REVISTA DIREITO PÚBLICO

Presentation of the thematic dossier:

Developing a sociological approach to analysing the relationship between Reproductive Justice, Democracy and the Rule of Law in Brazil[1]

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ABSTRACT: The article traces the origins of the concept of Reproductive Justice in Brazil, demonstrating its potential to tackle structural inequalities related to reproductive health. It then proposes a sociological approach to analyze the juxtaposition between Sexual and Reproductive Rights (SRR), Democracy and the Rule of Law. SRHR are rarely considered relevant to the functioning of democracy and the rule of law in contemporary societies. Academic literature on the importance of protecting basic rights in transitional and post-transitional societies usually stresses the significance of rights with obvious political or perhaps also socio-economic implications, excluding sexual and reproductive health from these debates. This article challenges these assumptions and argues that the level of protection provided for SRHR should be seen as an integral part of a "litmus test" for the functioning of constitutional democracies. Although the relationship between reproductive rights and the rule of law is one of complex correlation, it is an important indication of the quality of democratic government. The article suggests that the violation of reproductive rights can reflect and, in turn, intensify weaknesses in democratic culture and contribute to the wider erosion of legitimate institutions that are fundamental to the functioning of the state. As a consequence, both legal and medical professions play an important role in this development and should be seen as fundamental structural elements of constitutional democracies based on the rule of law. Adequate protection of reproductive rights cannot therefore be seen as a marginal aspect. As a consequence, reproductive justice is an essential element of the legal fabric of contemporary democratic societies.

KEYWORDS: Reproductive Justice, Sexual and Reproductive Rights, Reproductive Health, Access to Health Care, Inequalities, Women's Rights.

[1] This research is part of the project "Building Reproductive Justice with Indigenous Women in the North East of Brazil", carried out in partnership by UFPE and the University of Birmingham and funded by the AHRC/UKRI (AH/X008118/1).
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1. What is Reproductive Justice?

The concept of Reproductive Justice has been defined as 'the complete physical, mental, spiritual, political, economic, and social well-being of women and girls [that] will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about [their] bodies, sexuality and reproduction for [themselves], [their] families and [their] communities in all areas of [their] lives" (Asian Communities for Reproductive Justice (now Forward Together): 2005). In particular, this concept includes the ability of all women, girls, and LGBTQI+ persons to enjoy equal access to sexual and reproductive healthcare in a sustainable environment. Importantly, Reproductive Justice moves beyond the focus on the right to not have a child and includes the right to have and parent children in safe democratic environments. Consequently, it 'simultaneously demands a negative right of freedom from undue government interference and a positive right to government action in creating conditions of social justice and human flourishing for all' (Luna & Luker 2013: 328).

The concept of Reproductive Justice originated in critiques of the reproductive rights discourse mounted by Black and Indigenous women, who highlighted its failure to effectively address structural and systemic inequalities (Careshaw 1989, Roberts 1991, 1996; Bridgewater 1999; Rutherford 1991, Hooton 2005; Tamale 2008). It was first articulated just before the Cairo Conference on Population and Development in the National Black Women's Reproductive Justice Agenda in 1994.[4] ` Subsequently, Dorothy Roberts called for a 'radical vision of reproductive justice' in her book, which addressed historic reproductive inequalities faced by black women in the USA (Roberts 1997: 312; Luna & Luker, 2013: 337). The concept was further developed by the founders and

[4] https://www.congress.gov/116/meeting/house/110211/witnesses/HHRG-116-GO00-Wstate-HowellM-20191114.pdf

supporters of the SisterSong reproductive health collective, a group of grassroot organisations representing Indigenous, African American, Arab and Middle Eastern, Asian and Pacific Islander, and Latina women. Their work represented 'a shift (...) from a narrower focus on legal access and individual choice, to a broader analysis of structural constraints on agency' (Luna 2009: 350). Over time, the term has changed to gradually incorporate other marginalized groups, like persons LGBTQI+ and persons with disabilities.

Activists and academics often emphatically express the view that reproduction must be considered among an array of social justice concerns (Kuna & Luker 2013: 343; Crenshaw 1989; West 2009), and especially that gender operates in conjunction with subordinate identities of race, class, and sexuality as "multiple jeopardy" and a "matrix of domination" (Kuna & Luker 2013: 335, citing: Collins 1990 and King 1988). The concept of Reproductive Justice focuses on gender equality and choice by positioning bodily autonomy and reproductive decision making within social-structural contexts, such as education, violence, poverty, labour, incarceration, LGBT rights, and immigration (Eaton & Stephens 2020). As such, Reproductive Justice is simultaneously a theoretical framework and an activist model, which brings together theories of human rights, equality, and social justice as well as intersectional and locally grounded examinations of women's embodied experiences (Ross & Solinger 2017; Luna & Luker 2013; Van Dyke & McCammon 2010). The focus on inclusivity and intersectionality has meant that in recent years Reproductive Justice has become a theoretical and practical tool helping both academics and activists to challenge modes of privilege and oppression, affecting especially – but not exclusively – women of colour (Eaton & Stephens 2020). Reproductive Justice framework is especially appropriate for examining women's health because it identifies connections between reproductive health and gendered sociopolitical

complexities that impact women's lives around the globe (Luna, 2009; Silliman, Ross, & Gutiérrez, & Fried, 2016; SisterSong, 2018).[5]

2. Reproductive Justice in Latin America

Reproductive Justice is particularly important for Latin America and Brazil as it offers a matrix in which it is possible to analyse and address the history of structural inequalities in the area of reproductive health, rights, and labour, family life, and society at large. It does so by fostering collaboration between activists fighting for women s (human) rights, racial equality, environmental justice, queer families, Indigenous sovereignty, and police and prison abolition (Latimer 2022: 347).

A connection between reproductive rights and broader political, socio-economic, and cultural factors in the region has been recognised and examined by many – mainly feminist and (socio-)legal – scholars (see Rohden 2001; Aldana 2008; Galli 2011; Zordo 2012; Segato 2014; Madeira & Diniz 2016, Machado and Maciel 2017, Sieder 2017; Machado and Cook 2018; Barrancos, 2020; Drinot 2020; Friedman 2019; Marcus-Delgado 2019; Marino 2019; Kimbal 2020; Roth 2020). The utility of, and the need for, the Reproductive Justice framework has become particularly apparent in the aftermath of the Zika epidemic, which demonstrated the acute systemic injustices concerning reproductive health(care), especially in Brazil (Stern 2016; Bond 2016; de Zordo 2016; Gonzalez & Diniz 2016; Ventura and Camargo 2016; Diniz 2017; Johnson 2017; Diniz and Ambrogi 2017, Valente 2017; Rabionet et al. 2018; Nading & Lowe 2018; Teixeira et al. 2020; Brito & Rondon 2024). The threats to reproductive and minority rights by the conservative government in Brazil, exacerbated dramatically by the Covid19 pandemic, incentivised further engagement with reproductive justice (Prandini & Larea 2020;

[5] At the same time, it should be noted that problems concerning sexual and reproductive health also affect men and boys. Those from marginalized groups will face specific set of challenges, which would be captured by the Reproductive Justice framework.

Ventura et al. 2020; Algora 2021; Nolan 2022; Paro et al. 2023; Rondon et al. 2022).[6] Importantly, civil society organisations of indigenous and black women, women with disabilities, and women deprived of liberty have been specifically advancing the idea of reproductive justice to give visibility to their lives and to how they are affected by intersectionality.[7] In their Dossier on Black Women and Reproductive Justice" the Criola Black Women collective noted that the framework of Reproductive Justice allows them to look at inequities in sexual and reproductive health through a broad perspective, in conjunction with Human, Economic, Social, Cultural and Environmental Rights, citizenship and democracy (2021:7).

This recognition of Reproductive Justice as a normative, analytical, and practical tool for conceptualising structural inequalities and generating change has gained traction much more slowly in law and jurisprudence, and other institutional settings. At the international, regional and domestic level, there is still a great deal of variation in terms of norms, court decisions and government policies governing and shaping the access to reproductive health services and rights. Cases granting reproductive health rights are still relatively rare and the court proceedings and processes take years. Furthermore, while the Reproductive Justice movement emerged in the 1990s, the term itself has appeared in official documents of international organisations only very recently (UNFPA 2021, 2022, 2024). Despite gaining considerable attention in international soft law documents (ICPD 2024), the term has never been used in the jurisprudence of the bodies monitoring the American Convention on Human Rights.

However, over the years, first the Inter-American Commission on Human Rights, and, subsequently, the Inter-American Court of Human Rights (IACtHR) have gradually

[6] Analysis emerging in the context of the COVID 19 pandemic point to the need to establish a global health research agenda based on sustainability, emphasising cultural diversity, solidarity, justice and autonomy.

[7] Organisations which utilised the concept f Reproductive Justice are among others: Criola; Anis – Instituto de Bioética; Católicas pelo Direito de Decidir; CEPIA; CFEMEA; CLADEM; Coletivo Feminista Sexualidade e Saúde; Coletivo Margarida Alves; Criola; Cunhã - Coletivo Feminista; Grupo Curumim; Portal Catarinas; Rede Feminista de Saúde; REDEH – Rede de Desenvolvimento Humano; e Frente Nacional Contra a Criminalização das Mulheres e Pela Legalização do Aborto, campanha Nem Presa Nem Morta.

developed a comprehensive (gender-sensitive and intersectional) understanding of the challenges that hinder access to sexual and reproductive healthcare and rights. These challenges included the subordination of women in both the public and private spheres, socio-cultural practices that place women s role as mothers before their role as autonomous individuals, and stereotypes, policies and practices that give control and decision-making power to men (O Connell 2014: 120). A similar approach was taken by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW). As is well-known, in *Alyne da Silva Pimentel vs. Brazil* (2011), concerning maternal mortality, the CEDAW Committee noted that preventable maternal death disproportionately affected low-income, Afro-Brazilian, and indigenous women, as well as women living in rural areas and in the Brazilian north and northeast. Consequently, the Committee ordered reparations and issued comprehensive recommendations aimed at improving maternal healthcare.

The IACtHR has followed the approach taken by CEDAW Committee becoming more innovative and vocal in promoting a gender and intersectional perspective in its jurisprudence concerning maternal mortality, assisted reproductive technologies, sterilisation, abortion, and LGBTQI+ rights. In *Murillo et al. vs. Costa Rica* (2012) it concluded that while the state ban of *in vitro* fertilisation was not expressly addressed at women and appeared neutral, it has a disproportionately negative impact on women. The Court pointed out that the prohibition of IVF violated the right to personal integrity and to private and family life guaranteed by Article 11(2) IACHR, which are inextricably linked with personal autonomy and reproductive freedom (paras. 147 and 272). Importantly, it had a differentiated impact on the victims owing to their situation of disability, gender stereotypes and, for some of the victims, their financial situation (para 297). Focusing on the positive obligations of the state, it noted that these rights include (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right.

In *I.V. vs. Bolivia* (2016), concerning an unauthorized tubal ligation surgery that deprived the victim of the possibility to conceive, the Court found a violation of the rights to personal integrity, liberty, dignity, private and family life, access to information, and the right to found a family, in relation to the prohibition of discrimination under the ACHR, as well as violations of the Convention of Belém do Pará. In *Manuela y otros vs. El Salvador* (2021), regarding an improper medical treatment that resulted in the victim's death, the Court highlighted the correlation between reproductive rights (the right to life, personal integrity, private life, health) and the rule of law (presumption of innocence, personal liberty, equality before the law). Importantly, the Court also found the breach of the prohibition of cruel, inhuman, or degrading punishment in relation to Manuela's family due the deep suffering and anguish they experienced to the detriment of their psychological and moral integrity.

In *Britez Arce vs. Argentina* (2022), concerning an induced childbirth which also led to the victim's death, the Court declared Argentina responsible for the violation of the rights to life, humane treatment and health, children's rights and family protection, as well as a fair trial and judicial protection. Importantly, and contrary to the European Court of Human Rights, the Court ruled on obstetric violence, defining it as a form of gender-based violence, exercised by those in charge of health care for pregnant persons accessing services during pregnancy, childbirth and post-partum. According to the IACtHR obstetric violence is expressed mostly, although not exclusively, in a dehumanizing, disrespectful, abusive or negligent treatment of pregnant women; in withholding of treatment or complete information about their health and the applicable treatments; in forced or coerced medical interventions, and in the tendency to pathologize natural reproductive processes, among other life-threatening expressions in health care during pregnancy, childbirth and post-partum (para. 75).

Most recently, the IACHR decided the case of *Beatriz vs. El Salvador* (2024) concerning a woman who was denied abortion even though she was suffering from a serious illness, and her foetus was diagnosed with anencephaly. The Commission s

provisional measures compelled El Salvador to provide Beatriz with life-saving abortion care despite the country s complete prohibition of the procedure. Although the measures were disregarded by the government, the case established that international human rights law can override regressive domestic abortion restrictions when women s lives and health are endangered. The Court found El Salvador responsible for violating Beatriz's rights to health, personal integrity, private life, and access to justice, declaring the denial of abortion a form of obstetric violence. It ordered El Salvador to establish regulatory measures to ensure legal certainty in abortion cases, incorporating a gender perspective, in line with international human rights standards.

In most of these cases, state obligations have been drawn broadly and the Court imposed substantive changes in public policy concerning healthcare infrastructures and practice. As such, the IACtHR has been much more progressive in its interpretation of the rights enshrined in the ACHR than the ECtHR in its development of reproductive rights under the ECHR (e.g. *Vo vs France* (2004); *Tysiąc vs Poland* (2007); *Evans vs UK* (2007); *A.B.C. vs Ireland* (2010); *R.R. vs Poland* (2011); *S.H. et al. vs Austria* (2011); *P.S. vs Poland* (2012); *Mennesson and Others v. France and Labassee v. France* (2014); *Paradiso vs Italy* (2017); *M.L. vs Poland* (2023)). (O Connell, 2014: 120). At the same time, the Court has fallen short in implementing remedies that are designed to ensure non-repetition of violations' O Connell 2014: 117). With new cases currently being decided on the merits, it is hoped that there will soon be formal recognition of the importance of Reproductive Justice in advancing sexual and reproductive rights on the ground.

3. Recent advancements and challenges concerning Reproductive Justice in Brazil

The use of the Reproductive Justice framework is relatively recent in Brazil. With some notable exceptions mentioned above, academic discussions in this respect occur

mainly in health studies, with some notable exceptions in law and political sciences. The latter are usually driven by scholars with an activist (civil society) background (Schiocchet and Castilho 2024).[8] Consequently, it might be surprising to some – and not at all to others (!) – that the term has already appeared in judicial pronouncements of the Brazilian Federal Supreme Court.[9] The most important was the vote issued by Justice Rosa Weber before her retirement from the bench in 2023. The vote challenged the current criminalisation of abortion in Brazil on the basis of what she called reproductive social justice". In her decision, she has argued that the problem requires interpretation of i) the right to life and the scope of its protection in constitutional law, ii) women's fundamental rights, iii) sexual and reproductive rights as fundamental rights in constitutional law and iv) reproductive social justice as an institutional response to fundamental duties of protection (emphasis added] (para 35). Among her arguments, she posited that:

'*...it is essential to combine public policies in a structure of reproductive social justice, as an institutional formula that will subjectively equip women with reproductive rights, and empower through appropriate policies, many of which are already part of the Unified Health System (...). In this context, the system of reproductive social justice stems from the premise of public health protection in terms of women's sexual and reproductive health rights, taking into account their freedom to build the dignified life project that seems coherent to them (para. 124).*

The vote casted by Justice Rosa Weber is important for many reasons. First, it is important because the liberalisation of abortion law is desperately needed to protect substantial parts of Brazilian population, as abortion remains one of the five main causes

[8] In addition to literaturę cited at the start of the article of a total of 29 theses and dissertations, 25 were issued after 2020, and more than half of this number in the last two years.

[9] First, a judgemonocratic decision declared the admissibility of an amicus curiae of a human rights clinic with expertise in "Reproductive Justice". This is the only reference of the term within the jurisprudence of the Court (See:ADO 20 / DF - DISTRITO FEDERAL. Relator(a): Min. ANDRÉ MENDONÇA. Julgamento: 06/11/2023. Available at: https://jurisprudencia.stf.jus.br/pages/search/despacho1466451/false). Second, considering an analysis of all other Superior Courts in the country, there are only mention in two habeas corpus decided by the STJ (See: HC 503.595-MS (2019), HC 455.261-SP (2018)).

of women's mortality. While access to abortion is not the only problem in the area of sexual and reproductive healthcare, it remains constantly under threat.[10] Legal abortion is a reproductive right available through the Unified Health System (SUS) when the pregnancy is the result of rape, when the pregnancy puts the woman's life at risk (decree law 2.848/1940) and when the foetus is diagnosed with anencephaly (ADPF 54/2012). According to data from the Ministry of Health, between 2012 and 2021, only 11,837 women were able to access abortion for medical or legal reasons.[11] While the number of legal abortions has increased in the last five years, the numbers remain low and the current prohibition has not reduced the overall number of abortions in Brazil. [12] According to the 2021 National Abortion Survey, one abortion occurs every minute in the country, which amounts to 1,369 per day and 500,000 per year. According to the Centre for Reproductive Rights, it is estimated that five million women in Brazil have already had an abortion, equivalent to one in every seven women under the age of 40. Half of them did so before the age of 20, and most in unsafe conditions. In May 2024, in its country report, the CEDAW Committee warned against the persistent criminalisation of abortion. The CEDAW Committee expressed particular concern about the onerous procedural requirements to access abortion imposed not only by law, but also by the healthcare professionals in every-day medical practice (2024: 10). With the percentage of abortions among black women being higher than among white women, the burdens adversely affect this group of the Brazilian society.[13] As noted by Justice Weber, 'unsafe abortions and the

[10] The Bill 1904, currently under discussion in the National Congress, equates the interruption of pregnancy after 22 weeks with the crime of murder.

[11] For more information: https://cienciaesaudecoletiva.com.br/artigos/aborto-e-raca-no-brasil-2016-a-2021/18886?id=18886&id=18886

[12] Data from the Ministry of Health shows that the number of legal abortions carried out by SUS has increased by 71 per cent in the last five years. In 2018, 1,570 procedures were carried out. In 2023 in Brazil, there were a total of 2,687 cases of legal abortion. Of this number, 140 were of girls up to the age of 14. These numbers sit uneasily with the fact that in 2023, Brazil recorded 74,930 rapes, the highest number in history. Of these, 56,820 were rapes against vulnerable people. See: Source: https://www.gov.br/saude/pt-br/centrais-de-conteudo/publicacoes/boletins/epidemiologicos/edicoes/2022/boletim-epidemiologico-vol-53-no47

[13] The data is from the "Aborto e raça no Brasil, Pesquisa Nacional de Aborto 2016 a 2021". Available at: https://www.scielo.br/j/csc/a/rKQ6mrR8h8vTYkqhbWMfQWp/

increased risk of mortality reveal the disproportionate impact of the rule criminalizing the voluntary interruption of pregnancy, not only on the grounds of sex and gender, but also, and more densely, on the grounds of race and socio-economic conditions' (para 170).

Consequently, the second, and arguably even more important, reason why Justice Weber s vote requires attention is that it highlights the significance of intersectionality, inextricably connected with Reproductive Justice. As is well known, despite significant achievements in the area of health rights in practice, many marginalised groups in Brazil continue to face persistent and structural inequalities in their enjoyment of the right to (sexual and reproductive) health (Droubi et al. 2020). According to Criola, Brazilian patriarchal racism creates a precarious life for black trans and cis women. They are the main victims of mistreatment, neglect and violence at various levels. The social places of these women in the slave society are re-actualized daily and materialized in poverty, unemployment, maternal death, barriers to access to health, food insecurity, hypersexualization, marginalization in political spheres and the control of sexuality (2021: 65). Quilombola, Afro-descendant, and Indigenous women, commonly live in rural, poor, marginalized areas with limited access to health care and family planning services (I/ACHR 2017). Consequently, they are disproportionately affected by the sharply increasing rate of maternal mortality (CEDAW 2024).[14] Indigenous women in particular present a disproportionately high incidence of STD/HIV/AIDS and cervical

[14]Consequently, CEDAW Committee issued several recommendations for Brazil to (among other actions):
- Legalize abortion and decriminalize it in all cases and ensure that women and girls have adequate access to safe abortion and post-abortion services to ensure full realization of their rights, their equality and their economic and bodily autonomy to make free choices about their reproductive rights;
- Strengthen measures to counter the alarming rate of maternal mortality including by improving access to prenatal and postnatal care and emergency obstetric services provided by skilled birth attendants throughout the territory of the State party, and address its root causes such as obstetric complications, early pregnancy and unsafe abortions;
- In line with general recommendation No. 39 (2022) on the rights of indigenous women and girls, recognize and incorporate indigenous traditional and naturopathic health systems, ancestral knowledge, cosmology and practices into the health care system, recruit indigenous shamans, healers and midwives, and hire female doctors for gynecological care in indigenous areas.
- Increase its effectiveness in formulating, coordinating and overseeing the preparation and implementation of gender responsive laws and policies at federal, state and municipal levels...

cancer due to lack of equipment and infrastructure. Importantly, they remain largely invisible in general epidemiological data.

These problems have been exacerbated in recent years, both by the increased violence – especially against Indigenous peoples, perpetuated by previous governments, and by the outbreak of Covid19 (Fraser 2019). The existential threat to Indigenous communities was recognised by the Federal Supreme Court (STF), which in 2020 affirmed for the first time the right to health of Indigenous people and the indispensability of intercultural dialogue in any question involving their rights (Droubi et al. 2020). This requirement echoes an I/ACHR Report (2017), which identified the lack of culturally sensitive services as one of the main obstacles for achieving good health among Indigenous women and called for their worldview and conception of good living to be taken into account in all policies that affect them. An important step towards creating inclusive and equitable healthcare for Indigenous women was the recognition of traditional medicine as an extremely valuable healthcare resource (Ramos 2019; Feitosa & Oliveira 2020). In Brazil, the so called Arouca Law (Law 9.836) created the Indigenous Health Care Subsystem (SASI), as part of SUS as early as 1999. Art. 19-F created a duty to take into account the local reality and the specificities of the culture of indigenous peoples and the model to be adopted for indigenous health care, which should be guided by a differentiated and global approach . And yet, Indigenous healing practices have still not acquired the same level of recognition as other alternative methods utilised within SUS. The CEDAW Committee Report noted that [t]raditional and naturopathic health systems, ancestral knowledge, cosmology and indigenous practices are not (...) integrated in the federal health care system, negatively impacting access to health care by Indigenous women' (2024: 11).

More generally, despite enormous efforts and significant progress made in the area of sexual and reproductive health(care) and rights, specific experiences of marginalised groups, including women from diverse ethnic, cultural, and socio-economic backgrounds, are often overlooked. Still relatively little is known about the way in which

Indigenous, LGBTQI+, disabled and other minority groups understand sexual and reproductive health and rights, the extent to which cultural beliefs and practices shape these understandings, and the ways they influence access to healthcare on the ground. Furthermore, the relationship between reproductive rights, environmental and land rights, and individual and collective worldviews and cosmovision remains largely underexplored. Finally, despite a growing academic debate, comprehensive theorisation of the relationship between Reproductive Justice, citizenship, democracy, and the rule of law is still missing.

Our Special Issue aims to address this gap, by setting out a research agenda for the future, which should include women and persons from minorities that have been rendered invisible in the past. Importantly, this article intends to illuminate the co-constitutive relationship between SRHR and the broader issues linked to democracy, rule of law, all of which have faced increasing challenges in recent years. This relationship is also importantly highlighted by Justice Weber s vote, to which we return below. At the centre of the discussion presented here is whether and if so to what extent processes undermining or strengthening the rule of law, democracy, state structures, or the capitalist economy affect sexual and reproductive healthcare.

4. The relationship between Reproductive Rights, Democracy, and the Rule of Law

This juxtaposition between Reproductive Justice, Democracy and the Rule of Law is often ignored by legal literature concerning the rule of law. Although acknowledged by some scholars as a constitutional problem (Kommers 1977; Siegel 2014; Bergallo & Ramón 2016), the regulation of abortion and other reproductive rights is usually seen as a phenomenon that is separate from and peripheral to the problem of the rule of law. As a result, it is rarely considered relevant to the functioning of democracy in contemporary

societies. Most authors studying constitutional breakdown have omitted to show full regard for the intensifying retrenchment in the sphere of reproductive rights that has taken place in many of the countries experiencing constitutional crisis. For example, Sadurski, writing about the protests against the restrictions of abortion law in Poland, described these demonstrations as episodic single-issue protests [emphasis added] (Sadurski, 2019: 9). In particular, academic literature on the importance of protection for basic rights in transitional and post-transitional societies typically emphasises the significance of rights with obvious political or perhaps also socio-economic implications but often fails to include reproductive rights in these discussions. In Brazil, main critiques of reproductive rights still stem from the field of health studies, maintaining the debate isolated from fundamental questions concerning inclusion and democracy. Both academics and the international community that heralded the successful processes of democratic transition in Latin American or Central and Eastern European states seemed to accept that successful transition to a constitutional democracy is possible without due regard for the protection and implementation of sexual and reproductive rights. This is true of transitional societies such as Poland or Brazil, in which political and legal elites dissociated, to a large extent, limitation of reproductive rights from questions of democracy and the rule of law. In both cases, this understanding was unsettled by the radical retrenchment of reproductive rights during governments associated with democratic backsliding (Reis & Cabral 2019; Assis & Erdman 2021; Eltit et al. 2021; Krajewska 2021; Bucholc 2022).

Here, we would like to challenge such assumptions. We argue that the level of protection provided for reproductive rights should be seen as an integral part of a litmus test for successful transitions and for the functioning of constitutional democracies more broadly. A hypothesis that we would like to highlight, and which requires further investigation in future studies, is that the recent retrenchment of reproductive rights is closely associated with the broader anti-constitutional populist backsliding . For example, we argue that alliances between anti-abortion and anti-constitutional factions

can be observed in many places across the world. The limited choice over issues concerning family planning (contraceptive methods or sterilisation)[15] can also be closely associated with broader societal patterns of misogyny, high levels of violence against women and poverty. We accept commonly proposed arguments that the emergence of populist conservative governments often leads to rapid weakening of reproductive rights protection. However, we would like to make a different proposition. Namely, that the converse is possible: the retrenchment and/or weak protections of reproductive rights may often indicate problems with the rule of law. Although the relationship between reproductive rights and the rule of law is not one of straightforward causation, but rather of complex correlation, it exists, and it is an important indication of the quality of democratic government. This analysis goes beyond a simple acknowledgment that violations of reproductive rights, i.e. human rights, constitute inherent violations of the rule of law. Studies of societies such as Poland – or Brazil – suggest that disregard for reproductive rights may *both* reflect and, in turn, intensify weaknesses in democratic culture, and to contribute to the broader erosion of legitimate institutions. In this respect, we emphasize the role not only of lawyers and judges, but, importantly, of healthcare professionals of all kinds in the consolidation of democratic structures. Consequently, we argue for the inclusion of this professional group, alongside the legal profession, in the assessment of the levels of entrenchment of the rule of law. As a result, we argue that adequate protection of reproductive rights cannot be viewed as a marginal aspect of democracy and that such rights are an essential element of the legal fabric of a democratic society. As such, the Special Issue brings to the foreground an important, yet often forgotten, dimension of Reproductive Justice.

The relationship between reproductive rights, democracy and the rule of law can be considered at three levels: legal, historical, and sociological. Notably, first, reproductive rights constitute a category of rights of high significance, both intrinsically

[15] Until 2023, when law 14.443/2022 came into force in Brazil, women needed their partners permission to perform certain forms of female sterilization.

and in terms of their wider socio-political implications. Historically, feminist scholars have challenged the public/private divide in law and politics. They have demonstrated that reproductive rights, often considered by legal interpreters as belonging to the sphere of private life, are inherently political and public. In particular, they have highlighted the connections between reproductive rights, citizenship, and the state (Luker 1984; Petchesky 1997; Lister 1997; Fuszara 2010; Plummer 2013; Mishtal 2015; Oja & Yamin 2016). Like more unambiguously political rights, we can see that reproductive rights are enmeshed in the fabric of democracy as a whole, often forming *de facto* preconditions for democracy. Such rights encapsulate one of the most fundamental and intimate aspects of personal sovereignty and experiences related to their realisation have a powerful impact, both direct and indirect, on the rule of law and democracy. These rights transgress the typical – and now largely contested (Trinidade & Gonzalez-Salzberg 2024) – division between civil and political rights on the one hand and social, economic, and cultural rights on the other. Only if citizens can have full control over their own bodies, determine their life s course, and access all the available resources, whether economic, political, or social, can we speak of a democratic society. Conversely, it is difficult to classify as democratic a state in which the rights and freedoms of half of the population can be subject to arbitrary curtailment. Violations of such rights disproportionately affect women, bringing to the surface asymmetries in their political and legal inclusion and autonomy in contemporary societies. Reproductive rights contain implications that affect the interests of certain, often vulnerable, groups with such intensity that it is at least arguable that a strong democracy will provide particularly robust protection for such rights. As demonstrated by the vote of Justice Rosa Weber, the Brazilian Constitution of 1988, in conjunction with international human rights law, provides strong support for women s and minority rights. The disregard for or the violation of such rights can often go hand in hand with the violation of rights required and exercised by other vulnerable minority groups. It is not a coincidence that the CEDAW Committee noted with concern the limited use of temporary special measures in areas where women, particularly rural

women, women with disabilities, indigenous women, Quilombola women, women of African descent, and lesbian, bisexual, transgender and intersex women, are underrepresented and disadvantaged, including in political, public, social and economic life, education, employment, health care and social security (2024: 4).

5. Reproductive Justice and colonial legacies

The issue of self-determination inevitably poses the problem of self-ownership of the body, which, in turns, brings to the foreground the sensitive subject of colonial legacies still presents in many societies, including Brazil. These legacies constitute the second dimension in which the juxtaposition between Reproductive Justice, democracy, and the rule of law can be considered. In fact, both the (ultra-)conservative and the women s rights movement have a long history of utilising these legacies in the political struggles over reproductive rights. For instance, the anti-abortion movement in the USA has used abolitionist" labels to co-opt the imagery from slavery and other Black experiences to argue against abortion for over a century. (Moseley-Morris, 2023). Women s rights activists posit an argument that involuntary labour or slavery is analogous to the forced motherhood imposed by laws restricting reproductive autonomy. US scholars and activists have referred to such restrictions, especially in the context of abortion, as involuntary servitude" (McConnell 1991; Hirschmann, 2003; Goodwin, 2022). While this discussion is complex and context-specific, this dimensions of restrictive approach to reproductive health and rights cannot be ignored.

The intersection between reproduction, gender, race – and slavery – has been extensively analysed by feminist scholars, especially in the USA (Hartman 1997; Roberts, 1997; Beisel & Kay 2004; Weingarten, 2014; Weinbaum, 2019; Morgan, 2021; Latimer, 2022). They demonstrated that the thinking that enabled four hundred years of forced reproduction of the enslaved and saw unborn babies as property even before their birth, necessarily shaped and continues to shape abortion regulation today (Latimer, 2022:

345). It is important to note that the rationale behind the restrictions on reproduction changed over time. In the 18th and 19th century, fears about reproductive autonomy of enslaved women stemmed from two reasons. First, from the newly formed view that the foetus is "a separate entity", one that would produce future profits or that could be parcelled out' (Roberts, 1997: 41). Second, from the fact that enslavers were concerned about the autonomy of the enslaved women as they saw the use of abortifacients as a form of resistance. Importantly, as noted by Heather Latimer, [a]fter slavery ended, abortion regulation continued to be racially motivated by the pro-natalist violence of the slave episteme' (2022: 345). In the post-abolitionist period in the 19th century, the rationale for the regulation pivoted and white women were disciplined into viewing their bodies as national vessels of reproduction and believing that disrupting this process was against the nation-state and their race' (Weingarten, 2014: 19; Luker & Luna 2013). This latter paradigm viewing the motherhood of white women as vital for nation-building and the regulation thereof can be found in many post-colonial and post-imperial societies. As aptly noted by Cassia Roth 20th century states from Chile to Iran allowed women symbolic access to citizenship by recasting women s maternal identities as crucial to national development' (Roth, 2020: 7). Therefore, while comparisons between the US and Brazilian reproductive policies, especially regarding Black and Indigenous populations are difficult to draw, it is important to remember that some parallels between pronatalist policies exist.

In Brazil the continuities that the slave system left on black women s bodies concerning pregnancy, abortions, breastfeeding, and raising children have been analysed Brazil by scholars such as Okezi Otovo (2016), Maria HTP Machado (2017), Cassia Roth (2020) and Jozuane Zadroski (2019; 2022). Research undertaken by Roth on the post-emancipation and the Vargas era in Brazil demonstrated that while, unlike in the USA, no formal exclusion of Black lives through Jim Crow laws or sterilisation policies existed, post-abolition governmental approaches towards reproduction in Brazil were part and parcel of the Republic s cementing of new forms of power' (2020: 9). Criminal cases from

Rio de Janeiro and the writings of healthcare professionals such as gynaecologists and obstetricians, examined by Roth, show how women were perceived as 'reproducers and civilisers of the nation' (2020: 16). Unlike in the USA, citizenship was linked more closely to women s identities as mothers, regardless of race, class, or marital status' (20202: 18). At the same time, the idea of racial harmony" did little to address inequalities. Control over reproduction – even if not excessively punitive – remained a crucial interest of the state and its policies of whitening". Racialised politics affecting reproductive practices of Indigenous people included respectively the criminalisation and restriction of the art of curing" and charlatanism and healing" through the Philippine Ordinances (1890) and Decree 5156 (1904). For Roth, the post-emancipation era was also a period of medicalization of women s pregnancy with a focus on the expansion of the working population. The legacies of slavery were present in Brazil as late as the end of the 20th century, as demonstrated by the involuntary sterilisation carried out mainly in the poorest areas of the country in the 1990s on predominantly black women.[16]

While racial categories did not officially determine policies concerning reproduction, poor women, descendants of those enslaved, relied on public services and therefore remained much more visible to public authorities and fertility control. Eugenic practices (and later mindsets) and patriarchal values regulated women s bodies and decisions over maternity for generations. In her vote Justice Rosa Weber s asserted that restriction of reproductive autonomy represents institutional violence and conceptualises women as an an instrument whose decisions are made by the State and greater society' (para 86). This violence must be seen as a continuation of colonial legacies incompatible with democracy.

6. A "thick" sociological understanding of the rule of law

[16] For more details, see "Relatório n. 2, de 1993 - CN : relatório final da Comissão Parlamentar Mista de Inquérito destinada a examinar a incidência de esterilização em massa de mulheres no Brasil". Available at: https://www2.senado.leg.br/bdsf/item/id/85082

The third level at which the relationship between reproductive rights, democracy and the rule of law can be analysed is sociological. Such analysis reconfigures the straightforward argument that crises of the rule of law have detrimental effects on reproductive rights. Conversely, it shows that reproductive rights can indicate a weak institutionalization of the rule of law and human rights. The reasoning is as follows: the behaviour of state institutions – public authorities – perpetuating or allowing violations or limitations of sexual and reproductive health services, contributes to the increasing lack of trust in the law and the Constitution. In this respect, it is not only lawyers and legal institutions but also the medical profession, healthcare institutions, and medical organizations that undermine the trust in the legal system. The behaviour of these professional groups vis-a-vis sexual and reproductive rights (especially abortion) illuminates much more general attitudes to, and understandings of, the law and the rule of law. This in turn affects the way in which all citizens view and experience the law, its legitimacy and efficiency. Consequently, we argue that the operationalization of reproductive rights, in general, should be seen as an integral part of any assessment of the extent to which democratic principles are entrenched and the rule of law respected.

Writing in 1999, a Polish sociologist, Grażyna Skąpska, claimed that to be real, the constitutionally proclaimed rule of law must be implemented in the daily life operations of the political system, in the expectations and behaviour of functionaries of the system and the attitudes of citizens' (1999: 225). Quoting Perez Diaz, she highlighted the need for consistency between social cognition and institutions. It is the stage of institutionalization, of the fit between institutional arrangements, popular expectations and behaviour, and the legitimation closely linked with it in everyday opinions, (...) and evaluations which has salient importance for the establishment of liberal, constitutional democracy and civil society' (Skąpska 1999: 225). As such, the entrenchment of the rule of law is inherently connected with legal culture, understood as attitudes to law among wide strata of society, in particular people s understandings of their rights and

obligations and their expectations towards the judiciary, and legal institutions more generally, and their fellow citizens (Kurczewski, 2007). Seen from this perspective, the functioning of the rule of law should be assessed not only through analysis of the visible – even ostentatious – political and legal acts, some of which may be directed at seizing control over legal institutions. It is far more important to investigate the far less visible every-day experiences of legality and extra-legality, the spaces where social practices take little notice of or consciously circumvent the law. It is crucial to analyse how individuals, groups, networks react or do not [emphasis added] react to formal law, which does not reach them or is considered unimportant, because there are no official reactions to circumventing the law' (Czarnota & Krygier 2006: 161).

It also reveals the persistent and increasing disjunction between law, institutions, and social cognition. This disjunction stems from the normalisation of illegality, of legal uncertainty, and of distrust towards public authorities and institutions. This in turn can undermine general confidence in legal principles and procedures; self-evidently, it can also undermine confidence in medical organisations and healthcare professionals. Public regard for institutions that are fundamental to functioning democracies is likely to be diminished. Therefore, professional groups, such as the doctors, midwives, and nurses should be seen as structural elements of the rule of law. While the role of lawyers is often noted in such discussions, the acknowledgment of healthcare professionals as actors shaping the development and institutionalisation of the rule of law is far less common.

7. Healthcare profession as an integral element of the rule of law

The way that the medical profession behaves in the context of sexual and reproductive health and rights both indicates and influences the function of the rule of law. Persistent violations of women s human rights do not happen in a vacuum. They

indicate weak institutionalisation of the rule of law, because they mean that corrective legal or professional mechanisms of such behaviour are weak or do not exist.

In Brazil, as evidenced by Roth (2020), the medical profession has been closely connected to the judicial system since the late 19th century. Despite punitive criminal codes, the number of prosecutions and convictions for offences such as abortion was historically very low. While Roth speaks about the complaisance of the healthcare professionals in the denunciations of women attempting to access abortion, which would indicate potential compliance with the law, there were instances in which doctors and midwives far exceeded their legal obligations imposed by criminal law, eagerly reporting women to the police. For years, members of professional groups and organisations, as well as law enforcement agencies, have been persistently failing to protect the rights, health, and life of their citizens. Admittedly, most recently, the STF overturned a decision of the Federal Council of Medicine, which banned termination of pregnancy beyond the 22 week-gestation period (ADPF 1141). Nevertheless, civil and criminal courts have not always provided sufficient protection against these abuses of power perpetrated by the medical profession, e.g. in instances of obstetric violence (Leite et al. 2024; Schiocchet & Suellyn 2023) . If liability was established, damages were awarded after the harm was done. One could argue that lack of law enforcement has its positive aspects. Admittedly, low conviction rates against women accessing abortion have contributed to lower mortality rates (Weber, 2023: para. 157). However, the fact that the legal system does relatively little to address the abuses of power concerning refusal to provide sexual and reproductive health services by healthcare professionals creates further uncertainties and suggests weak embedding of the rule of law. It is difficult to imagine that these habitual forms of behaviour would not undermine societal confidence in legal principles and procedures, and in turn lead to a more general loss of trust in public institutions. Such patterns of behaviour can do nothing but undermine the faith of a significant number of citizens in their system of government. It is difficult to talk about the

rule of law where the laws do not inform people what to expect of others' (Weingast 2009).

Finally, there is the metaphorical elephant in the room: restrictive abortion regimes almost invariably stimulate illegal medical practices, giving rise to the phenomenon known as the abortion underground . As mentioned above, it is commonly accepted that the estimated number of illegal abortions in Brazil, although impossible to assess precisely, can reach 500000 a year. This means that for decades, Brazilian citizens have experienced a disjunction between institutional (official) and individual (covert) behaviour concerning the provision of abortion services. Furthermore, they experience a legal system that continues to promote inequality, as access to abortion remains open to those with financial means. The scale of the phenomenon demonstrates that the experience of extra- or illegality is very common, as it affects not only the women having abortions but also people close to them. The scale of the phenomenon further suggests that, over the years, public authorities were only symbolically interested in enforcing the law. While every prosecution of a woman or a healthcare professional increases the chilling effect of the law, cases against healthcare professionals, which reached higher courts are still relatively few and far between. At the same time, ample anecdotal evidence suggests that law enforcement agencies, and members of the judiciary often target and harass women and girls seeking abortion.[17] While this lenience of enforcement agencies and courts towards the medical profession allows for at least some access to abortion services, their selective and targeted behaviour also contributes to legal uncertainty, ambiguity, and in turn, further undermines trust in state institutions and the law.

Therefore, we argue that analysis of the way in which reproductive rights have developed and operated in Brazil reveals the weak institutionalisation of the rule of law,

[17] A recent example occurred in 2020, as described in many media sources. For more details: https://brasil.elpais.com/brasil/2020-08-16/menina-de-10-anos-violentada-fara-aborto-legal-sob-alarde-de-conservadores-a-porta-do-hospital.html

understood not only as a way in which legal institutions function, but also as way in which law is understood, recognised, and followed by different professional groups and in society at large. The criminalisation of abortion encourages disregard for law and legal principles, thus undermining the basis of society based on the rule of law. Both legal and medical professions play an important role in such development and should be seen as important structural elements of a constitutional democracy based on the rule of law. Consequently, we and some contributors to this Special Issue demonstrate that sexual and reproductive rights should be incorporated into assessments of the institutionalisation and entrenchment of the rule of law in society. The operationalisation of reproductive rights, defined in broad terms, should be seen as an important part of the litmus test , which we use to examine the efficacy of democratic structures and the quality of the democracy and the rule of law. Future researchers should examine in detail the factors determining and conditioning this relationship. Adequate protection of reproductive rights cannot be viewed as a marginal aspect of democracy and such rights are an essential element of the legal fabric of a democratic society.

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Taxonomy

Atina Krajewska	Conceptualization (Ideas; formulation or evolution of overarching research goals and aims); Methodology; Writing – original draft; Writing – review and editing; Supervision; Project administration; and, Funding acquisition.
Carina Calabria	Conceptualization (Ideas; formulation or evolution of overarching research goals and aims); Methodology; Writing – original draft; Writing – review and editing; Supervision; Project administration; and, Funding acquisition