Femicide: An Analysis from the Perspective of The Human Person's Dignity

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Abstract: *This research aims to analyse Law 13.104 / 2015, its scope and hypotheses of application, its legal structure, the perpetrator and the victim, and the [in]adequacy of the aggravation with the constitutional principle of equality. The method used was bibliographical, with a view to using the study of scientific, jurist opinion and legal texts to encourage debate on gender violence, aiming at cultural evolution and the construction of a just, supportive and equal society. In conclusion, the paper addresses the partial symbolism exercised by the Law, its applicability to* cis *and* trans *women, the constitutionality and mixed legal structure of the aggravation, covering objective and subjective aspects, in that order, and, finally, the undeniable legislative errors that, once again, suggest penal symbolism.*
Keywords: *Femicide; Gender Violence; Law nº 13.104/2015.*

Feminicídio: Sob a perspectiva da dignidade da pessoa humana
Resumo: *Na presente pesquisa tem-se por objetivo analisar a Lei nº 13.104/2015, sua abrangência e hipóteses de aplicação, sua natureza jurídica, o sujeito ativo e o sujeito passivo, e a [in]adequação da qualificadora com o princípio constitucional da igualdade. O método utilizado foi o bibliográfico, visando, a partir do estudo de textos científicos, doutrinários e legais, ao incentivo do debate sobre a violência de gênero, objetivando a evolução cultural e a construção de uma sociedade justa, solidária e igualitária. Em conclusão, aponta-se para o simbolismo parcial exercido pela norma, a aplicabilidade da Lei às mulheres* cis e trans*, a constitucionalidade e natureza jurídica mista da qualificadora, com traços objetivos e subjetivos, nesta ordem, e, por fim, para os inegáveis equívocos legislativos que sugerem, mais uma vez, o simbolismo penal.*
Palavras-chave: *feminicídio; violência de gênero; lei nº 13.104/2015.*

Introduction

Even nowadays, laws and public policies are not enough to prevent the lives of women from being brutally taken. Therefore, combating this and other forms of gender violence has become essential.

In Brazil, from 2006 to 2016, the rate of homicides against women grew by 6.4%, rising from 4,030 in 2006 to 4,645 women murdered in 2016 (BRAZILIAN PUBLIC SAFETY FORUM, 2018, p. 44, 49).

As of yet, there is no quantified information on femicide in the database of the Information Systems on Mortality. As such, there is no way of identifying the quantity of victims of this specific crime type in the quantitative figures for homicides in Brazil. (BRAZILIAN PUBLIC SAFETY FORUM, 2018, p. 46).

In this context, given the recurrent phenomenon of women being murdered in the domestic environment, Law nº 13.104/2015 was enacted. However, as shall be shown, its objective is the subject of debate among Criminal Law theorists, considered by some jurist opinion as merely symbolic criminal law.

This article therefore aims to analyse Law nº 13.104/2015 in order to verify its scope and hypotheses of application, its legal structure, the victim and the perpetrator of the crime of femicide,

and the appropriateness or inappropriateness of the aggravation with the constitutional principle of equality.

This research is justified by the importance of the theme in our current society given the continuous practice of gender and domestic violence crimes against women.

The bibliographical method was employed to obtain results, based on the study of scientific, legal and theoretical texts, in order to stimulate debate on gender violence and contribute to cultural evolution and the construction of a fair, supportive and equal society.

It is important to highlight the development of research into case law, which was undertaken in the electronic database of precedents in Brazilian courts, revealing the position of some judges in relation to the theme in question.

Aggravation and the hypotheses of applicability for femicide

Law nº 13.104/2015 was enacted in March 2015, being announced on International Women's Day and, since then, it has been the subject of intense debate regarding its necessity, objectives, scope, legal structure, constitutionality, as well as possible legislative errors.

The cited Law included femicide as aggravation for the crime of homicide, as per subitem VI, Article 121 of the Penal Code, defining the homicide carried out "against a woman for reasons inherent to her condition as a woman" and, furthermore, in sections I and II, of §2-A, of the Penal Code, outlined what were considered to be "reasons inherent to her condition as a woman" for the effects of the cited Law, namely, "domestic and family violence; and disregard or discrimination of the condition of woman" (BRASIL, 2015).

The introduction of the aggravation had the immediate consequence of expanding the list of heinous crimes, since Article 1, subitem I, of Law nº 8.072/1990 (Heinous Crimes Law) includes, among others, the crime of homicide committed in aggravation (BRAZIL, 1990).

Contrary to popular opinion, femicide is not unprecedented in legislation, since long before the law was enacted in Brazil, the crime already existed in other Latin American countries such as Costa Rica, which legislated for it in 2007, Guatemala, the following year, Chile, in 2010, Peru, in 2011, and El Salvador, Mexico and Nicaragua, in 2012 (Ana Isabel Garita VILCHEZ, 2013, p. 48). Dandara Oliveira de Paula (2018, p. 6) notes that between 2010 and 2015 the number of Latin-American countries that defined femicide in their legal codes increased from four to sixteen. Nevertheless, there needs to be a broadening of the tools for legal application, in addition to campaigns to raise society's awareness of the subject in order for workable results to be achieved.

It is worth mentioning, for information purposes, that according to research by Julio Jacobo WAISELFISZ (2015, p. 27) and contained in the 2015 Violence Map, Brazil occupies a shameful 5th (fifth) place in the ranking of countries with most deaths among women, among the 83 (eighty three) countries analysed.

As per Law nº 13.104/2015, femicide consists in homicide carried out "against a woman for reasons inherent to her condition as a woman", whereby these reasons are taken, for legal purposes and as per subitems I and II of § 2-A, of Article 121 of the Penal Code, to mean the crime committed in the context of domestic and family violence, in addition to the crime committed as a result of a disdain or discrimination against the status of woman, as cited above (BRASIL, 2015).

The first hypothesis, despite the jurist opinion controversy that will be analysed in due course, is objective in nature, where the homicide committed against a woman falls within the context of domestic and family violence.[1] In terms of what is considered to be domestic and family violence against women, it is important to cite Article 5, of Law nº 11.340/06, popularly known as the Maria da Penha Law, which states, *in verbis*, that:

> Article 5: For the effects of this Law, domestic and family violence against women is considered any action or omission based on gender that results in death, injury, physical, sexual or psychological suffering, emotional distress and damage to property: (See supplementary law nº 150, of 2015)
> I – within the domestic unit, taken to mean the permanent living space of people who are related or not, including occasional interactions;
> II – within the family, taken to mean the community formed by individuals who are or consider themselves to be related, united by natural bonds, affinity or express willingness;
> III – any intimate affectionate relationship in which the perpetrator lives with or has lived with the victim, regardless of cohabitation.
> Sole paragraph. The personal relations described in this article encompass any sexual orientation. (BRASIL, 2006).

[1]It is noted that the lawmaker was mistaken in inserting the conjunction "and" instead of "or" in the wording of paragraph I, § 2-A, from Article 121 of the Penal Code, conveying the idea of adding the two circumstances, and not alternativity. This is because not all domestic violence is family violence and vice versa.

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It is worth highlighting that the homicides committed against women generally differ from those practised against men in that they take place in the domestic environment, where the victim often suffers in silence for some time before her eventual and unfortunate death.

The second hypothesis covered by Law nº 13.104/2015, for its part, is inherently tied to the subjective factor and is characterized by the discrimination or disdain for the condition of woman as motivation for carrying out the crime. In this case, the law professional must analyse the perpetrator's intention to reveal the actual motive for the crime, confirming the aggravation only where there is proof that the offence occurred due to a disregard or discrimination against the condition of woman.

It is noteworthy that the legislator did not provide for the aggravation to be applied indistinctly and purely in the event of women being murdered. On the contrary, in order for femicide to be confirmed, the crime of homicide (killing someone) must be committed against a woman for reasons inherent to her condition as female, as per the description in Law nº 13.104/2015, which inserted paragraphs and subitems in Article 121 of the Brazilian Penal Code (BRASIL, 2015).

Furthermore, it is worth noting that attempted homicide with the aggravation of femicide is accepted and, for obvious reasons, the unintentional aspect is not contemplated, since the crime of femicide only exists in the intentional category, as per Article 121, §2, subitem VI c.c. Article 121, §2-A, subitems I and II of the Penal Code, legal provisions that preclude the existence of this crime in the involuntary mode, thereby applying Article 18, sole paragraph, of the Brazilian Penal Code (BRAZIL, 1940).

Legal Structure of the Aggravation

There are various stances on the legal structure of the aggravation for femicide. De Plácido and Silva (1997) define the structure as: "[...] in legal terminology, it indicates in particular the essence, substance or completion of things" (p. 230).

For some, such as Guilherme de Souza Nucci (2017), the aggravation has an entirely objective structure. In arguing that femicide involves an objective aggravation in its totality, this Criminal Law theory shows that the rule "[...] is connected to the victim's gender: being a woman" (p. 46-47).

For others, such as Rogério Sanches Cunha (2015), Alice Bianchini and Luiz Flávio Gomes (2015, p. 21), there is no way of considering femicide objectively as they consider the aggravation as subjective in its entirety. *Luciano Anderson de Souza and Paula Pécora de Barros (2016, p. 270-271)*, proponents of the third current of jurist opinion, and despite not being in the majority, introduce greater coherence to the legal interpretation, whereby the nature of the aggravation is mixed, containing objective and subjective aspects, in subitems I and II respectively.

Supporters of this hypothesis suggest application of the aggravation described in subitems I and II, of §2, of Article 121 of the Penal Code, in the case of crimes committed in line with subitems I and II, of §2-A, of Article 121 of the Penal Code, by virtue of the former being subjective and the latter objective. As such, the stance of the Superior Court of Justice (STJ) is contained in the decisions below, obtained from the STJ electronic database of precedents:

> 1. As per article 121, § 2-A, II, of CP, the aggravation of femicide occurs in cases where the crime is committed against a woman in a domestic and family violence scenario, thereby being considered objective, dispensing with the analysis of perpetrator's intention. **Thus, *bis in idem* does not apply in the recognition of aggravation in case of a morally reprehensible motive and femicide, the former being subjective and the latter objective.** 2. The indictment decision should only rule out the aggravation of the crime of homicide and when completely discordant with the evidence provided in the records. This is because the relevant procedural juncture must be limited to a judgement on admissibility in which the existence of evidence the crime was committed is examined, discounting any usurpation of the jury court's jurisdiction and the risk of summary judgement of the case's merits. 3. Habeas corpus denied (Habeas Corpus nº 433.898 - RS, Rep. Judge Minister Nefi Cordeiro, Sixth Panel, decision on 24/04/2018, DJe 11/05/2018c) [our bold highlighting].

Minister Felix Fischer comments on the matter in Special Appeal nº 1.707.113:

> Considering the subjective and objective circumstances, there is the possibility for coexistence between the aggravation of morally reprehensible motive and femicide. This is because the motivation for the former is subjective, thus of a personal nature, whereas femicide is objective in character since it occurs in the crimes committed against women because of their inherent condition as female and/or whenever the crime is tied to domestic and family violence as such, meaning that the perpetrator's intention is not analysed (Special Appeal nº 1.707.113 - MG, Rep. Judge Minister Felix Fischer, decided on 29/11/2017, Dje 07/12/2017).

For supporters of this hypothesis, the application of reduced sentences, under §1, Article 121 of the Penal Code, would also be possible in both cases (subitems I and II), since there is no impediment to the coexistence of objective aggravation with privilege, which considers subjective aspects in its assessment. See below:

> [...] Firstly, it must be stressed that there are no doubts as to the perpetration and criminal materiality, and absent a challenge to the legal characterisation attributed to the facts, whereby, according to the records, **it is incontrovertible that the defendant carried out the crime of aggravated homicide (femicide) in its intentional form** [...] (Special Appeal nº 1.721.370 - BA, Rep. Judge Ribeiro Dantas, decision on 23/02/2018, DJe 28/02/2018a) [our bold highlighting].

Another line of thought includes the conceptions of Bianchini and Gomes (2015), who argue that the legal structure of femicide is subjective in its entirety. Therefore, there is no possibility of recognizing any privilege: "It is impossible to view femicide, which is something abominable, reprehensible, and repugnant to the dignity of women, as having been carried out for reasons of any relevant moral or social value or soon after the victim's unjust provocation" (p. 21).

The idea that femicide is objective is mostly detriment to the thesis that it is subjective in nature, although they are judged in the sense that femicide is subjective, as per Appeals Court Judge Corrêa Camargo of the Minas Gerais State Appeals Court:

> Under the terms of the Penal Code, **the recognition of voluntary manslaughter, of a subjective nature, is incompatible with the aggravation of femicide, of the same nature**, so there is therefore a clear contradiction between them. The preliminary argument accepted. Merits to the appeals affected. (TJ-MG - APR: 10271160070725001 MG, Rep. Judge: Corrêa Camargo, Decision date: 14/03/2018b) [our bold highlighting].

According to this theory, similarly, the application of the aggravation in concurrence with others of the same (subjective) nature would not be admitted, under penalty of *bis in idem*.[2]

In the face of precedents and the majority of jurist opinion, which deem femicide to be objective in its legal structure, both in the occurrence of the aggravation described in subitem I and II, of §2-A, of Article 121 of the Penal Code, as explained above, it would be possible to accept cases for the reduction of sentences as per §1, of Article 121 of the Penal Code, since they have a subjective nature, therefore compatible with the objective nature of femicide.

In the same manner, it would be possible to apply femicide in conjunction with the aggravations from sections I, final part (motive of moral turpitude), and II (futile motive) from §2, Article 121 of the Penal Code, without recognising the existence of *bis in idem.*

For proponents of the third stream, such as Souza and Barros (2016, p. 271), sections I and II, of §2-A, Article 121 of the Penal Code represent, respectively, aggravating traits of an objective and subjective order, despite the given objective "domestic and family violence" having been mistakenly configured within the subjective structure ("due to the female element").

In the case of subitem I, Article 2-A, of the Penal Code, the objective nature of femicide occurs in the event of contextual domestic and family violence. Therefore, the simple fact that a homicide against a woman takes place in a household, in a family environment or in any affective, intimate relationship, enables the application of aggravation contained therein.

In this insubstantial circumstance, any value judgement on the real motivation, that is, where the legal professional does not need to analyse the psyche of the perpetrator in order to discover the real intention (will), the crime merely has to have taken place in a domestic and family context for the aggravation to apply.

As such, notwithstanding the debate among jurist opinions, it is perfectly possible for femicide to coexist in the hypothesis of family and domestic violence as per subitem I, §2-A, Article 121 of the Brazilian Penal code with the sentence reduction provided for in §1, Article 121 of the Brazilian Penal code, since the subparagraph is clearly objective in nature, tied to the locality it occurred, allowing that the crime may have been committed because of the motives described in §1. However, regarding the application of aggravation in section I, §2-A, Article 121 of the Brazilian Penal code in conjunction with the aggravations from sections I, final part, and II, §2, Article 121 of the Brazilian Penal code, there is no obligation to recognise a possible argument for *bis in idem*, given the different legal structures, since the first is objective in nature and the others are subjective.

Nevertheless, the aggravation detailed in subitem II, of §2-A, Article 121 of the Penal Code, notwithstanding contrary interpretations, is subjective in nature, and for its applicability there needs to be proof that the perpetrator committed the crime imbued with disdain or discrimination for the condition of woman.

To this end, it is necessary to appreciate the element of volition and the will of the perpetrator, so that the occurrence of the aggravation may be recognized. In this case, the legal professional needs to perform a subjective analysis on the psyche of the perpetrator to identify whether the crime was driven (the element of volition) by disdain or discrimination for the victim's condition as a woman. This analysis must be carried out with a considerable degree of responsibility on the part of the legal professional and should also count on the assistance, if deemed necessary, of mental

[2] *Bis in idem* is a legal concept that consists in the repetition (*bis*) of a penalty on the same fact (*in idem*) in the same sphere of the Law. For example, an individual receives two sentences in the area of Criminal Law, because of the same crime committed by him/her. Criminal Law is the branch of Law that deals with the conduct that is considered to be a crime if committed by an individual.

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health professionals, with a view to applying the aggravation from item II, §2-A, Article 121 of the Penal Code, only in cases where it is found that the determinant motive for the crime coincides perfectly with the description contained in the penal code thereby avoiding the banalisation of the aggravation's application.

In this hypothesis, admitting the subjective nature of item II, §2-A, Article 121 of the Brazilian Penal Code, it is not possible for femicide to include the benefit of reduced sentence as per §1; in addition to the aggravation described in subitems I, last part, and II, §2, all from Article 121 of the Brazilian Penal code.

This is because femicide practised in the hypothesis of disdain for or discrimination against her condition of woman has a clear subjective nature linked to her condition. The incidence of causes for a reduced sentence as per §1, Article 121 of the Brazilian Penal Code, precludes its application for the aggravated crimes under item II, of §2-A, Article 121 of the Brazilian Penal Code, since there is no conceiving legally or socially whether a perpetrator can murder a woman because of a disdain for or discrimination against her condition as woman, impelled by motive of relevant social or moral value, or under the sway of violent emotion, directly following an unjust provocation from the victim since the proof of the element of volition that characterises the aggravation as per subitem II, §2-A, Article 121 of the Brazilian Penal Code, prevents the moral and legal recognition for applying the cited causes for reduced sentences.

Specifically in relation to the application of items I, final part, and II, §2, along with the aggravation from subitem II, §2-A, all from Article 121 of the Brazilian Penal Code, its legal unfeasibility, since the *bis in idem* would come into play, given that murdering a woman because of a disdain for her condition as woman constitutes a motive of "moral turpitude", while murdering a woman due to a discrimination against her condition as woman constitutes a motive of "futility".

Nevertheless, despite the differing positions, it is certain that aggravations of a subjective order do not coexist and may only be applied concomitantly with aggravations of an objective order. Similarly, the causes of a subjective nature for a reduced sentence may only apply in cases of crimes whose aggravations are of an objective nature.

Perpetrators and victims in the aggravation of femicide

For the victim of the aggravation, the rule establishes its application because of sex, namely, female. There are two main currents that divide this theme. The first contends that the term "sex", used in the text on aggravation, is a biological factor, determined by the XX pair of chromosomes, while the second argues that it involves a legal factor, determined by the subject's documentation allied with a sex change operation.

However, before examining the arguments for jurist opinion, it is worth highlighting that the bill formulated by the Federal Senate, particularly the Mixed Parliamentary Inquiry – Violence Against Women in Brazil, contained the term "gender", which was suppressed in House of Representatives through Amendment to Wording nº 1 for Bill nº 8.305/2014, assigning space for the expression "conditions of the female sex".[3]

However, as Ela Wiecko Volkmer de Castilho (2015) points out, despite the alteration being entitled Amendment to Wording, it was clear that its goal was to restrict the scope of the bill without allowing it to go back to the House for new analysis, meaning it was not in fact an Amendment to Wording.

Indeed, the amendment to the bill sought to include only *cis*[4] women as victims of the aggravated crime through the use of term "sex", to the exclusion of *trans* women[5] (CASTILHO, 2015, p. 4). However, as mentioned above, the conception of the term "sex" is not unanimous in jurist opinion.

Delving into the first theory, which is characterised by the conservatism represented by sexual binarism, it is assumed that sex, no matter how controversial the debate, is a biological fact divided into female and male, albeit in rare cases, intersexual or hermaphrodite, who are born with two genitalia, both female and male, with one predominant.

In this theory, the legal text is clear in the sense of encompassing only *cis* women and precluding its applications to transsexual (*trans*) women. From this perspective, Francisco Dirceu Barros (2015) comments:

> A woman is identified by her genetic or chromosomal design. In this case, since neocolpovulvoplasty [sex change operation] changes the aesthetic but not the genetic design, it will not be possible to apply the aggravation of femicide.

In their understanding, extending the application of the aggravation as per Article 121, §2, subitem VI c.c §2-A, subitem II, of the Brazilian Penal Code, to *trans* women would go against the

[3]Information taken from the House of Representatives' site.
[4]Women who are biologically female and have a female gender identity.
[5]Women who underwent surgery to change their biological sex from male to female and have legally changed their gender identity from male to female.

fundamental principles inherent to criminal law, consistent with the strict legality, specificity and prohibition of analogy *in malam partem*[6] and, as such, its extension would be impossible since, in brief summary, the conduct of the perpetrator must fit the conduct classified as a crime perfectly, preventing the application of analogy to the detriment of the accused. Moreover, the classification must be clear and precise so as not to generate doubts regarding the characterisation of the criminal offence. Souza and Barros (2016), postulate that:

> Therefore, the law must precisely define the prohibited conduct, so the expressions cannot be imprecise or ambiguous. Based on this corollary, the principle of specificity arises, whereby the legislator must explicitly determine the conduct subsumed in the penal class, as well as the principle for prohibiting analogy *in malam partem* (p. 270).

On the other side are those who defend the second current of jurist theory, which follows an interpretative trend that adapts better to the reality of contemporary society. In their understanding, the *trans* woman may be a victim of femicide, provided two requisites are present, namely, sex change and legal civil registration of this change, in compliance with the essential element of the criminal classification in Article 121, §2, subitem VI c.c §2-A, subitem II of the Brazilian Penal Code, which is the condition of female, taken to mean, among other things, as disdain for or discrimination against the condition of woman (BRASIL, 2015).

Following this line of thinking is the pioneering charge made by the Public Prosecutor's Office of São Paulo State against an individual who murdered his companion, a *trans* woman, in the city of São Paulo. In the indictment, the Prosecuting Attorney, Flávio Farinazzo Lorza (2016) argued:

> The victim undoubtedly behaved like a woman, even having a registered social name, and was in a loving relationship with a man, wearing feminine clothes and female hairstyle, in addition to having undergone surgical procedures to modify the body, such as silicone breast implants (p. 159).

Souza and Barros (2016) indicate the need and possibility for extending the aggravation to *trans* women:

> The Femicide Law undeniably needs to be applied to transsexual women since it was created to reduce the high incidence of violence against women, also suffered by "*cis women*" (women who have a biologically female sex and gender identity), as well as "*trans women*" (women who are biologically male and have a female gender identity), who can similarly be victims under this law given the reproduction of the chauvinistic violence model (p. 269).

Along these lines, transsexual men undergoing the surgical procedure to change their sex, from female to male, and who complete the legal civil registry of their new gender identity would not be included in the definition of this law. The latter jurist opinion seems to better represent the theoretical objectives of the regulation, and also protects *trans* women, who suffer similar troubles due to discrimination and domestic violence.

However, notwithstanding the above position, there is the chance that a literal interpretation of the Law could indicate its non-application to *trans* women, based on the principles of strict legality, specificity and prohibition of analogy *in malam partem*.

Nevertheless, in a democratic state governed by the rule of law, such principles do not possess absolute contours and so must be interpreted in conjunction with the foundations of the Federal Republic of Brazil, including the cornerstone of a person's human dignity, as per Article 1, subitem III of the 1988 Federal Constitution; and basic rights, among which are the right to a dignified life and the inviolability of the honour, private life and image of the person, as per Article 5, header and subitem X, respectively, of the 1988 Federal Constitution. Flávio Henrique Franco Oliveira (2014) explains that:

> The valuation of the human person is legally expressed by the fundamental constitutional principle of dignity, which ensures the minimum respect for the human being. The dignified being and personality share an unbreakable bond, and they consist of attributes viewed as the first rights of the human being (p. 103).

As such, the legal interpretation must be guided by the dignity of the human person, based on Article 1, subitem III of the 1988 Federal Constitution, in order to cover the fundamental rights to a life worth living, the inviolability of honour, private life and image of the person provided for, respectively, in Article 5, header, and subitem X of the 1988 Federal Constitution, and to include transsexual women under the femicide law aggravation.

A dignified life is one lived with dignity, taken to mean a material end, an objective, "[...] which is cemented in the equal and general access to assets (health, safety, ecologically balanced

[6]The prohibition of the *in malam partem* analogy means not allowing the use of an analogical interpretation to the detriment of the accused.

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environment, education, among others) [...] contributing to a life that is worth living" (Joaquín Herrera FLORES, 2009, p. 37).

Empirical data reinforce the need for this type of interpretation, for example, data relating to life expectancy for transsexual women, which is just 35 (thirty five) years of age, while the national average is 75 (seventy five) years, that is, more than double, according to material published by the website G1 (2017).

It is worth noting that there are other theories around the theme, including those that legal registration alone as a woman would be enough for classification as an aggravation under femicide, and others who claim that only the gender to which the victim belongs should be considered.

However, these theories are unfeasible in terms of applicability, for the reasons explained above. Moreover, the theme encompasses numerous hypotheses that must be treated individually, and therefore deserve separate study.

For information purposes only, Law nº 11.340/06 (Maria da Penha Law) may be extended to cover transsexual women although this law does not provide for crimes, with the exception of the recently inserted Article 24-A, rather granting protective measures, meaning there is no obstacle to its application. In this sense, FONAVID precedent nº 46 (2017) establishes that the Maria da Penha law applies to *trans* women, regardless of legal registration of social name and sex change operation in the cases covered by article 5, of Law 11.340/2006.

Finally, regarding the perpetrator, the law did not change and the crime was considered as common, or one which any perpetrator could commit as long as the homicide was undertaken for reasons relating to the condition of woman, as per the legal provision.

The aggravation of femicide: its constitutionality and possible inconsistencies

Part of jurist opinion classifies femicide as merely symbolic criminal law created in order to satisfy popular demand and not to repress the incidence of crime, whereby the repression is secondary to the symbolism exercised by the insertion of the regulation in the legal framework. Carmo and Messias (2017) explain that:

> It must be admitted that there is no distinction between the expressions legal system and legal framework, and moreover, recognise the lack of distinction between those and the expression Law, since they all reflect a system composed of positive law, Science of the Law and the social language that comprises legal regulations, on which material on the human behaviour is projected, disciplining it in terms of intersubjectivity relations, with social reality as the object (p. 195).

In relation to symbolism, Paulo de Souza Queiroz (2005) states that:

> It is claimed that the symbolic function is one which does not entail the effective resolution of conflicts in social interests, through the State's punitive instruments. The goal of the penalty and Criminal Law in the symbolic view is merely to give public opinion the impression of tranquillity provided by a diligent legislator supposedly aware of the problems produced by criminality (p. 52).

Critics argue that homicide committed because of gender would lead to an aggravated charge of "moral turpitude" or even "futile" motive as per Article 121, § 2, subitem I, final part, and II of the Penal Code, arguably making Law nº 13.104/2015 redundant, which appears coherent when you consider femicide committed because of a disdain for or discrimination against the condition of woman. As shown in item 2, this addresses the subjective issue, which is classified in the motivation of the perpetrator who, in this case, would be dealt with considering the definition covered by the "moral turpitude" or "futility" classification.

On the other hand, another part of jurist opinion argues that although the crime indicates extreme turpitude, the precedents and legal opinion, while in the majority, are not unanimous, the reason for which there was a need to make the application more objective, clearly defining its applicability. Bianchini and Gomes (2015):

> Strictly speaking, femicide could already (and, in certain cases was) classified as heinous crime (homicide for morally reprehensible, futile motive etc.). After all, there is no denying turpitude in the act of murdering a woman out of gender discrimination (killing a woman because she was wearing a miniskirt or burnt the dinner or wants to separate or because she met another boyfriend after separation etc.). But this interpretation was not uniform, hence the relevance of the new Law to affirm that all these scenarios undoubtedly represent heinous crimes (p. 18).

In the case of Article 121, §2-A, sub item II, the symbolism of the regulation is evident, since the aggravation is merely of a subjective order, characterised on the whole by the motivation (turpitude or futility) of the perpetrator which if recognised will then result in the one of the aggravations covering motive, as per Article 121, §2, subitem I, final part, and subitem II of the Penal Code. From this viewpoint, the aggravation has the role of demonstrating that the State is concerned with violence against women, revealing its symbolic function.

However, it is worth noting that the aggravation is not restricted to the subjective data in subitem II, which certainly characterises turpitude or futility.

The regulation also qualifies homicide committed in a domestic or family scenario, determining the application of the aggravation in a clear and objective manner, meaning that a homicide committed in the context of domestic and family violence, which could previously be classified as simple homicide if it did not fit any of the aggravations, can now be recognised as aggravated homicide in an objective form by the fact that it occurred in that particular situation.

The clear characterisation of the aggravation is important in ensuring greater confidence in its application, leading to more certainty in the more severe punishment of the criminal and, for this reason, it is necessary and logical.

In relation to the constitutionality of femicide, there is much debate about whether the aggravation clashes with the constitutional principle of equality between men and women, which states that "men and women are equal in rights and obligations", as per Article 5, subitem I, of the 1988 Federal Constitution (BRASIL, 1988).

Firstly, it should be stressed that the legislation on femicide generally reflected the existence of gender violence against many women, both *cis* or *trans*, simply resulting from their condition as woman.

In addition, the inclusion of the aggravation revealed a certain preoccupation by the State with the violence suffered by women, since it had an obligation to use its own mechanisms to play its part given that gender violence is a problem that is lacking in state intervention. Luana Bandeira de Mello Amaral, Thiago Brasileiro de Vasconcelos, Fabiane Elpídio de Sá, Andrea Soares Rocha da Silva and Raimunda Hermelinda Maia Macena (2016) explain that: "Despite the policies protecting and supporting women in reducing violence, numbers are still high and affect women in different contexts of vulnerability" (p. 534).

There are those who argue that the inclusion of Law nº 13.104/2015 is discriminatory and paternalistic, reinforcing the stereotype of women as the "fragile sex", but most criticism is around the constitutionality of the Law.

Critics claim the law is unconstitutional as it detracts from the principle of equality, given that in their view, the Law attaches more relevance to a woman's life than to a man's. Euro Bento Maciel Filho (2014) asserts:

> To be very clear, it is not being claimed that the inclusion of "femicide" in the Penal Code would be an exaggeration, but in certain objective terms, it is evident that the new criminal classification is indeed "discriminatory".
> [...]
> To clarify, it is noteworthy that the lawmaker created a *discrímen between men and women*. In fact, men who were to become victims of "domestic violence" shall not be afforded the same legal protection that is now intended for women [*highlighting ours*].

The debate about the femicide law's constitutionality also took place in Guatemala and Mexico, where the law was enacted in 2008 and 2012. It is important to highlight that the constitutionality of the law was upheld in these countries.

Despite the criticism, the constitutionality of Law nº 13.104/2015 prevails in Brazil as shown in different situations in which the lawmaker can apply a differentiation in treatment, with a view to achieving parity. Luiz Alberto David Araújo (2006) comments:

> In addressing the principle of equality, the conventioneer aimed to protect certain groups deemed to be deserving of differentiated treatment. Emphasising a historical reality of social marginalization or paucity arising out of other factors, measures were taken to compensate in order to cement, if only partially, an equality of opportunities similar to other people, who do not suffer from the same types of restrictions. These are called affirmative actions (p. 134).

This involves the material application of the equality principle, understood to mean equity, which is achieved in the maximum that the equal must be treated in the measure of their equality and the unequal in the measure of their inequality, since "[...] there is no way to dissociate people in situations where there are no unequal factors *in them*" (Celso Antônio Bandeira de MELLO, 2012, p. 35 [*author's highlighting*]).

Within the scope of this study, the creation of Law nº 13.104/2015 reveals that this material difference is latent, as shown in the previous items.

Therefore, Law nº 13.104/2015 appears constitutional, since it is aligned with the principle of equality, as per the header in Article 5 of the 1988 Federal Constitution (BRASIL, 1988), since there is a "logical correlation" in the homicide committed against women in the context of domestic and family violence; due to the disdain for or discrimination against the condition of woman; and the law and subsequent regulation on aggravation, this being a "logical correlation", *per se*, compatible with the principle of equality (MELLO, 2012, p. 17), given that the difference in the physical attributes of men and women places women in a vulnerable situation in the face of their tormentors.

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The setting of differentiated treatment, also known as positive discrimination or affirmative action, appears in our legislation in different situations, for example, in quotas for people of African descent, quotas for the disabled and quotas for the underprivileged to attend universities, such as in the *Programa Universidade para Todos* (University for All Programme - ProUni). Sandro César Sell (2002) explains that affirmative actions are:

> [...] a series of measures intended to correct a specific form of inequality of social opportunities: that which seems to be associated with certain biological characteristics (such as race and sex), or sociological (ethnicity and religion), which mark the identities of different groups in society (p. 25).

On the international scene, Convention n.º 89, of 1948, ratified by Brazil through Decree nº 41.721, July 25, 1957, reaffirmed via Decree nº 95.461, of December 11, 1987, which prohibited night shifts for women, except those occupying technical or managerial positions, women working in health, hygiene and well-being services and who do not normally perform manual labour, as per the systemic interpretation of Articles 3 and 8, of Convention nº 89/1948.

Convention nº 100, of 1948, was similarly ratified by Brazil through Decree nº 41.721, of June 25th 1957, reaffirmed through Decree nº 95.461, of December 11th 1987, which covers the "[...] Equal Pay for Male labour and Female labour in Work of Equal Value" (BRASIL, 1957).

All these affirmative actions were proposed to balance out the opportunities of individuals, so that despite the differentiated treatment, the overall goal is to bring about material equality, justifying the decision.

Law nº 13.104/2015 also has some inconsistencies, particularly regarding Article 121, §7, subitems I, II and III, of the Penal Code. This Law introduced the terms for increased sentences for femicide, providing for an increase of between 1/3 (one third) and 1/2 (one half) if the crime is committed during pregnancy or in the first 3 (three) months after giving birth; against a person under the age 14 (fourteen) years, over 60 (sixty) years or a disabled person; or in the presence of the victim's descendent or predecessor (BRASIL, 1940).

The above-cited causes for the increased sentences are justified due to the greater repugnance of the act, reflecting a higher degree of reproach and, consequently, they are the target for much criticism, indicating a possible legislative error. Gamil Föppel El Hireche and Rudá Santos Figueiredo (2015) comment on the theme:

> Subitem II replicates a provision that had previously increased sentences for murder. Concerning subitem III, the selective and isonomy violating character of the new legislation: a homicide committed against a woman, in the context of domestic violence and in conditions of disdain for gender, in the presence of the spouse or companion, does not escalate the crime.
> Subitem I violates the principle of proportionality in tying an unjustified increase in sentence in relation to females within the first three months of giving birth. There is no reasonability in this, while the period (three months and not six months or a year) was arbitrarily chosen.

The doubts and queries take the following lines: if these circumstances result in greater reprehensibility, why do they only apply to the aggravation of femicide and not all types of homicide? Using this logic, the fact that a femicide was committed in the presence of the victim's descendent or predecessor should be applied to homicide in general, since one case is as reprehensible as the other.

The same applies to the other causes for increased sentences under Article 121, §7, and subitems of the Penal Code.

This error, also called legislative inconsistency, raises the question of symbolic criminal law for the defenders of this theory. This is because, in popular terms, one can note a double standard, since circumstances that in any other case would represent a higher degree of reprehensibility end up being applied in the event of femicide only.

Final considerations

Currently, women have gained an enormous range of rights, but there is nevertheless a major difference between men and women, a difference that pulverises the fundamental right to material equality, due to the physical disparity of men and women which places women in a vulnerable situation in the face of their tormentors.

This inequality and the rising numbers of homicides against women, mainly committed by men in the domestic and family environments, or simply motivated by a disdain or discrimination against the condition of woman, led the lawmakers to edit Law nº 13.104/2015 and introduce the term femicide to the national legal framework to identify the homicides committed in virtue of the female element, with the condition of woman taken to mean, for the legal purposes as per subitems I and II § 2-A, do Article 121 of Brazilian Penal Code, as the crime committed in the context of domestic and family violence, in addition to the crime committed because of a disdain or discrimination against the condition of woman.

According to the research performed, the current jurist opinion that views the aggravation of femicide as being mixed, albeit not in the majority, is the one that lends greater coherence to current normative interpretation.

The hypothesis from subitem I, § 2-A, Article 121 of the Brazilian Penal Code is objective in nature, existing jurist debate notwithstanding having been addressed herein, and is applicable to homicide committed against women in the context of domestic and family violence.

Despite disputes in the opinions of jurists, there is room for the coexistence of femicide in the event of domestic and family violence of subitem I, § 2-A, Article 121 of the Brazilian Penal Code with the reduced sentence benefit under §1, Article 121 of the Brazilian Penal Code, since the subparagraph is clearly objective in nature, tied to the locality it occurred, allowing that the crime may have been committed because of the motives described in §1.

In relation to the application of the aggravation from subitem I, §2-A, Article 121 of the Brazilian Penal Code concomitantly with the aggravations from subitems I, final part, and II, §2, Article 121 of the Brazilian Penal Code, there is no obligation to recognise a possible argument for *bis in idem*, given the different legal structures since the first is objective in nature and the others are subjective.

The hypothesis covered by subitem II, §2, Article 121 of the Brazilian Penal Code is inherently tied to the subjective factor and is characterized by the discrimination or disdain for the condition of woman as motivation for carrying out the crime.

In this case, for femicide to apply, it is necessary that the crime of homicide (murdering someone) is committed against a woman due to her condition as female, as per Law nº 13.104/2015, which included paragraphs and subitems in Article 121 of the Brazilian Penal Code.

To this end, it is necessary to appreciate the will of the perpetrator, so that the occurrence of the aggravation may be recognized. In this hypothesis, allowing for the subjective nature of subitem II, §2-A, Article 121 of the Brazilian Penal Code, it is not possible for femicide to include the benefit of reduced sentence as per §1; in addition to the aggravation described in subitems I, last part, and II, §2, all from Article 121 of the Brazilian Penal Code. This is because femicide practised in the hypothesis of disdain for or discrimination against her condition of woman precludes the application of reduced sentences under §1, Article 121 of the Brazilian Penal Code, due to incompatibility of the facts.

Similarly, it appears impossible to apply the aggravations from subitems I, final part, and II, of §2, for crimes qualified by subitem II, §2-A, all from Article 121 of the Brazilian Penal Code, since they are all subjective in nature whereby any application would result in *bis in idem*, since murdering a woman because of a disdain for her condition as woman constitutes a motive of "moral turpitude", while murdering a woman due to a discrimination against her condition as woman constitutes a motive of "futility".

Viewing the victim of femicide from a post-modern interpretation, with the 1988 Federal Constitution as starting and focal point, radiating its rules and principles on the whole legal framework, the aggravation of femicide covers both *cis* and *trans* women, the latter conditional on their having undergone a sex change operation and legal registration of their new name, so as to comply with both the sex and gender issue in relation to the application of the criminal law addressed herein.

Regarding the symbolism that the aggravation of femicide could represent, in the case of Article 121, §2-A, subitem II, the symbolism exercised by the regulation is evident since the aggravation is only of a subjective order, characterised on the whole by the motivation (turpitude or futility) of the perpetrator which if recognised will then result in the one of the aggravations covering motive, as per Article 121, §2, subitem I, final part, and subitem II of the Penal Code. From this viewpoint, the aggravation has the role of demonstrating that the State is concerned with violence against women, revealing its symbolic function

However, the regulation also qualifies homicide committed in a domestic or family scenario, determining the application of the aggravation in a clear and objective manner, meaning that a homicide committed in the context of domestic and family violence, which could previously be classified as simple homicide if it did not fit any of the aggravations, can now be recognised as aggravated homicide in an objective form by the fact that it occurred in that particular situation.

In terms of constitutionality, Law nº 13.104/2015 is constitutional, since it is aligned with the principle of equality, as per the header in Article 5, 1988 Constitution (BRASIL, 1988).

Finally, it is worth stressing that, despite the vital gains made by women, there is still a long way to go to eradicate the culture of violence against women, and this will only be possible through education and raising awareness of the theme, in order to eliminate chauvinistic and misogynist customs while propagating a culture of respect and equality of gender.

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