

**Argumentation and Discourse on the Maria da Penha Act in Decisions
of the Brazilian Superior Court of Justice / *Argumentação e discurso
sobre Lei Maria da Penha em acórdãos do STJ***

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ABSTRACT

This study employs Critical Discourse Analysis (CDA) as the theoretical framework to analyze the arguments used by the Superior Court of Justice (“the Superior Court”) in decisions related to the Maria da Penha Act, which had significant impact on Brazilian case law. The author’s main objective is to discuss how Brazilian Justices construct legal arguments about violence against women in such an important public institution as the Superior Court, popularly known as the “Citizenship Court.” The paper also aims to expose conflicting dialogues, ideologies, and power games that are inherent in these decisions.

KEYWORDS: Argumentation; Discourse; Gender-based violence; Maria da Penha Act; STJ

RESUMO

Neste artigo, usamos a Análise de Discurso Crítica (ADC) como abordagem teórico-metodológica para analisar argumentos de ministros e ministras do Superior Tribunal de Justiça (STJ) em um acórdão que afetou o entendimento jurisprudencial brasileiro sobre a Lei Maria da Penha. O principal objetivo neste trabalho é analisar como a Justiça constrói argumentos relativos à violência contra as mulheres em um órgão público notório, como o STJ, que é popularmente conhecido como "Tribunal da Cidadania" por, supostamente, garantir o exercício de vários direitos para a população brasileira. Também buscamos trazer a público diálogos conflitantes, ideologias e jogos de poder inerentes à decisão em análise.

PALAVRAS-CHAVE: Argumentação; Discurso; Violência de gênero; Lei Maria da Penha; STJ

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Clearly, then, moral virtue belongs to all of them; but the temperance of a man and of a woman, or the courage and justice of a man and of a woman, are not, as Socrates maintained, the same; the courage of a man is shown in commanding, of a woman in obeying.
Aristotle

Introduction

The quote above is from “The Politics,” by Aristotle, who is considered to be the father of Rhetoric. While the mention of the philosopher in an analytical text such as this seems appropriate in itself, this particular quote introduces a chain of meanings in the words *temperance, courage, justice, man, woman, commanding* and *obeying* that relate appropriately to the topic of this analysis: The violence that innumerable women suffer in relationships with their partners. This topic represents a social problem that has mobilized the feminist movement since the 1970s and serves as the subject of a series of social policies in the areas of health, education, and safety. It is also a focus of legal and legislative action and debate in Brazil.

Examination of this social issue within the parameters of linguistics, as proposed in this article, is topical because of changes in the understanding of language that have been developed through the study of linguistics, to which the works of Bakhtin and his Circle have contributed significantly. In opposition to the dichotomous visions of his time, which defined language as the individual representation of thought (individualistic subjectivism), or as a system abstracted from the social practices of use (abstract objectivism), Bakhtin rescued linguistics from the formalism that isolated it in the social field.

The studies of linguists that attempt descriptions of critical discussions on social themes, such as that proposed herein to analyze gender-based violence through the lens of language, are built on the foundation of Bakhtin’s work. In this context, it was possible to direct the discourse of the present study towards the interaction between subjects, the relation of facts, circumstances, the social historical context, and, most importantly, ideology. Nevertheless, the framework in which this study considers the problem, derived from its textualization in legal discourse, also illuminates incompatibilities.

After subsequent studies of the Bakhtin Circle, it became impossible to conceive of language with any sense of neutrality, as a mere instrument of communication for the support of thought. In Vološinov's words:

Social psychology in fact is not located anywhere within (in the "souls" of communicating subjects) but entirely and completely *without* – in the word, the gesture, the act. There is nothing left unexpressed in it, nothing "inner" about it – it is wholly on the outside, wholly brought out in exchanges, wholly taken up in material, above all in the material of the word (1986 p.19; emphasis in original).

However, as Colares (2008) observed, due to linguistic and social training, the Brazilian legal community typically defines texts in terms of the asymmetry of power, as natural and non-problematic. There is constant evidence of this in studies on gender-based violence in texts on the Brazilian penal system (FREITAS, 2011a; 2011b; 2013; FREITAS and PINHEIRO, 2013), creating an entire sphere of problems related to the ways in which the law deals with a type of violence for which, justly, the questions of power are not dissociable.

As the work of the legal community is anchored primarily in its language, this paper analyzes the legal argumentation through a discursive approach in dialogue with Bakhtin. It applies the theoretical framework of Critical Discourse Analysis (CDA) (FAIRCLOUGH, 2003; RESENDE and RAMALHO, 2006) to an eminently argumentative body of work that is a product of the Brazilian legal system – specifically, a precedential decision of the Brazilian Superior Court of Justice ("the Superior Court") on the Maria da Penha Act. In analyzing this decision, the objective is to discuss how a Court of Law at the level of the Superior Court, known as the "Citizenship Court," because of its perceived role in guaranteeing the practice of various rights to the Brazilian population, deals with a problem of gender-based violence and implements the law to fight it. The primary goal is to bring to the public eye the dialogues that are locked away among some of the social entities that manipulate the Brazilian legal system, together with their ideological values and their role in the legal balance of power.

1 *Habeas Corpus* n° 96.992 - DF (2007/0301158-9)

This article analyzes a decision stemming from criminal proceedings related to gender-based violence, which began in 2007 and reached the Superior Court of Justice due to a request for *habeas corpus*, which was tried in August 2008. (*Habeas corpus* is called upon when an individual experiences an illegal restraint of liberty or power abuse.) The case that resulted in a request for *habeas corpus* began when, in the first instance court, “[i]n the presence of the Justice, the District Attorney and her lawyer, the victim declined to represent against the perpetrator,” who was her partner.

The accusations were of minor injuries to the body, damage, and threats. The prosecutor insisted on the provision of testimony with regard to the minor injuries to the body, with the understanding that Law 11.340/2006, known as the Maria da Penha Act, considers that this type of public penal lawsuit is not conditioned upon the representation of the victim. In other words, the court would not require the victim’s representation. The Justice rejected the prosecutor’s request, however, alleging that the law did not modify its conditional character. The Prosecutor’s Office then appealed to the second instance court that provided the request, determining that the Justice in the first instance court should receive denunciation and prosecute the aggressor. The defendant, feeling outraged, interjected with a request for *habeas corpus* to the Superior Court of Justice. Our analysis is undertaken from this particular case.

The interest in this specific ruling is due to the fact that it brings within its text a discussion that, until recently, has occupied the Brazilian legal system with regard to cases of violence against women since the inception of the Maria da Penha Act in 2006. Justices throughout Brazil had to decide between attending to the victim’s desire to forgive the aggressor and decline the proceeding, or prioritizing the social causes of gender-based violence and with regard to human rights, which guided the decision in the Maria da Penha Act, and punishing the aggressor, even if against the victim’s will. This issue was resolved in 2012 by the Supreme Federal Court, in the trial of a Direct Action of Unconstitutionality, which argued that gender-based crimes should not be considered private action, but instead are public penal lawsuits not conditional to the representation of the victim. However, before the decision of the Supreme Federal Court, the Superior Court of Justice occupied a privileged position in this controversial

issue, setting precedents to legal hearings throughout the country and capturing the attention of the media and public opinion on the issue.

In the ruling being analyzed here, the Sixth Panel¹ of the Superior Court of Justice provided a decision in 2008 that was applauded by the supporters of the fight against gender-based violence and that guided future rulings on similar cases throughout the nation: It denied the right of *habeas corpus* based on the vote of the rapporteur, Minister Jane Silva, accompanied by Ministers Hamilton Carvalhido and Paulo Gallotti. Ministers Nilson Naves and Maria Thereza de Assis Moura, who had approved the request, were defeated. Not with standing, one of the defeated votes registered in this ruling was used to its full extent three years later, in 2011, by its author, Minister Maria Thereza de Assis Moura, when she was the rapporteur of another decision² that altered the Superior Court's stance on the issue from that point forward.

Various media outlets covered this decision that outraged members of social movements in support of victims of gender-based violence. Such a scenario justifies the inclusion of this specific text to highlight the forms of legal action applicable with regard to the Maria da Penha Act. Reviewing the arguments used in the text allows one to understand the dialogic processes that activate power relations disputed within the deciding entity with regard to women's right to non-violence while also reflecting on the framework of legal discourse.

2 Reviewing the Ruling with Regard to Critical Discourse Analysis

Critical Discourse Analysis (CDA) is a field within linguistics, heir to Critical Linguistics, which, similarly to other areas correlated with Systemic Functional Grammar, and Social Semiotics, to mention but a few, composes the ample theoretical

¹The decision of *Habeas Corpus* N° No. 96 992 - DF was tried by the Sixth Panel of the Superior Court of Justice, composed of five ministers. This Court is divided into three specialized sections. Each section consists of two specialized panels, and each panel is composed of five ministers. The first and second panels comprise the First Section, specializing in Public Law; the Third and Fourth Panels comprise the Second Section, specializing in Private Law; and the Fifth and Sixth Panels, the Third Section, specializing in matters of Criminal Law. The case of concerning the Maria da Penha Act is judged in this third section, because it is a criminal proceeding. One minister must be in charge of drafting the vote of the decision as rapporteur, and four other ministers will support this vote or not. With five votes, there is no possibility of a tie, so the result is always the majority, for or against the vote of the rapporteur.

² The agreed decision was *Habeas Corpus* N° 154.940 - RJ (2009/0231509-0).

field of discourse studies. The distinguishing feature of CDA is its proposal to study language as a social practice, while also considering the crucial role of context and the relationship that exists between language and power, domination, discrimination, and control. In this sense, the ideological effect of the texts is a priority of this chain, which is strongly influenced by the work of Bakhtin and the Circle, the first to outline a linguistic theory of ideology, which states that language is always used in an ideological manner:

Language, in the process of its practical implementation, is inseparable from its ideological or behavioral impletion. Here, too, an orientation of an entirely special kind – one unaffected by the aims of the speaker’s consciousness – is required if language is to be abstractly segregated from its ideological or behavioral impletion (VOLOŠINOV, 1986, p.70).

For Fairclough (2003), ideologies are representations of aspects of the world that are plainly identifiable within texts. The author believes that the principal difference in the approach that CDA takes with ideology is in its critical bias, as opposed to merely descriptive forays. In this perspective, the notion of “critical” means considering the social data and focalizing it as a linguistic-discursive practice, revealing how these are imbricated with socio-political structures that are more extensive with regard to power. Therefore, the textual analyses in CDA consider bodies of work in terms of their effects on power relations and must discuss how these texts collaborate for the maintenance, establishment, or modification in social relations of dominance, exploitation, and control, among other factors.

Moreover, the textual analysis of the decision begins with an understanding of this document as a manifestation of verbal communication, as Bakhtin (2010) postulated, in his conception of discourse genres and their connections to the historical, social, and cultural context of this communicative activity. Bakhtin’s definition, “relatively stable types of utterances” (2010, p.60), subsidized Fairclough’s (2003, p.65) elaboration, which considers genres as “specifically discursal aspect of ways of acting and interacting in the course of social events.”

Similar to Bakhtin (2010), Fairclough (2003) highlights the abstract nature seen in genres, and proposes a classification according to certain levels of abstraction. One such classification relates to the degree to which a genre relates to the social practices that the text presents through language. In this sense, the author refers to *situated*

genres, like the name suggests, as a specific language exercise placed within a situated social practice. In this theoretical framework, the ruling under analysis is considered a situated genre that performs, according to Bortoluzzi (2010), one of the most important social practices, in a legal sense, whether according to its own legal intent or from the perspective of those that comprise society: The legal ruling.

Bortoluzzi (2010, p.513) states that “the act of deciding is the climax of any legal action, for it depends on the decision a sentence that affects someone’s life.” The decision-making process of the Court is regulated by the Brazilian Civil Procedure Code within which the denomination of *agreed decision* is given to decisions provided by Courts with the competence to provide decisions in first instance courts. Therefore, the text of the agreed decision represents a decision about another decision with a foundation in laws, and it receives this designation because it registers agreements between various judges who concur on the best legal way to take specific actions.

As a situated genre in the deciding practices of the Superior Court of Justice, the agreed decision in question is placed in Fuzer and Barros’ (2008, p.48) definition of “genre system”: “a series or sequence of conjugated acts that take place and evolve along the time and is designed for the application of criminal law.”³ In this system, a genre follows another genre in a regular sequence and in predictable temporal standards, revealing a communicative flow typical to the group in which it originated. According to Ferraz Júnior’s (2013, p.287) commentary, “the act of deciding implies a situation of communication, understood as a global interactive system because it is always referred to another person at different levels.”⁴ The aggressor, for example, can either be absolved or condemned to punishment that varies between community and social service, mandatory participation in psychological treatment, or even punishment that denies the right to freedom. The ruling of the Superior Court of Justice, in this sequence, represents a decision that can either finalize a prosecution or, such as the case in question, recover a prosecution that was suspended in a previous instance by another legal ruling. More importantly, the decisions of the Superior Court of Justice affect the

³Text in original: *uma série ou sequência de atos conjugados que se realizam e se desenvolvem no tempo, destinando-se à aplicação da lei penal no caso concreto.*

⁴Text in original: *uma situação de comunicação, entendida como sistema interativo global, pois decidir é ato sempre referido a outrem, em diferentes níveis recorrentes.*

interpretation of the federal law throughout Brazil, because this Court is responsible for standardizing the rule of law.

In the generic structure of an agreed decision, reasoning is the primary method of textual organization. According to Miranda Netto and Camargo (2010), the Constitutional Court must justify each act of decision in a constant struggle for popular adherence, in order to guarantee its function as representative of the people. Therefore, the judges of these Courts argue with more integrity and vigor than the legislators do. For Fairclough (2003), argument is an abstraction that transcends the web of specific social practices. This allows the author to consider argument as pre-genre within his theoretical critique, as many social practices employ this kind of textual organization.

In the field of law, argumentation is a part of legal dogmatism, specifically within the legal dogmatism of decision (FERRAZ JÚNIOR, 2013). In this area, argumentis considered technological knowledge that does not prioritize the decision in terms of its description as a social reality, but rather in terms of rules for the act of deciding, within the norms and conceptions of the field. Such characteristics support legal systems that are positive or bureaucratized, and are reflected in the referenced texts, which suffer strong generic coercions, mostly in terms of structural composition.

The agreed decision genre is a standardized text in the mold of legal culture. Its textual structure seeks to guarantee its standing with regard to decisions taken in specific situations. In this way, legal discourse in general aims to be characterized by an impression of truth, which describes reality, as if the words and actions within were transparent, bringing an objective and invariable meaning with them. This is a conception that has more and more been questioned within the field of law. According to Ferraz Júnior's (2013, p.327) proposition, "the decision-making discourse is, in these terms, evaluative and ideological."⁵

These characteristics of decision-making discourse imply many problems with regard to power issues. The decision, historically, is linked to deliberative tradition, which later was appropriated by the dogmatic doctrine that lays the foundation for the legal field. According to Ferraz Júnior (2013, p.285), this doctrine:

⁵Text in original: *o discurso decisório é, nesses termos, avaliativo e ideológico.*

is concerned with the technical requirements, which are the instruments serving the decider, apparently to suit his action to the very nature of the conflict, but, in fact, to find the decision that is imposed and prevalent as legally.⁶

The author also states that decision and conflict are correlated terms that are both centralized on the notion of control: The power of decision. Justifications that the dogmatism must explicitly incorporate the phenomenon of power as an element of theorization are constantly growing within the field of law. The doctrine discusses judicial power, but “as a kind of neutered judge, devoid of the brutality of strength, an exercise of control that might be confused with obedience and compliance to laws” (FERRAZ JÚNIOR, 2013 p.289).⁷ This stance is incompatible with the Bakhtinian thought insofar “The Circle rejects the idea that moral decisions exist independently of the process that demands them and of the situated character of the subject” (SOBRAL, 2005, p.23).⁸ With regard to conflicts, decisions are made as a final action. Deciding demands a suspension of decision when facing options, in which one possibility is chosen and the rest are abandoned. The implied choices are taken within the inexorable scope of the subject-society relationship, even though they seek the framing to the molds of legal discourse and depersonalized, objective, and neutralized dogmatism.

These attributes of judicial discourse make it the ideal object of study with regard to CDA, given its multidisciplinary aspect and its stance on the relationships between language, ideology, power, dominance, discrimination, and control. The argument proposed by Fairclough (2003) basically involves a grammatical focus on text structure, associating it with the socio-historical meaning of the text and a critical approach to the social practices in which it is applied. This entire spectrum that frames the current research makes CDA a strategic resource for this proposal, which is focused on gender-based violence and the discourse of law, both of which have a central connection to power.

⁶Text in original: *preocupa-se com os requisitos técnicos que constituem os instrumentos de que serve o decisor, aparentemente para adequar sua ação à natureza mesma dos conflitos, mas, na verdade, para encontrar a decisão que prevalecentemente se imponha e os conforme juridicamente.*

⁷Text in original: *como uma espécie de árbitro castrado e esvaziado da brutalidade da força, um exercício de controle que se deve confundir com obediência e a conformidade às leis.*

⁸Text in original: *O Círculo refuta a ideia de que decisões morais existam independentemente do processo concreto dessa decisão e do caráter situado do sujeito.*

3 Arguments on Gender-based Violence in the Discourse of Decision: Actors, Ideologies, and Conflicts

The ruling on *Habeas Corpus* N° 96.992 – [DF] rendered a decision with regard to a crucial issue within the interpretation of the Maria da Penha Act: Whether an action of minor injuries to the body is conditioned upon or not conditioned upon representation of the victim. The law does not state that public penal lawsuits have an “unconditioned” legal nature with regard to domestic violence. Thus, it is necessary that the victim formally testify against abusers so that prosecutors can take appropriate legal measures. The renunciation of representation shall only be admitted before the judge, in a hearing especially assigned for such purpose, before receiving the denunciation and after being notified by the Prosecutor’s Office.

Research on gender-based violence (CAMPOS, 2004; FREITAS, 2011b) shows that the majority of the trials of this nature, in general, end with no major penalties against the aggressors, because they end due to a withdrawal by the victim or a conditional suspension of the trial.⁹ This is possible because of an interpretative ambiguity that the law created by not verbally expressing the nature of the penal lawsuit. This, in turn, allowed judges throughout the nation to opposite interpretations, recognizing the renunciation to representation or not. The agreed decision from the Supreme Court of Justice that the current paper analyzes should have ended this discussion in 2008, as it established a precedent that supports the duty of the State to protect women’s rights, designating the Prosecutor’s Office with the power to take action against aggressors of battered women, independently of the representation of their victims.

Such a decision, however, was not unanimous. The rapporteur, Minister Jane Silva, voted in agreement, and was accompanied by Ministers Hamilton Carvalhido and Paulo Gallotti. Ministers Nilson Naves and Maria Thereza de Assis Moura voted against the decision. All of these actors, despite having behaved within the rigid standard that denotes the structure of the agreed decision genre, are real people, situated in specific

⁹The conditional suspension of proceedings is an institution for criminal policy that is beneficial to the accused, providing for the suspension of the proceedings, following the receipt of the complaint, since the crime imputed to the defendant does not have minimum sentence higher than one year. The defendant who receives the benefit of conditional suspension is subject to compliance with certain legal conditions, with the aim of achieving the extinction of criminal liability without the necessity of trial.

historical moments, dealing with a practice that is similarly situated in a socio-historical context. According to Colares (2008), with regard to the lessons of Bakhtin, the linguistic-discursive productions, however not explicitly intended, are determined by ideologies, beliefs, and values that permeate the discourse of its utterer of subjectivity. Therefore, these judges' decisions were, in one way or another, underlined by their deepest ideologies and habits: "all family values, all they hear on a conversation with their family are reflected in the sentence, even if unconsciously" (WARAT 2010, p.41).¹⁰ Such an observation supports the mistrust exposed by Ferraz Júnior (2013, p.293) that, in the decision-making process,

although a general rule appears first, followed by the description of the case, and finally by the conclusion, in fact, the decision-maker would tend to develop the decision by a reverse procedure, intuiting first the conclusion, and then regressively seeking the premises to support it.¹¹

Not with standing, in the textualization of the agreed decision, judges seek to endow their arguments with normative power based on the legal system. For this, they trace a series of inter-textual relations that dialogue with differing authorities and previous genres, through the mention of precedents, doctrine, summaries of other decisions, and documents that have the power of the law.

This dynamic characterizes the agreed decision as a highly dialogical genre with identificational meanings (FAIRCLOUGH, 2003) that expose conflicting stances and perspectives. Analyzing these texts in the framework of CDA implies adopting different theoretical and methodological possibilities that guarantee the interdisciplinary profile of CDA (REZENDE; RAMALHO, 2006). In the same way that heterogeneity is a characteristic of this field, to contemplate it, the current study borrowed resources from other sectors, such as Systemic Functional Linguistics, in which CDA has a point of anchorage for textual analysis.

¹⁰Text in original: *todos os valores familiares, tudo o que ele escuta em uma conversa com seus familiares se reflete na sentença, ainda que de forma inconsciente.*

¹¹Text in original: *embora formalmente primeiro apareça a regra geral, depois a descrição do caso e por fim a conclusão, na verdade, o decididor tenderia a construir a decisão por um procedimento inverso, intuindo, primeiro, a conclusão a que se deve chegar para então buscar, regressivamente, suas premissas.*

Continuing in this vein, one finds support in the Appraisal System that is proposed by Martin and White (2007). According to Van Dijk (2000), a CDA theorist, one can draw from part of the work on *topoi*, for argumentation studies. From Sociology, one finds in Bourdieu (2006) support for the symbolic power. In law, one dialogues with critical authors, such as Ferraz Júnior (2013) and Warat (2010), who deal with decisions. These will be the primary sources of reference that will be applied in the discursive exploration of arguments by the Ministers in the ruling so that this study may discuss their dialogues, as well as their ideological stances and perspectives on power, with regard to the interpretation and application of the Maria da Penha Act.

3.1 Arguments in the Defense of the Rights of the Family to Harmony in the Home

Beginning with the vote of the rapporteur, at that moment, Minister Jane Ribeiro Silva, who currently presides as a judge of the Court of Justice of Minas Gerais (TJMG), had been presiding over the Brazilian Superior Court of Justice for a year and a half, in the Third Section. She was the rapporteur of important issues in the application of the Maria da Penha Act, such as her decision to maintain the conviction of journalist Pimenta Neves in the death of his ex-girlfriend (Resp. 1012187). In the conclusion of the vote analyzed in the present study, she positioned herself against the concession of *habeas corpus* for the aggressor, stating that “[g]iven the conditions of procedurability of the action, it is left to the District Attorney the role of legal agent for penal lawsuits. Due to this, I reject the order. This is my vote.”¹²

Disregarding the discussion on the order in which the judges construct their decisions, whether from premises or from conclusion, this study will focus on the final utterances of the Minister, as she concludes her decision: “rebuilding the legislative alterations that *led to the understanding that an action of minor injuries to the body, practiced against women in a family setting, is necessarily, publicly unconditional.*”¹³

Repeatedly, the Minister highlights the social reasons for which the Maria da Penha Act was drafted, which were, in her words,

¹²Text in original: *Presentes, pois, as condições de procedibilidade da ação, compete ao Ministério Público titular da ação penal, movê-la. Posto isto, denego a ordem. É como voto.*

¹³Text in original: *conduziram ao entendimento de que a ação sobre lesões corporais leves e culposas, praticadas no âmbito familiar contra mulher, é, necessariamente, pública incondicionada.*

to attend to the varied and, unfortunately, numerous cases of minor injuries to the body practiced in the safety of the home, a location that should impair the peace and harmonious living situation between its members and, furthermore, never should the aggression be unhindered as it often is, which risks the family structure and foundation of society.¹⁴

Having provided the background, she declares that “*given the doubt on what kind of penal action must be managed following these modifications,*”¹⁵ she indicates two possible—however contrasting—theories. At that moment, the Minister opts for the one that recognizes the criminality of the aggression:

The second theory, to which I align myself, puts forward that with the advent of Law 11.340/2006, the legislator proposed changes that effectively could contribute to cease or, at least, drastically reduce the sad violence that is ongoing many Brazilian homes, a disguised violence which corrodes the foundations of society little by little.¹⁶

In a previous work (FREITAS, 2013), the current authors dealt with the choices jurists must make in delivering decisions, an issue faced once again in this article. The referenced statements show that by affiliating herself with the second camp, the Minister discarded the first, because it does not privilege the interests that she prioritizes. Her choice, however, is not an arbitrary legal imposition. Much to the contrary, it is a choice within the options that legal texts offer. Therefore, and similarly supported in the vision of Bourdieu (2006), this analysis emphasizes that legal decisions imply choices that are more influenced by the ethical attitudes and moral values of the participants than to the strict rules of law, which in most senses are projected as neutral and universal. This is demonstrated in the analysis.

CDA provides much emphasis on external analyses. In other words, it considers relationships between texts and other elements of events, practices, and social

¹⁴Text in original: *foi atingir os variados e, infelizmente, numerosos casos de lesões corporais praticados no recanto do lar, local em que deveria imperar a paz e convivência harmoniosa entre seus membros e, jamais, a agressão desenfreada que muitas vezes se apresenta, pondo em risco a estrutura familiar, base da sociedade.*

¹⁵Text in original: *diante da dúvida sobre qual a espécie de ação penal deverá ser manejada após todas as mudanças.*

¹⁶Text in original: *A segunda teoria, a qual me filio, preconiza que com o advento da Lei 11.340/2006 o legislador quis propor mudanças que efetivamente pudessem contribuir para fazer cessar, ou, ao menos reduzir drasticamente, a triste violência que assola muitos dos lares brasileiros, uma violência velada que corrói as bases da sociedade pouco a pouco.*

structures. Simultaneously, it focuses on internal relationships, which include, for example lexis and syntaxes. According to Vološinov (1986), words are the purest and most sensitive mode of social relationship. In this sense, while considering the rapporteur's text on evaluative lexical items, one can trace certain values that imply the notion of family that is at the center of her argument. By referring to violent actions against women, the judge creates various nominal threads such as: *Numerous cases of minor injuries to the body; disguised violence; and unhindered aggression*. These sequences function syntactically as the agent of the actions that are expressed by verbal groups: *Ongoing; risk; and corrodes*. Their objective is: *The safety of the home; peace; many Brazilian homes; harmonious living situation; family structure; and foundation of society*.

These utterances form a representation within which the notion of family is conceived by an ideal universal institution model that mythicizes “the family” as a sacred element that inhabits a “home” in which “parents” and “children” live in perfect harmony. In her research, Campos (2003) states that this conception feeds the logic that makes criminal prosecutions end with the closure of proceedings by the resignation of victims, who are induced to reconcile with their aggressors for the sake of preservation of the “family,” the “home,” and its “harmony.” Although the rapporteur shares many elements of legal jargon in which “the family” is conceived in a conservative manner, prioritizing its upholding, she is a proponent of the opposite course of action, defending the removal of the aggressor from the “home,” in compliance with article 226 of the Federal Constitution: *The family, which is the foundation of society, shall enjoy special protection from the State.*¹⁷

She explicitly declares that [f]amily is the most important institution of the State, sustaining it and supporting it. A family without structure conduces, fatally, a fragile and unarticulated State, making it incapable of safeguarding the public sphere and of assuring individuals of their constitutional rights.¹⁸ It should be noted that, at this point, she did not refer to the woman directly. Her greater premise is that domestic violence affects the interests of the State. Such an elaboration is an institution that Law borrows

¹⁷Text in original: *a família, base da sociedade, tem especial proteção do Estado*.

¹⁸Text in original: “a família é a instituição mais importante do Estado, que lhe dá base e sustentáculo. Uma família desestruturada conduz, fatalmente, a um Estado desarticulado e frágil, tornando-o incapaz de resguardar a esfera pública e de assegurar aos indivíduos seus direitos constitucionalizados”.

from classical rhetoric, the *topoi*, also known as standardized schemes of discourses, that “represent the common sense reasoning typical for specific issues” (VAN DIJK, 2000, p.98). The *topoi* favor the acceptability of choice by legal agents. Therefore, the judge sets apart the collective institutions of the State and family that tend to greater interests than the individual or the woman.

Only after having started this argument in general can the rapporteur then bring the woman and the family members to which the State owes its protection into her text:

The greater interest of society; is the protection of women that are subjugated by the economic ‘power’ of their partners, of elderly women, and, mostly, of minors, who, as a general rule, are victims, even in the case of mental violence, from this kind of situation. For this reason, the choice is not solely of the victim, but of the District Attorney, an institution essential to Justice.¹⁹

This entire arrangement is quite functional to the necessary alignment of the framework of judicial discourse, which seeks what Ferraz Júnior (2013) denotes as subsumption. The author explains that subsumption refers to the submission of the case to the law’s own rules and applications. Given this, the rapporteur, while attempting to defend a cause supported by feminist movements and her own argumentation, avoids exposing this alignment and, to the contrary, starts with traditionalist rhetoric, adjusted to legal culture. This orchestration is more efficient in validating, within the field of law, the ideals that instigated the Maria da Penha Act: Providing a more rigorous legal framework for gender-based violence.

3.2 Arguments in the Defense of the Right to Absolve the Aggressor

The rapporteur’s vote was accompanied by those of Ministers Hamilton Carvalhido and Paulo Gallotti. Given that these judges aligned themselves with the decision of Minister Silva, many textual resources are repeated and, therefore, this study opts to prioritize the contradictions and disputes in the decision-making process. The

¹⁹Text in original: “O interesse maior é da sociedade; é a proteção de mulheres que ficam subjugadas pelo “poder” econômico do parceiro, de idosas e, sobretudo, das menores que, via de regra, são vítimas, ainda que de violência mental, desse tipo de situação. Por tal razão, a escolha não pertence à vítima, mas ao Ministério Público, órgão essencial à Justiça”.

present analysis therefore proceeds to the diverging votes, placed by Ministers Nilson Naves and Maria Thereza de Assis Moura.

It should be recalled that both votes against were beaten by the majority; however, it was with the same vote that Minister Maria Thereza de Assis Moura, three years later when the composition of the Third Section was modified, was accompanied by the other judges in unanimously accepting her decision. This fact redefined the understanding of the Superior Court of Justice that aggressors of women could have their trials suspended with the renunciation of the victims. There were repercussions in the media and protestsheld by various feminist movements; however, the decision prevailed until 2012, when the Supreme Federal Court sought to pacify the issue, judging that penal lawsuits of moderate physical injuries have an unconditional nature.

At this point, it is helpful to summarize the arguments that, to the contrary, consider the representation of the victim necessary, beginning with the vote of Minister Nilson Neves, with the final words:

I believe, and forgive my petulance, more honorable to admit, in cases such as these, the representation, in other words, that the penal action depends on the representation of the victim (and the withdrawal as well, of course). There are situations and situations, those of regret, fear, etc., but there are those that are resolved in another way – *backing out*, for example. We know, you know more than I do, that the use of denominated coercive methods are to be seen from a subsidiary perspective: Such I have been stating in my votes, to know, “*the penalty can only be imposed when it is impossible to obtain this through any other less onerous method*” (ROXIN). Among others, of my report, the REsp-663.912, of 2005, and the HC-87.644, of 2007. I request permission to such majestic a vote, of author by the illustrious rapporteur, to concede the order, recuperating, then, the original decision (Minister Nilson Naves’ vote; our emphasis).²⁰

²⁰Text in original: Acho, perdoem a minha petulância, mais salutar admitir-se, em casos que tais, a representação, isto é, que a ação penal dependa de representação da ofendida (também a renúncia, é claro). Há situações e situações, há as do receio, do medo, etc., mas há as que se resolvem doutro modo – voltando atrás, por exemplo. Sabemos, sabem mais do que eu, que o uso dos denominados meios coercitivos há de ser visto de modo subsidiário: tal venho falando em meus votos, a saber, “a pena só pode ser cominada quando for impossível obter esse fim através de outras medidas menos gravosas” (ROXIN). Entre outros, de minha relatoria, o REsp-663.912, de 2005, e o HC-87.644, de 2007. Peço vênica a tão majestoso voto, de autoria de tão ilustre Relatora, para conceder a ordem, recuperando, então, a primitiva decisão (Voto do Ministro Nilson Naves; grifos nossos)”.

One can discuss the judge's decision for the category of *engagement* that is proposed by Martin and White (2007) to analyze the historical and social voices launched in his argument. Holding constant the premise that, as Bakhtin states, verbal utterances are always dialogical, these authors theorize on the form that producers of a text affiliate themselves with or against a contextual fact, as well as the form in which the others are invited to endorse these points of view. Engagement indicates the resources for positioning the speaker's/author's voice with respect to the various propositions and proposals conveyed by a text; meanings by which speakers either acknowledge or ignore the diversity of view-points put at risk by their utterances and negotiate an interpersonal space for their own positions within that diversity. Here, one uses two main categories of engagement: *Dialogic expansion*, the degree to which an utterance, by dint of one or more of these wordings, entertains dialogically alternative positions and voices; and *dialogic contraction*, acts to challenge, fend off, or restrict the scope of such.

The expression "backing out" is stressed here, to analyze the stance of the judge given a discussion on gender-based violence. This expression directly consigns the present study to a problem that was dealt with in previous research (FREITAS; PINHEIRO, 2013): The innumerable trials that are closed because women "back out" and forgive their aggressors. At that time, the present authors analyzed "terms of retraction" in trials of domestic violence and observed that this genre is textualized in such a way that it is evident that the victims, usually poorly educated women, are not responsible for its conception. Evidence was found that the "terms of retraction" were signed by these women without their knowledge of its contents. Functionally, the genre operates a confession of guilt by women that "back out;" they confess to have acted under emotional distress or in an irresponsible manner. Concretely, it registers the victims' regret, their forgiveness of the aggressors, and, indirectly, their own plea for forgiveness to the law for embarrassment due to the initiation of legal action.

The Maria da Penha Act represents a victory for various social groups, especially feminist ones, who fight for women's rights and against gender-based violence. It was developed for the purpose of combatting the trivialized way in which women who were victims of domestic violence were discarded by the national legal system. In this sense, maintaining the understanding that a woman may "back out"

reveals a dialogic contradiction with discourse and practices that support the complacency with which this violence is dealt. The argument that the law must respect the victims' desire to free the aggressor from applicable sentencing implies a proportional respect to violence against the aggressed. With respect to aggressions, the entire offensive list that involves the cases of violence (FREITAS; PINHEIRO, 2013) with its included content of terror is forgiven and forgotten. One detects, however, a dialogic expansion in the argument of the judge that aligns him with the trivial ways that the legal decisions operated in the fillings of trials before the Maria Act, and totally against its objectives.

It is understood that the expression "backing out" has a potential ambiguity in interpretation, because it can mean both minimizing the violent action by the aggressor and subsequent forgiveness of him, and also the acceptance of the violent standard the victim suffered prior to the proceeding because this forgiveness does not guarantee an end to the aggressions. On the contrary, it is seen that women who give up their right to represent against their aggressors suffer gender-based violence again, and many times return to court in a vicious cycle (CAMPOS, 2004). Above all, accepting the forgiveness of this violence is tantamount to not considering its criminal nature, minimizing it as a mere idiosyncrasy of certain conjugal relationships. This seems to be the understanding of Minister Maria Thereza de Assis Moura, as is seen in this segment of her vote:

Separately, the fact that we are dealing with domestic violence against the woman as an attack against basic human rights, in accordance with art. 6º da LMP, also does not impose the conclusion that we are dealing with an *unavailable asset*. It is pacific that the *physical integrity is available*, except when it significantly threatens the individual's own life or indicates mental insanity, *such as in elective surgeries, plastic surgeries, tattoo, and participating in extreme sports and martial arts, are considered the regular exercise of a right*. Furthermore, there are many other rights, normally classified as fundamental rights, which are also available: *Property and freedom* are examples of this (Minister Maria Thereza de Assis Moura's vote; our emphasis).²¹

²¹Text in original: *Por outra, o fato de tratar-se a violência doméstica contra a mulher de um atentado contra os direitos humanos, conforme estatui o art. 6º da LMP, também não impõe a conclusão de que se trate de um bem indisponível. É pacífico que a integridade física é disponível, salvo quando ameace significativamente a própria vida humana ou indique insanidade mental, tanto que cirurgias eletivas, inclusive plásticas, tatuagens, participação em esportes radicais, artes marciais, são considerados*

In order to analyze this argument, the present study refers to the concept of *presupposition*, as it is referred to in the field of CDA, within the notion of interdiscursivity with a foundation on Bakhtin's (1986) dialogical theory and Foucault's (2002, *apud* FAIRCLOUGH, 2003) concept of *order of discourse*. For Fairclough (2003), the interdiscursivity is a type of relationship that is external to the text, between facts that are present and others that are absent, which demands choice – what is said in the text is always in relation to the unsaid. This exteriority reveals, even against the utterers' will, many personal and historical values. In order to analyze the implicitly or explicitly expressed values of the Minister's argument, this study begins once again by observing the lexical and syntactic structures. The word “asset,” as used, is associated with “property,” so much so that the noun appears in the final line of the transcription, next to “freedom,” which is another correlated term. The women's physical integrity is, therefore, an “available asset.” In other words, her “physical,” or body, is “property,” which she can deploy freely, or use however she desires. The notion of freedom would be associated with this free will on the use of her body. There is, therefore, a presupposition that women have total autonomy to make use of their bodies as they desire.

Fairclough (2003) affirms that presuppositions are propositions considered by the producer of a text as predetermined or given, connecting the text to other texts. In many cases of presupposition, the other text is not necessarily specified or identifiable, but a correspondence to general opinion, that people tend to say, to the accumulated textual experience. This presupposition on female autonomy recalls what Boel and Agustini (2008) discussed in their discourse on judicial equality. In a study titled “A mulher no discurso jurídico: Um passeio pela legislação brasileira” (“The Woman in Legal Discourse: A Walk Through Brazilian Legislature”), the authors observed that the judiciary officers disseminated an alleged victory of equal rights between men and women in the legislature, brought forth by the Constitution of 1988 and the Civil Code of 2002.

exercício regular de um direito. Ademais, há muitos outros direitos, normalmente classificados como direitos fundamentais, que também são disponíveis: a propriedade e a liberdade são exemplos disso (Voto da ministra Maria Thereza de Assis Moura, grifos nossos).

This image, especially as portrayed by the media, is clearly the result of what the media promotes since the feminist movements: The belief that women have already conquered their rightful place, at the moment when there are equal rights and considerations between men and women in the various social groups. Nevertheless, the researchers' studies expose the presence of vestiges of sexist and patriarchal ideologies, both in the law and in its application, and that the illusion of equality is necessary for an image of impartiality of the judiciary so that characteristics of naturality/truism are kept apparent in its discourse.

The concatenation that the judge provides for her argument on female autonomy, by linking this with women's right to make use of their bodies, using the examples of the choice to engage in *elective surgeries, plastic surgeries, tattoo, and participating in extreme sports and martial arts*, associates women's decisions to forgive their aggressor to an idiosyncrasy or, in other words, a sadomasochistic, yet harmless, oddity: Women's right to be abused, if they so desire. Such an argument does not capture the discourse of the construction of a socio-cultural female, known as gender, which is included within the text of the Maria da Penha Act, which originated the law and is textually expressed within it.

It is known that the Maria da Penha Act is the result of a long struggle by feminist and human rights movements. Its promulgation addressed a complaint to the Inter-American Commission on Human Rights on a legislative omission by the Brazilian State, which had not complied with the commitments it had agreed to in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará, in order to guarantee the specific protection of women. The omissions of the ideas of gender, which must guide the treatment provided by the judiciary of this violence, is textually registered in the 5th article of the law, which defines it as “*any action or omission based on gender that causes the woman's death, injury, physical, sexual or psychological suffering and moral or patrimonial damage.*”

This definition was taken directly from the treaty signed at the Convention of Belém do Pará. Understanding gender-based violence under the bias of gender implies the recognition that the female body has historically been the target of constant exploitation, of the widest varieties. Furthermore, it implies that the beliefs in biological

differences of gender that allow women to be labeled as inferior and submissive must be overcome.

Admitting that gender-based violence is an idiosyncratic standard of a relationship that should be as acceptable as other painful and/or risky idiosyncrasies to which people submit their bodies freely, as cited by the Minister, demonstrates a dialogic contradiction with the discourse that preceded the law. The argument that the female body is an “available asset” creates some dangerous ambiguities: Women can make use of their bodies to be abused; or women’s bodies are at the disposal of the aggressor to abuse of if they, the women, desire. In this line of reasoning, several fallacies that are present in common sense are in dialogic expansion with the Minister’s argumentation. These are particularly expressed in popular sayings, such as “women like being beaten,” or “women are like steaks, the more you beat them, the softer they get.”

These arguments could just as well support the act of mutilating women’s clitoris in Africa, if this were their choice. At present, the struggle against gender-based violence must face all myths, beliefs, and cultural practices, as submission and sexism are also cultural practices. What the judge seems to forget, or does not know altogether, is that certain attitudes are not free choices. Many times women, and/or their children, are threatened. People make choices within their realm of possibilities, or under the guidance of a symbolic power, and, according to Bourdieu (2006), the symbolic power is, with effect, these invisible powers that can only be exercised with the complicity of those that do not want to know that they are subject to the same with they do.

The argument of Minister Hamilton Carvalhidois more aligned with the ideas that provided the basis for the Maria da Penha Act than Minister Silva’s:

Under a sociological focus, it is undeniable to recognize that the majority of women victim to domestic violence, especially those of less favored social classes, when they take their cases to the acknowledgment of the “authorities,” they end up being coaxed towards representation, suffering intimidation of all sorts by the aggressors, including physical, moral, psychological, financial, etc. There are cases, for sure, in which women represent themselves by spontaneous free will, given the reconciliation of the family. However, in the clash between the two scenarios, the prevailing one is that which best attends to a social interest, in other words, that effectively contributes to the preservation of the physical integrity of women, who

have historically been victims of domestic violence and maintained as the weak link in conjugal and family relationships.²²

The Minister's vote contains several instances that are in direct dialogic expansion with the feminist discourse that sought so arduously to protect women's rights, just as the Maria da Penha Act's text itself did. Here the "sociological focus" and "social interest" are reinforced, according to claims by human rights groups that fight for the effectiveness of the law.

Approaching the end of this analytical section, it is worth recalling that this entire discursive debate of Justice (the Superior Court of Justice) on gender-based violence took place at a moment prior to the Supreme Federal Court's ruling, in 2012, which pacified the question on the unconditioned character of the Maria da Penha Act, annulling the entire ruling of 2011, which was guided by Minister Maria Thereza de Assis Moura's controversial vote. New studies must be undertaken so that we may have access to the current issues that have left the Brazilian legal system at a standstill with regard to gender-based violence. Therefore, it is appropriate to propose a reservation and refer to Bourdieu's (2006) reasoning on symbolic power: It is necessary to know how to discover where it is least visible, where it is most completely ignored, but recognized.

Conclusion

Referring once again to Aristotle's quote, the present authors chose to use the words of a Greek philosopher who lived prior to the Christian era in order to recall that beliefs on the roles of men and women in domination-submission relationships, as

²²Text in original: *E sob um enfoque sociológico, é inegável reconhecer que grande parte das mulheres vítimas de violência doméstica, especialmente aquelas de classes econômicas menos favorecidas, quando levam seus casos ao conhecimento das chamadas "autoridades", acabam por ser coagidas a se retratar, sofrendo intimidação de todos os tipos por parte dos infratores, inclusive físicas, morais, psicológicas, financeiras etc. Casos há, por certo, em que as mulheres retratam-se por livre e espontânea vontade, dada a reconciliação da família. Mas no confronto entre os dois cenários, deve prevalecer o que melhor atenda ao interesse social, isto é, que efetivamente contribua para a preservação da integridade física da mulher, historicamente vítima de violência doméstica e tida como o mais fraco na relação conjugal e familiar.*

expressed by Aristotle more than 2000 years ago, still provide support, in the 21st century, for gender-based violence.

In modern days, gender-based violence represents a direct offense to the equalitarian ideal desired by society, defined by the paradigm of a democratic and lawful State. Consequently, it has become the target of public policies and legal action, in an attempt to disrupt it. However, the belief in the impartiality of legal discourse makes the community itself unaware of the need for engagement with political issues by its representing legal agents, many of whom align themselves ideologically to the traditional patriarchal domain, which can even be considered sexist. Without a clear declaration of a political position with regard to social issues in general, and particularly for gender-based violence, many rulings, contrary to the equalitarian ideal that they should supposedly guarantee, end up strengthening the power of the sexist culture, providing it with normative sustenance.

The present author have not sought to develop a proof on argumentation theory with new categories of analysis in this text, which is focused on argumentation and discourse in dialogue with Bakhtin and the Circle. This study was restricted to applying discourse analysis on the arguments of Ministers of the Superior Court of Justice on the Maria da Penha Act in order to bring forth to the public eye the debates that are at a standstill, due to their ideological games and power struggles. It can be assumed, in accordance with Plantin (2009), that the practice of evaluating arguments is guided by a simple principle: *One who does not accept an argument is the first, and probably best, critic*. It is because the authors do not accept arguments that support gender-based violence that this article was undertaken. Within CDA, according to Chouliaraki and Fairclough (1999), the researcher, contrary to supposed scientific neutrality, assumes both the perspective of someone who is engaged in social practice—that is, interested in the appropriation of social resources—and also to the theoretical perspective, attempting to describe these same social resources. The authors argue that no unilateral negativity, incompatible with the principles of science, must accompany this specification. On the contrary, the positioning of the analysts indicates an ethical commitment. With regard to scientific assumption, this is guaranteed by the demonstrated evidence that the theoretical framework, which includes textual and socially oriented analyses, considering conjuncture, particular practices, and semiosis.

The method and objective for this article, in which the CDA approach was followed, used certain categories that guided our focus on the textual resources of the ruling, under the ampler understanding of social power, which permeate this language. Even though this study sought to provide evidence on ideological conflicts within the Brazilian Superior Court of Justice rulings on gender-based violence, the undertaking does not propose a terminal analysis. On the contrary, the intention herein is to provoke further debate and push forward the critical process.

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