Ministry of Health to adopt measures in favor of trans people and transvestites regarding access to health, including respect for gender identity when filling out the Declaration of Live Birth form, precisely because of the difficulty in correctly noting the degree of kinship of trans fathers and mothers in the documents.

Thus, some questions are raised: is it possible to think about parenting from a non-cis-heteronormative framework? How do current family values and principles relate to colonial structures and conceptions about gender, especially when given the example of transparency? In the theoretical framework of decoloniality, which grows in the national legal literature, to

⁵ The following excerpts are illustrative of this finding: "This is to judge, immediately, that the first opportunity in which our Federal Constitution uses the word "sex" is in item IV of its article 34. The article, which deals with the "fundamental objectives" of our Federative Republic; the item, to incorporate the word "sex" to lend it the clear meaning of a disjointed anatomical-physiological conformation between man and woman" (...) "It is, therefore, a normative work at the site of the most natural differentiation between the two typologies of the human race, or, in a language that is less anthropological and more of formal logic, it is a question of normative work at the site of the most elementary differentiation between the two species of the human race: the male and the female. A dichotomy that is culturally more elaborate than that of male and female, although both modalities concern the same animal kingdom, as opposed to the vegetable and mineral kingdoms." (STF - ADI: 4277 DF, Rapporteur: Ayres Britto, j. on: 05/05/2011).

⁶ SANTOS, Andressa Regina Bissolotti dos. **LGBT movement and law: identities and discourses in (de)construction**. 2017. Dissertation (Master's Degree in Law) – Graduate Program in Law, Federal University of Paraná, Curitiba. p. 27.

⁷ The term transparentality is based on the international literature to name the exercise of the parental project performed by trans people, or even to identify the relational axis of those who exercise parental authority with regard to trans children and adolescents (SANTOS, Andressa Regina Bissolotti dos; LIMA, Francielle Elisabet Nogueira. **LGBTI+ families. In fashion**: MATOS, Ana Carla Harmatiuk; MENEZES, Joyceane Bezerra de (coords). **Family Law by Brazilian Jurists**, 2nd ed. Indaiatuba: Foco, 2022. p.233-256). For the purposes of this chapter, we will concentrate our observations on the first hypothesis.

(re)think the law, social relations and human rights⁸, there are arsenals of analysis and criticism of the operability of the norm in the scope of law, which is why we start from this "key" to weave considerations and propositions to the contemporary family legal discourse.

It is intended, therefore, to contribute to a possible understanding referenced in the conception of democratic family⁹ developed by Maria Celina Bodin de Moraes, in comparison with the critique of decolonial thought, in order to reimagine theorizations and practices committed to the human in its most concrete aspect.

2 Dialogues between productions from the Global North and decolonial studies on gender and sexuality

The insurgency of a thought situated from the Global South, such as the decolonial one, impels us to lay bare civilizational projects in the name of modernity¹⁰, in which the racialization of certain social segments to the detriment of others, gender binarism and cis-heteronormativity have revealed themselves to be colonial mechanisms imposed with the aim of instilling and reproducing a *Eurocentric* ethos in colonized societies.

Gender and sexuality, although distinct in terms of categories, are intimately related. These are constructs that are operationalized through "learning and practices undertaken by an inexhaustible set of social and cultural instances, in an explicit or disguised way, in an always unfinished process"¹¹. Based on Foucault¹², it can be seen that, in modernity – specifically, at the turn of the eighteenth century to the nineteenth century¹³ –, discourses related to sexuality begin to refer to truths that are established or disputed around sex.

Laqueur evidences, through a detailed bibliographic survey¹⁴, how this historical moment brought about the obligation of sexual differentiation to make bodies socially intelligible, which was duly intensified with the medicalizing race that reached the nineteenth century.

These statements are very much in line with what Foucault himself was already

⁸ ROSSI, Amélia Sampaio; KOZICKI, Kátia. The coloniality of law: constitutionalism and human rights as modern categories in deconstruction. **Legal Cultures Journal**, v. 8, n. 21, Sept./Dec., 2021, p. 23-50.

⁹ MORAES, Maria Celina Bodin de. The democratic family. **Journal of the Faculty of Law of UERJ**, v. 13-14, p. 47-70, 2005.

¹⁰ RESTREPO, Eduardo; ROJAS, Axel. **Decolonial inflection: Fuentes, conceptos y cuestionamientos**. Popayán, Colombia: Editorial Universidad del Cauca, 2010. p. 207-208.

¹¹ LOURO, Guacira Lopes. Gender and sexuality: contemporary pedagogies. **Pro-Positions**, v. 19, n. 2 (56) - May/Aug. 2008. p. 17.

¹² FOUCAULT, Michel. **History of Sexuality: the will to know**. Translated by Maria Thereza da Costa Albuquerque and Jose Augusto Guilhon Albuquerque. 5th ed. Rio de Janeiro: Paz & Terra, 2017.

¹³ At this point, it is evident how, in Foucaultian thought, the period identified as modernity is much more aligned with understanding hegemonic that decolonial authors intend to combat.

¹⁴ LAQUEUR, Thomas. **The construction of sex: body and gender from the griegos to Freud**. Madrid: Cátedra, 1994.

willing to thematize in volume 1 of the *History of Sexuality* regarding the centrality of sex as a focus of political dispute and "regulation of populations, for all the global effects it induces"¹⁵, giving rise to "infinitesimal surveillance, constant controls, spatial ordering of extreme meticulousness, to medical or psychological examinations [...]"¹⁶. Sex would thus function as a unified concept and an explanatory category, playing a fundamental role in understanding what we are – both as individuals and as a society – in the regulation of morals, in social behavior, etc. Hence the difficulty, *a priori*, of questioning its concept, since it hegemonically positions itself as a natural biological category that determines what people can or cannot be and do.

In Foucaultian thought, this technology of sex began to be ordered, at the end of the eighteenth century, around the medical institution, the demand for normality and the problem of life and disease: bodies and erotic practices began to be scrutinized from a logic of the border between normality and pathology, in a management that fused the medical discourses, legal, psychological and governmental practices, classifying perversions, deviant and "unproductive" sexualities¹⁷, and safeguarding the legitimacy of experiencing sexual practices in marriage.

It is no coincidence that it is observed that the same context indicated the establishment of the notion of childhood in the Western world¹⁸, demonstrating how the social interests of protecting this stage of life were materialized through moralistic understandings of subjects and bodies. Therefore, it is observed how sexuality comes to be conceived as an instrument for the expansion of biopower, a power over life and over bodies¹⁹, through what Foucault calls the device of sexuality, which can be translated as a heterogeneous network of knowledge and powers that make up a strategy for the management and control of bodies.

At this point, the dialogue with the conceptualizations of gender becomes desirable. Joan Scott points out that, until the 1980s, there was a tendency to treat gender as a social construction of sex – "the entirely social creation of ideas about the roles of men and women"²⁰, thus assessing the notion that gender would be an assimilation of meanings about biologically given sexual differences. In short, the understanding was that sex was to nature, as gender would be to culture, activating the oppositional pair nature x culture.

¹⁵ FOUCAULT, Michel. **History of Sexuality**: the will to know. Translated by Maria Thereza da Costa Albuquerque and José Augusto Guilhon Albuquerque. 5th ed. Rio de Janeiro: Paz & Terra, 2017. p. 157.

¹⁶ FOUCAULT, Michel. **History of Sexuality**: the will to know. Translated by Maria Thereza da Costa Albuquerque and José Augusto Guilhon Albuquerque. 5th ed. Rio de Janeiro: Paz & Terra, 2017. p. 157-158.

¹⁷ TONELI, Maria Juracy Filgueiras. Sexuality, gender and generations: continuing the debate. In: JACÓ-VILELA, Ana Maria; SATO, Leny (ed.). **Dialogues in social psychology**. Rio de Janeiro: Edelstein Center for Social Research, 2012. p. 147-167. ISBN: 978-85-7982-060-1. Available at: [https:// books.scielo.org/id/vfgfh/pdf/jaco-9788579820601-12.pdf](https://books.scielo.org/id/vfgfh/pdf/jaco-9788579820601-12.pdf). Accessed on: August 14, 2023.

¹⁸ ARIÈS, Philippe. **Social history of the child and the family**. Rio de Janeiro: LTC, 2015.

¹⁹ DREYFUS, Hubert; RABINOW, Paul. **Michel Foucault**: a philosophical trajectory. Rio de Janeiro: Forense Universitária, 1995.

²⁰ SCOTT, Joan. **Genre**: a useful category for historical analysis. Available at: https://disciplinas.stoa.usp.br/pluginfile.php/185058/mod_resource/content/2/G%C3%AAnero-Joan%20Scott.pdf. Accessed on August 14, 2023.

The historian warns us that the constancy of the descriptive use of gender, as, for example, can be verified by theorists of patriarchy (by assuming that men have always dominated women, seeking a single and founding explanation of this power relationship), leads to hierarchies/asymmetries between sexual differences that leave no room for questioning and changing the existing historical paradigms that govern the binary opposition between man and woman²¹.

Linda J. Nicholson also explains the fact that biology continues to be the great provider of gender, without the proper contextualization of the *body*. The author perceives that the biological trait was assumed as the basis on which cultural meanings are constituted and was maintained, to a large extent, in the context of the feminisms of the 1960s and 1970s, with theorists of patriarchy, one of the assumptions of biological determinism: that of the existence of common aspects – with emphasis on reproductive capacity – to various cultures²².

In the cadence of understanding sex and gender as binary and dichotomous elements, Judith Butler also inserts the concept of compulsory heterosexuality into the treatment of the sex/gender system, so that, for her, it is through a normative (and naturalized) heterosexual desire that identity experiences are legitimized²³. Thus, for Butler, turning to the problematization she makes about the claim of an essentialized subject in feminism, when we try to define the category "women", we will inevitably fall even more into the male/female binary of a compulsory heterosexual (or heteronormative²⁴) matrix.

Hence the author affirms the continuity of the so-called "intelligible genres", which institute and maintain relations of coherence and continuity between sex, gender, sexual practices and desire²⁵.

The construction of the reasoning carried out so far demonstrates how, in the articulation of these post-structuralist perspectives on gender and sexuality, the theoretical frameworks of the Global North remain almost unanimous. Questioning Anglo-American hegemony in the formulation of feminist critique, Chandra Mohanty introduces the understanding of the existence of women's

²¹ SCOTT, Joan. **Genre:** a useful category for historical analysis. Available at: https://disciplinas.stoa.usp.br/pluginfile.php/185058/mod_resource/content/2/G%C3%AAAnero-Joan%20Scott.pdf. Accessed on August 14, 2023.

²² NICHOLSON, Linda. Interpreting the genre. **Revista Estudos Feministas**, Florianópolis, v. 8, n. 2, 2000. Available at: <https://periodicos.ufsc.br/index.php/ref/article/view/11917>. Accessed on: August 14, 2023.

²³ BUTLER, Judith. **Gender Problems:** Feminism and Subversion of Identity. Translated by Renato Aguiar. Rio de Janeiro: Editora Civilização Brasileira, 2003.

²⁴ Conceptually, heteronormativity is apprehended as a set of "institutions, structures of understanding and practical orientations that make heterosexuality be seen not only as coherent – that is, organized as a sexuality – but also privileged" (BERLANT, Lauren; WARNER, Michael. Fri in public. **Critical Inquiry**, v. 24, n. 2, 1998. p. 547-566), which does not fail to produce relations of exploitation and inequality within the heterosexualized society itself.

²⁵ "In other words, the spectres of discontinuity and incoherence, themselves only conceivable in relation to existing norms of continuity and coherence, are constantly forbidden and produced by the very laws that seek to establish casual or expressive lines of connection between biological sex, culturally constituted gender, and the 'expression' or 'effect' of both in the manifestation of sexual desire through sexual practice" (BUTLER, Judith. **Gender Problems:** Feminism and Subversion of Identity. Translated by Renato Aguiar. Rio de Janeiro: Editora Civilização Brasileira, 2003, p. 38).

voices in southern nations²⁶.

Like Gayatri Spivak – for whom Western feminism is an accomplice of the imperialist project "by aligning itself with a policy whose primary objective would be to make the third world subject an other"²⁷ – she presents a refined critique of the colonizing space represented by Western academia, in an attempt to exercise the *decolonization* of feminist thought.

Gloria Anzaldúa, when theorizing about *queer* from her Latin American lesbian experience – more specifically, *Chicana*, from her *mestizo consciousness*²⁸ –, classifies it as a "movement contrary to the hegemonic forms of control of institutionalized knowledge", displacing and destabilizing ethnic-racial, gender, and sexuality identity boundaries and exploring the various differences between women themselves subordinated in more precarious contexts²⁹.

It is noted how these concrete experiences, in the search for the construction of a contesting thought-action that is placed on the margins of the Anglo-Saxon or European frameworks once referenced, question the tendency to treat race, ethnicity, gender and sexuality as mutually exclusive categories of experience and analysis³⁰, a tendency that, in the words of Yuderkys Espinosa-Miñoso,

[...] it has to do with the limits of the gaze imposed by the West, which presents a specialized, compartmentalized, classificatory treatment of social phenomena, thus preventing the glimpse of their interdependence or deep connection, so that their rupture and separation are impossible³¹.

The perspective of intersectionality, in this sense, brings a "conceptualization of the problem that seeks to capture the structural and dynamic consequences of the interaction between two or more axes of subordination", since "such systems often overlap and intersect,

²⁶ MOHANTY, Chandra Talpady. Under the eyes of the West: feminist studies and colonial discourses. BRANDÃO, Izabel; CAVALCANTI, Ildney; COSTA, Cláudia de Lima; LIMA, Ana Cecília (eds.). **Translations of culture: critical feminist perspectives (1970-2010)**. Florianópolis: EDUFAL, UFSC, 2017. p. 309-353.

²⁷ ALMEIDA, Sandra Regina. Gayatri Chakravorty Spivak: A Critique of Western Feminism. In: BRANDÃO, Izabel; CAVALCANTI, Ildney; COSTA, Cláudia de Lima; LIMA, Ana Cecília (eds.). **Translations of culture: critical feminist perspectives (1970-2010)**. Florianópolis: EDUFAL, UFSC, 2017. p.626-627.

²⁸ "Queer theorization is not a mere inversion of hierarchies, but puts in check the very conceptualization of semantic categories, preventing their fixity. In Anzaldúa, the queer concept intertwines with those of "borderlands/ la frontera" and "mestizo consciousness", strategically transgressing identity parameters of race and sexuality, demolishing any myth of epistemological or identity purity, of reason or pure race, which prevents the displacement and abject transgression of symbolic/material boundaries" (SULLIVAN, Nikki. **A critical introduction to queer theory**. New York: New York University Press, 2003. p. 66).

²⁹ ANZALDÚA, Gloria. Queer(izar) the writer – loca, escritora y chicana. In: BRANDÃO, Izabel; CAVALCANTI, Ildney; COSTA, Cláudia de Lima; LIMA, Ana Cecília A (eds.). **Translations of culture: critical feminist perspectives (1970-2010)**. Florianópolis: EDUFAL, UFSC, 2017. p. 408-425.

³⁰ SIMAKAWA, Viviane Vergueiro. *For decolonial inflections of nonconforming bodies and gender identities: an autoethnographic analysis of cisgenderism as normativity*. 2016. 244 f. Dissertation (Master's Degree in Culture and Society) - Multidisciplinary Graduate Program in Culture and Society, Institute of Humanities, Arts and Sciences Professor Milton Santos, Federal University of Bahia, Salvador, 2015. p. 30.

³¹ ESPINOSA-MIÑOSO, Yuderkys. Overcoming the fragmented analysis of domination: a feminist-decolonial review from the perspective of intersectionality. Translated by Nadia Luciene Ziroldo. **Revista X**, v. 17, n. 1, 2022, p. 430.

creating complex intersections"³².

More explicitly, Maria Lugones also invests in confronting the coloniality of gender, when she states that "sexual dimorphism has become the basis for the dichotomous understanding of gender, the human characteristic"³³. In the critical framework of decoloniality³⁴, therefore, there is an awareness that gender and race *are mutually produced*, feeding each other in the modern binary construction of oppositionalities. The way in which

It comprises gender, by virtue of coloniality, it depends on how we understand race, but, expanding, we can also include class, and the opposite equally³⁵.

In the same way, compulsory heterosexuality, as a political regime, is shown to be one of the fundamental pillars, along with race and gender, in the coloniality/modernity axis, to perpetuate the hierarchies (and dehumanizations) of the human³⁶. The same can be said in relation to cis-heteronormativity, which is constituted from the pre-discursivity of sex, binarity and the permanence of genders³⁷.

These initial considerations are important for the development of contemporary views on family law, especially considering gender as a key to analysis from a decolonial perspective and from intersectionality.

3 Contributions to the construction of the democratic family from the decolonial

³² CRENSHAW, Kimberlé. Document for the meeting of specialists in gender-related aspects of racial discrimination. **Journal of Feminist Studies**, year 10, n. 1, sem/2002. p. 177. Available at: <http://www.scielo.br/pdf/ref/v10n1/11636.pdf>. Accessed on: 02 Aug 2023.

³³ LUGONES, Maria. Towards a decolonial feminism. **Journal of Feminist Studies**, v. 22, n. 3, Sept-Dec 2014. p. 937-938.

³⁴ Regarding the argument of incompatibility between intersectionality and decoloniality, Camilla de Magalhães Gomes explains: "I believe that, in some way, an intersectional perspective is part of a decolonial analysis and, therefore, does not constitute opposing or excluding theories. The difference may lie in the fact that intersectionality is a dynamic approach to how subjects, experiencing different oppressions and, therefore, under their intersectionality, are like pedestrians walking along the avenues created by the power structures of gender, race, class, ethnicity... For a decolonial analysis, on the other hand, it is a matter of thinking about how these power structures are performed in a way that is dependent on each other, as if this theory turned its eyes to an earlier moment, not thinking of finding an origin for these structures, but seeking to show that they are already constituted in an interdependent way" (GOMES, Camilla de Magalhães. **Themis Travesti: the relations between gender, race and law in the search for an expansive hermeneutic of the "human" in Law**. 2017. 234 f. Thesis (Doctorate in Law) - Graduate Program in Law, State and Constitution, University of Brasília, 2017. p. 36.

³⁵ GOMES, Camilla de Magalhães. **Themis Travesti: the relations between gender, race and law in the search for an expansive hermeneutic of the "human" in Law**. 2017. 234 f. Thesis (Doctorate in Law) - Graduate Program in Law, State and Constitution, University of Brasília, 2017. p. 51.

³⁶ GOMES, Camilla de Magalhães. **Themis Travesti: the relations between gender, race and law in the search for an expansive hermeneutic of the "human" in Law**. 2017. 234 f. Thesis (Doctorate in Law) - Graduate Program in Law, State and Constitution, University of Brasília, 2017. p. 50.

³⁷ "Here, in particular, it is worth reflecting on how the concept of cisnormativity can be encompassed by the Butlerian concept of heteronormativity: by defining unintelligible gender identities – or whose existence is an affront to normativities – as "those in which gender does not derive from sex and those in which the practices of desire do not 'derive' from either 'sex' or 'gender'", and gender identity as "a relationship between sex, gender, sexual practice and desire" (...), we perceive that possible definitions of cisgenderism are located in the 'normative consequences' between 'sex' and 'gender', in the supposed pre-discursive, binary and permanent coherences between 'male + man' and 'female + woman'. Cisgender intelligibility that presupposes heterosexual intelligibility as a result (SIMAKAWA, Viviane Vergueiro. **For decolonial inflections of nonconforming bodies and gender identities: an autoethnographic analysis of cisgenderism as normativity**. 2016. 244 f. Dissertation (Master's Degree in Culture and Society) – Multidisciplinary Graduate Program in Culture and Society, Institute of Humanities, Arts and Sciences Professor Milton Santos, Federal University of Bahia, Salvador, 2015. p. 57).

critique

As we have seen, it is essential to think of the history of modernity as "a process of progressive globalization that begins with the colonization of the American continent"³⁸ and to denaturalize its darkest side, which is coloniality.

In this sense, Aníbal Quijano³⁹ bases the categories of coloniality of power and coloniality of knowledge as follows: i) the first refers to a dimension of how the forms of power developed in modern capitalism with the administration of the colonies, from the fifteenth century onwards, assumed a pattern of hierarchization and control of the population, which is sustained, including the idea of race; ii) the coloniality of knowledge, on the other hand, consists of the devaluation of knowledge, cosmologies, and practices of subaltern and/or racialized groups, in order to guarantee the superiority of others, especially from the Global North, which establishes itself as a center of scientific production⁴⁰. Maria Lugones also inserts a third aspect of coloniality, which is the coloniality of being, which she classifies as "a process of active reduction of people, the dehumanization that makes them fit for classification,

the process of subjectification and the attempt to make the colonized less than human beings"⁴¹.

These notes can be instrumentalized with regard to the investigation of civilizing projects in the name of modernity that are also present in the construction of the human in law. This is how modernity and coloniality become fundamental tools for "thinking about how European colonialism is based on the dehumanization of a non-European other, a way of thinking about the human, from which we have not yet freed ourselves"⁴².

And it is this nuance of coloniality that engenders dichotomies that oppose humans and non-humans, body and mind, reason and emotion, nature and culture, feminine and masculine, and so on. It is possible to say, based on such assertions, that the narrative of the human in democratic constitutionalism and in the founding theory of human rights is based on these oppositions.

³⁸ TORRE, Salvo; BENEGLIO, Maura; GOBBO, Alice Dal. Il pensiero decoloniale: dalle radici del dibattito ad una proposta di método. **ACME: An International Journal for Critical Geographies**, v. 19, n. 2, p. 448-468, set. 2020.

³⁹ QUIJANO, Aníbal. Coloniality of power, Eurocentrism and Latin America. *In*: LANDER, Edgardo (ed.). **The coloniality of knowledge: Eurocentrism and social sciences. Latin American perspectives**. Buenos Aires: CLACSO, 2005, pp. 117-142. Available at: http://biblioteca.clacso.edu.ar/clacso/sur-sur/20100624103322/12_QUIJANO.pdf. Accessed on: August 14, 2023.

⁴⁰ DIMENSTEIN, Magda; SILVA, Gabriel de Nascimento and; DANTAS, Candida; MACEDO, João Paulo; LEITE, Jäder Ferreira; ALVES FILHO, Antonio. Gender in the decolonial perspective: an integrative review in the Latin American scenario. **Revista Estudos Feministas**, Florianópolis, v. 28, n. 3, e61905, 2020, p. 4.

⁴¹ LUGONES, Maria. Towards a decolonial feminism. **Revista Estudos Feministas**, v. 22, n. 3, Sept-Dec 2014, p. 939.

⁴² GOMES, Camilla de Magalhães. **Themis Travesti: the relations between gender, race and law in the search for an expansive hermeneutic of the "human" in Law**. 2017. 234 f. Thesis (Doctorate in Law) - Graduate Program in Law, State and Constitution, University of Brasilia, 2017. p. 38.

In human (and fundamental) rights, it is observed how many theories take the human – complete, stable and free – as a universal category under consensus to establish which rights would belong to it; The universal is taken as a parameter to deal with individualities⁴³, a conception that is passed on in a majority way in the legal, academic and jurisprudential space.

Likewise, in many theorizings, the notion of the dignity of the human person also appears as a mere descriptive recognition of the nature of the dignified human person: the idea of "human person" contained in the concept takes as its presupposition the modern notions – and therefore Eurocentric – of subject and individual as

A subject who has an intrinsic value in himself, because he is human; autonomous as a rational subject that, by free will, gives itself its own law which, in turn, being the result of a rational activity, is universalizable; that it needs a minimum of material to survive⁴⁴.

The very notion of the subject of law forged in Western theoretical formulations, notably of Cartesian aspiration, is permeated by the colonizing gaze; and the law that is developed in Brazil is shown to be "the result of an eminently European perception of the values deserving of tutelage and protection"⁴⁵. It is a rationality that works and universalizes despite and beyond the corporeality of being, placing itself as the maintainer and reproducer of asymmetries of gender, race and class.

Decolonial studies then denounce how the gears of coloniality operate in this jusphilosophical field, indicating how the norm, as well as the modern institutions that embody it, how law is, from its origin, racialized and gendered and, therefore, created to recognize the intelligibility of certain beings to the detriment of others.

Likewise, it is verified that these same considerations can guide, through a critical bias, new possibilities to expand and reimagine the human, individually and collectively, in the legal sphere.

Family law, in the constitutional order, has shown sensitivity in accepting transformations in its *ratio*, based on its democratization⁴⁶ and the provocation of concrete demands, especially in comparison with the paradigm once in force.

In this sense, it is clear that, for the realization of the constitutional project of the democratic family, there must be "a development that is marked by the effective protection of

⁴³ GOMES, Camilla de Magalhães. **Themis Travesti**: the relations between gender, race and law in the search for an expansive hermeneutic of the "human" in Law. 2017. 234 f. Thesis (Doctorate in Law) - Graduate Program in Law, State and Constitution, University of Brasília, 2017. p. 145.

⁴⁴ GOMES, Camilla de Magalhães. The subjects of the legal performative – rereading the dignity of the human person in the frameworks of gender and race. **Rev. Law and Praxis**, Rio de Janeiro, v. 10, n. 2, 2019, p. 881.

⁴⁵ TEIXEIRA, João Paulo Allain. The coloniality of Law and regional identities in Brazil. **Consultor Jurídico Magazine**, [s. l.], Available at: <https://www.conjur.com.br/2020-jul-30/teixeira-colonialidade-direito-identidades-regionais-brasil>. Accessed on: August 13, 2023.

⁴⁶ MORAES, Maria Celina Bodin de. The democratic family. **Journal of the Faculty of Law of UERJ**, v. 13-14, p. 47-70, 2005.

the dignity of the person and the realization of his existential values"⁴⁷. However, it is necessary to recognize normative statutes that continue to disseminate, legally and socially, inequalities due to the non-full recognition of existences.

As already launched in the introductory part of this work, experiences are identified that are not yet adequately protected by the legal field in terms of recognition and effectiveness, using concrete cases for better construction and use of the debate.

4 Transparentalities, gender and decoloniality

For inductive reflection of the ideas launched here, the report of a concrete case is described: after the birth of her biological son, Ágata Mostardeiro found herself at a crossroads to proceed with the registration of the baby. The failure to present to the respective Civil Registry of Natural Persons proof that she would have a genetic link with the child, as is presumed in relation to the partner who gave birth, hindered the desired registration act⁴⁸.

In the baby's Declaration of Live Birth (DNV), signed by the professional who performed the delivery, the name of Ágata, a trans woman who, at the time of such facts, already had her documents rectified, appeared only as a *companion* of the pregnant mother. Therefore, the guidance given to the couple was, under the terms of Provision No. 63/2017 of the National Council of Justice, to request, *after* the birth registration was carried out exclusively in the name of the other mother – a cis woman – the recognition of socio-affective maternity, even though it was the biological child of both. By following these guidelines, Ágata could finally speed up the procedures to include her son in the list of her dependents of the health plan, since the child had complications from premature birth and needed specific care that would become financially less impactful to the couple with the coverage of the plan.

In Bahia, Theo Brandon and Yuna Vitória da Silva faced similar difficulties when their son's DNV was issued, in view of the resistance of the medical team to mark Yuna, a trans woman, as the mother, and Theo, a pregnant trans man (and consequently a parturient) as the father. In their report⁴⁹, the couple exposed several problems resulting from the lack of preparation of medical and registry care to accommodate demands related to the transgender

⁴⁷ MORAES, Maria Celina Bodin de. Vulnerabilities in family relations: the problem of gender inequality. In: MATOS, Ana Carla Harmatiuk; MENEZES, Joyceane Bezerra de (coords). **Family Law by Brazilian Jurists**. Rio de Janeiro: Foco, 2022. p. 592.

⁴⁸ CANOFRE, Fernanda. After two years, Justice recognizes trans woman as the biological mother of the child. **Folha de São Paulo**, Belo Horizonte, 28 ago. 2020. Available at: <https://www1.folha.uol.com.br/cotidiano/2020/08/depois-de-dois-anos-justica-reconhece-mulher-trans-como-mae-biologica-do-filho.shtml>. Accessed on: August 13, 2023.

⁴⁹ MARQUES, Ana Angélica Martins. "I am recognized within my gender category," celebrates a trans mother. **Universa - Uol**, May 09, 2020. Available at: <https://blogdamorango.blogosfera.uol.com.br/2020/05/09/sou-reconhecida-dentro-da-minha-categoria-de-genero-celebra-mae-trans/?cmpid=copiaecola>. Accessed on: July 17, 2023.

body, highlighting the absence of obstetrics in the outpatient clinics that provide care to transgender people and the significant lack of knowledge of professionals regarding trans integral health. Theo and Yuna had to appeal to the Public Defender's Office of Bahia to ensure the correct recording of their relationship with the baby.

Both cases reflect problems that touch on the particularity of transparentalities (or parentalities trans) and have an active impact on the exercise of rights in the family field, among others.

Although the civil law does not provide restrictive definitions about who can and should be considered father or mother, in terms of the exercise of parental project, gender norms apply that naturalize the exercise of maternity and paternity by, respectively, cisgender women and men, to determine *how* and *by whom* such kinship relations must be lived. In this sense, it is observed how cis-heteronormativity, which is based on the matrix of the coloniality of gender and bodies, operates structurally, greatly impacting existential and social relations, as well as legal normativity itself as a whole.

In terms of the organization of society, the law, traditionally understood as a formal instance of regulation of social relations, by disciplining rules related to civil registration, name and family relations – central issues to the analysis intended here –, creates and reproduces social realities, inducing certain practices through the compliance with its norms, including those that concern differences and sexual functions.

Once again, it is seen how sex, in the ahistorical, binary and biologicist perspective, constitutes itself as a determining element of people's civil status and for access to so many fundamental rights, such as family recognition by the State. Law, therefore, can be thought of as a "strategy" that produces gender or, alternatively, as a "technology" of gender, since its discourse constructs and reproduces gendered practices on subjects, on bodies – the latter which, if, on the one hand, were abandoned by colonizing Western modernity⁵⁰, paradoxically, were taken as an instance of the production and circulation of power.

This contemporary legal rationality, whose germ dates back to modernity, is identified with the heterosexual matrix that requires a linear correspondence (or *continuum*) between sex/gender/desire, conferring intelligibility to the hegemonic model of male-female sexual binarism, imputing the place of abjection to bodies that do not conform to the cis-heteronorm.

Trans bodies are still subject to processes of symbolic sterilization⁵¹, in the sense

⁵⁰ NASCIMENTO, Wanderson Flor do. **For a decolonized life**: dialogues between the bioethics of intervention and studies on coloniality. Thesis (Doctorate in Bioethics) - Graduate Program in Bioethics. Brasília: University of Brasília, 2010.p. 103.

⁵¹ ANGONESE, Monica. **A trans father, a trans mother**: rights, reproductive health and parenting for the population of transvestites and transsexuals. 2016. Dissertation (Master's Degree in Psychology) – Graduate Program in Psychology at the Federal University of Santa Catarina, Florianópolis.

that trans reproductive rights and health remain between absences and invisibilities, because their reproductive capacity is not considered in terms of the feasibility of exercising human reproduction.

In addition, it is seen that experiences involving raising, caring for and educating children also permeate rigid morality lenses that, despite all the legislative and jurisprudential advances, are still in line with the paradigm of the patriarchal nuclear family, with regard to what is understood as a "healthy" exercise of the parental project, which, in the same way, it tends to reflect signs of femininity and masculinity from the figures of mother and father.

This is because reproduction and parenting are usually elaborated from cisgender and heterosexual bodies. The example of transcending couples⁵² illustrates dynamics, family organizations, and demands that are not considered *a priori*, precisely due to the cis-heteronormative reference of body and family from which we start as a society, such as pregnancy and breastfeeding performed by transmasculine bodies, which give rise to other conceptions of paternity.

Furthermore, the proposal of affectivity, despite having been sedimented in the family discourse, in this sense, seems to be insufficient to promote the full recognition of families that are made invisible, especially because it is also anchored in idealizations about living in the family that, not infrequently, lean towards the traditional cis-heteropatriarchal model and, therefore, with colonial roots.

It is necessary, therefore, that new "keys" of interpretation be constructed to rethink the categorizations that convey the human in law, in order to curb discrimination based on any pretext, even because "respect for dignity does not only impose the protection of equality, but mainly requires that substantial equality be achieved"⁵³.

5 To (not) conclude

The proposal that is inserted here is based on an experimental impetus, which sought to combine critical perspectives of gender and sexuality with the proposal of decoloniality, to address concerns that arise in the field of family law, in which the cultural broth that conferred exclusive legitimacy to the cis-heteropatriarchal nuclear family still reverberates.

In the modern conformation of law, the construction of the abstract and universal

⁵² "The term refers to a marital configuration in which two trans people have a loving relationship" (ALEXANDRE, Vinícius. **Living an insubordinate conjugality**: narratives of cis-trans couples and transcending couples. Dissertation (Master's Degree in Sciences) - Graduate Program in Philosophy, Sciences and Letters, University of São Paulo, Ribeirão Preto, 2020. p. 24).

⁵³ MORAES, Maria Celina Bodin de. Vulnerabilities in family relations: the problem of gender inequality. In: MATOS, Ana Carla Harmatiuk; MENEZES, Joyceane Bezerra de (coords). **Family Law by Brazilian Jurists**. Rio de Janeiro: Foco, 2022. p. 593.

notion of the subject of law was based, homogenizing complex phenomena that are inscribed in the bodies and experiences of gender and sexuality, a reflection of colonizing Western modernity and its moralities.

And, although normative and social advances are envisioned to encompass anxieties and demands related to sexual and gender diversity, a cis-heteronormative ideal persists as the foundation of understanding humanity, so that experiences that escape this normativity are marginalized and hindered from their full existence, since their recognition, in the concreteness of their challenges, it still goes through obstacles. This is the case of the vicissitudes that touch on transparentities, which build places to experience family organizational dynamics of mothering and fathering, blurring the boundaries of the ideals of body, reproduction, parenting and family that are informed by cis-heteronorma.

However, the regulatory perspective of law, combined with its theorizing, must also be in step with social demands, since the law itself must be built from its sociality and humanity, and not *in spite* of these. It is in this conjuncture that reflections and propositions that consider the element of coloniality in the foundation of modernity – and, therefore, of law – are urgent, aiming at the construction of paradigms that can, in fact, materialize democratic ethics.

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