

Relations between law, gender, and Constitution: (re)thinking constitutional history through women's experiences ¹

Relações entre direito, gênero e Constituição: (re)pensando a história constitucional através das experiências femininas

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ABSTRACT: This article aims to analyze the importance of using gender categories in constitutional history research. To do so, after discussing the heterogeneous character of the discipline's object of study

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and the claims for reassembling women's experiences in historical analysis, it uses examples to demonstrate how the integration of gender conflicts into constitutional history is essential and how it contributes to the enrichment of this investigation field. Such examples encompass examining two main dimensions: the relations between constitutions and authoritarianism and the dynamics surrounding constituent processes and the constitutionalization of women's rights. This exploratory, socio-legal study dwells on a bibliographical review of female and male authors that directly or indirectly tackle the topic. Lastly, the paper demonstrates the relevance of studies in constitutional history that question how gender inequality is reproduced by both law and politics, as well as of those that consider the strategies by which women work their ways to overcome inequality and assert their rights.

KEYWORDS: Law. Historical analysis. Gender relations. Constitutional history. Women's experiences.

RESUMO: Este trabalho busca analisar a importância do uso da categoria gênero nas pesquisas em história constitucional. Para tanto, após discutir o caráter heterogêneo do objeto de estudo da área e as demandas por recuperação de experiências femininas em análises históricas, demonstra, através de exemplos, como a integração de conflitos de gênero é necessária e enriquece esse campo de investigação. Tais exemplos envolvem a análise de duas dimensões de destaque: a das relações entre Constituição e autoritarismo e a das dinâmicas que circundam processos constituintes e a constitucionalização de direitos das mulheres. A pesquisa desenvolvida, de ordem exploratória e de natureza jurídico-sociológica, efetua uma revisão bibliográfica com base na produção de autoras e autores que se debruçam, direta ou indiretamente,

sobre o tema. Ao fim, torna-se possível demonstrar a importância de que os estudos em história constitucional se ergam questionando a maneira pela qual as desigualdades de gênero são apropriadas pelo direito e pela política, assim como os modos forjados pelas mulheres para contornarem essas desigualdades e reivindicarem seus direitos.

PALAVRA-CHAVE: Direito. Análise histórica. Relações de gênero. História constitucional. Experiências femininas.

Introduction

The socio-cultural construction of differences between men and women is a fundamental base upon which gender hierarchies and power structures are built. The legal field is one among many areas in which this dynamic can be identified, as it is not an isolated fact that, throughout history, rights have been provided following patriarchal and discriminatory discourses.

This statement does not mean that women have been completely absent from fighting for their individual rights, as well as for the rights of their social group as a whole. However, not rarely, the construction of narratives around legal phenomena occurred in accordance with a homogenous male bias. Thus, there was a narrow or inexistent interest in exploring the object of study in ways that incorporated the effects of gender asymmetry and recognized the presence of women in relevant episodes.

Although slowly, as the number of studies aiming to recover women's experience in history increases, this scenario has been changing towards greater proximity between the debates around gender relations and the legal field. From this

context, this article intends to answer the following question: what is the importance of employing gender categories in constitutional history studies?

In order to situate this research question-problem, it is necessary to delimitate some features of constitutional history investigation. As Barbosa explains⁴, an investigation in this field must acknowledge that, even if the Brazilian historical process is singular and cannot be compared roughly to that of countries like the United States and England, that does not mean that the Brazilian constitutional experience is an isolated phenomenon, but rather still one that shares constitutionalism's general premises. Likewise, making constitutional history entails entering a field of dispute for memory, in which narratives are confronted.

From these premises, this study aims, primarily, to identify gender elements as key categories of analysis in constitutional history. More specifically, it intends to discuss the heterogeneous character of this discipline's object of study, to outline the utility and relevance of employing gender categories to grasp historical phenomena, and to highlight some of the contributions that a gendered perspective may add to the analysis of events from a constitutional history perspective.

This essentially exploratory study adopts a deductive methodological approach, starting from the characterization of constitutional history as a field of study that must incorporate conflict, contradictions, and the multiple topics shaping the time and object under exploration. Thus, this paper highlights the importance of identifying conflicts related to gender issues and women's responses when facing them.

This study is a socio-legal investigation that used a multidisciplinary dialogue, especially with history and so-

4 BARBOSA, 2018.

cial sciences. The research was carried out by collecting and analyzing works authored by both male and female authors that propose relevant discussions on the topic.

First, the article discusses the complexity of research potentially developed in the realm of constitutional history, highlighting the unfixed and diverse character of the actors and circumstances that can be investigated. Likewise, and related to this feature, it also addresses the crucial need to overcome textual aspects or official descriptions and assess the broader context in which the event under study was verified.

Next, the article endeavors to tackle how historical studies are appropriating the gender category. It argues that, beyond constructing narratives that emphasize the impact of gender disparities on women, they must promote an approach that interlocks the different inequalities among women themselves, such as those based on race and class.

Lastly, in the final section, addressing the constitutional experiences developed in Brazil's Second Republic (post-1930), when female participation in the political debate became more expressive, this study uses examples to analyze the relations between constitutions, authoritarianism, gender, and the processes of women's rights' constitutionalization. It also addresses the participation of women in Constituents Assemblies in order to demonstrate the importance of adopting a gendered perspective to constitutional history investigation.

1 The heterogeneity of constitutional history's object of study

First, to grasp how gender categories provide important analytical perspectives to constitutional history, this

article endeavors to outline some considerations about the boundaries of the studies within the field. Doing so enables developing a brief and non-exhaustive perspective on how to accordingly scale the object of study within this realm of investigation.

This study aims to highlight how constitutional history's object of study, in accordance with the authors herein considered, is not static, not exclusively attached to normative structures, nor inert to social conflicts. Therefore, it is an object that should be linked from the gender conflicts that happen amidst legal-political relations.

Historical research is, in general, a complex and multifaceted field. In opposition to a linear, standstill investigation of phenomena, Bloch⁵ points out that the object of history should not be subsumed to the mere depiction of the past, identifying it, instead, in the study of the alterations carried out by human action over time.

The author also highlights the importance of not limiting the search for explaining certain facts to their filiation and the relevance of understanding the moment they took place. Moreover, he argues that the past (not only the immediate one) may contribute to understanding the present through the interactions and projections of both times into one another. Therefore, it is mistaken to suggest that historical observation should take past and present as separated.⁶

The field of constitutional history is no different. The heterogeneity of the historical subject is also a part of this area of study and, as such, brings along more specific questions. In that sense, Suanzes-Carpegna⁷ presents a concept of constitutional history with a subjective character: it is the

5 BLOCH, 2002.

6 BLOCH, 2002.

7 SUANZES-CARPEGNA, 2007.

history that aims to study the origins and the development of constitutions produced by the liberal and democratic-liberal states. This substantive branch of constitutional history is necessarily dynamic and alive, so it cannot be framed within a rigid framework. On the contrary, it is open to narrative disputes, conflicts, and diverse discursive strategies.

In the development of the liberal and liberal-democratic state constitutions, notably, when we consider the changes promoted by the American and French revolutions, the relation between law and politics was profoundly affected, as the previous arrangements proved inadequate to the new institutional requirements. The comprehension of constitutions as mere formal documents faced its historical delimitation at this moment. Constitutions then started to express a threefold meaning: the positive manifestation of the political options of a nation, a set of legal norms with a certain degree of specificity, and a general status of legal hierarchy, in the condition of rights that legitimize themselves *per se*.⁸

As the positive manifestation of the political options of a nation, a constitution is directly linked to the idea of constituent power, a concept that is not exclusively legal nor neutral but, rather, also entails social and political dynamics.

When addressing constituent power, Böckenförde⁹ situates the constitution in this relationship between law and politics. Clarifying that his theoretical notion should not be confused with Carl Schmitt's, as it overcomes the sphere of political decision-making, the author assigns the constituent power a "*fuera y autoridad (política) capaz de crear, de sustentar y de cancelar la Constitución en su pretensión normativa de validez.*"¹⁰ Thus, it is a dynamic force that attributes to its

8 PAIXÃO, 2014.

9 BÖCKENFÖRDE, 2000.

10 BÖCKENFÖRDE, 2000, p. 163.

product, the constitution, an equally living character.

Appropriated by both law and politics, the constitution then becomes a key element both for legal history and the analysis of the myriad political processes' nature. However, for that to be possible, constitutional history must be aware of the practical uses and theoretical formulations concerning the categories of constitutionalism, such as that of constituent power.¹¹ From these initial concerns, some methodological issues gain special relevance for the investigations carried out in the field.

There are debates around the need to guide research by combining both normative-institutional and doctrinal sources and connecting them to the social context in which they occur. It is expected that doing so can cast light on the historical reality as a whole, especially in what concerns the intellectual and political fields. Therefore, the intention is to grasp the object of study from within its environment to further explain it.¹²

Understanding the specificities of an investigated event's historical time even entails addressing what is conceived as a "right" or a "constitutional right" in such context. In a broader sense, a constitutional right is deemed as a pretense claim against governmental abuse. There are, however, variations in the ways such claims are received in different countries and legal systems.¹³

Moreover, "rights" often become objects of conflicts that aim at transformations, and the requirements upon them are not purely formal. This situation is due to the mutable content of claims, which is defined within a certain time and space and influenced by revolutions, wars, authoritar-

11 PAIXÃO, 2014.

12 SUANZES-CARPEGNA, 2007.

13 GARDBAUM, 2011.

ian settings, state restructuring, and requests of particular groups, among other myriad aspects.¹⁴

Going beyond the written text and reaching a broader context requires analyzing the circumstances in which constitutions are formulated and interpreted, as well as the multiple meanings at stake, the agents that put them forward, and their motivations. It also encompasses analyzing the spheres in which these elements occur, such as the linguistic, ideological, and institutional ones.¹⁵

As to the agents, it is important to emphasize, according to the notion of constituent power, that the concept of the people, as the bearer of such prerogative, should not be reduced to those individuals who hold active citizenship nor to an ethnic component. The constituent power expresses itself as a politically delimited grouping, conscious of the political dimension at play, and able to eventually be represented by a particular social group, in case the latter acquires the proper acknowledgment to do so.¹⁶ From this essentially democratic perspective, complexity follows constitutions from their elaboration all the way to future modification attempts.

In this sense, one should not lose sight of how dogmatic discourses are constructed, enabling their contextualization and verifying their effects. This requires the analysis to account for the diverse instruments of social control and power building – such as those originated in the local, minor instances of power.¹⁷

Therefore, constitutional history should not be oriented by single, homogeneous narratives, such as those based only on what is explicitly written or the official discourses that are

14 COSTA, 2004.

15 HESPANHA, 2011.

16 BÖCKENFÖRDE, 2000.

17 HESPANHA, 2011.

produced and reproduced. Instead, research in this discipline must incorporate conflict, ambiguity, and tension – and, for that to be possible, the diversity of historical subjects too.

Gender inequality intersects all of these features, as it actively shapes conflict for rights at the core of most constitutional phenomena. However, despite their centrality, gender issues are rarely considered in historical constitutional analyses. In this sense, this study affirms that the history of women and gender relations must not be overlooked by constitutional history.

Modern constitutionalism, androcentric in its origin, dwells on an abstract notion of individual freedom, which was based on the absence of the state in private relationships in the name of protecting the personal sphere. The subject of such freedom was essentially the male figure to whom citizenship was primarily attributed.¹⁸

Costa¹⁹ points out how the acknowledgment of women as political subjects was a topic in relation to which the claims for rights reached worldwide attention. This movement happened especially after the second half of the 19th Century, alongside the increasing requests for gender equality and female autonomy.

However, constitutionalism's male nature did not simply fade away at that moment. Even the newly inaugurated constitutional stage, inaugurated in the post-war period, while marked by a change of perspective regarding the norms that guide the relation between society and state, still held a typical indifference towards women's claims.²⁰

Particularly regarding the Latin American continent, "despite the great historical, political, and social advances,

18 SILVA; WRIGTH, 2015.

19 COSTA, 2004.

20 SILVA; WRIGTH, 2015.

neither the Latin-American Parliaments nor the (Political and Constitutional) Sciences realized that the social fabric was also composed by women.”²¹ This situation significantly changed when there was a greater articulation of women’s movements and feminist groups, as they engaged in the constituent processes in the region from 1980 onwards.

This article proposes the approximation of women’s experiences with constitutionalism as a key topic for investigation, considering the need to incorporate gender conflicts into examining constitutional phenomena. In order to better delimitate the articulation of these subjects, the following section introduces the use of gender categories in historical analysis.

2 Gender, its intersections and historical analysis

[...] the main goal when we confront the norm is not merely to speak about identities but to unravel the use institutions make of identities to either oppress or privilege. What is aimed at with this debate is to fundamentally understand how power and identities work together depending on different contexts and how colonialism, besides creating, either delegitimizes or legitimizes certain identities. Thus, it is not a reductionist politic but rather an account of the fact that inequalities are created based on how power articulates these identities; they result from a structure of oppression that privileges some groups at the expense of others.²²

21 SILVA; WRIGTH, 2015, p. 116, author’s translation. Originally: “apesar do avanço em termos históricos, políticos e sociais, nem os Parliamentos e nem a Ciência (Política ou Constitucional) latino americanas se deram conta de que o tecido social também é composto por *mulheres*.”

22 RIBEIRO, 2017, p. 20, author’s translation. Originally: “[...] o objetivo principal ao confrontarmos a norma não é meramente falar de identidades, mas desvelar o uso que as instituições fazem das identidades para oprimir ou privilegiar. O que se quer com esse debate, fundamentalmente, é entender como poder e identidades

The abovementioned excerpt, in which Ribeiro²³ recalls the need to focus on the production processes of social identities, poses in an uncomplicated manner the perspective on gender that this article proposes to be analytically relevant in constitutional history. It primarily suggests that the devaluing of certain identities is socially structured and the effects of asymmetric power relations between the sexes are deepened by the effects of race and social class discrimination, among other factors at play.

Based on this premise, this section presents some of the main contributions made by feminist research to the application of a gendered perspective in historical analysis. In doing so, it uses the conceptualization elaborated by Joan Scott, who became a distinguished scholar by working on the interlocking of history and gender. The author considers gender both as a preliminary way of attributing meaning to power relations and as a social structure that accounts for hierarchies established upon sex differences and therefore integrates social relations.²⁴

However, even before Scott,²⁵ discussions about the integration of women's experiences to history were already a study topic in a field known as History of Women. This discipline developed in the late 1960s and evolved within a context of rising feminist claims and amidst the renovation of historiography towards greater inclusion of the experience of diverse subjects of investigation.²⁶

funcionam juntos a depender de seus contextos e como o colonialismo, além de criar, deslegitima ou legitima certas identidades. Logo, não é uma política reducionista, mas atenta-se para o fato de que as desigualdades são criadas pelo modo como o poder articula essas identidades; são resultantes de uma estrutura de opressão que privilegia certos grupos em detrimentos de outros."

23 RIBEIRO, 2017.

24 SCOTT, 1995.

25 SCOTT, 1995.

26 SOIHET; PEDRO, 2007.

This scenario represents the initial moments of what Rago²⁷ considers as the building of a feminist epistemology, in allusion to a mode of knowledge production reared by feminism that encompassed significant transformations in science-making. It was based on the critique of humanities' mainstream operation, which adopted a conception of the individual as a universal, male, white, and heterosexual being.

On the one hand, there was a continuous increase of reflections and research that endeavored to unravel women's experiences and achievements in various past times from that time onwards. On the other hand, this also revealed that the integration of women into history held, as a consequence, the acknowledgment that one could not speak of a homogeneous historical subject and history posed in such terms would turn out to be incomplete.²⁸

Through the theoretical contributions of feminism and its ramifications among other, diverse fields of knowledge, new discussions around women's experience gradually spread out in historiographic production. These discussions enabled historians to question the roots of certain practices and patterns, as well as to investigate female figures more broadly, including characters such as nuns, prostitutes, and domestic workers.²⁹

One of the people to put forth relevant considerations on the topic in the 1980s was the French historian Michelle Perrot. The author explored the restriction on historical observation of women due to what she reckoned to be a limited conception of women. They were portrayed as homogeneous beings, delimited by their common attributes as a group, as the investigation of particular female identities

27 RAGO, 1998.

28 SOIHET; PEDRO, 2007.

29 RAGO, 1998.

was neglected. She also further developed the discussion on the difficulties of recovering historical documents records on women due to their limited presence in public archives. In the author's understanding, women were either rarely or superficially portrayed, as documents were elaborated under a male bias.³⁰

Perrot³¹ also discussed how women were portrayed following the role they played in society. She argued that oral history stands as an important instrument for constructing a female memory by privileging direct reporting. Memory is, in this sense, understood as nothing more than a zone defined by the interactions among time and space and the ways men and women move through it.

At the same time, Scott³², in her work entitled "*Gender: a useful category for historical analysis*," originally published in 1989, addressed the limits of the History of Women. She alluded to the fact that the initial acknowledgment that the discipline had gained was later hindered by the behavior of a significant part of historians, who acted to minimize it or isolate it from other areas of historiography.

In the attempt to overcome theoretical challenges such as this, it would be important to do more than report the participation of women in past events. Namely, it would be necessary to demonstrate the connection of these occurrences to present historical practices and overcome an analysis restricted to topics deemed as "private," such as the family, to reach other realms, such as the political.³³

The historian must observe at least four aspects of gender relations that are directly interlocked to gender as a

30 PERROT, 1989.

31 PERROT, 1989.

32 SCOTT, 1995.

33 SCOTT, 1995.

structuring element of social relations. First, the questioning of symbolic representations (*e.g.*, innocence *vs.* corruption). Second, the exploration of normative concepts (either legal, religious, political) that emphasize restrictive interpretations of those symbols. Third, the inclusion of the political dimension that surrounds these constructions and extrapolates kinship in order to encompass external domains, such as education and the job market. Fourth and final, the debate on subjective identity and how the production and legitimization of power appropriate gender.³⁴

This last item will be reassessed in the final section of this article, attempting to more precisely illustrate the enriching contributions of a constitutional history activity that incorporates gender. For the moment, it is relevant to recollect the points made at the beginning of the section – namely, that gender is not an autonomous structure that interacts with other categories, such as race and social class.

In this sense, intersectionality suggests a way of thinking about how identities can be defined differently depending on the correlating inequalities structured by the simultaneous actions of patriarchy, racism, and class discrimination, among other variables that affect economic, social, and political areas.³⁵ These categories express specific roads of vulnerabilities and frequently go unnoticed when we deal with broader populational segments, such as those created by gender. Because of this process, the identification of interlocking axes of subordination is indispensable for analyzing not only the differences between sexes but also those among women themselves.³⁶

34 SCOTT, 1995.

35 CRENSHAW, 2002.

36 CRENSHAW, 2002.

Spengler and Lima³⁷ recover the importance of appropriating these intersections in academic research. They highlight the need that has arisen in the field of feminist studies to promote an epistemological change so that narratives include black, indigenous, lesbian, and trans women, among many others. Through this need, attention has been drawn to how fundamental the correlation between gender, race, and class is.

From a Brazilian perspective, the analysis must tackle the effects of racism and sexism on women, especially those who are poor and living in urban peripheries. These women, beyond facing the racial and sexual division of labor, deal with insufficient health and hygiene conditions, as well as with hassles produced by police violence in their family's daily lives.³⁸

Thus, the use of the term "women" rather than "woman" becomes evident, indicating that processes of oppression and subordination are experienced in different ways. In the same way, the fight for women's rights, whether in the social, political, or economic sphere, can be guided from different perspectives, from these different clippings.³⁹

Black women, as pointed out by Carneiro⁴⁰, have dealt, for several times, with their experiences being sidelined within the feminist movement, even though the context is that of Brazilian society, which has a large part of the population composed of black people. This scenario has been changing, especially through the organization of black women for the visibility of this problem, which has led to more discussions about the impacts of intersections between racism and sexism.

37 SPENGLER; LIMA, 2021.

38 GONZALEZ, 1984.

39 SPENGLER; LIMA, 2021.

40 CARNEIRO, 2011.

Therefore, there is a need for analyses to adopt a framework opposing the universalization of “women” as a category and further develop the debate on how power legitimizes certain identities to the detriment of others from a colonialist perspective that privileges some groups while disregarding others.⁴¹ In this sense, this study argues for an articulation between constitutional history and gender that is responsive to a dynamic conception of history and recovers historical events by incorporating into them the effects of the social construct of male and female differences. It is also based on inquiring how and why these constructions are created and how they impact women differently.

3 Constitutional history and gender: mapping interlockings

Having outlined how constitutional history should define the study of its phenomena, this paper has argued that it should transcend textual dispositions to incorporate subjects, tensions, and conflicts surrounding them. In doing so, a gendered perspective constitutes an indispensable lens to the constitutional historian, as it defies preconceptions of differences among the sexes and sheds light on their relation to the power structures at play.

Some dimensions may exemplify the importance of developing studies that promote this interlocking. By considering the Brazilian experience, this article specifies the contributions of gender categories for analyzing the following items: i) the relations between constitutions and authoritarianism, and ii) the dynamics surrounding constituent processes and constitutionalization of women’s rights.

41 RIBEIRO, 2017.

3.1 Constitution, authoritarianism and gender

As to the relations between constitutions and authoritarianism, addressing how state imperatives may influence the alterations of gender relations, Scott⁴² asserted that the possibilities of identifying connections between authoritarian regimes and the control of women were still not fully explored. In various cases, such as Nazi Germany and the Stalinist Soviet Union, a common point was legitimizing the authority power through its association to masculinity ideals while pejoratively associating opponents to female ones. In addition, measures like bans on women's participation in politics and the imposition of dress codes were often present, and they materialized a type of political domination over women, conveying an affirmation of power.⁴³

In Brazil, the establishment of authoritarian regimes also affected women's freedoms. The consolidation of dictatorships in political power makes it clear that violations of women's rights, more than a consequence of the implementation of the autocratic regime, are expressions of gender as a typical category for violent practices.

Specifically, in the case of the Brazilian dictatorship (1964-1985), after the military coup, one of the mechanisms used by the regime to ensure its own legitimacy was to vest the overthrowing government as a revolutionary constituent power, an attempt grounded in Francisco Campos' doctrine. Campos was one of the rapporteurs of the dictatorship's first Institutional Act (*Ato Institucional*). Later named *Ato Institucional n. 1*, this legislative act installed in the regime's lexicon that the coup, as a revolutionary event, was a primary

42 SCOTT, 1995.

43 SCOTT, 1995.

manifestation of constituent power, legitimized *per se*, and, therefore, responsible for refunding the legal system.⁴⁴

This doctrine offered the basis for the regime's legal structure, whose main strategy was to issue legislative acts aimed at restricting political rights, freedom of gathering, and other basic prerogatives from then on conditioned by an authoritarian legal order that reshaped democratic ideas^{45,46}. This tactic was the building block for institutionalizing practices of political persecution and torture against the opposition, which was considered an enemy of the so-called revolution. This scenario is also where gender plays its part.

Studies such as the one developed by Colling⁴⁷, Teles,⁴⁸ and Carvalho⁴⁹ show how much dictatorial repression on women – especially female militants of the political opposition – was not neutral in terms of gender. Instead, it used features of the female body (pregnancy and menstruation, for instance) to torture women. The persecution reprehended, beyond censoring political positions that could be considered subversive, female dissonance to patriarchal patterns, which were also at the core of the regime's power affirmation.

Reassembling the connections between authoritarianism and constitutionalism between 1964 and 1985 in Brazilian history through a gendered perspective may contribute to unraveling, among other nuances, how the institutionalization of the state of exception by the *Atos Institucionais* affected women's rights. It also may add to the comprehension of repression on deviant femininity as a reiteration of

44 ROCHA, 2018.

45 PAIXÃO, 2014.

46 ROCHA, 2018.

47 COLLING, 2015.

48 TELES, 2015.

49 CARVALHO, 2016.

the so-called revolutionary constituent power grounded in narratives of family, morality, and honor. Lastly, it can also help to understand if and how this repression would operate distinctively depending on the persecuted women's race, class, or sexual orientation.

Likewise, addressing the relation between constitutions and authoritarianism from a gendered perspective impacts transitional justice debates. To the extent gender categories gathered multiple, distinctive aspects for the persecution and perpetration of violence against women in the Brazilian military dictatorship, the axes of transitional policies (memory and truth, justice, reparation, and institutional reform) require these differentiations to be accounted for so measures can be effective.⁵⁰

From this integrative exercise, myriad issues arise. Examples include the incorporation of women's resistance practices in the historical memory of that time. Another topic entails the identification of gender violence patterns in dictatorial repression. Finally, the importance of including women in the formulation of transitional policies, instead of placing them merely as recipients, becomes clear.^{51,52}

There is a wide variety of topics yet to be investigated about authoritarianism, and even those compose only one of the many spheres in which constitutional history can use gender categories. Analyzing how women's rights were debated during the elaboration of constitutions and how these rights were inserted into these documents is another dimension of what this study proposes. Moreover, observing popular participation in constituent processes, emphasizing female activity, still opens other research possibilities.

50 ROESLER; SENRA, 2013.

51 ROESLER; SENRA, 2013.

52 CARVALHO, 2016.

3.2 Constituent processes, constitutionalization of rights, and women's participation

While relating the consolidation of political power and transformations in gender relations carried out by state action, Scott⁵³ indicates that one of the ways in which the Welfare State manifested its characteristic paternalism was through social protection rights for women. In Brazil, the regulation of labor relations carried out in the Getúlio Vargas Era (1930-1945) is a key case. From the 1930s on, the social labor legislation was treated as a state policy and was strengthened by a series of decrees issued during the Provisional Government, whose norms were broadly constitutionalized in 1934.⁵⁴

Women were one of the groups who had their work conditions modified at the time, particularly through Decree n. 21.417-A of May 17th, 1932. In this scenario, there are a variety of questions that can be analyzed in constitutional history. In their research, Fraccaro⁵⁵ and Marques⁵⁶ tackle topics such as the right to equal pay between men and women and legal dispositions that were more protective – even discriminatory – than supportive of the female workforce⁵⁷. The authors also address debates around these topics in the 1933-1934 Constituent Assembly, as well as the participation of organizations like the Brazilian Foundation for Female Progress (*Fundação Brasileira pelo Progresso Feminino, FBPF*)⁵⁸

53 SCOTT, 1995.

54 BERCOVICI, 2009.

55 FRACCARO, 2016.

56 MARQUES, 2016.

57 As an example, Decree n. 21.417-A/1932 forbade female night work (Article 2), with the exception of specific situations, such as work places where only family members were coworkers.

58 The organization led the fight for women's suffrage in Brazil, and suffragist

in the discussions.

This process is also analyzed by Dultra⁵⁹, who investigates female participation in the dynamics of the 1933-1934 constituent process. The author deals with issues such as the constitutionalization of women's suffrage – recognized at the infraconstitutional level in 1932 –, and women's labor rights.

The regulation of women's work and its constitutionalization over the 1930s are examples of the concerns put forth by Costa⁶⁰, who highlights that the meanings, the claims, and introduction of rights in positive law must be taken as part of the specific context that surrounds the equivalent social demands. As suggested by Bercovici⁶¹, this entails observing the regulation of female work while assessing, among other circumstances, the social labor legislation as part of a broader political panorama in which the main stakes relate to the institutionalization of mass democracy.

A more recent case, which also links constitutional history and gender, is the participation of civil society in the 1987-1988 Constituent Assembly. This process was a constituent phenomenon that received greater popular attention than the previous ones, creating fruitful and variegated grounds for investigating female participation leading up to the promulgation of the Brazilian Constitution of 1988. Again, the social movement for women's rights at that time should be understood as delimited by a particular historical moment, especially in Latin America.

Landau⁶² depicts Latin America as a rich region in terms of constitutional elaboration, at least in the recent past.

Bertha Luz was involved in the discussions about female work regulation in the 1933/1934 Constituent Assembly.

59 DULTRA, 2018.

60 COSTA, 2004.

61 BERCOVICI, 2009.

62 LANDAU, 2019.

Addressing the constituent processes that took place in the continent from the 1990s onward, *e.g.*, Colombia's (1991), Argentina's (1994), Venezuela's (1999), Ecuador's (2008), and Bolivia's (2009), the author highlights a tendency towards more participative processes through forming Constituent Assemblies and increasing dialogues with civil society. This scenario is largely related to the democratic character of these processes, which were mostly carried out as responses to institutional political crises.

Though the period studied by Landau⁶³ is different from when the Brazilian constitution was elaborated, this country also had greater popular participation in its last constituent process. Although an exclusive constituent power was not established – the assembly responsible for drafting the new charter was created based on an Amendment to the 1967 Constitution – the process entailed public discussions and open hearings, as well as the mobilization and participation of organized civil society groups. In this sense, the 1988 constituent process cannot be reduced to a mere continuation of the previous order.^{64 65}

Women were one of the groups who had crucial participation in the 1987-1988 constitutional process. Addressing their presence at that moment, the works of Silva⁶⁶, among others, emphasize the active engagement of female constituent representatives and the overall feminist and women's movement in drafting the new text. The main intention of these groups was to advance the constitutional recognition of rights aimed at the correction of gender inequality and the consolidation of rights for all people.

63 LANDAU, 2019.

64 PAIXÃO, 2014.

65 BARBOSA, 2018.

66 SILVA, 2011.

Events like the organization of the “Women and Constituent” (*Mulher e Constituinte*),⁶⁷ a campaign that led to elaborating a document entitled “Women’s Letter to the Constituents” (*Carta das Mulheres aos Constituintes*), and the joint efforts of female constituents and women in the civil society were essential at the time. These sectors, which put pressure on debates and canvassed for women’s rights – becoming known as Lipstick Lobby (*Lobby do Batom*) –, had great influence in the legal affirmation of myriad rights through positive law, such as 120-day maternity leave and equal rights and duties in the married life.⁶⁸

The mobilizations articulated within the “Women and Constituent” campaign generated debates that reached a wide diversity of women over different country regions. Members of the campaign discussed propositions, for instance, with black and lesbian women collectives and addressed various claims related to gender equality, such as the right to education and the fight against racial discrimination.⁶⁹ These events constitute an illustrative case of how much female groups may influence the manifestation of the constituent power and how this dimension is attention-worthy in the constitutional history field.

It is important to highlight that the situation of black women was also brought to the debates of the 1987-1988

67 The campaign was issued by the National Council for Women’s Rights (*Conselho Nacional dos Direitos da Mulher - CNDM*) in 1985. The campaign motto was “A valid Constituent must include the words of women” (“*Constituinte pra valer tem que ter palavra de mulher*”) and it crossed the country canvassing for the inclusion of women’s conditions in the debates of the upcoming Constituent. The main propositions on women’s claims elaborated in the campaign were compiled in a document entitled “Women’s Letter to the Constituents” (“*Carta das Mulheres aos Constituintes*”), handed in at the Brazilian National Congress in March 26th 1987.

68 SILVA, 2011.

69 SILVA, 2011.

Constituent Assembly. Lélia Gonzalez participated in the meeting of the “Sub-commission on Blacks, Indigenous Populations, Disabled People and Minorities” (*Subcomissão dos Negros, Populações Indígenas, Pessoas Deficientes e Minorias*) on April 28, 1987. On that occasion, she was a speaker on the topic “The black and his situation” (*O negro e a sua situação*) and did not leave out the discrimination faced by black women, alluding to the greater exclusion that operates on them due to the intersection between gender, race and class and criticizing the myth of a racial democracy in Brazil.⁷⁰

Therefore, beyond the discussion of gender, the understanding of the difficulties that surround the daily lives of black women managed, somehow, to be problematized in the Constituent Assembly, and the speech of Lélia Gonzalez in the mentioned subcommittee was an important milestone of that moment.

The 1988 Constitution may be regarded as an advance in the relation between Brazilian constitutionalism and the International Human Rights Law. Studies such as those developed by Saldanha⁷¹ and Piovesan and Fachin⁷² show that a greater concern with gender equality at the constitutional level aligns with international documents, *e.g.*, the Convention on the Elimination of All Forms of Discrimination against Women (1979)⁷³ and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1994)⁷⁴.

There was, notably, a greater influx and influence of International Law in internal Brazilian law in the last decades,

70 GONZALEZ, 2020.

71 SALDANHA, 2018.

72 PIOVESAN; FACHIN, 2018.

73 Ratified by Brazil in 1984.

74 Ratified by Brazil in 1995.

which happened largely due to international court decisions. As illustrated by the adoption of Law n. 11.340/2006 (Lei Maria da Penha) after the events that took the Maria da Penha *vs.* Brazil case to the Inter-American Human Rights Commission. The law issued followed the court's recommendations on the matter.^{75,76}

All these examples point out that the constitutional history's field of analysis, especially in the case of the wide laboratory of experiences that constitute the recent past of Latin America, is enriched when the diverse identities of the subjects acting as relevant political forces are considered. In fact, constitutional history requires a methodological approach that enables linking the text and the context, creating a dialogue between the researched sources and the reality of the historical time under investigation.⁷⁷ Through the lens of gender inequality analysis, the events under study are further contextualized by considering women's experiences, be they of inclusion or exclusion, in history and constitutionalism.

It should also be noted that feminist claims on the state are part of a broader dimension, which mainly involves the demand for a profound social transformation in gender relations, bearing in mind that the state itself is an institution formed from a male perspective.⁷⁸

However, analyzing constitutional history through the eyes of women's interventions in the struggle for rights is an important element for thinking about the possibilities of penetrating social reality through legal structures and gradually changing its excluding dynamics.

75 SALDANHA, 2018.

76 PIOVESAN, FACHIN, 2018.

77 SUANZES-CARPEGNA, 2007.

78 CASIMIRO; VIANA; KREUZ, 2020.

As this study has demonstrated, including gender categories in constitutional history studies enables verifying how gender hierarchies act restrictively or extensively on developing women's rights over time. The framework also allows the constitutional historian to observe how discriminatory behavior, based on the reproduction of gender stereotypes, is used by discourses and practices as means of consolidating political power. Finally, it also enables researchers to reassemble decisive historical events aimed at the construction of female citizenship and strengthening of national democracy.

4 Final remarks

From what was presented in this article, it is clear that constitutional history cannot be carried out by using universal and neutral narratives, as if they were inert to conflict. Investigating phenomena in the discipline should overcome a unitary perspective on events, adding to the studies the multiplicity of identities that shape them.

This approach is no different for gender relations. Especially from the late 1960s onward, there were increasing practical and theoretical claims for the inclusion of women in historical narratives. This movement has reinforced the perception of how incomplete history can be whenever built upon rigid patterns and homogeneous subjects. Moreover, this process has underlined the need to treat gender as interlocked with variables that may harshen inequalities and that are themselves grounded in the gender category, such as race and class.

Based on these remarks, and by no means expecting to address every study possibility on the matter, it was possible to analyze some of the situations in which the use of

the gender categories is extremely fruitful for constitutional history. By addressing mainly two exemplificative dimensions, the article has suggested how gender relations cross interactions between constitution and history.

By analyzing this interlocking from the perspective of constitutionalism and authoritarianism, this study evidenced that the construction of hierarchies between men and women can be an instrument for asserting the consolidation of power in dictatorial regimes, such as the Brazilian dictatorship of 1964. Likewise, in the face of the particular political persecution women suffer in dictatorships, debates concerning transitional justice devices should also address such disparities, as well as their different effects on women.

As to female participation in constituent processes and the constitutionalization of rights aimed at reducing inequalities between men and women, it is also a fertile ground to adopt a gendered perspective to recount constituent assemblies and the events building to them. Doing so sheds light on the tensions at play, the ways women work their ways to claim rights in these spaces, and the contributions that their mobilizations bring to the democratic field.

These two dimensions elucidate the diverse character of the questions that can be investigated by constitutional history as the discipline concedes greater attention to women's experiences. Such questions can also be posed as constitutional history inquires the ways in which law and politics reproduce gender discrimination, as well as the strategies through which women work their ways around inequalities and assert their rights.

If constitutions are situated between law and politics, which are both spaces where gender is produced, they should also be investigated using a gender-centered lens. Doing so would enable not only the incorporation of women to constitutional history as a specific research area but would

also add to the understanding that history is deficient whenever it neglects the analysis of gender conflicts.

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