Recebido em: 30/08/2023
Aprovado em: 07/11/2023

DISCRIMINATION AND LAW BEYOND PUNISHMENT. JURY DISCRIMINATORY ACQUITTALS. THE BRAZILIAN SUPREME COURT AND ADPF 779 DECISION.

DISCRIMINAÇÃO E DIREITO PARA ALÉM DA PUNIÇÃO. ABSOLVIÇÕES DISCRIMINATÓRIAS PELO TRIBUNAL DO JÚRI. STF E A DECISÃO DA ADPF 779

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ABSTRACT: Discrimination has many faces unreachable by law in its usual punishment remedies. Jury discriminatory acquittals involving women victims are an example. Juries may discriminate against women when freeing men who killed their female partner "because she misbehaved." In Brazil, a defense argument was developed over time for that purpose: "the self-defense of a man's honor." Can law help minimize this kind of discrimination? Are there legal remedies available beyond punishment? The Brazilian Supreme Court tackled this problem in the ADPF 779 case. One of the legal remedies engaged by the Court in the case was an appeal: the possibility of prosecutors appealing jury discriminatory acquittals to appellate courts which were given authority to declare those acquittals void, remanding the case to a new jury trial. This paper aims to describe the jurisprudential construction of the appeal as a remedy in Brazilian Constitutional Law since 1988, explaining how the Court employed it in the ADPF 779 decision and to discuss its potential and limitations to deal with discrimination. The appeal remedy has costs and does not guarantee the second jury trial will render a non-discriminatory decision. But it has potential that should not be dismissed. Monitoring the results of its use may produce essential data for legal discussion on the matter.

KEYWORDS: Women discrimination; discriminatory acquittal; jury nullification; honor killings

RESUMO: Sanções impostas pela ordem jurídica têm uma capacidade limitada de enfrentar determinadas manifestações de discriminação. Tribunais do júri podem discriminar mulheres ao declarar inocentes homens que matam ou tentam matar suas parceiras por conta de alguma espécie de "comportamento impróprio" delas, como adultério. A tese da "legítima defesa da honra" masculina foi desenvolvida nesse contexto. No julgamento da ADPF 779 o STF associou a essa prática discriminatória uma outra espécie de eficácia jurídica, diversa da sanção: atribuiu-se ao Judiciário um poder de revisão. O STF consagrou a possibilidade de o Ministério Público apelar de decisões absolutórias com caráter discriminatório de modo a obter-se a nulidade do júri e a realização de um novo. O objetivo deste artigo é descrever a construção, desde 1988, dessa modalidade de eficácia jurídica em relação a decisões absolutórias do júri, sua aplicação pelo STF na ADPF 779 bem como seus potenciais e limitações para lidar com o fenômeno da discriminação. A conclusão apurada é a de que o poder de revisão consagrado pelo STF tem custos a serem considerados e não garante que o segundo júri não será discriminatório; nada obstante, pode gerar incentivos na promoção da igualdade e contribuir para alterações mais profundas nos

padrões sociais. O monitoramento da utilização real do poder de revisão e de seus resultados ao longo do tempo fornecerá elementos importantes para a reflexão jurídica sobre o tema. A metodologia utilizada combinou a pesquisa qualitativa exploratória e a revisão bibliográfica.

PALAVRAS-CHAVE: Discriminação contra mulher; legítima defesa da honra; ADPF 779; nulidade júri;

Discrimination and law beyond punishment. Jury discriminatory acquittals. The Brazilian Supreme Court and ADPF 779 decision.

> *Exodus 23.1-2: "Do not spread false reports. Do not help a guilty person by being a malicious witness. Do not follow the crowd in doing wrong. When you give testimony in a lawsuit, do not pervert justice by siding with the crowd;"*

A TRIBUTE TO JUSTICE LUÍS ROBERTO BARROSO

This paper is written as a tribute to Justice Luis Roberto Barroso and three of his ideas. Justice Barroso is first and foremost a scholar who believes good ideas may foster public debate, get people together to work out solutions, change practices, and help make a better society. To discuss his ideas is the best way to honor him.

Justice Barroso has written extensively about the effectiveness of Brazilian Constitutional norms and how legal remedies can foster the implementation of constitutional provisions so that reality can look more like the constitutional ideal (BARROSO, 2009). Secondly, on the role of Supreme Courts, Justice Barroso believes they should occasionally perform an "enlightened" role, pushing society and history (BARROSO, 2018). Finally, in the divisive field of Brazilian criminal law, Justice Barroso has highlighted the need to balance its twofold constitutional purposes: (i) to protect the defendant's individual rights and (ii) to safeguard society and shield the human rights of people in general (BARROSO and ARAÚJO, 2023).

The issue discussed in this paper connects these three ideas Justice Barroso has been putting forward for a while. The Brazilian Constitution of 1988 provides for equal treatment for men and women. Therefore, the legal consequence associated with killing women should be like the one associated with killing men. But this is not always the case, and the usual legal remedies – punishment – cannot be used to deal with this kind of discrimination when it happens in a jury trial. Should Courts develop other legal remedies? Or should they wait for Congress to decide? How should Courts deal with the defendant's rights in the context of discriminatory

acquittals, considering the constitutional role of criminal law? These are the questions the Brazilian Supreme Court faced when deciding ADPF 779, and Justice Barroso's three ideas mentioned above were pivotal to the outcome.

INTRODUCTION

What are law's limits and potential to prevent and redress discrimination? The primary legal remedies for this purpose are punishment of the person discriminating against others and their obligation to compensate for any damages resulting from the discrimination. Discrimination, though, poses one of the most complicated issues for the law to deal with, for it has many faces and manifesting behaviors flowing from an ingrained mindset usually built when we were raised. In this setting, punishment can target and prevent cruder practices that are easily spotted – which is of utmost importance, of course – but discriminatory behaviors taking place outside the legal radar will probably continue to happen and do harm.

The limitations of law and punishment in this context are evident and as law cannot deal with all misconduct, it should focus on salient practices, while other interventions tackle the more subtle ones. In this sense, the law will not be able to prevent all kinds of discriminatory behavior. It is therefore welcome that research in psychology, for instance, is testing different non-punitive approaches to diminish prejudice on a deeper level by destabilizing stereotypes[2].

But what should be considered for the law to give up and leave discriminatory practices to other interventions? Where to draw the limit of the law outreach and why? Some types of discrimination are too egregious and frequent to be ignored by law, even if hidden in culture and facilitated by a venerable institution: discriminatory jury deliberations and decisions in criminal cases leading to acquittals are one example.

Many sorts of prejudice can fuel discriminatory acquittals: racial, gender, religious, political, and national, among many others. This paper focuses on one kind of discriminatory acquittals: those involving violence against women perpetrated by their husbands, boyfriends, or partners as an alleged "reaction" to what was considered by the defendant an "improper" behavior on the part of their female victims. The phenomenon is described by expressions like *honor killings or honor assaults or honor crimes* in some places and has many cultural nuances around the globe. In some communities, talking to a foreign man can result in a woman's death with little chance of the murderer ever facing trial (REDDY, 2008; VITOSHKA, 2010).

2 In *Think Again. In the Power of Knowing What You Don't Know,* Adam Grant, an organizational psychologist, describes exciting examples of how non-punitive approaches can challenge ingrained prejudices and foster chance (GRANT, 2021, p. 121).

Adultery or suspicion of adultery was a typical example in Brazil, and juries acquitted many husbands who killed their wives in this context (TOIGO, 2010; RAMOS, 2012; LAGE and NADER, 2013).

The discriminatory acquittals just described are experienced by many societies where women were or are regarded as inferior to men, but the legal solution framed by the Brazilian Supreme Court (STF) in the ADPF 779 case, rendered in August 2023[3], is uncommon in other jurisdictions and may add to the global discussion. As we will see, STF developed a set of legal remedies – not related to punishment or civil liability – including the possibility of State Courts to hear appeals from prosecution and declaring void a discriminatory acquittal jury deliberation so that a new jury trial must take place (the appeal remedy).

The legal possibility of State Courts to declare void an acquittal jury deliberation may seem controversial in other jurisdictions, but it is not new in Brazilian law. The Brazilian Supreme Court has decided several cases on the issue since 1988 when the Federal Constitutional was enacted; some are still pending resolution. When ADPF 779 was filed, the Court had a well-developed legal remedy to use right in hand.

This paper is organized, after the initial tribute to Justice Luís Roberto Barroso and this introduction, in four parts and a conclusion. Part 3.1 briefly presents the context of discriminatory acquittals involving female victims in Brazil, some constitutional reasons they should receive legal attention, despite being out of reach from usual legal remedies, and a sum of the ADPF 779 STF order. Part 3.2. describes the constitutional route the Brazilian Supreme Court opened to allow a review role to appellate state courts so they can declare void acquittal jury deliberations and decisions. Part 3.3 explains how the ADPF 779 decision engaged this legal remedy in confronting a discriminatory practice that other sanctions cannot reach: jury acquittals that discriminate against women whose partners killed or tried to kill. Part 3.4. discusses the potential and limitations of the appeal remedy developed by the Brazilian Supreme Court in the case.

1. ANALYSIS

1.1. Jury discriminatory acquittals, Brazilian context and ADPF 779

People discriminate against others, so it is not surprising that juries discriminate against defendants and victims (as individuals or as members of a social group)[4], the latter being the focus of this paper. There are various risk factors for discriminatory deliberations, many related to social dynamics

3 STF, ADPF 779, Rapporteur Justice Dias Toffoli, DJe August 10, 2023.

4 Discrimination can be directed to anyone, including prosecutors, judges, witnesses, not only defendants and victims.

and others connected to the jury trial itself: e. g., how jurors are selected, how many of them are needed to reach a verdict, how the case is presented to them, etc. Regardless of the factors involved in each case, if a discriminatory jury deliberation is issued, can the law do anything about it? The ordinary answer is negative or something close to that.

Courts also discriminate against defendants and victims, but Courts' orders must state their rationale and may be subject to appeal: discriminatory reasoning can be more easily noticed and challenged. Discriminatory jury deliberations are different and pose an extra challenge. Legal systems usually protect jurors and their discussion against scrutiny and review, and they do that for important reasons. The consequence is that it is challenging to assert why jurors decided and whether their reasons were discriminatory. Remedies to deal with jury deliberation are minimal.

Besides, juries sometimes decide outside the legal framework, even against the existing law, and disconnected from the evidence presented. This power – the jury nullification power – is considered inevitable in jury trials. Besides its inevitability, authors have different opinions on whether the nullification power is positive or not for democracy and the rule of law, whether it should be incentivized to foster a social cause, whether judges should tell jurors anything about it, especially whether they should tell them they have this power or to warn them not to use it (HOROWITZ & KERR, 2001; BROWN, 1997; LEIPOLD, 1996; BUTLER, 1995; WEINSTEIN, 1992/1993).

Juries in the past have resisted applying the abundance of capital penalties provided by law in England, and juries in the U.S. Northern States resisted enforcing slavery legislation. But the same power that allows juries to resist unjust laws and foster legal change through jury nullification also allows discriminatory deliberations. Jurors can decide outside of the legal framework for different purposes, including, unfortunately, discriminatory ones (TETLOW, 2009). In Brazil, jury nullification in favor of acquittal (mercy acquittal) has been legally provided for since a legal reform in 2008[5]. If jurors have the power to nullify and decide outside the legal frame, what can the law do?

Another reason can be added at this point to push the phenomena outside the reach of law. Defendants have constitutional enforceable due process rights to challenge a discriminatory conviction. Some solutions exist substantiated on the defendant's standing to appeal on the grounds, for example, on equality and due process rights and request a new trial. Still, victims or their families do not have an individual and enforceable right to the defendant's conviction by a jury (TETLOW, 2009). Nor potential future victims belonging to the discriminated category of person possess a remedy against discriminatory

5 Federal Law 11.689/2008.

acquittals that deprive them of the benefits of criminal law deterrence. This sort of discrimination cannot be challenged by any individual right.

Despite the limits of usual legal remedies, discriminatory acquittals involving female victims continue to be a constitutional violation in Brazil and probably in other legal systems which values equal protection and equality among men and women. The objective violation of the Constitution is the following. The Constitution protects liberties and rights (e.g., life). The law promises to react in a certain way if these liberties or rights are violated, and this reaction is vital to their protection. The Constitution also requires the law to make the same promise to everyone. But the law fails to fulfill its promise if the victim is a woman who has behaved in a way her partner considers shameful: the promise is valid only to men. The discrimination is too blunt and harmful to be ignored by the law.

And the stakes rise when criminal law is involved. Victims of crimes and their families are dealing with dramatic and unjust harms and often urgent and irreplaceable losses to which they did not contribute. Families and friends lost loved ones; people are injured; women are beaten; children are abused; lives are destroyed and disrupted, and those still living carry deep and disturbing wounds in their bodies, minds, and emotions because of what happened. Women's trust in the rule of law is understandably compromised in the context of the discriminatory acquittals discussed in this paper: they can be the next victim, and the law will not react as promised.

The stakes are high as well from the indicted and defendant's point of view. Criminal law usually impacts personal freedom: incarceration, even when other harms do not accompany it (and they typically do), is a dramatic restriction of one's life that cannot be undone. Days, months, and years in prison cannot be returned to an inmate. Lifetime does not stop, and it is inevitably limited. It is hard to look at it lightly: money is replaceable to some extent, but life is not. This makes any legal solution in criminal discriminatory acquittals sensitive.

In Brazil, juries only decide cases involving intentional crimes against human life; judges decide all other matters. Therefore, any discriminatory jury deliberation in Brazil will involve high-profile criminal cases. In jurisdictions where juries decide civil cases, discriminatory deliberations and decisions can happen in any of them, but discrimination in criminal cases naturally tend to be more troublesome.

Besides, in Brazilian case law, defense attorneys developed a line of legal reasoning over the 20th Century to place this discriminatory acquittal within legal boundaries. As in many systems, self-defense is a justification defense in Brazil. Defense attorneys developed the "the self-defense of a man's honor" argument before juries, labeling the violence against women as a self-defense action by the defendant in the face of the women's behavior

that was considered to threaten his honor. The argument assumed men and women were essentially unequal before the law as it gave similar weight to a woman's life and a man's "honor" (RAMOS, 2012; SILVEIRA, 2021). Note also that "the self-defense of a man's honor" is not the equivalent to the recognition by criminal law of altered emotional states, such as the notion of extreme emotional disturbance in American criminal law, that may lead to a reduction of the gravity of the crime or the punishment. By contrast, self-defense is justified violence, operating as a removal, in casu, of the illegality of the act. A successful self-defense results in a finding that no crime occurred.

One cannot know whether Brazilian juries acquitted defendants convinced by this defense argument as jurors' votes are secret in Brazil. History tells us the argument was frequently used and that many juries decided husbands or partners who had killed their wives in this context were not guilty, suggesting it was, to some extent, successful (TOIGO, 2010; RAMOS, 2012; LAGE and NADER, 2013).

And at this point, we get back to the initial question. May law help prevent discrimination when defendants are not held liable and punished because of unlawful discrimination on the part of a jury? Are there other remedies that may be useful? Or is this the limit to where the law can reach? What can the law do with a discriminatory jury deliberation that frees a defendant out of discrimination against women, possibly convinced by "the self-defense of a man's honor" argument?

The Brazilian Supreme Court (STF) dealt with precisely this challenge at the constitutional level in the decision rendered on August 2023: the ADPF 779 case[6]. The Court used three main remedies to tackle the problem, none of them forms of punishment. First, STF considered "the self-defense of a man's honor" argument to violate the Brazilian Federal Constitutional of 1988 and ruled that the Brazilian self-defense legal provisions could not be construed to encompass it (the declaratory remedy). Then, the Court order provided for two sets of remedies to prevent the use of "the self-defense of a man's honor" argument and discriminatory acquittals: (i) the Court banned the use of "the self-defense of a man's honor" argument in a jury (the banned speech remedy); and (ii), if it is used, the Court allowed the Judge to declare the jury void, and State Courts to hear appeals and declare

6 STF, ADPF 779, Rapporteur Justice Dias Toffoli, DJe August 10, 2023. During the Brazilian Supreme Court debates (open to the public and broadcasted), the Rapporteur Justice Dias Toffoli suggested to Congress and to women representatives in particular an amendment to the Brazilian Federal Constitution to exclude the right to a jury trial. According to Justice Toffoli, all criminal cases should be decided by a judge to present further discrimination (see https://www.migalhas.com.br/quentes/389157/toffoli-diz-para-congresso-propor-extincao-do-juri--passou-da-hora). It is beyond the scope of this paper to discuss the merits of the idea and if it would be even possible considering the Brazilian constitutional system. But his comment shows the engagement of the Court with the issue.

void a discriminatory acquittal jury deliberation so that a new jury trial must take place (the appeal remedy).

The appeal remedy is of particular interest for its novelty, as it can directly challenge a discriminatory acquittal that would otherwise be unchallengeable in its substance. Declaring the use of the "the self-defense of a man's honor" argument is unconstitutional, and proscribing its articulation before a jury is important, but what if the argument is presented? Or what if it is not verbalized, but a discriminatory acquittal is reached anyway? The appeal remedy offers a legal way to undo the discriminatory acquittal and opens the possibility of a new jury trial. How the Brazilian Supreme Court got to this idea is the content of the next topic.

1.2. The Brazilian Supreme Court and the control of jury deliberation by appellate state courts since 1988

Jury deliberations are constitutional matters in Brazil because Article 5, XXXVIII of the Brazilian Federal Constitution of 1988 considers the trial of intentional crimes against life cases by a jury a fundamental right. The provision also states the sovereignty of jury verdicts, and the secrecy of jurors' votes and requires proceedings to guarantee full defense rights to defendants[7]. Brazilian scholars and the Brazilian Supreme Court's opinions describe juries as venues for fairness-enhancing popular participation in public matters, a goal several provisions of the Brazilian Constitution provide for (TUCCI, 1999). Jury deliberations may trigger constitutional debates in Brazil on precisely these two dimensions: the defendant's rights and popular participation in the criminal justice system.

The same Article 5, XXXVIII of the Brazilian Constitution defers to federal criminal procedure law the organization of the jury proceedings. The Federal Code of Criminal Procedure (Código de Processo Penal - CPP), enacted originally in 1948, regulates the issue. For this paper, it is worth mentioning three CPP rules. In Brazil, prosecutors, not grand-juries, decide on whether to indict and judges decide on whether the indictment meets the requirements of the law, sending to jury trials only the cases in which an indictment was deemed formally and substantively adequate (Articles 406 – 421). Juries have 7 (seven) jurors and deliberate by a simple majority vote for conviction and acquittal verdicts (Article 447). Both prosecutors and defendants can appeal to appellate state courts against a jury deliberation considered "manifestly contrary to the evidence on record." (Article 593,

7 Article XXXVIII - The institution of the jury is recognized, with the organization determined by law, guaranteeing the following: a) full defense; b) secrecy of the votes; c) sovereignty of the verdicts; d) jurisdiction to try cases of intentional crimes against life.

III, d)[8]. The appellate court can, in this case, decide the jury deliberation void and order a new jury trial. The second jury deliberation cannot be appealed under the same argument. For several decades, then, this possibility to appeal a jury deliberation existed in Brazil as was used by defense teams and prosecutors.

After the enactment of the Brazilian Federal Constitution of 1988, the Brazilian Supreme Court (STF) decided cases challenging whether Article 593, III, d, from the Code of Criminal Procedure, the one providing for appeals against a jury decision considered manifestly contrary to the evidence on record, was consistent with the new Federal Constitution. The challenge focused on CPP's possibility for prosecutors to appeal against an acquittal verdict, arguing that the jury deliberation was incompatible with the evidence on record. The argument challenging this legal provision was that only defendants, not the prosecution, should be allowed to appeal, out of the full defense guarantee constitutional clause.

STF disagreed with the challenge, ruling the federal law provision valid and has reasserted that understanding over time. The Court stated that the sovereignty of jury verdicts should coexist with due process, also a constitutional provision in Brazil, inserted in the "Individual and Collective rights" section (Article 5, LIV, and LV). The Court considered that preventing public prosecutors from asking for a new jury before a deliberation contrary to the evidence would harm due process. According to the Brazilian Supreme Court, in this context, due process should not be construed exclusively as an individual right of the defendant but should be guaranteed to public prosecutors and defendants alike, allowing both parties the same procedural resource[9].

The Brazilian Supreme Court's decision on the validity of Article 593, III, of the Code of Criminal Procedure consolidated in Brazilian constitutional and criminal law a system in which appellate courts have an overseer role in jury's deliberations, whatever the decision is. The Court understood this overseer role as harmonious, at least *a priori*, with the "sovereignty verdict of jury deliberation" constitutional clause. Also, the overseer role of appellate courts was not exclusively connected by the Court with the defendant's protection and the guarantee of "full defense" but more broadly with the

8 The Code of Criminal Procedure was initially enacted in 1941, but the actual Article 593, III, d, was changed by Law 263 in 1948. The appeal mentioned in the text was allowed since 1941 in Article 592, III, b, in slightly broader terms, *verbis*: "injustice of the jury's decision, as it finds no support in the evidence present in the case files or presented during the trial.". Other appeals are possible mostly on procedural grounds.

9 The two STF's Chambers rendered many decisions stating this understanding and quoting just one is enough: STF, 2a Chamber, Rapporteur Justice Ricardo Lewandowski, RHC 118.656, *DJE March 17, 2014:* "The jurisprudence of this Supreme Court is well-established that the constitutional principle of the sovereignty of verdicts, even in cases where the decision is manifestly contrary to the evidence on record, is not violated by ordering a new trial before the Jury Court. This is because the right to challenge the decisions of the Jury Court coexists with the principle of respecting the popular verdicts. Precedents have supported this interpretation. Denying the right of appeal to the Public Prosecutor in cases where there is a clear discrepancy between the popular verdict and the evidence on record would amount to a violation of the guarantee of due process of law. This guarantee encompasses, among other essential elements, the right to equality between the parties."

"correction" of the jury deliberation, as public prosecutors can also appeal. According to the ruling, if the state court deciding the appeal finds that the evidence does not support the jury's conclusion, a new jury needs to take place to retrial the case. Two coinciding deliberations from different juries are required to overcome the appellate courts findings about the evidence, as a second appeal on the same grounds is not allowed.

The discussions before the Brazilian Supreme Court did not examine the discriminatory acquittal phenomena. The focus was on the due process clause interpretation. As mentioned, STF's opinion was that it should be construed not as an exclusive right of defendants but as a guarantee of equality between the parties, granting prosecutors the same right to appeal that defendants have. According to the Court, even before ADPF 779, it was already possible for prosecutors to appeal a jury deliberation – any jury deliberation involving discrimination against the victim or not – if the verdict was manifestly contrary to the evidence on the records.

After this first question was settled, a new constitutional dispute involving jury deliberations and the possibility of review by state courts reached the Brazilian Supreme Court. The question now dealt with the construe of Article 593, III, of the Code of Criminal Procedure *vis* the constitutional sovereignty of jury deliberations. What are the limits of the state court's oversight role consistent with the sovereignty of jury deliberation constitutional clause? What can count as "manifestly contrary to the evidence on record"?

Several cases were decided by STF on this question, usually involving appeals filed by public prosecutors against jury deliberation that had freed the defendant on the argument that the acquittal verdict was "manifestly contrary to the evidence on record.". The Court's orders usually reestablished the jury deliberation and answered the questions above with the following guidelines. Suppose there are plausible versions of the event according to the evidence. In that case, the state court must defer to the plausible version preferred by the jury[10]. The appellate court must respect the jury's reasonable interpretation of the evidence.

In an opinion from 2015 (HC 126.516), the First Chamber of the Brazilian Supreme Court decided to restate the limit to the oversight role of the appellate court according to these lines: *"It is not within the jurisdiction of the Court of Justice [the state appellate court] to conduct a technical and exhaustive examination of the evidence to ultimately choose the evidentiary aspect that best fits its conviction, thereby dismissing the version chosen by the jury, which, as is well known, renders its verdict based on [the] personal conscience [of each juror]*."[11]

10 STF, 2a Chamber, Rapporteur Justice Joaquim Barbosa, HC 85.904, DJE June 29, 2007.

11 STF, 1a Chamber, Rapporteur Justice Luiz Fux, HC 126.516, *DJE June 15, 2015.*

Although allowing prosecutors to appeal acquittal deliberations, STF did not extend the review jurisdiction of appellate courts to make their assessment of the evidence under the "manifestly contrary to the evidence on record" legal criteria equal to the one of the jury. On the contrary, the jury assessment of the evidence should be privileged, particularly in an acquittal decision. Appellate courts should self-restrain and use their appellate review jurisdiction solely to avoid an illogical or preposterous jury decision, not to force its convictions on the matter to prevail. The boundaries can be tricky here as what counts as an illogical decision may be hard to define. Again, the issue of discriminatory acquittals was not discussed by the Court in any way.

While courts reviewed on appeal jury deliberations all over the country, Congress discussed the topic. A new federal law was enacted by Congress in 2008, changing the Code of Criminal Procedure and the jury organization: Federal Law 11.689/2008. One of the changes involved jury instructions. The new Article 483, III, of the Code of Criminal Procedure gave juries the nullification power to free defendants outside the legal framework, with significant repercussions to the limits of the state court's appellate jurisdiction over jury deliberations[12].

According to the new legislation, two jury instruction questions are asked first: whether the facts described by the prosecution happened and whether the defendant committed the crime or participated in it. If most jurors answer "no" to any of these two questions, the defendant is acquitted, and no other questions are asked. If most jurors answer "yes" to any of them, a generic query is presented: "Does the juror free the defendant?". If most jurors answer "yes," the defendant is acquitted. If they answer "no," new questions are asked about causes to aggravate or mitigate the sentence to be rendered.

According to Congress' materials, the purpose of the new legislation was to simplify and standardize the questions asked in a jury trial, focusing them on the three fundamental issues to be decided[13]. The previous legislation required the judge to prepare a customized and sometimes complex set of questions considering the arguments prosecutors and defense lawyers presented in each case.

The new generic question made explicitly possible for juries to decide on reasons other than those pertaining to the facts and the evidence or to the conduct of the defendant. The legislation invites in consideration of mercy, compassion, political and ideological views, and humanitarian considerations, among others. Unfortunately, discrimination against the defendant or the

12 The case decided by the First Chamber of STF in 2015, and mentioned in the text, didn't discuss this new piece of legislation.

13 https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=92850 (access on October 1, 2023).

victim (or the group the victim belongs) can also manifest in this new jury instructions environment.

The 2008 legislation brought new questions to the use of the appellate jurisdiction of state courts over jury decisions, including standing. One such questions is whether public prosecutors still be allowed to appeal acquittal jury deliberations based on the generic question now provided by law. Legislation permits jurors to free the defendant for reasons unrelated to the law or the evidence. Would allowing prosecutors to appeal a jury deliberation make sense because it was "manifestly contrary to the evidence on record"?

These questions divided legal scholarship, in state and federal courts, and even the Brazilian Supreme Court (CAVALCANTE SEGUNDO & SANTIAGO, 2015, ANDRADE & FISCHER, 2020; DIAS & OLIVEIRA JR, 2020; SILVA, 2022). In 2018, after many decisions from lower courts in different directions, the Brazilian Superior Court of Justice (STJ), a court with highest infra-constitutional jurisdiction over the country, issued an order that should be followed by lower state and federal appellate courts (HC 313.251/RJ). According to the STJ order, prosecutors continue to have the power to appeal any acquittal jury deliberations "manifestly contrary to the evidence on record," even if based on the answer to the generic question now provided by CPC, Article 483, III. To most judges at STJ, the purpose of the new legislation was not to give juries an absolute power to free defendants. The opinion does not discuss the issue of discriminatory acquittals. The point is well summarized in this excerpt from the STJ decision:

> "The exoneration of the defendant by the jury, on the grounds of article 483, III, of the Criminal Procedure Code (CPP), even if driven by clemency, does not render an absolute and irreversible verdict. The Court reserves the authority to overturn such a decision if it becomes evident that the jury's conclusion significantly deviates from the evidence presented during the trial. Consequently, it remains entirely possible to exercise exceptional oversight over the jury's acquittal ruling to prevent miscarriages of justice and uphold the principle of dual appellate judicial review. Interpreting otherwise would entail accepting that the jury possesses complete and conclusive authority regarding the defendant's acquittal. However, in my view, this was not the legislator's intent when mandating the inclusion of a general acquittal question, as stipulated in article 483, III, of the CPP."[14]

14 STJ, Rapporteur Justice Joel Ilan Paciornik, HC 313.251/RJ, *DJE* March 27, 2018.

This discussion finally reached the Brazilian Supreme Court via what in Brazilian constitutional procedure is called "extraordinary appeal"[15]. The constitutional dispute revolves around the constitutional sovereignty clause of jury deliberations and the defendant's rights. If juries can free a defendant for reasons unrelated to the evidence or the law, would the possibility of appeal against this kind of deliberation harm the sovereignty clause? The two chambers of the Brazilian Supreme Court have different views on the topic, and in June 2020, the Court decided the matter would be examined by its full panel in the future.

The first of the Court two chambers has issued orders according to the same lines of the STJ decision mentioned above, highlighting that juries do not have boundless powers and are not free to give absurd acquittals. For most Justices in the First Chamber, the constitutional sovereignty clause is not harmed because the appeal grant will result in a new jury trial, and the new legislation from 2008 didn't change that: a jury will continue to have the final say on the matter. Also, from the perspective of the defendant's rights, the First Chamber considered that due process requires prosecution and defense to be treated equally, as STF has stated before:

> 1. The sovereignty of verdicts is a constitutional assurance of the Jury Tribunal, the competent body for adjudicating intentional crimes against life. It serves as the sole exhaustive instance for evaluating the facts and evidence within the trial process. Its decisions cannot be substantively supplanted by judgments rendered by judges or higher courts. It maintains exclusivity in the analysis of merit. 2. The introduction of the generic query into criminal procedural legislation (Law 11.689, June 9, 2008) was clearly intended to streamline juror voting by consolidating defense arguments into a single question rather than transforming the body of jurors into an "unassailable and boundless power.". 3. In our legal framework, even though the specific pronouncement of the Jury Tribunal holds sovereign authority as a judgment emanating from the constitutionally designated Natural Judge for intentional crimes against life, it is not beyond challenge, invulnerable, or limitless. It must respect the principle of dual jurisdiction. Precedents support this understanding. 4. An appeal does not supplant the constitutional provision of the Jury Tribunal's exclusive authority in assessing the merits of intentional crimes against life. When an appeal overturns the initial decision of the Jury Panel, it merely directs a fresh and definitive merit trial by the same Jury Tribunal. 5. While a constitutionally permissible new trial by the same Jury Tribunal is within the accusatory system established by our

15 STF decided on June 22, 2020, that the issue should be decided by the Full Panel (TEMA DE RG 1087 – ARE 1.225.585).

> legal framework as a safeguard of due process, a distinct interpretative differentiation for the purpose of appellate remedies between prosecution and defense is not feasible. Such a distinction would infringe upon the fundamental principle of contradiction, which mandates the dialectical conduct of proceedings (par conditio).[16]

The Second Chamber of STF, on the other hand, issued orders sharing a different understanding of the constitutional question. For Justices in the Second Chamber, after the new legislation from 2008, prosecutors cannot appeal acquittal jury deliberations grounded on the generic question for two reasons. For this set of Justices, this kind of appeal would harm the sovereignty clause of jury deliberation and would also violate the presumption of innocence, harming defendant's rights:

> 1. Jury Court and sovereignty of verdicts (Article 5, XXXVIII, "c", Constitution). Challenge of acquittal based on a generic question (Article 483, III, combined with §2, Criminal Procedure Code) due to a scenario of a decision blatantly contrary to the evidence on record (Article 593, III, "d", Criminal Procedure Code). Acquittal by leniency and sovereignty of verdicts. 2. The Jury is an institution aimed at ensuring citizen participation in Criminal Justice, constitutionally enshrined through the principle of sovereignty of verdicts (Article 5, XXXVIII, "c", Constitution). Consequently, the applicable appeal against the substantive decision of the jurors is limited, only being admissible under the circumstance defined in subparagraph "d" of Article 593, III of the Criminal Procedure Code: "when the decision of the jurors is manifestly contrary to the evidence on record." In the event of the success of such an appeal, the tribunal composed of professional judges can only subject the defendant to a new trial by a jury. 3. In the legislative reform of 2008, the procedure of the jury was substantially altered, including the method of questioning the jurors. A generic and obligatory question was introduced, where the lay judge is asked: "Does the juror acquit the accused?" (Article 483, III and §2, Criminal Procedure Code). In other words, the jury can acquit the defendant without any specification and without the need for motivation. 4. Considering the generic question and the unnecessary requirement for motivation in the jurors' decision, the possibility of acquittal by leniency is established. In other words, even in clear contradiction to the evidence on record. If the juror can acquit the defendant without specifying the reasons when answering the generic question, and thus, on any grounds, there is no acquittal based on such

16 STF, 1o Chamber, Rapporteur Justice Alexandre de Moraes, RHC 226.879 AgR, DJe May 17, 2023.

> rationale that could be deemed "manifestly contrary to the evidence on record.". 5. Restriction on the prosecution's appeal based on Article 593, III, "d", Criminal Procedure Code, if the acquittal is grounded in the generic question (Article 483, III and §2, Criminal Procedure Code). No violation of the principle of equality of arms. Presumption of innocence as a guiding principle of the criminal process structure. No violation of the right to appeal (Article 8.2.h, American Convention on Human Rights). Possibility of limiting prosecutorial appeals. The internal appeal lodged by the Federal Public Ministry is denied, upholding the monocratic decision issued, which, by invalidating the Appellate Court's judgment, reinstated, as a consequential effect, the acquittal judgment issued by the Jury Court's Presidency.[17]

The Second Chamber's decisions on this topic were unanimous but one of the Justices (Justice Edson Fachin), despite following the same conclusion, pointed out as an obiter dictum a problematic issue he considered the Court would soon need to examine: discriminatory acquittals. Finally bringing this issue to light, Justice Fachin pondered about the correct approach to a hypothetical situation in which a jury frees a husband who killed his wife because she did something he considered shameful to him on some "honor killing" reasoning, using the general jury instructions acquittal question from article 483, III, CPP. Or, what if a jury acquits a defendant who killed a person from a minority group based on some hate and discriminatory discourse shared by the defendant and jurors? Would article 483, III, CPP forbid any appellate oversight from state courts? Is this consistent with the Constitutional provisions which provide for women's equal rights and make discrimination illegal?

His point was that the general question from article 483, III, CPP, does allow the jury to decide on non-legal arguments. Still, it does not prevent appellate courts from assessing what kind of non-legal reason was used by jurors to free the defendant. Both provisions had to coexist. Eventually, some of the juror's reasonings could violate constitutional provisions and be invalid, allowing trial or appellate courts to declare jury deliberation void in these cases. In other words, according to Justice Fachin, jurors can acquit defendants based on non-legal arguments because of article 483, III, CPP, but not on any non-legal view: some of them may be inadmissible according to the Constitution.

Justice Fachin's comment was an obiter dictum at that point, and the Court did not decide the topic. As mentioned, in June 2020, the Court agreed to examine as a full panel whether prosecutors can invoke the "manifestly contrary to the evidence on record" provision to appeal jury deliberations

17 STF, 2a Chamber, Rapporteur Justice Gilmar Mendes, RHC 117.076 MC, DJe November 18, 2020.

grounded on the general acquittal question from article 483, III, CPP. The Supreme Court's decision on the matter is attentively awaited.

In the meantime, while postponing the decision on the broader issue for a future moment, STF quickly offered an answer to the problem foreseen by Justice Fachin when a case discussing it reached the Court. ADPF 779 was filed on January 6, 2021, and less than three months later, the Court issued a preliminary injunction. On August 1, 2023, the Court pronounced a final and unanimous decision, proscribing the "self-defense of a men's honor" argument from juries and allowing prosecutors to appeal acquittal verdicts, even those grounded on the generic question from CPP, article 483, III, if the reasoning for the jury deliberation might have been the "self-defense of a men's honor."

1.3. The Brazilian Supreme Court and the ADPF 779 decision.

The Brazilian Supreme Court (STF) has an important role – its primary role according to the Federal Constitution – as a Constitutional Court, hearing cases in which abstract as well as applied review of legislation takes place. The abstract judicial review system in Brazil allows the Brazilian Supreme Court to decide, with binding effects, on the unconstitutionality of a statute. STF can also decide extraordinary appeals against state and federal court decisions in cases in which a constitutional matter was raised and grant writs of habeas corpus in different circumstances. The system is complex, and the Brazilian Supreme Court may say something about jury deliberations in all these different procedural contexts.

ADPF[18] is one of the abstract judicial review proceedings that can be brought directly before the Brazilian Supreme Court. On January 6, 2021, a political party filed ADPF 779 asking the Court to rule as unconstitutional any interpretation of legal provisions from the Penal Code and from the Criminal Code of Procedure that encompassed the "self-defense of a man's honor" argument within the boundaries of self-defense justification. The constitutional grounds for the request were that the "self-defense of a man's honor" argument violates human dignity, the right to life, and equality among men and women, provided by Articles 1o, III, and 5o, I and LIV, of the Brazilian Federal Constitution. The petitioner in this case mentioned the discussion on the possibility of prosecutors appealing discriminatory jury acquittals based on the generic defense question discussed above but did not formulate a direct constitutional question on the matter.

Indeed, the constitutional discussion at ADPF 779 did not revolve around individual rights. The Court incidentally mentioned the defendants'

18 ADPF – Arguição de Descumprimento de Preceito Fundamental.

due process rights to state they are not violated by its order. Furthermore, the ADPF 779 decision does not refer to any individual right of victims or their families to the conviction of a particular defendant. The main constitutional question before STF was whether the objective dimension of constitutional rights like human dignity, right to life, and equality among men and women, considered in the normative space they together project, crafted a collective right to jury deliberations that do not discriminate against women. And if it did, what legal remedies were required to materialize this right. The Brazilian Supreme Court answered the first question in the affirmative. The more complicated issue was which remedies could be used in the case.

On February 26, 2021, the Rapporteur, Justice Dias Toffoli, issued a preliminary injunction stating the unconstitutionality of the "self-defense of a men's honor argument," forbidding the self-defense legal provisions to be construed as encompassing it and prohibiting defense attorneys to articulate directly or indirectly this kind of argument before juries across the country. The order mentioned that if the defense used the argument, this would cause the jury to be declared void but did not decide on the possibility of appeal by prosecutors if the acquittal was grounded on the generic question from CPP, article 483, III[19]. After the Rapporteur issued the preliminary injunction, the petitioner in the case filed a motion asking the Court to decide specifically about this latter question.

On March 15, 2021, the full panel of the Court ratified the preliminary injunction issued by the Rapporteur. Moreover, it expanded on who would be forbidden to articulate the "self-defense of a man's honor" argument in any stage of a jury trial proceeding. Besides the defense attorneys, the Court also directed the banned speech order to prosecutors, police officers, and judges. Justices again discussed the possibility of appeal when the acquittal was grounded on the generic question from CPP, article 483, III, but did not decide on it[20].

On August 1, 2023, STF reached a unanimous merit decision on ADPF 779 and issued an order on the prosecutor's appeal against an acquittal verdict grounded on the jury nullification power. The final Court order restated that the "self-defense of a man's honor" argument was unconstitutional and could not be construed from the law regulating the self-defense justification. The Court made permanent the provision from the preliminary injunction banning the argument from being articulated by anyone. Importantly, and the Court added two other remedies to deal with the issue: (i) if the "self-

19 The issuance of an individual injunction in ADPF 779 was unsurprising, as Justices in the Brazilian Supreme Court have extraordinary individual and monocratic power (ARGUELLES and RIBEIRO, 2018). The speed of the decision, though, was uncommon.

20 STF, ADPF 779-MC-Ref, Rapporteur Justice Dias Toffoli, DJe May 20, 2021. The opinion for the preliminary injunction is available at the Court website (www.stf.gov.br). The opinion for the final decision has yet to be published.

defense of a men's honor" argument is articulated the jury trial should be declared void by the Judge, although the defendant cannot request it if his defense was the one using the argument; and (ii) prosecutors may appeal an acquittal jury decision if it adopted the "self-defense of a men's honor" reasoning. In this latter case, state court ought to declare the trial void and order a new jury trial to take place, even if the acquittal was grounded on the generic question from CPP, article 483, III. The ruling published by the Brazilian Supreme Court on August 10, 2023, reads as follows:

> The Court, unanimously, has ruled entirely in favor of the petition presented in this assertion of the breach of fundamental precept, for the following purposes: (i) to establish that the concept of "defense of honor" is unconstitutional, as it contradicts the constitutional principles of human dignity (Article 1, Section III of the Constitution), the right to life, and gender equality (Article 5, heading, of the Constitution); (ii) to interpret Articles 23, Section II, and 25, both the heading and the sole paragraph, of the Penal Code, as well as Article 65 of the Code of Criminal Procedure, in a manner that excludes the "defense of honor" from the scope of the self-defense doctrine, and as a consequence, (iii) to prohibit the defense, the prosecution, the police authorities, and the Court from directly or indirectly employing the notion of "defense of honor" (or any argument that leads to this notion) during pre-trial or criminal proceedings, as well as during the trial before the jury, under the penalty of rendering the action and the judgment null and void; (iv) given the impossibility for the accused to benefit from their own morally reprehensible actions, the recognition of nullity is prohibited in cases where the defense has utilized this notion for such purposes. Lastly, the Court also found in favor of the alternative request presented by the petitioner, thereby interpreting Article 483, Section III, § 2, of the Code of Criminal Procedure following the Constitution, to affirm that the authority of the jury's verdict is not undermined by the appellate decision that annuls an acquittal based on a general question, when such a decision, in any way, might imply the revival of the objectionable "defense of honor" doctrine.

1.4. Assessing the appeal remedy used in ADPF 779 decision.

Having declared unconstitutional the "defense of men's honor" speech in the context of criminal proceedings and the construction of criminal law and procedure provisions to allow it as a type of self-defense, the Brazilian Supreme Court's decision at ADPF 779 put forward two sets of legal remedies to deal with discriminatory acquittals by juries. The first tool tries to control speech: the arguments used by all legal actors involved in a jury trial and the

criminal proceedings leading up to it. Important as it is, this article does not further discuss this first remedy. The second is the appellate review remedy (the appeal remedy): it gives state officials – trial judges and appellate courts – an overseer role to declare void a jury proceeding or a jury decision and remand the case for a new trial. The Court also gave prosecutors standing to appeal an acquittal verdict contrary to the evidence, regardless of the generic jury nullification provision the CPP seemed to have adopted in its reformed jury instructions questions.

The Court organizes the remedies in a sequenced, layered fashion. First, the Court stated that it was unconstitutional to construe the justification of self-defense to encompass the "self-defense of a man's honor" argument because it violates the Constitution. Then, the Court order banned the argument from being verbalized during the jury trial, hoping it would not be inside the jurors' minds already. But what if the argument is articulated despite the STF order? In this case, the Court decision provides for the jury to be considered void and a new one arranged, although not to benefit the defendant in case his defense suggests the "self-defense of a man's honor" with the purpose to cause a mistrial or trial nullity. If these layers of remedies do not work and the jury reaches a discriminatory acquittal, and even if jurors decide to free the defendant using a logic out of the legal frame, grounding it on the generic jury nullification question, prosecutors may appeal, arguing the verdict was contrary to the evidence. The state appellate court may declare the trial void so that a new one will decide the case.

Can the appeal remedy help minimize discrimination? What are the costs associated with its implementation? Research over time assessing the outcomes related to the actual use of the remedy is needed to offer a conclusive answer to these questions. However, anticipating the potential and limitations of the remedy may be helpful to amplify the former and curtail the latter's impact.

First, the Court's declaration that a discriminatory acquittal violates the Constitution gives public prosecutors a language to use before juries that has a similar status to the due process guarantee defense lawyers can use: to prevent discrimination against female victims and women in general is also a constitutional right. No outcome is guarantee but at least the discrimination issue can be presented before the jury as it is: an unconstitutional behavior (TETLOW, 2012).

The possibility of review on appeal by a state court to declare a discriminatory acquittal void, requiring a new jury trial, may help minimize discrimination. The existence of this legal possibility, endorsed by the Supreme Court, and public knowledge about it may limit jurors' willingness to decide in a discriminatory fashion, knowing their decision may not prevail. It may

even discourage people with deep prejudices but who are not activists of their prejudices from participating in juries.

Research in the United States is trying to assess the impact on jury nullification instructions. Are juror's biases exacerbated when judges explicitly instruct the jury about their power to decide outside the law? Should nullification instruction take place or not? (HOROWITZ, 2008). Similar research would be helpful in Brazil to assess the impact on jurors of judges' instructions about the possibility of jury deliberation being declared void if it discriminates against women in general and potential future female victims on the grounds that the "self-defense of the honor of a man" decisional motivation entail the reduction of the deterrent effect of criminal punishment in relation to them in a manner that does not affect potential future male victims.

Besides these broader impacts, the appellate review remedy opens up the possibility of a non-discriminatory decision on the second jury trial. There are no guarantees here, but at least there is a chance. In a Brazilian famous case of the 1970's involving a well-known couple at the time (Doca Street and Angela Diniz), the man was convicted by the second jury for killing his former female partner (SPIELER, 2011).

Law and Court orders stating that discriminatory acquittals are unconstitutional and can be declared void do not change consciences automatically. Profound behavior change only happens when we internalize norms different from the ones we learned before. This usually happens through the power of socialization mechanisms (ROBINSON, 2007, p. 102). Still, the law and Court orders play a role, even if a limited one, in shaping the social environment and adding to social pressure that can change mindsets over time. These statements may play an agenda-setting role, triggering public debate and helping build social consensus and, therefore, social pressure (KLEIN, 2007/2008).

But there are costs associated with it that cannot be ignored. The appellate review remedy gives state officials – the trial judge and appellate courts – the power to control jury deliberation to some extent. Jury deliberation will be treated as final and sovereign only after the second trial if the first one is declared void. The design is not unusual in democracies where apex constitutional courts control procedural aspects of congressional or parliamentary deliberation and declare it invalid, requiring a new bill to be approved. Although it would be difficult to describe the appeal remedy as a mere procedural kind of control of a jury deliberation, particularly when jurors grounded their decision on the generic clause, the outcome is similar, as appellate courts will not decide the case themselves but resend it to a new trial.

The implementation of appeal remedies will also cost more money and time from people to serve as jurors and from court personnel and budgets, as they will eventually need to organize more than one trial per crime. These

costs should be assessed and publicized so people can clearly understand how much tax money was spent because a discriminatory acquittal had to be declared void. The time aspect also affects defendants, victims, and their families, who will need to wait more for closure. If statutes of limitation apply, this may also be an issue to consider.

Finally, the appeal remedy imposes an extra burden on defendants, who may face two trials. But it does not seem an extraordinary burden. First, it is not uncommon that legal systems provide for juries to be declared void for different reasons frequently related to violations of due process. Second, even if one rejects the Brazilian Supreme Court's construe of the due process clause, it is reasonably accepted that, from a theoretical point of view, due process requires that whoever is in a position of deciding cases be impartial. A jury discriminating against the category of persons the victim belongs to is not impartial, thus acts in violation of due process and ought not to make decisions with state authority. From a human rights perspective, criminal law is related to defendants' rights; however, criminal law provisions and their implementation are also required to protect fundamental rights, like the right to life.

CONCLUSION

Discrimination may take many forms, some of which are unreachable by the ordinary legal remedy of punishment. One example of a dramatic discriminatory practice just beneath the legal surface is discriminatory jury acquittals. This paper focused on a kind of discriminatory acquittal – jury deliberations that free men who killed their female partners because of their "improper" behavior – and the Brazilian Supreme Court's answer to it in the ADPF 779 decision.

The Brazilian Supreme Court decision declared the "self-defense of a man's honor" argument unconstitutional when used as a legal ground for these discriminatory acquittals and banned its use in jury trials and in the proceedings leading up to them. The Court also allowed discriminatory acquittals to be appealed by prosecutors – the appellate review remedy – even if jurors ground their decision in a Brazilian legal provision that requires trial judge to include in their jury instructions a question that directly invites jurors to contemplate their power to nullify, deciding out of the legal frame to declare a defendant not guilty. The possible outcome of the appeal is for the jury deliberation to be declared void by an appellate court that will then remand the case for a new jury trial.

The appeal remedy does not seek punishment nor guarantee that the new – and final – jury trial will be an impartial one. It is, in this sense, a weak legal remedy. The appeal remedy also has costs. But its potential to

foster decisions that do not discriminate against women and to help build a social environment that is less discriminatory seems to outweigh the costs. Although the law will not be able to deal with all kinds of discriminatory behavior and should not try to achieve that, when it comes to criminal law and discriminatory acquittals involving the right to life, the law should play a role to at least try and minimize discrimination even if this role requires the law to innovate legal remedies.

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