INFIRMITAS SEXUS, ANIMI LEVITAS. THE PUNISHMENT OF WOMEN UNDER THE "*ANCIEN RÉGIME*"

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Abstract

The criminal law of the *ancien régime*, through law and doctrine, broadly enshrined the principle of *favor sexus*. The basis of this apparent privileged treatment (*fragilitas, infirmitas*) and the concrete solutions of an exclusively male law allow us to reflect on how nature constituted the alibi for a differentiated legal status and on the complexity and profound contradictions of the image and treatment of women criminals, then as now.

Keywords

Punishment and gender. *Favor sexus*. *Infirmitas sexus.* History of criminal law.

Summary

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I. THE PRINCIPLE OF MITIGATING CRIMINAL LIABILITY

a. Sex, or more precisely the fragility of women, was a cause of attenuation of criminal responsibility in the criminal law of the *ancien régime* .[2]

In 1557, Rui Gonçalves, a lensman at the University of Coimbra, presented a list of cases in which women *were punished more leniently* and *piously than men*[3] . His work on the *privileges and prerogatives* of the *female gender*, dedicated to Queen Catarina, wife of King João III, was published for a second time in 1785, the year in which the chaplain of Queen Maria I *remembered* to dedicate it to her sovereign (*Dedicatória*).

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[2] Guido Rossi, "Statut juridique de la femme dans l'histoire du droit italien (époques médiévale et moderne)" in *Recueils de la Société Jean Bodin*, Volume XII, pp.128 and 129; André Laingui, *La responsabilité pénale dans l'Ancien Droit*..., p.251: "La fragilité des femmes leur était une excuse: propter sexum mitius agendum est in poenis cum mulieribus."; André Laingui and Arlette Lebigre, *Histoire du droit pénal*, Volume I, p.91; Jean-Marie Carbasse, *Histoire du Droit Pénal*..., p.228: "Autre cause d'atténuation de la responsabilité (...): le sexe féminin."; and António Manuel Hespanha, *O estatuto jurídico da mulher na época da expansão*, p.11.

[3] *Dos privilegios e praerogativas que ho genero feminino tem*..., *Prerrogativa* 88, *Poena minor*, pp.95-97. This work, constructed from the (male) perspective of the *advantages* attributed to the female "gender", is an unavoidable historical milestone for the reconstruction of the legal status of women and even for a theory of law that takes gender as a subject for reflection and does not dispense with the rich materials provided by legal history.

Tiraquellus, in the first great treatise on criminal responsibility (1559), based on ancient history and Roman law itself, includes gender - along with age - among the causes for mitigating penalties[4] . In his opinion, women should be punished less severely in the case of infractions.[5]

[4] See Tiraqueau, *De Poenis Temperan- dis*, Cause 9. Causes 7, 8 and 9 deal with excuses resulting from age and sex. As a common trait, young age or youth (Cause 7) and old age or decrepitude (Cause 8) present intellectual weakness, which legitimizes the suppression or mitigation of the penalty. As André Laingui observes in his note on these Causes (p.67), modern law is determined more by physical weakness than by intellectual weakness. Cause 45 (p.245) is dedicated to physical weakness and allows for the mitigation of the rigor of non-capital punishment - for example, amputation - which could verifiably lead to death if the condemned person was very young, very old or very frail. Lardizabal y Uribe also identifies age and gender as criteria for determining sentences. *Discurso sobre las penas...*, Capítulo IV (*De la verdadera medida y cantidad de las penas y de los delitos*), § II (*De la verdadera medida y cantidad de las penas*), 17, p.117: "Débese también tener consid- deración en la imposición de las penas a la edad y sexo (...)". This approximation between children, the elderly and women or between age, sex and *illness* or *infirmity* will naturally persist in the Penal Code of 1852. See. Article 19, §11, and the commentary by Levy Maria Jordão, *Commentario ao Codigo Penal Portuguez*, Tome I, p.56 ("He who injures an old man, he who injures a child, he who beats a woman (...)"); and Article 72, as well as the respective annotation, pp.172 and 173.

[5] *De Poenis Temperandis*, Causa 9, 5 (p.78). Tiraqueau also alludes to the excuse resulting from sex and rusticity, in Causa 11, 11, in order to rule it out when the agent, although committing "an offense out of ignorance", does so "in secret". Although "ignorance of the law" normally acts as an excuse, in these cases there is a "presumption of intent" (idem, p.87).

Pascoal de Mello Freire recognizes gender as a cause for mitigating punishments[6] - *in crimes*, women *should be punished a little more leniently*[7] . Joaquim José Caetano Pereira e Sousa also believes that, given their *delicacy* and *sensitivity*, they should not be *punished so severely.*[8]

Pastoret, who writes a short chapter on the relationship between punishment and the sex of the accused, identifies here a criterion

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[6] Mello Freire, "Instituições de Di- reito Criminal Português", Title I (*Dos delitos, delinquentes, e* penas *em geral*), §XXIV (*Pena sem delito*), p.75: "The penalty is attenuated taking into account age, sex, dignity, and above all the degree of intent or guilt, and other circumstances that seem to diminish the atrocity of the crime and must be taken into account beforehand".

[7] "Instituições de Direito Civil Português", Book II (Do Direito das Pessoas), §XIII, p.145

[8] *Classes of Crimes*..., Section I, Chapter I (*Crimes in general*), note 21 to §17, p.14: "Women, who are more delicate and sensitive than men, should not be punished so severely.". According to Pereira e Sousa, crimes, both public and private, were subject to "general modifications" (form of government; climate; customs; public opinion; national character) and "particular modifications". These included circumstances relating to the person of the aggressor; the person of the victim; time; place; manner; quality; quantity; and the event. With regard to the "organization" of the perpetrator's person, gender, age, education and private life were considered. See *Classes of Crimes*..., Section I, Chapter I, §§15-17, pp.10-17, maxime note 21 to §17, p.14. When referring to the circumstances relating to the person of the offender, he formulates the principle according to which the measure of the seriousness of offenses is found more in the malice of the aggressor than in the insult of the offended and does not mention women (note 22 to §17, pp.15 and 16). There is no reference to the word "woman" in the Alphabetical Index.

recognized by *many peoples*[9] . In a century in which humanitarianism is fighting to reform criminal law, he says that humanity would have made itself heard at least with regard to the sex that it believes is the depository of the benefits of nature.[10]

b. *Benignity* in determining penalties - even in legal determination - ceased in the face of *atrocious crimes*[11] , a legal and doctrinal category that historically acts as a true antecedent to *the criminal law of the enemy*. The extreme seriousness of these crimes - paradigmatically political delinquency - determined, from the substantive and adjective points of view, an exceptional regime, in which power no longer treated the delinquent as a *subject*. In 18th century contractualist terminology, they imply a return to the state of nature and war. In Lardizabal y Uribe's explanation, such crimes inherently revealed a malice incompatible with the presumption of greater weakness.[12]

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[9] Pastoret, *Des loix pénales*, Volume II, Part Three, Chapter VII (*Rapports physiques*), Article I (*Rapports de le peine avec le sexe de l'accusée*), pp.143 and 144. The author also sticks to the approach of sex in relation to age (Article II, pp.145-149) and the physical situation of the accused (Article III, pp.149-153).

[10] Idem, p.144.

[11] Arlette Lebigre, "Imbecillitas sexus", p.38.

[12] *Discurso sobre las penas...*, Capítulo IV (*De la verdadera medida y cantidad de las penas y de los delitos*), § II (*De la verdadera medida y cantidad de las penas*), 18, p.118: "(...) las leyes deben mirar con más benignidad en el establecimiento de las penas a las mujeres que a los hombres. However, this should not be understood when a woman's malice is so great, as it sometimes happens, that she commits crimes that are so atrocious that

c. The principle of mitigating the criminal responsibility of women is no more than one of the manifestations of *the partiality of criminal law*[13] or of the *famous and scandalous difference*[14] . Just as the principle of personal inequality in the face of the criminal law[15] is nothing more than a specific manifestation of the statist society in current law.

In fact, in the society of the *ancien régime*, social status - resulting from a combination of factors such as the social group of origin and belonging, creed, sex, professional activity and individual conduct - defines a personal status and this implies specific penal treatment.

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they exceed the weakness of her sex, in which case they should be treated in the same way as men".

[13] The expression is Pastoret's. See *Des Loix Pénales*, Volume II, Part Four, Chapter XIII (*De la partialité des loix pénales, ou de leur respect pour la grandeur et la richesse*), pp.78-86.

[14] In this expression which, among us, became representative of the variation of punishments according to social status, Mello Freire refers to the treatment of the adulterous woman's spouse depending on whether or not he was a nobleman. *Codigo Criminal intentado...*, Introduction, §VI, p.XX: "(...) it is consented not only that the husband can kill his wife and the adulterer, when he finds them in the act, but also outside the occasion and at all times, and that he can summon his friends and relatives to do so: and this is where the famous and scandalous difference is made between the nobleman, the judge, and the other men, as if they didn't all have the same and equal right to their honor". See O.F. L.V, T.38.

[15] See Tomás y Valiente, *El Derecho penal de la Monarquia Absoluta...*, pp.317-330.

In Pereira e Sousa's *Diccionario Juridico*[16] , the word *man* is not defined from an idea of unity or equality, but of division or difference: men are *divided* into free and slaves, and nobles and commoners. *Absolute equality* is limited to the natural state - which the lawyer in the House of Appeal understands as jusnaturalistic - and *is entirely incompatible with the needs of men*. In a possible action, the term *state*[17] is identified with a person's condition, by which they enjoy different rights and duties. Nature itself determines a differentiated legal status (or state): *by the natural state*, *men are either born or unborn*; *those born are male or female, infants or adults*. And above all: *these qualities, or conditions, also give them different rights*. History therefore documents the now famous *naturalization* of difference.

In short, the legal system does nothing more than reflect society's way of being. It can even protect the class structure by designing crimes in which the perpetrator does not recognize that certain people belong

[16] *Outline of a Legal Dictionary...*, Volume II, Voices of *Man* and *Equality*: "Men are equal among themselves because human nature is the same in all. They all have the same reason, the same faculties, one and the same end. (...) This equality consists only in the right that all men have equally to society and to happiness, so that every man has the right to be treated as a man by others, and that natural law is not broken in his regard. Any other kind of equality is impossible and repugnant to the natural order and civil institutes. The state of solitude, independence and absolute equality is entirely incompatible with the needs of men."

[17] Idem, Tome I, voice *state*: "State in the sense of the Forum, means the condition of a person, the quality by virtue of which he enjoys different rights and prerogatives. The state in this meaning comes to us either from Nature or from the institution of men, and is therefore distinguished into Natural and Civil."

to certain groups[18] . Observed through the lenses and values of the present, the signs can even appear contradictory. The Charter of April 4, 1755 forbade the name *cabouculo* - a derogatory term or *name of contempt* that referred to mestizos - to be given to Portuguese people in the Kingdom of America who married Indians.[19]

In fact, this is not even a principle that confronts the absolute monarchy[20] and, when this danger exists or is foreseen, the royal legislation carefully removes the differentiated treatment. This is what happens with political crimes. Or when the Crown is particularly committed to pursuing a certain objective.

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[18] Tomás y Valiente, *El Derecho penal de la Monarquia Absoluta...*, p.47: "Being descended from Christians, being an "old Christian", was an important guarantee of orthodoxy. On the other hand, to publicly call someone "moro", "perro judío", "converso", "tornadizo", or "marrano", meant an insult of such trascendence that the offended party felt impelled to wash it off immediately so as not to be disgraced".

[19] Vd. *Collection of Ancient and Modern Legislation of the Kingdom of Portugal.* Part II. *Da Legislação Moderna*, *Tom. III de LL., Alvv., etc.* (*which covers the reign of King José I. up to* and *including the year 1756*); and Joaquim José Caetano Pereira e Sousa, *Esboço de um Diccionario Juridico...*, Tomo I.

[20] Tomás y Valiente, *El Derecho penal de la Monarquia Absoluta...*, pp.318 and 325: "However, exceptions to this principle were made. The absolute monarchy used as a weapon of penal policy the suppression of any general guarantee or private privilege in those crimes which, due to their seriousness or frequency, it wanted to combat at all costs. It was a way of making the penal law more severe in these cases".

Social status implies particularities in the procedural and penal treatment of the individual. It influences their legal-penal status as a criminal and as a victim. It is reflected in incrimination and especially in punishment. This is, in fact, its privileged field of observation.

d. Acceptance of the partiality of the law cannot, however, obscure the fact that it coexists with the apology *for the good equality of justice*. Far from being configured as a system, the legal system of the *ancien régime* often produced contrary statements, and it was sometimes difficult to articulate how they could coexist as a rule or exception.

The legislation of the 1700s was therefore no stranger to the idea of equality. The Letter of Law of May 25, 1773 outlawed *the seditious and impious distinction* between *new Christians and old Christians*[21]. Similarly, justice must be distributed equally among the vassals[22] . Or the graces and benefits with which the sovereign promotes the general happiness must *descend from the throne* with equality[23] .

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[21] *Collecção da Legislação Portuguesa desde a Ultima Compilação das Ordena- ções, redegida pelo Desembargador Antonio Delgado da Silva. Legislation from 1763 to 1774*, pp.672-678.

[22] Decree of September 15, 1778. Vd. *Collecção da Legislação Portu- gueza desde a Ultima Compilação das Ordenações, redegida pelo Desembargador Antonio Delgado da Silva. Legislation from 1775 to 1790*, pp.182 and 183.

[23] Law of February 4, 1773. See *Collecção da Legislação Portugueza desde a Ultima Compilação das Ordenações, redegida pelo Desembargador Antonio Delgado da Silva. Legislação de 1763 a 1774*, pp.645-648; and Manuel Fernan- des Thomaz, *Repertório Geral, ou Indice Alphabetico...*, Tomo I, 71, p.484.

Mello Freire, through his *Criminal Code*, intends to eradicate the *distinction of punishments by the distinction of people*[24] . Recalling Brissot de Warville and Beccaria, and despite contemplating the possibility of legal derogation, it enshrined the principle of equal punishment regarding corporal and infamous punishments - *judges shall give the same punishments and corporal and infamous punishments to all criminals, without distinction of person*.

In the *Classes of Crimes*, Pereira e Sousa recognizes the impartiality of penalties[25] . And, according to the same *Diccionario*, punishments should be carried out equally on the great and the small, the powerful and the humble because with the *exception of people,* God is offended, and men are scandalized[26].

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[24] Mello Freire, *Codigo Criminal intentado...*, Título IV (*Das Penas*), §13, p.8; and *Provas...*, *Ao Título IV*, p.11: "In §.13. the distinction of penalties by the distinction of persons is prohibited (...) every criminal ceases to be a good citizen, and (...) no longer has the right to the privileges of his order (...)".

[25] Joaquim José Caetano Pereira e Sousa, *Classes of Crimes...*, Section I, Chapter II (*On penalties in general*), §28, p.30. And, in note 45 to §28, p.30: "Since crime affects all men equally, equal punishment should be inflicted on all of them without odious distinctions.".

[26] See voice *sentence* in *Esboço de um Diccionario Juridico...*, Volume II, which refers to the Regiment of September 5, 1671, § 22. Accepção" is defined as "predilection" or "partiality". In this sense, it says that one should judge "without acception of persons" (idem, Tome I). Aversion" is considered "most odious in a magistrate. Any Judge who in his Judgments or Orders shows aversion to any of the Parties may be declared suspect." (ibidem).

Humanitarianism does criticize penal predilection. But it doesn't do so uniformly and coherently[27] . It defines the difference between nobles and commoners as the main target of its criticism. This is how Beccaria's statement should be understood: *the* penalties *should be the same for the first and last citizens*[28] . However, this discourse does not address women. Reformism seeks above all to erect the law as the instrument of equality. Citizens are equal through the law. Therefore, in the obedient words of the Russian *Instructions*, equality between citizens means that everyone is obliged to observe the same laws.[29]

e. The exact scope of the principle of attenuation of criminal responsibility still leaves some doubt.

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[27] We come across both authors who condemn the socio-penal difference and those who tolerate it. The legislation itself reflects this confluence of opposing currents. Tomás y Valiente mentions a law from the end of the 18th century in which the monarch justifies the differentiated penal treatment with an effort at balance that is very revealing of this turbulence of ideas: "(...) halfway between the stamental vision of society, still dominant, and liberal egalitarianism, already incipient." (*El Derecho penal de la Monarquia Absoluta...*, p.324). If, on the one hand, he admits this treatment as a consequence of the social "quality", on the other hand, he takes care to justify it, and does not take it for granted.

[28] Beccaria, *Dos delitos y las* penas..., §XXI (*Penas de los nobles*), p.106: "Every difference, whether in honors or in wealth, in order to be legitimate, presupposes a previous equality based on the laws, which consider all subjects equally dependent on them.".

[29] *Instructions adressées par Sa Majesté L'Impératrice de toutes les Russies...*, *Article* V (*De l'état des Habitants en general*), 29, p.16.

According to André Laingui and Arlette Lebigre, the judge had to assess the guilt of women more leniently, especially when the offense was excused by Roman law or when there was no violation of divine law, natural law or the law of nations.[30]

Jean-Marie Carbasse states that jurisprudence has never accepted a general principle of mitigating responsibility in favor of women[31] . What's more, in certain crimes, they were even punished more severely. In fact, this is the case in the crime of adultery, as Pastoret notes[32] . Only when it came to the choice of penalties, on the grounds of decency or respect for the sex (*propter reverenciam sexus*), were women given specific treatment[33] . These specificities would therefore only apply to the applicable penalties and their execution.

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[30] *Histoire du droit pénal*, Volume I, p.92. This distinction was criticized by Farinacius, since the lack of discernment inherent in sex as a basis for mitigating responsibility would also make sense in serious crimes.

[31] *Histoire du Droit Pénal...*, p.228.

[32] Pastoret gives adultery as an example of a crime in which only the woman is punished, noting the absurdity of various aspects of the penal difference in this area. See *Des Loix Pénales*, Volume II, Part Three, Chapter VII, Article I, p.144.

[33] Jean-Marie Carbasse, *Histoire du Droit Pénal...*, p.229. Pierre Petot and André Vandenbossche, "Le statut de la femme dans les pays coutumiers français du XIIe au XVIIe siècle" in *Recueils de la Société Jean Bodin*, Volume XII, p.252: "Les dispositions relatives au droit criminel s'appliquent de la même manière à la femme et à l'homme. En particulier, la femme est passible de la peine capitale, mais, dans divers circonstances, elle bénéficie d'une certaine clémence. Pourtant, en cas d'adultère, la femme est punie plus sévèrement que l'homme (...)". Adopting the same perspective in his analysis of Hungarian law, Charles D'Eszlary, "Le statut de

II. THE FOUNDATION OF *FAVOR SEXUS*

a. Identifying the basis of the *favor sexus*, which, at least in appearance, is an advantage, is less obvious than one might expect. For two reasons. Firstly, there was no great concern to justify the "difference" or the very inferiority of women. These are aspects that only appear in the texts because they were peacefully accepted. Secondly, the doctrinal and legal texts are deposits of arguments that are often contradictory or, at least, difficult to reconcile.

b. The matrix of all the contradictions and ambivalences could well be rooted in the thinking of St. Paul. On the one hand, in the Letter to the Galatians, he proclaims equality: *there is neither Jew nor Greek; there is neither slave nor free; there is neither male nor female, for you are all one in Christ Jesus*[34] . And the First Letter to the Corinthians does not fail to point out the complementarity between *man* and woman: *neither is woman without man, nor man without woman, in the sight of the Lord. For just as woman was taken out of man, so man exists through woman, and both come from God*[35] . On the other hand, several texts defend male superiority and female submission. The 1st Letter to the Corinthians: *the*

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la femme dans le droit hongrois" in *Recueils de la Société Jean Bodin*, Volume XII, p.441: "Apart from the quelques délits dont nous venons de parler, le droit hongrois ne faisait aucune différence entre l'homme et la femme. Cependant on infligeait généralement aux femmes un châtiment moins sévère qu'aux hommes.".

[34] Gal. 3:28.

[35] 1 Cor. 11, 11-12.

head of every man is Christ, the head of the woman is the man[36] . *Woman is theglory of man. Man was not taken out of woman, but woman out of man; nor was man created for woman, but woman for man*[37] . The Letter to the Ephesians: *Let women be submissive to their husbands, as to the Lord, for the husband is the head of the wife, just as Christ is the Head of the Church, His Body, of which He is the Savior. And just as the Church is subject to Christ, so women should be subject in everything to their husbands*[38] . And finally, the Letter to the Colossians: *Women, be submissive to your husbands, as is fitting in the Lord*[39] .

This ambiguity will have an enormous impact on the evolution of Christian thought[40] and will not leave the legal texts themselves, which will perpetuate ambivalent or even contradictory discourses.[41]

c. If the ambivalence of St. Paul's texts can explain the antithetical discourse that so often arises about women, it is not equality or

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[36] 1 Cor. 11:3.

[37] 1 Cor. 11:7-8.

[38] Eph 6:22-24.

[39] Col. 3:18.

[40] Looking at the thought of St. Paul, Tertullian, St. Augustine, Gratian and St. Thomas, René Metz, "Le statut de la femme en droit canonique medieval" in *Recueils de la Société Jean Bodin*, Volume XII, pp.65-80. And, alluding to the opposing tendencies which, also within Christian thought, recognized moral and spiritual equality but which, on a practical level, supported submission and a differentiated legal status, Guido Rossi, "Statut juridique de la femme dans l'histoire du droit italien (époques médiévale et mo- derne)" in *Recueils de la Société Jean Bodin*, Volume XII, p.116.

[41] Regarding the legal status of women in medieval canon law, René Metz notes an ambivalent discourse or a "double attitude" that persists in a "perpetual

complementarity that emerges in the legal texts, but rather inferiority and submission.

Current law reflects above all the influence of St. Thomas and, through the Angel of the Schools, the indelible mark of Aristotle who, in the *Treatise on the Generation of Animals*, sees in woman a frustrated male. Woman corresponds to something imperfect and occasional and is, by nature, inferior to man in dignity and power. Strictly speaking, it is the understanding that nature has given man more discernment that justifies women's legal incapacities.[42]

d. In summary, four reasons based on nature can be put forward to support the attenuation of women's criminal responsibility or the

contradiction": "Tantôt le droit canonique prône la parfaite égalité des sexes, tantôt il dénonce leur inégalité, plaçant la femme dans un état d'infériorité étonnant. Des raisons majeures militent en faveur de l'égalité de la femme et de l'homme, des raisons secondaires en faveur de leur inégalité. L'égalité a des fondements solides, l'inégalité repose sur les bases fragiles." ("Le statut de la femme en droit canonique medieval" in *Recueils de la Société Jean Bodin*, Volume XII, p.59). Pointing out also the ambiguities of the solutions found, Arlette Lebigre, "Imbecillitas sexus", p.38: "(...) les hommes auxquels il appartient de rendre la justice s'en tirent comome ils peuvent, par des solutions contradictoires, voire paradoxales, aussi ambiguës que l'image qu'ils se font de la femme.".

[42] *Summa Theologiae*, P.1, Q.92, A.1.

benefits of the female gender[43] : physical and intellectual weakness; the domestic and family role; modesty; and a lower propensity for crime.

Not all of them carry the same weight. The social role primarily attributed to women within the family is a less frequent and secondary explanation.[44]
The mitigation of punishments was mainly based - doubly so - on the natural fragility of their reason and will - the famous *imbecillitas sexus*[45] - and on their natural inability to bear the rigor of certain

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[43] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 22, *Carcerari*, p.52.

[44] Jean Portemer finds two explanations for the "rigorist" current: physical and psychological weakness and women's domestic role. See "Le statut de la femme en France" in *Recueils de la Société Jean Bodin*, Volume XII, pp.449 and 450. The author identifies three currents regarding the situation of women: "authoritarian" or "rigorist", "rationalist" (also traditional, favorable and based on systematic thinking) and "social" (arising from the very needs and transformations of social life, giving women an "infinitely" broader role than legal norms would suggest). See "La femme dans la legislation royale..., pp.442 and 443. In relation to the legal-penal status, she explains: "It is above all the penal law that seems to have created special rules for women. Non certes qu'il ait fait preuve à son égard de sensibilité excessive; non aussi qu'il n'ait jamais pris en considération sa qualité de mère; mais il a par de nombreuses textes adouci les peines applicables aux femmes (...)".

[45] The expression "propter sexus inbecillitatem" is used by Ulpianus (D.16,1,2,2). See also, for example, C.9.8.5.3 ("pro infirmitate sexus"); D.22,6,9 ("propter sexus infirmitatem"); D.1,5,9, where it is recognized that the condition of females is worse than that of males; D.48,13,7 (6), mentioning sex as a criterion for determining whether the penalty was more severe or more lenient; D.48,5,39(38),7, in the same vein; and D.48,5,39(38),2, distinguishing between offenses under the law of nations

punishments[46] . The *beautiful sex*[47] is also, in the terminology that philosophers, jurists and the law itself recognize, the *fragile sex*[48] . And the physical governs morality[49]…

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and "our law", in which case the excuse of sex was used. See Arlette Lebigre, "Imbecillitas sexus", pp.35-51.

[46] André Laingui, *La responsabilité pénale dans l'Ancien Droit...*, p.251; André Laingui and Arlette Lebigre, *Histoire du droit pénal*, Volume I, p.91; and Jean-Marie Carbasse, *Histoire du Droit Pénal...*, p.228.

[47] On the subject of *pimping*, Pereira e Sousa, *Classes of Crimes...*, Section II, Genre I, Class III, Species VIII, §3, p.227.

[48] Voltaire, *Oeuvres Complètes de Voltaire*, Tome XXVI, *Commentaire sur le livre des délits et des peines par un Avocat de Province*, I. *Occasion de ce commentaire*, p.282 ("sexe faible"); Mello Freire, *Codigo Criminal intenta- do...*, *Provas*, *Ao Título XXXI*, p.104; Letter of Law of June 19, 1775: "(...) the freedom of some individuals having reached such an excess of scandal, that abandoned to a licentious life, and devoid of the qualities that could qualify them for noble and opportune marriages, they made use of those reprobate ways that malice and debauchery had invented, to corrupt the spirit of the Daughter Families, immediate successors, or well endowed; already by deceitfully abusing friendship or kinship; already by buying the infamous industry of people who live off the turpitude and corruption they solicit; and already by making or extorting promises of marriage, the strongest weapons to overcome a fragile sex (...)" (Collecção)....)" (*Collecção da Legislação Portugueza desde a Ultima Compilação das Ordenações, redegida pelo Desembargador Antonio Delgado da Silva. Legislation from 1775 to 1790*, pp.45-47).

[49] Voltaire, *Oeuvres Complètes de Voltaire*, Tome XVIII, *Dictionnaire Philosophique*, *femme* voice, pp.41 and 42: "Il n'est pas étonnant qu'en tout pays l'homme se soitu rendu maître de la femme, tout étant fondé sur la force. Il a d'ordinaire beaucoup de supériorité par celle du corps et même de l'esprit.".

At issue is the lightness or *levity* of mind (*levitas animus*) attributed to women by the Romans. According to Gaius, the ancients understood that even if they were of age, they should be under guardianship because of their *mental instability* or *inconstancy of spirit* (*propter animi levitatem*[50]). However, he does not fail to consider that this *commonly* alleged reason - which often causes them to be deceived - seems to be more of a specious reason than a true one.[51]

In conclusion, it was the core of criminal responsibility - freedom - that was eroded in crimes committed by women. The same weakness (*imbecillitas*, *infirmitas*, *fragilitas*) that underpinned legal incapacities in private law generated the principle of *favor sexus* in criminal law[52]. Thus, as Mello Freire teaches, women, *because of the shyness and fragility of their sex, are better off than men.*[53]

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[50] *Institutions*, 1, 144 (p.117).

[51] *Institutions*, 1, 190 (p.127). See. A. Santos Justo, *Breviário de Direito Ro- mano Privado Romano*, pp.62 and 63. The situation of inferiority to which women were subject in Roman law, and which the author decries particularly in the sphere of private law, is sometimes based on modesty, coyness and levity. He cites the Law of the XII Tablets (V, 7,1) and Gaius, for whom reason "seems more apparent than true" (1, 190).

[52] Guido Rossi, "Statut juridique de la femme dans l'histoire du droit italien (époques médiévale et moderne)" in *Recueils de la Société Jean Bodin*, Volume XII, p.128.

[53] "Instituições de Direito Civil Português", Book II (*Do Direito das Pessoas*), §XIII, p.145.

e. According to Tiraquellus, women should be treated more gently, given the weakness of their sex[54] . Punishing them could be less than honorable or even shameful. There was no glory in killing a woman. Nature itself seemed to impose this leniency when it was observed that raging lions roared more ferociously against men[55] ... The latter, on the other hand, were punished more severely because they had to outdo women in virtue and because it was their duty to govern them by example[56] . From the theologians' point of view, they sinned more seriously. Even if the sin was minor. The cause lay in the condition of sinners. Men are more perfect than women[57] . They are righter.[58]

For Tiraquellus too, women were endowed with less reason than men. The terms of his comparison leave no doubt. Therein lies the true explanation of the difference in gender. If a man, attacked by another, fights *back excessively*, he should be punished, even if only in an attenuated form. But if a *brute beast*, *entirely devoid of reason*, kills another who provoked it, the *master of* the latter has no recourse.[59] Reason allows people to overcome their passions and emotions. In animals, there is no reason that can contain anger within the limits of a reasonable response. Their actions are not *imputable* to them.[60]

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[54] Tiraqueau, *De Poenis Temperandis*, Causa 9, 1 (p.77).
[55] Idem, Causa 9, 2 (p.77).
[56] Idem, Causa 9, 1 (p.77).
[57] Idem, Causa 9, 3 (pp.77 and 78).
[58] Idem, Causa 9, 4 (p.78).
[59] Idem, Causa 9, 5 (p.78). See D.9,1,1,11.
[60] Idem, Causa 9, 5 (p.78).

Returning to the subject, he defines the formula of punishment according to sex: insofar as men are endowed with more reason than women, and can *easily resist* the incitements of vices or, as theologians say, can resist temptations, it is *right to* punish women *more leniently*[61]

Finally, it needs to be clarified: sex can be a cause for mitigating penalties, but never a cause for removing criminal responsibility. This reason reserves Tiraquellus a special place among those who study the legal and criminal status of women. Animals may be devoid of reason, but women have *some*[62] ... In short, they are far removed from men and too close to animals.

f. For Lardizabal y Uribe, gender *influences knowledge*[63]. The *bodily weakness of* women, the result of their *delicate constitution, communicates itself to the mind*, whose operations depend so much on *the organization of the*

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[61] Idem, Causa 9, 6 (p.78).

[62] Idem, Causa 9, 6 (p.78). André Laingui and Arlette Lebigre rightly comment that Tiraqueau's "anti-feminism" goes far beyond what Roman law allowed: "(...) c'est Tiraqueau qui - en leur faveur, il est vrai - vilipendra le plus les femmes, joignant le pédantisme à la plaisanterie (...)" (*Histoire du droit pénal*, Volume I, p.91). And Jean-Marie Carbasse considers that, of all the doctors of ancient criminal law, Tiraqueau is the one who most despises women (*Histoire du Droit Penal...*, p.228). Still on Tiraqueau's "fierce anti-feminism" see. Arlette Lebigre, "Imbecillitas sexus", p.36.

[63] *Discurso sobre las penas...*, Chapter IV (*De la verdadera medida y cantidad de las penas y de los delitos*), § II (*De la verdadera medida y cantidad de las penas*), 17, p.117.

body[64] ... Physical weakness engenders weakness of understanding. In short, women are physically weaker, less capable of understanding evil and resisting it.

g. Pastoret justifies the weighting of the sex of the accused with two ideas: a *greater weakness in the organs* and an *idea of modesty*[65] . In fact, the modesty inherent in the female sex was sometimes invoked to prevent certain punishments that involved exposing the body - *propter reverentiam sexus*. However, he notes the absurdity of the distinction because he believes that it offends modesty as much to expose the female body to men as it does to expose the male body to women[66] . He attempts an explanation: the idea of modesty has perhaps not been well understood...

h. In the work of Rui Gonçalves, we find the most benign foundation of *favor sexus*: women are *naturally less daring*[67] . In this indulgence - perhaps sincere, perhaps naive, perhaps self-interested - it is at least fair to recognize coherence. More incomprehensible are the frequent allegations of female malice and perfidy. If, by nature, women were

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[64] Idem, 18, p.118.

[65] Pastoret, *Des Loix Pénales*, Volume II, Part Three, Chapter VII (*Rapports physiques*), Article I (*Rapports de la peine avec le sexe de l'accusé*), pp.143-144 : "L'intérêt naturel qu'inspire une plus grande foiblesse dans les organes a produit ce changement auquel concourut aussi une idée de pudeur (...)".

[66] Idem, p.144.

[67] *Of the privileges and privileges that the female gender has...*, *Prerogative* 88, *Poena minor*, p.96.

considered to be cunning and malicious[68] why should they be punished more leniently?

i. Despite also being the depository of the heritage of the past, the 18th century was not unrelated to some *egalitarian passion .*[69]

Merlin, in his *Répertoire*, begins by acknowledging the fragility of the sex. Easier to persuade and frighten, more fragile, women deserve a *certain indulgence* in cases whose seriousness does not essentially violate the law. But he ends by declaring: *today, women are punished in all cases with the same rigor as men .*[70]

In the *Persian Letters*, Montesquieu is interested in a question about which he heard a *very gallant philosopher*: does natural law make women subject to men? The *empire of* men over women receives the epithet which, in his vocabulary, contains the usual formula of repudiation: it is a *true tyranny*, a *tyrannical power*, a creation of despotic governments. A *real injustice*. Women submit because there is *more gentleness*, *more humanity* and *more reason* in them. Showing a taste for irony and paradox, he notes that the qualities that should ensure their

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[68] Guido Rossi, "Statut juridique de la femme dans l'histoire du droit italien (époques médiévale et moderne)" in *Recueils de la Société Jean Bodin*, Volume XII, pp.118 and 119.

[69] André Laingui and Arlette Lebigre attribute this passion to "droit intermédiaire" (*Histoire du droit pénal*, Volume I, p.92). See also Goncourt, *La femme au XVIIIe siècle*, maxime pp.371-405.

[70] Merlin, *Repertoire universel et raisonné de jurisprudence*, Tome IV, voice *Excuse*, p.913.

superiority end up de- terminating their loss... He recognizes a *natural* and *universal empire* for them stemming from beauty, that *art* that *little souls* possess[71] , and which no one seems to be able to resist. But above all, it points the way to the future: the empire of men will disappear if education is the same. *We use* all sorts of *means* to undermine their courage - *the forces would be equal if education were the same .*[72]

III. THE POWER TO IMPOSE PENALTIES - TO PUNISH MODERATELY WHEN UNRULY...

a. Only the monarch had the power to impose punishments - *no one of any dignity could claim this power*. But the vestiges of the Roman law of life and death still allowed exceptions to be made: for parents in relation to their children; for masters in relation to slaves or servants; and for husbands in relation to their *wives*. Parents, masters and husbands exercised *some power* over them and could inflict *certain punishments* on them, albeit *light and moderate .*[73]

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[71] *The Spirit of the Laws*, Book VII, Chapter IX (*On the condition of women in the various governments*), p.113: "In despotic states, women do not introduce luxury; they themselves are an object of luxury. (...) Their quarrels, their indiscretions, their repugnances, their inclinations, their jealousies, their tantrums, this art that small souls possess of interesting large ones, could not remain without consequence."

[72] *Lettres persanes*, Tome I, Letter XXXVIII, p.81 : "(...) éprouvons- les dans les talents que l'éducation n'a point affloiblis, et nous verons si nous sommes si forts.".

[73] Mello Freire, "Instituições de Direito Civil Português", Book I (*Do direito público*), Title III (*Do direito de punir*), § V (*Direito de impor pena*), p.127.

The Ordinances recognize manorial, patrilineal and marital power. Punishments were imposed on anyone who *punished* a child, disciple, wife, child or slave[74] . And anyone who imprisoned a child-family member or slave *to punish* them *and make amends for bad manners and customs .*[75]

The husband had *a certain power* - recognized by all rights[76] - over the person of his wife, who submitted to him with her *own consent and even by natural right*[77] . It was not a right of life and death, but the *power to direct his wife's actions, defend her and punish her moderately when she was unruly .*[78]

[74] O.F. L.V, T.36, §1.

[75] O.F. L.V, T.95, §4: "(...) because in such a case you can arrest them.".

[76] Mello Freire, "Instituições de Direito Civil Português", Book II (*Do direito das pessoas*), Title VII (*Do poder do marido sobre a mulher*), note to §I (*O poder do marido sobre a mulher*), p.60. See, for example, O.F. L.V, T.66: "(...) in the power of the husband (...)".

[77] Mello Freire, "Instituições de Direito Civil Português", Book II, Title VII, §I, p.60; and, again alluding to "a certain power", §III (*Algumas efeitos do mesmo*), p.61.

[78] Idem, §II (*What it consists of*), pp.60 and 61; and its note, p.61: "The right to correct women who are not very docile has always been welcomed in Portugal, and more so among commoners than among people of quality. Often, this led to abuse, for which judges, especially ecclesiastical judges, became concerned almost every day. And not infrequently these matrimonial disagreements are resolved by separating bed and board for a while."

In short, the husband could punish his wife. Imprisoning her in private[79] Killing her *lawfully* when he caught her in adultery[80] ...

b. In criminal drama, women can appear as victims or offenders - but not as judges[81] . This situation was the result of Roman law, cited in turn. According to Ulpianus, women are barred from all civil or public

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[79] Joaquim José Caetano Pereira e Sousa, *Classes of Crimes...*, Section I, Genre I, Class I, Species II (*Crimes against the rights of the Emperor*), NºII (*Private Imprisonment*), §2, p.60.
[80] O.F. L.V, T.38, pr.: "(...) can lawfully kill her (...)". The husband could also accuse his wife of adultery. O.F. L.V, T.25, §3; and the Charter of September 26, 1769, which forbade the taking of enquiries and admitting accusations of concubinage: "(...) the greatest confusion and abuse has resulted from the aforesaid proceedings; the result being that married women, who live in good harmony with their husbands, having two people who are their enemies, who go to swear against them in the aforesaid proceedings, appear pronounced, imprisoned and infamous to the discredit of their husbands, and exposed to the danger that they suffer with them in satisfaction of their honor, which they imagine has been offended; The procedure of these Devassas is null and void, as it is contrary to the Laws of My Kingdom, which do not recognize any legitimate party for the accusation of that crime, other than the spouses themselves (...)" (Antonio Delgado Silva).)" (Antonio Delgado da Silva, *Collecção* da *Legislação Portugueza*, pp.432 e 433).

[81] António Manuel Hespanha, *O estatuto jurídico da mulher na época da expansão*, v.g. pp.5, 9 and 15. With regard to French law, Ferrière is peremptory: women cannot exercise a magistracy; they cannot be admitted to public office; they cannot be judges. In general, on the incapacities of women in French law, see. *Dictionnaire de Droit et de Pratique*, Tome I, voice *Femmes*, p.623. And in particular on the exclusion of public functions as an integral element of the general status of women in Belgian law see. John Gilissen, "Le statut de la femme dans l'ancien droit belge" in *Recueils de la Société Jean Bodin*, Volume XII, pp.258-262.

offices; therefore, they cannot be judges, nor perform magistracies, nor postulate, nor intervene for others, nor be prosecutors[82] . For Bodin, *virile actions* are contrary to sex, modesty and feminine modesty[83] .

Unsurprisingly, Rui Gonçalves points out that *women are regularly not allowed to search, to be judges, or to arbitrate*. But he adds, keen to point out the exception: this is true of women *who have no jurisdiction of their own*[84] . In fact, if, as a rule, women could not *judge for themselves or have jurisdiction*, however, the opinion of the doctors admitted that queens, princesses and *very clear and noble women according to law*, when they held states and lordships, had this prerogative .[85]

IV. THE PENALTIES

§1 The death penalty

[82] D.50,17,2. See A. Santos Justo, *Breviary of Roman Private Law*, pp.62 and 63.
[83] Jean Bodin, *Les six livres de la Repu- blique*, Book VI, Chapter V, p.698.
[84] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 13, *Arbitrix*, p.45.
[85] Idem, *Prerogative* 71, *Iudicare*, pp.86 and 87.

a. The death penalty could not be carried out on pregnant women[86] - *even if they are ten days* pregnant *or less, and if they do not belong to their husbands*, writes Rui Gonçalves .[87]

The *favor of childbirth* is included by Pereira e Sousa among the *just causes* for *delaying* the execution of the sentence[88] . For this reason, the ordinance that allowed *any of the people to kill* the banished *without penalty*[89] - absentees condemned to the last torture[90] - had no place in pregnant women .[91]

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[86] Maria Paz Alonso and António M. Hespanha, "Les peines dans les pays ibériques (XVIIe-XIXe siècles)" in *Recueils de la Société Jean Bodin*, Volume LVII, p.222: "L'exécution des peines corporelles et de la peine de mort était ajournée dans le cas de femmes enceintes.". Still on the suspension of the execution of the death penalty on pregnant women, see. Tomás y Valiente, *El Derecho penal de la Monarquía Absoluta...*, p.370.

[87] Women "who are mainly pregnant have many more prerogatives and benefits than others"; *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 92, *Pregñas*, pp.99 e100.

[88] *First Lines on Criminal Procedure*, Chapter XXXIX (*On Execution*), §CCXCII, pp.213 and 214.

[89] O.F.L.V.T.126, §8.

[90] Mello Freire, "Instituições de Direito Criminal Português", TitleXXII (*Da requisição ou condenação dos ausentes*), §V (*Dos banidos*), p.163. In a note, the author clarifies: "However, today it is no longer lawful to kill the banished, since *one should not grant to each person what should publicly be done by the magistrates* (...)" (ibidem).

[91] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 92, *Pregñas*, p.100.

On the subject of embargoes[92] to the execution of corporal punishment, Vanguerve states that the execution was suspended when the condemned woman was *pregnant* and *until she* became *pregnant*, a solution drawn from *natural reason*, *since the creature that the condemned* woman *has in her womb does not die .*[93]

According to Lopes Ferreira, the *biggest and most notable doubt* regarding the death penalty was to what extent it would be possible to halt its execution by *order of the judge*[94] . He thus lists a long list of causes that allowed the execution to be *extended by* means of exceptions. Suspension[95] could occur for reasons not dependent on the convict's will in the case of a pregnant woman, *due to the danger of miscarriage*[96] ,

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[92] Embargos always have suspensive effect; see. Joaquim José Caetano Pereira e Sousa, *Primeiras Linhas sobre o Processo Criminal*, Chapter XXXVI (*Dos Embargos*), §CCLXVIII, p.197.

[93] *Pratica Judicial...*, Parte Terceira, Capítulo VII (*Em que se trata dos Embargos às execuções*), 49, p.311.

[94] *Pratica Criminal...*, Tomo IV, Capítulo VII (*De como se deve fazer a execução corporal no Réu condenado, e acusado pela Justiça de qualquer crime grave: e como, e de que modo se deve executar*), 31, p.531.

[95] Blackstone also alludes to the suspension of executions on the grounds of the convict's pregnancy. *The Commentaries on the laws of Eng- land*, Book IV (*Of Public Wrongs*), Chapter XXXI (*Of reprieve and par- don*), p.387: "Reprieves may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered.".

[96] Manuel Lopes Ferreira, *Pratica Criminal...*, Tomo IV, Capítulo VII, 37, p.532: "(...) if the convict is a woman, let her be pregnant, because if so, she should not be sentenced to death, because of the danger of abortion (...)".

both in the case of legitimate childbirth and adulterous childbirth[97]. TheJudicial Reform would continue this rule .[98]

Jousse, commenting on the French law[99] , explains that the execution of the death penalty was deferred until birth or - as he corrects a little *later* - until *a certain time afterwards*, when the condemned woman was *in good health*. Even in cases of *uncertain* or undetermined pregnancy. And he explains the basis of the legal provision: the *mother's misfortune* should not affect the child in her womb. It would even be better to avoid a conviction in such circumstances[100] . When family members refused to take charge of the child, the king would provide for its support.

Even among us, if, after birth, no nanny could be found who could raise the newborn, paying for it out of public expenses, *the* execution

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[97] Idem, 39, p.532.

[98] Decree of May 16, 1832 (*Reform of the Judiciary*) in *Collecção de Decretos e Regulamentos...*, p.138: "The death penalty shall never be carried out (...) on a pregnant woman. (...) Only after these accidents shall the sentence be carried out." (Article 226).

[99] *Ordonnance* of 1670, Title XXV (*Des sentences, jugements et arrêts*), Art. 23: "Si quelque femme devant ou après avoir été condamnée à mort, parait ou déclare être enceinte, les juges ordonneront qu'elle sera visitée par matrones qui seront nommées d'office, et qui feront leur rapport dans la forme prescrite au titre des experts, par notre ordonnance du mois d'avril 1667: et si elle se trouve enceinte, l'exécution sera différée jusques après son accouchement.".

[100] Jousse, *Traité de la justice criminelle...*, Volume II, Part III, Title XXV, §III (*Des choses qui peuvent faire différer l'éxecution d'un criminel condamné à une peine corporelle*), 59, p.545.

was still suspended because it *is more important for the Republic to preserve childbirth after birth than it is while it is in the womb .*[101]

b. The wheel was not inflicted on women *for reasons of decency and honesty .*[102]

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[101] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 92, *Pregñas*, p.100.

[102] See the voice *wheel* in Joaquim José Caetano Pereira e Sousa, *Esboço de um Diccionario Jurídico...*, Tome III. The same happened in French law. The wheel was converted to death by fire, hanging or beheading, depending on the social status of the condemned woman or the crime in question. In these cases, the execution, or at least the complete execution, could be preceded by secret strangulation, which the courts ordered by *retendum*. Rousseau de La Combe, *Traité des matières criminelles...*, Part I, Chapter I (*Des Crimes & Peines en général*), 27, p.7. The author begins by stating the principle according to which all kinds of penalties could be applied to women: "Dans l'ordre judiciaire, les filles & femmes peuvent être condamnées à toutes sortes de peines, à la réserve (...) de la roue (...)". The postponement of the wheel is reiterated with regard to those who have committed murder by ambush ("meurtre de guet-à-pens") or helped to commit it. Women of the people ("routurieres") were sentenced to be hanged instead, and noblewomen to be beheaded ("condamnées à avoir la tête tranchée"). See Part I, Chapter II (*Des Crimes & Peines en particulier*), Section VII (*Du Meurtre ou Homicide*), Distinction VI (*De l'Homicide & Meurtre de guet-à-pens, & de l'Assassinat*), 4, p.61. Jousse adopts an identical formula: women can be condemned to all penalties "without distinction". Except, namely, the wheel and dragging ("être tirées à quatre chevaux"). See *Traité de la justice criminelle...*, Tome I, Part I (*Des Crimes & des Peines*), Title III (*Des Peines*), 16, p.41. Muyart de Vouglans, *Institutes au Droit Criminel...*, Part VIII (*De l'Éxécution des Jugements*), Title II (*Des Peines en général, & des Cas où l'on peut les diminuer ou augmenter*), Chapter II (*Des Peines, suivant nos Usages*), p.401: "(...) Femmes are not condemned to this Peine, for reasons of decency & public honor."; *Les lois criminelles de France...*, Book Two (*De*

Women can also emerge as redemptive figures. According to a legendary[103] and somewhat *bizarre* practice that nevertheless seemed to be observed *in some Peoples*, the death penalty was forgiven to the defendant who agreed to marry a *harlot* or *a lady*. However, Lopes

la Peine en général, et de ses différentes especes), Title IV (*Des différentes especes de Peines usitées dans ce Royaume*), Chapter I (*De la Peine capitale ou du dernier Supplice*), §3 (*De la Roue*), 3, p. 52: "Il y a deux choses remarquables par rapport à cette peine; l'une, qu'elle ne s'ordonne point contre *les femmes* à cause de la décence due à leur sexe, & on la convertit, à leur égard, en celle du feu, de la potence, ou de la décapitation, suivant leurs qualités, ou celle du crime.". Pastoret, *Des Loix Pénales*, Volume II, Part Three, Chapter VII (*Rapports physiques*), Article I (*Rapports de la peine avec le sexe de l'accusé*), p.144: "Jamais le supplice de la roue, en les condamnant à la mort (...)". See also André Laingui and Arlette Lebigre, *Histoire du droit pénal*, Volume I, p.92; and Jean-Marie Carbasse, *Histoire du Droit Pénal...*, p.229.

[103] Alluding to this "old usage" and the doctrine's difficulty in explaining it, Jean Imbert and Georges Levas-seur*, Le pouvoir, les juges et les bourreaux*, p.257.In the eighteenth century, however, there was still a late testimony in the streets of Paris, according to which a smuggler condemned to death had preferred the punishment of the penalty to the sight of a generous but less conventional beauty... There is also reference to this "somewhat bizarre right of grace" in Dutch law Jan Willem Bosch, "La femme dans les anciens Pays- Bas septentrionaux" in Recueils de la Société Jean Bodin, Volume XII, p.344.See also René Metz, "Le statut de la femme en droit canonique medieval" in Recueils de la Société Jean Bodin, Volume XII, p.111; and Pierre Lemercier, "Une curiosité judiciaire au moyen âge: la grâce par mariage subséquent, Révue Historique de Droit Français et Étranger, 4ª série, T.33, 1955, pp.464-474.

Ferreira rejects this hypothesis - *if it were allowed, no man would die unmarried .*[104]

§2. the galleys

The penalty of galleys was never applied to women[105] , who were spared *propter reverentiam sexus*. This *reverence* for gender had a double

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[104] *Pratica Criminal...*, Tome IV, Chapter VII 41, p. 533: "(...) when the condemned Defendant wants to marry some lady, or harlot, who currently exists in the place determined for his lustful life, which he was exercising: because for this act it seems that he should be forgiven the death penalty (...) But this opinion is not true according to law, nor should it be followed, and therefore it is disapproved (...)".

[105] See the *galley* voice in Joaquim José Caetano Pereira e Sousa, *Esboço de um Diccionario Juridico...*, Volume II. This rule applied in the same way in French law. Rousseau de La Combe, *Traité des matières criminelles...*, Part I, Chapter I (*Des Crimes & Peines en général*), 27, p.7: "Dans l'ordre judiciaire, les filles & femmes peuvent être condamnées à toutes sortes de peines, à la réserve des galeres (...il n'y a que les hommes qui puissent être condamnés à ces deux dernieres peines, de quelque état, qualité & condition qu'ils soient, les Gentilshommes comome les Roturiers, mêmes les Prêtres & autres Ecclesiastiques.". Jousse, *Traité de la justice criminelle...*, Tome I, Part I (*Des Crimes & des Peines*), Title III (*Des Peines*), 16, p.41 ; and 37, p.49: "(...) in place of this penalty, on prononce contra elles, celle de la reclusion dans une maison de force à temps, ou à toujours, suivant les circonstances". Muyart de Vouglans, *Institutes au Droit Criminel...*, Part VIII (*De l'Éxécution des Jugements*), Title II (*Des Peines en général, & des Cas où l'on peut des diminuer ou augmenter*), Chapter II (*Des Peines, suivant nos Usages*), p.404Cette Peine ne peut être prononcée contre *les Femmes* à cause de la foiblesse du sexe; mais l'on y a substitué d'être renfermées dans l'Hôpital Général, comme il paroît par la Déclaration du 29 Avril 1688, ou bien celle du Bannissement perpétuel: l'on n'y condamne point non plus les *Vieillards*, les *Malades incurables*, *les Estropiés* d'un Bras ou d'une Jambe, ou *Culs-de-jatte*, &

concern. On the one hand, it was considered inherent in women that *they were* more physically fragile - *the weakness of their constitution made them incapable of enduring the work that was sometimes required of those forced into the galleys*[106] . In fact, women's nature seemed to be very resistant to punishment... and crime, since, in the same understanding, their weakness also made it easier for them to *fall* or commit crimes. On the other hand, the demands of decency did not allow them to be confused with the forced of different sexes .[107]

The law charter of November 10, 1708 sentenced only men to the galleys and established a substitute sentence for women: banishment to Brazil .[108]

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généralement tous Ceux qui ne sont pas en état de ramer."; *Les lois criminelles de France...*, Book Two, Title IV, Chapter II (*Des Peines Corporelles*), § 2 (*Des Galeres*), 6, pp. 56 e 57: "Qu'en général la peine des galeres ne peut être prononcée contre les femmes, *propter reverentiam sexus*; mais que, pour en tenir lieu, on prononce contre elles, celle de la détention en une maison de force à tems ou à perpétuité, & quelquefois même celle du fouet & du bannissement, comme nous le verrons d'après les lois rendues en matiere de vol, de mendicité & de contrebande.". See Jean-Marie Carbasse, *Histoire du Droit Pénal...*, pp. 229 and 267.

[106] Joaquim José Caetano Pereira e Sousa, *Esboço de um Diccionario Juridi- co...*, Tomo I, voz *galé*.

[107] Ibidem: "(...) Women are not punished with the Galleys. Decency does not allow them to be confused with the forced of different sexes (...)".

[108] *Collection of Ancient and Modern Legislation of the Kingdom of Portugal.* Part II. *Da Legislação Moderna*, *Tom. II de LL., Alvv., etc.* (*which includes the reigns of D. Affonso VI, D. Pedro II,* and *D. João V*): "(...) and will be degraded for a period of ten years: which disgorgement for men will be galleys, and for women to Brazil (...)".

According to Pereira e Sousa, in the Ordinances, women were sentenced to temporary or life imprisonment[109] . The same solution was followed by French law. In Pastoret's words, imprisonment was for women what the galleys were for men.[110]

§3. corporal punishment

[109] Joaquim José Caetano Pereira e Sousa, *Esboço de um Diccionario Juridico...*, Tome I, *galley* voice: "In parity of crime they are condemned to temporary or perpetual confinement in some powerhouse.".

[110] Pastoret, *Des Loix Pénales*, Tome I, Part II, Chapter II, Art. VII, p. 111: "Seclusion in a prison is generally for women what galleries are for men. Il y avoit pourtant une grande différence relativement aux effets civils. Elle n'emportoit pas la confiscation des biens." According to Ferriere, however, in cases where the law ordered the penalty of galleys for men, women were sentenced to flogging, temporary or perpetual banishment, "(...) selon la qualité du fait (...)" (Diction- naire de Droit..., Tome I, verbo Gale- res, p.633). Giving an account of a transitional phase, Muyart de Vouglans teaches that, in place of galleys, the penalty of detention was applied ("la detention en une maison de force à tems ou à perpétuité"), as well as imprisonment and banishment ("& quelque fois même celle du fouet & du banissement"). See Les lois criminelles de France..., Book Two, Title IV, Chapter II, § 2, 6, p.56.

a. According to Pastoret, women should also be spared punishments that involved great suffering or very hard work[111] . He even disapproves of the momentary pain of branding with a hot iron .[112] According to our Ordinances, women were not subject to the penalties of having *their limbs cut off* or flogging.[113]

However, António Vanguerve Cabral does not fail to mention, by way of example, the cutting off or ablation of limbs such as *women's breasts* as corporal punishments which, without taking life, were also included in the concept of natural death[114] ... The condemned person loses members of the body that fulfill a function or an office, a distinct operation.[115]

b. In the case of pregnant women, the concern for the child's survival imposed specific limitations. For this reason, corporal punishment could only be carried out some time after childbirth. And, for the same

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[111] *Des Loix Pénales*, Tome II, Part Three, Chapter VII (*Rapports physiques*), Article I (*Rapports de la peine avec le sexe* de *l 'accusé*), p.144 : "(...) celles qui tiennent à de grandes douleurs ou à des travaux pénibles onté été proscrites.".

[112] Ibidem: "(...) point de douleur momentanée, comme la marque (...)".

[113] O.F. L.V, T.137, §3: "(...) And in executions of the cutting off of limbs, or of whippings, he shall send only the men. (...)". In fact, flogging a woman was a case of devassa. See Joaquim José Caetano Pereira e Sousa, *Esboço de um Diccionario Juridi- co...*, Tome I, voice *açoutar*; and Law of January 15, 1652.

[114] *Epilogo Juridico...*, Capítulo LXXII (*Como se entende essa palavra, que a Ord. poem em muy muitas lugares morra por ello: de que especie de morte se deve entender?*), 5, p.210.

[115] Idem, 5-10, p.210.

reason, women who *were* pregnant, pregnant or *pregnant* could not be tormented or put in torment . [116]

According to Lopes Ferreira, while birth did not prevent the execution of the death penalty, the same was not true of other corporal punishments. In the case of these, death is not only a penalty that the law does not demand; it is an outcome that must be avoided at all costs. Protecting the mother means guaranteeing the survival of her child - *she must be expected to convalesce because she is not going to die before the execution is carried out on her*[117] . He also refers to the possibility of a mutilating sentence. If the mother of a child was sentenced to have her hand cut off or some other corporal punishment, the execution of the sentence was suspended until a nanny could be found .[118]

Mello Freire preserves the solution in his *Criminal Code*: no penalty, even a pecuniary one, shall be carried out on a pregnant woman: nor shall her sentence

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[116] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 92, *Pregñas*, p.100; Lopes Ferreira, *Pratica Criminal...*, Tomo III, Capítulo XXII (*Em que se trata, do tormento, tortura, ou tratos em que Réus são metidos; e como, e quando se devem executar, conforme a nossa* Ord. lib.5 tit.134), 50, p.363. The "pregnant woman" or "pejada" is included among the "persons exempt" from this "torture". Pereira e Sousa, *Primeiras linhas sobre o processo criminal*, Chapter XXVIII (*Dos Tormentos*), §CCIX, p.164. In relation to French law, see. Jousse, *Traité de la justice criminelle...*, Volume II, Part III, Title XXV, §III (*Des choses qui peuvent faire différer l'éxecution d'un criminel condamné à une peine corporelle*), 59, p.545.

[117] Manuel Lopes Ferreira, *Pratica Criminal...*, Tome IV, Chapter VII, 38, p.532.

[118] Idem, 52, p.535: "(...) if the mother of any child is sentenced to have her hand cut off, or to other corporal punishment; because in this case the sentence should not be

of conviction be served on her while she is pregnant, and one month after she gives birth[119] . And according to the Penal Code of 1852, corporal punishment was not carried out on pregnant women, except for correctional imprisonment, until one month *after the end of the pregnancy*. Levy Maria Jordão recalls that previous legislation in Portugal applied Roman law. And he gives the reason why: the law exempted women during pregnancy from suffering penalties to prevent abortion[120].

With regard to floggings, Jousse expresses a somewhat dubious opinion, but nevertheless gives an account of the deferral of execution in cases of advanced pregnancy .[121]

§4. Confinement

a. In principle, banishment could affect men and women

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carried out on the person of the said woman, until a nanny has been found for the child (...)".

[119] Mello Freire, *Codigo Criminal intentado...*, Title LXV (*Da execução da sentença*), §8, p.148.

[120] Levy Maria Jordão, *Commentario ao Codigo Penal Portuguez*, Tomo I, co-mentário ao Artigo 92º, pp.215-217.

[121] Jousse, *Traité de la justice criminelle...*, Volume II, Part III, Title XXV, §III, 59, p.545: "La disposition (...) doit aussi s'étendre aux femmes condamnées à la question; & même quelque fois on differe pour le fouet, surtout quand la grossesse est avancée; & je l'ai vu ainsi pratiquer.".

indifferently[122] . Although not in the same way. The fact that the law does not expressly mention them when it establishes the punishment is irrelevant - *the male gender always includes the female gender, apart from a few exceptional cases in which the matter is different .*[123]

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[122] Maria Paz Alonso and António M. Hespanha, "Les peines dans les pays ibériques (XVIIe-XIXe siècles) " in *Recueils de la Société Jean Bodin*, Volume LVII, p.212: "Au Portugal, par contre, les femmes pouvaient être l'objet de bannissement dans le royaume (à Castro Marim, village de frontière dans les bouches du Guadiana).".

[123] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 92, *Pregñas*, p.4. In the same vein, Ferriere*, Dictionnaire de Droit et de Pratique*, Tomo I, voz *Femmes*, p.623: "Sous le mot d'hommes, les femmes sont comprises.". This fact did not prevent the recognition of a different legal status: "Quoique les femmes soient souvent comprises sous le mot d'hommes, il est certain que la différence du sexe rend en plusieurs articles du Droit, les conditions des hommes & des femmes différentes." (ibidem). António Manuel Hespanha, *O estatuto jurídico da mulher na época da expansão*, p.2: "The most general rule that jurists evoke, regarding this use of the gender of words, is that in the current locution, the masculine generally includes the feminine."; and p.4: "The feminine is, in general, irrelevant (non-existent), being denoted by the masculine *tanquam corpus a capite sua*.". Thus, the Manueline Ordinances state: "(...) We command that any man or woman who is degraded (...)" (L.V, T.107, pr.). And the corresponding passage in the Philippine Ordinances is worded differently: "We command that any man or woman who is degraded (...)" (T.141, pr.). António Manuel Hespanha, who deals with the hermeneutics of the rules of gender use in legal texts and analyzes the pre-understanding of women as degraded beings, dwells on the exceptions to this rule: "The *Philippine Ordinances* (I, 74, 20) speak of fines to be applied to "women who are used to shouting"; just as, when dealing with the crime of witchcraft, the *Decree of Gratian* (p. II, C. 26, q. 5, c. 12) naturally evokes sorceresses.

Even so, pregnant women could not be deported and the prohibition was maintained if, after birth, the child could be *harmed or detrimental .*[124]

In the 16th century, the Law for the Reformation of Justice prohibited women from being sentenced to banishment to Africa[125] . They could be banished to the coutos of the Kingdom, to Brazil, and to the islands of São Tomé and Príncipe.

Continuing with this solution, the Philippine Ordinances also stated that -women should not be deported to Africa .[126]

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[124] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 92, *Pregñas*, p.100. This risk also justified the fact that pregnant women could not be forced to give testimony or swear. The author opposes the "common opinion" according to which, "without distinction", "pregnant women should not swear or give evidence". The restriction should only apply when "the child would be at risk".

[125] Law of July 27, 1582, §58: "I plead with all My courts not to condemn any woman from now on, for any fault whatsoever, to be banished to any of the places in Africa: and they may condemn them to be banished to the coutos of the Kingdom, or outside it, to Brazil, Sam Tomé, or Príncipe Island, according to the quality of the fault." (José Anastácio de Figueiredo, *Synopsis Chronologica*, Tome II, p. 213 and 214). See Mello Freire, *Instituições do Direito Criminal*, Title XX (*Da sentença criminal, e sua execução*), note to §VI (*Da execução da sentença nos degredados*), p.151.

[126] O.F. L.V, T.140, §2: "And women shall not be condemned to be banished to Africa, for any case whatsoever, but shall be degraded to other parts, according to their faults, and our Ordinances". See Manuel Lopes Ferreira, *Pratica Criminal...*, Tratado II, Capítulo IV, 40, p. 163; Mello Freire, "Instituições do Direito Criminal", Título XX (*Da sentença criminal, e sua execução*), note to §VI (*Da execução da sentença*

This differentiation is expressly reiterated with regard to certain types of crime, such as pimping[127] , sorcery and superstition[128] , incest[129] and bigamy[130] . Or even the crime of blessing animals[131] . Married bartenders and their bargirls[132] . Ruffians[133] . Or those who wore

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nos degredados), p.151; and Joaquim José Caetano Pereira e Sousa, *Primeiras Linhas sobre o Processo Criminal*, Capítulo XXXIX (*Da Execução*), note to §CCXCVI, p.217.

[127] The formula of the law incriminates "everyone", but the punishment is established "according to the difference between the sexes": "(...) shall be degraded four years to Africa, if a man, and if a woman, six to Castro-Marin." (L. V, T.32, §7).

[128] O.F. L.V, T.3, §3: "(...) be degraded to Africa for two years; and being a woman of the same quality, be degraded to Castro-Marim for three years (...)".

[129] O.F. L.V, T.17, §2: "(...) the men will be degraded for four years to Africa with a whip and a nail, or with a nail in a hearing, according to the difference of the persons, and the women for five years to Castro-Marim. (...)"; §3: "(...) he will be degraded for five years to Africa, and she will be degraded for seven years to Castro-Marim.) he will be degraded for five years to Africa, and she for seven to Castro-Marim: and if it is in the third or fourth degree, he will be degraded for two years to Africa, and she for three to Castro-Marim, with a bar and nail in the audience, according to the difference of the people. (...)".

[130] O.F. L.V, T.19, §2: "(...) be degraded for four years to Africa, or for a longer period, if it appears to the Judges (...) be degraded for five years to Castro-Marim.".

[131] O.F. L.V, T.4: "(...) And if he is a Squire, or from there upwards, he shall be degraded for one year to Africa, and pay two thousand réis to whoever accuses him. And if she is a woman, she will be sent to Castro-Marim for two years (...)".

[132] O.F. L.V, T.28, pr.: "(...) be degraded for the first time for three years to Africa (...)"; § 1: "(...) be butchered by the Vila with a bar and a nail, and degraded for one year to Castro-Marim (...)".

[133] O.F. L.V, T.33, pr.: "(...) he will be degraded to Africa, and she to the Couto de Castro-Marim until our mercy (...)".

clothes of the opposite sex[134] . While the men were sent to Africa, the women were sent to Castro Marim.

Other provisions deport men to Africa and women to Brazil .[135]

The banishment can, however, be fixed without any distinction as to location. Out of court for a year[136] . To Brazil, although to different captaincies[137] . Or simply to Brazil, in the case of the adulteress and the husband who consented to the adultery .[138]

There are therefore several precepts in the Ordinances that expressly refer to the specifics of banishment for women. But not all of them are limited to stipulations about the place or duration of the

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[134] O.F. L.V, T.34: "(...) if he is a Squire, and from there upwards, he will be degraded two years to Africa, and if he is a woman of the said quality, he will be degraded three years to Castro-Marim. (...)".

[135] O.F. L.V, T.17, §2: "(...) be degraded ten years for Africa, and she five for Brazil. (...)".

[136] With regard to the courtiers who kept barregãs at Court, the sentence of banishment was indifferent to gender and social status: "(...) each of them will be degraded for a year outside the Court." (O.F. L.V, T.27, pr.); "(...) And women (...) shall be degraded for one year outside the Court (...)" (idem, §1).

[137]O.F. L.V, T.17, §3: "(...) be degraded ten years for Brazil, for different Captaincies. (...)".

[138] O.F. L.V, T.25, §9: "(...) he and she will be butchered with chapels of horns, and degraded to Brazil (...)".

banishment. The alcoviteira who was not condemned to death or to perpetual banishment to Brazil had to *always* wear a *red gaiter or gown*[139] *on her head outside her home*. Failure to comply with this infamous penalty resulted in perpetual banishment to Brazil .[140]

This is also the case with crimes that can only be committed by women. The rule specifically refers to the banishment of women as a result of gender being an essential element of the incrimination. Thus, the barregãs of clerics are successively banished *for one year outside the*

[139] The *polaina* was a kind of red cap with which the alcoviteiras were marked by criminal sentence (Luiz da Cunha Gonçal- ves, "Terminologia jurídica das Ordenações..., p.182). In the words of Friar Joaquim de Santa Rosa de Viterbo, the *enxaravía*, which was also called *polaina*, was the opprobrious insignia of the alcoviteiras. It consisted of "(...) a *beatilla of red silk*, which they wore on their heads until they left for banishment." (*Elucidário das palavras, Termos e Frases*, Volume II, p.221). According to João Pedro Ribeiro, at the time of the Philippine Ordinances, this word was already considered old-fashioned, like others found in Book V. The medieval origin of these terms is reflected in the fact that, as he notes, their meaning can be found in Father Viterbo's *Elucidário*. See *Dissertações Chronologicas e Criti- cas...*, Tome IV-Part II, *Appendice* II ("Words found in the Philippine Code, or already antiquated...), pp.74 and 75.

[140] O.F. L.V, T.32, §6: "(...) And in all cases in which any woman is sentenced for being an alcoviteira in any of the aforementioned punishments, where she does not have to die, or be degraded to Brazil, she must always wear a red gaiter or gown on her head outside her house, and this must be stated in the sentence; and if she does not wear it, she must be degraded forever to Brazil. (...)".

city or town and its terms; *outside the whole bishopric for one year*; *outside the bishopric until* our mercy*; and* forever to Brazil .[141]

b. After the Philippine Ordinances, various provisions perfected and adjusted to the circumstances the system of banishment applied to women.

The Assent of August 30, 1614 adapted the principle prohibiting banishment to Africa to repeat offenses. *Since women could not be banished to Africa*, the first and second banishment to the Kingdom that women failed to comply with was commuted to Brazil, at the discretion of the judges .[142]

In order to extinguish the castes of mules as much as possible, the Royal Letter of October 20, 1620 ordered the co-mutation of the banishment of women to Brazil into banishment to Cape Verde or São Tomé .[143]

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[141] O.F. L.V, T.30, pr.

[142] *Collecõ chronologica dos Assentos das Casas da Supplicação, e do Civel* (1791), XXI, pp. 27 and 28: "The woman who, being degraded to the Couto de Castro Marim, did not comply with the degre- do, and was therefore doubled; or who, being degraded out of the Vila e Termo, did not comply with this extermination, and was therefore imposed to the said Couto, also did not comply with it, and was therefore doubled, if she also does not comply with the latter, she may be degraded to Brazil for the years that seem good to the Judges, even if they are less than five; since she cannot, as a woman, be degraded to Africa".

[143] *Ordenações, e Leys do Reyno de Portu- gal.... Book Five* (Vincentian edition, 1747), p.296: "In order to extinguish as much as possible the mulatto castes in Cape Verde and S.

The punishment of banishment according to gender is intact in 18th century legislation.

The charter of November 10, 1708, which banned the use of gypsy clothing and language, imposed the cumulative penalties of execution and banishment. While men were punished with ten years in the galleys, women were sent to Brazil for the same amount of time .[144]
In the search for the fairest and most useful solution, the legislator is not limited, however, to looking at the subject from the perspective of certain particularities that are relevant to them. In fact, these specificities can outweigh the individual. Because he is a man or a woman, the subject is also an integral part of a group, of a family unit that transcends him.

The Decree of February 10, 1750[145] ordered the arrest and deportation to the State of India of *vagrants for their idleness*, and ordered the commutation of sentences for prisoners in court jails. Some of the

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Tomé, it is ordered that in the Relations the women who are usually degraded to Brazil be degraded to these Islands.".

[144] *Collection of Ancient and Modern Legislation of the Kingdom of Portugal.* Part II. *Modern Legislation*, *Tom. II de LL., Alvv., etc.* (*Which includes the reigns of D. Affonso VI, D. Pedro II, and D. João V*): "(...) will incur the penalty of execution, and will be de- graded for a period of ten years: which degorgement for men will be galleys, and for women to Brazil. (...)".

[145] *Collecção da Legislação Portuguesa desde a Ultima Compilação das Ordena-ções, redegida pelo Desembargador Antonio Delgado da Silva. Legislation from 1750 to 1762*, p.9.

commutation requirements listed give a glimpse of the conditions that had to be met by the convicts. At the same time, these requirements constituted conditions for the banishment itself. Age, no more than forty. And health *capable of travel*. In addition to physical robustness, the law maintains the truly preventive concern of not disrupting the convict's family nucleus and does not allow *those who have wives and children to leave for the* Indian Ocean *if they miss their absences .*[146]

The following year, the Decree of May 7th sent the vagrant prisoners to Maranhão, without differentiating between genders. Since settlement was one of the legislator's motivations, he granted some favors for the displacement of the respective families .[147]

At the end of the 18th century, a new provision on the banishment of women momentarily changed the traditional regime.

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[146] In the same vein, in the *petition for pardon from banishment*, which Gregório Martins Caminha reproduces, the supli- cant justifies himself in this way: "(...) because he has been absent for this case, and is poor, and has a wife and children to maintain.". He mentions his crime, the penalty he was sentenced to - two years' banishment "to each of the places in the kingdom" - and also the fact that he had already benefited from a previous pardon. See *Tratado da Forma dos Libellos*, p.137.

[147] *Collecção da Legislação Portugueza desde a Ultima Compilação das Ordenações, redegida pelo Desembargador Antonio Delgado da Silva. Legislation from 1750 to 1762*, p.99: "(...) when some of the said prisoners are married and take their wives and children, or if they are single and want to get married to take their wives, the same favor and grace will be practiced with them as I have done with the other settlers of the Islands; and the same I am pleased to allow any female prisoner who is married, or who wants to get married, to go on this monsoon (...)".

Taking into *account serious inconveniences and* unspecified *damages*, the Decree of June 27, 1795[148] prohibited, in principle, the banishment of women outside the Kingdom or *to the Overseas Conquests*[149] . This penalty was to be *commuted to confinement in the Casa Pia of St. George's Castle in the city of Lisbon*, of arbitrary duration or *as many years as the judges felt were sufficient to satisfy their offenses*.

The preservation of family unity and the married state certainly led to this exception being made. If the women were married and their husbands, defendants of the same crimes or perpetrators *of the same crimes*, were sentenced to a similar penalty, they had to accompany them in *the places of the Overseas Conquests*.

For the same reason, the Ordinances already ordered the banishment of both spouses to the same place when the husband *consented* to his

[148] *Supplemento à Collecção de Legislação Portugueza do Desembargador Antonio Delgado da Silva. By the same. Anno de 1791 a 1820*, p.89. See Manuel Fernandes Thomaz, *Repertório Geral, ou Indice Alphabetico...*, Tomo II, 567, p.79.

[149] Joaquim José Caetano Pereira e Sousa, *Primeiras Linhas sobre o Processo Criminal*, Chapter XXXIX, § CCXCVI, note 532, p.217, also refers to this Decree and the extensions made by the Notice of December 19, 1809 and the Provision of January 11, 1810.

wife's adultery, while the adulterer was banished to a different place.[150]

If the crime was so serious or of *such an aggravating* nature that the judge felt it deserved *a penalty greater than life imprisonment* - but in any case less than the ultimate penalty - the arbitrary punishment *deemed most proportionate* would be imposed. By virtue of this arbitrary punishment applicable to more serious crimes, the law creates a second cause for the admissibility of female banishment outside the Kingdom. For this reason, Pereira e Sousa comments, cross-referencing the text of the Ordinances with the 1795 Decree: *women are not subject to the penalty of banishment to Africa or other overseas places; except in serious cases, or if they are married, and their husbands, the perpetrators of the crime, are condemned to the same penalty .*[151]

c. The ban on banishment outside the Kingdom brings national law closer to French law, according to which women could not, as a rule, be banished or banished - *le sexe ne doit point être banni*[152] . Mello Freire recognized that in France women were not sent out of the Kingdom: *ne liberos pariant in terra aliena - which is the reason given by the*

[150] O.F. L.V, T.25, §9: "(...) he and she will be butchered with chapels of horns, and degraded to Brazil, and the adulterer will be degraded forever to Africa, without prejudice to the husband wanting to lose them".

[151] Joaquim José Caetano Pereira e Sousa, *Primeiras Linhas sobre o Processo Criminal*, Chapter XXXIX, §CCXCVI, note 532, p.217.

[152] Thorillon, *Idées sur les Loix Criminelles*, Tome I, Title I, § IV, Art. 102, p.292.

jurisconsults[153] . Decency seemed to prevent it[154] . However, there were exceptions for the crimes of theft, smuggling, begging and vagrancy[155] . Similarly, banishment was also replaced by detention .[156]

Jousse presents a somewhat different perspective. He echoes, of course, the claim that the *Parlement of* Paris never condemned

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[153] Mello Freire, *Codigo Criminal intentado...*, *Provas*, *Ao Título IV*, p.9.

[154] Rousseau de La Combe, *Traité des matières criminelles...*, Part I, Chapter I (*Des Crimes & Peines en général*), 27, p.7 : "(...) à cause de la décence dûe au sexe.". And in the same vein, Chapter II (*Des Crimes & Peines en particulier*), Section I (*Du Crime de Luxure*), Distinction II (*De l'Avortement, recelement de grossesse, Supposition & exposition de part*), 3,p.15. Referring to perpetual banishment, Muyart de Vouglans, *Institutes au Droit Criminel...*, Part VIII (*De l'Éxécution des Jugements*), Title II (*Des Peines en général, & des Cas où l'on peut des diminuer ou augmenter*), Chapter II (*Des Peines, suivant nos Usages*), p.405"(...) il ne peut être prononcé contre les Femmes, suivant les dernières Déclarations et Arrêts, mais il doit être converti ou dans la Détention perpétuelle dans une Maison de Force, ou dans un Bannissement pérpetuel hors du Ressort du Parlement, qui produit alors le même effet, à leur égard, que celui hors du Royaume; du reste, cette Peineestordinairement accompagnée *de* celle du Fouet."; and *Les lois criminelles de France...*, Book Two, Title IV, Chapter III, § 1, 7, p. 63: "(...) à cause de la décence qui ne permet pas qu'une femme se puisse aisément retirer hors du royaume.". The sentence had to be converted into imprisonment ("détention en maison de force"). On banishment in general ("bannissement en général") and its application to women ("femmes mariées & sous puissance de mari"), see. Jousse, *Traité de la justice criminelle de France...*, Part One, Title III, 48, p. 53.

[155] Muyart de Vouglans, *Les lois criminelles de France...*, Book Two, Title IV, Chapter III, § 1, 7, p. 63.

[156] Jean-Marie Carbasse, Histoire du Droit Pénal..., p. 229 : "(...) mais seulement à la réclusion dans une maison de force.".

women to perpetual banishment outside the Kingdom for the sake of procreating abroad[157] . They could only be perpetually banished outside the *Parlement*'s circumscription (*ressort*), with confiscation of their property. But there is no basis for such an understanding. On the contrary, the *Déclaration* of August 4, 1682 had established the penalty of perpetual banishment from the Kingdom against Bohemians and their wives[158] . Married women under the power of their husbands could also be banished.[159]

Not only would this trend not be maintained in our criminal law, but it would be subject to a new inflection in the first decade of the 19th century, more in line with the traditional options of the Portuguese legislator.

The Decree of March 2, 1801[160] allowed convicts to take their wives with them. And, above all, at the end of the first decade of the 19th

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[157] Jousse, *Traité de la justice criminelle...*, Tome I, Part I (*Des Crimes & des Peines*), Title III (*Des Peines*), 16, p.41.

[158] Idem, 10th (*Bannissement à perpetuité hors du Royaume*), 42, pp.50 and 51.

[159] Idem, *Observations sur le bannissement en général*, 48, p.53.

[160] This Decree determined that criminals imprisoned in Lisbon Prison should be sentenced summarily and within eight days, with the sentences being commensurate with those of banishment to certain places (João Pedro Ribeiro, *Indice Cronologico Remissivo...*, Parte I, p.227). See the verb *degredo in* Joaquim José Caetano Pereira e Sousa, *Esboço de um Diccionario Juridico...*, Tomo I; and Levy Maria Jordão, *Commentario ao Codigo Penal portuguez*, Tomo I, Comentário *ao* Artigo 35º, p. 123.

century, the Decree of June 27, 1795 was subject to such an *expansion*[161] that it was totally distorted.

In fact, the Provision of the Desembargo do Paço of January 11, 1810[162] on the commutation of sentences, taking *as* one of the objects of regulation *the punishment that should be given to women for their crimes*, determined that they could be degraded *without distinction* to places in Africa and the states of Brazil, as they deserved for the crimes they had committed, preferring those that were less populated.

The legal criterion for determining the place of exile in this law is quite simply the need to populate certain territories. This was far from concerns such as decency or female fragility, which were seen as incompatible with the harshness of certain places.

§5. Imprisonment

[161] Through the Notice of December 29, 1809 and the Provision of January 11, 1810. See the verb *degredo* in *Esboço de um Diccionario Juridico...*, Tomo I; and *Primeiras Linhas sobre o Processo Criminal*, Capítulo XXXIX, § CCXCVI, nota 532, p.217.

[162] António Delgado da Silva, *Collecção* da *Legislação Portugueza...*, *Legislação de 1802 a 1810*, p.796: "(...) extending the provision of the Decree of June 27, 1795: It was right to determine that women could be degraded indiscriminately to places in Africa and in my States of Brazil, according to their merit for the crimes they had committed, preferring those places that were less populated (...)".

a. Women enjoyed a favorable prison regime, since they were not imprisoned for crimes[163] . If the offenses were *minor*, they were handed over to a guarantor. And if they swore that they couldn't provide a *guarantor*, they gave an *oath, which is to swear that they are complying with justice*. If the offenses were *serious*, they were put in nuns' monasteries or handed over to *honest and virtuous mistresses*, so as *not to be offended or insulted in their chastity*. By the time of Rui Gonçalves, this privilege and prerogative no longer existed because women were imprisoned *separately from men*, thus ending the cause of common law. Pereira e Sousa reiterates the demand: the women's prison should be separate from the men's, *so as not to jeopardize their honesty*[164] . In Mello Freire's proposed reform, adulterous women are ordered to be interned in houses of correction and convents[165] . In short, they were only imprisoned for serious crimes[166] . Social status was no less important than gender. When *noblemen and noblewomen* were accused of serious crimes and cases, the king *usually* ordered them to be placed in the

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[163] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 23, *Carcerari*, pp.52-54.

[164] *First lines on criminal procedure*, Chapter VIII (*Prison*), note 150 to §LXV, p.73.

[165] Mello Freire, *Codigo Criminal intentado...*, Título XI (*Dos adúlteros*), § 4, p.19: "(...) will be imprisoned in a convent or house of correction forever, according to her quality, and there supported by her husband, for which maintenance will be judged, and she will not be allowed to speak to an outsider, however close and joint she may be in kinship, without written permission from her husband". These rules are described by Eduardo Correia as curious; see "Estudos sobre a evolução das penas no direito português", p.70.

[166] "Instituições de Direito Civil Português", Book II (*Do Direito das Pessoas*), §XIII, p.145.

custody of bailiffs or *people of honor*. Public prisons thus seemed to be reserved for women of *poor fortune and quality*.

Rui Gonçalves proposes that the solution be enshrined in law, in order to avoid *vexation and work*, given the difficulty in obtaining special provision, particularly in remote places .[167]

Referencing the Notice of September 18, 1778, Manuel Fernandes Thomaz recalls in his *Repertório* that the Court House of Correction was not established in general for *women criminals* but only for those who were of *less regular habits .*[168]

[167]Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 23, *Carcerari*, pp.53 and 54: "However, it would be a great favor to the female gender if there were a law: that noble, noblewomen and honorable, honest and respected girls, of a certain quality upwards: being accused of a crime, be handed over to honest people to guard them, or to their honorable and creditable relatives with sure bail, due to the great affront they receive by being imprisoned in public prisons, where women of little fortune and quality are commonly found.".

[168] *Repertório Geral, ou Indice Alphabeti- co...*, Tome II, 566, p.79.

b. According to the Ordinances[169] , as a rule, women *who were honorable and lived honestly* were not imprisoned for *civil debts*, even if the debt was privileged .[170]

This prerogative of the *female gender* only benefited *honest, continent* women *who lived publicly and chastely*. The common opinion of the doctors was that *dishonest* women *who lived dishonestly* should be imprisoned. Except when they were married. National law, however, eliminated this limitation. Rui Gonçalves agrees: *the dishonest married woman deserves less privilege & favor than the dissolute single woman*[171]. It was generally understood that the privileges granted by law to married women were limited to those who lived *honestly*. The text of the Ordinances itself exempted *public unmarried women* from the privilege.

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[169] O.F. L.III, T.31, §4: "And this which is said above, that they must be imprisoned, shall not be understood of women, because for civil debts, even if they are convicted of them, they cannot be imprisoned."; L.IV, T. 76, §6:"But women shall not be imprisoned for civil debts, even if they are convicted of them by sentence. 76, § 6: "However, women will not be imprisoned for civil debts, even if they are convicted by sentence, unless they are unmarried public women, because they can be imprisoned for civil debts, except for the rent of dresses and jewelry, which they rent in the city of Lisbon, because they will not be imprisoned for these rents.". See Mello Freire, "Instituições de Direito Civil Português..., Book II (*Do Direito das Pessoas*), §XIII, p.145.

[170] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 22, *Carcerari*, pp.51 and 52.

[171] Idem, p.52.

This prerogative, which would be extended in the second half of the eighteenth century to all bona fide debtors[172] , is delimited by Lopes Ferreira: women were imprisoned for *civil debts arising* from harm or crimes[173] . Similarly, women sentenced to a pecuniary penalty for a particular crime.[174]

c. In France, imprisonment for women had been introduced in 1724 to replace the galleys and the sentence of perpetual banishment outside the Kingdom, to which they could not be condemned because of the decency due to their sex (*à cause de décence due à leur sexe*) .[175]

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[172] See Law of June 20, 1774, §19; Assent of August 18, 1774; and Mello Freire, "Instituições de Direito Civil Português", Title XIII (*Do Comércio*), note to §XIII, p.70.

[173] Manuel Lopes Ferreira, *Pratica Criminal...*, Tomo IV, Capítulo VIII (*De que modo se deve fazer a execução nos bens dos condenados em pena pecuniária, imposta por qualquer delito*), 4, p.540: "(...) a woman must also be imprisoned for civil debts that are the result of harm, in order to pay them: notwithstanding the general privilege she has not to be imprisoned for civil debts (...)".

[174] Idem, maxime 7, p.540: "(...) And our conclusion above, in which we affirmed that the Defendant must pay the pecuniary sentence from prison, must be extended. Firstly, in the case of a private crime, and not a public one, when someone guilty of it is sentenced to a pecuniary penalty, because the prison sentence must also be paid (...) Secondly, it is extended to a woman who commits such a crime and is sentenced to a pecuniary penalty; because this sentence must be paid from prison, and it is a custom that has already been ob- served (...)".

[175] Muyart de Vouglans, *Les lois criminelles de France...*, Book Two, Title IV, Chapter III, §3 (*Reclusion dans une Maison de Force*), 1, p.66.

Referring to prison as a place, Vouglans explains that punishment was no longer carried out in the enclosed spaces that existed in the courts, but in forts and castles for men, and in cloistered hospitals and convents for women .[176]

Pastoret observes that confinement in a house of *force* (*maison de force*) applied to women like the galleys to men[177] . As for deprivation of liberty, he recommends a laborious and torment-free confinement[178] . He advocated improving the lot of prisoners and identified the following as criteria that could inspire gentleness and humanity in prison: the sex of the accused, age and social position .[179]

[176] Idem, § 4 (*De la Prison perpétuelle*), 3, p.67: "(...) il faut remarquer (...) according to the current usage of all tribunals, whether ordinary or military, (with the sole exception of ecclesiastical tribunals) this sentence is no longer ordered or carried out in those places known as prisons, which are enclosed within the enceinte of the tribunals which pronounce it; mais dans les fort ou châteaux, & autres maisons de force, qui sont destinés pour la prison des hommes; comme l'hôpital-général, ou les convents cloîtrés, pour les femmes.".

[177] Pastoret, *Des Loix Pénales*, Tome I, Part II, Chapter II (*Des peines corporelles non capitales, et des peines afflictives*), Article VII (*Des maisons de force*), p.111.

[178] Idem, Part III, Chapter VII (*Rapports physiques*), Article I (*Rapports de la peine avec le sexe de l'accusé*), p. 144: "(...) en les privant de la liberté, une clôture laborieuse mais sans torments (...)".

[179] Idem, Part II, Chapter II, Article VI (*De la prison*), p.108.

Pereira e Sousa[180] recalls that the Leopoldina[181] punishes pimping, in the event of recidivism, with public labor for men and imprisonment (*ergastolo*) in a powerhouse for women. The death penalty, the abolition of which it proceeds to, is generally replaced by the penalty of public work for men and the penalty of *ergastolo parimente a vita* for women .[182]

Under no circumstances did the Penal Code of 1852 allow the penalty of public work to be applied to women, determining that it should be replaced by imprisonment with or without work. Levy Maria Jordão explains *the reason for this*: *not only* would it be *impossible to carry out the sentence*, it would be *barbaric .*[183]

d. When a prisoner escaped or broke the chain, the crime was considered proven and he was punished as if he had confessed. Except if he had fled to fulfill a vow and returned of his own free will, according to the opinion of the doctors.

Women could, however, freely escape from jail in order to preserve their *modesty and chastity*, if they feared being offended by the jailer or

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[180] *La Riforma Penale di Pietro Leopoldo*, §CI.

[181] Pereira e Sousa, *Classes of Crimes...*, Section II, Genre I, Class III, Species VIII (*Lenocínio*), §6, p.228.

[182] Levy Maria Jordão, *Commentario ao Codigo Penal Portuguez*, Tomo I, co-mentário ao Artigo 72º, p.173.

[183] Rui Gonçalves, *Dos privilegios e praerogativas que ho genero feminino tem...*, *Prerrogativa* 62, *Fuga*, p.80.

someone else. They had to be *honest and honorable* or *incontinent*, so as not to contaminate the cells .[184]

e. The wives of those who could be arrested in their honor enjoyed the same right. In fact, the Ordinances allow for imprisonment *in their honor*[185] : of noblemen; of judges; of knights; of doctors of laws, canons and medicine; of clerks of the Royal Chamber; and of their children and wives, for *as long as they are married to them or remain in honest widowhood*. Lopes Ferreira also writes that the person to whom homage was to be paid was not put in the public prison, but in his own home prison until he had paid the pecuniary penalty to which he had been sentenced. The woman - even if she wasn't *noble by generation* - benefited from her husband's privileges and nobility. Even after she was widowed, as long as she didn't remarry[186] . Or as long as she led an *honest life*[187] . The woman enjoyed the nobility and privileges of her

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[184] O.F. L. V, T. 120, pr. See Joaquim José Caetano Pereira e Sousa, *Primeiras Linhas sobre o Processo Crimi- nal*, Chapter X, § LXXV, p.86.

[185] Manuel Lopes Ferreira, *Pratica Criminal...*, Tomo IV, Capítulo VIII (*De que modo se deve fazer a execução nos bens dos condenados em pena pecuniária, imposta por qualquer delito*), 12, p.541.

[186] Mello Freire, "Instituições de Direito Criminal Português", Title XV (*Do réu preso sob homenagem ou com guador*), §III (*To whom it is granted*), p.111.

[187] Brissot de Warville, *Théorie des Loix Criminelles*, Tome I, Chapter II (*Tableau correspondante des crimes & des peines*), Section II (*Principes préliminai- res sur les peines*), p.188: "(...) Heureux le peuple où le sentiment d'honneur peut être l'unique loi! Il n'a presque pas besin de législation: l'infamie, voilà son code pénal; & ce resort bien plus énergique qu'ailleurs l'appareil des supplices les plus cru- els (...)".

husband. Thus, a situation of penal advantage was communicated to her. Gender also inherently implies status.

§6. Infamous punishments

a. Infamy - the *penal code of* happy people who can do without the arsenal of torture[188] - affects men and women indifferently. *They all* apply to them, Pastoret reminds us .[189]

It is not even humanitarianism that doubts the usefulness or justice of infamous punishments. Mello Freire disagrees with the abolition of the infamy penalty proposed by some - *for its good effects*[190] . Filangieri declares with terrifying modernity his preventive confidence in the fear of infamy or the *loss of the right to public opinion - what a prodigious effect* public opinion *can have* when it is well *directed*[191] !... Infamous punishments

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[188] Pastoret, *Des Loix Pénales*, Volume II, Part Three, Chapter VII (*Rapports physiques*), Article I (*Rapports de la peine avec le sexe de l'accusé*), p. 144 : "On a conservé pour elles toutes les peines infamantes (...)".

[189] In the *Proofs* to the *Essay of the Criminal Code...*, he ponders: "I believe that this penalty should not be entirely abolished, as someone would like, because of the good effects it produces; however, it should not be prodigalized and much less left to the discretion of the judge." (*Evidence...*, *Title IV*, pp.239 and 240).

[190] *Oeuvres de G. Filangieri*, Tome II, *La Science de la Législation*, Book Three (*Des Lois Criminelles*), Part Two (*Des délits et des peines*), Chapter VII (*Des peines d'infamie*), p.19.

[191] Discurso sobre las penas..., Chapter V (De los diversos géneros que hay de penas, y de quales puede usarse, ó no, con utilidad y conveniencia de la república), § III (De las penas corporales), Azotes, 11, p.196"I also believe that the current practice is worthy of reform, when women are stripped naked from the middle of their bodies upwards with their breasts uncovered, which certainly offends modesty, and I **have seen it**

are seen as a bargaining chip for the moderation of corporal punishment. We are therefore mainly faced with the defense of mere adjustments, resulting from individual reflection, favored by the reformist environment.

Thus, Lardizabal y Uribe condemns the practice of his time that made women go naked from the waist up - *it offended modesty .*[192]

Thorillon doesn't question the marks on the body, whether for men or women. He advocates public execution - *l'exemple, l'exemple, est la véritable leçon*[193] ... But he limits them to life sentences.[194]

The golden rule requires appropriateness to the crime and is enunciated, in an *entirely original* way[195] , by Beccaria: if the legislator

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cause this effect even among the people of the lower classes. In some parts, they are cubiertas por delante, dejándoles sola- mente descubiertas las espaldas, lo que es más conforme a la decencia, y por otra parte no se disminuye nada la pena de la vergüenza."

[192] Thorillon, *Idées sur les Loix Criminelles*, Tome I, Title I (*Des Peines attachés aux aux Crimes & Délits*), § IV (*Des Loix relatives aux différens genres de peines*), Art.101 (*Flétrissure*), pp.291 and 292.

[193] Idem, Art.100 (*Travaux publics, Réclusion*), p.291; and Art.111 (*Prisons, Cachots, Galères, Infamies, &c.*), p.305.

[194] Guilherme Braga da Cruz, "O movimento abolicionista e a aboli- ção da pena de morte em Portu- gal..., p.444, note 1.

[195] Beccaria, *Of Crimes and Punishments...*, § XXIII (*Infamy*), p.108.

declares *actions that are in themselves indifferent* to be *infamous, he diminishes the infamy of actions that are truly so .*[196]

b. This alignment of infamous punishments is quite apart from the law. Prior to the commission of any crime and corresponding to mere immersion in or belonging to a certain social group, it is presented simultaneously as a consequence and a cause of the punishment[197] . The underlying principle in the Ordinances associates a vile person and a vile penalty. In other words, vile punishments - or at least their most infamous forms - are imposed on vile people[198] . In fact, vileness radiated across multiple domains. For example, harlots as *infamous* were by right defective witnesses.[199]

The ultimate reason for rejecting infamous punishments is not their lack of humanity, but the fact that they are not controlled by the

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[196] On the evidential and punitive functions of fame and infamy of fact, see. António Manuel de Almei- da Costa, *O Registo Criminal...*, pas- sim.

[197] This association is denounced in the formulas of the law. L. V, T.30, § 14: "(...) if they are vile people, the judge shall order them to be given thirty strokes (...)"; T. 42, §4: "(...) if he is a vile person, he should be arrested and publicly butchered by the town (...)".

[198] Like banished persons, bankrupts in bad faith, habitual drunkards, and gamblers by trade or tafuis. See *First lines of criminal procedure*, note 359 to §CLXXXVII of Chapter XXVI (*On Witnesses*), pp.148 and 149; and O.F. L. IV, T.90, §1: "(...) vile and torpid, and of bad manners, for being a drunkard, a taful, or of other similar turpitude. (...)". Cânido Mendes de Almeida's edition completes the legal example by mentioning harlots (note 6, p.935).

[199] Basílio Alberto de Sousa Pinto, *Lições de direito criminal...*, p.88.

legislator. This is what Basílio de Sousa Pinto would say, co-mentoring Mello Freire's manual: *criminalists speak out against* infamous punishments *because infamy is the child of public opinion, and not of the will of the legislator*[200] . As Filangieri observed, it wasn't the law that established infamy; it merely declared it .[201]

In this way, we can understand the legislator's choices, which, in an elliptical way, try to instrumentalize social mechanisms that act on reputation in different ways, depending on whether the conduct is carried out by men or women.

Bentham, in his critical appraisal of punishments that *touch* or *hurt honor,* exemplifies one of these *indirect* resources of the legislator. If a woman goes out into the street after a certain hour, it is presumed that she goes out for a *bad purpose*. The *link* between the two offenses is merely *apparent*[202] . The legislator *transfers to one crime the measure of censure that belongs to another,* in *other* words, he *considers one crime to be proof of another*[203] . And he comments, in a nonchalant manner: *it is true that in this respect public opinion is not very embarrassed by the evidence; men*

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[200] Filangieri, *Oeuvres de G. Filangieri*, Tome II, *La Science de la Législation*, Book Three (*Des Lois Criminelles*), Part Two (*Des délits et des peines*), Chapter VII (*Des peines d'infamie*), p.22: "(...) Ce n'est donc pas la loi qui établie l'infamie; elle ne pe*ut* faire autre chose que la déclarer.".

[201] *Theoria das Penas Legaes...*, Book III, Chapter III, p.245.

[202] Idem, p. 244.

[203] Idem, p.245.

have a prodigious facility for believing evil, so that a superficial connection is enough to be admitted as a sufficient presumption .[204]

Underneath the formal statement that infamous punishments are applicable regardless of gender, we find a specific weakness in women's reputations.

§7. Confiscation

In his legalistic commentary, Pereira e Sousa teaches that the penalty of confiscation, pronounced *by the laws* against the defendants of some crime, could be more or less extensive, according to the nature of the crime[205] . The penalty of confiscation did not revolve blindly around the tax authorities. It was already limited by the protection of the interests of heirs and spouses .[206]

Among us, the penalty of confiscation of property[205] was not applied to the wife's share of the estate or the dowry. Even in the crime of lese-

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[204] According to the "general maxim" established in French law, confiscation did not impede the rights of the believers, which included husbands, as regards common property ("conquêts de communau- té"); women, as regards their dowry ("dot"); and children, as regards their inheritance ("douaire"). See Muyart de Vouglans, *Les lois criminelles de Fran- ce...,* Book Two, Title IV, Chapter 6, §1, 5, p.74; Loisel*, Institutes...,* Book VI*,* Title II, max. 25, 26 and 27 (pp.153 and 154); and Jousse, *Traité de la justice criminelle de France...*, Part One, Title III, 195 and 196, pp.106 and 107.

[205] José Caetano Pereira e Sousa, *Classes of Crimes...*, Section II, Genre I, Class I, Species I (*Crimes against the State*), NºI (*High treason. Lesa Magestade*), §9, p.41"It only takes place after the debts and the dowry or the wife's share have been deducted.";

majesty of the first head[206] . The Ordinances' solution was preserved in Mello Freire's *Codigo criminal intentado* .[207]

V. CONCLUSION

Imbecillitas sexus, infirmitas consilii, animi levitas. Imperfection, fragility, inconstancy. Nothing in this masculine argument seems likely to make the object of study happy. If, initially, men are victims of their perfection and women are punished with benevolence, then,

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and *Primeiras Linhas sobre o Processo Crimi- nal*, Chapter XXXIX, § CCXCV, note 531, p.216: "Since the penalty is confiscation of property, the following are excepted from it. I. A woman's inheritance or dowry. Ord. l.5. tit.6. §.20. (...)".

[206] O.F. L.V, T.6, §20: "And if the one who commits thecrime is married, if it is per letter of the half according to the custom of the Kingdom, the woman will have all her half safe. And if it is for dowry and arras, there will be all her dowry and arras at the time they are due, and all that there is to be for the sake of her dowry contract, notwithstanding the malice by the husband, unless she has participated in the said crime. (...)".

[207] *Codigo criminal intentado...*, Título XIII (*Do crime de alta traição*), §24, p.31: "In the sentence, the woman shall be ordered to return her dowry, her arras, or her share, having married by letter of half, or in the manner of the custom of the kingdom, and not having participated in her husband's crime.". In the crime of lese-majesty, however, the tax authorities did not follow this maxim. Loisel, *Institutes...*, Book VI, Title II, max. 21, p.153: "(...) leze- Majesté, où le Roy prend tout (...)"; and Muyart *de* Vouglans, *Les lois criminel- les de France...*, Book Two, Title IV, Chapter 6, § 1, 5, p.74.

gradually, equality will allow women to win the right to lose favorable treatment.

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