

**To consume or be consumed? Sexist beer advertising in Brazil: Gender and power struggles for fair representation within consumer law**

by

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LLB, Pontifícia Universidade Católica de São Paulo, 2006  
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A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

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University of Victoria

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We acknowledge and respect the lək'wəŋən peoples on whose traditional territory the university stands and the Songhees, Esquimalt and W̱SÁNEĆ peoples whose historical relationships with the land continue to this day.

## **Supervisory Committee**

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## Abstract

In this dissertation I use a consumer law case related to a sexist advertisement (*Skol* Summer Muse campaign) to examine the effectiveness of feminist engagement with the Brazilian State and the market. Brazilian consumer law is a hybrid law, where the state oversees private relationships, imposing the observance of public principles on private social actors. It is also hybrid in the sense that it combines civil, criminal, procedure, and administrative legislation in a single code. The Brazilian *Consumer Code* forbids discriminatory advertising but does not define it. This complex case involved multiple social actors, political and legal processes: the market (represented by the beer company that promoted the advertisement and the market self-regulatory body that monitors advertisement in Brazil); the feminist movement; and the state (represented by state and federal prosecutors, the judiciary, and PROCONS - administrative bodies that enforce consumer law) during a time of significant social change in Brazil. Theoretically grounding my work in feminist political economy analysis and considering contestation about sexist advertising as a relevant focus for political action, I discuss how material social inequalities are produced, reflected, reproduced, and reinforced in two ways: i) visually in advertising, and ii) discursively in the legal documents that comprise the litigation around the *Skol* Summer Muse Campaign. This work brings into conversation: i) fields of law that are hybrid (neither private or public) namely national and international human rights law that protects women, and consumer law in Brazil; and ii) discussions of material redistribution and visual representation in advertising, and establishes advertising and consumer law as a fruitful field for political action and contestation. I also look at the limits and challenges, as well as the strengths of the feminist movement in Brazil. The dissertation bridges

discussions about consumer law and human rights through feminist lenses. It supports debates about sexist advertising and its impacts on women's lives in other jurisdictions, including Canada. Finally, the dissertation contributes to broadening perceptions of gender, justice, and law. It also proposes tools to advance gender justice through strategic litigation and engagement with consumer law processes. I conclude that the feminist movement in Brazil should engage more actively with consumer law and the regulatory bodies that enforce it. This engagement will both expand their work to enhance women's equality and support the National Consumer System. Simultaneously, the Brazilian feminist movement, by engaging with international human rights treaties ratified by Brazil, helped to define sexist advertising as a human rights issue, a strategy that can be used by other social movements in Brazil or in other countries that have signed these treaties. Finally, this dissertation involved an extensive and thorough process of translation, and considers the challenges and politics of providing full and multi-layered translations of legal systems, concepts and cultures.

**Key words:** Consumer Law – Human Rights Law – Gender – Social Inequalities – Advertising – Regulation – Social Activism – Feminism in Brazil

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## **Dedication**

For all my partners in feminist activism, for our shared fights and ideals;

for Marcelo, for our love and shared journey;

and

for Laura and Elis, so that you can live in a better world than the one I have lived in.

## **List of Acronyms**

AMBEV – Companhia de Bebidas das Américas / American Beverage Company

ANDEC - Associação Nacional de Defesa do Consumidor / National Association to Defend Consumers

APC - Associação de Proteção ao Consumidor / Association to Protect Consumers

CEDAW – Convenção para a Eliminação de Todas as Formas de Discriminação Contra a Mulher / Convention on the Elimination of all Forms of Discrimination Against Women

CEPIA - Cidadania, Estudo, Pesquisa, Informação e Ação / Citizenship, Studies, Research, Information and Action

CLADEM – Comitê da América Latina e do Caribe para a Defesa dos Direitos das Mulheres / Latin American and Caribbean Committee for the Defense of Women's Rights

CODECON - Conselho de Defesa do Consumidor / Council to Defend Consumer Rights

CONAR – Conselho Nacional de Autorregulamentação Publicitária / Brazilian National Council of Self-Regulation in Advertising

DPDC - Departamento de Proteção e Defesa do Consumidor / Department of Consumer Protection and Defense

FBSP - Forum Brasileiro de Segurança Pública / Brazilian Forum for Public Safety

IDEC - Instituto Brasileiro de Defesa do Consumidor / Brazilian Institute for Consumer Defense

LMP – Lei Maria da Penha / Maria da Penha Law (MPL)

MP/SP – Ministério Público de São Paulo / São Paulo state Public Prosecutor’s Office

MPF – Ministério Público Federal / Federal Prosecutor’s Office

PT- Partido dos Trabalhadores (Worker’s Party)

PLANDEC – Plano Nacional de Cidadania e Consumo / National Plan for Consumption and Citizenship

PROCON – Programa de Proteção e Defesa do Consumidor / Program to Protect and Defend Consumers

RMM – Rede Mulher e Mídia / Women and Media Network

Senacon – Secretaria Nacional do Consumidor / National Consumer’s Secretariat/Bureau

SEPPIR - Secretaria Especial de Políticas de Promoção da Igualdade Racial / Special Secretariat for Racial Equality Policies Promotion

SNDC – Sistema Nacional de Proteção e Defesa do Consumidor / National Consumer Defense System

SPM - Secretaria de Políticas para as Mulheres / Special Secretariat to Promote Women’s Policies

UNGCP – Diretrizes das Nações Unidas para a Proteção do Consumidor / United Nations Guidelines for Consumer Protection

UNIFEM – Fundo de Desenvolvimento das Nações Unidas para as Mulheres / United Nations Development Fund for Women

WTO – Organização Mundial do Comércio / World Trade Organization

## Introduction

If objectification in advertising has changed a lot in recent years, traditional advertising in Brazil still often depicts the female body as a sexual object to promote beer consumption.<sup>1</sup> Objectification of women in advertising has led to contestation by social movements and individuals resulting in procedures before CONAR<sup>2</sup> (the market self-regulatory body that oversees advertising in Brazil), and state sanction.<sup>3</sup> I have encountered this debate about sexist advertising many times, both as a feminist activist, and as a state representative at the federal body that oversees consumer rights in Brazil, Senacon.

Brazilian consumer law established limits to advertising back in 1990, giving power to state bodies to impose fines in cases of illegal advertising. This authority to oversee advertising was not accomplished without struggles: while the state claims this responsibility based on consumer law, companies argue that any attempt to regulate advertising by the state results

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<sup>1</sup> Berenice Bento, “A creveja e o assassinato do feminino”, *Folha São Paulo* (3 January 2007) Online; Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, “Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?” (2019) 39:5 *Int J Advert Rev Mark Commun* 679–698.

<sup>2</sup> According to Fernanda Almeida Marcon, Ana Maria Simões Ribeiro, and Elton Belz, from 2007 to 2016, CONAR received 102 claims against sexist advertising, also pointing out an increase of 244% in the number of claims from 2012 to 2016. Fernanda Almeida Marcon, Ana Maria Simões Ribeiro, & Elton Belz, “A atuação do CONAR nos casos de denúncias de sexismo na propaganda: liberdade de expressão comercial versus respeito às mulheres” (2017) XX SEMEAD - Semin Em Adm. For na analysis of a case involving AMBEV and its beer Skol, see also: Ivan Paganotti, “A negação da negativa em um palimpsesto de propaganda: conflitos entre liberdades em expressões sobre a campanha de carnaval da Skol em 2015” (2016) 2:1 *Revista Observatório*.

<sup>3</sup> “Procon de Vitória aplica multas pela propaganda da Devassa” *INESC* (18 July 2011) online: <<http://www.inesc.org.br/noticias/noticias-gerais/2011/julho-2/procon-de-vitoria-aplica-multas-pela-propaganda-da-devassa>>; “Justiça abre processo contra Devassa por propaganda abusiva” *G1* (4 November 2013) online: <<http://g1.globo.com/economia/midia-e-marketing/noticia/2013/10/justica-abre-processo-contradevassa-por-propaganda-abusiva.html>>.

in censorship. In a country deeply marked by multiple dictatorships, this discourse is quite influential.

In the summer of 2006, the biggest beer corporation in Brazil, AMBEV (Companhia de Bebidas das Américas), introduced its summer campaign materials (television and printed advertisements) to promote one of their beer products: *Skol*.<sup>4</sup> This campaign explored the idea of a summer muse delivered to men, and of products conceived to better allow men to gaze at the feminine body as a way of encouraging consumption.

I use the *Skol* Summer Muse campaign and the political and legal processes that contested it to explore issues related to power and agency, as well as normativity and ideas of normalcy and adequacy regarding laws, bodies and identities, and social change related to gendered social roles. I look at power imbalances materialized in social inequalities that are produced and reproduced visually through advertising. I also discuss contestation of such representations as a form of political action, and the limits to state's enforcement of regulation regarding abusive advertising in Brazil.

The social actors interacting in this case are: i) AMBEV and CONAR (market self-regulatory body), representing the market; ii) the feminist movement, represented by the following feminist non-profit organizations: Instituto Patrícia Galvão, CEPIA, CLADEM, and Rachel Moreno, representing the Women's Observatory; iii) the Brazilian State in

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<sup>4</sup> AMBEV is an enterprise created in 1999 with the fusion of *Cervejaria Brahma* and *Companhia Antarctica*. AMBEV currently produces and sells 30 different brands, operating in 17 countries in the region. AMBEV - Companhia de Bebidas das Américas, "AMBEV - History Overview", online: <<https://ri.ambev.com.br/en/overview/history/>>.

multiple forums: the judiciary, the administrative bodies enforcing consumer law (PROCONs), and federal and state prosecutors' office representatives.

Litigation around this campaign started in 2006, when Rachel Moreno, a feminist engaged in discussing the image of women in the media in Brazil, reported the *Skol* Summer Muse campaign to the Federal Prosecutor's Office (MPF) for being discriminatory and violating women's fundamental and human rights to fair representation within the media. This campaign showed a woman, the Summer Muse, being cloned as beer bottles and delivered to men in their homes and in bars. By the time Rachel Moreno reported the issue, CONAR had already decided that the advertisement was in accordance with their self-regulatory guidelines. After unsuccessful attempts to reach an agreement between Rachel Moreno (representing a group of feminists) and AMBEV, the federal prosecutor's officer forwarded the case to the São Paulo State prosecutor's office (MP/SP). The MP/SP proposed a collective lawsuit against AMBEV, which was dismissed by the São Paulo state court, deeming the advertising non-discriminatory (2012 decision). In parallel, the São Paulo PROCON (Programa de Proteção e Defesa do Consumidor / Program to Protect and Defend Consumers - an administrative body responsible for enforcing the consumer law in Brazil) imposed a fine on AMBEV finding the 2006 *Skol* Summer Muse campaign abusive for discriminating against women, in violation of the *Consumer Code* - law n.º 8.078/90,<sup>5</sup> known as the Code of Consumer Defense and Protection (here referred simply as "*Consumer Code* – CDC").<sup>6</sup> AMBEV appealed this decision, seeking to annul the fine

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<sup>5</sup> *Lei Federal n.º 8.078, de 11 de setembro de 1990*, D.O.U., 12 September 1990. Online: PROCON Rio de Janeiro <[http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC\\_Novembro\\_2014\\_Ingles.pdf](http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf)>.

<sup>6</sup> Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 126.

imposed by PROCON. This time, in 2016, the São Paulo state court decided that the *Skol* Summer Muse campaign was discriminatory, violating sections of the *Consumer Code*, and upholding the PROCON's fine (2016 decision). AMBEV appealed this decision many times, including to the Superior Court in Brazil (STJ). In 2020 the STJ, considering that the São Paulo state court's 2016 decision was not unanimous, sent the case back to the state court for further clarification. The São Paulo state court has not yet reviewed this appeal, but the 2016 decision is a landmark as it appears to be the first court decision in Brazil to recognize sexist advertising as a form of discriminatory advertising under the Brazilian *Consumer Code*.

When taking a closer look at the *Skol* Summer Muse campaign and related litigation, I was intrigued by how different the two decisions on the same case were, and how the case had mobilized so many social actors. I was curious to investigate the discourses on gendered social roles and visual representations that could emerge from all the documents related to this case.

## **Research Questions**

This dissertation bridges multiple fields of knowledge. Regarding law, I connect Brazilian consumer law, and domestic and international human rights law that protect women's rights to establish sexist advertising as a human rights issue. From a socio-legal perspective, I use a feminist political economy approach to advance discussions on gender justice and establish advertising as a locus for political action in contemporary consumer societies. Therefore, I expand feminist critique of the law, searching for connections between consumer law and human rights law through feminist activism in Brazil. My investigation

shows how challenging specific feminine representations in advertising matters for gender equality, as well as contributes to the expansion of possibilities for strategic litigation for the feminist movement in Brazil. I made the choice to focus on a binary perception of women's identities and social roles because the material I am studying (sexist advertising) still operates in this paradigm, being binary and heteronormative, showing very strict representations of men and women, in intersection with race/ethnicity, social class, age, geographical location, religion, and disabilities. This is not to say that I do not consider relevant the representation (or lack thereof) of LGBTQ+2 people in advertising, but that I am choosing to concentrate my analysis on visual representations of cis-women in advertising, together with assigned gender identities and social expectations. The stereotypes that encapsulate women's identities affect trans and non-binary people as well, and in this sense, what I discuss in this dissertation may also benefit these other groups.

I ground the legal questions in this dissertation on the *Skol* Summer Muse campaign and how this case was discussed and decided in different arenas. I focus on how sexist advertising, here understood as a form of abusive advertising in the Brazilian *Consumer Code*, was dealt with by state and market self-regulatory institutions responsible for enforcing advertising regulations. I also examine how the representatives of the feminist movement discussed sexist advertising using a human rights framework.

The socio-legal questions in this dissertation involve why and how representation in advertising matters for gender equality more broadly in consumer and media saturated societies. If material social inequalities are reflected, produced, reproduced, and reinforced visually in advertising and discursively in legal documents, how does social movements'

engagement with discriminatory advertising through multiple sites of power (market self-regulatory bodies and state bodies) constitute a relevant space for political action?

My case analysis shows the different ways equality claims were articulated and what these emerging discourses reveal about these debates in Brazil. I observe that the Brazilian feminist movement has been seeking fair representation in advertising and I believe it is important to understand why this was chosen as a focus for political action. Following this thread, I connect issues of social inequalities with social representation in advertising to discuss engagement with consumer law as a political action. I look at feminist theories of political economy to better understand how social inequalities ground asymmetrical positions for men and women in capitalist societies, seeking to understand how advertising and law have contributed to upholding or disrupting power dynamics<sup>7</sup> that sustain or shift these social gender inequalities by displacing traditional ideas of the public and private divide.

I focus on the strategies and the discourses that contest representation in advertising, as well as how feminists in Brazil are engaging with and occupying different socio-political arenas to do so. I do not discuss femvertising (the use of marketing messages to promote women's and girls' empowerment in campaigns like "Dove real beauty"),<sup>8</sup> but ways in which women and activists are contesting advertising that violates one's rights. It is not my

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<sup>7</sup> Law can be both "coercive and discursive, [...] deeply linked to normative claims, high among them equality, liberty, individualism, and the rule of law, that are used to justify and contest the way in which power relations are organized". Judy Fudge & Brenda Cossman, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 30.

<sup>8</sup> Neema Varghese & Navim Kumar, "Feminism in advertising: irony or revolution? A critical review of femvertising" (2020) *Fem Media Stud.*

goal to define what would be an appropriate message for advertising, I am instead concerned with what makes a marketing campaign discriminatory, and methods and tools to address this issue. As a consequence, I am interested in the political and legal articulations feminists have been making to claim better representation in advertising.

By analyzing the documents related to all the administrative, self-regulatory and judicial proceedings regarding the Skol Summer Muse campaign, I demonstrate: (i) which legal discourses about Brazilian women in consumer society emerge from such documents; (ii) how these discourses are related to structural social inequalities and permeated by interconnections among gender, sexuality, race/ethnicity, social class, age, and geographical location, religion, and disabilities; and (iii) how they have changed (or not) over time, considering the case has been *sub judice* for at least 16 years. I am also concerned with how the feminist movement engages with different state institutions and power structures to contest and discuss women's role in Brazilian society. Finally, a debate that permeates the whole dissertation is who has the authority to regulate and oversee advertising in Brazil: the state? The market? Both?

By bringing new perspectives to the legal interpretation of discriminatory advertising that could support the enforcement of consumer law by members of the Brazilian National Consumer System (SNDC), I propose ways to advance strategic litigation on equality and sexist advertising by offering additional tools to social movements (social movements in general, but feminist movements in particular) to access the National Consumer System in Brazil. I see this contribution in multiple dimensions, including: i) stimulating an interpretation by the authorities responsible for enforcing consumer law that is gender-sensitive; ii) promoting an expansion of human rights law and its interpretation to

encompass protection against discriminatory advertising; iii) sensitizing the consumer movement and state bodies to gender issues and international human rights law that integrates the *Bill of Rights* in Brazil; iv) introducing consumer law and its mechanisms to the feminist movement as additional tools to channel their claims related to sexist advertising; v) fostering collaboration and coalitions between members of the SNDC and feminist groups interested in discussing gender and advertising. Finally, I contend that consumer law and laws that protect women's human rights are a form of hybrid law, ensuring the observance of minimum human rights standards in private relations.

## **Theory**

This research is interdisciplinary and investigates how material social inequalities intersected by gender, social class, race/ethnicity, age, geographical location, sexuality, religion, disabilities, and gender identity are reflected, produced, reproduced, and reinforced visually in advertising, and discursively in legal documents. I look at issues related to law and law's enforcement, and representation or misrepresentation in advertising as political sites of contestation. I use feminist political economy, consumer law, and human rights law to discuss the role of women in the Brazilian consumer society and their representation in advertising. Merging these fields, I propose an interpretation of Brazilian consumer law that considers these three axes (feminist political economy, Consumer Law, and Human Rights Law) as non-stable or fixed, but in constant interaction.

I use feminist political economy because it is this particular thread of feminism that discusses women's social place in capitalist consumer societies, looking into the relationships between women, work, and consumption, as well as state regulation of market

activities such as advertising. I am interested in how the discourses about gender roles that support the traditional capitalist divide between paid and unpaid work, private and public, permeate the legal debates about advertising. Additionally, to use feminist political economy to discuss legal issues is still uncommon in Brazil. One must remember that when second wave feminism was exploding in more advanced economies in the Global North, in Brazil, as in other countries in the Latin American region, most of these debates were censored due to the repressive governments in place at the time. As a result, many feminist studies in Brazil focus on post-structuralist debates, and do not explore feminist political economy.

I work in a conversation with Antonella Picchio, Maria Mies, Silvia Federici, and Nancy Fraser; and ground discussions on social inequalities in Brazil by bringing relevant data and the perspective of Brazilian authors such as Lélia Gonzalez and Jessé Souza. I bridge such theoretical references with discussion on symbolic and discursive violence (looking at social harm caused by advertising), using them as guidelines to explore representation or misrepresentation in advertising and gender equality more broadly. Here I work mostly with Foucault, Teresa de Lauretis, and Heloísa Buarque de Almeida.

In this sense, my work connects discussions from the North to the South, and contributes to expand the debate around: contesting advertising as a locus for political action and a human rights matter; as well as combines issues of material distribution with representation in advertising.

There is a developing literature on consumer society and consumerism in Brazil<sup>9</sup> (mostly in sociology, anthropology, and marketing).<sup>10</sup> Specialized literature on advertising and consumer law in Brazil does not discuss sexist advertising in depth.<sup>11</sup> The Brazilian feminist movement has solid experience with national and international litigation on sexual and reproductive rights and violence against women, but little experience in litigation in the consumer law field. I (and my research) am (are) right at this intersection, between consumer law and international human rights law from a feminist perspective, merging redistribution and visual or imagetic representation in consumer societies.<sup>12</sup>

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<sup>9</sup> Livia Barbosa, *Sociedade de consumo*, 4th ed, Ciências Sociais Passo a Passo 49 (Rio de Janeiro: Zahar, 2014) at 58.

<sup>10</sup> Since 2003, a research group, called *Estudos do Consumo* (Consumption Studies), has been accumulating and fostering research on consumption studies in Brazil. The researchers in charge hold annual conferences and in 2012 decided to create a bi-annual Portuguese-Brazilian online journal entitled Consumption, Culture and Society (<<http://www.estudosdoconsumo.com.br/wp-content/uploads/2010/10/Lancamento-Versao-Final-Ingles-Consumption-Culture-and-Society-29-08-2012-21.pdf>>). Focusing on law, the *Revista Luso-Brasileira de Direito do Consumo* has been publishing on Brazilian and Portuguese consumer law since 2011, but this is a more technical legal publication, that focuses more on the consumer law, law development, and change than in the connections between consumer society and law.

<sup>11</sup> One of the few books on the consumer law that expressly addresses it, although not in depth and not from a feminist perspective, is: Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2nd ed (São Paulo: Editora Revista dos Tribunais, 2013), and its updated version: Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito: Enganosa, Abusiva, Infantil, Digital, Comparativa*, 3d ed (São Paulo, Brazil: Saraiva, 2018). See also: Leonardo Roscoe Bessa & Walter José Faiad de Moura, *Manual de Direito do Consumidor* (Brasília: Ministério da Justiça - Secretaria Nacional do Consumidor, 2014) at 157-62.

<sup>12</sup> Imagetic is a word that does not seem to exist in English. The word in Portuguese I used to bring this term to my dissertation is *Imagética/o*, which is an adjective that indicates that something is expressed through images, and can also indicate something that reveals imagination, something imagined and visually depicted. In Portuguese this word is often used in the Communication field and also in literature, as a way to indicate how perfectly some images translate some ideas (in a poem, for example). In English, it seems that the word used in these contexts would be either visual or graphic, but for me, *imagética/o* seems to have a deeper meaning, combining the expression of ideas through images in an intentional, sometimes poetical, sometimes strategic way. To my Portuguese readers, please stay with the idea of imagetic, but for my English readers, please read the word imagetic as a synonym for visual.

## **Methodology**

I used bibliographical and documentary research to identify and collect relevant documents that comprise the *Skol* Summer Muse campaign and related litigation in the multiple venues where it was discussed, resulting in the analysis of the following core materials: i) the *Skol* Summer Muse campaign and other subsequent advertising materials (30 second video and printed advertisements from 2006, billboard ads from 2015 and 30 second video from 2017), and ii) the legal documents that can be found in the self-regulatory, administrative and judicial proceedings.

From a Foucauldian perspective, I focus on power relationships that emerge from the multiple narratives and sites of power involving the *Skol* Summer Muse campaign, as a way to understand who talks about women's bodies and social roles in advertising, how this discussion is framed within the law (and its connections to social representation of women), and who holds the power to define what constitutes discriminatory advertisement.

## **Positionality**

My research is explicitly feminist and uses a feminist epistemology and methodology. I am part of the research problems I want to tackle, and my experience as a feminist informs and organizes my work. Starting from my own practice as an activist, informed by a gender justice approach, I explore how consumer society and neoliberalism in late-industrial economies (like Brazil) structure discourses through advertising and law that sustain social inequalities and symbolic violence against women.

I have had the privilege of working and fighting for women's rights together with many feminists in Brazil over the last eighteen years and I am both grateful and accountable to

them. The same way they support my work and my personal, academic, and activist growth, I am dedicated to supporting our collective fights. As a result, this research is also a commitment to strengthen the bridges between academia and social movements. Aligning myself with other feminist scholars, I contest the idea of neutrality in the development of academic research, and I challenge assumptions that presuppose objectivity and a rigid separation between the researcher and the object of research.<sup>13</sup> Like Vandana Shiva and others, I am interested in a form of engaged theory, so that I can go beyond a supposed dualism between academy and activism.<sup>14</sup> For me one cannot exist without the other.

I anchor my exploration of the core questions in this research in the idea of theory-in-process, considering my relationship with my research questions and the feminist movement in Brazil.<sup>15</sup> The idea of theory-in-process accommodates an intersectional analysis that welcomes multiple perspectives and seeks points of connection among them, with an emphasis on such connections that can reflect specific social, historical, and economic contexts in continuous interaction.

Positionality and relationship also frame the questions I ask and the answers I found in the process of writing this dissertation through personal experiences that intersect with geographical locations and make explicit different power relations and struggles. In Brazil, a society structured through colonialism, patriarchy, and racism, I am located in a very

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<sup>13</sup> Marcy Margaret Fonow and Judith A. Cook, "Feminist Methodology: New Applications in the Academy and Public Policy", (2005) 30 (4) *Signs* 2211-2236.

<sup>14</sup> Vandana Shiva & Maria Mies, *Ecofeminism* (2014) at 42; Carol J Adams, *The Carol Adams Reader: Writings and Conversations 1995-2015* (Bloomsbury, 2016) at 23-25 and 42; Emily Snyder, *Gender, Power, and Representations of Cree Law* (UBC Press) at 45-48.

<sup>15</sup> Karen J. Warren, *Ecofeminist Philosophy: a western perspective on what it is and why it matters* (Rowman and Littlefield Publishers, Inc. EUA, 2000) at 67.

privileged position regarding my research object: I am upper middle class, I am seen as white, and have some relative power and agency due to my background as a lawyer. Therefore, my own lenses privilege struggles related to gender asymmetries in the Brazilian society. This does not mean that I am not aware of the situations and disempowerment racialized women in Brazil suffer, but that this is not my personal experience while living there. However, once I moved to Canada, these power relationships and struggles shifted, as here, I am not seen as white, but as a Latin-American immigrant, regardless of the colour of my skin, and on some occasions I could experience the uncomfortable position of being identified with over-sexualized women, just by being Brazilian. Writing about Brazil at a Canadian university allowed me to have some distance from the Brazilian reality and see things I could not see while immersed in the Brazilian social and cultural context. This open investigation process, articulated by the idea of positionality and relationship, allowed for a richer and more inter-connected perception of the research object, and the ability to see my research object in different ways.

This flexible intellectual process, grounded in relationships, has resonated significantly with my experience in writing this dissertation. Since my arrival as an uninvited guest in these unceded *lək<sup>w</sup>əŋən* and *WSÁNEĆ* Territories, my relationships with the theories and research objects have changed profoundly. I have learned, with the Indigenous scholarship flourishing at the University of Victoria, the power and strength of relationships in all contexts and regarding all living beings. My relationship to these territories and the people I have met along the way are also an integral part of my dissertation, and I am thankful for all these encounters.

## Structure of the Dissertation

In chapter one, I describe the *Skol* Summer Muse campaign (television and printed advertisements), present challenges related to language and translation and explain why I consider this case a relevant locus for political action and contestation.

Using feminist political economy as my grounding theory, in chapter two, I explore how representation in advertising connects with social inequalities women face by reinforcing the sexual division of labour. In chapter three, I ground the theoretical discussion presented in the previous chapter by providing information on women's social reproduction and the gendered division of labour in Brazil. I present information on the feminist movement in Brazil and how it has been challenging the public/private divide through public debate and strategic litigation. This information is relevant to better understand how this social group acts to contest the *Skol* Summer Muse campaign.

In the fourth chapter, I introduce the legal framework for advertising in Brazil, starting with the economic and political context that led to the most important law to regulate consumers' rights: the Brazilian *Consumer Code*. I describe the most relevant sections of this Code that refer to advertising regulation, and the structure of the National System created to protect consumers by enforcing this law. I also propose an interpretation of gender-based discriminatory advertising as a human rights issue, by analyzing international human rights laws and connecting it to Brazilian regulations on advertising.

In chapter five I describe the litigation around the *Skol* Summer Muse campaign, including information on: i) my relationship to the case, ii) how it unfolded chronologically, iii) how I

was able to access the documents in my fieldwork to Brazil, and iv) what happened in each venue where the case was litigated.

Chapters six, seven, and eight are my analysis chapters. Chapter six centers on struggles related to laws, power, and authority. Based on translated quotes from the submissions made throughout the litigation of the *Skol* Summer Muse campaign, I explore the following questions: who has the power to determine the applicable laws and enforce them? who has the power to speak and silence? and who has the power to contest and propose new ways of seeing and interpreting the laws? More concretely, I discuss how the Brazilian feminist movement, through CEPIA, Instituto Patrícia Galvão, and CLADEM, and the state bodies that are part of the SNDC, discusses sexist advertising through the *Skol* Summer Muse campaign litigation, what law they argue is applicable to it, and who has the authority to regulate advertising and impose sanctions to non-conforming advertising, a debate that is politically loaded by the fear of censorship in Brazil. I also look at the limitation discussion to understand how the divisions between public and private law are presented in the case.

Chapter seven focuses on normativity and deviant standards related to body image, social roles, and gender identities. By analyzing how gender stereotypes are structured and presented in the advertisements, I examine issues of conformity and non-conformity related to body image and stereotyped ideas of gender roles. I explore feminist claims for a different visual representation in advertising as a locus for the political debate, looking at the multiple hybrid legal spaces and how they are occupied and explored by the feminist movement and the representatives of SNDC (the national system designed to protect consumers in Brazil).

In chapter eight, I discuss how my case analysis reveals perceptions about women's roles in Brazilian society, how they are disputed, and what that means in terms of social change. I investigate arguments presented by the parties, strategies for contestation, and ways that the company slowly shifted its identity as a brand over the years. Finally, chapter nine highlights my main contributions to the fields of human rights law, consumer law, and feminist theory and presents concluding thoughts. Specifically, regarding the Brazilian legal framework, I suggest using a gender-based approach of international human rights law to support a gender-sensitive interpretation of the concept of discriminatory advertising in the *Consumer Code*. This interpretation also leads me to expand the Brazilian debates on consumer law and advertising regulation, and propose discussing discriminatory advertising as a human rights issue. In the socio-legal field, I explore how sexist advertising can be a visual representation of material social inequalities in a given society, merging redistribution and representation issues based on Nancy Fraser's conception of bi-dimensional justice theory, and argue that contesting advertising can be a relevant focus for political action in media-saturated societies. Finally, I point to possibilities of expanding feminist strategic litigation, to include accessing the Brazilian national system to protect consumers (SNDC).

## **Chapter 1: Why the *Skol* Summer Muse?**

Reflection on language and translation has permeated every aspect of my dissertation work, from describing the *Skol* Summer Muse campaign (frames from the Television and printed advertisements), to explaining why this campaign and subsequent litigation was relevant to establishing a definition of abusive advertising that is gender sensitive. I begin this chapter by describing the process and issues around translation before presenting the *Skol* Summer Muse campaign and providing an overview of the related litigation.

### **1.1 A Brief Note on Language**

Writing about this Brazilian case in English led me to translate not just words, but also cultural meanings, legal systems, and different ways to think about academic labour. In this process, I also explained the work of institutions that do not exist in Canada or that operate differently in Canada and Brazil.

Studying in Canada meant accessing debates that are not available in Portuguese, deepening and expanding my analysis and incorporating a body of literature that is not always available in Portuguese or easily accessed in Brazil. Among other reasons, the 1964 dictatorship that ruled Brazil for 21 years delayed the incorporation of relevant feminist debates that happened in the global North during the 1960s, 1970s, and 1980s into the Brazilian academic debate and feminist activism. The military dictatorship censored

information, and books were prohibited from circulating. In other cases, many materials took a very long time to be translated into Portuguese or were never translated.<sup>16</sup>

I bring to the Canadian context information about the Brazilian legal system, presenting relevant information for future studies. Beyond the translation of words and institutional practices, my work involves translation of part of the Brazilian legal system itself and promotes a two-way dialogue. While this process can be exhausting and challenging, it is also an enriching one, as it contributes to broadening concepts of law, including its interpretation and enforcement. By processing academic content in two languages, I not only expand my personal intellectual scope, but I bridge the gap between different legal systems and cultures.

Additionally, law and advertising are fields highly embedded in socio-cultural values, which amplified my challenges related to translation. Law being a language on its own, and as a particular discourse positioned within the different discursive traditions of a given community,<sup>17</sup> translating law and civil law procedures that happened and are described in Portuguese into an Anglo-Saxon and common-law context was a multi-layered process.

Despite challenging, research involving translations enhance connections between the local and the global, and inspire solutions to similar problems in different contexts, as observed

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<sup>16</sup> Buying books in Brazil tends to be expensive, and books coming from other countries tend to be more so. Therefore, there is also a question related to social inequalities and access to debates being held in the international fields of research.

<sup>17</sup> Delece Smith-Barrow, "Law School Orientations Offer First Year Survival Skills", *US News* (29 August 2014), online: <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2014/08/29/learning-how-to-excel-in-outside-of-class-at-law-school-orientation>; José Lambert, "The Status and Position of Legal Translation: a Chapter in the Discursive Construction of Societies" in *Transl Issues Lang Law* (Hampshire, 2009) 75.

by Pooja Parmar: “Translations – both literal and conceptual – facilitate communications across differences. Translation is not, however, a simple transference of information from one language to another, but rather, an attempt to bridge difference.”<sup>18</sup>

## 1.2 The Television Advertisement

Summertime in Brazil is not just for holidays on the beach, Christmas, New Year’s parties, and Carnival. It is also an optimal time to sell beer. Beer producers prepare for this season by launching advertising campaigns that often explore the consumption of beer at the beach.<sup>19</sup> A common narrative for these television advertisements connects the consumption of extremely cold beer (to cool off in the hot weather) with beautiful women, who might serve the beer to men or just be at the beach.

The *Skol* Summer Muse Television advertisement<sup>20</sup> starts with a beauty contest taking place at the beach, where the Summer Muse is walking on a catwalk, and security guards are trying to contain the public that is desperate to touch her. The camera focuses on the Muse’s body and on the beer.

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<sup>18</sup> Pooja Parmar, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings* (New York: Cambridge University Press, 2015) at 13.

<sup>19</sup> In Brazil it is legal to consume alcohol at beaches, in parks, and elsewhere, so there are many bars and restaurants selling it. Even street vendors offer alcoholic drinks, including not only beer, but also drinks such as the traditional *caipirinha* – a blend of a sugar cane spirit, *cachaça*, and fruit.

<sup>20</sup> I was able to obtain these picture frames from the YouTube video thanks to my dear friend Rafael Kenji Hirai Takaki, to whom I am very thankful for this help.

Image 01 – frame 01, 2006 Skol Summer Muse TV advertisement.



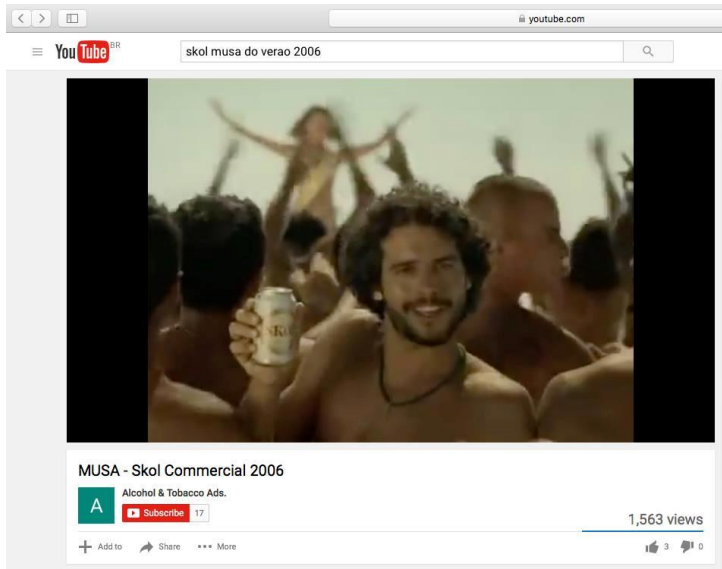
Photographers (all men) are taking pictures of the Muse and specific parts of her body are visually highlighted. Her bikini has the same colours as the beer brand being advertised: yellow and brown.

Image 02 – frame 02, 2006 Skol Summer Muse TV advertisement.



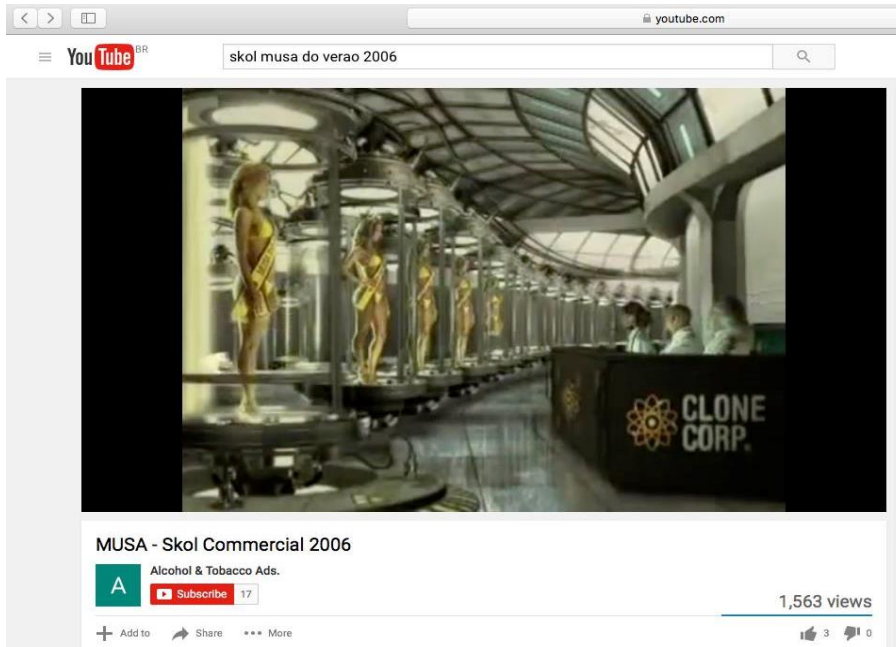
Next, one man shows the beer and says that if the “guy who created this *Skol* [the beer] was the same one who created the Summer Muse, she wouldn’t be like this [unreachable], but like that [images to follow].”

*Image 03 – frame 03, 2006 Skol Summer Muse TV advertisement.*



At this point we are transported to the narrator’s imaginary world, which shows a simulation of a production line where the Summer Muse is cloned.

*Image 04 – frame 04, 2006 Skol Summer Muse TV advertisement.*



In the sequence, the cloned Muses are delivered to men in different situations.

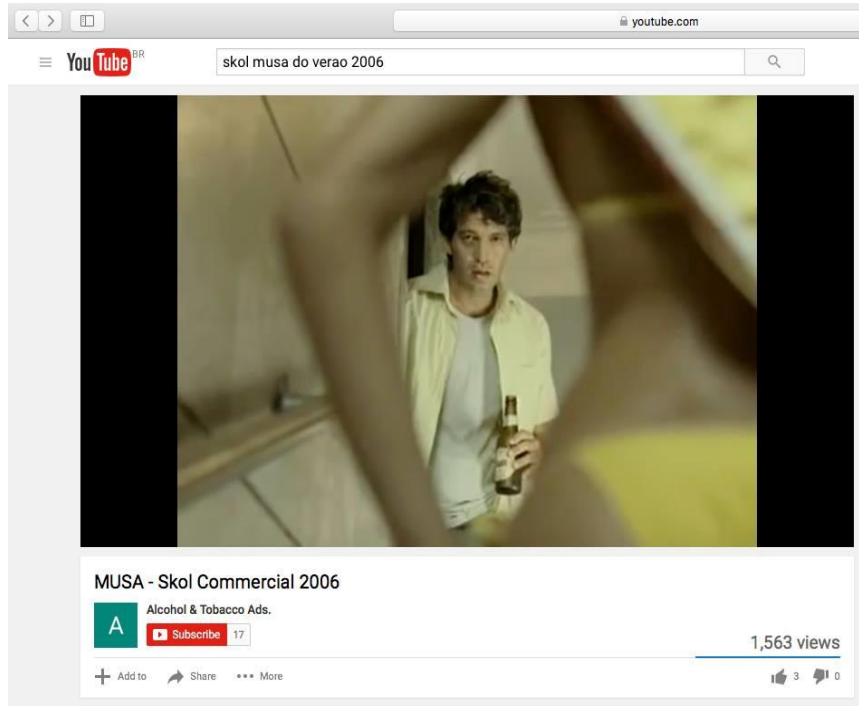
*Image 05 – frame 05, 2006 Skol Summer Muse TV advertisement.*



*Image 06 – frame 06, 2006 Skol Summer Muse TV advertisement.*

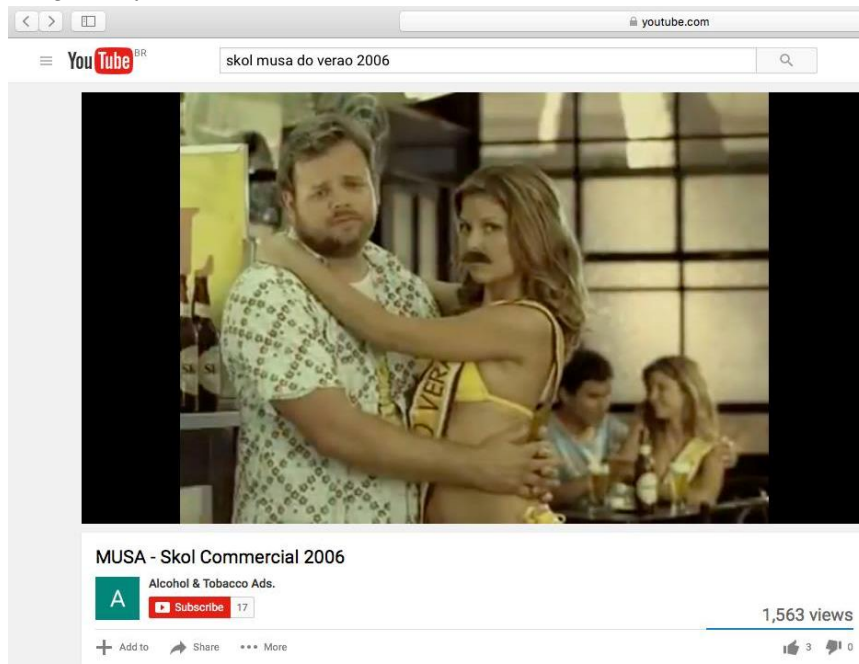


Image 07 – frame 07, 2006 Skol Summer Muse TV advertisement.



One of the Muses comes with a “defect” (a moustache), which generates frustration in the customer receiving her/it, who says: “Oh! Only mine came with a defect!”

Image 08 – frame 08, 2006 Skol Summer Muse TV advertisement.



In a final scene, many Muses are delivered to a bar, where the male-only and mostly white customers celebrate their arrival, while drinking the advertised beer. The last image shows the brand combined with the slogan for the campaign: *Com Skol seu verão fica redondo*, which in a possible translation means “Skol makes your summer smooth.”

Slogans are so deeply embedded in local culture that translating one increases the risk of the translation not being fully understood by the reader who is an outsider to the culture where the slogan was initially released. Slogans usually play with language structure and shifts of metaphors, images, and other figures of speech. In this case, the slogan plays with language implying that by consuming *Skol* your summer will be “round.” “Round” here refers to the idea that good things are round, like the sun, doughnuts, and in the case of the advertisement, the breasts and hips of women. In contrast, bad things are square. In Portuguese, “square” has an informal connotation meaning, as in English, “A person considered to be old-fashioned or boringly conventional in attitude or behavior.”<sup>21</sup> In Portuguese, both people and things can be old-fashioned and boringly conventional – so to be round or to go down round means fun or pleasure; it means that the advertised beer goes down smoothly and makes the drinker’s summer better, as I suggest in this translation.<sup>22</sup>

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<sup>21</sup> Oxford Dictionaries - online, “Oxford Dictionaries - word square”, online: *Oxf Dictionaries* <<https://en.oxforddictionaries.com/definition/square>>.

<sup>22</sup> Translation from one language to another is always a complicated task, and requires deep knowledge of the two languages you are working with. Considering this, I thank Luciana Yonekawa for helping me in thinking about the translation of this advertisement’s slogan, as well as other sections of this dissertation.

Image 09 – frame 09, 2006 Skol Summer Muse TV advertisement.

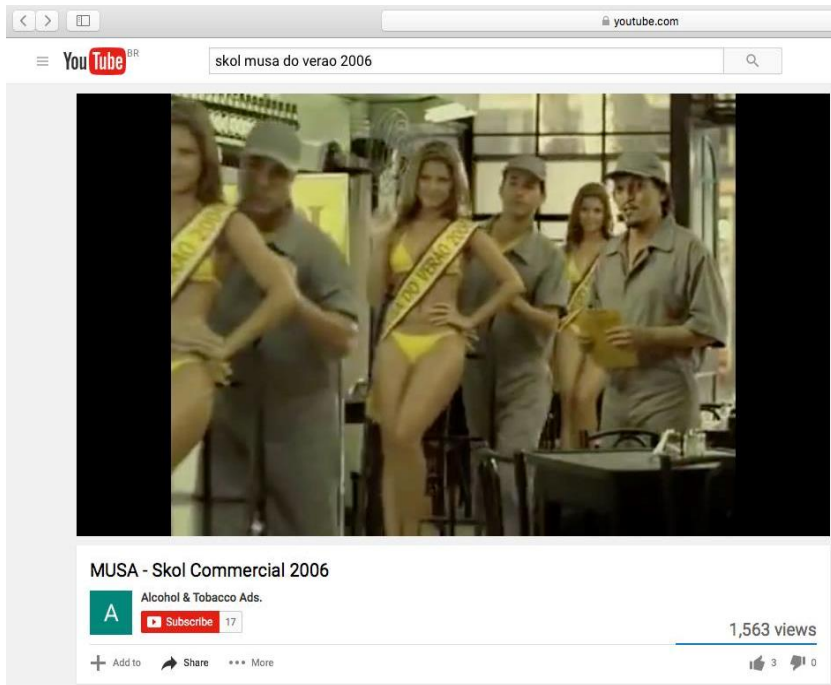


Image 10 – frame 10, 2006 Skol Summer Muse TV advertisement.

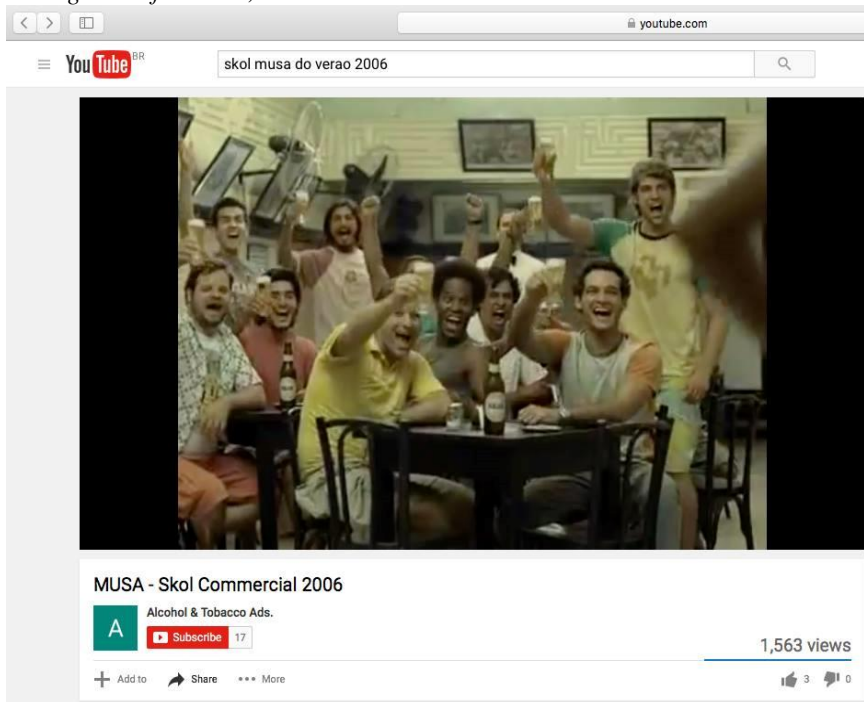


Image 11 – frame 11, 2006 Skol Summer Muse TV advertisement.



### 1.3 The Printed Advertisements

In the printed versions of this advertisement, AMBEV used the same slogan and continued to promote the beer with the idea that “if the person who created the beer was the same one who created ... (an object), this object would be different”. The objects would be changed to feature the observation of the feminine body in an overtly sexualized way. As can be seen in the images below, the feminine body is considered something to be seen, to offer pleasure to a male, heterosexual audience. Women, here, are barely human: they seem to exist to ensure men’s pleasure, as long as they have a perfect, round (a body that should be round in very specific areas such as the hips and the breasts) and sculpted bodies that are extensively exposed during everyday activities. Of course, the “perfection of the body” is framed by the ideas and perceptions of what a heterosexual man in Brazil would consider “sexy” or “hot.” This perception is also permeated by ideas of race and ethnicity: the Muse is white and has long, straight, blonde hair. Brazil being a country with a majority of black

people, blond people and people with European physical characteristics tend to be idealized as the ultimate beauty standard.

While in the television ad a woman herself was compared to a beer, in the printed ads the comparison was between the creation of the beer brand and other products designed to display a woman's body in an even more explicit way, making women's objectification evident. In the printed ads, the woman is shown using daily products in ways that reveal her body according to what could be considered the normative cisheterosexual masculine desires regarding women's bodies in Brazil in 2006. Another interesting change concerns the expressions used: while in the television ad the main character says "if the man who created the Summer Muse contest was the same one who created Skol, it would not be like this...", in the printed ads the idea was that if the man who created a specific product had **consumed** the advertised beer, he would be affected in such a way that the final manufactured products would be completely different.

This difference is enhanced visually by the fact that the products in the first images are always square or rectangular, while in the second image, they are round, referring to the key idea of the slogan and promoting the idea that consuming *Skol* makes everything fun, using round as a synonym for good, fun things. For example, in this first image, the text reads: "if the guy who created the changing room drank Skol, it would not be like this (first image), but like that (second image)". Accordingly, the first changing room has a rectangular curtain while the second one has a circular one. This is a visual reference to the beer's slogan, that claims that Skol makes everything "round," fun and delightful. This message is also reinforced by the words written on the bottom right of all the images with the round objects: "With Skol everything becomes round."

Image 12 – 2006 Skol Summer Muse printed advertisement, Changing room.



In the second ad, the idea follows the same model: “If the guy who created the water fountain drink Skol, it wouldn’t be like this (first image), but like that (second image).”

Image 13 - 2006 Skol Summer Muse printed advertisement, Water fountain.



In this third example, the text reads: “If the guy who created the skirt drank Skol, it wouldn’t be like this (first image), but like that (second image).”

*Image 14 - 2006 Skol Summer Muse printed advertisement, Skirt.*



The message conveyed is very clear: drinking Skol helps create a “better world,” one in which women’s bodies are exposed in ways that please men.

#### **1.4 The Skol Summer Muse Campaign as *Locus* of Political Action and Contestation**

In Brazil, as in other places, the private sphere of consumption is often identified as feminine, and typically, advertisements that target women as consumers explore women’s social roles as both mothers/wives and workers.<sup>23</sup> By contrast, when targeting ‘male’ consumers, images of women, women’s bodies, and femininity are often used in marketing

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<sup>23</sup> Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (London, UK: Zed Books, 2014).

as strategies to increase sales. In the latter, feminine sexuality is heavily exploited to sell different products, including alcohol and cars, for example.<sup>24</sup>

Gender representations and stereotyping in advertising are relevant to understanding gendered power relations in any given society. Even if this phenomenon is expressed differently according to each national reality,<sup>25</sup> worldwide advertising tends to explore gender roles through basically two narratives: i) showing women as consumers, primarily in their roles as mothers, or as mothers and workers who engage with different products and services to better accomplish both tasks;<sup>26</sup> or ii) focusing on women's bodies and body parts in highly sexualized advertisement pieces, using these bodies as means to promote consumption.<sup>27</sup> I am particularly concerned with this second kind of representation, where sexualized images of women are used to promote products, since connections between gender-based discrimination and violence are more obvious and clearer in the latter, as discussed in chapter two (item 2.5). These connections might also reveal levels of tolerance regarding gender-based discrimination and violence in different social groups.

The establishment of consumer rights in Brazil, in a context of economic crisis rather than of economic abundance (as will be briefly addressed in chapter three), a different historical

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<sup>24</sup> Jean Kilbourne, *Can't buy my love: how advertising changes the way we think and feel* (New York: Touchstone, 2000); Diane E. Levin, and Jean Kilbourne, *So Sexy So Soon: The New Sexualized Childhood and what Parents can do to Protect their Kids* (New York, Ballantine Books, 2009).

<sup>25</sup> Chapter two of the dissertation explores this topic in more depth.

<sup>26</sup> Nancy Fraser, *Fortunes of Feminism* (New York: Verso, 2013) at 35; Heloísa Buarque de Almeida, "Consumidoras e Heroínas: gênero na telenovela" (2007) 15(1): 280 *Revista Estudos Feministas*.

<sup>27</sup> Diane E Levin & Jean Kilbourne, *supra* note 30; Jean Kilbourne, *supra* note 30; Rachel Moreno, *A imagem da mulher na mídia* (São Paulo, 2012).

trajectory than what is seen in economies in the global north,<sup>28</sup> combined with the patriarchal, racist, classist structure of Brazilian society makes up the contextual background that informs this research.

Focusing on the *Skol* Summer Muse campaign allows a deep analysis of how multiple social discourses about the social representation of women, their bodies, and the legal limits to advertisement have been shaped symbolically and visually in multiple arenas. It also reveals the agency of state actors (public office prosecutors and PROCONs), self-regulatory bodies (CONAR), social movements, including feminist movements (Rede Mulher e Mídia, CLADEM, CEPIA and Instituto Patrícia Galvão). After 17 years, Brazilian courts are still analyzing the *Skol* Summer Muse case. Subsequent beer campaigns promoted by the same company have also been the focus of discussion in other spaces, such as social media, and the later ones indicate that the company has repositioned itself in the market, launching marketing campaigns that promote diversity.

The legal discussions that emerge from the litigation around the *Skol* Summer Muse campaign expose biases and social expectations regarding women in the Brazilian society, revealing sites of power relations, as suggested by Judy Fudge and Brenda Cossman.<sup>29</sup> By focusing on representation in advertising and its relationship with Brazilian consumer law, I

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<sup>28</sup> Leonardo Roscoe Bessa & Walter José Faiad de Moura, *Manual de Direito do Consumidor* (Brasília: Ministério da Justiça - Secretaria Nacional do Consumidor, 2014) at 27.

<sup>29</sup> Law can be both “coercive and discursive, [...] deeply linked to normative claims, high among them equality, liberty, individualism, and the rule of law, that are used to justify and contest the way in which power relations are organized.” Judy Fudge & Brenda Cossman, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 30.

advance feminist debates about gender-based discrimination in advertising, connecting the fields of law, sociology, political science, and media.

The *Skol Summer Muse* campaign<sup>30</sup> and subsequent litigation proposes a relevant discussion about sexist advertising for at least six reasons. First, the case evoked significant debate about commercial freedom of expression and women's rights to non-discrimination in mass media representation. Second, multiple social actors were divided in their opinions about this campaign, with some deeming it discriminatory and others claiming the opposite. Third, precisely due to its controversial characteristics, the campaign generated intense public discussion and pushed the state to act. Fourth, this case provides insight into how, through debates about the concept of discriminatory advertising and its possible gendered dimensions, the representation of women's social roles has been disputed by different social actors (feminist groups, consumer's rights groups, and marketing professionals). Fifth, this case raises a broader discussion of whether advertising should be regulated by law, and if so, by what kind of law. Sixth, this case appears to be the first judicial decision in Brazil to set a precedent defining sexist advertising as a form of abusive advertising under the Brazilian *Consumer Code*.

In 2010, a similar case with a more explicit racial context was also debated in different arenas in Brazil, but did not have a final decision aligned with the demands of social movements, as was the case with the *Skol Summer Muse*. Briefly, this other case revolved

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<sup>30</sup> I am extremely thankful for many meaningful conversations about this case with Márcio Marcucci and Andrea da Silva Souza Sanchez, both public servants at the São Paulo PROCON. They have supported me in the process of writing this dissertation by granting me access to key documents in this case and by discussing relevant issues related to its litigation.

around a beer advertisement, published in magazines and newspapers, promoting “Devassa<sup>31</sup> Tropical Dark (*Devassa Negra*),” produced by Brasil Kirin Indústria de Bebidas S/A, which showed a drawing of a black woman with the message: “It’s by the body that we recognize the true Negra,”<sup>32</sup> “Black Devassa. Dark Ale style, with high fermentation, creamy and with a roasted malt aroma,<sup>33</sup>” as reproduced in the image below.<sup>34</sup>

Image 15 – Devassa Negra printed advertisement.




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<sup>31</sup> In Portuguese, the word Devassa has two main meanings. First, as a reference to acts pursued by the police during a criminal investigation. It can be connected with the idea of an intense investigation, something that invades, or looks into the depths of a specific situation. It can have the sense of causing a big mess or destruction. In parallel, Devassa can also refer to a woman who is seen as vulgar, as someone who acts like a prostitute or in obscene ways. The name of this beer refers to this second meaning, but might also uses the idea that a woman behaves in such a vulgar way that can destroy everything around her (like family relationships, for example).

<sup>32</sup> From the original in Portuguese: “É pelo corpo que se reconhece a verdadeira Devassa.”

<sup>33</sup> From the original in Portuguese: “Devassa Negra. Estilo Dark Ale de alta fermentação, cremosa e com aroma de malte torrado.” It is importante to note that in Brazil the word “Negra” (and “Negro”) does not have the same negative connotation, and is not as politically loaded as in the United States. The black movement in Brazil often refer to themselves as “movimento negro,” for example.

<sup>34</sup> Image obtained from the online reproduction at: Jorge Américo, “‘É pelo corpo que se reconhece a verdadeira negra’ - Devassa Negra deve alterar conteúdo ‘racista e sexista’ de propaganda”, (2 March 2012), online: <<https://www.geledes.org.br/e-pelo-corpo-que-se-reconhece-a-verdadeira-negra-devassa-negra-deve-alterar-conteudo-racista-e-sexista-de-propaganda/>>.

The *Devassa* advertising was also discussed in multiple forums. It was investigated by the São Paulo MPF, the ES state MP (ES – Espírito Santo, Brazilian state), by the Consumer Police Office in the state of Espírito Santo, and by SPM (the federal body that used to coordinate national policies to promote and ensure women’s rights). Both the municipal PROCON of Vitória/ES and the Espírito Santo state PROCON imposed a fine on Brasil Kirin Indústria de Bebidas S/A for the *Devassa* advertisement. CONAR also decided on this case (suggesting a change in the advertisement), as did the ES judicial system (civil court), which dismissed the imposition of the fine by ruling that the advertisement was not discriminatory.<sup>35</sup> The investigation started by the Consumer Police Office of the Espírito Santo state resulted in a criminal action before the Espírito Santo criminal court.

The *Devassa* case was also investigated by the DPDC, which started an administrative procedure against Brasil Kirin Indústria de Bebidas S/A, but finally concluded by dismissing the claim and archiving the case on August 24<sup>th</sup>, 2020, considering that CONAR has acted on this case by suggesting a change in the campaign; and that the company has acted accordingly;<sup>36</sup> and that other consumer bodies had taken action in this case.<sup>37</sup>

Just like in the *Skol* Summer Muse campaign, in the *Devassa* case there was a multitude of places in which the advertisement was disputed, but no significant condemnation was imposed upon against the company in the *Devassa* case. This also shows that a better strategy to address cases like these is needed, and is thus what I propose in this dissertation.

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<sup>35</sup> “Não é ofensiva propaganda da Devassa com referência ao corpo da mulher negra”, *Migalhas - Online* (8 November 2013), online: <<https://www.migalhas.com.br/quentes/190053/nao-e-ofensiva-propaganda-da-devassa-com-referencia-ao-corpo-da-mulher-negra>>.

<sup>36</sup> *Ibid.*

<sup>37</sup> Senacon, *NOTA TÉCNICA Nº 77/2020/CSA-SENACON/CGCTSA/DPDC/SENACON/MJ* (2020).

The decision to ground my theoretical and political discussions in the Skol Summer Muse campaign is based upon my knowledge of the case through my feminist activism, as well as the meaningful conversations about it with members of the SNDC, in particular Andrea da Silva Sanchez and Marcio Mariucci, both public servants at São Paulo PROCON. I had previous knowledge of the case and understood its relevance to consumer law. I have revised specific literature on sexist advertising within the Brazilian consumer law; as well as data on how the SNDC (with a particular focus on the PROCONs' work) deal with the topic of sexist advertising. Judicial decisions on abusive practices in advertising are not abundant in Brazil, and most of what had been decided refers to advertising aimed at children.<sup>38</sup> After verifying the scarcity of debates and specific judicial and PROCON decisions on the matter (as detailed in chapter three), I decided to ground my research on the *Skol* Summer Muse campaign because it mobilized multiple social actors, including representatives of the feminist movement, and that it encompassed many different judicial decisions at different levels, setting a relevant precedent by defining sexist advertising as discriminatory and therefore abusive (2016 decision).<sup>39</sup> Even if Brazil is ruled by a civil

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<sup>38</sup> At least since 2007, through its Child and Consumerism program, Instituto Alana, a Brazilian non-profit organization, has been pushing debates on advertising to children by presenting claims to the public prosecutor's office in many states in Brazil, reporting companies for malpractice, and contributing to legislative debates on the matter at the federal level. Over time, the Child and Consumerism program has acted on 238 claims to different social and State actors. Many of them became judicial actions, resulting, over time, in fines being imposed on companies and the establishment of the understanding amongst Brazilian courts and administrative bodies, such as PROCONs and Senacon, that directing advertising at children is illegal in Brazil, since it is a form of abusive advertising. More information can be found at: Instituto Alana, Projeto Criança e Consumo, "Criança e Consumo - Ações Jurídicas", online: *Institutional - Non-Profit* <<https://criancaconsumo.org.br/acoes-juridicas/>>. This work resulted in public debates on stricter regulations on advertising to children, with proposals to enhance protection within the *Consumer Code*, and decisions from the Superior Court in Brazil defining advertising to children as illegal. See: Cláudia Lima Marques & Roberto A C Pfeiffer, "Dissemination of Consumer Law and Policy in Brazil: The impact of EU Law" (2022) 45 *J Consum Policy* 27–48.

<sup>39</sup> In her book about advertising and law, Lucia Ancona Lopez de Magalhães Dias observes how relevant the Skol Summer Muse campaign is for the debates on sexist advertising, but her work only looks at the 2012

law tradition, judicial precedents matter in terms of forming judges' and courts' understandings on a particular matter. Therefore, this case has become representative of the debates around this topic within the judiciary.

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decision (her book was published in 2013). She refers to a decision published by the Minas Gerais state court that dismisses a magazine marketing campaign as discriminatory (TJMG, Apelação Cível n. 10024.10.149915-0/001, published on March 20, 2012). According to: Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013), at 169 and 179. In an updated version of this book, she observes that there is debate around the *Skol* Summer Muse campaign, and expands the discussion on sexist advertising by bringing more information about court decisions and CONAR decisions. See: Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito: Enganosa, Abusiva, Infantil, Digital, Comparativa*, 3d ed (São Paulo, Brazil: Saraiva, 2018) at 66-67.

## Chapter 2: Women, Capitalism, and Consumerism

Gender structures paid work, State services, regulations, and political representation.<sup>40</sup>

Advertising, when representing gender according to the established female/male framework defined within a patriarchal and capitalist structure, both reflects and reinforces concrete social inequalities that affect and disempower women in contemporary societies, marking the boundaries between public and private, and often using housework and the hyper-sexualization of female bodies to represent women's social roles. I am interested in how the discourses about gender roles that support the traditional capitalist divide between paid and unpaid work, private and public, permeate the legal debates on regulating sexist advertising.

I ground my analysis in feminist political economy and redistributive justice theories both in a material and symbolic way. Building on the work of Antonella Picchio, Maria Mies, Dorothy Smith, and Marilyn Waring, which analyses how women's work is framed as non-paid work in capitalist societies, and on the work of Nancy Fraser, Teresa de Lauretis, Foucault, and Heloísa Buarque de Almeida, I discuss advertising as a *locus* to promote gender justice.

I begin this chapter by exploring social reproduction and the gendered division of labour, and how such divide support ideas of a strict separation between the public and private spheres. Next, I discuss how such social inequalities are also produced, reflected, and

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<sup>40</sup> Nancy Fraser. What's critical about critical theory? The Case of Habermas and Gender. In *Fortunes of Feminism*, Verso, 2013, p. 39

reinforced in advertising that promotes stereotyped images of femininity and sexuality that contribute to upholding patriarchal structures and foster violence against women.

## 2.1 Social Reproduction

Feminist political economy describes how under capitalism, female or female-associated reproductive and care work is made invisible and exploited, rooting social inequality in women's unpaid work in the capitalist mode of production.<sup>41</sup> Women's reproductive and care work<sup>42</sup> was historically rendered invisible and considered "unproductive" under capitalism when, in fact, they sustain and reproduce capitalist structures, being at the core of capitalist accumulation. As Picchio reminds us: "housework is the production of labour as a commodity, while waged work is the exchange of labour."<sup>43</sup>

This process of obscuring women's work results in multiple inequalities in terms of access to competitive paid jobs, equal participation in politics, and the experience of poverty after retirement.<sup>44</sup> Even when states map information on time spent on unpaid work through official statistics,<sup>45</sup> this information is not used to implement policies to compensate women

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<sup>41</sup> Leah F. Vosko, "The Past(s) (and Futures) of Feminist Political Economy in Canada: Reviving the Debate" (2002) *Studies in Political Economy* 68, at 57.

<sup>42</sup> Marilyn Waring, *Counting for Nothing: What Men Value and What Women are Worth* (Toronto, Ontario: University of Toronto Press, 2004) at 23.

<sup>43</sup> Antonella Picchio, *Social Reproduction: the Political Economy of Labour Market* (Cambridge: Cambridge University Press, 1992) at 96 and 98.

<sup>44</sup> Freya Kodar, "Pensions and Unpaid Work: A Reflection on Four Decades of Feminist Debate", *Can J Women Law* (2012) 180.

<sup>45</sup> At least since 1986, Statistics Canada records information on unpaid work done within the household (<https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54931-eng.htm>); Information on time spent on housework has been available in Brazil at least since 1994, but from 2016 on, due to a change in the methods of collecting this information, historical comparison from 1994 to the present cannot be made. (2528: *os desafios do passado no trabalho doméstico do século XXI: reflexões para o caso Brasileiro a partir dos dados da PNAD contínua*, by Luana Pinheiro et al (Instituto de Pesquisa Econômica Aplicada, 2019) at 10.)

for the time they spend doing reproductive and care work,<sup>46</sup> something that would promote a more balanced division of resources and wealth.

Social reproduction encompasses all the biological and cultural aspects related to childbearing, raising children, and preparing them to enter the work force, a task that women have historically been responsible for. Feminist scholarship highlights that although central for the reproduction of social classes and of capitalism itself, reproductive work is made invisible, it is devalued and deemed non-work.<sup>47</sup> In this process, women are positioned in an asymmetrical position in relation to men,<sup>48</sup> generating social inequalities that are further aggravated by multiple intersectionalities including aspects related to race-ethnicity, age, origin, social class, religion, disabilities, and gender identities.<sup>49</sup> This inequality is sustained not only by material conditions (such as unequal distribution of work

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<sup>46</sup> Freya Kodar, "Pensions and Unpaid Work: A Reflection on Four Decades of Feminist Debate", *Can J Women Law* (2012) 180. An exception is Argentina, which in 2021, in a very innovative pension regulation, ensured that women and pregnant people will have access to pensions based on their care work and considering how such work affect their ability to obtain contribute equally to men for pensions. Argentina, Ministerio de Trabajo, Empleo y Seguridad Social, res. 17/2021, de 27/07/2021. Retrieved from: <https://www.argentina.gob.ar/normativa/nacional/resoluci%C3%B3n-17-2021-352421/texto> (Oct, 07, 2021). According to Mayra Cotta and Thais Farage, similar laws were also approved in Uruguai and Chile: Mayra Cotta & Thais Farage, *Mulher, Roupas, Trabalho: como se veste a desigualdade de gênero* (São Paulo, Brazil: Editora Schwarcz S.A., 2021) at 173.

<sup>47</sup> *Supra* note 23 at 31; *Supra* note 43 at 115 and 139. See also:

"When labour is defined as non-labour, values becomes non-value, rights non-rights, and invasion becomes defined as improvement (...) To define social labour as a state of nature is an essential element of this 'improvement'. This achieves three things simultaneously: 1) It denies any contribution by those whose products are appropriated, and by converting their activity in passivity transforms used and developed resources into 'unused', 'undeveloped' and 'wasted' resources; 2) by construing appropriation to mean development and 'improvement', it transforms robbery into a right with the claim to ownership based on a claim of improving; and 3) and relatedly, by defining previous social labour as nature, and thus not conferring any rights, it transforms people's assertion of their customary, collective usufructory rights into 'piracy' and 'theft'. Vandana Shiva & Maria Mies, *Ecofeminism* (2014) at 32.

<sup>48</sup> Marcy Margaret Fonow and Judith A. Cook, "Feminist Methodology: New Applications in the Academy and Public Policy", (2005) 30 (4) *Signs* 2211-2236.

<sup>49</sup> Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989 *Univ Chic Leg Forum* 139-167; Lélia Gonzalez, "A mulher negra na sociedade brasileira: Uma abordagem político-econômica" in Flavia Rios & Márcia Lima, eds, *Por Um Fem Afro-Latinoam*, 4th ed (Rio de Janeiro: Zahar, 2020) 49.

and social resources) but also by discursive ones. In this regard, advertising plays an important role in not only producing but also reinforcing stereotypical women's roles in contemporary societies.

In this context, patriarchal relations are key to defining capitalist production and in organizing a multitude of power relations, involving the state, the market, and the citizen.<sup>50</sup>

For Mies, using patriarchy to discuss women's oppression is helpful because the term captures its systemic character, encompassing the historical and societal dimensions of women's exploitation and oppression.<sup>51</sup> There is no single and monolithic definition of patriarchy; instead, patriarchy is a structure that over time will allow different configurations or manifestations of power within it.<sup>52</sup> Likewise, power cannot be understood as a simple structure of domination. From a Foucauldian point of view, power is dynamic, relational, and omnipresent, which means that it happens continuously within relationships, reproducing and renovating itself.<sup>53</sup>

By perceiving patriarchy as non-static, we observe an overall structure that operates differently in each jurisdiction, depending on the intersection amongst oppressive structures: multiple forms of patriarchy interlock gender, sexuality, ethnicity, age, and social class in different ways, producing a wide variety of oppressions within a general patriarchal framework. Such oppressions are expressed through discourses and practices

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<sup>50</sup> *Supra* note 23 at 13 and at 38.

<sup>51</sup> *Ibid* at 37.

<sup>52</sup> Bob Jessop, *State Power: a Strategic-Relational Approach*, Maiden, Polity, 2010, p. 158.

<sup>53</sup> Michel Foucault, *Histoire de la sexualité I: La volonté de savoir* (France: Gallimard) at 121-122.

that support and maintain these oppressive structures. Our challenge, as Jessop reminds us, is to analyse these structures in-depth, identifying ways to dislodge them.<sup>54</sup>

Capitalism, like any other socio-economic system, establishes processes for production and circulation of goods, distribution of wealth, and reproduction of society. Traditional theorists of capitalism often focus on the use of waged labour to produce commodities (and how labour itself became a commodity, which is reproduced both materially and socially according to historically established social norms)<sup>55</sup> as well as on the allocation of resources for production.<sup>56</sup> This focus obscures the social processes of reproduction, almost as if reproductive work could be placed outside the regular functioning of capitalism. Therefore, the traditional definitions of paid work also allowed the construction of reproductive work in general, and housework in particular, as non-work,<sup>57</sup> structuring women's inequality and subordination through power relations.<sup>58</sup> As Fraser reminds us, the ideas of worker, consumer, and wage, despite being strictly economic concepts, are implicitly gendered.<sup>59</sup>

Maria Mies, Antonella Picchio, Silvia Federici, and Dorothy Smith, among other scholars, have argued that reproductive work is central to the accumulation of capital<sup>60</sup> by showing

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<sup>54</sup> *Supra* note 23 at 161.

<sup>55</sup> Leah F. Vosko, "The Past(s) (and Futures) of Feminist Political Economy in Canada: Reviving the Debate" (2002) *Studies in Political Economy* 68, at 57.

<sup>56</sup> *Supra* note 43 at 15.

<sup>57</sup> *Supra* note 23, at 46.

<sup>58</sup> *Supra* note 43 at 11.

<sup>59</sup> *Ibid supra* note 40 at 38.

<sup>60</sup> *Supra* note 23; *Supra* note 43 at 1; Dorothy Smith, *The everyday world as problematic: a feminist sociology* (Massachusetts (West Hanover): Northeastern University Press, 1987); Silvia Federici, "Wages against housework" in *Revolut Point Zero Housework Reprod Fem Struggle* (Toronto, Ontario: PM Press, 2020).

that capitalist structures, combined with patriarchy and racism, organize work such that reproductive work is obscured by production, being mostly excluded from the analysis of value and accumulation.<sup>61</sup> Consequently, reproductive work is often not addressed in economic theory, whether by the liberal-conservative or the Marxist strains.<sup>62</sup> What we obscure or value is tied to our location in society, since positionality shapes how we can see the world and value things. Economics is defined as a male-oriented field,<sup>63</sup> designed by and for white men,<sup>64</sup> with statistics on the work force being collected in a context permeated by a masculine-biased system that continuously excludes women and women's activities.<sup>65</sup> In this context, what societies tend to value or disregard is closely connected to which structures we aim to sustain or dismantle.

The more reproductive work is defined as women's natural work, circumscribed to the private sphere, the more it is rendered invisible, even when it sustains the productive work done in the public sphere. As a result of this division, the lines between public and private life and the consequences derived from such divisions profoundly affect people's lives. Social relationships organized by gender are at the core of such divisions, and structure them, with the private sphere dedicated to reproduction and the public sphere to production.

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<sup>61</sup> *Ibid supra* note 43 at 31-33.

<sup>62</sup> *Ibid supra* note 42 at 24.

<sup>63</sup> *Ibid supra* note 42 at 23.

<sup>64</sup> *Ibid supra* note 42 at 36 and 59.

<sup>65</sup> *Ibid supra* note 42 85-88; "Thus the international economic system constructs reality in a way that excludes the great bulk of women's work – reproduction (in all its forms), raising children, domestic work, and subsistence production. Cooking, according to economists, is 'active labour' when cooked food is sold and 'economically inactive labour' when it is not. Housework is 'productive' when performed by a paid domestic servant and 'non-productive' when no payment is involved. Those who care for children in an orphanage are 'occupied'; mothers who care for their children at home are 'unoccupied'." See also *Supra* note 42 at 25, and 27 on the structure of the United Nations System of National Accounts (UNSNA) and how it excludes women's work, and pages 33 and 34 on unpaid work done by women in the private sphere, which becomes paid work in the public one.

Gender, combined with race/ethnicity and class, locates women in different positions in this public/private divide.<sup>66</sup> The foundation of these distinctions is the capitalist structure itself, which values production work over reproduction, through remuneration. This separation between production and reproduction, which is artificial (because it was created and demands constant ideological work to sustain it) and abstract, was naturalized through social, historical, and cultural processes and implies the subordination of social reproduction to the needs of capital accumulation.<sup>67</sup> This separation affects women's lives concretely.<sup>68</sup>

The double load of women who hold a paid job and are responsible for the majority (if not the totality) of housework exposes how women actually perform two jobs but receive payment for just one, the one that is rendered visible and is considered productive by capitalism.<sup>69</sup> This is how women's productivity precedes and supports male productivity,<sup>70</sup> allowing for capitalist accumulation and the maintenance of social inequalities between men and women: by exploiting women's invisible work, including the concrete reproduction of human beings apt and qualified to enter the work force<sup>71</sup> and women's various forms of productivity,<sup>72</sup> capitalism and patriarchal structures are combined, ensuring the continuity of multiple forms of discrimination and social inequalities. Intersectionality plays a relevant role here, creating unequal conditions for women from

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<sup>66</sup> Susan B. Boyd, "Challenging the Public/Private Divide: An Overview" in Susan B. Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 14.

<sup>67</sup> *Supra* note 40 at 31; *Supra* note 49 at 47.

<sup>68</sup> *Supra* note 43 at 97; *Ibid supra* note 49 at 49.

<sup>69</sup> *Ibid* at 108.

<sup>70</sup> *Supra* note 49 at 58

<sup>71</sup> *Ibid* at 58

<sup>72</sup> *Supra* note 42 at 23.

different race-ethnicities and social classes. Especially in countries with a colonial past like Brazil, there is a huge divide between white and black women: while white women mostly joined the labour market in the 1960s, black women had always worked outside the household, usually performing care work in other homes. Also, as pointed out by Lélia Gonzalez and others, often the economic autonomy and advancement of white women in the labour market was obtained through the exploitation of black women.<sup>73</sup>

Dorothy Smith argues that the invisibility of domestic work contributes to reproducing social classes,<sup>74</sup> by showing how schools presuppose that mothers will be home supporting children's studies. As a result, since they lack this support at home, children from families where mothers also hold a full-time paid job are at a disadvantage. Smith does not claim that it is women's responsibility to fulfill these duties, but calls attention to the importance of acknowledging the existence of these immaterial expectations that reproduce social inequalities through patriarchal, racial, and capitalist structures. In this context, de-gendering these activities could be an important step forward to a more egalitarian society.

The assumption that women will supervise all or almost all the educational work at home became clear after the explosion of the COVID-19 pandemic. According to UN Women,

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<sup>73</sup> Lélia Gonzalez, "Cultura, etnicidade e trabalho: Efeitos linguísticos e políticos da exploração da mulher" in Flavia Rios & Márcia Lima, eds, *Por Um Fem Afro Lat Am*, 4th ed (Rio de Janeiro: Zahar, 2020) 25 at 40, 42-43; Lélia Gonzalez, "A mulher negra na sociedade brasileira: Uma abordagem político-econômica" in Flavia Rios & Márcia Lima, eds, *Por Um Fem Afro-Latinoam*, 4th ed (Rio de Janeiro: Zahar, 2020) 49 at 58.; Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 481. In European countries and in North America, this domestic work is often performed by migrant women. See: Helena Hirata, "Care work: A comparison of Brazil, France and Japan" (2016) 13:24 Sur J.

<sup>74</sup> Dorothy Smith, *The everyday world as problematic: a feminist sociology* (Massachusetts (West Hanover): Northeastern University Press, 1987) at 174.

during the pandemic women have done 29% more childcare per week than men.<sup>75</sup> The pandemic has demonstrated women's struggles to balance professional and personal life, making it evident that women perform two or more jobs but receive recognition only for the one that is identified with productive work and is compensated by wages. According to the World Economic Forum, when the pandemic hit, men all over the world expanded the time spent in caregiver duties. Women, however, were disproportionately affected by the closure of schools and daycares, spending even larger portions of time in double-shifts. This meant a reduction in paid working hours, and a deepening of the gender gap,<sup>76</sup> which has affected women not only in the present, but also in the future. According to UN Women, due to COVID-19, it is expected that 47 million additional women and girls will be pushed into extreme poverty. If before the pandemic the time for women to achieve full equality with men was 99 years old; now, post pandemic, women will have to wait at least 136 years. This is related not only to the fact that women were overburdened by care and reproductive work, they also suffered from lack of access to fundamental rights such as to education and health care.<sup>77</sup>

Data from UN Women shows that across 45 countries, 1 in 5 women lost their jobs during the pandemic due to the lack of daycare services, accounting for more than 54 million jobs

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<sup>75</sup> UN Women, "COVID - 19: Rebuilding for Resilience", online: *UN Women* <[https://www.unwomen.org/en/hq-complex-page/covid-19-rebuilding-for-resilience?gclid=CjwKCAjwoMSWBhAdEiwAVJ2ndkWsRHjw6zJJuic6B\\_qa\\_vaf\\_lEcKrej4C\\_23a0ULWilH87QoFQrjBoC3pkQAvD\\_BwE](https://www.unwomen.org/en/hq-complex-page/covid-19-rebuilding-for-resilience?gclid=CjwKCAjwoMSWBhAdEiwAVJ2ndkWsRHjw6zJJuic6B_qa_vaf_lEcKrej4C_23a0ULWilH87QoFQrjBoC3pkQAvD_BwE)>.

<sup>76</sup> *Global Gender Gap Report 2021* (Geneva: World Economic Forum, 2021) at 53-56.

<sup>77</sup> Fatemah Albader, "Discrimination against Women: Under the Magnifying Glass of Covid" (2022) 23 *Georget J Gend Law* 433-448.

globally.<sup>78</sup> In short, this data reveals that “women’s employment is shaped by care responsibilities in a way that men’s is not,”<sup>79</sup> a situation that is even worse for racialized and poor women. In Brazil, women were also the ones most affected by the pandemic: 23.5% of women went on leave or were somehow off work, in contrast with only 15% of men.<sup>80</sup>

## 2.2 Gendered Division of Labour

The differentiations between male and female, naturalized and perceived as biological and immutable, even if historically defined,<sup>81</sup> have accordingly resulted in distinct and asymmetrical social roles attributed to men and women under the different modes of production.<sup>82</sup> At first, the asymmetry between men and women was defined by their sexual differences.<sup>83</sup> Progressively, the biological characteristics were also being connected with emotional disposition and personality, reducing women's identity and personality to their biological and social functions as mothers.<sup>84</sup> This limited definition of social roles marked the ideological foundation for the particular division of labour under capitalism, separating reproductive and productive work more strictly, increasing control over women’s bodies and activities and combining a set of structural and material issues with cultural and

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<sup>78</sup> Research and Data Section, UN Women, *Beyond COVID-10: A Feminist Plan for Sustainability and Social Justice* (Tina Johnson) at 20-21.

<sup>79</sup> *Ibid* at 09.

<sup>80</sup> *Síntese de Indicadores Sociais: Uma análise das Condições de Vida da População Brasileira - 2021* (Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística - IBGE, 2021) at 39.

<sup>81</sup> Thomas Laqueur, *Inventando o sexo: corpo e gênero dos gregos a Freud* (Rio de Janeiro: Relume-Dumará, 2001).

<sup>82</sup> *Ibid supra* note 49 at 53.

<sup>83</sup> Thomas Laqueur, *supra* note 81.

<sup>84</sup> Margareth Arilha, “Sexualidade, gênero e direitos sexuais e reprodutivos” in Elza Berquó, ed, *Sexo e vida: panorama da saúde reprodutiva no Brasil* (Campinas: Editora Unicamp, 2003) at 95.

immaterial ones. Feminist scholarship has been working to question and dismantle such structures.<sup>85</sup>

Observing the division of labour between men and women under capitalism<sup>86</sup> allows us to look at how capitalist societies, laws, and state policies organize the public/private<sup>87</sup> divide, and consequently position individuals within these boundaries.<sup>88</sup> The increased segregation between public and private is one of the most significant cultural changes that accompanied industrialisation.<sup>89</sup> Klein observes that from the 1980s on, neoliberal trends have permeated this reshaping of the public/private divide, leading to a process of concretely and symbolically diminishing the space for a non-commercialized public sphere.<sup>90</sup>

The process of accentuating the division between public and private, although variable according to geographical location and level of industrialization, is intensely gendered<sup>91</sup> and has been an ongoing process, accompanying the development of capitalism itself.<sup>92</sup> As an ideological marker, the public/private divide can be observed from different perspectives: while the state is positioned as public in relation to the market (as economic

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<sup>85</sup> Gayle Rubin, "El tráfico de mujeres: notas sobre la 'economía política' del sexo." (1983) VIII:30 *Nueva Antropol*; Dorothy Smith, *The everyday world as problematic: a feminist sociology* (Massachusetts (West Hanover): Northeastern University Press, 1987); Leah F Vosko, "The Past (and Futures) of Feminist Political Economy in Canada: Reviving the Debate" (2002) 68 *Stud Polit Econ*; Lisa Disch & Mary Hawke's work, *The Oxford Handbook of Feminist Theory* (New York: Oxford University Press, 2016); Judy Fudge & Brenda Cossman, *Privatization, Law and the Challenge to Feminism* (Toronto, Ontario: University of Toronto Press, 2002).

<sup>86</sup> *Supra* note 23 at 104.

<sup>87</sup> *Ibid supra* note 43 at 74.

<sup>88</sup> *Ibid*.

<sup>89</sup> Cecilia Benoit & Helga Hallgrímsdóttir, *Valuing Care Work* (Toronto, Ontario: University of Toronto Press, 2011) at 3; Susan B Boyd, "Challenging the Public/Private Divide: An Overview" in Susan B Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 8.

<sup>90</sup> Naomi Klein, *No logo: taking aim at the brand bullies* (Toronto: Vintage Canada, 2000) at 30-31.

<sup>91</sup> Susan B Boyd, "Challenging the Public/Private Divide: An Overview" in Susan B Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 8.

<sup>92</sup> *Supra* note 23; Nancy Fraser, *Fortunes of Feminism* (New York: Verso, 2013).

activity), viewed as private, the market as a workplace is defined as public in relation to the household, in this case defined as private.<sup>93</sup>

In capitalist societies, these divisions between public and private, production and reproduction, are gendered, racialized, and organized by class divides, as are the identities of the subjects expected to occupy the private and public spheres. Fraser points out that in male-dominated capitalist societies, gender identity refers to roles assumed in production and reproduction, with men being identified as the worker,<sup>94</sup> who earns money for his family, and the woman as the one who spends these funds to purchase and prepare goods for domestic consumption (unpaid work):<sup>95</sup> the housewife. This process of “housewifization” resulted in women assuming the role of consumer when it comes to buying cleaning products and food.<sup>96</sup> As Nancy Fraser indicates, the housewife’s social role has been shaped and intensely promoted through advertising:

The consumer, after all, is the worker’s companion and helpmeet in classical capitalism. For the sexual division of domestic labor assigns to women the work – and it is indeed work, though unpaid and usually unrecognized work – of purchasing and preparing goods and services for domestic consumption. You can confirm this even today by visiting any supermarket or department store. Or by looking at the history of consumer goods in advertising. Such advertising has nearly always interpellated its subject, the consumer, as feminine. In fact, it has elaborated an entire phantasmatics of desire premised on the femininity of the subject of the consumption.<sup>97</sup>

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<sup>93</sup> Susan B Boyd, “Challenging the Public/Private Divide: An Overview” in Susan B Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 8 and 9.

<sup>94</sup> *Supra* note 40 at. 34

<sup>95</sup> *Ibid supra* note 40 at. 35. See also: *Supra* note 23 at 116.

<sup>96</sup> *Supra* note 23 at 106 and 109.

<sup>97</sup> *Supra* note 40 at 35.

She also argues that in the post-Second World War period, in western States with a welfare structure, male identity tends to be associated with citizen identity while female identity is associated with social aid programs,<sup>98</sup> increasing State control over women's bodies and sexualities.<sup>99</sup> This is the case with social policies in Brazil like the *Bolsa Família*, which rely on women's roles in families to reduce social inequalities. Among the recipients of the social benefit, many feel that it is women's moral obligation to take care of their families, which includes deciding how to spend the money received through the *Bolsa Família*,<sup>100</sup> something I discuss further in this chapter.

### 2.3 Stereotypical Gender Roles in Advertising

Neoliberal discourses impose a prevalence of market-oriented policies over welfare politics, where individuals as both producers and consumers are perceived to be motivated mostly by economic or material considerations, rather than for example, ideas about social justice. In this context, citizenship is defined through consumption and economic production rather than through political or social participation in non-profit related activities.<sup>101</sup>

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<sup>98</sup> *Supra* note 40 at 37.

<sup>99</sup> Cecilia Benoit & Helga Hallgrímsdóttir, *Valuing Care Work* (Toronto, Ontario: University of Toronto Press, 2011) at 9; *Supra* note 40. In the book *History of Sexuality*, Michael Foucault discusses in detail how, from discussions on population, natality, and sexuality became a public matter, subjected to state interference and regulation. See Michel Foucault, *Histoire de la sexualité I: La volonté de savoir* (France: Gallimard) at 36-37: "Entre l'État et l'individu, le sexe est devenu un enjeu, et un enjeu public; toute une trame de discours, de savoirs, d'analyses et d'injonctions l'ont investi."

<sup>100</sup> Walquiria Leão Rego & Alessandro Pinzani, *Vozes do Bolsa Família: Autonomia, dinheiro e cidadania* (São Paulo: Editora Unesp) at 219.

<sup>101</sup> Deborah Thien and Holly Dolan, "Emplacing Care: Understanding Care Work across Social and Spatial Contexts" in Cecilia Benoit and Helga Hallgrímsdóttir, eds, *Valuing Care Work: Comparative Perspectives* (Toronto, Ontario: University of Toronto Press, 2011) at 25-26.

Brands are at the core of economic activity, and more present in all aspects of our everyday lives than ever.<sup>102</sup> Even in unequal societies like Brazil, where consumption is often a privilege, brands can also have a key role. By populating the imagination of those in precarious financial and social situations. This persistent presence of brands increasingly shapes our concepts and perceptions of self-value and personal success through the expansion of materialistic values by advertising and ownership of products.<sup>103</sup> As such, advertising is an important instrument to convey social values that the market is interested in promoting.

One consequence of this intense and massive marketization of life is the illusion of freedom of choice and the reduction of such freedoms as freedom to purchase or choose between different brands or products, as Maria Mies reminds us:

As the capitalist commodity market creates the illusion that the individual is free to fulfil all her/his desires and needs, that individual freedom is identical with the choice of this and that commodity, the self-activity and subjectivity of the person is replaced by individual consumerism.<sup>104</sup>

Along these same lines, Jessé Souza criticizes the idea that freedom in Western capitalist societies is often reduced to freedom to choose from brands...<sup>105</sup> He also observes that that in Brazil this liberalizing view, which reduces political choices to consumerism, is often

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<sup>102</sup> Naomi Klein, *No Logo* (Toronto: Vintage Canada, 2000) at 146.

<sup>103</sup> Tim Kasser, *The High Price of Materialism* (Cambridge: MIT Press, 2002) at 9.

<sup>104</sup> *Supra* note 23 at 40.

<sup>105</sup> “Na realidade, a transformação e o amesquinamento de escolhas morais – no caso, a da busca da felicidade – em escolhas que se reduzem, todas elas, à expressão quantitativa em dinheiro, é uma das formas principais de legitimação de todas as sociedades ocidentais.” Free translation from the author. Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 451-2.

reinforced through Brazilian soap operas, advertising strategies, films, and national politics.<sup>106</sup>

Because we live in societies immersed in marketing and branding,<sup>107</sup> which have advertising at the core of economic activity,<sup>108</sup> advertising integrates our social and cultural ethos by encapsulating in visual codes messages that reflect the social values, ideas, and stereotypes of a given society.<sup>109</sup> Klein reminds us that for big companies that operate transnationally, the branding process is not only related to an economic movement, but is also implicated in changing cultural ideas and behaviours:

For these companies, branding was not just a matter of adding value to a product. It was about thirstily soaking up cultural ideas and iconography that their brands could reflect by projecting these ideas and images back on the culture as ‘extensions’ of their brands.<sup>110</sup>

In this context, when producing specific symbolic constructions of social subjects, mass media (traditionally television but increasingly internet and social media as well) in general, and advertising in particular, appropriates and reshapes certain cultural goods

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<sup>106</sup> Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 451, 454 and 456.

<sup>107</sup> About the processes by which brands become more important than the products themselves, Naomi Klein writes, “What was changing was the idea of what – in both advertising and branding – was being sold. The old paradigm had it that all marketing was selling a product. In the new model, however, the product always takes a back seat to the real product, the brand, and the selling of the brand acquired an extra component that can only be described as spiritual. Advertising is about hawking product. Branding in its truest and most advanced incarnations, is about corporate transcendence.” Naomi Klein, *No logo: Taking aim at the brand bullies* (Toronto: Vintage Canada, 2000) at 21.

<sup>108</sup> Benjamin R. Barber, *Consumed: How markets corrupt children, infantilize adults, and swallow citizens whole* (New York: Norton & Company Ltd., 2008) at 11; Gilles Lipovetsky, *Felicidade Paradoxal: ensaio sobre a sociedade de hiperconsumo* (São Paulo: Companhia das Letras, 2008) at 29; Laura Hastenpflug Wottrich, “Não podemos deixar passar”: práticas de contestação da publicidade no início do século XXI (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 28.

<sup>109</sup> Gilles Lipovetsky, *A Felicidade paradoxal* (São Paulo: Companhia das Letras, 2007) at 29.

<sup>110</sup> Naomi Klein, *No logo: taking aim at the brand bullies* (Toronto: Vintage Canada, 2000) at 29.

already negotiation within a given society.<sup>111</sup> In this reshaping process, these social constructions are organized through the intersection of multiple categories, such as gender, class, race-ethnicity, and geographical location (e.g., urban and rural, north and south) and visually represented in advertising. Therefore, if sexist advertising is reflecting misogynistic social values, it is also reifying such values. In many jurisdictions, advertising still mostly shows women as either mothers and housewives (even if women – especially racialized women – have been in the job market for so long) or as sexual objects. Advertisements publicized in different media (television, radio spots, printed ads, billboards, online ads, ads in social media) can reinforce and normalize specific social constructions,<sup>112</sup> slowing down initiatives to promote gender equality advanced by feminist groups and promoted by the state.

Images are a central aspect of advertising and an important vehicle for the verbal and non-verbal messages communicated through advertising,<sup>113</sup> revealing symbolic values borrowed from the shared rhetorical ideas of a given community.<sup>114</sup> Advertisements are messages embedded in a particular system of communication and work within the established codes in circulation in a given culture.<sup>115</sup> Umberto Eco defines codes as a “cultural phenomena,”

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<sup>111</sup> Heloisa Buarque de Almeida, “Consumidoras e Heroínas: gênero na telenovela” (2007) 15(1): 280 *Revista Estudos Feministas*; Laura Hastenpflug Wottrich, “*Não podemos deixar passar*”: práticas de contestação da publicidade no início do século XXI (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 32.

<sup>112</sup> Heloisa Buarque de Almeida, “Consumidoras e Heroínas: gênero na telenovela” (2007) 15(1): 280 *Revista Estudos Feministas*.

<sup>113</sup> Umberto Eco, *La struttura assente: introduzione alla ricerca semiologica* (Casa Ed. Valentino Bompiani & C. S.p.A., Milano, 1968) at 169.

<sup>114</sup> *Ibid* at 92.

<sup>115</sup> *Ibid supra* note 113 at 188.

inscribed into a system of relationships, which the code establishes as accepted in a given group within a given period of time.<sup>116</sup> According to Eco and other theorists of communication in the field of cultural reception,<sup>117</sup> meanings are not static, but are culturally and temporally defined, revealing a great deal about a particular social group.<sup>118</sup> New perspectives challenge the established codes by proposing new ways to read them, and create a crisis within the system of codes and the ideologies that support them.<sup>119</sup> Messages, in this context, reveal important information about a specific culture (in this case, Brazilian society),<sup>120</sup> and advertising, being structured and permeated by socio-cultural codes, organizes and sustains discourses that create and reproduce gendered social inequalities based on codified cultural and social meanings.<sup>121</sup> This is why changes in the codified messages of advertising could promote disruptions in the community from which it emerged or represent a rupture that has happened in such a community.

Representation in advertising can be a locus of political action, as shown in my case analysis. Representation is a core issue in our societies, and is shaped by exclusionary structures, including patriarchy, social class, racism, ageism, and geographical location.

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<sup>116</sup> *Ibid supra* note 113 at 45.

<sup>117</sup> See for example: Jesús Martín-Barbero, *Dos meios às mediações: Comunicação, cultura e hegemonia* (Rio de Janeiro: Editora UFRJ, 1997); Stuart Hall, “Encoding, Decoding” in *Cult Stud Read*, second edition ed (London and New York: Routledge Taylor & Francis Group, 1999); Ana Escosteguy & Nilda Jacks, “Comunicação e Recepção. Uma visão latina-americana” (2007) 12:57 *Razón Palabra*, online: <<http://www.redalyc.org/articulo.oa?id=199520710003>>; Robert A White, “Recepção: A abordagem dos Estudos Culturais” (1998) 12 *Comun Educ* 57–76.

<sup>118</sup> *Ibid supra* note 113 at 98.

<sup>119</sup> *Ibid supra* note 113 at 97.

<sup>120</sup> *Ibid supra* note 113 at 152 and 263.

<sup>121</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York, USA: Routledge, Chapman & Hall, 1990) at 148.

Advertising dialogues with all of these structures. For Judith Butler, representation can have a double meaning:

On the one hand, representation serves as the operative term within a political process that seeks to extend visibility and legitimacy to women as political subjects; on the other hand, representation is the normative function of a language which is said either to reveal or to distort what is assumed to be true about the category of women.<sup>122</sup>

Intense debates about representation and the politics of recognition and identity marked academic debates from the 1990s on, with critiques of gender essentialism and discussions about intersectionality. At this point, there was an explosion of discussion on the politics of identity and recognition, and a growing tension between scholars pushing for more debate on redistribution as a core issue to reduce social inequalities and those claiming that identity policies and recognition were also key. On this, Fraser offers a critique of neoliberalism and a liberal strand of feminism, pointing out how the “politics of recognition” is often dissociated from redistributive policies, tending to align with neoliberalism rather than promoting deep structural change in both capitalist and patriarchal structures.<sup>123</sup> For her, discussing representation and identity issues disconnected from the redistribution of material wealth and resources does not dismantle the structures that produce and reproduce social inequalities; a more complex and integrated discussion of social justice is needed. She claims that “struggles against heterosexist misrecognition do not automatically threaten capitalism, but must be linked to other (anti-capitalist) struggles.”<sup>124</sup> Therefore, by focusing only on identity issues or representation, we neglect

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<sup>123</sup> Nancy Fraser, *Fortunes of Feminism* (New York: Verso, 2013) at 4-5.

<sup>124</sup> *Ibid* at 12.

an important structure that sustains social inequalities: capitalism. This is why it is important to conceive of justice in a manner that connects discrimination to identity and redistributive issues, since focusing on one or the other will not encompass the complexity of the structural inequalities we face in late-capitalist societies.

Following this thread, and considering how contemporary societies are permeated by marketing and branding processes, I argue that Fraser's work on equal representation in the political and decision-making spheres can be extended to advertising, this also being an important locus for visibility and political contestation: "We are, therefore, struggling for women's autonomy in the following special sense: a measure of collective control over the means of interpretation and communication sufficient to permit us to participate on a par with men in all types of social interaction, including political deliberation and decision-making."<sup>125</sup> For Fraser, the ways we talk about women and women's representation is always contextual:

Discourses are historically specific, socially situated, signifying practices. They are the communicative frames in which speakers interact by exchanging speech acts. Yet discourses are themselves set within social institutions and action contexts. Thus, the concept of a discourse links the study of language to the study of society.<sup>126</sup>

If discourses about women and womanhood represent specific moments in time of a given society, the way such discourses are produced and reproduced in advertising, a form of discourse as well, also reveal stereotyped views of what it means to be a woman, or what is

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<sup>125</sup> *Supra* note 40 at 48.

<sup>126</sup> Nancy Fraser, "Against Symbolicism: The Uses and Abuses of Lacanianism for Feminist Politics" in *Fortunes Fem State-Manag Capital Neoliberal Crisis* (New York, USA: Verso, 2013) at 150.

valued in a woman in determined moments in time and in specific societies. Considering visual representation in advertising as a symbolic tool strictly related to social inequalities and distribution struggles from a material point of view in societies that are deeply marketized, and taking discourse in this context, can lead us to think about contestation around images in advertising as a way to advance discussions on gender justice.

Consider the beauty market, for example: beauty products are disproportionately advertised to women, who spend more time and resources on pursuing beauty ideals than men.<sup>127</sup>

Women's cosmetic and basic hygiene products, in particular personal items such as shampoos and creams, tend to be more expensive. Yet women, on average, still make less money than men, both reflecting and reinforcing gender-based social inequalities.

The idea that women spend more money on products aimed at the female market, albeit still receiving lower wages or payments for the same jobs worked by men, has been increasingly studied in different fields and is commonly referred to as “pink tax.”<sup>128</sup>

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<sup>127</sup> Leeat Ramati-Ziber, Nurit Shnabel, & Peter Glick, “The Beauty Myth: Prescriptive Beauty Norms for Women Reflect Hierarchy-Enhancing Motivations Leading to Discriminatory Employment Practices” (2020) 119: American Psychological Association J Personal Soc Psychol Interpers Relat Group Process (2) 317–343; Susie Orbach, *Bodies* (London, UK: Profile Books); Samantha Kwan & Mary Nell Trautner, “Beauty Work: Individual and Institutional Rewards, the Reproduction of Gender, and Questions of Agency” (2009) 3:1 Sociol Compass 49–71.

<sup>128</sup> Charlotte Alter, “Women Pay More for Everything From Birth to Death, Report Finds”, *TIME* (23 December 2015); *From Cradke to Cane: The Cost of Being a Female Consumer: A Study of Gender Pricing in New York City* (New York: New York City Department of Consumer Affairs, 2015); Rajiv Vaidyanathan & Praveen Aggarwal, “Does MSRP impact women differently? Exploring gender-based differences in the effectiveness of retailer-provided reference prices” (2020) 54 J Retail Consum Serv; Kim Elsesser, “The Link Between Beauty and The Gender Gap”, *Forbes* (28 October 2019), online: <<https://www.forbes.com/sites/kimelsesser/2019/10/28/the-link-between-beauty-and-the-gender-gap/?sh=14f176ea5545>>; Juliana Faddul, “‘Pink tax’: As mulheres gastam mais do que os homens ou apenas pagam mais caro?”, *CNN Bras - Online* (3 October 2020), online: <<https://www.cnnbrasil.com.br/business/pink-tax-as-mulheres-gastam-mais-do-que-os-homens-ou-apanas-pagam-mais-caro/>>; Fernanda Matos Cavalcante, *Pink tax - A desigualdade de gênero na tributação sobre consumo e renda* (Monografia de conclusão de curso, Universidade Presbiteriana Mackenzie, 2021)

According to official data, in Brazil in 2020, men still earned wages that were 28.1% than the ones received by women, and white people received wages that were 73.3% higher than racialized people.<sup>129</sup> Meanwhile, data from 2018 showed that on average, women paid 12.3% more than men for products specifically marketed to women.<sup>130</sup> According to marketing researcher Fábio Mariano, women's and girls' products are more expensive than the same products sold to men and boys. This difference in price can reach 17% for adult clothing, 23% for baby clothing, 16% for toys, 27% for haircuts, and 4% for hygiene products.<sup>131</sup>

In this context, images of women in advertising, especially when highly idealized or over-sexualized, maintain or deepen the gender gap. Visual representations of women in advertising can connect material or redistribution issues to symbolic ones, and when images promote objectification, they constitute the symbolic and discursive ground on which violence against women grows, as is further discussed in this chapter. Considering that representation is not independent from structural social inequalities, I agree with Fraser that if we look at representation and distribution issues separately, we will exacerbate feminist struggles. We need to promote and apply a social justice theory that can meaningfully

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[unpublished]; Alara Efsun Yazicioglu, *Pink Tax and the Law: Discriminating Against Women Consumers* (London and New York: Routledge Taylor & Francis Group, 2018).

<sup>129</sup> *Síntese de Indicadores Sociais: Uma análise das Condições de Vida da População Brasileira - 2021* (Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística - IBGE, 2021) at 26-27.

<sup>130</sup> Sara Guimarães, "Pink tax: O preço da desigualdade de gênero", *Corr Braz* (16 March 2020), online: <<https://www.correiobraziliense.com.br/app/noticia/comunidade-ei/2020/03/16/noticias-comunidadeei,834648/pink-tax-o-preco-da-desigualdade-de-genero.shtml>>; Fábio Mariano, "Taxa Rosa", online: <<https://static.poder360.com.br/2018/07/TAXA-ROSA-GENERO-1.pdf>>.

<sup>131</sup> Fábio Mariano, *supra* note 130.

combine both strands, since problems of representation do not happen in a vacuum, but are closely related to issues of unequal material/economic distribution of resources.

Disputing advertising can become a focus for political action, as it has by part of the feminist movement in Brazil. The danger of this form of activism would be the cooptation of identity politics by brands, as claimed by Klein and others.<sup>132</sup> Although, if we consider consumption as political,<sup>133</sup> representation in advertising can both reflect social inequalities and maintain specific symbolic images that sustain and reinforce these material

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<sup>132</sup> “The backlash that identity politics inspired did a pretty good job of masking for us the fact that many of our demands for better representation were quickly accommodated by marketers, media makers and pop-culture producers alike – though perhaps not for the reasons we had hoped. If I had to name a precise moment for this shift in attitude, I would say August of 1992: the thick of the ‘brand crisis’ that peaked with Marlboro Friday. That’s when we found out that our sworn enemies in the ‘mainstream’ – to us a giant monolithic blob outside of our known university-affiliated enclaves – didn’t fear and loathe us but actually thought we were sort of interesting. Once we’d embarked on a search for new wells of cutting-edge imagery, our insistence on extreme sexual and racial identities made for great brand-content and niche-marketing strategies. If diversity is what we wanted, the brands seemed to be saying, then diversity was exactly what we would get. And with that, the marketers and media makers swooped down, airbrushes in hand, to touch up the colors and images in our culture. (...)

“But for many of the activists who had, at one point not so long ago, believed that better media representation would make for a more just world, one thing became abundantly clear: identity politics weren’t fighting the system, or even subverting it. When it came to the vast new industry of corporate branding, they were feeding it.” Naomi Klein, *No logo: taking aim at the brand bullies* (Toronto: Vintage Canada, 2000) at 111- 113; Kim Elsesser, “The Link Between Beauty and The Gender Gap”, *Forbes* (28 October 2019), online: <<https://www.forbes.com/sites/kimelsesser/2019/10/28/the-link-between-beauty-and-the-gender-gap/?sh=14f176ea5545>>.

<sup>133</sup> “Redefining citizenship in connection with consumption and political strategy requires a conceptual framework for examining cultural consumption as an ensemble of practices that shape the sphere of citizenship. This framework also enables us to transcend the fragmentation that characterizes renewed analytical interest in this category. The dissatisfaction with the juridical-political sense of citizenship has led to advocacy for a notion of cultural citizenship, as well as forms of citizenship defined by race, gender, and ecology, to which we can add an infinite multiplicity of demands, resulting in a splintered concept. In the past, the state provided the framework (albeit unjust or biased) that contained the variety of forms of participation in public life. Nowadays, the market brings together these forms of participation through the medium of consumption.” Néstor García Canclini, *Consumers and Citizens: Globalization and Multicultural Conflicts*, translated by George Yúdice (United States of America: University of Minnesota Press, 2001) at 22. Alongside the idea of consumption as political, Mayra Cotta and Thais Farage connect the way we dress and consume fashion to political attitudes. Mayra Cotta & Thais Farage, *Mulher, Roupas, Trabalho: como se veste a desigualdade de gênero* (São Paulo, Brazil: Editora Schwarcz S.A., 2021) at 89 and 93; Jesús Martín-Barbero, *Dos meios às mediações: Comunicação, cultura e hegemonia* (Rio de Janeiro: Editora UFRJ, 1997) at 289.

inequalities.<sup>134</sup> Likewise, contestation around advertising exposes how a particular social group interacts with media contents more broadly, as well as levels of acceptance and/or rejection of the messages the advertising conveys.<sup>135</sup>

But how do stereotypical images of women in advertising relate to social inequalities? Mies reminds us that violence against women is primarily centered on women's bodies, their "first and last means of production," their territories.<sup>136</sup> Discursive or physical control over women's bodies is fundamental for maintaining unequal social relations between men and women and it is at the core of patriarchal structures.<sup>137</sup> Such subordination, first by violence and later by ideological institutions, structures patriarchy and is key for capitalist accumulation.<sup>138</sup> Religion, alongside other powerful ideological institutions, like the patriarchal family, law, and medicine,<sup>139</sup> has historically played a central role in upholding distinct, asymmetrically shaped social systems, locating women in subordinate positions<sup>140</sup>

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<sup>134</sup> Mônica Machado, *Consumo e politização: discursos publicitários e novas formas de engajamento juvenil* (Doutorado, Universidade Federal do Rio de Janeiro, Centro de Filosofia e Ciências Humanas; Escola de Comunicação, Programa de Pós-Graduação em Comunicação e Cultura, 2010) [unpublished] at 164-168.

<sup>135</sup> Laura Hastenpflug Wottrich, "*Não podemos deixar passar*": *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 23.

<sup>136</sup> *Ibid supra* note 49 at 170.

<sup>137</sup> *Ibid supra* note 49 at 25.

<sup>138</sup> *Ibid supra* note 49 at 170.

<sup>139</sup> Foucault argues that medicine, psychiatry, and law have a particularly relevant role in establishing patterns and standards for what is considered "normal" and what needs intervention within the domain of sexuality. Therefore, this is a system that operates to regulate sexuality from multiple points of view, with an aim to normalize behaviours. Efforts to produce normalization happen through the definition of what is a "normal sexual behaviour" and what is "deviant", the latter being either treated medically or through the criminal justice system. Michel Foucault, *Histoire de la sexualité I: La volonté de savoir* (France: Gallimard) at 42-43, 45-46, and 50-51.

<sup>140</sup> *Ibid supra* note 49 at 67.

through the public/private structure.<sup>141</sup> I add advertising to such structures that organize and enforce social control, because in late-capitalist societies, advertising is inescapable.<sup>142</sup>

American advertising is a peculiar institution, intrinsically connected with the development of American democracy in a context of abundance.<sup>143</sup> Advertising, then, occupies a special place in the symbolic and visual imaginaries within consumer societies, promoting certain values, body ideals, and social and cultural aspirations. Gilles Lipovetsky observes that in more advanced consumer societies consumption have transitioned from a hierarchical model of social distinctions to a more horizontal one, organized around networks of interests or tribes, where marketing seeks to create experiential consumption based on interests rather than ostentation.<sup>144</sup> However, in peripheral societies like Brazil, consumption still plays an important role in establishing and maintaining class/social divisions, having a massive effect on influencing behaviours, with brands upholding social distinctions.<sup>145</sup> This is why media in general and advertising in particular contributes to reinforcing these stereotypes, presenting consumption as a feminine practice, relegated to

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<sup>141</sup> Susan B Boyd, “Challenging the Public/Private Divide: An Overview” in Susan B Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 17.

<sup>142</sup> Roxanne Hovland, *Advertising, Society, and Consumer Culture* (New York, USA: Routledge Taylor & Francis Group, 2015) at 5-7; David Morris Potter, *People of Plenty: Economic Abundance and the American Character* (Chicago, USA: University of Chicago Press, 1954) at 167.

<sup>143</sup> Potter argues that modern American Advertising is a peculiar institution, intrinsically connected with the development of American democracy in a context of abundance. David Morris Potter, *People of Plenty: Economic Abundance and the American Character* (Chicago, USA: University of Chicago Press, 1954) at 176.

<sup>144</sup> Gilles Lipovetsky, *A Felicidade Paradoxal: Ensaio sobre a sociedade de hiperconsumo*, 1 reimpressão ed, translated by Maria Lucia Machado (São Paulo, Brazil: Companhia das Letras, 2008) at 39-41,43-44 and 118.

<sup>145</sup> Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 162-165; Rosana Pinheiro-Machado & Lucia Mury Scalco, *supra* note 112; Milena Carvalho Bezerra Freire de Oliveira-Cruz, *Articulações entre consumo e recepção publicitária: estudo com mulheres da “nova classe trabalhadora”* (Escola de Comunicação e Artes, Universidade de São Paulo, 2015); Mônica Machado, *Consumo e politização: discursos publicitários e novas formas de engajamento juvenil* (Doutorado, Universidade Federal do Rio de Janeiro, Centro de Filosofia e Ciências Humanas; Escola de Comunicação, Programa de Pós-Graduação em Comunicação e Cultura, 2010) [unpublished] at 168.

the private and domestic sphere, the social place of the housewife,<sup>146</sup> while exploiting images of women's bodies to promote sales. The Brazilian advertising market is not to be ignored: it is the largest in Latin-America, with a total advertising spend of \$15.5 million in 2018.<sup>147</sup>

As for the construction of stereotypical ideas of femininity, a specific “technology of gender” can be identified, organizing disciplinary and normative discourses that structure some of the hegemonic representations of the feminine. “Technology of gender” is a concept elaborated in 1994 by Teresa De Lauretis, who developed a feminist analysis of Foucault, applying it to media discourse. According to her, the media has a key role in constructing and reinforcing a given society's perceptions of gender roles, considering that “gender is a representation and that such representation is its construction.”<sup>148</sup> And de Lauretis continues:

(...) the discrepancy, the tension, and the constant slippage between Woman as representation, as the object and the very condition of representation, and on the other hand, women as historical beings, subjects of ‘real relations’, are motivated and sustained by a logical contradiction in our culture and irreconcilable one: women are both inside and outside gender, at once within and without representation.<sup>149</sup>

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<sup>146</sup> Heloisa Buarque de Almeida, núcleo de estudos de gênero, PAGU, UNICAMP. Consumidoras e Heroínas: gênero na telenovela.

<sup>147</sup> Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, “Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?” (2019) 39:5 Int J Advert Rev Mark Commun 679–698.

<sup>148</sup> Teresa de Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington: Indiana University Press, 1987) at 2.

<sup>149</sup> Teresa de Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington: Indiana University Press, 1987) at 10.

Therefore, the construction of stereotypical ideas of gender through images disseminated in mass media is based on how these representations play out outside the media, but also support its constant construction and reproduction through cultural goods.

This is not by chance, but is tied to the structural inequalities promoted by patriarchy and capitalism, translated into social values disseminated through advertising. As Heloísa Buarque de Almeida says: “Advertising works with values that circulate within societies, as if they were natural, when they are, in fact, constructed as social meanings and contexts.<sup>150</sup>” Values promoted by markets<sup>151</sup> make use of the constant negotiation and construction of personal values in relation to other social values. Such negotiations happen in different political arenas, including the legal system and the media. As a result, the way our concrete lives are shaped by economic inequalities and unequal distribution of work is also reinforced symbolically through images promoted by the media. In this context, being excluded from advertising can reflect an exclusion from the consumer society, which in turn, might indicate severe marginalization. If we think about advertising as a locus of discourse, and as a space for individuals to be represented in consumer society), challenging hegemonic and often misogynist, racist, and overall discriminatory images in advertising can be essentially political.

The behavioural prescriptions assigned to gender are related to social and cultural contexts, and permeated by practices and cultural-social beliefs in a given historical period, as Fraser

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<sup>150</sup> Heloísa Buarque de Almeida, *Muitas mais coisas: telenovela, consumo e gênero* (DCL Thesis), Universidade estadual de Campinas, Instituto de Filosofia, Letras e Ciências Humanas, 2001, at 219.

<sup>151</sup> Tim Kasser, *The high price of materialism*, (Cambridge: MIT press, 2002) at 26.

reminds us: “To have a social identity, to be a woman or man, for example, just is to live and act under a set of descriptions.”<sup>152</sup> Identities are often more fluid than social and cultural structures might let us feel or perceive. Advertising, as a generalizing mechanism, reinforces ideas of uniformization and fixed identities, or at least categorizes individuals into very narrow identities, in constant interaction with the economic, political, and cultural environment in which advertising is embedded.<sup>153</sup> Discursively, advertising can be a strong tool to sustain specific power relationships. When choosing a target, advertisers are determining who is at the centre (target/consumer) and who is at the margins (and could be consumed); what habits and social practices and symbols are identified with specific strands of social classes and should be valued or devalued. Advertising, in a heavily branded context as ours, are part of our identity building processes.<sup>154</sup> If we think about advertising as a product of hegemonic discourse, it can reveal a lot about the normative identities, defined according to specific gender, race, age, and social classes parameters. The power to impose specific world views, habits, and beauty standards, as any kind of hegemonic discourse, is not an impenetrable structure or a linear form of power. Rather, whenever we can identify hegemonic discourses, we can also find counter-discursive offensives: spaces for negotiating cultural and social values and identities, as well as for individual and collective agency.<sup>155</sup> Such agency can lead to contesting normative ideals of

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<sup>152</sup> *Supra note 126* at 140.

<sup>153</sup> Laura Hastenpflug Wottrich, “*Não podemos deixar passar*”: *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 17-18.

<sup>154</sup> Tim Kasser, *The high price of materialism*, (Cambridge: MIT press, 2002).

<sup>155</sup> *Supra note 126* at 142; Teresa de Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington, USA: Indiana University Press, 1987) at 18.

sexuality, identity, and cultural behaviour, and shows that there are ways to challenge hegemony, even from subordinate positions.<sup>156</sup>

### 2.3.1 Mothers and Housewives

The stereotypical idea of men as responsible for paid work and women for unpaid work is reproduced over and over through mass media in soap operas, films, and advertising. Esther Hamburger observed that in the 1950s and 1960s, the massification of television in Brazil and the development of soap operas disseminated an ideal of consumption anchored in representations of urban middle-class women from the São-Paulo/Rio de Janeiro cities (where such content is usually produced).<sup>157</sup> She also pointed out that in the 1970s, these soap operas were initially produced as a form of marketing for multinational companies such as Gessy Lever and Colgate-Palmolive.<sup>158</sup> As a result of these intense and strategic marketing practices, such as merchandising, Brazilian soap operas became key in promoting new products and new habits, pushing for an overall sense of modernization.<sup>159</sup>

Alongside the same lines, Heloísa Buarque de Almeida reminds us that when television shows, and soap operas in particular, promote new habits anchored in the consumption of new products, gender becomes relevant.<sup>160</sup> Even if the role of women and family structures have been changing, discussed and disputed throughout the years,<sup>161</sup> in such soap operas

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<sup>156</sup>*Supra* note 126 at 143.

<sup>157</sup>Esther Hamburger, “Diluindo Fronteiras: A televisão e as novelas no cotidiano” in Fernando A Novais, ed, *História Vida Priv No Bras Vol 4 Contrastes Intimidade Contemp* (Companhia das Letras) 440 at 442.

<sup>158</sup> *Ibid* at 459.

<sup>159</sup> *Ibid* at 465 to 476.

<sup>160</sup> Heloísa Buarque de Almeida, Núcleo de Estudos de Gênero - PAGU/UNICAMP. Consumidoras e Heroínas: gênero na telenovela (Estudos Feministas, Florianópolis, 15 (1): 177-192, janeiro-abril/2007).

<sup>161</sup> On this topic, see: Heloísa Buarque de Almeida, *Muitas mais coisas: telenovela, consumo e gênero* (DCL Thesis), Universidade estadual de Campinas, Instituto de Filosofia, Letras e Ciências Humanas, 2001; Esther Hamburger, “Diluindo Fronteiras: A televisão e as novelas no cotidiano” in Fernando A Novais, ed, *História*

and in most of the traditional forms of advertising in Brazil consumption is presented as something that belongs to the private sphere, heavily marked as feminine and women's responsibility, following the "housewifization" trend observed by Fraser.<sup>162</sup> As a consequence, representations of the feminine in television shows and advertising tend to follow very traditional stereotypes for cis-women, who are presented primarily as mothers and housewives, even if they assume other roles, like workers, as well.<sup>163</sup> As one male creative director from Brazil (aged 37) declared in an in-depth interview: "We represent the family this way. There is the wife and the kids, and the husband, and the dog, the really conservative family. It's not just the woman, it's a population, an entire population stereotyped."<sup>164</sup> Women also seem to share this view, as a female copywriter added: "it would take courage to do the opposite (...) I'd like to see any client, any large company have the courage to test that."<sup>165</sup>

In field work conducted in a small city in the south of Brazil, Milena Carvalho Bezerra Freire de Oliveira-Cruz concluded that lower-middle class women strongly identify themselves as housewives, even if they work for wages outside the home (often as maids in

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*Vida Priv No Bras Vol 4 Contrastes Intimidade Contemp* (Companhia das Letras) 440; Heloísa Buarque de Almeida, Núcleo de Estudos de Gênero - PAGU/UNICAMP. *Consumidoras e Heroínas: gênero na telenovela* (Estudos Feministas, Florianópolis, 15 (1): 177-192, janeiro-abril/2007).

<sup>162</sup> *Supra* note 123.

<sup>163</sup> Heloísa Buarque de Almeida, Núcleo de Estudos de Gênero - PAGU/UNICAMP. *Consumidoras e Heroínas: gênero na telenovela* (Estudos Feministas, Florianópolis, 15 (1): 177-192, janeiro-abril/2007) at 189.

<sup>164</sup> Quoted in Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, "Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?" (2019) 39:5 *Int J Advert Rev Mark Commun* 679–698.

<sup>165</sup> Quoted in Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, "Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?" (2019) 39:5 *Int J Advert Rev Mark Commun* 679–698. On sexism in Advertising Agencies, see also: Andrea DiP, "Machismo é a regra da casa", *Pública* (13 March 2015), online: <<https://apublica.org/2015/03/machismo-e-a-regra-da-casa/>>.

upper-class households). They are the primary person responsible for grocery shopping, managing the family budget, and doing care work, and their partners do not share these responsibilities.<sup>166</sup> In Brazil, women spend from 18 to 22 hours weekly doing unpaid reproductive or care work, compared to a weekly average of 12 hours for men.<sup>167</sup> For the women interviewed by Carvalho Bezerra Freire de Oliveira-Cruz, advertising that showed men doing activities related to care work or housework could be humorous, but was unrealistic. Women pay close attention to the brands of cleaning products, which according to the author hold a special symbolic place for women from lower classes in Brazil: there is a connection between the tidiness and cleanliness of the household with their personal identities as good housewives, mothers, and wives. For them, using cheaper cleaning products instead of the brands they admire means spending more time, money, and work doing chores. Here we see the power of advertising, even if many of the women who were interviewed claimed that advertising does not affect them.<sup>168</sup>

In Brazilian soap operas, white women often share the role of housewife with domestic workers, in an accurate representation of the Brazilian job market for racialized women, and mirroring the social inequalities that persist in Brazil. In this context, consumption is

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<sup>166</sup> Milena Carvalho Bezerra Freire de Oliveira-Cruz, *Articulações entre consumo e recepção publicitária: estudo com mulheres da “nova classe trabalhadora”* (Escola de Comunicação e Artes, Universidade de São Paulo, 2015).

<sup>167</sup> 2528: *os desafios do passado no trabalho doméstico do século XXI: reflexões para o caso Brasileiro a partir dos dados da PNAD contínua*, by Luana Pinheiro et al (Instituto de Pesquisa Econômica Aplicada, 2019) at 32.

<sup>168</sup> Milena Carvalho Bezerra Freire de Oliveira-Cruz, *Articulações entre consumo e recepção publicitária: estudo com mulheres da “nova classe trabalhadora”* (Escola de Comunicação e Artes, Universidade de São Paulo, 2015).

portrayed as a marker of social stratification.<sup>169</sup> Buarque de Almeida claims that these soap operas constitute a form of gender technology (as defined by De Lauretis), since the constructions of the social roles of men and women, as represented in the soap operas, tends to have a hegemonic effect over the years.<sup>170</sup> I agree with Buarque, and I add that traditional forms of marketing also constitute a form of gender technology, especially if we think about the images in advertising as being a way that gender, race, class, and sexual identity are symbolically performed.<sup>171</sup>

Persistent racism in Brazil (which includes the denial that racism exists),<sup>172</sup> contributes to a patent lack of diversity in representation within the media, and in advertising in particular. A study conducted in 2013 in Brazil (by Data Popular and Patrícia Galvão Institute) interviewed 1,501 people, men and women 18 years and older, in 100 cities in all regions in Brazil. Sentences about advertising campaigns and trends were presented to the interviewees so that they could express their agreement or disagreement with the statements: 80% of the interviewees felt that the women shown in advertising are mainly

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<sup>169</sup> Heloísa Buarque de Almeida, Núcleo de Estudos de Gênero - PAGU/UNICAMP. *Consumidoras e Heroínas: gênero na telenovela* (Estudos Feministas, Florianópolis, 15 (1): 177-192, janeiro-abril/2007).

<sup>170</sup> Heloísa Buarque de Almeida, Núcleo de Estudos de Gênero - PAGU/UNICAMP. *Consumidoras e Heroínas: gênero na telenovela* (Estudos Feministas, Florianópolis, 15 (1): 177-192, janeiro-abril/2007) at 188.

<sup>171</sup> Judith Butler defines gender as being constantly performed, and therefore constantly re-created through repetition and performance: “In this sense, *gender* is not a noun, but neither is it a set of free-floating attributes, for we have seen that the substantive effect of gender is performatively produced and compelled by the regulatory practices of gender coherence. Hence, within the inherited discourse of the metaphysics of substance, gender probes to be performative – that is, constituting the identity it is purported to be. In this sense, gender is always a doing by a subject who might be said to preexist the deed.” Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York, USA, 1990) at 24-25.

<sup>172</sup> Lélia Gonzalez, “Racismo e sexismo na cultura brasileira: Ensaio, intervenções e diálogos” in Flavia Rios & Márcia Lima, eds, *Por Um Fem Afro Lat Am*, 4ª reimpressão ed (Rio de Janeiro: Zahar, 2020) at 80 and 90-91; Jessé Souza follows this thread and argues that racism in Brazil takes a different shape than in countries like United States, which does not mean that racism does not exist in Brazil, but only that it operates in another way. See: Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 426 and 441-444.

white women, and most of them would like to see more black women; 73% of the interviewees saw more blond women and would like to see more women with brown hair; and 78% saw mostly young women, and would like to see older women more often.<sup>173</sup> Additionally, for 56% of the interviewees, television advertising did not show real women. For 61% of the women and 62% of the interviewed men, television advertisements did not show women who also work and study apart from being a mother and a wife, and for 58% of those polled, women tend to be shown in hypersexualized ways, focusing on women's bodies. Eighty-four percent of the interviewees agreed that women's bodies are often used to promote consumption in television advertisements. For 39% of the women, women are not shown as intelligent people in advertising, and 67% of the women agreed that the beauty standards shown in advertising are unrealistic, while 61% of them believe that this situation generates frustration amongst women.

It was interesting to see, for example, how this research mapped women's opinions on their own bodies compared to advertising, and how men saw this relationship. For example, 52% of women in the poll believed they have small breasts, but 54% of the interviewed men indicated that they see women with big breasts around them. On this issue, 68% of the interviewees believed that women in advertising have big breasts, and they like it to be this way. Similar data was collected regarding buttocks, colour of the eyes, type of hair (straight or curly), and curvy bodies. In this regard too, we notice a flagrant lack of diversity in a

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<sup>173</sup>Instituto Data Popular & Instituto Patrícia Galvão, *Representações das mulheres nas propagandas na TV* (2013); Luciana Araújo, "Para diretora executiva do Instituto Patrícia Galvão, pesquisa aponta que a publicidade representa a mulher de forma ultrapassada" *Instituto Patrícia Galvão* (29 September 2013), online: Instituto Patrícia Galvão <<http://agenciapatriciagalvao.org.br/mulher-e-midia/pautas-midia/segundo-pesquisa-propaganda-representa-a-mulher-de-modo-ultrapassado/>>.

country that is profoundly marked by racial and ethnic diversity: 80% of the interviewees believed that television advertisements tend to show more white women, and they say they would like to see more diversity. Blonde women are also perceived as the majority of women portrayed in television advertising, as pointed out by 73% of the poll respondents. Seventy-three percent of the interviewees see the women in advertising as upper class women, and 64% would like to see more women from lower social classes in advertising too.<sup>174</sup>

Along the same lines, a 2015 study mapped more than 2,800 commercials broadcast on television during one month. In these advertisements, 99% of the males were white and 1% were racialized; 93% of females were white, 7% racialized, and 100% of the child actors were white.<sup>175</sup> This is particularly noteworthy in a country where racialized people represent 54% of the population.<sup>176</sup> This racialization of advertising is even more explicit when it comes to beauty products, which impose Eurocentric beauty standards onto a population that is strongly marked by racial diversity.<sup>177</sup> As a consequence, engaging in beauty processes that intend to hide or change curly and afro style hair is a mark of

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<sup>174</sup> *Ibid.* Complete information on this research is available at: [https://assets-institucional-igp.sfo2.cdn.digitaloceanspaces.com/2012/05/representacoes\\_das\\_mulheres\\_nas\\_propagandas\\_na\\_tv.pdf](https://assets-institucional-igp.sfo2.cdn.digitaloceanspaces.com/2012/05/representacoes_das_mulheres_nas_propagandas_na_tv.pdf)

<sup>175</sup> “Propaganda brasileira ainda usa estereótipos de gênero e raça, diz pesquisa” *Portal Uol* (23 November 2015), online: <<http://economia.uol.com.br/noticias/redacao/2015/11/23/propaganda-brasileira-ainda-usa-estereotipos-de-genero-e-raca-diz-pesquisa.htm>>.

<sup>176</sup> “Negros representam 54% da população do país, mas são só 17% dos mais ricos” *Portal UOL Economia* (04 December 2015), online: <<http://economia.uol.com.br/noticias/redacao/2015/12/04/negros-representam-54-da-populacao-do-pais-mas-sao-so-17-dos-mais-ricos.htm>>.

<sup>177</sup> Marketing practitioners tend to agree that in Brazilian advertising there is a tendency to focus on a European beauty style, showing pale skin, blonde hair, and blue eyes. According to: Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, “Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?” (2019) 39:5 *Int J Advert Rev Mark Commun* 679–698; “Cor e Dor Moral: sobre o racismo na ralé” in *Ralé Bras Quem É E Como Vive*, 2a ed (Belo Horizonte: Editora UFMG, 2016) at 409-418; Mayra Cotta & Thais Farage, *Mulher, Roupas, Trabalho: como se veste a desigualdade de gênero* (São Paulo, Brazil: Editora Schwarcz S.A., 2021) at 201.

structural racism in the country. Brazil is the largest market for the beauty industry within the Global South, with a 2014 income of R\$ 101.7 billion, representing 1.8% of Brazilian Growth Domestic Product.<sup>178</sup> Mayra Cotta and Thais Farage remind us that the Brazilian beauty market is the fourth largest industry in Brazil, if we consider volume of production and consumption, and that Brazilian women spend more than half of their salaries on beauty products.<sup>179</sup> Globally, the beauty market has a turnover of US\$ 532 billion a year.<sup>180</sup>

On this topic, a recent study conducted by Leeat Ramati-Ziber, Nurit Shnabel, and Peter Glick sought to prove the main hypothesis of Naomi Wolf's *The Beauty Myth*,<sup>181</sup> that beauty standards imposed in Western societies undermine feminism and diminish women's advancements regarding gender equality. According to the authors of the study, such beauty standards do in fact work as a "more subtle way to restrict women in societies that claim to value gender equality" by promoting a delusive idea of choice when it comes to pursuing beauty,<sup>182</sup> reminding us of the limited perception of choice in capitalist societies as a form of freedom, as observed by Mies.<sup>183</sup> The authors also found that pressures to meet particular beauty standards also contributed to women's processes of self-objectification.<sup>184</sup>

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<sup>178</sup> Associação Brasileira da Indústria de Higiene Pessoal, Perfumaria e Cosméticos, "Setor de Higiene e Beleza cresce 11% em 2014", *ABIHPEC*, online: ABHIPEC < <https://www.abihpec.org.br/2015/04/setor-de-higiene-e-beleza-cresce-11-em-2014/>>.

<sup>179</sup> Mayra Cotta & Thais Farage, *Mulher, Roupas, Trabalho: como se veste a desigualdade de gênero* (São Paulo, Brazil: Editora Schwarcz S.A., 2021) at 205.

<sup>180</sup> Mayra Cotta & Thais Farage, *Mulher, Roupas, Trabalho: como se veste a desigualdade de gênero* (São Paulo, Brazil: Editora Schwarcz S.A., 2021) at 206.

<sup>181</sup> Naomi Wolf, *The Beauty Myth* (London, UK: Vintage, 2015).

<sup>182</sup> Leeat Ramati-Ziber, Nurit Shnabel, & Peter Glick, "The Beauty Myth: Prescriptive Beauty Norms for Women Reflect Hierarchy-Enhancing Motivations Leading to Discriminatory Employment Practices" (2020) 119: *American Psychological Association J Personal Soc Psychol Interpers Relat Group Process* (2) 317–343 at 339.

<sup>183</sup> *Ibid* supra note 49 at 40.

<sup>184</sup> Leeat Ramati-Ziber, Nurit Shnabel, & Peter Glick, "The Beauty Myth: Prescriptive Beauty Norms for Women Reflect Hierarchy-Enhancing Motivations Leading to Discriminatory Employment Practices" (2020)

This mismatch in how people are represented in advertising and how they look in Brazilian society is not unintentional: especially when it comes to beauty products, it can be a strategy to promote sales by intensifying the desire to achieve a particular beauty standard. As a result, women in Brazil rarely recognize themselves in advertising. This lack of representation in advertising and television in general provides room to deepen reflections on representation issues, revealing a struggle within the feminist movement in Brazil. While white feminists complain about misrepresentation in advertising, black feminists claim that they are barely represented in advertisements at all. Overall, in 2020, 22% of advertising campaigns in Brazil featured black women, while only 7% of Brazilian television content contained representations of black people. Advertisements featuring women as protagonists in 2019 are also worth considering: 70% of the advertisements had white women as the protagonists, while 17% had black women and 13% involved women from other ethnic groups.<sup>185</sup> Data from 2019 pointed out that racialized women in Brazil accounted for 16% of the overall consumption in Brazil, representing an average market share of R\$ 704 billion a year in the country.<sup>186</sup> Yet, only 7.4% of the advertisements showed black women as the protagonist.<sup>187</sup> Even if representation of racialized people has been expanding over the years, it is still quite unrepresentative when compared to the 56%

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119: American Psychological Association *J Personal Soc Psychol Interpers Relat Group Process* (2) 317–343 at 338.

<sup>185</sup> Mariana Estarque & Priscila Camazano, “Mulheres negras protagonizam só 7,4% dos comerciais”, *Folha São Paulo - Online* (6 October 2019), online: <<https://www.geledes.org.br/mulheres-negras-protagonizam-so-74-dos-comerciais/>>.

<sup>186</sup> Roughly CAD U\$169,4 billion a year, according to Brazilian Central Bank Conversion rates in July 18, 2022: Banco Central do Brasil, “Banco Central do Brasil - Conversor de Moedas”, online: <<https://www.bcb.gov.br/conversao>>.

<sup>187</sup> Marina Estarque & Priscila Camazano, “Negras movimentam R\$ 704 bi por ano, mas são escanteadas pela publicidade”, *Folha São Paulo - Online* (8 October 2019), online: <<https://www.geledes.org.br/negras-movimentam-r-704-bi-por-ano-mas-sao-escanteadas-pela-publicidade/>>.

of black and multiracial people in the Brazilian society.<sup>188</sup> Therefore, even if the majority of women in charge of doing paid domestic work in Brazil are racialized, and even though black women represent a substantial market share in the country, mainstream advertising does not portray these women very often and does not consider them to be housewives. The advertising message is directed to the white woman who will likely hire a racialized woman to take care of the children and the house while she works outside the home.

In this context, representation in advertising also reflects material social inequalities, showing who is considered to be a consumer and who is not, who is included in consumer society and who is not. From this perspective, racialized women and LGBTQ2+ people often do not conform to mainstream gender representations in advertising, while white women are represented in very specific ways, for example, as mothers. We can say that even today images of women in advertising are predominantly connected to their roles as mothers, caregivers, and housewives, and act as a discursive tool to keep women in this subordinated position.

### **2.3.2 Sexual Objects**

In opposition to the housewife, dressed in ways to suppress any manifestation of their sexuality,<sup>189</sup> stands the hypersexualized woman, who with her intense sexuality is the centre of heterosexual men's desires.<sup>190</sup> It requires a lot of concrete and symbolic structures to

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<sup>188</sup> *Apesar do aumento, número de negros na publicidade não reflete a população brasileira* (TV Cultura, 2022).

<sup>189</sup> Mayra Cotta & Thais Farage, *Mulher, Roupas, Trabalho: como se veste a desigualdade de gênero* (São Paulo, Brazil: Editora Schwarcz S.A., 2021) at 185.

<sup>190</sup> I am focusing on the two most common representations of women in advertising (housewife and sexual object), but other authors list others such as Trophy, Sexually Powerful, Professional and Object of Beauty. More at: Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, "Female role portrayals in Brazilian

keep women's sexuality under control, and cultural apparatuses (including advertising and mass media) contribute to locking women into this objectified position in regard to the male gaze, as pointed out by De Lauretis.<sup>191</sup> Within patriarchal relations, women's sexuality, although located in the feminine body, is often perceived and represented as a man's property.<sup>192</sup> Remembering that patriarchy and capitalism mutually sustain each other, advertising exploits women in multiple ways: by rendering their work invisible, by framing housework as "love," by profiting from their sexuality, by promoting unattainable beauty standards and then selling overpriced products for women to conform to such beauty ideals, and so on.

On the question of hypersexualized women, often the image of the "mulatta" (a woman with one black and one white parent) tends to be the most common one. As Lélia Gonzalez argues, the "mulatta" is highly sexualized in Brazilian culture, both symbolically (for example, in Carnival parades she is seen as the most beautiful and sensual woman), and concretely (mulattas tend to be seen as women to "have sex with," due to their supposed natural sexual and erotic attributes, and not necessarily women to marry).<sup>193</sup>

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advertising: are outdated cultural stereotypes preventing change?" (2019) 39:5 Int J Advert Rev Mark Commun 679–698.

<sup>191</sup> Teresa de Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington, USA: Indiana University Press, 1987) at 44; Rotem Kahalon, Nurit Shnabel, & Julia C Becker, "'Don't Bother Your Pretty Little Head': Appearance Compliments Lead to Improved Mood but Impaired Cognitive Performance" (2018) 42:2 Psychol Women Q 136–150.

<sup>192</sup> Teresa de Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington, USA: Indiana University Press, 1987) at 14.

<sup>193</sup> "Judith Butler, *Gender Trouble – Feminism and the Subversion of Identity*, Judith Butler, 2th ed (New York: Routledge, 2014) at p. 3-4.

<sup>193</sup> Lélia Gonzalez, "A mulher negra no Brasil" in *Por Um Fem Afro Lat Am Ens Interv E Diálogos*, 4a reimpressão ed (Rio de Janeiro: Zahar, 2020) 158 at 164-170; Mariza Corrêa, "Sobre a Invenção da Mulata" (1996) 6–7 Cad Pagu 35–50.

Therefore, visual representations of women in advertising often reflect the social divide between public and private, with women being assigned to the private sphere of care or being the object of heterosexual desire. This contributes both to constructing gender and to reinforcing these gendered positions. As Teresa de Lauretis reminds us, “[t]he construction of gender is both the product and the process of its representation.”<sup>194</sup> For her, the sex-gender system is simultaneously a sociocultural structure and a semiotic apparatus.<sup>195</sup>

Thinking with De Lauretis, the power to construct symbolic structures of gender, and fighting them raise questions related to big corporation’s power (through advertising and television content) in promoting representations of gender in mass media, versus the ability to exercise agency, refuse, and transform specific representations, adapting them to different social realities. Perhaps where and to what extent mass media communications are critically received depends on the specific social, geographical, class, race, and gender statuses of the audience.

## **2.4 Advertising and Gender-based Violence**

In the case of sexist advertising, as part of a wider mass media structure, images uphold stereotypical representations of women either as responsible for all care work, or as sexual objects. Women often occupy either the role of consumers of items to support household chores and care work, or the highly sexualized objects to call men’s attention to specific products or brands.<sup>196</sup> Rather than being something empowering, often women’s sexuality

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<sup>194</sup> Teresa de Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington, USA: Indiana University Press, 1987) at 3.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid* supra note 49 at 120.

in the media is shown in a context of objectification.<sup>197</sup> Karen Middleton, Sarah Turnbull, and Mauro José de Oliveira observe that while “76% of female marketers and 88% of male marketers, globally, believe they avoid using gender stereotypes, almost half of consumers (both male and female) feel unrepresented by advertising.”<sup>198</sup>

According to Marcos Cobra, a marketing professor at a renowned institution in Brazil (Fundação Getúlio Vargas - FGV), sex is used to draw the consumer’s attention: since women are a symbol of beauty and pleasure in consumer societies, marketing strategies should associate the consumption of goods with the image of women, seeking to transform the product into pleasure, magic, and seduction.<sup>199</sup> In-depth interviews with marketing professionals signal that the prevalence of over exposed bodies is not only normalized but also perceived as a cultural characteristic of Brazil:

What do 18-40 year-old men spend most time thinking about? Women/ It’s easy. Let’s put a semi-naked woman in the ad, it will draw the attention of these guys. (Male Creative Director, aged 31).<sup>200</sup>

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<sup>197</sup> Mayra Cotta & Thais Farage, *Mulher, Roupas, Trabalho: como se veste a desigualdade de gênero* (São Paulo, Brazil: Editora Schwarcz S.A., 2021) at 154.

<sup>198</sup> Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, “Female role portrayals in Brazilian advertising: Are outdated cultural stereotypes preventing change?” (2019) 39:5 Int J Advert Rev Mark Commun 679–698.

<sup>199</sup> “O apelo ao sexo é utilizado para conquistar a atenção do consumidor. O objetivo do marketing é transformar desejo em consumo. Os consumidores são movidos por emoções, por isso o aumento dos apelos eróticos. Os produtos devem mexer com o lado lúdico e pudico do consumidor. (...)”

O marketing elegeu a mulher como objeto de beleza. A sociedade de consumo tem a mulher como seu símbolo. Basta olhar os anúncios publicitários para ver a sexualidade implícita, ou mesmo explícita. (...) O marketing deve associar o consumo prazeroso com a figura da mulher. Deve-se transformar o produto em “prazer”, “magia” e “sedução”. (...)”. Maria Filomena Gregori, *Prazeres perigosos: Erotismo, gênero e limites da sexualidade*, 1st ed (São Paulo: Companhia das Letras) at 93-94.

O sexo na sociedade de consumo está presente na vida de qualquer pessoa; o consumidor procura o sexo como afirmação social, pessoal e afetiva. O poder econômico é representado pela posse de símbolos sexuais representados por marcas e categorias de produtos.”

<sup>200</sup> Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, “Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?” (2019) 39:5 Int J Advert Rev Mark Commun 679–698.

I think anthropologically we are a society that likes to expose the body. There is a cultural heritage of generations of body exposure, sexuality, sensuality, and accepting it as normal. I watch some 300 commercials a day and I do not see the same exploitation of the female body in foreign advertising and I'm talking about global companies that sell products all over the world. (Male Art Director, aged 38).<sup>201</sup>

However, employing images of the feminine body in hypersexualized and semi-pornographic ways is particularly common when advertising alcoholic drinks, in Brazil and elsewhere.<sup>202</sup> The problem with such visual representations is that by objectifying women, one also changes the way women are seen, setting the stage for violence against women to be symbolically acceptable, in a context where women are already a social group that struggles with discrimination and violence,<sup>203</sup> as Kilbourne puts it:

Ads don't directly cause violence, of course. But the violent images contribute to the state of terror. And objectification and disconnection create a climate in which there is widespread and increasing violence. Turning a human into a thing, an object, is almost always the first step toward justifying violence against that person. It is very difficult, perhaps impossible, to be violent to someone we think of as an equal, someone we have empathy with, but it is very easy to abuse a thing. We see this with racism, with homophobia. This step is already taken with women. The violence, the abuse, is partly the chilling but logical result of the objectification.<sup>204</sup>

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<sup>201</sup> Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, "Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?" (2019) 39:5 Int J Advert Rev Mark Commun 679–698.

<sup>202</sup> When it comes to women and alcohol advertisements, this is not only a Brazilian tendency. This happens in other countries as well, as in United States, for example: Jean Kilbourne, *Can't Buy My Love: How Advertising Changes the Way We Think and Feel* (New York: Touchstone, 1999) at 246-247.

<sup>203</sup> Sarah J Gervais & Sarah Eagan, "Sexual Objectification: The Common Thread Connecting Myriad Forms of Sexual Violence Against Women" (2017) 87:3 Am J Orthopsychiatry at 227.; "When men objectify women, they do so in a cultural context in which women are constantly objectified and in which there are consequences – from economic discrimination to violence – to that objectification." Jean Kilbourne, *Can't buy my love: how advertising changes the way we think and feel* (New York: Touchstone, 1999) at 279.

<sup>204</sup> Jean Kilbourne, *Can't buy my love: how advertising changes the way we think and feel* (New York: Touchstone, 1999) at 278.

It is not that advertising that objectifies women is primarily responsible for violence against women, or that violence is a direct consequence of an advertisement that objectifies women. However, we are immersed in advertising messages; they surround us constantly.<sup>205</sup> Advertising, then, is a central force in maintaining discursive and visual (or imagetic) representations of women's roles in consumer societies. The hyper-sexualization of women in advertising and the social harm associated with it have long been discussed in feminist scholarship, and confirmed by research conducted in multiple fields.<sup>206</sup> In the long term, if women are constantly portrayed as objects, this contributes to the idea that they are less human or not fully human. If advertisements are not the only cause of this outcome, we can still observe a symbiotic relationship: advertising reflects social values at the same time as it reinforces them, in a vicious cycle.

If we consider violence against women to be a continuum that goes from psychological or moral abuse to femicide,<sup>207</sup> advertising and its symbolic power play a key role in constructing our perceptions about what is acceptable and what is not. In this context,

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<sup>205</sup> Susan Linn, *Crianças do Consumo: a infância roubada* (São Paulo: Instituto Alana, 2006).

LINN, Susan. In: *Crianças do Consumo: a infância roubada*.

<sup>206</sup> Sarah J. Gervais & Sarah Eagan, "Sexual Objectification: The Common Thread Connecting Myriad Forms of Sexual Violence Against Women" (2017) 87:3 *Am J Orthopsychiatry*; L Monique Ward, "Media and Sexualization: State of Empirical Research, 1995-2015" (2016) 4-5:53 *J Sex Res - Annu Rev Sex Res Spec Issue* 560-577 at 569-570.

<sup>207</sup> Paola Santana Nazarit & Lorena Astudillo Pérez, *Violencia Extrema hacia las Mujeres en Chile 2010-2012* (Red Chilena contra la Violencia hacia las Mujeres y Heinrich Böll Stiftung - Cono Sur, 2014) at 13; Femicide is a term used to designate homicides in which the cause of death can be associated with the victim's gender or identification with the female gender, in a broader context of sexism and misogyny. Diana Russel first used this term before the International Court against Women, in Brussels, in 1976. She also discusses this concept in her book published in 1992. See: Diana Russell e Jill Radford, *Femicide: The Politics of Women Killing*, Nova York, Twayne Publisher, 1992, p. 3. In 2009, the Inter-American Court of Human Rights statement on *Caso González y Otras ("Campo Algodonero") Vs. México* is a landmark on the concept of femicide as an extreme form of violence against women, see: Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. México* (Inter-American Court of Human Rights - Secretariat, 2009).

everyday forms of the objectification of women produce an imaginary where violence against women is not only tolerated and accepted, but stimulated. Along these lines, when discussing a national, online campaign created by Brazilian feminist groups to report the everyday forms of harassment that women experience, the #meuprimeiroassédio (#myfirstharassment), discussed further in the next chapter, Nicole Cristine Baumgarten observes that violence against women does not have a fixed definition, but can be seen as a spectrum. She argues that nowadays the internet is both giving visibility to everyday forms of violence by identifying and naming it, and amplifying the ways in which women suffer violence.<sup>208</sup> Therefore, these discursive forms of violence become the foundation for other more extreme manifestations of misogyny.<sup>209</sup> As Márcia Tiburi reminds us, “the idea of what is violence defines what kind of violence is possible”<sup>210</sup> and “all symbolic violence weights materially,”<sup>211</sup> reinforcing the idea of a continuity between the acts of speech and physical violence.

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<sup>208</sup> Nicole Cristine Baumgarten, “#meuprimeiroassédio: considerações sobre violência, gênero, feminismos e mídias” (2020) 26 Ponto Urbe Rev Núcleo Antropol Urbana USP 1–9 at 3.

<sup>209</sup> Sarah J. Gervais & Sarah Eagan, “Sexual Objectification: The Common Thread Connecting Myriad Forms of Sexual Violence Against Women” (2017) 87:3 Am J Orthopsychiatry at 227..

<sup>210</sup> Márcia Tiburi, *Como conversar com um fascista: reflexões sobre o cotidiano autoritário brasileiro*, 5th ed (Rio de Janeiro: Record, 2016) at 77. Translation provided by the author.

<sup>211</sup> Márcia Tiburi, *Como conversar com um fascista: reflexões sobre o cotidiano autoritário brasileiro*, 5th ed (Rio de Janeiro: Record, 2016) at 77. Translation provided by the author.

### **Chapter 3: Social Reproduction and the Gendered Division of Labour in Brazil: Social Inequalities Within Society and Amongst Women**

Keeping in mind that the public/private divide can be organized differently depending on state regulation and social organization, in this chapter I present information about Brazil and how women there are positioned within this divide, providing data on social inequalities in Brazil and inequalities among Brazilian women, as well as on violence against women in the country. I also explore how this particular arrangement of the public/private divide structures patriarchal and capitalist societies, as well as legal relationships, positioning women at a disadvantage in late-capitalist and highly unequal consumer societies in the global south, like Brazil.<sup>212</sup> In the concluding section, I focus on how the feminist movement in Brazil has been using strategic litigation to promote women's rights and fight violence against women.

Brazil has had a complex economic and social development, being structured by deep social inequalities. As a result, extreme poverty and extreme wealth coexist, sometimes in the same cities, and even in the same neighborhoods. The huge and historical income inequality results from the way capitalism expanded in Brazil and continues to sustain a highly unequal society, not only from an economic standpoint but also from cultural, political, and social ones. Such inequalities are, as they often are, shaped by sex, gender

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<sup>212</sup> I find it hard to define Brazil in terms of “developed or developing” countries. This terminology is problematic because it implies that there is only one way, or one right way, to develop, and does not consider the multiple ways development can be understood, while also suggesting that there are phases to be completed to reach development. Additionally, this language is framed by a colonial perspective, imposed from the global north to the global south, making me uncomfortable with these terms.

identity, sexuality, ethnicity-race, social class, geographical location, age, religion, and disabilities. In this context, consumption is complexified, by combining the fulfilment of material needs with emotional and cultural ones.<sup>213</sup> The expansion of consumer society in Brazil meant increased access to products that meet basic needs, such as toothbrushes, food, refrigerators, and stoves, while also promoting social inclusion through consumption. It is in this context that I discuss whether activism around gender-based discrimination in advertising could constitute a disruptive practice. To set the stage for this discussion, in this chapter I discuss how ideologies about social reproduction and the gendered division of labour structure symbolically and concretely Brazilian women's lives.

The definition of women as housewives under capitalism is shaped by intersectionality, in a combination of privileges related to: social class, race/ethnicity, age, geographical location, and ability. Women of colour have always worked for wages and in many cases have made possible either the privileged or “protected” position of the housewife<sup>214</sup> within the private sphere or allowed white women's engagement in the workplace.<sup>215</sup> Symbolically, being a housewife, has often been associated with passivity,<sup>216</sup> in contrast to the active role of the male breadwinner.

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<sup>213</sup> Jesús Martín-Barbero, *Dos meios às mediações: Comunicação, cultura e hegemonia* (Rio de Janeiro: Editora UFRJ, 1997) at 289.

<sup>214</sup> Angela Y. Davis, *Women, Race and Class* (New York, USA: Vintage Books - Random House New York) at 12.

<sup>215</sup> Susan B. Boyd, “Challenging the Public/Private Divide: An Overview” in Susan B. Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 12; Angela Y. Davis, *Women, Race and Class* (New York, USA: Vintage Books - Random House New York) at 5 and 12; Lélia Gonzalez, “A mulher negra na sociedade brasileira: Uma abordagem político-econômica” in Flavia Rios & Márcia Lima, eds, *Por Um Fem Afro-Latinoam*, 4th ed (Rio de Janeiro: Zahar, 2020) 49 at 58.

<sup>216</sup> *Ibid supra* note 49 at 53.

Positioning women in different places within the public/private divide has also affected how women interact with legal structures: while white women lacked state protection against the domestic violence happening inside their homes, black and Indigenous women have experienced prevalent state intervention in their lives.<sup>217</sup> In terms of waged work, while white upper class women massively entered the work force after the Second World War, often relying on care work provided by racialized women to be able to work for wages, black women have historically worked in under-valued and low paid jobs.<sup>218</sup>

Brazil is a highly unequal society<sup>219</sup> that historically reproduces social inequalities through the gendered division of labour, gendered stereotypes, racial and ethnic prejudices, and the privileges of social class.<sup>220</sup> For Jessé Souza, Brazil experienced a kind of modernity grounded in consistent social exclusion, at once reflecting and reinforcing sociological debates about social inequalities and the state's role in Brazil: "The modernity of countries like Brazil is 'deficient,' selective and peripheral because a social and political effort to

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<sup>217</sup> Susan B. Boyd, "Challenging the Public/Private Divide: An Overview" in Susan B. Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 13; Martha Chamallas, *Introduction to Feminist Legal Theory*, 2d ed (New York, USA: Aspen Publishers) at 77.

<sup>218</sup> Susan B. Boyd, "Challenging the Public/Private Divide: An Overview" in Susan B. Boyd, ed, *Challenging Public/Private Divide Fem Law Public Policy* (Canada: University of Toronto Press) at 12; Angela Y. Davis, *Women, Race and Class* (New York, USA: Vintage Books - Random House New York) at 5 and 12; Lélia Gonzalez, "A mulher negra na sociedade brasileira: Uma abordagem político-econômica" in Flavia Rios & Márcia Lima, eds, *Por Um Fem Afro-Latinoam*, 4th ed (Rio de Janeiro: Zahar, 2020) 49 at 58.

<sup>219</sup> According to the World Inequality Report 2002, Brazil is one of the most unequal countries in the world, being highest than in the United States and China. More information available at: [https://wir2022.wid.world/www-site/uploads/2022/03/0098-21\\_WIL\\_RIM\\_COUNTRY\\_SHEETS.pdf](https://wir2022.wid.world/www-site/uploads/2022/03/0098-21_WIL_RIM_COUNTRY_SHEETS.pdf), at 185; Vera Batista, "IBGE: Brasil continua sendo o 9 país mais desigual do mundo", *Corr Braz* (12 November 2020), online: <[https://www.em.com.br/app/noticia/economia/2020/11/12/internas\\_economia,1204108/ibge-brasil-continua-sendo-9-pais-mais-desigual-do-mundo.shtml](https://www.em.com.br/app/noticia/economia/2020/11/12/internas_economia,1204108/ibge-brasil-continua-sendo-9-pais-mais-desigual-do-mundo.shtml)>; Cláudia Lima Marques & Roberto A C Pfeiffer, "Dissemination of Consumer Law and Policy in Brazil: The impact of EU Law" (2022) 45 *J Consum Policy* 27–48 at 44.

<sup>220</sup> Lélia Gonzalez, "Cultura, etnicidade e trabalho: Efeitos linguísticos e políticos da exploração da mulher" in Flavia Rios, ed, *Por Um Fem Afro Lat Am*, 4th ed (Rio de Janeiro: Zahar, 2020) at 36-37; Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 27, 141,532, and 432.

equalise social conditions of unprivileged classes was never effectively made.”<sup>221</sup> and rendering invisible the social structures that reproduce such social exclusion.

Such social inequalities were aggravated in the post-dictatorial period, when neoliberal policies amplified disparities in Latin-American countries like Brazil.<sup>222</sup> According to Jessé Souza, roughly one-third of Brazil’s population in 2016 was impoverished, relying on an average monthly income of \$CAD 187.87,<sup>223</sup> not covering basic costs of living including food security, housing, clothing, health, and educational expenses. This situation changed for the worse after Dilma Rousseff was impeached and Jair Bolsonaro was elected, as a result of cuts to many welfare program expenses combined with the COVID-19 pandemic, deepening social inequalities in Brazil and bringing back extreme poverty. Data from 2021 shows that 47.3 million Brazilians ended 2021 living in poverty, the highest number of people in poverty in 10 years, and that 20 million people found themselves in a situation of extreme poverty<sup>224</sup> and high food insecurity.<sup>225</sup>

To better understand the levels of social exclusion in Brazil, we need to look at Brazilian’s income and the distribution of different social classes. The *Associação Brasileira de*

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<sup>221</sup> Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 463; and at 98-100.

<sup>222</sup> Simone Bohn et al., "Can conditional cash transfer programs generate equality of opportunity in highly unequal societies? Evidence from Brazil." (2014) 22:51 *Rev Sociol E Política* 111.

<sup>223</sup> Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 143, 357, and 529 to 543. According to March 8th, 2017 conversion rates informed by the Brazilian Central Bank: 1 real Brazil/BRL (790) = 0,427954 Canadian Dollar/CAD (165); 1 Canadian Dollar/CAD (165) = 2,3366997 Real Brazil/BRL (790).

<sup>224</sup> This quoted data considers as extreme poverty living with less than US\$ 1,9, roughly R\$ 10, or less than this amount.

<sup>225</sup> Alexa Salomão, “Pobreza recorde acentua desigualdades no Brasil; veja por estado”, *J Folha São Paulo Online* (25 June 2022), online: <<https://www1.folha.uol.com.br/mercado/2022/06/pobreza-recorde-acentua-desigualdades-no-brasil-veja-por-estado.shtml>>.

*Empresas de Pesquisa* (ABEP - Brazilian Association of Enterprises that do Research) created a classification that is widely used to describe Brazilian social stratification in different classes, based on the Brazilian Economic Classification Criteria mixing and data from the official statistical bodies in Brazil like IBGE, the official agency that collects and organizes information on Brazilians and their living standards (something similar to Statistics Canada). ABEP's classification shows social class classification in Brazil by groups aggregated in social classes A, B1, B2, C,1, C2, and D- E. For example, in 2016 2.9% of the population belonged to social class A and 5.0% to B, while 27% were in the lower strata, classes D and E.<sup>226</sup> In 2022, this distribution remained very similar, with 2.9% of the population in social class A and 27.9% in classes D-E. Still according to ABEP, the average monthly household income for a person in social class A would be R\$ 21,826.74, while in class D-E it would be R\$900.60.<sup>227</sup> In July 2022 in Brazil, the official value for the minimum wage was R\$ 1.212,<sup>228</sup> which meant an income of R\$ 5.51 per hour worked.<sup>229</sup> According to DIEESE, a union institute in Brazil that works with statistics, a minimum wage of R\$ 6,535,40 would be necessary to provide for the basic needs of Brazilian citizens.<sup>230</sup> We can see the discrepancy between the roughly R\$ 900 earned by almost 30%

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<sup>226</sup> ABEP - Associação Brasileira de Empresas de Pesquisa, *Brazilian Criteria 2015 and social class distribution update for 2016* (2016) at 3.

<sup>227</sup> *Ibid* at 3 and 4.

<sup>228</sup> “Salário mínimo de R\$ 1.212 é promulgado”, *Agência Senado* (2 June 2022), online: <[<sup>229</sup> According to a conversion rate checked at the Brazilian Central Bank website on July 5, 2022, R\\$ 5,51 would equal to CAD US\\$ 1,3356. Banco Central do Brasil, \*supra\* note 185.](https://www12.senado.leg.br/noticias/materias/2022/06/02/salario-minimo-de-r-1-212-e-promulgado#:~:text=Foi%20publicado%20no%20Di%C3%A1rio%20Oficial,em%20R%24%201.212%20para%202022.>:~:text=Foi%20publicado%20no%20Di%C3%A1rio%20Oficial,em%20R%24%201.212%20para%202022.></a>; <i>Medida Provisória n. 1901, de 2021</i>, Medida Provisória n. 1901, de 2021 (31 December 2021).</p></div><div data-bbox=)

<sup>230</sup> DIEESE - Departamento Intersindical de Estatística e Estudos Socioeconômicos, “Pesquisa Nacional da Cesta Básica de Alimentos”, (May 2022), online: *DIEESE - Dep Intersind Estat E Estud Socioeconômicos* <<https://www.dieese.org.br/analisecestabasica/salarioMinimo.html>>.

of the Brazilian population and the need for at least R\$ 6,535.40 to cover basic needs.

Based on this data, it is clear that a large group of Brazilians cannot afford basics such as food and housing.

During the Worker's Party government, when public policies were created to reduce poverty, extreme poverty, and food insecurity in Brazil. In 2003, the federal government unified different social aid programs through a single cash transfer program, called *Bolsa Família*. In 2016, 13.8 million families were subscribed to *Bolsa Família* (representing 25% of the poorest in Brazil), providing a supplemental and variable monthly amount of money depending on the economic situation of the household. The program targeted families that lived on less than R\$ 85 per capita monthly income and families with monthly income between R\$ 85 and R\$ 170 per capita that have children between 0 and 17 years old. According to the classification of social classes provided above, these families are located below the classes D-E, which means they are extremely poor and face high levels of food insecurity.

Recipients of *Bolsa Família*, often marginalized people, are likely to have multiple and unstable occupations: men might do small repair jobs, painting, or construction, and recycling is a major source of income.<sup>231</sup> Women often work for different families as maids or nannies and do laundry and ironing as an extra source of income. To supplement this income, they might also sell recyclable garbage (which they collect at the houses where

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<sup>231</sup> In Brazil, 95% of aluminum cans are recycled, and 40% of all plastic and paper is recycled. This data is surprising given that recyclable garbage collection in Brazil is not a well-established policy throughout the territory. As well, collecting garbage to recycle is an exhausting and very unstable source of income, because it depends on what these workers can find. Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 98-306.

they work) and homemade food (snacks, desserts, bread) informally.<sup>232</sup> The women who perform these jobs are usually non-white women coming from the north or north-east to work in the south-east, notably São Paulo and Rio de Janeiro.<sup>233</sup> These women represent a large portion of the Brazilian population: in 2009, 7.2 million workers in the country did some form of domestic work, with 93% of them being women and most of them being black, according to the International Labour Organization: “whereas 21.7 per cent of all employed black women are domestic workers, this was the case for only 13.0 percent of those who were classified as non-black.”<sup>234</sup>

Domestic work in Brazil is widely informal, and it is one of the lowest paid jobs, tending to be very insecure: “less than 30 percent of all domestic workers hold a registered employment contract.” Around 15.3 percent of unregistered workers earn minimum wage.<sup>235</sup> Data from the 2018 PNAD report shows that this scenario has changed very little, with 92% of the 6 million people occupied with paid domestic work being women, of which 63% were black women.<sup>236</sup> Only 10% of women doing domestic paid work are white.<sup>237</sup> In 2020, out of the 4.9 million domestic workers in Brazil, 4.5 million were women and 65.3% of the domestic employees were racialized. Data from IBGE shows that

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<sup>232</sup> Jessé Souza, *A ralé brasileira: quem é e como vive*, 2d ed (Belo Horizonte: Editora UFMG, 2016) at 162.

<sup>233</sup> Helena Hirata, “Care work: A comparison of Brazil, France and Japan” (2016) 13:24 Sur J.

<sup>234</sup> International Labour Organization, *Domestic workers across the world: global and regional statistics and the extent of legal protection* (2013) at 26-27.

<sup>235</sup> International Labour Organization, *Domestic workers across the world: global and regional statistics and the extent of legal protection* (2013) at 74.

<sup>236</sup> 2528: *os desafios do passado no trabalho doméstico do século XXI: reflexões para o caso Brasileiro a partir dos dados da PNAD contínua*, by Luana Pinheiro et al (Instituto de Pesquisa Econômica Aplicada, 2019) at 8, 11 and 12.10.

<sup>237</sup> 2528: *os desafios do passado no trabalho doméstico do século XXI: reflexões para o caso Brasileiro a partir dos dados da PNAD contínua*, by Luana Pinheiro et al (Instituto de Pesquisa Econômica Aplicada, 2019) at 12.

these people were the ones who suffered the most during the pandemic, with significantly higher reductions in paid jobs than the average Brazilian with higher educational levels.<sup>238</sup> Considering the informality, the low wages, and the widespread abuse of workers' rights, women doing domestic work tend to be in highly vulnerable positions, especially if we add to this socio-economic situation the structural racism and sexism that prevails in Brazilian society.

In 2016, 92% of the beneficiaries of *Bolsa Família* were women. This is not surprising because the law privileges women as the recipients of the money (this is a legal requirement). To receive the benefit, women had to participate in some activities and ensure their children did the same. These activities were mostly related to health and education, as a mechanism created by *Bolsa Família* to reverse historical social inequalities and provide the children of vulnerable populations with better opportunities than their parents. For example, pregnant women had to attend prenatal follow-ups and breastfeeding women had to attend health follow-ups for their babies. Children had to have all vaccines up to date, and an 85% of attendance rate at school (75% for students between 16 and 17 years old, an age where teenagers in Brazil are allowed to work as apprentices).<sup>239</sup> In addition to this potential change in social structures in Brazil, *Bolsa Família* was created as a way to reach out to vulnerable families, to make them visible and included in public

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<sup>238</sup> *Síntese de Indicadores Sociais: Uma análise das Condições de Vida da População Brasileira - 2021* (Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística - IBGE, 2021) at 23-25.

<sup>239</sup> Leticia Bartholo, "Bolsa Família e autonomia feminina: O que nos dizem os estudos qualitativos?" (2016) 57 Int Policy Res Brief - Cent Incl Growth.

policies. This was a major shift in all the public policies implemented so far to tackle social inequalities in the country.

Some feminists argued that *Bolsa Família*'s focus on women reinforced traditional gender stereotypes, burdening women with care work, including the work to ensure the fulfilment of the conditions required by the program. Even if reinforcing the role of the housewife and the caregiver, literature indicated that *Bolsa Família*, by providing a steady income to these women, contributed to their empowerment as citizens by establishing their direct relationship with the state, without male mediation. The secure income allowed them to engage more with the local merchants and community, breaking through social isolation,<sup>240</sup> and facilitating the rupture of abusive intimate relationships previously marked by financial dependency on the male partner. In a way, *Bolsa Família* seemed to give these women autonomy and create a space for them to reflect on their lives and their political participation, including impacting how they vote.<sup>241</sup>

Among these other issues (women breaking cycles of domestic violence, more children in school, and more vaccines up-to-date), during the period that the *Partido dos Trabalhadores* (PT - Worker's Party) ruled Brazil (2002 to 2016), the *Bolsa Família* allowed historically marginalized social groups to start engaging with the consumer society through the acquisition of basic goods. At first, consumption focused on very essential products such as food, medicine, and school supplies. Over time, *Bolsa Família* boosted

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<sup>240</sup> Letícia Bartholo, "Bolsa Família e autonomia feminina: O que nos dizem os estudos qualitativos?" (2016).

<sup>241</sup> Walquiria Leão Rego & Alessandro Pinzani, *Vozes do Bolsa Família: Autonomia, dinheiro e cidadania* (São Paulo: Editora Unesp).

consumption of home appliances such as refrigerators, gas stoves (replacing wood operated ovens/stoves), and TVs.<sup>242</sup> This represented a significant market expansion and a challenge for the state when it came to enforcing consumer laws: given the amplification of the consumer market, and consequently, of consumer problems, without an expansion of the state system built to oversee consumer relations in Brazil, the existing bodies often struggled to provide assistance to consumers.

In emerging economies like Brazil, inclusion through consumption complexified debates about the political aspect of consumption in times of neoliberalism. According to Rosana Pinheiro-Machado and Lucia Mury Scalco, data from ethnographic research in Brazil shows that consumption fostered by cash transfer programs empowered unprivileged people in Brazil, encouraging relevant behavioural changes with the potential to disrupt and challenge power and class structures in the country.<sup>243</sup> Therefore, the social inclusion promoted by cash transfer programs transformed consumer relationships in Brazil, including state responses to the problems emerging from these relationships.

Later political and economic and political developments, including Dilma Rousseff's coup d'état<sup>244</sup> and Bolsonaro's election (2018), reversed some of the relevant changes brought by

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<sup>242</sup> For a detailed description on how *Bolsa Família* changed the people's daily life, please see: Walquiria Leão Rego & Alessandro Pinzani, *Vozes do Bolsa Família: Autonomia, dinheiro e cidadania* (São Paulo: Editora Unesp).

<sup>243</sup> Cláudia Lima Marques & Roberto A C Pfeiffer, "Dissemination of Consumer Law and Policy in Brazil: The impact of EU Law" (2022) 45 J Consum Policy 27–48 at 44; Rosana Pinheiro-Machado & Lucia Mury Scalco, "The right to shine: Poverty, consumption and (de) politicization in neoliberal Brazil" (2022) 0 (0) J Consum Cult 1–19; Jesús Martín-Barbero, *Dos meios às mediações: Comunicação, cultura e hegemonia* (Rio de Janeiro: Editora UFRJ, 1997) at 289.

<sup>244</sup> There was and still is a lot of debate around Dilma Rousseff's impeachment, with some deeming it a *coup d'État* and others considering it a regular process followed by Brazilian institutions to remove the president. In my understanding, it was a *coup d'État*, and although her rule deserved critique, the impeachment process was not democratic, despite its appearance of legality. For more on this debate: Danilo Enrico Martuscelli,

*Bolsa Família* and other social programs. Understanding this backlash would take a whole research project in itself, but I notice that with hunger and poverty returning to pre-*Bolsa Família* standards and worsening with the COVID-19 pandemic, consumer relations have shifted again.<sup>245</sup> I see this shift in two areas: i) in consumer behaviour, and (ii) in the work conducted by state institutions to protect consumers. In terms of consumer behaviour, there is a decrease in consumption, since family budgets are much tighter because of the economic crisis and because of nonexistent or very restricted access to basic products like food. As for consumer protection from state institutions, members of the SNDC (in particular the state bodies) tend to focus more on ensuring that basic needs are met and on protecting consumers from abusive practices than on dealing with more abstract demands such as abusive advertising, for example.

*Bolsa Família* changed poor women's lives, but did not transform them in housewives in the terms described by Fraser. The majority of the racialized and unprivileged women in Brazil work in other people's houses as maids and nannies, often in precarious working conditions, performing the majority or the totality of the housework. As discussed later in this chapter, the iconic housewife in Brazilian advertising is white and visually represents professional women, usually from upper classes, who rely on the work of racialized women to support their careers.

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“Polêmicas sobre a Definição do Impeachment de Dilma Roussef como Golpe de Estado” (2020) 14:2 Rev Estud E Pesqui Sobre Américas. Some also claim that Dilma Roussef's impeachment was a mysogenuous procedure. See at: Eleonora Menicucci & Júlia Martim, “Misoginia” in *Enciclopédia Golpe O Pap Mídia* (CLACSO, 2018) 144.

<sup>245</sup> *Ibid.*

Apart from how women are economically located in Brazil, it is important to understand how women are symbolically defined. In Brazilian and Latin American culture, the idea that men and women are “naturally different” has played a powerful role in social organization and cultural representations. These social perceptions, presented as natural, are rooted in values promoted by the Catholic Church in Latin American politics, particularly regarding women’s rights and the “essentialist difference feminism” doctrine proposed by this religious tradition.<sup>246</sup> According to Mala Htun, in this ideology, the woman’s unique place in society is perceived as a consequence of the fact that biologically, she can conceive, and morally, she is inclined to be a mother:

Women are distinct from men and have a unique mission stemming from their reproductive capacity and their roles as mothers. As John Paul II puts it, ‘a woman represents a particular value by the fact that she is a human person, and, at the same time, this particular person, by the fact of her femininity’ (1988:108). Roman Catholic ‘essentialist difference feminism’ justifies gender equality from an essentialist standpoint. Complementary sex differences are constitutive of equality.<sup>247</sup>

This ideology is at the core of Brazilian social structure, resulting in asymmetrical social relations between gendered individuals. Such asymmetries include personal, social, and economic factors: cis-women are expected to be mothers and fulfill such roles, thus reinforcing the obscuring of women’s care work as work. Data from 2019 shows that overall, women spend between 18 to 22 hours per week doing unpaid reproductive or care work, against a weekly average of 12 hours for men.<sup>248</sup> Familyist-oriented values contribute

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<sup>246</sup> Mala Htun, *Sex and State: Abortion, Divorce and the Family under Latin American Dictatorships and Democracies* (New York: Cambridge University Press, 2003) at 31: See also pages 32-33.

<sup>247</sup> *Ibid* at 16.

<sup>248</sup> 2528: *os desafios do passado no trabalho doméstico do século XXI: reflexões para o caso Brasileiro a partir dos dados da PNAD contínua*, by Luana Pinheiro et al (Instituto de Pesquisa Econômica Aplicada, 2019) at 32.

to perpetuating a high tolerance of violence against women in Brazil<sup>249</sup> and severe limitations to women's sexual and reproductive rights, as discussed in the next section.<sup>250</sup>

Together with the social role of a mother comes the role of a housewife, and in opposition to it, the woman with dubious sexual or moral conduct. Within this logic, women are divided into those who get married (*moças de família*) and women whose behaviour deviates from what is defined by a conservative religious morality as appropriate (often called as prostitutes, even if they do not perform sexual work).<sup>251</sup> These strict gendered perceptions, defined through stereotypical gender roles, are also reflected and reinforced in advertising, when products for the household are often advertised to women who are perceived as the primary caregivers of the house and family members, while advertisements for beer, clearly aimed at heterosexual men, focus on hypersexualized women. In my case analysis this tension will emerge as well, particularly when the fact that women are mothers is presented as the major reason for not discriminating against women in advertising.

### **3.1 Violence Against Women in Brazil**

Sexism and racism permeated by patriarchal and archaic values compose the foundational structure of Brazilian society. Although feminist groups have been fighting these structures, they are deeply rooted in Brazilian history and social norms, and as such, they are hard to

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<sup>249</sup> Brazil is one of the most dangerous places for women in the world, holding the 5<sup>th</sup> highest female homicide rate in the world (4.8 homicides in every 100 thousand). Julio Jacobo Waiselfisz, *Mapa da Violência 2015 – Homicídio de Mulheres no Brasil* (Brasília: Flacso Brasil, 2015) at 30.

<sup>250</sup> Tamara Amoroso Gonçalves and Thaís de Souza Lapa, *Aborto e Religião nos Tribunais Brasileiros* [Translation: Abortion and Religion in Brazilian Courts] (São Paulo: PROSARE, 2008) (with Thaís de Souza Lapa) online at: <http://goo.gl/6iUnWW>. See also Marcelo Gomes Sodré, *Formação do Sistema Nacional de Defesa do Consumidor* (São Paulo: Editora Revista dos Tribunais, 2007).

<sup>251</sup> João Manuel Cardoso de Mello & Fernando A Novais, "Capitalismo tardio e sociabilidade moderna" in Lília Moritz Schwarcz, ed, *História Vida Priv No Bras* (Companhia das Letras, 1998) at 610.

change. One might say that there are ongoing changes, but progress is far from being completed. Violence against women is widespread in Brazil and data shows it has reached epidemic levels, particularly during the COVID-19 pandemic as this section discusses.

Brazil has always been an unsafe place for women. In 2012, the country was ranked as one of the most violent in the world with 4.4 murders for every 100,000 women.<sup>252</sup> Over the last 30 years, 91,000 women were killed in Brazil, 43,500 just in the last decade, an increase of 217.6% during that period. Beatings are the most common type of physical violence experienced by women, representing 56% of the cases. Violence against women and domestic abuse was experienced as a repetitive form of violence in 51.6% of the cases. One in five women reported that she had already suffered from violent behaviour perpetrated by a male, known or unknown. Finally, this 2012 report shows that the social perception of violence against women did not match reality: although 91% of the Brazilian population considered that it is wrong to beat women in any situation, data proved that a woman was beaten every two minutes in Brazil.<sup>253</sup>

The 2015 edition of the *Mapa da Violência* reported that in 2013, 4,762 women were murdered in Brazil, and in 50.3% of these cases the crime was committed by a family member, representing 7 feminicides a day for the period. If we consider only the partner or ex-partner of the victim as responsible for the crime, we have 4 female homicides a day.<sup>254</sup>

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<sup>252</sup> Julio Jacobo Waiselfisz, *Mapa da Violência 2012. Os novos padrões da violência homicida no Brasil. Caderno complementar 1: homicídio de mulheres no Brasil* (São Paulo, Instituto Sangari, 2011).

<sup>253</sup> Fundação Perseu Abramo, *Mulheres Brasileiras e Gênero nos Espaços Público e Privado* (Fundação Perseu Abramo, 2010) at 228.

<sup>254</sup> *Mapa da Violência 2015: Homicídio de mulheres no Brasil*, by Julio Jacobo Waiselfisz (Brasília, DF: Faculdade Latino-Americana de Ciências Sociais, FLACSO, 2015) at 70.

There were no later reports from this series to follow up on this data, but according to a joint report published in 2021 by a Brazilian Federal Agency that works with statistics in the country (IPEA), together with non-profit organizations, in 2019, 3,737 Brazilian women were killed,<sup>255</sup> 1,246 of them inside their homes (33% of the total),<sup>256</sup> and 66% of them were black women.<sup>257</sup> The report also showed that from 2009 to 2019, there was an increase of 10.6% in homicides of women.<sup>258</sup> Information collected and organized by the *Forum Brasileiro de Segurança Pública (FBSP- Brazilian Forum for Public Safety)*, a non-profit organization focused on promoting public debate on violence in Brazil,<sup>259</sup> concluded that between March 2020 and December 2021, 2,451 women were killed, resulting in an average of one femicide in Brazil every 7 hours in 2021.<sup>260</sup> Sexual violence is also widespread: 100,398 women and girls were raped during the same period.<sup>261</sup>

The feminist movements in Brazil have historically fought violence against women by bringing it to the centre of the political debate as a public matter, rather than something that needs to be discussed and fixed between the couple, in an expression of the well-known claim that the “personal is political” promoted by second-wave feminism worldwide.

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<sup>255</sup> *Atlas da Violência 2021* (São Paulo, Brazil: Instituto de Pesquisa Econômica Aplicada - IPEA; Fórum Brasileiro de Segurança Pública) ISSN 2764-0361 at 21.

<sup>256</sup> *Ibid* at 41.

<sup>257</sup> *Ibid* at 38.

<sup>258</sup> *Atlas da Violência 2021* (São Paulo, Brazil: Instituto de Pesquisa Econômica Aplicada - IPEA; Fórum Brasileiro de Segurança Pública) ISSN 2764-0361 at 41.

<sup>259</sup> “Fórum Brasileiro de Segurança Pública”, online: *Fórum Bras Segur Pública* <<https://forumseguranca.org.br/>>.

<sup>260</sup> Samira Bueno, ed, *Violência contra Mulheres em 2021* (2022) at 3.

<sup>261</sup> Samira Bueno, ed, *Violência contra Mulheres em 2021* (2022) at 2.

Following trends of fourth wave feminism that expanded activism through social media by using hashtags (#) to promote the visibility of multiple forms of violence women experience (like the #metoo movement),<sup>262</sup> online campaigns in Brazil like #meuprimeiroassedio (#myfirstharassment) and #meuamigosecreto (#mysecretSanta)<sup>263</sup> have become popular on social networks, mostly on Facebook and Twitter. These campaigns demonstrated how permissive Brazilian society is to violence against women, and that such violence permeates our society.<sup>264</sup> In the first case, people were invited to share stories about the first time they suffered any form of harassment, using the hashtag #meuprimeiroassedio (#myfirstharassment). According to Olga,<sup>265</sup> the feminist organization that promoted the campaign, the hashtag was used 82,000 times on Twitter. An analysis of the 3,111 stories shared showed that the average age of first harassment suffered by a woman or girl in Brazil is 9.7 years old.<sup>266</sup> This information is in line with official data from the Brazilian Ministry of Health, which concluded that from 2011 to 2017: “(...) 184,524 cases of sexual violence were reported, of which 58,037 (31.5%) had

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<sup>262</sup> Neema Varghese & Navim Kumar, “Feminism in advertising: irony or revolution? A critical review of femvertising” *Fem Media Stud* at 5.

<sup>263</sup> Harumi Visconti & Bruno Ferrari, “#MeuAmigoSecreto: nova campanha na internet denuncia o machismo do dia a dia”, *Época - Online* (25 November 2015), online: <<https://epoca.globo.com/vida/experiencias-digitais/noticia/2015/11/meuamigosecreto-nova-campanha-na-internet-denuncia-o-machismo-nosso-de-cada-dia.html>>.

<sup>264</sup> Nicole Cristine Baumgarten, *supra* note 210.

<sup>265</sup> “A feminist NGO created in 2013 to empower women through information. The project is a content hub that addresses topics important to the female audience in an accessible manner.” Cf.: OLGA. A Olga. Disponível em: <<https://thinkolga.com/sobre/>>. Acesso em: 28 fev. 2019.

<sup>266</sup> Cláudia Fusco, “Tag #meuprimeiroassédio foi uma das mais buscadas do ano, diz Google”, *Rev Galileu - Online* (17 December 2015), online: <<https://revistagalileu.globo.com/Sociedade/noticia/2015/12/tag-meuprimeiroassedio-foi-uma-das-mais-buscadas-do-ano-diz-google.html>>.

children as victims and 83,068 (45.0%) had adolescents as victims, concentrating 76.5% of the cases reported in these two periods of life.”<sup>267</sup>

The same organization has carried out and continues to work on several other projects and platforms, such as the *Fiu Fiu* Map, an interactive online platform where women can report abuses in public places, share information about perpetrators, and thus protect themselves collectively.<sup>268</sup> Mirrored by the success of the #meuprimeiroassedio (#myfirstharassment) campaign, #meuamigosecreto (#mysecretSanta) emerged spontaneously on social media to expose stories and situations faced by women that revealed close male friends being myogenous or sexist, as a way to show how these macho behaviours tend to be naturalized in Brazilian society. Again, the campaign received criticism and many questioned why these behaviours, if indeed serious charges, were not be formally denounced.<sup>269</sup> However, this type of criticism only reinforces the extent to which some issues are still silenced and normalized, and the fact that the obstacles women face to reporting violence and discrimination are still unacknowledged by the majority of the society.

### **3.2 Feminist Movement in Brazil and its Strategies to Fight Structural Inequality and Gender-based Violence through Social Mobilization, Participation in State bodies, and Strategic Litigation**

Women in Brazil have long been active in fighting for their rights. They have challenged patriarchal institutions as early as the 1880s, when some women worked as teachers,

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<sup>267</sup> Secretaria de Vigilância em Saúde, *Boletim Epidemiológico - Análise da violência sexual contra crianças e adolescentes no Brasil, 2011 a 2017*, v. 49, n. 27 (2018).

<sup>268</sup> Olga, “Mapa Chega de Fiu-Fiu”, online: *Chega Fiu Fiu* <<http://chegadefiufiu.com.br>>.

<sup>269</sup> Harumi Visconti & Bruno Ferrari, *supra* note 271.

writers, and artists, or joined the movement that pressed for the end of the slavery in the country.<sup>270</sup> Women officially gained the right to vote through a national law passed in 1932.<sup>271</sup> During the discussion of the 1934 Constitution, Carlota Pereira de Queiroz was elected to take part in the group proposing the new constitution (amongst 252 male representatives), also being elected as a congresswoman shortly after the Constitution was passed. Women were also engaged in movements against the dictatorships Brazil has faced, taking part in communist movements and other forms of resistance.<sup>272</sup> Patrícia Galvão, known as Pagu, had a key role in defending women's rights and was the first woman to be arrested for political reasons in the twentieth century in Brazil.<sup>273</sup>

In the 1960s, Brazilian women took to the streets to demand daycare and health care services and to protest against the increase in the cost of living.<sup>274</sup> Between 1964 and 1968, their protests focused on the disappearances of their children and partners.<sup>275</sup> During the 1964 dictatorship, women organized themselves into two major groups: one formed by intellectuals, mostly in urban centres like Rio de Janeiro and São Paulo, pushing for broader changes such as re-democratization,<sup>276</sup> and another emerging from grassroots movements and more connected with women's problems in everyday life, such as the lack of daycare

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<sup>270</sup> Maria da Glória Gohn, *Novas Teorias dos Movimentos Sociais*, 5a ed (São Paulo, Brazil: Eições Loyola Jesuítas, 2014) at 137.

<sup>271</sup> Walter Porto Costa, *Voto da Mulher*, 3 edição ed (Brasília: Lexikon, 12AD) 384; Vera Fátima Gasparetto, *A busca por uma cidadania da imagem: organização, lutas e articulação de políticas públicas no Brasil pela Rede Mulher e Mídia* (Mestrado, Universidade Federal de Santa Catarina, 2014) [unpublished] at 43 and 44.

<sup>272</sup> Eva Alterman Blay, "Como as mulheres se construíram como agentes políticas e democráticas: o caso brasileiro" in Eva Alterman Blay & Lúcia Avelar, eds, *50 Anos Fem Argent Bras E Chile* (São Paulo: Editora Universidade de São Paulo, 2017).

<sup>273</sup> *Ibid supra* note 276 at 137.

<sup>274</sup> *Ibid supra* note 278 at 75.

<sup>275</sup> *Ibid supra* note 278 76-77.

<sup>276</sup> Carmen Hein de Campos & Fabiana Cristina Severi, "Violence against women and the feminist critique of Law: a brief analysis of Brazilian academic production" (2019) 10:02 Rev Direito E Práxis 962–990 at 966.

services, the elevated cost of living, and domestic violence.<sup>277</sup> Brazilian activists who were exiled in Mexico, Chile, Cuba, and France started to form coalitions and get organized, using their international experience to significantly change feminism in Brazil.<sup>278</sup> Brazilian women were highly engaged in international events such as the World Conference of the International Women's Year in 1975, which led to an intense and highly qualified training in international human rights law, something that we can see as very present in Brazilian feminist activism today.<sup>279</sup> Eva Alterman Blay observes that feminist activism became widespread in Brazil in this period, despite the perception by some that feminism was somehow restricted to middle and upper class white women and intellectuals.<sup>280</sup> As an example of how in reality women from all social classes were politically engaged, Blay remembers that black women were quite active during the dictatorship, founding important non-profit organizations after the re-democratization, such as Geledés,<sup>281</sup> Fala Preta, and Criola, for example.<sup>282</sup> According to Djamila Ribeiro, Black Feminism expanded in Brazil beginning in the 1980s, although not without struggles for political visibility in the construction of feminist movements and strategies that had white women at their centre, as pointed out by Lélia Gonzáles in Brazil, and Angela Davis and others elsewhere.<sup>283</sup>

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<sup>277</sup> *Ibid supra* note 276 at 140.

<sup>278</sup> *Ibid supra* note 276 at 140-141.

<sup>279</sup> *Ibid supra* note 282 at 967.

<sup>280</sup> *Ibid supra* note 276 at 84.

<sup>281</sup> *Ibid supra* note 276 at 92

<sup>282</sup> Djamila Ribeiro, "Black Feminism for a New Civilizational Framework: A Brazilian perspective" (2016) 13:24 *Sur Int J Hum Rights* 99–103 at 101.

<sup>283</sup> Angela Y Davis, *Women, Race and Class* (New York, USA: Vintage Books - Random House New York, 1983).

As suggested by Carmen Hein de Campos and Fabiana Cristina Severi, the strong connection between left wing political engagement and academic feminism in Brazil resulted in the establishment of studies on women and gender in Brazil focused on fighting social inequalities and political authoritarianism, and on seeking to influence public policies and to promote legal change more actively than in the North America.<sup>284</sup>

In this context, it is not surprising that feminists were highly active during processes of discussion of relevant legal documents, such as the 1988 Brazilian Constitution. Through advocacy work known as the “Lipstick Lobby,”<sup>285</sup> feminists ensured equality between men and women was established as a fundamental right and as a general principle for Brazilian society.<sup>286</sup> Equality in marriage was also regulated in the Constitution, in what many scholars refer to as a process of “constitutionalizing civil law.”<sup>287</sup>

Maria da Glória Gohn observes that during the 1990s, following the tendency of other social movements, feminists started looking for ways to institutionalize their fights through

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<sup>284</sup> *Ibid supra* note 282 at 965-966.

<sup>285</sup> Mala Htun, *Sex and State: Abortion, Divorce and the Family under Latin American Dictatorships and Democracies* (New York: Cambridge University Press, 2003) at 125; Eva Alterman Blay, “Como as mulheres se construíram como agentes políticas e democráticas: o caso brasileiro” in Eva Alterman Blay & Lúcia Avelar, eds, *50 Anos Fem Argent Bras E Chile* (São Paulo: Editora Universidade de São Paulo, 2017) at 88; Lucas Coelho Brandão, *Os movimentos sociais e a Assembléia Nacional Constituinte de 1987-1988: entre a política institucional e a participação popular* (Mestrado, 2011) [unpublished] at 95, 125, 138-139 and 164; Vera Fátima Gasparetto, *A busca por uma cidadania da imagem: organização, lutas e articulação de políticas públicas no Brasil pela Rede Mulher e Mídia* (Mestrado, Universidade Federal de Santa Catarina, 2014) [unpublished] at 45.

<sup>286</sup> Mala Htun, *Sex and State: Abortion, Divorce and the Family under Latin American Dictatorships and Democracies* (New York: Cambridge University Press, 2003) at 124-125; Eva Alterman Blay, “Como as mulheres se construíram como agentes políticas e democráticas: o caso brasileiro” in Eva Alterman Blay & Lúcia Avelar, eds, *50 Anos Fem Argent Bras E Chile* (São Paulo: Editora Universidade de São Paulo, 2017) at 88.

<sup>287</sup> Fernando Horta Tavares et al, “Apontamentos para o reconhecimento das uniões homossexuais face ao paradigma do Estado Democrático de Direito” (2010) 6:2 Rev Direito GV São Paulo 443–468; Maria Celina Bodin de Moraes, “A constitucionalização do direito civil e seus efeitos sobre a responsabilidade civil” (2006) 9:29 Rev Direito Estado E Soc 233–258.

the establishment of non-profit organizations. As a result, organizations created and coordinated by women spread all over the country, in the different social classes. Women engaged in institutional politics through their work in feminist organizations, pushing for change and obtaining success in ensuring their demands were incorporated in unions' platforms and political parties, public policies, and legal documents (laws and treaties) both at the national and international levels, as occurred during the Beijing Conference in the 1990s.<sup>288</sup>

According to Gohn, it is from the 1990s onwards that the relationships between social movements and states shifted, with the displacement of the centre of political action from civil society to state bodies, particularly at the federal level.<sup>289</sup> This is exactly what happened in Brazil with the creation of three ministries as autonomous federal bodies, with independent budgets to promote and implement policies focused on promoting human rights, women's rights, and racial equality. Many activists from the black and feminist movements in Brazil joined those bodies as public servants, in a movement called by Lúcia Avelar "State Feminism."<sup>290</sup>

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<sup>288</sup> *Ibid supra* note 276 at 142-143; Vera Fátima Gasparetto, *A busca por uma cidadania da imagem: organização, lutas e articulação de políticas públicas no Brasil pela Rede Mulher e Mídia* (Mestrado, Universidade Federal de Santa Catarina, 2014) [unpublished] at 45.

<sup>289</sup> *Ibid supra* note 276 at 13.

<sup>290</sup> Flávia Rios, "A cidadania imaginada pelas mulheres afro-brasileiras: da ditadura militar à democracia" in Eva Alterman Blay & Lúcia Avelar, eds, *50 Anos de Feminismo: Argentina, Brasil e Chile* (São Paulo: Editora Universidade de São Paulo, 2017) at 245. On processes of institutionalization of other social movements, see also: Carlos Henrique Demarchi & Maria Teresa Miceli Kerbauy, "Ações do FNDC no debate sobre a democratização da comunicação: breves apontamentos" (2017) 18:37 *Comun Inov - PPGCOMUSCS* 119–132 at 121.

At the federal level, these three state bodies were created in 2003: the SEPPIR (*Secretaria Especial de Políticas de Promoção da Igualdade Racial* – Special Secretariat for Racial Equality Policies Promotion – SEPPIR),<sup>291</sup> the Special Secretariat for Human Rights, and the Special Secretariat to Promote Women’s Policies (SPM – *Secretaria de Políticas para as Mulheres*).<sup>292</sup> The creation of the ministries of SEPPIR and SPM are intertwined: the first person to be appointed as the head of SEPPIR was Matilde Ribeiro, a social activist connected with both the feminist and the black movements. SEPPIR had 5 ministers, 3 of them being women. These two state bodies were relevant spaces for social movements to engage with state policies and they were particularly open to the feminist and black movements’ participation.<sup>293</sup> Social movements engaged with state bodies mostly through public consultations, representation in National Councils, and in National Conferences, each of which are ways to amplify social participation in the definition of public policies and guidelines for the government to act in protecting the rights of vulnerable groups. There were problems in terms of representation and also challenges regarding the actual implementation of public policies, but at least there were spaces for engaged discussion, assigned budgets, and state structures to enforce them.

In 2017 a new presidential decree extinguished these independent ministries and created the Human Rights Ministry, incorporating within its structure and responsibilities the activities that were once SEPPIR’s and SPM’s.<sup>294</sup> The special bodies responsible for gender equality

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<sup>291</sup> *Decreto n. 7261*, 7.261 (12 August 2010) at 621.

<sup>292</sup> *Lei n. 10.683*, 10.683 (28 May 2003).

<sup>293</sup> *Ibid supra* note 299] at 46.

<sup>294</sup> *Decreto n. 9.122*, 9.122 (9 August 2017).

and racial equality lost their independence, autonomy, and budgets (now subsumed to the Human Rights Ministry), as well as their capacity to operate.

With Bolsonaro's election in 2019, this structure changed once more into the "Ministry of Women, the Family, and Human Rights" (*Ministério da Mulher, da Família e dos Direitos Humanos*),<sup>295</sup> with Damares Regina Alves, an evangelical minister, appointed as minister from 2019 to 2022.<sup>296</sup> Upon her appointment, she declared that a "New Era" was about to begin in Brazil, where boys would dress in blue, and girls, in pink,<sup>297</sup> in a reference to the need to make sure "boys are boys" and "girls are girls." Along these lines, the former minister declared in 2019 that it was necessary to teach boys to offer flowers to and open doors for women and girls, as a way to fight domestic violence. She also promoted a campaign to teach beauty professionals to identify signs of domestic violence.<sup>298</sup> Under Damares and her successor, the new ministry merged policies for women and human rights with policies aimed to the "family." Family is used in the singular to align with extreme right and very conservative groups that support Bolsonaro who insist that only one kind of family is legitimate, the one composed of a mother, a father, and their children, in a depiction of what would be the "traditional" family. The merging of policies focused on protecting women and the family, in the same state body, also seeks to obscure feminist claims that the house and the family are not safe spaces for women and girls. This is a

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<sup>295</sup> *Lei n. 13.844, de 18 de junho de 2019.*, 13.844 (2019).

<sup>296</sup> Camila Brandalise, "Nova ministra de Mulheres é pastora, foi abusada e tem filha indígena", *Universa - UOL Online* (6 December 2018).

<sup>297</sup> G1, "Em vídeo, Damares diz que 'nova era' começou: 'meninos vestem azul e meninas vestem rosa'", *Portal G1* (3 January 2019).

<sup>298</sup> "Vamos ensinar os meninos a levar flores e abrir porta para as mulheres, diz Damares.", *Folha São Paulo - Online* (8 March 2019), online: <<https://www1.folha.uol.com.br/cotidiano/2019/03/vamos-ensinar-os-meninos-a-levar-flores-e-abrir-porta-para-as-mulheres-diz-damares.shtml>>.

backlash against at least 5 decades of feminist activism in Brazil represented in a single linguistic change.

In terms of political action, Gohn calls our attention to how women's fights in Brazil have been split into two different groups, who take different forms of action: the feminist movement, and the women's movement. According to her, feminists are academics and women engaged in political processes (institutional politics, via political parties or participating in the discussion and definition of public policies and international articulations), while in the women's movement, we see women founding and engaging with grassroots movements, in which the gendered perspective is not always present.<sup>299</sup> Either in more high level politics or in grassroots ones, women in Brazil have been very engaged in fighting for their rights and for change in a highly hierarchical, sexist, patriarchal, and racist society. One of the ways they have been very active is through strategic litigation.

Strategic litigation, internationally or nationally, has been a key approach used by the Brazilian feminist movement. Even if it is not possible to solve all social problems through litigation strategies, due to the limited role of the judiciary and litigation strategies themselves, litigation still has a relevant role and can result in fruitful societal changes.

Litigation has been used to push for new interpretations of existing law, promote recognition of rights, or demand the implementation of rights.<sup>300</sup>

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<sup>299</sup> *Ibid supra* note 276 at 142-143.

<sup>300</sup> Judy Fudge & Brenda Cossman, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 408.

In cases that are of interest to a larger community, and where the decision can potentially affect a collectivity of individuals, strategic litigation can be a useful tool to press for social change and law enforcement. In Brazil, the feminist movement is highly engaged with strategic litigation both at the national and international levels, and focuses broadly on topics related to violence against women and sexual and reproductive rights (here included are abortion issues and sex education).<sup>301</sup>

A good example of successful litigation in the field of violence against women is the approval of the Maria da Penha Law in Brazil, which resulted in strategic litigation before the Inter-American Human Rights System, but also reflects demands articulated by feminists since at least the 1970s.<sup>302</sup> The feminist movement, represented by CLADEM/Brazil, in partnership with CEJIL, proposed the case to the Inter-American Commission on Human Rights. Maria da Penha had suffered severe violence by her ex-husband (and was almost killed twice). The case took a very long time to be processed by the Brazilian courts, and after the Inter-American Commission decision her husband was finally convicted.

Law 11.340/06,<sup>303</sup> known as the “Maria da Penha Law” (MPL), is a landmark victory for women’s rights in Brazil because it provides a legal framework to address gender-based

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<sup>301</sup> Alba Ruibal, “Feminismo frente a fundamentalismos religiosos: mobilização e contra-mobilização em torno dos direitos reprodutivos na América Latina” (2014) 14 *Rev Bras Ciênc Política* 111–138; Alba Ruibal, “Social movements and constitutional politics in Latin America: reconfiguring alliances, framing and legal opportunities in the judicialization of abortion rights in Brazil” 10:4 *Contemp Soc Sci* 375–385; Tamara Amoroso Gonçalves & Thaís de Souza Lapa, *Aborto e Religião nos Tribunais Brasileiros* (São Paulo: Ipê - Instituto para a Promoção da Equidade/ Comissão de Cidadania e Reprodução, 2008).

<sup>302</sup> *Ibid supra* note 282 962–990 at 978.

<sup>303</sup> *Lei Maria da Penha*, 11.340/06 (7 August 2006).

domestic violence.<sup>304</sup> Its approval resulted from intense and consistent feminist activism over the years (activism that was intensified after the end of the dictatorship),<sup>305</sup> combined with the sanction imposed by the Inter-American Commission on Human Rights (IACHR) upon Brazil in the case of *Maria da Penha vs. Brazil*. This was the first case in which the Commission ever applied the Belém do Pará Convention.<sup>306</sup> In a 2008 report, the United Nations Development Fund for Women (UNIFEM) acknowledged that the MPL represents “the culmination of a longstanding campaign pushed by women’s organizations in partnership with national, regional and international organisations, such as the Inter-American Commission of Human Rights.”<sup>307</sup> Public policies were created to address gender-based domestic violence throughout the country, in attention to the IACHR’s decision and feminist activism at the national level, more intensely during the years that SPM was functioning as an independent Ministry.

The MPL changes the criminal treatment of domestic and family violence against women in Brazil significantly, contributing to “channel public policies and also as an instrument of social transformation built on the theories and practices of the feminist movement that draws inspiration from the movements for legislative changes and public policies

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<sup>304</sup> CLADEM: *Caso Maria da Penha, Brasil (violência doméstica contra as mulheres)*, <<http://cladem.org/po/nossos-programas/litigio/litigios-internacionais/11-sistema-interamericano-de-direitos-humanos-oea/21-caso-maria-da-penha-brasil-violencia-domestica-contra-as-mulheres>>.

<sup>305</sup> Eva Alterman Blay, *Assassinato de Mulheres e Direitos Humanos* (São Paulo: Editora 34, 2008); Wânia Pasinato, “The Maria da Penha Law: 10 years on: What Do We Celebrate?” (2016) 24:24 *Sur J* 155–163.

<sup>306</sup> Tamara Amoroso Gonçalves, *Direitos Humanos das Mulheres e a Comissão Interamericana de Direitos Humanos* (São Paulo: Editora Saraiva, 2013) at 244; Programa de Litígio, CLADEM, *Sistematização de experiências em litígio internacional* (2009); CENTRO PELA JUSTIÇA E DIREITO INTERNACIONAL, “Los desafíos para la protección de los derechos de las mujeres y las niñas en el sistema interamericano”, (2002) at 2; *Maria da Penha, Brazil*, online: CEJIL - Centro por la Justicia y el Derecho Internacional website <<https://cejil.org/en/cases/maria-da-penha>>.

<sup>307</sup> UNIFEM, *O Progresso das Mulheres do Mundo 2008/2009: Quem responde às Mulheres? Gênero e Responsabilização* (2008) at 76.

addressing rights for women in the international context.”<sup>308</sup> The law is the first one to explicitly address gender inequality as the underlying cause of violence against women, and recognizes multiple forms of violence against women, defined by the law as a form of human rights violation. Here we see how the feminist movement was able to claim state protection for violence that happens within intimate relations, thus pushing for new boundaries for the public/private divide within the law. Also, as Carmen Hein de Campos and Fabiana Cristina Severi observe, after the approval of the Maria da Penha Law, legal discussions from a gender perspective became more frequent in Brazil, promoting an expansion in the debates about the dimensions of gender-based violence.<sup>309</sup>

The MPL is only applicable when offences take place within intimate relationships. Even if the law amplifies the concept of family relations (extending protection to dating and less stable relationships), it is limited to this intimate circle. Recently, protection was extended to trans women<sup>310</sup> and to female domestic workers, in the case of the latter, as a protection against employers.<sup>311</sup> This means that violence against women perpetrated outside this framework is not encompassed by the measures defined by the MPL. In addition, the MPL faces many challenges regarding its implementation, including the lack of consistent training for public servants who work within the justice system, such as lawyers, judges,

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<sup>308</sup> Wânia Pasinato, “The Maria da Penha Law: 10 years on: What Do We Celebrate?” (2016) 24:24 Sur J 155.

<sup>309</sup> *Ibid supra* note 282 at 980.

<sup>310</sup> Recently, MPL protection was granted to trans-women. According to STJ decision: STJ, “Lei Maria da Penha é aplicável à violência contra mulher trans, decide Sexta Turma”, (6 April 2022), online: *Institutional - Super Trib Justiça STJ* <<https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/05042022-Lei-Maria-da-Penha-e-aplicavel-a-violencia-contra-mulher-trans--decide-Sexta-Turma.aspx>>.

<sup>311</sup> Iáris Ramalho Cortês & Myllena Calasans de Matos, *Lei Maria da Penha: do papel para a vida. Comentários à Lei 11.340/2006 e sua inclusão no ciclo orçamentário* (Brasília: CFMEA - centro Feminista de Estudos e Assessoria, 2007).

and police officers.<sup>312</sup> Besides, the necessary connections between violence against women and sexual and reproductive rights are not always addressed or dealt with by the Brazilian State. For example, abortion is illegal in Brazil in most cases, but it is allowed in pregnancies that result from sexual violence. Even though abortions in such cases have been permitted since 1940, the majority of states and cities do not have the facilities to provide legal abortion services to women. Only 37 health clinics offer this service to women, in a country with more than 5,000 cities.<sup>313</sup> These services are also often concentrated in big urban areas, leaving women in more remote areas under-served.<sup>314</sup> Considering the limited access to abortion services, feminist groups in Brazil have also been contributing to supporting women and girls in obtaining legal abortions.

On the national level, strategic litigation is also a powerful tool: at least three cases submitted by groups engaged with feminist articulations to the Supreme Court in Brazil discuss legalizing abortion in Brazil,<sup>315</sup> displacing the blocked debate on the topic in the

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<sup>312</sup> Wânia Pasinato, “The Maria da Penha Law: 10 years on: What Do We Celebrate?” (2016) 24:24 Sur J 155; Marilda de Oliveira Lemos, *Alívio e Tensão: um estudo sobre a interpretação e aplicação da Lei Maria da Penha nas Delegacias de Defesa da Mulher e Distritos Policiais da Seccional de Polícia de Santo André - São Paulo* Universidade de São Paulo - Faculdade de Filosofia, Letras e Ciências Humanas, 2010) [unpublished].

<sup>313</sup> L. Formenti. *Cai número de locais que fazem aborto legalizado*. Oct. 29<sup>th</sup> 2015. Available at: <<http://agenciapatriciagalvao.org.br/direitos-sexuais-e-reprodutivos/cai-numero-de-locais-que-fazem-aborto-legalizado/>>

<sup>314</sup> Tamara Amoroso Gonçalves, ed, *Relatório Alternativo para a Terceira Rodada de Avaliação Multilateral - Mecanismo de Monitoramento da Convenção de Belém do Pará* (CLADEM/Brazil, 2016).

<sup>315</sup> Supremo Tribunal Federal Plenário, Brasília, 12 April 2012, Argüição de Descumprimento de Preceito Fundamental - ADPF 54 online: Supremo Tribunal Federal (STF), *Inteiro teor do Acórdão, ADPF 54* (Supremo Tribunal Federal (STF, Brazil), 2012).<<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>>; Supremo Tribunal Federal Plenário, Brasília, Argüição de Descumprimento de Preceito Fundamental - ADPF 442 online: <<http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=5144865>>, and Supremo Tribunal Federal Plenário, Brasília, Ação Direta de Inconstitucionalidade - ADI 5581 online <<http://www.stf.jus.br/portal/processo/verProcessoDetalhe.asp?incidente=5037704>> .

Congress to the Supreme Court. One of them, the ADPF 54, was successful in broadening the permissions for legal abortion in Brazil by including cases of anencephaly.

In Brazil, feminist groups have also been engaging with debates on democratizing the media (by discussing the process of public concessions of television channels),<sup>316</sup> and representation and misrepresentation within the media. Here we can see at least two central demands: one for more participation and one for better representation in media. As pointed out by Vera Fátima Gasparetto, the organization of feminist groups around the issues on media and cyber-activism focus on challenging both economic structures, represented by media corporations, and symbolic structures that show women in very strict and limited ways.<sup>317</sup>

From at least the 2000s onward, national feminist networks like *Rede Mulher e Mídia* (RMM) started to promote discussions about sexist advertising in Brazilian society in a more consistent way, either through litigation or public debate. Reaching out to the SPM and to the market, this group sought to create mechanisms to oversee the media market to ensure that no violation to human rights is committed through mediatic messages.<sup>318</sup> This is a very important point: when presenting formal claims to authorities regarding sexist

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<sup>316</sup> In the Brazilian legal system, public concessions are temporary permissions granted by the state to certain private operators to commercially exploit limited public interest assets - such as transport systems (roads, subways and trains), or communication vehicles (radio or television stations in certain bands of the electromagnetic spectrum in a specific location). These concessions should observe specific regulations derived from the Constitution to guarantee access and quality of these services for the population. Thus, television stations that are public concessions need to guarantee that their programming has a minimum quality, defined in regulation, which governs their advertising, news, educational and entertainment production. Therefore, it is from this point of view that feminists contest sexist advertising in Brazil.

<sup>317</sup> *Ibid supra* note 299 at 57.

<sup>318</sup> *Ibid supra* note 299 at 25-26.

advertising, Brazilian feminists tend to frame sexist advertising as a form of discrimination that offends fundamental human rights and consequently violates the international human rights treaties signed by Brazil: the Convention on the Elimination of All Forms of Discrimination against Women or/and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

Vera Gasparetto observes that feminist activism around media peaked in Brazil between March 2009 and January 2011, when the RMM was officially formed and started to get organized through the cyber-space and congregated strategies for cyber-activism: a website was created, a blog,<sup>319</sup> and an e-mail group list to facilitate debates.<sup>320</sup> It was also in this period that the discussion of media gained *momentum* in Brazil, when the federal government called for the National Conference on Media,<sup>321</sup> scheduled to take place in Brasília on December 2010.<sup>322</sup> Unlike others, the National Conference on media was held only once. From 2020 onward, no more National Conferences were held by the Brazilian government, since the president, Jair Bolsonaro, revoked all the previous decrees on National Conferences and ended this form of participatory engagement in the definition of public policies for Brazilian civil society.<sup>323</sup>

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<sup>319</sup> Claudinha, “Nasce a Rede Mulher e Mídia: grupo de trabalho propõe criação de rede nacional”, (22 October 2009), online: *Dialógico* <<http://dialogico.blogspot.com/2009/10/nasce-rede-mulher-e-midia.html>>.

<sup>320</sup> *Ibid supra* note 299 at 57.

<sup>321</sup> Carlos Henrique Demarchi & Maria Teresa Miceli Kerbauy, “Ações do FNDC no debate sobre a democratização da comunicação: breves apontamentos” (2017) 18:37 *Comun Inov - PPGCOMUSCS* 119–132 at 126-129.

<sup>322</sup> *Decreto n.16 de Abril de 2009: Convoca a 1a Conferência Nacional de Comunicação - CONFECOM*, Decreto 16 (16 April 2009) at 16.

<sup>323</sup> *Decreto n. 10.346, de Maio de 2020*, Decreto n. 10.346 (11 May 2020) at 34.

The RMM connects activists and institutions at the local, regional, and federal levels, mostly online but with a couple of in-person or hybrid meetings.<sup>324</sup> Gasparetto also points out that the members of this network circulate between state institutions and non-state institutions easily, acting in different ways: public claims/ denouncing cases of human rights violation within the media, mediation, and protests,<sup>325</sup> she also acknowledges that this group (RMM) seeks to face the tensions between the latent fear of censorship in Brazilian society and women's fundamental rights.<sup>326</sup> As Gasparetto has demonstrated, by protesting against sexist advertising in different situations, the RMM has pushed for debates in Brazilian society regarding the right to non-discrimination and objectification in advertising and freedom of expression by the market.<sup>327</sup> The RMM also engaged with the United Nations, reaffirming the international character of the Brazilian feminist movement by presenting a report to the United Nations Special Rapporteur on Freedom of Expression Frank la Rue, in 2012. In this document, RMM claimed that the Brazilian media did not respect women's fundamental rights, by promoting violence against women and the marketization of women's bodies, when focusing on stereotypical and non-diverse images of women, in contrast to the Brazilian reality.<sup>328</sup> The Brazilian feminist activism, by using the human rights framework to address these issues have been contributing to broaden the discussion on gender representation in consumer societies, marking it as a relevant political site of action and inspiring other social groups to fight for better representation in

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<sup>324</sup> *Ibid supra* note 299 at 58.

<sup>325</sup> *Ibid supra* note 299 at 58.

<sup>326</sup> *Ibid supra* note 299 at 80.

<sup>327</sup> *Ibid supra* note 299 at 112-113; 117-119; 126-127; 137-139; 141-143; 147-150; 161-166.

<sup>328</sup> *Ibid supra* note 299 at 159-161.

advertising in Brazil and elsewhere. The idea that misrepresentation in advertising can be a human rights issue, grounded in international human rights treaties, as defended by Rachel Moreno, CEPIA, CLADEM, and Instituto Patrícia Galvão (feminist and institutions that worked in my case analysis) in their submissions related to the *Skol* Summer Muse Campaign, seems to fit with the way the many sectors of the Brazilian feminist movement have been operating over the years: by using international law to deal with national agendas through strategic litigation. This pathway could be used by social movements in other countries that have ratified the same international treaties, such as the CEDAW Convention or the Belém do Pará Convention.

On the national level, while other laws on violence against women in Latin America take a broader perspective to include institutional violence and violence within the media as forms of violence against women, the Maria da Penha Law is more restricted in its reach,<sup>329</sup> though it still addresses the issue. The Maria da Penha Law, despite focusing on criminal policies, establishes in its article 8 the need to promote changes within the social and cultural background,<sup>330</sup> recognizing the role of media in perpetuating violence against women in Brazil, and determines that public policies related to fighting violence against women must avoid gender stereotypes:

Article 8. The public policy aimed at restraining domestic and family violence against women will be implemented by means of an integrated set of actions by the Federal Union, the States, the Federal District and the

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<sup>329</sup> See for example, Argentinian Law, *Ley 26.485*, 26.485 (1 April 2009).

<sup>330</sup> Special Secretariat for Women's Policies Presidency of the Republic, *Maria da Penha Law n° 11.340 of August 7, 2006 Retrains domestic and family violence against Women, 2006*, (Brasília, Special Secretariat for Women's Policies Presidency of the Republic, 2006), online: <<http://www.compromissoeatitude.org.br/wp-content/uploads/2012/08/SPMlawmariapenha2006.pdf>>.

Municipalities and non-government actions, according to the following guidelines:

III - respect, in the social communication media, for the ethical and social values of the person and the family, avoiding stereotyped roles that legitimize or encourage domestic and family violence, in compliance with item III of article 1, item IV of article 3 and item IV of article 221 of the Federal Constitution.<sup>331</sup>

Feminist groups and individuals, whether through the RMM or not, often discuss sexist advertising as one more example of the general discrimination women suffer within the media.<sup>332</sup> Even if consumer law provides a general framework for advertising in Brazil, the feminist movement does not seem to explore consumer law or options from the National Consumer System when contesting possible sexist advertising. In this context, I argue that article 8 of the MPL could be used to support strategic litigation proposed by the feminist movement in Brazil, in cases where sexist advertising is discussed, promoting an intensification of the litigation strategies within the state bodies that oversee consumer law and combining the consumer law legislation with specific laws on women's rights as a way to foster fruitful debates on gender equality in capitalist societies.

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<sup>331</sup> Special Secretariat for Women's Policies Presidency of the Republic, *Maria da Penha Law n° 11.340 of August 7, 2006 Retrains domestic and family violence against Women, 2006*, (Brasília, Special Secretariat for Women's Policies Presidency of the Republic, 2006), online: <<http://www.compromissoeatitude.org.br/wp-content/uploads/2012/08/SPMlawmariapenha2006.pdf>>.

<sup>332</sup> *Ibid supra* note 299 at 112-113; 117-119; 126-127; 137-139; 141-143; 147-150; 161-166.

## Chapter 4: Legal Responses to the Economic and Political Development of the Brazilian Consumer Society

In this chapter I discuss how law in Brazil has changed to accommodate the needs of an emergent consumer society. I demonstrate how the process to approve a consumer law in Brazil has had its unique pathway, pushed by social mobilizations after the end of the 1964 dictatorship and emerging in a context of economic crisis rather than abundance. The approval of a consumer law is tied to the 1988 Constitution, which frames consumer rights as fundamental rights and place human rights in a privileged position within the Brazilian state structure.

I also present general information on the *Consumer code* and on how it accommodates collective responsibility through the category of collective and diffuse rights, focusing on the Code of Consumer Defense and Protection (Law n. 8078/90,<sup>333</sup> referred to in this work as “*Consumer Code*”). I then describe the state institutions that were created to enforce consumer law in Brazil. While the first topic (collective responsibility in consumer society) is relevant for the field of legal theories and for consumer law theory, the latter (structure of the bodies that enforce consumer law in Brazil) is important to better understand how the feminist movement has and could access such structures to promote debates about sexist advertising.

Next, I highlight advertising regulation in Brazil, and discuss sexist advertising as a human rights issue, connecting consumer law and international and national norms on human

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<sup>333</sup> *Lei Federal n° 8.078 de 11 de setembro de 1990*, DOU, 12 September 1990. online: PROCON Rio de Janeiro <[http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC\\_Novembro\\_2014\\_Ingles.pdf](http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf)>.

rights and discrimination enforced in the country. I end this chapter by describing the self-regulatory initiatives put in place by Brazilian markets to deal with sexist advertising.

#### **4.1 Locating the debate: The End of the Dictatorship in Brazil, Social Movements and the New Constitution, the Development of Consumer Society, and Legal Tools to Address Collective Problems Associated with Consumption**

Brazil had a late economic development and delayed transformation into a consumer society, which happened around the end of the 1970s and 1980s, after the end of the 1964 dictatorship period.<sup>334</sup> While literature covering industrialization in Brazil from an economic perspective is abundant, there is relatively little scholarship covering the development of consumer society alone or focusing on the connections between the legal system and socio-economic developments.<sup>335</sup> Literature on consumer society and consumerism is a developing field in Brazil,<sup>336</sup> mostly emerging from the social sciences (sociology and anthropology) and marketing.<sup>337</sup>

My research considers the post-1985 dictatorship period as key historical background to the definition of human rights and consumer law in Brazil. The 1964–1985 dictatorship

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<sup>334</sup> *Supra* note 250 at 55.

<sup>335</sup> Aron Belinky, *Consumo, Cidadania e a Construção da Democracia no Brasil Contemporâneo: Observações e reflexões sobre a história do Idec* (Masters, Faculdade Getúlio Vargas (FGV/EAESP), 2010) [unpublished] at 12.

<sup>336</sup> Livia Barbosa, *Sociedade de consumo*, 4th ed, Ciências Sociais Passo a Passo 49 (Rio de Janeiro: Zahar, 2014) at 58.

<sup>337</sup> Since 2003, a research group, called *Estudos do Consumo* (Consumption Studies) have been agglutinating and fostering research on consumption studies in Brazil. The researches in charge hold annual conferences and in 2012 decided to create a bi-annual Portuguese-Brazilian online Journal entitled Consumption, Culture and Society (<<http://www.estudosdoconsumo.com.br/wp-content/uploads/2010/10/Lancamento-Versao-Final-Ingles-Consumption-Culture-and-Society-29-08-2012-21.pdf>>). Focusing in law, the *Revista Luso-Brasileira de Direito do Consumo* has been publishing on Brazilian and Portuguese consumer law since 2011, but this is a more technical legal publication, that focuses more on the consumer law, law development and change than in the connections between consumer society and law.

delayed the development of an independent consumer movement, even if some strategies to protect consumer rights in Brazil were in place as early as 1976, mostly due to the chaotic economic situation faced by the country. This late consumerist development<sup>338</sup> was aligned with neoliberal politics implemented at the end of the dictatorship in Brazil.<sup>339</sup>

In Brazil, liability for collective damages emerging from mass production is addressed by collective rights, which encompasses three different categories that are presented in more detail in this chapter. For my dissertation, the idea of diffuse rights, consolidated by the *Consumer Code*, is a key legal concept to addressing social harm caused by sexist advertising. The social mobilizations that led to the approval of a Brazilian Consumer law, and how this process is tied to the definition of consumer rights as fundamental rights, is presented in this chapter. I also provide key information on consumer protection legislation in Brazil, focusing on advertising regulations and emphasising concepts related to diffuse rights that provide support to address sexist advertising as an illegal practice in Brazil.

#### **4.1.1 Political and Economic Background**

The military government, which prevailed for 21 years, silenced many social demands and social movements with violent repression,<sup>340</sup> and deemed social movements illegal, as many fought against the regime. Coordinated resistance to the official politics united most

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<sup>338</sup> *Supra* note 250.

<sup>339</sup> Lucas Massimo Tonial Antunes de Souza, *A implantação das reformas neoliberais no Brasil na década de 1990: a produção das revistas "Economia e Sociedade" e "Dados" em debate* (DCL Thesis), Universidade estadual de Campinas, Instituto de Filosofia, Letras e Ciências Humanas, 2012; Brasílio Sallum Jr, "O Brasil sob Cardoso: neoliberalismo e desenvolvimentismo" (2000) 11(2):23-47 *Revista Tempo Social, Rev. Sociol. USP, S.Paulo*; Luiz Carlos Bresser-Pereira and Daniela Theuer, "Um Estado novo-desenvolvimentista na América Latina?" (2012) 21, Número Especial, 811-29, *Economia e Sociedade*, Campinas.

<sup>340</sup> Djalma Eudes Santos, "Sobre as possibilidades de ação política na esfera do consumo" (2014) 26 *Psicologia & Sociedade* 201 at 205.

of the calls from social movements in a shared agenda against the regime. It was a period of brutal violence,<sup>341</sup> with extensive use of torture, enforced disappearances, censorship, and other crimes committed to support the military group in power.<sup>342</sup>

The severe human rights violations that occurred during the dictatorship generated a trauma that is still being digested by Brazilian society, which has, as of 2022, not yet gone through a process of transitional justice. Violations perpetrated during the dictatorship were not punished and some topics, like any form of media regulation, became taboo. As a consequence, Brazilian society has a latent collective fear of any media regulation, immediately identifying it with censorship.<sup>343</sup> It was not until 2012 that a National Committee to be established to investigate crimes that happened under dictatorial regimes in Brazil (1946 to 1988).<sup>344</sup> Known as the “National Truth Commission,” the first report was published in 2014 and concluded that many common crimes committed during the dictatorship, notably illegal detention, torture, executions, and forced disappearances, persist even now, in part because these crimes were never acknowledged and punished.<sup>345</sup>

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<sup>341</sup> AI-5, a new law approved by the military government that profoundly changed the constitutional system in Brazil. Due to these changes, some authors consider it to create a new constitutional order.

<sup>342</sup> Elio Gaspari, *A Ditadura Envergonhada* (São Paulo: Companhia das Letras, 2002).

<sup>343</sup> Ivan Paganotti, *Ecos do Silêncio: Liberdade de Expressão e Reflexos da Censura no Brasil Pós Abertura Democrática* (Doutorado, Universidade de São Paulo, 2015) [unpublished] at 37 and at 149.

<sup>344</sup> *Lei 12.528/2011*, 12.528 (18 November 2011); Brazil experienced more than one dictatorship, but in this research, I am focusing on the period from 1964 to 1985. In 1959, Jânio Quadros, the president at the time, renounced to the Presidency. His successor, João Goulart, was on an official visit to China at the time and debates were raised in the country, as the military high hierarchy tried to forbid him to come back to Brazil due to what they called a matter of national security. In 1961 João Goulart took office of the Presidency in a Parliamentary System, a fragile political and institutional agreement. This instability, allied with the more Left-Wing positions defended by João Goulart, opened the door for the Coup d'État in 1964. Boris Fausto, *História do Brasil*, 13th ed (São Paulo: Editora Universidade de São Paulo, 2008) at 442-443.

<sup>345</sup> José Carlos Dias et al., *Comissão Nacional da Verdade - Relatório, Vol. I* (Comissão Nacional da Verdade, 2014) at 964.

Ivan Paganotti argues that this continuity of authoritarian practices is not restricted to the more traditional and violent ones, such as torture and forced disappearances, but also affects the domain of freedom of expression, often supported by judicial decisions. According to him, the Brazilian Supreme Court has issued decisions that limit people's rights to free speech, and these limitations are often identified as a restriction grounded in economic interests.<sup>346</sup> If society does not discuss media regulation more broadly, fearing censorship, but courts practice censorship for commercial interests, this might mean a reduced ability to recognize social interests when restrictions to commercial speech are discussed in courts (in cases about advertising, for example), suggesting an alignment of the judiciary with commercial values rather than with social ones.

With the end of the military dictatorship in 1985 and the possibility of a new constitutional order, a myriad of social movements<sup>347</sup> worked hard, separately or in coalitions, to ensure the representation of their political agendas within the new Constitution, proposing a human rights and social justice framework.<sup>348</sup> However, there have rarely been any obvious or consistent alliances between groups that demanded stronger protection for consumer rights and feminist movements. Feminists and consumer rights activists managed to ensure

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<sup>346</sup> Ivan Paganotti, *Ecos do Silêncio: Liberdade de Expressão e Reflexos da Censura no Brasil Pós Abertura Democrática* (Doutorado, Universidade de São Paulo, 2015) [unpublished].

<sup>347</sup> Enid Rocha, "A Constituição Cidadã e a institucionalização dos espaços de participação social: avanços e desafios" in *20 Anos Constituição Cidadã e Desafios Seguridade Soc* (Brasília: Associação Nacional dos Auditores Fiscais da Receita Federal do Brasil (ANFIP), 2008) at 135-136.

<sup>348</sup> Mala Htun, *Sex and State: Abortion, Divorce and the Family under Latin American Dictatorships and Democracies* (New York: Cambridge University Press, 2003) at 124; José Murilo de Carvalho, *Cidadania no Brasil: o longo caminho* (Rio de Janeiro: Civilização Brasileira, 2004) at 206; Lucas Coelho Brandão, *Os movimentos sociais e a Assembléia Nacional Constituinte de 1987-1988: entre a política institucional e a participação popular* (Mestrado, 2011) [unpublished] at 80; Djalma Eudes dos Santos, "Sobre as possibilidades de ação política na esfera do consumo" 26 *Psicol Soc* 201 at 205.

that the new Constitution, approved under massive popular participation,<sup>349</sup> contained general principles to protect their interests.

Overall, the 1988 Constitution boosted the participatory resources allowing society to contribute to public policies,<sup>350</sup> since the social trauma caused by the military regime led to an environment of maximization of all forms of freedom and the search for consolidating social movements' concerns as constitutional rights. This text, the eighth in Brazilian history, is known as the "Citizens' Constitution," and is principle-oriented, complex, and programmatic.

In an attempt to overcome the traumatic dictatorship, civil rights protections were maximized,<sup>351</sup> with legislators and social movements pushing for an expansion of rights, in particular those related to freedom of expression and social participation. Most of the fundamental rights can be found in article 5 of the 1988 Constitution, which describes all individual and collective rights such as the rights to life, equality before the law and equality between men and women, access to justice, and the due process of law and others.<sup>352</sup>

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<sup>349</sup> José Murilo de Carvalho, *Cidadania no Brasil: o longo caminho* (Rio de Janeiro: Civilização Brasileira, 2004) at 199.

<sup>350</sup> *Supra* note 250 at 135-136; On participatory instruments created by the 1988 Constitution, see: Vera Schattan Pereira Coelho, "What did we learn about citizen involvement in the health policy process: lessons from Brazil" (2013) 9:1 J Public Deliberation, online: <file:///Users/Tamara/Downloads/jdd-433-coelho.pdf>. Vera Schattan Pereira Coelho, Ilza Araújo L de Andrade, & Mariana Cifuentes Montoya, "Deliberative fora and democratisation of social policies in Brazil" 33:2002 IDS Bull 1-16; Vera Schattan Pereira Coelho, Barbara Pozzoni, & Mariana Cifuentes Montoya, "Participation and Public Policies in Brazil" in *Deliberative Democr Handb* 174.

<sup>351</sup> José Murilo de Carvalho, *Cidadania no Brasil: o longo caminho* (Rio de Janeiro: Civilização Brasileira, 2004) at 206.

<sup>352</sup> 1988 Constitution of the Federative Republic of Brazil, Article 5 head: " All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:"

Consumer protection was constitutionalized,<sup>353</sup> being defined as a fundamental right,<sup>354</sup> and limiting commercial activity,<sup>355</sup> in a direct response to consumer's rights activism.<sup>356</sup> The 1988 Constitution imposed limitations on market activities, which should respect consumer rights, which in Brazilian law includes protection against misleading and abusive advertising. Two aspects make consumer protection particularly interesting in Brazil: first, it is considered a fundamental right according to a Constitutional mandate,<sup>357</sup> in response to economic chaos; and second, the law that protects consumers is a hybrid law, neither entirely public nor entirely private, which also establishes a complex state-centered enforcement structure to make sure consumers are protected in markets.

Women have played a consistent role in consumer rights movements, even if not always from an explicitly feminist perspective.<sup>358</sup> This involvement began in what was known as the "Housewives movement," when women would monitor market practices and ensure consumer rights were being respected, by, for example, checking price accuracy. This was also a response to the economic chaos at the time, since in 1993, for example, inflation

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Article 5 contains 78 sub-articles and 4 paragraphs. While a sub-article might present a specific topic related to the "head" (*caput*) of the article, the paragraphs present general information or guidance related to the scope of that specific article. *Constitution of the Federative Republic of Brazil*, (October 1988).

<sup>353</sup> Patricia Galindo da Fonseca, *Droit de la protection du consommateur au Québec et au Brésil* (Montreal: Les Éditions de l'Institut d'études internationales de Montreal - IEIM, 2016) at 183.

<sup>354</sup> *Supra* note 250 at 147 and 165; *Supra* note 28 at 29; Aron Belinky, *Consumo, Cidadania e a Construção da Democracia no Brasil Contemporâneo: Observações e reflexões sobre a história do Idec* (Masters, Faculdade Getúlio Vargas (FGV/EAESP), 2010) [unpublished] at 29; Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 124-125.

<sup>355</sup> *Supra* note 250 at 147 and 165; *Supra* note 28 at 29; Aron Belinky, *supra* note 4 at 29.

<sup>356</sup> Djalma Eudes dos Santos, "Sobre as possibilidades de ação política na esfera do consumo" 26 *Psicol Soc* 201 at 205-206.

<sup>357</sup> 1988 Brazilian Federal Constitution, article 5, XXXII.

<sup>358</sup> Djalma Eudes Santos, "Sobre as possibilidades de ação política na esfera do consumo" (2014) 26 *Psicologia & Sociedade* 201 at 204.

reached almost 2,500 percent,<sup>359</sup> leading consumer protection to be focused on ways to safeguard consumers from inflation and constantly rising prices. Shortly after the end of the dictatorship, with the approval of the 1988 Constitution and the political transition into democracy, when high inflation was being controlled under the mandate of Fernando Henrique Cardoso (Brazilian President from 1995 to 2003) through the “Real Plan,”<sup>360</sup> consumer movements were able to enlarge their field of intervention and public discussion, focusing on topics besides price accuracy. Consumer activism included lobbying for a range of consumer rights, such as clearer contracts and contractual protections, product safety, financial and other essential services (like water and power, for example), and advertising, as discussed below.

## **4.2 How Social Mobilization Led to the Approval of a Brazilian Consumer Law**

Worldwide, the development and consolidation of a consumer society with massive scale production started to challenge traditional understandings of commercial rights and contracts. The development of legal frameworks to promote collective litigation is closely linked with the advancement of consumer societies, since it is in the context of consumer societies that risk and liability becomes collective instead of individual.<sup>361</sup> Collective lawsuits’ procedural instruments are created, such as collective actions to demand damage

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<sup>359</sup> *Supra* note 250 at 61.

<sup>360</sup> Brazil has struggled with many economic crises in its history, which led to many changes in the currency. From 1993 to 1994, Brazil had “cruzeiro real” as its currency, but in 1994, under the government of Itamar Franco, a new economic plan was launched, aiming to stabilize the currency. The new currency was called “real” and is the one that is still in use today.

<sup>361</sup> Marcelo Gomes Sodré, *Investigação acerca das tensões e mutações na sociedade contemporânea e o advento dos direitos difusos materiais* (Livre Docência, Pontifícia Universidade Católica de São Paulo, 2022) [unpublished].

compensation for environmental disasters or consumer problems that affect the whole collectivity of consumers.

Consumer class actions changed the way consumer relationships developed in the United States, and along with the development of a consumer society, it inspired different ways to deal with this new reality.<sup>362</sup> Sinai Deutch observes that in the context of consumer societies, consumer rights should be considered to be human rights that ensure human dignity, and the main reason for that is that the relationship between consumers and corporations is marked by profound economic and power inequalities, eroding the basic right to negotiation between the parties and leading to adhesion contracts.<sup>363</sup> The change in the way rights are negotiated generated different and more complex categories of rights that are often hybrid (mixing public and private law), and also demanding new legal tools or remedies, such as collective lawsuit mechanisms. Discussions regarding consumer rights regulations emerged in different countries alongside the development of consumer society, and in places like Brazil, they brought a public interest perspective on legal regulation to an area that was traditionally regulated by private law.

In Brazil, mobilization to protect consumers in Brazil started at least 20 years before the approval of a specific consumer law, in the early 1970s.<sup>364</sup> In 1976, the first PROCON

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<sup>362</sup> Marcelo Gomes Sodré, *Investigação acerca das tensões e mutações na sociedade contemporânea e o advento dos direitos difusos materiais* (Livre Docência, Pontifícia Universidade Católica de São Paulo, 2022) [unpublished] at 363-364.

<sup>363</sup> Sinai Deutch, “Are Consumer Rights Human Rights?” (1994) 32:3 Osgoode Hall Law J 537–578 at 552-553.

<sup>364</sup> Marcia Andreia da Silva Almeida, *O movimento consumerista e a padronização técnica da produção industrial: perspectivas e desafios à participação das entidades civis de consumidores nas atividades de normalização e regulamentação técnicas* (Doutorado, 2015) [unpublished] at 4 and 121.

(*Programa de Proteção e Defesa do Consumidor*/ Program to Protect and Defend Consumers), an administrative body to protect consumer rights, was created by the São Paulo state, even though a consumer law did not yet exist.<sup>365</sup> From 1976 to 1985, the majority of Brazilian states created PROCONs<sup>366</sup> at the state or municipal administrative levels in an attempt to protect citizens from the escalating consumer problems, especially prices and inflationary issues.<sup>367</sup>

In 1977, three non-profit associations working with consumer rights were created in Brazil: the APC (*Associação de Proteção ao Consumidor* – Association to Protect Consumers) in Rio Grande do Sul (South of Brazil), the CODECON (*Conselho de Defesa do Consumidor* – Council to Defend Consumer Rights) in Rio de Janeiro (South East of Brazil), and the ANDEC (*Associação Nacional de Defesa do Consumidor* – National Association to Defend Consumers) in Brasília (capital of Brazil, in the midwest of the country).<sup>368</sup>

In 1987, IDEC (*Instituto Brasileiro de Defesa do Consumidor* – Brazilian Institute for Consumer Defense) was created.<sup>369</sup> The latter has historically been the most well-structured non-profit consumer association in Brazil and the only one that is a member of Consumers International today.<sup>370</sup> Slowly, and mostly after the end of the dictatorship, the consumer

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<sup>365</sup> *Supra* note 250 at 121.

<sup>366</sup> PROCONs (PROCON – *Programa de Proteção e Defesa do Consumidor* / Program to Protect and Defend Consumers) are administrative bodies that work to enforce consumer law on the administrative level. They can address violations of the *consumer code* through different legal remedies.

<sup>367</sup> *Supra* note 250 at 133; *Supra* note 352 at 378.

<sup>368</sup> *Supra* note 250 at 137; *Supra* note 28 at 27; *Supra* note 352 at 177.

<sup>369</sup> *Supra* note 250 at 147.

<sup>370</sup> Consumers International is a coalition of more than 240 member organizations in 120 countries. This coalition represents consumer interests in the global arena, focusing on promoting better consumer relations and safe, quality, and sustainable goods for all. More information available at: Consumers International, “Consumers International”, online: *Institutional - Non-Profit* <<https://www.consumersinternational.org/who-we-are>>.

rights movement expanded its activities in Brazil, with a proliferation of non-profit organizations during the 1980s.<sup>371</sup> Since the beginning, a strong coalition between newly created PROCONs and emergent non-profit associations has marked the consumer rights movement in Brazil.

Although the state-run PROCONs have worked with non-profit organizations, PROCONs have always been more active because they have more financial support than the non-profit organizations. For multiple reasons, including widespread poverty and social inequalities, Brazil does not have a very strong associative culture, which means that donations to community services and non-profit organizations are scarce. As a consequence, most of the agenda in the consumer rights field has been advanced by state bodies, often in partnership with NGOs, making it mostly state-driven but also highly sensitive to social demands.

This consumer movement (composed of a state-led group and non-profit organizations) fought for proper consumer regulations, both at the Constitutional and Infra-constitutional levels from 1985 to 1990. This period was a fruitful time for social justice activism and for pushing for laws and a state structure that could implement public policies to protect citizens and promote fundamental rights like the rights to life, protest, and expression, which were suppressed during the 1964 dictatorship.

This mobilization to protect consumer rights led to the discussion and development of a legal framework that could address product/service liability in a collective way, more attuned to the expansion of production and consumption in Brazil. From 1985 on, collective

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<sup>371</sup> *Supra* note 352 at 441.

rights, in Brazil called “diffuse and collective rights,” started to be discussed.<sup>372</sup> Collective rights represent interests that are neither exclusively public nor private,<sup>373</sup> and they usually offer protection to the whole collectivity of individuals instead of a multiplicity of consumers considered altogether. Representing the interests of a collectivity of individuals, such rights have both a communal and an individual dimension, but not always equal with the state’s or the whole society’s interests.<sup>374</sup> Rather, collective rights represent the interests of a particular social group, united by a factual or legal connection. For example: all consumers who bought a particular product from a producer or citizens/communities that are affected by a specific environmental risk.

In Brazil, law 7.347/1985,<sup>375</sup> known as the “collective lawsuit law” (Lei da Ação Civil Pública), created rules for collective action lawsuits<sup>376</sup> even before a legal definition of diffuse and collective material rights came into place. This means that procedural law preceded substantive law.<sup>377</sup> This law established that the plaintiff who proposes the collective lawsuit must either be a state body that represents the society (public

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<sup>372</sup> *Supra* note 250 at 124; *Supra* note 352 at 179; Hugo Nigro Mazzilli, *A Defesa dos Interesses Difusos em Juízo*, 25th ed (São Paulo: Saraiva, 2012) at 48-49.

<sup>373</sup> Hugo Nigro Mazzilli, *A Defesa dos Interesses Difusos em Juízo*, 25th ed (São Paulo: Saraiva, 2012) at 50.

<sup>374</sup> I understand that society’s interests and the state’s interests are not always aligned and the need to problematize this assumption. But I am considering a classical legal paradigm that divides public and private law and considers public law to somehow be the representation of society’s interests – as in criminal law, for example.

<sup>375</sup> *Lei 7.347/1985*, 24 July 1985 [*Lei 7.347/1985*]. See also Hugo Nigro Mazzilli, *supra* note 35 at 49.

<sup>376</sup> In common law countries, collective demands are usually proposed before courts through class action lawsuits. In Brazil, class action lawsuits do not translate precisely to our mechanisms for collective demands. In this research, I will use collective action lawsuits and public civil action as synonyms to refer to lawsuits that are presented in favour of a collectivity. On the parallels between collective actions in Brazil and the United States of America, see also: Luís Roberto Barroso, “A proteção coletiva dos direitos no Brasil e alguns aspectos da class action Norte-Americana” (2015) 10/2015:DTR/ 2015/11541 *Doutrinas Essenc Direito Const* 1957–1981.

<sup>377</sup> *Supra* note 352 at 173 and 179.

prosecutor's offices at the state or federal level, and representatives of the union, the states, or the municipalities), or a civil society/non-profit organization.<sup>378</sup> This is the main difference from the North-American class action, where an individual or group of individuals can propose the action.<sup>379</sup> Therefore, in Brazil, for collective rights (*lato sensu*), the action needs to be proposed by an entity that represents the collectivity of individuals; in the North-American class action, individuals or a group of individuals can claim collective rights, by representing a specific "class" or group of individuals.<sup>380</sup> While I will not discuss all the differences between these two legal procedures (class action for damages and collective lawsuits in Brazil) extensively, it suffices to indicate these major differences, in particular when I discuss the meaning and content of collective and diffuse rights in Brazil.<sup>381</sup> I present more detailed information on collective and diffuse rights in Brazil when I discuss the *Consumer Code* further in this chapter.

Law 7.347/1985, although procedural, set the stage for the discussion and development of legislation on consumer and environmental issues and defined the procedural requirements for public civil action to be presented. It was also the procedural regulation that grounded the collective action lawsuit analysed in this research.

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<sup>378</sup> According to article 5 of law 7.347/1985 (Lei da Ação Civil Pública) and article 82 of Law 8.078/90 (CDC).

<sup>379</sup> Flávia Batista Viana, "Algumas Considerações sobre as class actions Norte-Americanas (pequenos contrapontos com as ações coletivas Brasileiras)" (2008) 159/2008:DTR/ 2011/1513 Rev Trib Online - Rev Processo 93–117.

<sup>380</sup> Luís Roberto Barroso, *supra* note 389.

<sup>381</sup> See also: Cássio Scarpinella Bueno, "As Class Actions Norte-Americanas e as ações coletivas Brasileiras: pontos para uma reflexão conjunta" (1996) 82/1996:DTR/1996/175 Rev Trib Online - Rev Processo 92–151.

### 4.3 The 1988 Federal Constitution: Human rights and Consumer Protection

The establishment and definition of rights happens gradually through historical processes and as an answer to authoritarian regimes and multiple forms of oppression.<sup>382</sup> This emphasis on the historical processes through which human rights are defined allows us to see the power struggles that preceded the recognition of something as a human right. It was no different with the formulation of the 1988 Constitution in Brazil when society's ultimate goal was to create legal protection against the extensive rights violations perpetrated during the 1964 dictatorship.

The 1988 Constitution organizes the Brazilian state,<sup>383</sup> defines procedures for passing laws and constitutional amendments, indicates the federative sharing of power and competencies amongst the federative units, and declares fundamental and social rights.<sup>384</sup> This Constitution differs from previous ones in many ways, and one of them is that it places fundamental rights at the beginning of the text, indicating that human rights are at the core of the structure of the Brazilian state.<sup>385</sup> The Constitution is considered to be principle-

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<sup>382</sup> Jürgen Habermas, "The concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) *Metaphilosophy* 41: 04 at 466; Luigi Ferrajoli, "Sobre los derechos fundamentales" (2006) *Cuestiones Constitucionales* 15 at 127; Norberto Bobbio, *A era dos direitos* (Rio de Janeiro: Elsevier, 2004).

<sup>383</sup> Defining the state is not easy or unproblematic. In this chapter and further on this dissertation, I will use Jessop's definition of a state, considering it as an apparatus put in place to organize and rule society: "(...)the core of the state apparatus can be defined as a distinct ensemble of institutions and organizations whose socially accepted function is to define and enforce collectively binding decisions on a given population in the name of their 'common interest' or 'general will' (cf Jessop 1990b: 341). This broad definition identifies the state in terms of its generic features as a specific form of macro-political organization with a specific type of political orientation; it also indicates that there are important links between the state and the political sphere and, indeed, the wider society." Bob Jessop, *State Power: A Strategic-Relational Approach* (Malden, MA, USA: Polity Press) at 9.

<sup>384</sup> Brazil has had 8 Constitutions: 1824, 1891, 1934, 1937, 1967, 1969 and 1988. For this work, only the 1988 Constitution is relevant, since it is the document that establishes the legal framework from 1985 until today, including the period when the litigation I am focusing my analysis on took place.

<sup>385</sup> The first article of the Constitution declares that sovereignty, citizenship, the dignity of the human person, the social values of labor and free enterprise, and political pluralism are the basis of the Brazilian Federative

oriented, but the whole text has 250 articles, which makes enforcement a challenge. Being the legal document in Brazil with the most comprehensive bill of rights of all time, encompassing civil and political, economic, social, and cultural rights, as well as protection for vulnerable social groups such as children, youth, and elderly people, the new Constitution presents a division between individual, collective, and social rights. Social rights were amplified, and the right to vote was universalized.<sup>386</sup>

Article 5 is complemented by international human rights treaties ratified by Brazil.

Paragraph 3 was added to article 5 in 2005 and states that any human rights treaty ratified by Brazil and approved by the Congress following the procedure to pass an amendment to the Constitution is considered as a part of the Constitution and an extension of article 5.

The approval of paragraph 3 was intended to clarify doctrinal debates in the legal community regarding the status of human rights treaties ratified by Brazil. Considering that most international human rights treaties were ratified before 2005, what is the legal status of these treaties in the Brazilian legal system? The dominant view, supported by the Supreme Court, is that human rights treaties that were incorporated through a different

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Republic. The third article indicates that to build a free, just, and solidary society; to guarantee national development; to eradicate poverty and substandard living conditions; to reduce social and regional inequalities; and to promote the well-being of all, without prejudice as to origin, race, sex, color, age, and any other forms of discrimination is a primary goal of the Brazilian state. See Flávia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional*, 14th ed (São Paulo: Saraiva, 2013).

Article 4° provides that Brazilian international relations will be governed by the prevalence of human rights and other principles. Article 5° contains an extensive description of fundamental rights, along with its 78 lines and three paragraphs. Often, each line has multiple subparagraphs. Section 3 and 4 of article 5° are related to the incorporation, into the Brazilian legal system, of international human rights treaties.

<sup>386</sup> José Murilo de Carvalho, *Cidadania no Brasil: o longo caminho* (Rio de Janeiro: Civilização Brasileira, 2004) at 206; The 1988 Constitution allowed illiterate people to vote. It also determined that all citizens older than 18 years old must vote, while voting became optional for people aged between 16 and 18 years old. See: José Murilo de Carvalho, *Cidadania no Brasil: o longo caminho* (Rio de Janeiro: Civilização Brasileira, 2004) at 200.

legislative procedure than the constitutional amendments have a supra legal status: superior to other federal laws, but not of constitutional status.<sup>387</sup> I share the understanding of Flávia Piovesan, who claims that due to the very special content and the high emphasis the Constitution puts on human rights, human right treaties are, materially if not formally, part of the Brazilian Constitution.<sup>388</sup>

According to Cláudia Lima Marques and Roberto Pfeifer, the inclusion of consumer protection in the Constitutional text is a trend in newer constitutions approved by the end of the twentieth century in democracies emerging after dictatorships, like in Portugal and Spain.<sup>389</sup> Monika Jagielska and Mariusz Jagielski observe that constitutionalizing consumer rights is often related to imposing limits on economic activity and granting specific rights to consumer-citizens,<sup>390</sup> and represents a process of “fundamentalisation” of consumer rights.<sup>391</sup> The same thing happened in Brazil, where 1988 Federal Constitution mentions consumer protection three times: amongst the fundamental rights in article 5, as a limit for economic activities in article 170,<sup>392</sup> and as a mandatory command regarding the creation of

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<sup>387</sup> STF, RE 466.343-SP / 2008: Juliana Rimoli & Raphael Molina, “A Convenção 190 da OIT e sua importância no enfrentamento da violência e assédio laboral”, *Migalhas - Online* (1 July 2021), online: <<https://www.migalhas.com.br/depeso/347870/a-convencao-190-da-oit>>.

<sup>388</sup> Flávia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional*, 14th ed (São Paulo: Saraiva, 2013).

<sup>389</sup> Cláudia Lima Marques & Roberto A C Pfeiffer, “Dissemination of Consumer Law and Policy in Brazil: The impact of EU Law” (2022) 45 *J Consum Policy* 27–48; Monika Jagielska & Mariusz Jagielski, “Are consumer rights human rights?” in *Eur Consum Prot Theory Pract* (Cambridge: Cambridge University Press, 2012) at 336; Delphine Aurelie Laurence Defossez, “Consumer law in Constitution: a big mistake? The specific case of aviation in Brazil” (2017) 4:3 *Rev Investig Const*, online: <<https://www.scielo.br/j/rinc/a/MbDbPW95tQRM9CXd7KTWwQj/?format=pdf&lang=en>> at 70 at 68.

<sup>390</sup> She brings as examples the Constitutions of Bulgaria, Cambodia, Paraguay, Colombia, Serbia, and Lithuania. According to: Monika Jagielska & Mariusz Jagielski, “Are consumer rights human rights?” in *Eur Consum Prot Theory Pract* (Cambridge: Cambridge University Press, 2012) at 337.

<sup>391</sup> Monika Jagielska & Mariusz Jagielski, “Are consumer rights human rights?” in *Eur Consum Prot Theory Pract* (Cambridge: Cambridge University Press, 2012) at 352.

<sup>392</sup> 1988 Constitution of the Federative Republic of Brazil, article 170: The economic order, founded on the appreciation of the value of human work and free enterprise, is intended to ensure everyone a life with

a specific law protecting consumer rights (article 48 of the Temporary Constitutional Provisions Act).<sup>393</sup>

In the chapter on fundamental rights, Article 5 reads:

Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA No. 45, 2004)

(...)

XXXII – the State shall provide, as set forth by law, for the defense of consumers;<sup>394</sup>

These guidelines give consumer protection high priority within the Brazilian legal landscape. Consequently, consumer protection is defined as an unchangeable Constitutional principle, which means that consumer rights cannot be negotiated or renounced.<sup>395</sup> The attribution of such rights to consumers recognizes consumers' vulnerability within

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dignity, in accordance with the dictates of social justice, with due regard for the following principles: (CA No. 6, 1995; CA No. 42, 2003)

I – national sovereignty;

II – private property;

III – the social function of property;

IV – free competition;

V – consumer protection;

VI – environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes;

VII – reduction of regional and social differences;

VIII – pursuit of full employment;

IX – preferential treatment for small enterprises organised under Brazilian laws and having their head-office and management in Brazil.

*Sole paragraph.* Free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by law.

<sup>393</sup> The Temporary Constitutional Provisions Act was created when the 1988 Constitution was passed and establishes a series of commands to Congress, in order to ensure transition into democracy. The approval of a consumer law was determined by one of these provisions, in article 48, as indicated. *Constitution of the Federative Republic of Brazil*, (October 1988): “Article 48. The National Congress, within one hundred and twenty days of the promulgation of this Constitution, shall draw up a consumer defense code.”

<sup>394</sup> *Ibid.*

<sup>395</sup> Delphine Aurelie Laurence Defossez, “Consumer law in Constitution: a big mistake? The specific case of aviation in Brazil” (2017) 4:3 *Rev Investig Const*, online:

<<https://www.scielo.br/j/rinc/a/MbDbPW95tQRM9CXd7KTWwQj/?format=pdf&lang=en>> at 70.

consumer relations.<sup>396</sup> The constitutional dimension of consumer protection in Brazil was confirmed by the Brazilian Supreme Court.<sup>397</sup>

The law that regulates consumer relations in Brazil has a special place within the hierarchy of laws,<sup>398</sup> since it is derived from a constitutional mandate to protect fundamental rights.

The Constitution is at the top of the legal system and is followed by infra-constitutional regulations, which are ordered as such: complementary laws (*leis complementares*),<sup>399</sup> ordinary laws (*leis ordinárias*),<sup>400</sup> delegated laws (*leis delegadas*), provisional measures

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<sup>396</sup> *Supra* note 352 at 185-186, 193 and 283; Amanda Flávio de Oliveira, “Reforma do Direito do Consumidor Brasileiro a partir das lições da behavioral economics: uma agenda possível?” in Isabela Maiolino & Luciano Benetti Timm, eds, *Direito Consum Novas Tendências E Perspect Comp* (Brasília, DF: Editora Singular, 2019) at 229-231.

<sup>397</sup> Cláudia Lima Marques & Roberto A. C. Pfeiffer, *supra* note 37.

<sup>398</sup> Knowing the hierarchy of laws in a given legal system allows one to better understand how this system is organized and which laws have more relevance or prevalence over others. Understanding such a hierarchy also helps in solving questions regarding enforcement and implementation of laws, in particular when a conflict amongst different legal provisions is identified.

<sup>399</sup> Complementary laws are the ones approved by the Congress to complement a Constitutional provision, whenever the Constitution demands laws to regulate specific issues. Article 68 states that delegated laws are given to the President by the Congress to initiate the legislative process on specific topics. Some topics can never be the object of Delegated laws, like pluriannual plans, budgetary directives, organization of the judicial power and others (fully described on article 68. See: *Constitution of the Federative Republic of Brazil*, October 1988 [*Constitution of the Federative Republic of Brazil*:

Article 68. Delegated laws shall be drawn up by the President of the Republic, who shall request delegation from the National Congress.

Paragraph 1. There shall be no delegation of acts falling within the exclusive competence of the National Congress, of those within the exclusive competence of the Chamber of Deputies or the Federal Senate, of matters reserved for supplementary laws and of legislation on:

I – the organization of the Judicial Power and of the Public Prosecution, the career and guarantees of their members;

II – nationality, citizenship, individual, political and electoral rights;

III – pluriannual plans, budgetary directives and budgets.

Paragraph 2. The delegation to the President of the Republic shall take the form of a resolution of the National Congress, which shall specify its contents and the terms of its exercise.

Paragraph 3. If the resolution calls for consideration of the bill by the National Congress, the latter shall do so in a single voting, any amendment being forbidden.

<sup>400</sup> Ordinary laws provide regulation on general issues, following the federative share of competencies defined by the Constitution. Brazil is a federative country divided into 26 states and one federative district (which hosts Brasília, the capital) and 5,570 municipalities (Portal Brasil, “Cresce número de municípios no Brasil”, *Portal Bras - Econ E Emprego* (27 June 2013), online: <<http://www.brasil.gov.br/economia-e-emprego/2013/06/cresce-numero-de-municipios-no-brasil-em-2013>>. Both states and municipalities are considered federative units, along with the federal level. All federative units share administrative and

(medidas provisórias),<sup>401</sup> and legislative decrees (decretos). There are different procedures to be observed when approving each of these laws. Legislative competencies are described through articles 22 to 23 in the Constitution. Consumer regulation in Brazil is concentrated in a Code that organizes most of the rights and duties related to relationships that take place in consumer societies and between providers and consumers. This Code is formally an ordinary law approved at the federal level, which means it is enforceable in all 26 states and the Federal District. However, because this Code derives from a Constitutional mandate and is highly principle-oriented, scholars argue that the Code has a special place in the Brazilian legal system, establishing a legal micro-system<sup>402</sup> and creating a new field of law that encompasses civil, procedural, judicial, and administrative guidelines, as well as criminal provisions regarding a specific topic: consumer rights and relations.

Often, the federative unit's competencies overlap. Regarding multiple subjects, described in article 24 of the Constitution, the union, the federative district, and the states share legislative competency. All three federative units share the legislative competency to regulate production and consumption. Importantly, while commercial advertising must only be regulated by the union, production and consumption can have local legislative frameworks, adapted to each local context. However, states and municipalities can provide

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legislative competencies but have relative autonomy to implement projects and programs locally. The management of basic public services such as health and education are divided amongst the three levels, and this separation is not always clear. For example, public universities or day care units can be administered at the federal, state, or municipal level, as well as all other levels of education.

<sup>401</sup> Provisional Measures are special legislative acts that regulate urgent matters; they are proposed by the President and voted through an urgent and special procedure. Legislative Decrees are approved by the chief of the executive power in all three federative levels (federal, state, and municipal) to further regulate rights described in laws. Legislative decrees cannot create new rights or institutionalize new policies, but only regulate in detail existing ones.

<sup>402</sup> *Supra* note 250 at 170 and 176; *Supra* note 28 at 78; *Supra* note 352 at 23, 171, 200 and 278.

further regulation on advertising considering issues that have a local dimension since they follow what is already provided in the federal and state Constitutions, as well as local legislation.<sup>403</sup>

Finally, the Brazilian Constitution establishes freedom of enterprise as one of the milestones of the economic system (art. 170). Freedom of enterprise is limited by worker and consumer rights, and by the protection of the environment.<sup>404</sup> Some scholars argue that advertising is also protected by the right to freedom of expression, defined as a fundamental right by the Constitution in article 5, IV and IX.<sup>405</sup> They claim that advertising is a form of artistic expression.<sup>406</sup> Although advertising does, indeed, have an artistic component, the right to freedom of expression is uniquely granted to individuals and not corporations/enterprises.<sup>407</sup> In the Brazilian legal system, enterprises have the right to freedom of enterprise, which includes the right to freely advertise products. Aligning myself with Gomes Sodré and Lopes Guimarães Júnior, I agree that advertising should be

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<sup>403</sup> For example, some cities have local regulations on the placement of billboards, like São Paulo city, according to – *Lei municipal n° 14.223, de 26 de setembro de 2006*, Secretaria do Governo Municipal, 26 September 2006. Online: <[http://www3.prefeitura.sp.gov.br/cadlem/secretarias/negocios\\_juridicos/cadlem/integra.asp?alt=27092006L142230000](http://www3.prefeitura.sp.gov.br/cadlem/secretarias/negocios_juridicos/cadlem/integra.asp?alt=27092006L142230000)>

<sup>404</sup> Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 123-124.

<sup>405</sup> *Constitution of the Federative Republic of Brazil*, *supra* note 363. “Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security, and to property, on the following terms: (CA No. 45, 2004)

IV – the expression of thought is free, and anonymity is forbidden;

IX – the expression of intellectual, artistic, scientific, and communications activities is free, independently of censorship or license.

<sup>406</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 31 and 35; *Supra* note 28 at 154; Marcelo Gomes Sodré, Fabíola Meira & Patrícia Caldeira, eds, *Comentários ao Código de Defesa do Consumidor* (São Paulo: Verbatim, 2009) at 239.

<sup>407</sup> The Brazilian legal system allows for a variety of commercial enterprises to operate in the Brazilian territory. They can vary from small family companies to big corporations with open capital and multiple stakeholders. I am focusing my analysis on a marketing campaign promoted by a big corporation, but I will use both terms (corporation and enterprise) in a non-technical way, as synonyms.

considered separate from art because advertising has the explicit objective to sell products, being oriented to and marked by commercial intent.<sup>408</sup> Also, I propose a restrictive interpretation of the Brazilian Constitution in article 5, understanding that the reference to “all persons” includes only individuals and not legal entities.

#### **4.4 The Code of Consumer Defense and Protection: Overarching Legislation to Protect Consumers in Brazil**

In the early 1990s, the instruction in article 48 of the Temporary Constitutional Provisions Act<sup>409</sup> and the direction from article 5 was fulfilled by a unified and general law to regulate consumer relationships, with the approval of law n.º 8.078/90,<sup>410</sup> known as the Code of Consumer Defense and Protection (here referred simply as “*Consumer Code – CDC*”).<sup>411</sup>

The Code drastically changed the Brazilian regulatory scenario regarding consumer protection: it was the first regulation approved in Brazil to effectively focus on consumer relations. Being inspired by the regulations passed in France, Spain, Portugal, Mexico,

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<sup>408</sup> While Lucia Ancona Lopez, Leonardo Roscoe Bessa e Walter José Faiad de Moura defend the position that advertising is covered by the Constitutional protection of freedom of expression, João Lopes Guimarães Junior and Marcelo Gomes Sodré argue otherwise, understanding that consumer protection limits the freedom to advertise, in particular when analyzing advertising addressed to children.

See: Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013); Leonardo Roscoe Bessa & Walter José Faiad de Moura, *Manual de Direito do Consumidor*, 4th ed (Brasília: Secretaria Nacional do Consumidor, Ministério da justiça, 2014); João Lopes Guimarães Junior, “O Estado de Bem-estar Social e a regulamentação da publicidade infantil” in Lais Fontenelle, ed, *Criança E Consumo 10 Anos Transform* (São Paulo: Instituto Alana, 2016) at 291; Marcelo Gomes Sodré, “Duas palavrinhas importantes: uma ausente, outra presente” in Lais Fontenelle, ed, *Criança E Consumo 10 Anos Transform* (São Paulo: Instituto Alana) at 308-312.

<sup>409</sup> The 1988 Constitution is the legal document that marks the transition from a dictatorial regime into a democratic one. It changes the legal order, establishing democratic principles to organize society and revoking authoritarian laws and Constitutional provisions. The Temporary Constitutional Provisions Act is an *addendum* that provides guidance to conduct the transition to a democratic legal system, appointing procedures to be conducted (like a referendum for choosing the form of the State) and the approval of several legislative measures.

<sup>410</sup> *Lei Federal n.º 8.078, de 11 de setembro de 1990*, D.O.U., 12 September 1990. Online: PROCON Rio de Janeiro <[http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC\\_Novembro\\_2014\\_Ingles.pdf](http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf)>.

<sup>411</sup> Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 126.

Quebec, and Germany,<sup>412</sup> the CDC aligns with modern legislation that protects individuals in a context of mass consumption, marking the development of consumer society in Brazil.<sup>413</sup>

In its first article, the Code establishes<sup>414</sup> that besides regulating private relations, it is a public interest law, guided by the promotion of social interests (*normas de ordem pública e interesse social/ loi d'ordre public et d'intérès social*),<sup>415</sup> and that requires the state to actively protect consumer rights.<sup>416</sup> Being hybrid law, the Code regulates private relationships (consumer-supplier) through public principles (bringing flexibility to the traditional civil law private principles as the *pacta sunt servanda*);<sup>417</sup> it is designed to ensure equality in these relationships, attempting to solve the power imbalance between consumers and suppliers.<sup>418</sup>

The Code acknowledges that suppliers have a more comprehensive understanding of the production processes and the products and services they offer in the market, while consumers have limited access to those, relying only on the information provided by

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<sup>412</sup> Cláudia Lima Marques & Roberto A. C. Pfeiffer, *supra* note 37.

<sup>413</sup> *Supra* note 250 at 176 at 129.

<sup>414</sup> CDC, “Art. 1. This Code sets forth the norms for consumer protection and defense, regarding public order and social interest, based on articles 5, paragraph XXXII, 170, paragraph V of the Federal Constitution in article 48 of its Transitional Dispositions.”

<sup>415</sup> Marcelo Gomes Sodré, Fabíola Meira & Patrícia Caldeira, eds, *Comentários ao Código de Defesa do Consumidor* (São Paulo: Verbatim, 2009) at 13.

<sup>416</sup> *Supra* note 352 at 23, 171, 200 and 278 at 194 and 270.

<sup>417</sup> Private law is oriented by the “freedom” principle, which allows all individuals to act as they wish, as long as they do not violate law, and regulates relationships that take place amongst individuals. A core principle is the *pacta sunt servanda*, which means that people’s will and negotiations, once agreed upon, make law between them. In general, private law regulates private relationships among people, both family and commercial relationships. Further developments of private law will include commercial and corporate law as branches of the private civil law system.

<sup>418</sup> *Supra* note 352 at 193.

suppliers. To offer balance in this unequal relationship, the Code establishes measures to overcome this inequality, balancing the relationship through a set of principles and rights applicable to both consumers and suppliers.<sup>419</sup> It also regulates material rights, such as the rights to dignity, life, health, safety, education, and others;<sup>420</sup> providing a framework for public policies dedicated to consumer protection.

The Code provides wide definitions of consumers and suppliers:

Art. 2. A consumer is any physical person or corporate entity who acquires or uses a product or service as a final user.

Sole Paragraph. The concept and status of consumer is extended to a collective of individuals, that may even be indeterminate, who may have participated in consumer relations.

Art. 3. A supplier is any physical person or corporate entity, of a public or private nature, domestic or foreign, as well as other involved in the activities of production, assembly, creation, construction, transformation, importing, exporting, distribution, or commercialization of products or services.<sup>421</sup>

The CDC rests on a broad understanding of consumer relations, and the definitions of consumer and supplier are so comprehensive that consumer protection is extended beyond the contractual dimension, expanding consumer protection to the pre-contractual phase,<sup>422</sup>

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<sup>419</sup> *Supra* note 28 at 79; Cláudia Lima Marques & Roberto A. C. Pfeiffer, *supra* note 37.

<sup>420</sup> *Lei 8078*, 11 September 1990 [*Lei 8078*].

Art. 4. The objective of the National Policy for Consumer Relations is to tend to consumers' needs, impose respect for the consumer's dignity, health, and safety, protect their interests, and ensure transparency and harmony in consumer relations, based on the following principles: (text from Law no. 9008 of March 21, 1995)

Art. 7. The rights set forth in this Code do not exclude any others that may come as a result of international treaties or conventions ratified by Brazil, of internal legislation, regulations set forth by administrative authorities with jurisdiction, as well as any other rights that stem from the general principles of Law, analogy, traditions and fairness. Sole paragraph. If more than one person was responsible for the offense, everyone will be held responsible for settling the damages as foreseen by consumption norms.

<sup>421</sup> 8.078/90, *Code of Consumer Defense and Protection*, (11 September 1990).

<sup>422</sup> *Supra* note 352 at 23, 171, 200 and 278 at 204 and 220.

even for those who have not engaged in consumer relations.<sup>423</sup> For example, articles 6 (III) and 31 of the *Consumer Code* define the right to information within the pre-contractual phase as a basic right of consumers and a duty for suppliers.<sup>424</sup> As a result, the supplier must provide full, truthful, and correct information about the products and services being offered.

The Code is mostly principle-oriented. Being so broad and open to multiple interpretations, many sections depend on definitions provided by scholars through doctrinal work, Senacon (the federal body created to address consumer rights public policies), and court decisions.<sup>425</sup>

Good faith and transparency in consumer relations are the central principles organizing the Code, since the Government is responsible for ensuring effective consumer protection.<sup>426</sup>

The Code presupposes an inequality between consumers and suppliers and seeks to resolve this by acknowledging that the consumer is the most vulnerable party in this legal

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<sup>423</sup> Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 133-134.

<sup>424</sup> *Lei 8078*, 11 September 1990 [*Lei 8078*].

Art. 6. The following are basic consumer rights:

III - adequate and clear information about different products and services, with correct specification of quantity, characteristics, composition, quality, price and taxes, as well as the risks presented; (Amended by Law No. 12,741, 2012)

(...)

Art. 31. The offer and the presentation of products and services must contain information that is clear, direct, precise, comprehensive, and in the Portuguese language regarding the characteristics, qualities, quantity, composition, price, warranty, validity and origin, among other pieces of information, as well as any risks that the product or service may pose to the consumer's health and safety. Sole paragraph. The information mentioned in this article, in chilled products offered to consumers, will be written in indelible form. (Included by Law No. 11,989, 2009)

<sup>425</sup> *Supra* note 352 at 416.

<sup>426</sup> *Code of Consumer Defense and Protection*, *supra* note 434.

Article 4. The objective of the National Policy for Consumer Relations is to tend to consumers' needs, impose respect for the consumer's dignity, health, and safety, protect his interests and ensure transparency and harmony in consumer relations, based on the following principles: (text from Law no. 9008 of March 21, 1995)

I - recognition of the consumer's vulnerability in the consumer market;  
II - government action in order to effectively protect the consumer;

relationship.<sup>427</sup> According to Bruno Miragem and Paulo Valério Dal Pai Moraes,<sup>428</sup> it is the acknowledgement of this vulnerability as a guiding principle that justifies the establishment of consumer protection in Brazil, as well as guides its enforcement.<sup>429</sup>

The Code defines consumers' fundamental rights in article 6, and includes consumers' health protection (against risks related to dangerous or harmful products or services); education and adequate information about goods and services (including precise information on quantity, characteristics, composition, price, taxes, and risks associated with its use); protection against misleading or abusive advertising and abusive contractual

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<sup>427</sup> *Supra* note 28 at 77; Marcelo Gomes Sodré, Fabíola Meira & Patrícia Caldeira, eds, *Comentários ao Código de Defesa do Consumidor* (São Paulo: Verbatim, 2009) at 41.

<sup>428</sup> Doctrine on Brazilian consumer law classifies vulnerability into four different categories: i) technical, ii) legal, iii) factual, and iv) informational. According to: Bruno Miragem, *Direito do consumidor: fundamentos do direito do consumidor: direito material e processual do consumidor, proteção administrativa do consumidor; direito penal do consumidor* (São Paulo: Editora Revista dos Tribunais, 2008) at 61-64; Antônio Benjamin Herman, Cláudia Lima Marques & Leonardo Roscoe Bessa, *Manual de Direito do Consumidor* (São Paulo: Editora Revista dos Tribunais, 2009) at 76-77. See also: Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 130.

Technical vulnerability refers to the fact that consumers are not familiar with the ways products are made, so there is a gap in knowledge about the technical aspects of the products, a situation in which consumers rely on the good faith and complete and accurate information provided by the supplier. Legal vulnerability concerns the consumers' lack of knowledge regarding all the consequences of signing a contract. This vulnerability will be even clearer if a consumer problem gets disputed before the judiciary, where for example, consumers will not always have the legal means to retain a lawyer, – a situation that also expresses an economic imbalance in the contractual relationship. The factual vulnerability reflects the general vulnerability consumers have in consumer relations and is exacerbated when the subject is elderly or a child. Finally, the informational vulnerability is related to the difficulty in accessing accurate information in a growing, globalizing, fluid world. According to: Leonardo Roscoe Bessa & Walter José Faiad de Moura, *Manual de Direito do Consumidor*, 4th ed (Brasília: Secretaria Nacional do Consumidor, Ministério da justiça, 2014) at 80-81; Bruno Miragem, *Direito do consumidor: fundamentos do direito do consumidor: direito material e processual do consumidor, proteção administrativa do consumidor; direito penal do consumidor* (São Paulo: Editora Revista dos Tribunais, 2008) at 61-64; Antônio Benjamin Herman, Cláudia Lima Marques & Leonardo Roscoe Bessa, *Manual de Direito do Consumidor* (São Paulo: Editora Revista dos Tribunais, 2009) at 76-77; Amanda Flávio de Oliveira, “Reforma do Direito do Consumidor Brasileiro a partir das lições da behavioral economics: uma agenda possível?” in Isabela Maiolino & Luciano Benetti Timm, eds, *Direito Consum Novas Tendências E Perspect Comp* (Brasília, DF: Editora Singular, 2019) at 229-231.

<sup>429</sup> Bruno Miragem, *Curso de Direito do Consumidor* (São Paulo: Editora Revista dos Tribunais, 2013) at 114; Paulo Valério Dal Pai Moraes, *Código de Defesa do Consumidor: o princípio da vulnerabilidade no contrato, na publicidade e nas demais práticas comerciais: interpretação sistemática do direito*, 3 ed. ed (Porto Alegre: Livraria do Advogado) at 125.

clauses; compensation for any individual or collective damage (financial or moral); and access to justice.<sup>430</sup> As for access to justice, the Code defines the possibility of shifting the burden of proof in favour of consumers. This inversion is not automatically in place for all lawsuits, but the judge must decide in each case whether the burden of proof will be shifted to favour the consumer. Advertising is the exception to this rule, because the change in the burden of proof is mandatory (article 38):<sup>431</sup> the supplier must prove that the advertising was not misleading or abusive.<sup>432</sup> There is doctrinal legal debate about who is responsible for eventual damages caused by misleading advertising: the supplier, the advertising agency, or the media? In my view, the supplier must hold primary responsibility for the damages, but considering that the Code establishes a shared responsibility among the whole supply chain, any of the subjects involved in the campaign could be held responsible, and then seek compensation through a suit for recovery against the other subjects involved in the production or broadcasting of the advertisement.<sup>433</sup>

Importantly, the Code protects the “exposed consumer,” extending consumer protection to an indeterminate collectivity of individuals, regardless of whether or not a contract was signed.<sup>434</sup> This means that anyone potentially affected by a commercial practice implemented by the supplier is protected, even if no contract was concluded. Therefore,

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<sup>430</sup> Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 128.

<sup>431</sup> *Code of Consumer Defense and Protection*, *supra* note 24: “Art. 38. The burden of proof regarding the truthfulness and correction of the information or public communication will be the Liability of its sponsor.”

<sup>432</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 89; *Supra* note 352 at 544.

<sup>433</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 319.

<sup>434</sup> Gustavo Tepedino, *Temas de direito civil* (Rio de Janeiro: Renovar, 2006) at 133.

protection extends not only to actual consumers, but to anyone potentially affected by commercial practices.<sup>435</sup> This is a characteristic of Brazilian consumer law, which is grounded in a collective and social conception of rights. This is fundamental for understanding consumer protection regarding advertising, because the subject who is protected is not a single individual, but the whole society who might have been exposed to an illegal advertisement.<sup>436</sup>

Therefore, consumer protection encompasses subjects who cannot be individualized or identified and are not necessarily connected by a legal relationship.<sup>437</sup> This protection is established through “diffuse rights.” Talking about diffuse rights is somewhat complicated due to the terminology used by the legislation and doctrinal works in Brazil, since the law and the scholarship differentiate collective rights as a broad category, which includes diffuse rights, collective rights *stricto sensu*, and homogenous individual rights.<sup>438</sup>

Therefore, diffuse rights are a category of collective rights.

In a simplified way, doctrine and law define diffuse rights as those that represent the rights of a social group that is impossible to determine and individualize, that has an object that is also impossible to individualize, and where the multiple affected individuals are connected by a factual situation. A classic example of diffuse rights is a case of air pollution or advertising. Even if every individual person can enjoy the right to a good quality of air or suffer from its bad quality individually, the object “quality of air” is impossible to

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<sup>435</sup> Cláudia Lima Marques & Roberto A. C. Pfeiffer, *supra* note 37.

<sup>436</sup> *Supra* note 352 at 19, 23, 171, 200, 201, 2004, 208, 210 and 278.

<sup>437</sup> Cláudia Lima Marques & Roberto A. C. Pfeiffer, *supra* note 37.

<sup>438</sup> Luís Roberto Barroso, *supra* note 389.

individualize. One cannot divide one's share of air, independently of the others' right to the enjoyment of good air quality. It is the same with advertising. Once an advertisement has been broadcast, it is impossible to identify how many people saw it and were affected by it. Therefore, it is impossible to individualize eventual compensation in these cases.

Collective rights *stricto sensu* would be the ones in which it is possible to determine the people who are entitled to such rights, but the object is impossible to individualize and individuals are connected through a legal relationship. Typical examples of collective rights are the public services such as water, public transportation, and education. All subjects using these services enjoy the individual and collective dimensions of such rights. A decision in a collective lawsuit that protects a collective right *stricto sensu* affects all people that use that particular service, like public transportation, for example.<sup>439</sup>

Homogenous individual rights are characterized by having an identifiable social group, with an object that is possible to be divided and linked by a common origin. Homogenous individual rights allow identification of the different outcomes or ways in which the individuals are affected by a particular legal relationship. A very well-known case in Brazil offers a good example of homogenous individual rights: the case of the flour contraceptive pills. In 1998, contraceptive pills without the active component produced by Schering were sold. These flour contraceptive pills that were sold in Brazil resulted in many women being pregnant in a country that only allows abortion when the life of the mother is in danger, in

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<sup>439</sup> *Ibid.*

cases of sexual violence, and anencephaly of the fetus.<sup>440</sup> As a consequence, a huge number of women got pregnant. The Ministry of Justice took action and imposed a fine, but other collective lawsuits were proposed, so that affected women received individual compensation. Such compensation was individualized and different for each woman, and according to Brazilian law compensation can even reach the victims' descendants.<sup>441</sup> Luís Roberto Barroso observes that a collective action in this case would be similar to a class action for damages in the North American common law legal system.<sup>442</sup>

Diffuse rights have a meta-individual dimension but are not the same as collective rights *stricto sensu*. For the latter, a legal relationship connecting all the subjects is required (for example, all individuals who have engaged in a consumer relationship with a particular supplier), while for diffuse rights, no such relationship is required; even subjects not engaged directly with the supplier but somehow exposed to the commercial practices can be protected.<sup>443</sup> When a collective lawsuit is proposed to protect diffuse rights, the judicial

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<sup>440</sup> See: "Schering Resumes Sales in Brazil", *Assoc Press* (21 July 1998), online: <<https://apnews.com/article/c2c72d500df51a8dc54d5e843f6bad37>>; BBC News, "Brazil's bitter pill", (1 July 1998), online: <<http://news.bbc.co.uk/2/hi/americas/123741.stm>>; IDEC - Instituto Brasileiro de Defesa do Consumidor, "IDEC conquista mais uma vitória no caso das 'pílulas de farinha'", (26 July 2011), online: *IDEC - Inst Bras Def Consum* <<https://idec.org.br/em-acao/em-foco/idec-conquista-mais-uma-vitoria-no-caso-das-pilulas-de-farinha#:~:text=Elas%20compraram%20p%C3%ADlulas%20que%20continham,exigir%20seus%20direitos%20na%20Justi%C3%A7a>>; IDEC - Instituto Brasileiro de Defesa do Consumidor, "IDEC - O caso das 'pílulas de farinha'", *Folha Londrina* (23 April 2004), online: <<https://www.folhadelondrina.com.br/economia/idec---o-caso-das-pilulas-de-farinha-486803.html>>; Mario Osava, "Bogus Medicines, a New 'Epidemic' in Brazil", *Inter Press Serv News Agency* (8 July 1998), online: <<http://www.ipsnews.net/1998/07/health-bogus-medicines-a-new-epidemic-in-brazil/>>; Laurie Goering, "Baby Boom Forces Brazil to Confront Fake Medicines", *Chic Trib* (13 July 1998), online: <<https://www.chicagotribune.com/news/ct-xpm-1998-07-14-9807140107-story.html>>.

<sup>441</sup> Luís Roberto Barroso, *supra* note 389.

<sup>442</sup> *Ibid.* On the differences between the Brazilian collective lawsuits and North-American class-actions, see also: Flávia Batista Viana, *supra* note 392.

<sup>443</sup> Hugo Nigro Mazzilli, *A Defesa dos Interesses Difusos em Juízo*, 25th ed (São Paulo: Saraiva, 2012) at 59.

ruling affects everybody, the whole collectivity, even people who never complained about or were exposed to a specific consumer problem.<sup>444</sup>

Diffuse rights are especially relevant when discussing advertising.<sup>445</sup> As advertisement usually relies on mass media to promote products and services, virtually all society can be affected by it and, according to Brazilian law, illegal advertising offends a diffuse right. This means that diffuse damage is established, generating the duty to provide compensation, even if it is impossible to identify all the people potentially affected or damaged by the advertisement that was considered illegal. Hugo Nigro Mazzilli argues that cases of illegal advertising (including misleading and abusive advertising) involve both a diffuse right and a matter of criminal law: it is a diffuse right when social groups seek civil reparation for damage caused by illegal advertising, but the state is also entitled to criminally pursue whoever is responsible for such a marketing campaign.<sup>446</sup> This idea will be important when we further analyse the Skol Summer Muse Campaign. Finally, an illegal advertisement also has an individual dimension and the supplier might be responsible for additional individual compensation.<sup>447</sup>

#### **4.5 Enforcing the Law: The National Consumer Defense System**

In this section I present the SNDC (*Sistema Nacional de Proteção e Defesa do Consumidor*), the national system created to oversee consumer law and protect consumers

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<sup>444</sup> Luís Roberto Barroso, *supra* note 389.

<sup>445</sup> Hugo Nigro Mazzilli, *A Defesa dos Interesses Difusos em Juízo*, 25th ed (São Paulo: Saraiva, 2012) at 58; *Ibid.*

<sup>446</sup> Hugo Nigro Mazzilli, *A Defesa dos Interesses Difusos em Juízo*, 25th ed (São Paulo: Saraiva, 2012) at 62.

<sup>447</sup> *Supra* note 352 at 210, 259-262.

and provide information on who its members are, the different state and non-state actors that comprise this National System.

Legal documents require enforcement mechanisms. In Brazil, national systems were created to ensure the enforcement of laws in different fields, like public health and metrology, for example.<sup>448</sup> A national consumer system, called the National Consumer Defense System, here referred as SNDC, was created by the *Consumer Code* as an enforcement mechanism to oversee consumer relations in Brazil and ensure consumer law is respected. The *Consumer Code* states that the State is responsible for implementing a National Policy for Consumer Relations, as follows:

Art. 5. For the execution of the National Policy for Consumer Relations, the public power will, among others, perform the following tasks:

- I - make complete and free judicial assistance available for consumers of a lower social status;
- II - institute Public Prosecutor Offices for Consumer Defense within the Public Prosecution Service;
- III - create police precincts specializing in helping consumers that have fallen victim to penal consumer-related infractions;
- IV - create Special Small Claims Courts and Specialized Sections for solving consumption related litigations;
- V - provide stimuli for the creation and development of consumer Defense associations.

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<sup>448</sup> The Bureau International des Poids et Mesures defines metrology as: “the science of measurement, embracing both experimental and theoretical determinations at any level of uncertainty in any field of science and technology.” In 1875, an international treaty (Metre Convention) defined international agreements regarding metrology and international units of measurement. See: Bureau International des Poids et Mesures, “What is Metrology?”, online: *Bur Int Poids Mes* <<http://www.bipm.org/en/worldwide-metrology/>>. Discussions on a national system for metrology took place in Brazil since the Portuguese Imperial government was established. In 1973 law n. 5.966/73 created a national system (*Sistema Nacional de Metrologia, Normalização e Qualidade Industrial*), aiming to “develop and implement the national politics of metrology, industrial normalization and quality certification for industrial products.”

In the Brazilian legal framework, such national policies should be implemented by a National System. While the Constitution was approved in 1988 and the *Consumer Code* in 1990, early development of a national consumer system can be traced to the late 1970s. From concrete problems related to controlling inflation, the system developed over the years, reaching a high level of complexity with the approval of the National Plan for Consumption and Citizenship (PLANDEC – further discussed in this chapter). This system is in constant interaction with citizens and with social movements in general (particularly with the consumer rights movement), but in my case study (Skol Summer Muse), also with the feminist movement. Marcelo Gomes Sodré describes the *Consumer Code* as a micro-system because it is a catalyst for public policies to protect consumers. This idea is grounded in the Constitutional mandate that the state should protect consumers, regarding their vulnerability on consumer relations.<sup>449</sup>

This National System encompasses multiple entities at all federative levels (federal, state, and municipal) and is primarily responsible for enforcing consumer law. During the 1960s, the idea of creating national systems was consolidated, and infra-constitutional regulations reflect that. At that time, three national systems were created: sanitary surveillance, market competition, and metrology.<sup>450</sup> In general, national systems are organized by federal laws and have a federal body coordinating and setting the guidelines for public policies to be implemented by state and municipal bodies. The process of creation of those systems

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<sup>449</sup> *Supra* note 250 at 172 and 179; Amanda Flávio de Oliveira, “Reforma do Direito do Consumidor Brasileiro a partir das lições da behavioral economics: uma agenda possível?” in Isabela Maiolino & Luciano Benetti Timm, eds, *Direito Consum Novas Tendências E Perspect Comp* (Brasília, DF: Editora Singular, 2019) at 229-231.

<sup>450</sup> *Supra* note 250 at 112, 117, 122 and 248.

differs from the process that resulted in the establishment of the national system to protect consumer rights. This difference is that when the federal law established and organized a national consumer system, many states already had administrative bodies to protect consumer rights. The structure of these administrative bodies, as well as their mode of operation, varied substantially from state to state, which made it challenging for a federal body to organize and regulate state and municipal bodies' activities in protecting consumer rights. It was also not easy for the federal body to exercise its authority, because the state bodies were already functioning autonomously at the time of its creation.<sup>451</sup> This posed an extra challenge for the consumer rights system, as it was being established and trying to work harmoniously. Here we can note how lateral or horizontal state structures co-exist with hierarchical, vertical ones, as discussed by Val Napoleon.<sup>452</sup> These multiple power structures acting simultaneously amplify the challenges to law interpretation and implementation since each state body within the system can enforce the federal law in a different way. At the same time, such structures allow for the accommodation of multiple relationships between and within law in this national system.

Article 105 of the *Consumer Code* determines who should be part of the National Consumer Defense System (SNDC): “federal, state, municipal, federal district agencies; as well as private consumer defense entities.” The lack of clarification about who should be part of the system and how it should operate created confusion, leading Sodr  to suggest

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<sup>451</sup> *Ibid* at 249.

<sup>452</sup> Val Napoleon, “Thinking about Indigenous Legal Orders” in Ren  Provost & Colleen Sheppard, eds, *Dialogues Hum Rights Leg Plur* (New York: Dordrecht Heidelberg: Springer Netherlands, 2013).

that it is highly questionable whether a national system to protect consumers exists.<sup>453</sup> The fact is that with or without previous coordination, organized or disorganized, for the last 27 years, federal, state, and municipal bodies have been organizing themselves and engaging in multiple discussions to enforce consumer law in Brazil. During this period, the definition of the role of the federal body changed and new groups engaged with the system, like representatives from the Special Small Claims Courts. Multiple social actors are responsible for ensuring the *Consumer Code* is observed and implemented, which includes punishing cases of misleading or abusive advertising.<sup>454</sup> Therefore, even if different from other systems created in Brazil, the SNDC can be considered a national system to oversee consumer relations in the country. In the 1970s, when the first PROCONs were created, through state's responses to consumer's needs, a system emerged. This means that these state bodies were functioning before their legal definition, regulation, and guidelines of and operation were established.

Currently, the following institutions take part in the SNDC: the National Secretary of the Consumer (Secretaria Nacional do Consumidor, Senacon), the Department of Consumer Protection and Defense (Departamento de Proteção e Defesa do Consumidor - DPDC), the state and municipal PROCONs (administrative bodies to protect consumer rights), state and federal public prosecutor's offices, public legal defense offices, consumer police offices, Special Small Claims Courts, non-profit organizations. Since the creation of Senacon, the

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<sup>453</sup> *Supra* note 250 at 249.

<sup>454</sup> Lucía Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 43.

SNDC has also been seeking partnership with federal regulatory agencies.<sup>455</sup> I briefly describe the role of each member, clarifying its duties and responsibilities, starting at the federal level.

#### **4.5.1. Consumer protection at the Administrative Federal level: Senacon – the National Secretary of the Consumer and DPDC - Department of Consumer Protection and Defense**

Prior to the *Consumer Code*'s approval, Decree 91.469/85 created the National Council to Defend Consumers, an institution where consumers, suppliers, and government representatives participated. The council was a fruitful arena for debates on consumer relations and in this space the first draft of the Brazilian *Consumer Code* was discussed and sent to the Congress. The intense and articulated discussion of the law proposed at this time facilitated the later approval of the Code by the National Congress.<sup>456</sup> This Council never acted as head of the SNDC because it was extinguished before the Code took effect (Law 8.028/90 article 27, §1º, b, 2).<sup>457</sup>

As a replacement, the Department of Consumer Protection and Defense (*Departamento de Proteção e Defesa do Consumidor, the "DPDC"*) was created within the Ministry of Justice. The DPDC was a small body within the Secretary of Economic Regulations<sup>458</sup> and was less diverse than the previous council, which meant a reduced ability to promote legal and political debates. DPDC was appointed as the head of the SNDC, responsible for

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<sup>455</sup> *Supra* note 28 at 33-52.

<sup>456</sup> *Supra* note 250 at 16 at 125 and 126.

<sup>457</sup> *Lei n. 8.028/90*, 8.028 (12 April 1990).

<sup>458</sup> *Supra* note 250 at 129.

coordinating the national public policies intended to protect consumer rights until 2012,<sup>459</sup> when the National Secretary of the Consumer (Senacon)<sup>460</sup> was created to replace DPDC and:

(1) guarantee the protection and exercising of consumer rights, (2) to promote harmonious relations between buyers and sellers, and (3) to promote the integration and joint action within Brazil's diverse national "system" of consumer protection. This system includes country-level bodies such as the National Consumer Secretariat, the Justice Ministry, and major consumer groups, but also Procons, which exist in Brazil's twenty-six states, as well as in nearly a thousand municipalities.<sup>461</sup>

At first, Senacon had an unusual internal organization, with just the DPDC below it. Senacon incorporated many of the responsibilities the department had. In terms of administrative sanctions imposed by the department on companies, Senacon became the administrative appeal instance. Senacon's primary function is coordinating the SNDC and establishing national public policies to protect consumer rights, and the DPDC is responsible for implementing such policies.<sup>462</sup> Senacon also became an autonomous body, independent of the Secretary of Economic Regulations, which was eliminated and replaced by another institution focused on competition issues.<sup>463</sup>

Besides occupying the "head" of the national system for consumer protection, Senacon represents the Brazilian government in international forums that discuss consumer issues,

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<sup>459</sup> *Decreto n. 7.738/12, 7.738* (28 May 2012).

<sup>460</sup> *Supra* note 352 at 333.

<sup>461</sup> Marcelo Gomes Sodré, "Watchdogs and Whistleblowers" in Stephen Brobeck & Robert N Mayer, eds, *Ref Guide Consum Act* (Denver, Colorado: Greenwood, 2015).

<sup>462</sup> *Supra* note 28 at 30.

<sup>463</sup> Estrutura da Secretaria Nacional do Consumidor – SENACON, Decreto n. 8.668/2016, see: Senacon, MJ, "Organograma: Secretaria Nacional do Consumidor", (September 2021), online: *Minist Justiça E Segur Pública* <<https://www.gov.br/mj/pt-br/aceso-a-informacao/institucional/organogramas/2022-organogramas/senacon-atualizado.pdf>>.

notably harmonization of consumer rules within *Mercado Común del Sur* (MERCOSUR – Common Market of the South)<sup>464</sup> and before the Organization of American States (OAS), on the matter of product security and market surveillance.<sup>465</sup>

The DPDC is responsible for implementing the national policies articulated by Senacon and works more as an executive body, supporting Senacon. The DPDC's activities cover four different areas.<sup>466</sup> The General Coordination for Studying and Monitoring the Market is responsible for sectorial dialogue with different segments of the market like financial, telecom, and health insurance, for example. This branch is responsible for monitoring self-regulatory mechanisms and engaging in public consultations to improve the regulatory environment in Brazil. This branch is the most engaged in the implementation of the National Plan for Consumption and Citizenship – Plano Nacional de Consumo e Cidadania: PLANDEC.<sup>467</sup> Plandec reinforces the connection between consumption and citizenship, or citizenship as an aspect of consumption, and establishes an overarching structure to promote and ensure consumer rights in Brazil, including a Council of Ministers and a National Observatory for Consumer Relationships in Brazil.<sup>468</sup>

The General Coordination of the National Informational System for the Defense of Consumers (*Sindec - Sistema Nacional de Informações de Defesa do Consumidor* – National System of Information on Consumer Defense) is responsible for coordinating,

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<sup>464</sup> More information on Mercosur can be found at: Mercosur, “Mercosur in brief”, online: *Mercosur* <<https://www.mercosur.int/en/about-mercorsur/mercorsur-in-brief/>>.

<sup>465</sup> *Supra* note 352 at 334-335.

<sup>466</sup> *Ibid* at 372.

<sup>467</sup> *Decreto n. 7.963/13*, 7.963 (15 March 2013).

<sup>468</sup> *Supra* note 352 at 332.

implementing, and improving Sindec's operation. Sindec is a software that harmonizes consumer claims presented to administrative bodies throughout the country so that they are reported consistently throughout all PROCONs that decide to use it.<sup>469</sup> This branch ensures that the system is operating in all PROCONs that are registered with Senacon, providing training and regular updates both to the system and for the operators of Sindec in local PROCONs. This Coordination is responsible for providing data regarding consumer claims nationally every year and administrating the new online platform implemented to solve consumer problems, the [www.consumidor.gov.br](http://www.consumidor.gov.br) (more information below). This is a relevant tool for solving consumer issues, with the state body mediating negotiations between providers who decided to join the platform and consumers.

The General Coordination for Technical Advice and Administrative Proceedings was responsible for supporting the Senacon in the establishment of institutional partnerships with other state and non-state bodies; monitoring and positioning the federal government regarding proposed laws related to consumer issues; implementing national policies related to recalls and product security and surveillance, in partnership with other governmental and non-governmental bodies, national and international; and enforcing consumer regulations through administrative proceedings that have a national dimension by suggesting the imposition of sanctions to the director of the DPDC.<sup>470</sup> When it comes to the imposition of fines, the general coordinator presents a submission to the director of the DPDC, who will then analyse the matter and decide whether the fine is justified or not. In this context, the

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<sup>469</sup> *Supra* note 352 at 377.

<sup>470</sup> *Supra* note 352 at 374-375 and 381.

DPDC acts to solve consumer problems that have a national dimension, and fines can be quite substantial. In 2018, for example, the DPDC ordered telecom companies in Brazil to pay a R\$ 9,3 million fine for violating the *Consumer Code*.<sup>471</sup> The structure of this Coordination was changed in 2019 so that it is only responsible for investigating violations to the *Consumer Code*, suggesting the imposition of fines, and overseeing recalls in the country. This change is addressed further in this section.

There is no hierarchy between Senacon and PROCONs, and Senacon does not operate as a second instance or appeal court for decisions taken by PROCONs. Each administrative body (Senacon and PROCONs) has their own internal appeal system: for example, a fine imposed by the DPDC is reviewed at the appeal level by Senacon, and the same structure can be observed in the PROCONs. A fine imposed by a PROCON cannot be reviewed by Senacon, only by the judiciary. This form of organization allows for cooperative relationships rather than hierarchical ones. Historically, members of the SNDC have sought coordination and cooperation through national meetings.

To foster debates and settle agreements regarding interpretation or strategies to deal with consumer problems nationwide, Senacon organizes regular annual meetings, congregating representatives from all the members of SNDC.<sup>472</sup> From 1990 to 2012, 72 annual meetings for the SNDC were organized by the DPDC,<sup>473</sup> and from 2012 to 2016, another 16

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<sup>471</sup> Cláudia Lima Marques & Roberto A C Pfeiffer, “Dissemination of Consumer Law and Policy in Brazil: The impact of EU Law” (2022) 45 J Consum Policy 27–48 at 44.

<sup>472</sup> Marcia Andreia da Silva Almeida, *O movimento consumerista e a padronização técnica da produção industrial: perspectivas e desafios à participação das entidades civis de consumidores nas atividades de normalização e regulamentação técnicas* (Doutorado, 2015) [unpublished] at 123-124.

<sup>473</sup> *Supra* note 352 at 376.

meetings were held by Senacon, for a total of 88 meetings over the last 16 years.<sup>474</sup> All of the 4,071,482 public institutions registered with Senacon, along with private institutions, are invited to the meetings.<sup>475</sup>

Usually, the meetings are hosted by one of the state members of SNDC, which volunteers to organize the local infrastructure for the meeting. The agenda to be discussed is set by Senacon, which also contributes with financial resources to support such meetings. This is understood by members of SNDC as an opportunity to bring the national body to the different states and cities and somehow regionalize the agenda and the debates. It also supports the consumer rights agenda locally, by calling attention to the subject and reinforcing the importance of protecting consumer rights. Additionally, these visits from the national body contribute to strengthening negotiations that can enhance local infrastructure to address consumer problems.

The meetings are an important locus for discussing problems that the SNDC members are identifying in their daily relations with consumers and that might have a national dimension

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<sup>474</sup> Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000658201779), answered by the Federal Government by the Document 11/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in February 23<sup>rd</sup>, 2017.

<sup>475</sup> The fact that the number of participants has more than doubled over the years shows the expansion and consolidation of the system. According to official information provided by Senacon, in 2010, a total of 60 people participated in the national meetings (32 representatives of PROCONS, 6 representatives of the Public Prosecutor Offices, 12 representatives of the Public Legal Defense, 4 representatives of Non-profit organizations and 6 special guests). In 2016, one of the national meetings had 109 attendees (65 representatives of PROCONS, 10 representatives of the Public Prosecutor Offices, 14 representatives of the Public Legal Defense, 14 representatives of Non-profit organizations and 6 special guests). In 2014, one of the national meetings congregated 189 representatives of SNDC's members, counting with 126 representatives of PROCONS. Data provided by Senacon also shows that if the number of participants varies, the frequency and number of meetings can range from one (2010) to 4 national meetings (2011, 2012, 2013, 2014). Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000658201779), answered by the Federal Government by the Document 48/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in April 3<sup>rd</sup>, 2017.

requiring federal action, which can encompass elaboration of guidelines for interpretation on specific subjects, federal administrative proceedings with imposition of fines, and promotion of sectorial dialogues to reach agreements and search for mass solutions to mass problems. Although critical to keeping the National System working and aligned, these meetings are not defined in any legislation or internal regulations of the Ministry of Justice, but are a custom that has been institutionalized over the years. Calling for the meetings being a discretionary decision of the secretary, there is a risk that, if political power changes, the meetings can be ended any time.

Another relevant question concerns budgetary allocations, because financial resources mean the capacity to foster and implement relevant public policies for better consumer relations.<sup>476</sup> The DPDC, and later Senacon, had increasingly larger budget assignments from 2006 to 2013, but in 2015 and later in 2016 the budget shrank significantly, probably affecting the activities developed by the federal government and its capacity to influence and coordinate consumer policies with the states and municipalities.<sup>477</sup> Many factors might explain this reduction, including technical and macro-political aspects, such as the political instability faced by the country from 2015 on. In 2015, Brazil faced a severe political crisis

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<sup>476</sup> The DPDC and Senacon were not always able to fully implement the funds received, which might have affected their designated financial allocation. At the same time, the establishment of Senacon in 2012, substituting the DPDC as the head of the system was seen as a window of opportunity to claim a more substantial budget: Senacon represents a larger structure, which also pushed for the development of more comprehensive and far-reaching consumer public policies.

<sup>477</sup> Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000836201761), answered by the Federal Government by Ofício 15/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in March 08<sup>th</sup>, 2017; Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000836201761), answered by the Federal Government by Ofício 15/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in March 08<sup>th</sup>, 2017.

that culminated with the impeachment of the elected president, Dilma Roussef, and her replacement by Michel Temer, who was her vice president. The new interim government profoundly changed the structure of the ministries, drastically reduced investments in social programs and public expenditure with public policies, and imposed a strict austerity agenda.

Further change came with the Bolsonaro government. According to a decree signed on January 1<sup>st</sup> 2019, and subsequently reviewed by two other decrees later in the same year, the structure of Senacon changed. Senacon remained as the head of the system, but gained the responsibility to oversee crimes against intellectual property and pirated products. The National Council that oversees the management and implementation of funds for diffuse rights became a branch of Senacon, and a department focused on promoting Diffuse and Collective Rights was created at the same level as the DPDC. Other changes were made in the structure of the DPDC and Senacon, reducing the responsibilities of one of its bodies, which is now responsible for overseeing recalls and violations to the *Consumer Code*. The responsibility to coordinate institutional relationships that was once in this General Coordination was moved up to the structure of the Senacon.<sup>478</sup> The efficacy of such changes will need to be observed over time.

Finally, I would like to make one last remark about SNDC: most of the social actors within the SNDC represent the state in different spheres (executive, judiciary, prosecution office,

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<sup>478</sup> Senacon, MJ, *supra* note 476.

and public attorney).<sup>479</sup> Even if the public prosecutor's office and public attorneys are responsible for representing society's interests, they still belong to the state apparatus. Therefore, it is remarkable how because of this extensive participation of state agents, the consumer rights agenda is mainly pushed forward by the state itself, through its different representations and sectors. This does not mean that the state bodies in charge of consumer protection promote or align themselves with the hegemonic discourse. Even if the state bodies do not always propose radical changes, as would be expected from social movements, PROCONs often do significantly challenge hegemonic economic powers. In an unexpected way, they act in coalition with other social movements from below to contest economic powers.<sup>480</sup>

Having provided information about the structure, key attributions, and budgetary allocations for Senacon, I now turn my attention to the other members of the SNDC, starting with the administrative bodies, the PROCONs.

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<sup>479</sup> Some additional information on the SNDC can also be found at: Cláudia Lima Marques & Roberto A C Pfeiffer, "Dissemination of Consumer Law and Policy in Brazil: The impact of EU Law" (2022) 45 J Consum Policy 27–48 at 44-47.

<sup>480</sup> Laurence Cox and Alf Gunvald Nielsen, *We make our own history* (London: Pluto Press, 2014) at 72: "(...) while social movements from above seek to create and consolidate economic and power structures which in turn give direction and meaning to the routines and lived experience of everyday life, social movements from below tend to reverse this order. Social movements from below, that is, grow out of people's experience of a concrete lifeworld that is somehow problematic relative to their needs and capacities, and from their attempts to combine, organise and mobilise in order to do something about this. A social movement from below can thus be denied as the organisation of multiple forms of locally generated skilled activity around a rationality expressed and organised by subaltern social groups, which aims either to challenge the constraints that a dominant structure of needs and capacities impose upon the development of new needs and capacities or to defend aspects of an existing dominant structure which accommodate some of their specific needs and capacities."

#### 4.5.2 Administrative bodies: PROCONs

The first administrative state office (PROCON) to promote consumer protection was created in 1976 by the state of São Paulo, before the approval of the national *Consumer Code* in 1990.<sup>481</sup> This example was followed by other states, and from 1976 to 1985 almost all of them created similar institutions. Therefore, consumer protection in Brazil started to be discussed and implemented prior to the approval of a national consumer law, and it was largely pushed by PROCONs. In part this is related to the economic context: the high inflation and economic crisis Brazil was facing led state bodies to attempt to control prices and protect consumers from this situation. The *Consumer Code*, in 1990, incorporated PROCONs as members of the SNDC.<sup>482</sup>

PROCONS are created by laws and are usually placed within the structure of the executive power at the state or the municipal level. These administrative bodies have the mandate to prevent, mediate, and impose repressive measures aiming to harmonize consumer relations and avoid litigation regarding consumer conflicts.<sup>483</sup> PROCONS, together with the DPDC and Senacon must follow federal decree 2.181/97, which establishes general procedural rules.<sup>484</sup>

In 2013, there were 778 PROCONS in Brazil: 27 at the state level (26 states and one federal district),<sup>485</sup> 13 in capitals, and 738 in other cities. The capacity of PROCONS differ

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<sup>481</sup> *Supra* note 250 at 132.

<sup>482</sup> *Ibid* at 133.

<sup>483</sup> *Supra* note 28 at 35 and 49; *Supra* note 352 at 388.

<sup>484</sup> *Decreto 2.181/97*, 2.181 (20 March 1997).

<sup>485</sup> The Federative Republic of Brazil has 26 states and the federal district, which has a different and separate organization from the states.

significantly throughout the country, and when we compare urban and rural areas. For example, in 2014 PROCONs helped a total of 108,362,880 consumers, but in the southeast region PROCONs handled the problems of 56% of the population, while in the north region PROCONs covered only 3% of the population.<sup>486</sup> PROCONs' structure can vary widely, as can the way they offer their services to consumers. Because the *Consumer Code* allows broad interpretation, the same consumer problem could be dealt with differently by the local PROCONs in São Paulo and Acre, for example. That is why since 2004, the federal government<sup>487</sup> has been making a considerable effort to ensure that all PROCONs follow the same procedures so that citizens in all states and cities can access the same kind of ground level consumer protection.

This gradual consolidation of the National System to protect consumer rights allowed the organization of specific tools to measure and identify consumer problems in Brazil. One of these tools, the National Informational System for the Defense of Consumers, Sindec, is a software aimed at creating a uniform way of receiving and processing consumer demands presented by citizens to the PROCONs.<sup>488</sup> This technology was first implemented in 2004. By 2014, all states had been integrated into this system, which allowed the design of national public policies based on the data collected throughout all the federative units. In 2021, Senacon reported that 850 cities had PROCONs and that there were 1,167 service

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<sup>486</sup> *Supra* note 28 at 56.

<sup>487</sup> *Supra* note 250 at 278.

<sup>488</sup> *Supra* note 352 at 377.

stations to support consumers in their problems with providers,<sup>489</sup> with a total of 29,971,809 procedures conducted through Sindec since 2004.<sup>490</sup>

Following direction from the *Consumer Code*, every year Senacon publishes a report with data from the previous year, pointing out the most relevant problems consumers faced and the companies which consumers reported most often. From 2011 to 2015, consumer claims have increased from 1,696,833 to 2,648,521. In 54% of these cases, women were the ones who reached out to PROCONs to complain about consumer problems. The top problems reported during this period involved telecom and financial issues.<sup>491</sup> Compared with previous years, in 2016, there was a reduction of 7.2% in the cases registered by PROCONs: a total of 2,458,127 from consumers all over the country. From all these calls, 63.7% were claims and 32.2% just requests for information. In 2016 women were still the ones who most frequently presented claims to PROCONs, since women represented 53.5% of all the people who reported to PROCONs during that year. Telecom and financial issues were still the most common problems reported by consumers in 2016.<sup>492</sup> Senacon published these reports until 2019, and then moved to an online platform where people can consult data from different years, the [sindecnacional.mj.gov.br](http://sindecnacional.mj.gov.br).<sup>493</sup> According to this website, up

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<sup>489</sup> Secretaria Nacional do Consumidor, “Secretaria Nacional do Consumidor - Sistema Nacional de Informações de Defesa do Consumidor (SINDEC)”, online: [sindecnacional.mj.gov](http://sindecnacional.mj.gov) <<https://sindecnacional.mj.gov.br/home>>.

<sup>490</sup> *Ibid.*

<sup>491</sup> Reports presenting the collected data from 2011 to 2015 are available at the Ministry of Justice website: Senacon, “Boletins SINDEC”, online: *Minist Justiça E Segur Pública* <<https://www.gov.br/mj/pt-br/assuntos/seus-direitos/consumidor/sindec/boletins-sindec>>.

<sup>492</sup> *Boletim Sindec 2016* (Secretaria Nacional do Consumidor, Ministério da justiça, 2016).

<sup>493</sup> Secretaria Nacional do Consumidor, “Secretaria Nacional do Consumidor - Sistema Nacional de Informações de Defesa do Consumidor - Atendimentos”, online: [sindecnacional.mj.gov](http://sindecnacional.mj.gov) <<https://sindecnacional.mj.gov.br/report/Atendimentos>>.

until August 2022, there were 697,690 procedures conducted by PROCONs in Brazil, 75.16% being claims referring to consumer problems and 24.84% being questions asked by citizens. Consumers reported financial issues the most, resulting in 35.66% of the claims, followed by telecom (19.33%), and problems with products (16.81%).<sup>494</sup> Women continued to be the ones most engaged in reaching out to PROCONs, representing 52.61% of the complaints while male consumers reporting to PROCONs account for 47.39% of the cases.

Considering that advertising was not among the most frequent claims presented by consumers, I formally requested Senacon information on this question. Although I asked for information collected through the 10 year period considered in this research (2006 to 2016), Senacon provided only information registered by Sindec from January 1<sup>st</sup> 2014 to December 31<sup>st</sup> 2016. Information from the previous period could not be obtained because the data recording process changed dramatically over time, together with the database. Due to technological changes in the system, early data from Sindec is not easily accessible. As for data from 2016 on, I would need to formally request information from Senacon again, considering that advertising was still not among the most common problems reported by consumers according to Sindec's website.<sup>495</sup>

From 2014 to 2016, consumer claims concerning advertising totaled 93,646 claims. Of these, 11,202 were specifically about abusive advertising:

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<sup>494</sup> *Ibid.*

<sup>495</sup> Consulted on August 04, 2022. *Ibid.*

Consumer Claims Regarding Advertising 2014 to 2016 <sup>496</sup>			
Reason for Consumer Claim	2014	2015	2016
Sell/Offer/Misleading Advertising	14,376	17,901	16,428
Misleading Advertising	11,629	11,502	10,608
Abusive Advertising	3,518	4,372	3,312
Total	29,523	33,775	30,348

Following this general data, most claims were also presented by women, keeping a constant average percentage of 52% over the 3 years. A request to Sindec to search the database with the key words “abusive advertising,” “discrimination,” “woman” or “discrimination” and “woman,” turned up no entries. This means that there are no records of consumers complaining about gender discrimination in advertising over the period Sindec has been operating, from 2004 to 2016.<sup>497</sup>

At the federal level, regarding the cases about advertising submitted and analysed by the DPDC and Senacon, I had no clear information on the number of administrative proceedings that were started or ended during the time of this research. According to the SIC-SENAÇON number 08198.007852/2022-93, the DPDC did not provide any

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<sup>496</sup> Information provided by Senacon in March 27<sup>th</sup> 2017, by e-mail.

<sup>497</sup> Tamara Amoroso Gonsalves, *Consulta a dados do Sindec* (2017).

information on cases decided prior to 2015, declaring that this information was not available. As to the proceedings started in 2015 and onwards, 16 referred to abusive (6) or misleading advertising (10), and all cases about abusive advertising were about advertising aimed at children.<sup>498</sup>

With this overview of the most common problems presented to PROCONs and identified by the Sindec, data from Consumidor.gov.br and from the DPDC indicates that abusive advertising does not appear as one of the most common consumer issues, unless it is related to advertising to children, which can be connected to social activism related to this topic promoted by the Alana Institute.<sup>499</sup>

Brazilians rely heavily on PROCONs to solve consumer problems.<sup>500</sup> This is a particular challenge after more than 12 years of consistent investments in social policies directed to reduce extreme poverty in Brazil, which increased consumption significantly:

In recent years, Brazil has gained considerable importance on the world stage, and the globalization of its economy has seen all the great world companies setting up shop there. As the economy has grown, Brazil's middle class has grown, but the opportunity to participate in the consumer market is just beginning for many of the country's citizens. According to the government-affiliated Institute of Applied Economic Research, 2012 saw 3.5 million people emerge from poverty (and an additional 1 million escape from extreme poverty) who then, in some form or another, went on to become part of consumer society.<sup>501</sup>

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<sup>498</sup> Secretaria Nacional do Consumidor - Senacon, *INFORMAÇÃO Nº 28/2022/CSA-SENACON/CGCTSA/DPDC/SENACON* (2022).

<sup>499</sup> For more information on the Alana Institute, see footnote 37 on page 38.

<sup>500</sup> Cláudia Lima Marques & Roberto A C Pfeiffer, "Dissemination of Consumer Law and Policy in Brazil: The impact of EU Law" (2022) 45 J Consum Policy 27–48 at 44.

<sup>501</sup> *Supra* note 250.

To deal with the increasing numbers of consumer problems in Brazil and the limited capacity of PROCONs, in 2016 Senacon launched a new online tool to help consumers settle agreements with suppliers: the [consumidor.gov.br](http://consumidor.gov.br) platform. Through this online service, consumers register their claims and enterprises answer the claims, offering solutions. The agreements are supervised by Senacon. In 2016, 288,000 claims were presented by consumers to the online platform. Altogether, 370 enterprises operating in all economic sectors are part of this program and according to Senacon, 80% of the complaints are resolved within 6 days.<sup>502</sup> According to the 2021 report (*Boletim Consumidor.gov.br 2021*),<sup>503</sup> since its creation in July 2014, the [Consumidor.gov](http://Consumidor.gov) platform had more than 5 million requests, a total of 3.5 million users, and more than 1,148 enterprises have registered. Resolution continues to be high, with companies solving the consumer's problems in 78% of the cases. Again, the topics that consumers raise the most are financial services (29%) and telecom (21.1%), followed by e-commerce problems.<sup>504</sup>

The data presented so far indicates that Brazilian consumers rely heavily on PROCONs or other state-led resources (like the [Consumidor.gov.br](http://Consumidor.gov.br) platform) to solve their consumer problems, meaning that these solutions often have some sort of governmental mediation. Apart from solving individual consumer problems, PROCONs, and especially Senacon, act in cases that represent a massive consumer problem, often by imposing fines that are then paid to the National Fund for Diffuse and Collective Rights. If there is a high level of

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<sup>502</sup> *Consumidor.gov.br: Balanço 2016*, available at: Secretaria Nacional do Consumidor, “*Consumidor.gov.br - Indicadores*”, online: *Consumidor.gov.br* <<https://www.consumidor.gov.br/pages/publicacao/externo/>>.

<sup>503</sup> *Boletim Consumidor.gov.br 2021*, Governmental, by Secretaria Nacional do Consumidor, *Boletim Consumidor.gov.br 2021* Governmental (Secretaria Nacional do Consumidor, 2021).

<sup>504</sup> *Boletim Consumidor.gov.br 2021*, Governmental, by Secretaria Nacional do Consumidor, *Boletim Consumidor.gov.br 2021* Governmental (Secretaria Nacional do Consumidor, 2021) at 4.

resolution for individual problems (reaching 78%, as mentioned above), when it comes to collective issues, the payment of the fine can be postponed for years, indicating that what happened in the *Skol* Summer Muse Campaign (company refusing to pay the fine by proposing multiple appeals) is quite common.

Research coordinated by Senacon and published in September 2021 studied the Brazilian state courts to explore how fines imposed by PROCONs are decided on the appeal level and whether they are reversed or maintained.<sup>505</sup> This study mapped out 1,445 judicial proceedings in six Brazilian courts that discussed fines imposed by PROCONs. The majority of cases were concentrated in the São Paulo state court: 84.2%, followed by 9.92% in the state court of Mato Grosso.<sup>506</sup> According to Andressa Kutschenko, author of the study, this might be because the majority of companies are located in São Paulo, but I add to this the fact that the São Paulo state PROCON was the first PROCON in Brazil and is recognized as one of the more active and innovative amongst the PROCONs, often pushing debate on new topics and promoting new interpretations of consumer law. From the 84.2% of cases decided by the São Paulo state court, 47% referred to fines higher than R\$ 100,000, and 9% of the cases were related to advertising, abusive commercial practices, or undue charges.<sup>507</sup> In 75.24% of the cases decided by the São Paulo state court, the fine imposed by PROCON was maintained, and in 11.79% of the cases the court partially changed the fine imposed by PROCON. The higher in the structure of the judiciary, the less

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<sup>505</sup> *Fortalecimento da proteção e defesa da concorrência e dos direitos do consumidor no Brasil*, Documento Técnico Final, by Andressa Kutschenko Nahas, Documento Técnico Final Projeto PNUD/BRA/11/008 (Brasília, DF: PNUD/Brazil and Senacon, 2021).

<sup>506</sup> *Ibid* at 58.

<sup>507</sup> *Ibid* at 59.

likely it is that the PROCON decision will be changed, with 85.4% of the cases that reach the Superior Court (STJ) confirming the fine.<sup>508</sup> Changes in the amount due for the fines also seem to change according to the size of the fine: for fines higher than R\$200.000, the reversibility is likely to occur in 31% of the cases, while for fines that reach 1 million reais, this probability reaches 35%.<sup>509</sup> It is important to note that overall, the São Paulo state PROCON has the highest fines, often surpassing R\$ 1 million.<sup>510</sup>

Along the same lines, research coordinated by Vítor Morais de Andrade collected and analyzed 738 cases decided by state courts in Brazil, the STJ, and the Supreme Court (STF) from January 2019 to October 2020 referring to fines imposed by municipal and state PROCONs, and concluded that in 62% of the cases the companies contested not the imposition of the fine, but the amount that is due. From the 738 cases, almost half (367) contested the amount of the fine imposed by PROCON, usually an amount that ranged from R\$ 10 and 50 thousand reais.<sup>511</sup> Also, according to this latter research, the fines imposed by São Paulo state PROCON tend to be higher, representing 57% of the fines over R\$ 1 million. In the majority of the cases, however, the fine is maintained by the judiciary, followed by the reduction of the fine imposed.<sup>512</sup> This is related to the fact that there is no way to ensure that PROCONs impose administrative fines in a uniform way: each

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<sup>508</sup> *Ibid* at 66.

<sup>509</sup> *Ibid* at 68.

<sup>510</sup> *Ibid* at 68.

<sup>511</sup> Ivan Ventura, “Multa sub judice” *Consum Mod*, online:

<<https://revista.consumidormoderno.com.br/multa-sub-judice/edicao-267/>>; Aline Herscovici, *As Razões de Decidir dos Tribunais Brasileiros Quanto a Multas Aplicadas pelo ODC* (Morais Andrade Advogados, 2022).

<sup>512</sup> Ivan Ventura, “Multa sub judice” *Consum Mod*, online:

<<https://revista.consumidormoderno.com.br/multa-sub-judice/edicao-267/>>; Aline Herscovici, *As Razões de Decidir dos Tribunais Brasileiros Quanto a Multas Aplicadas pelo ODC* (Morais Andrade Advogados, 2022).

PROCON has its own rules and procedures to establish the amount that is due, which creates a diversity of methods for determining how much a company should pay in case of a violation to the *Consumer Code*.

As we can see, the SNDC operates simultaneously in different power structures: laterally or horizontally in the relationship amongst the administrative bodies, regardless of whether they are at the federal, state, or municipal level (Senacon, state PROCONs, and municipal PROCONs), and hierarchically or vertically when a sanction imposed by such administrative bodies is discussed before the courts.

#### **4.5.2 Specialized Public Prosecutor's Offices**

Public Prosecutor's Offices have a broader scope of action than in other jurisdictions, where they usually work to secure observance of criminal law. The 1988 Brazilian Constitution establishes that the Public Prosecutor's Office has the central role of promoting justice, operating both at the state and federal judicial levels. State and federal prosecutor's offices can propose collective, constitutional, and criminal lawsuits, should monitor the fulfillment of legal obligations, issue notifications in administrative proceedings within its competences,<sup>513</sup> exercise external control over the police, and can also propose actions to discuss constitutional matters, among other responsibilities.<sup>514</sup>

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<sup>513</sup> Cláudia Lima Marques & Roberto A. C. Pfeiffer, *supra* note 37.

<sup>514</sup> *Constitution of the Federative Republic of Brazil*, *supra* note 10 “Article 127. The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests. (CA No. 19, 1998; CA No. 45, 2004)

Article 128. The Public Prosecution comprises: (CA No. 19, 1998; CA No. 45, 2004)

I – the Public Prosecution of the Union, which includes: a) the Federal Public Prosecution; b) the Labour Public Prosecution; c) the Military Public Prosecution; d) the Public Prosecution of the Federal District and the Territories;

II – the Public Prosecutions of the states.

Public Prosecutor's Offices should act to protect society's interests, ensuring that the state fulfils its obligation towards citizens in guaranteeing access to and enjoyment of fundamental rights. These offices usually have a collective perspective and are often associated with the duty to promote social justice through legal remedies. They combine criminal and social justice competences. Since at least 1985, the public prosecutor's office association has claimed that a specialized section should be created to address consumer issues. This demand was incorporated into the 1988 Federal Constitution and since then, progressively, sections specialized in consumer rights have been created within the structure of the prosecutor's office, both at state and federal levels.<sup>515</sup>

Federal and state Prosecutor's Offices have the same general objective in protecting collective and diffuse interests, but their competencies follow the jurisdictional division for federal and state justice. Within the realm of consumer protection, prosecutor's offices act

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Article 129. The following are institutional functions of the Public Prosecution: (CA No. 45, 2004)

- I – to initiate, exclusively, public criminal prosecution, under the terms of the law;
  - II – to ensure effective respect by the Public Authorities and by the services of public relevance for the rights guaranteed in this Constitution, taking the action required to guarantee such rights;
  - III – to institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests;
  - IV – to institute action of unconstitutionality or representation for purposes of intervention by the Union or by the states, in the cases established in this Constitution;
  - V – to defend judicially the rights and interests of the Indian populations; VI – to issue notifications in administrative procedures within its competence, requesting information and documents to support them, under the terms of the respective supplementary law;
  - VII – to exercise external control over police activities, under the terms of the supplementary law mentioned in the previous article;
  - VIII – to request investigatory procedures and the institution of police investigation, indicating the legal grounds of its procedural acts;
  - IX – to exercise other functions which may be conferred upon it, provided that they are compatible with its purpose, with judicial representation and judicial consultation for public entities being forbidden.
- Paragraph 1. Legitimation by the Public Prosecution for the civil actions set forth in this article shall not preclude those of third parties in the same cases, according to the provisions of this Constitution and of the law.”

<sup>515</sup> *Supra* note 352 at 193.

mostly by proposing collective lawsuits and trying to settle agreements with corporations in cases of collective damages (Termo de Ajustamento de Conduta, TAC in Portuguese).

These agreements are possible due to a provision in Law 7.347/85 and in general involve the fulfillment of specific obligations by the corporation to repair the damage that was caused.<sup>516</sup> Within consumer relations, TACs can be made to prevent damages or to impose compensation for damages caused by the supplier.<sup>517</sup> The consumer prosecutor's offices can act both in civil and criminal cases. According to Senacon, in 2017 there were 99 public prosecutor's offices specialized in consumer rights.<sup>518</sup>

#### **4.5.3 Public Legal Defense**

Public legal defense services are offered by the state to ensure citizens' access to justice. The public attorneys are civil servants who act on behalf of people who cannot afford a private lawyer. The legal competences of the Public Legal Defense are laid out in article 134 of the Federal Constitution.<sup>519</sup> Law 11.448/07 allowed the public legal defense bodies to propose collective lawsuits to protect consumers' interests.<sup>520</sup> According to Senacon, in 2017 there were 76 public attorneys specialized in consumer rights.<sup>521</sup>

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<sup>516</sup> *Lei 7.347/1985*, (24 July 1985).

<sup>517</sup> *Supra* note 352 at 427; Cláudia Lima Marques & Roberto A. C. Pfeiffer, *supra* note 37.

<sup>518</sup> Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000658201779), answered by the Federal Government by the Document 48/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in April 3<sup>rd</sup>, 2017.

<sup>519</sup> *Constitution of the Federative Republic of Brazil*: "Article 134. The Public Legal Defense is an essential institution to the jurisdictional function of the State and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, LXXIV. (CA No. 45, 2004)."

<sup>520</sup> *Supra* note 28 at 46.

<sup>521</sup> Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000658201779), answered by the Federal Government by the Document 48/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in April 3<sup>rd</sup>, 2017.

#### 4.5.4 Consumers' Police Offices

As the *Consumer Code* encompasses criminal regulations (articles 61 to 75), consumers' police offices investigate crimes against consumers. Police offices specialized in investigating crimes against consumers can be created by state authorities. But even when these specialized offices are not created, common Police Offices can register and investigate crimes against consumers.<sup>522</sup> According to Senacon, there were 23 consumers' police offices in Brazil in 2017.<sup>523</sup>

#### 4.5.5 Small Claims Courts

Law 9.099/95<sup>524</sup> created the small claims courts, which are considered to be more accessible courts. Citizens do not need lawyers to represent them and the procedures should be simplified and quicker than other judicial procedures.<sup>525</sup> The small claims courts favour agreements between parties and the amount of the claim is limited to a lower value. The Small Claims Courts play a major role in solving consumer problems and recently have been engaging more with the other members of the SNDC.<sup>526</sup> Senacon reports that in 2017 there were 27 state small claims courts specialized in civil causes (receiving consumer claims) and 5 federal ones.<sup>527</sup>

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<sup>522</sup> *Supra* note 28 at 47.

<sup>523</sup> Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000658201779), answered by the Federal Government by the Document 48/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in April 3<sup>rd</sup>, 2017.

<sup>524</sup> *Lei 9.099/1995*, 9.099 (26 September 1995).

<sup>525</sup> *Supra* note 352 at 420.

<sup>526</sup> *Supra* note 28 at 48.

<sup>527</sup> Information obtained through a request grounded on the Access to information Law in Brazil (Pedido de acesso à informação SIC 08850000658201779), answered by the Federal Government by the Document 48/2017/Assessoria Senacon/GAB-Senacon/Sencon/MJ in April 3<sup>rd</sup>, 2017.

#### **4.5.6 Non-profit organizations**

Non-profit organizations play an important role in fighting for consumer rights. In Brazil, these organizations face challenges regarding funding, as the associative culture in Brazil is not very strong. This means that individuals do not have the culture of donating to non-profit organizations in general. As non-profit associations engaged with consumer rights cannot receive funding or donations from enterprises (to maintain independence), they rely on extremely reduced resources, depending mostly on public funding. The state ensures the financing of these associations by offering resources through the national or state Funds for diffuse and collective fights. These funds (at the federal, state, and municipal levels) were established by federal, state, and municipal laws. The funds' resources are composed of money received by the state through collective lawsuits and fines imposed by PROCONs, for example. The resources are shared via public calls, when organizations can present proposals and receive the funding once their projects have been approved.<sup>528</sup>

#### **4.6 Regulating Advertising in Brazil**

In this section I provide an overview of relevant regulations regarding advertising in Brazil, focusing on selected federal laws, and on the market self-regulatory initiatives related to advertising regulation.

By a Constitutional mandate, advertising is regulated by a variety of federal laws in combination with the *Consumer Code*. While the *Consumer Code* establishes general

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<sup>528</sup> *Supra* note 28 at 49; *Supra* note 352 at 521.

principles and norms on advertising, specific federal laws provide further regulations on advertising of particular products, such as alcohol.<sup>529</sup>

#### **4.6.1 Laws on Advertising**

Here I describe pertinent federal regulations on advertising, starting with the Federal Constitution, then moving to the *Consumer Code*, and finishing with other pertinent federal legislation, going from the general to specific norms. State regulation on commercial advertising in Brazil is exclusively a matter of federal jurisdiction, according to Article 24 of the Constitution (supra mentioned). These laws are enforced locally by state and municipal bodies, or by the federal government (in cases of advertising that was broadcast nationally).

According to the Constitution, advertising is an expression of economic activities and is limited by the consumer rights defined in the *Consumer Code* (Constitution, article 170, IV). Brazil's consumer law (Law n. ° 8.078/90),<sup>530</sup> known as the Code of Consumer Defense and Protection and referred to in this work as "*Consumer Code*," is broad and comprehensive, being a federal law enforced in all 26 states and the federal district.<sup>531</sup> The *Consumer Code* regulates advertising, and its articles 36 and 37 are the most relevant for this discussion because they establish a broad and principle-oriented framework for

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<sup>529</sup> Some cities will have local regulations on the placement of billboards, like São Paulo city, for example – *Lei municipal n° 14.223, de 26 de setembro de 2006*, Secretaria do Governo Municipal, 26 September 2006. Online: <[http://www3.prefeitura.sp.gov.br/cadlem/secretarias/negocios\\_juridicos/cadlem/integra.asp?alt=27092006L142230000](http://www3.prefeitura.sp.gov.br/cadlem/secretarias/negocios_juridicos/cadlem/integra.asp?alt=27092006L142230000)>

<sup>530</sup> *Lei Federal n° 8.078 de 11 de setembro de 1990*, DOU, 12 September 1990. online: PROCON Rio de Janeiro *Lei Federal n. 8.078 de 11 de setembro de 1990*, 8.078 (12 September 1990).

<sup>531</sup> The Federative Republic of Brazil has 26 states and the federal district, which has a different and separate organization from the states.

advertising, leaving ample room for multiple interpretations about what is legal or illegal when it comes to advertising.

Article 36 presents general principles guiding advertising, such as veracity and identification of advertising messages as such, and section 37 sets boundaries regarding illegal advertising. The first guiding principle is that the advertisement must not be false or misleading (article 37, §1º), and the second is that advertising has to be clearly presented as advertising, so that the consumer can easily identify it as advertising (article 36). These rules should be observed in all forms of advertising in Brazil.

The Code defines two kinds of illegal advertising: false or misleading advertising (article 37,§1) and abusive advertising (article 37, §2). The Code does not define the meaning of abusive advertising, but provides a general framework of what it could encompass:

Section. 37. Any misleading or abusive advertising campaigns are prohibited.

§ 2. **An advertisement of any discriminatory nature or that incites violence**, explores fear or superstition or takes advantage of a child's lack of judgment or experience, disrespects environmental values or may cause the consumer to behave in a way that will bring harm to his health or safety would be considered abusive. (emphasis added)<sup>532</sup>

As we can see, the concept of abusive advertising is not explicit within the law, which only presents possible frameworks of what can be considered abusive advertising. Many scholars define “abusive” within consumer law as an open concept because the situations

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<sup>532</sup> *Lei Federal n° 8.078 de 11 de setembro de 1990*, DOU, 12 September 1990. online: PROCON Rio de Janeiro *Lei Federal n. 8.078 de 11 de setembro de 1990*, *supra* note 543.

listed in article 37 are merely examples.<sup>533</sup> One of the examples listed in §2 of article 37 is discriminatory advertising, which the Code also does not define. Defining this concept is left to the interpreter: academics and doctrinal work, public servants acting in administrative bodies that oversee consumer law, and judges. In this work, I am interested in understanding how sexist advertising has been defined having in mind the prescription of discriminatory advertisement as illegal within the Consumer Law framework.

But what does discriminatory mean? The Brazilian *Consumer Code* does not provide a definition and does not present references or guidelines for interpretation, such as in the Directive 2007/65/EC of the European Parliament and of the Council, which establishes that advertising must not “prejudice human dignity or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.”<sup>534</sup> This allows for the accommodation of the interpreter’s values about what can be considered as discriminatory or having the ability to promote violence. On this subject, the Guide to Consumer Defense, published by the National Consumer Bureau<sup>535</sup> points out the uncertainty that surrounds the concept of abusive advertising:

Contemporary debates about advertising that offend specific social values, in particular related to groups historically and socially considered as vulnerable - women, elderly, racialized people and children - have been more and more present. As the definition of “abusive” depends on values, that are, somehow subjective, its discussion as abusive advertising is not always easy. Different

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<sup>533</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 87.

<sup>534</sup> *Directive 2007/65/ EC of The European Parliament and of The Council*, Directive 2007/65/EC (18 December 2007).

<sup>535</sup> The Secretary/Bureau is the National body, responsible for promoting national politics to protect and defend consumer rights. It articulates all state and municipal agencies and sets the guidelines to better interpret consumer laws. More information available at: Secretaria Nacional do Consumidor, online: Secretaria Nacional do Consumidor, “Senacon - Atuação Internacional”, online: *Minist Justiça E Segur Pública* <<http://www.justica.gov.br/seus-direitos/consumidor/atuacao-internacional>>.

bill proposals are being debated in the National Congress to strengthen advertising regulation about a myriad of subjects (from cars to children). But regardless, new regulations on the subject, the Code [Code of Consumer Defense and Protection] already brings boundaries to repress abusive advertising, in particular the ones that takes advantage of elderly people and children to promote consumption, as well as the ones that convey racist or sexist messages.<sup>536</sup>

Doctrinal discussions also do not provide an accurate definition of the term “abusive advertising” or “discriminatory advertising,” and often discuss the topic of advertising to children as an example of abusive advertising in Brazil.<sup>537</sup>

Without clarification on how to understand discriminatory advertising, limits are being set case by case. Lucia Ancona Lopez de Magalhães Dias notes that an increasing number of debates about women have been presenting a challenge to courts and CONAR, the self-regulatory body that privately controls advertising in Brazil.<sup>538</sup> She observes that when defining discriminatory advertising, it is key to differentiate between *animus jocandi*<sup>539</sup> and discrimination.<sup>540</sup> *Animus Jocandi* would be the intention of making a joke, and not necessarily to discriminate, but to be playful and funny. However, more and more this idea has been challenged by nuances of humour and discrimination, or the right to be humorous based on discriminatory speech. Ancona Lopez de Magalhães Dias claims that to

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<sup>536</sup> *Supra* note 28 at 159 [Translated by the author].

<sup>537</sup> Fabio Schwartz, *Manual de Direito do Consumidor: Tópicos e Controvérsias*, 2a edição ed (Rio de Janeiro: Editora Processo, 2020) at 251-252; Ney Queiroz de Azevedo, for example, merely reproduces article 37,§ 2, and indicates that discrimination includes any kind of discrimination. According to: Ney Queiroz de Azevedo, *Direito do Consumidor* (Curitiba, Brazil: Editora Intersaberes, 2015) at 72.

<sup>538</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 179. Here I note that this book was published in 2013, therefore before the second decision on the *Skol Summer Muse*, which happened in 2016.

<sup>539</sup> *Animus Jocandi* is the Latin expression to describe something funny and entertaining, a joke. This expression is used a lot in the legal documents related to the *Skol Summer Muse Campaign*.

<sup>540</sup> A deeper discussion on this topic will be provided in chapters 6 and 7 of the dissertation.

differentiate *animus jocandi* and discrimination one must observe a criteria of relevance, according to which the interpreter could verify in a given case whether the images used in the advertisement only explore humour in an extreme way or if there is, indeed, discrimination. Therefore, according to her, the more an advertisement explores humour, the less discriminatory it potentially is, as consumers would easily notice that it is all about a joke.<sup>541</sup> In an updated version of her book on the topic of advertising, Lucia Ancona Lopez de Magalhães Dias observes that the analysis of the illegality of an advertisement must be done in each particular and concrete case, respecting the plurality of views existing in Brazilian society, but investigating whether the images and wording of the advertising reduces women to objects of consumption, and showing them in a position of inferiority or moral degradation must be avoided.<sup>542</sup>

I argue that this process of case-by-case definition is challenging considering the interpreter's positionality, since they are situated in a specific social and cultural context, which might affect their interpretation of the law, as well as perceptions of discrimination and violence. Men and women can have quite different interpretations of the same advertisement, especially when aspects such as race-ethnicity, age, social class, and education are considered.<sup>543</sup> As will be clear in my discussion on the litigation around the *Skol* Summer Muse Campaign, the idea of the objectification of women is disputed by multiple social actors, and it is not self-evident to all involved in discussing it.

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<sup>541</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 185.

<sup>542</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito: Enganosa, Abusiva, Infantil, Digital, Comparativa*, 3d ed (São Paulo, Brazil: Saraiva, 2018) at 66-67.

<sup>543</sup> Avtar Brah, "Diferença, diversidade, diferenciação" (2006) *Cad Pagu* at 341.

Along these lines, Patricia Cochran discusses how ideas of common sense presume normative and common values that could be exclusionary. She precisely explores how some assumptions on the universality of the concept of common sense or knowledge produce boundaries about what is acceptable, logical, and expected, and what would be reasonable to discuss, as well as what would fall off the realm of relevance, what would be unreasonable:

“Common sense knowledge consists of things that all rational people cannot help but believe; anything contrary to common sense knowledge is nonsense and unworthy of rational consideration. Common sense knowledge thus helps to set the boundaries of reasoned debate because of its normative claim to universality; Raid’s common sense knowledge consists of those things that every rational person *should* believe.<sup>544</sup>”

At the borders of the definitions of what is reasonable stands the ridicule, what should not be taken seriously. The problem with these concepts is that they are context-specific and vary according to time, society, and positionality within particular social groups. Therefore, setting the boundary of what is discrimination and what is just a joke, using the concept of *animus jocandi* as proposed by Ancona Lopez de Magalhães Dias, might not be helpful, in particular if we consider Brazilian society and its patriarchal, sexist, racist, and classist structure, and how deeply these characteristics are embedded in state institutions like the judiciary, which tends to align with a more conservative political view in Brazil. This debate on common sense and *animus jocandi* will be relevant further on, when I discuss the company’s strategy to avoid paying the fine imposed by PROCON by justifying that the

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<sup>544</sup> Patricia Cochran, *Common Sense and Legal Judgement: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen’s University Press, 2017) at 53 and 54.

*Skol* Summer Muse Campaign merely plays with humour and that interpreting it otherwise would be unreasonable and dissonant from the “common sense” of the average man.

On one side, the general provisions of the Brazilian *Consumer Code* favour a broad interpretation and leave room for the evolution of the concept of discriminatory advertising, which is open to change. On the other side, the fact that there is no information on how to understand the concept of discrimination in consumer law forces the interpreter to look for support in other legal documents and doctrine. The Constitution provides additional guidelines referring to commercial propaganda, meaning advertising,<sup>545</sup> in its article 220 of the chapter of Social Communication:<sup>546</sup>

Article 220. The manifestation of thought, the creation, the expression and the information, in any form, process or medium shall not be subject to any restriction, with due regard to the provisions of this Constitution.

(...)

Paragraph 4. Commercial advertising of tobacco, alcoholic beverages, pesticides, medicines and therapies shall be subject to legal restrictions, in accordance with (...) of the preceding paragraph and shall contain, whenever necessary, a warning concerning the damages which may be caused by their use.<sup>547</sup>

Law 9.294/96<sup>548</sup> regulates article 220 of the Constitution, defining rules for the advertising of potentially dangerous products, such as smoking products (derived from tobacco or not),

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<sup>545</sup> Often, the law in Brazil uses advertising and propaganda as synonyms, but scholars differentiate them, defining advertising as commercial messages, clearly intended to induce consumption, in contrast to propaganda, which does not have this commercial goal. Propaganda, in this case, would be governmental campaigns for vaccination, for example. This work is only concerned with commercial propaganda, or advertising, meaning messages that are presented within a consumer relationship. See: Marcelo Gomes Sodré, Fabíola Meira & Patrícia Caldeira, eds, *Comentários ao Código de Defesa do Consumidor* (São Paulo: Verbatim, 2009) at 226.

<sup>546</sup> For an overview of civil responsibility regarding the mass media in Brazil, see: Bruno Miragem, *Responsabilidade Civil*, 2d ed (Rio de Janeiro: Editora Forense Ltda., 2021) at 380-430.

<sup>547</sup> *Constitution of the Federative Republic of Brazil*.

<sup>548</sup> *Lei n. 9.294/1996*, 9.294 (15 July 1996).

alcoholic products, drugs and therapeutic products, and pesticides. According to article 4 of this law, advertising for alcoholic products can only be broadcast on television and radio between 9 PM and 6 AM, together with other restrictions: i) the prohibition against associating the product with Olympic or competitive sports, with the healthy development of any activity, with driving any kind of vehicles and with images that suggest a better sexual performance (first paragraph of article 4), and ii) the labelling of alcohol bottles/cans should come with the following warning: “Avoid excessive alcohol consumption.” Article 4-A, incorporated into the Law 9.294/96 by law 11.705/08,<sup>549</sup> states that a poster must be placed in a visible space inside establishments that sell alcoholic beverages, advising that it is a crime to drive after drinking, punishable with detention.

The law defines alcoholic drinks those that have an alcohol level of more than 13 Gay Lussac degrees<sup>550</sup> (article 1, paragraph 1),<sup>551</sup> which, in practice, excludes beer and wines from all regulations under this law.<sup>552</sup> This means that beer advertisements in Brazil are not

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<sup>549</sup> Article 4-A, incorporated into the Law 9.294/96 by law 11.705/08, states that a poster must be placed in a visible space inside establishments that sell alcoholic beverages, advising that it is a crime to drive after drinking, punishable with detention. *Lei 11.705/2009*, 11.705 (19 June 2008).

<sup>550</sup> Joseph Louis Gay-Lussac, a French chemist, developed a method for measuring the percentage of ethanol per millilitres in liquids at a temperature of 15° Celsius. It is a measure that shows the alcohol level of a beverage.

<sup>551</sup> *Lei n. 9.294/1996*.

<sup>552</sup> A collective action lawsuit proposed by the federal public office prosecutor is contesting this exclusion. In December 2014, one of the Brazilian Federal Courts (4th Region) ruled that the Federal Sanitary Agency (ANVISA) should establish regulations on advertising for alcoholic drinks with alcohol levels equal or superior to 0.5 Gay Lussac degrees, which would include beers in the restrictive regulations on advertising. According to: “Justiça atende a pedido do MPF e restringe propaganda de bebidas alcoólicas em todo o país”, *Página Of Minist Público Fed* (11 December 2014), online: <[http://www.prr4.mpf.mp.br/site/index.php?option=com\\_content&view=article&id=688:justica-atende-a-pedido-do-mpf-e-restringe-propaganda-de-bebidas-alcoolicas-em-todo-o-pais&catid=10:noticias&Itemid=58](http://www.prr4.mpf.mp.br/site/index.php?option=com_content&view=article&id=688:justica-atende-a-pedido-do-mpf-e-restringe-propaganda-de-bebidas-alcoolicas-em-todo-o-pais&catid=10:noticias&Itemid=58)>. Although valid within all the Brazilian territory, the Superior Court (STJ) is still considering an appeal against the Federal Court decision. According to: *Apelação Cível n 5017742-2420124047100*, [2016] Carlos Eduardo Thompson Flores Lens . In 2019, the Court determined that the first judicial decision is null and sent the case back to the first judiciary instance for a new decision. This means that this case still does not have a final decision, but will be re-examined in its full content by another

subjected to this law and can be broadcast at any time, day or night. The exclusion of alcoholic beverages with lower alcohol levels is tightly related to the lobby from beverage companies in Brazil, which have always advocated for more liberal regulation by invoking freedom of expression (in this case to advertise alcoholic drinks) as a fundamental right, and framing any attempt to limit it as censorship.<sup>553</sup> Such a lobby can be very strong, considering that the beer market alone represents 1.6% of the GDP in Brazil.<sup>554</sup>

Other regulations might limit advertising by regulating the product being advertised, addressing the vulnerabilities of a particular targeted audience of the advertising, or even discussing the role of advertising in ensuring fair competition among companies in a given market. Regarding more vulnerable subjects, law 11.265/2006,<sup>555</sup> which refers to the commercialization of products for toddlers and children, restricts advertising of infant formula, follow-up formula, and other related products. As to a specific product, in 2010 the Brazilian Sanitary Agency published a regulation (RDC 24/2010)<sup>556</sup> on advertising for highly processed food. This regulation was subjected to more than 11 judicial lawsuits

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judge. According to: Antonio Cedenho (Desembargador Federal), *Apelação Cível n. 0007791-44.2008.4.03.6103/SP* (2019).

<sup>553</sup> Despite civil society's intense mobilizations to include beer and wine as alcoholic drinks and restrict advertisements for these products, the law remains the same and allows advertising of such products during the day. For more information on this debate and how the beer market acted in coalition with other groups such as market professionals and CONAR, see: Laura Hastenpflug Wottrich, "*Não podemos deixar passar*": *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 163-167.

<sup>554</sup> Eduardo Vanini, "Mercado cervejeiro movimenta R\$ 74 bilhões no Brasil", *O Globo Online* (27 March 2016), online: <<https://oglobo.globo.com/economia/mercado-cervejeiro-movimenta-74-bilhoes-no-brasil-18950844>>.

<sup>555</sup> *Lei 11.265/2006*, 3 January 2006 [*Lei 11.265/2006*].

<sup>556</sup> *RDC 24/2010 - ANVISA*, Resolução-RDC 24 (15 June 2010).

proposed by the food industry and its enforcement was suspended,<sup>557</sup> the final decision being that ANVISA did not have the authority to regulate such matters through an administrative resolution.<sup>558</sup> The intense litigation regarding the RDC 24/2010 indicates the struggle between state efforts to regulate advertising of a specific product and the market. On the issue of the role of advertising in ensuring fair competition, law 9.279/1996<sup>559</sup> regulates intellectual property and refers to advertising when describing the crime of illegal competition. This law represses the use of advertising strategies from another company to generate confusion amongst consumers on purpose, trying to benefit from other companies' advertising claims or the intentional confusion between products from different companies.<sup>560</sup> As we can see, despite the many regulations on advertising, none of these laws provides further information on how to identify discriminatory advertising. This is why in the following section I explore laws that could support an interpretation of discriminatory advertising as a human rights issue.

#### **4.7. Discriminatory Advertising as a Human Rights Issue: Connections between Human Rights Law on Discrimination and Consumer Law in Brazil**

In this section I present and discuss the human rights framework (international and national) related to the issue of discriminatory advertising in Brazil. I argue that it is

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<sup>557</sup> Marcello Fragano Baird & Mariana de Araújo Ferraz, *Publicidade de Alimentos Não Saudáveis: os entraves e as perspectivas da regulação no Brasil* (IDEC - Instituto Brasileiro de Defesa do Consumidor and International Development Research Centre, 2014) at 34.

<sup>558</sup> Jirair Aram Meguerian (Desembargador Federal), , online: <<https://trf-1.jusbrasil.com.br/jurisprudencia/912347856/apelacao-civel-ac-ac-428824520104013400/relatorio-e-voto-912348002>>; “Anvisa não tem competência para regulamentar propaganda e publicidade comercial”, (25 February 2013), online: *Cons Justiça Fed* <<https://www.cjf.jus.br/cjf/outras-noticias/2013/fevereiro/anvisa-nao-tem-competencia-para-regulamentar-propaganda-e-publicidade-comercial>>.

<sup>559</sup> *Lei 9.279/1996*, 9.279 (14 May 1996).

<sup>560</sup> Lucía Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 44.

possible to discuss the concept of discriminatory advertising by using this framework, turning the debate into a human rights issue.

There is doctrinal discussion on whether consumer rights can be defined as human rights in both the fields of consumer law and human rights law.<sup>561</sup> In 1994, Sinai Deutch claimed that consumer rights should be acknowledged as human rights, by being considered a sort of expansion of already recognized economic rights.<sup>562</sup> He observes that consumer law is typically a field of law that is hybrid, by deriving mostly from private law but being combined with public law, in a “mixture of contract, tort, criminal, and administrative law.”<sup>563</sup> He also claims that in in consumer societies, since consumer relations are critical to sustaining daily life and basic activities, consumption supports human dignity:

In a consumer society, protection of the individual consumer is part of maintaining human dignity. If not given the right to fair trade, the right to fair contract, and the right to access to courts, a person’s dignity is disregarded. At the end of the day, these rights are no less important than other human rights.

Consumer rights are similar to other accepted human rights in other aspects as well. Human rights are intended to protect the individual from arbitrary infringements by the government. In the same way, the individual consumer is entitled to protection against big business corporations, monopolies, cartels, and multinational corporations.<sup>564</sup>

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<sup>561</sup> For discussions on consumer protection as a human rights issue: Sinai Deutch, “Are Consumer Rights Human Rights?” (1994) 32:3 Osgoode Hall Law J 537–578; Delphine Aurelie Laurence Defossez, “Consumer law in Constitution: a big mistake? The specific case of aviation in Brazil” (2017) 4:3 Rev Investig Const, online: <<https://www.scielo.br/j/rinc/a/MbDbPW95tQRM9CXd7KTWwQj/?format=pdf&lang=en>> at 70; Ewelina Cata-Wacinkiewicz, “Consumer’s Rights as a Special Category of Human Rights” (2013) 1 Int J Consum Law Pract 14–22; Illas Bantekas, “Consumer Rights As Human Rights” (2012) 1:2 Cyprus Hum Rights Law Rev 184–197; Monika Jagielska & Mariusz Jagielski, *supra* note 402.

<sup>562</sup> Sinai Deutch, “Are Consumer Rights Human Rights?” (1994) 32:3 Osgoode Hall Law J 537–578 at 541.

<sup>563</sup> Sinai Deutch, “Are Consumer Rights Human Rights?” (1994) 32:3 Osgoode Hall Law J 537–578 at 542.

<sup>564</sup> Sinai Deutch, “Are Consumer Rights Human Rights?” (1994) 32:3 Osgoode Hall Law J 537–578 at 552.

Other authors, like Illas Bantekas and Ewelina Cata-Wacinkiewicz, recognize that the power imbalance in consumer relations demands extra protection for individuals, considering the economic power of corporations and their relevance in consumer societies, similarly to how human rights protections are claimed to protect vulnerable subjects.<sup>565</sup>

Ewelina Cata-Wacinkiewicz defines consumer protection as a sub-category of human rights protection systems,<sup>566</sup> and observes that consumer rights comprise all the characteristics needed to define human rights as such, including: universality, individual character, inalienability, inviolability, and indivisibility.<sup>567</sup> She points out to the challenges in defining a list of internationally accepted rights for consumers, considering the multiple regulations in different countries,<sup>568</sup> but claims that consumers should have at least four basic rights recognized: to safety, to information, to choose products and services at competitive prices, and right of expression of opinions in defining consumer policies.<sup>569</sup>

Although using different perspectives, Sinai,<sup>570</sup> Cata-Wacinkiewicz,<sup>571</sup> Illas Bantekas,<sup>572</sup> and Monika Jagielska & Mariusz Jagielski,<sup>573</sup> all acknowledge the hybrid aspect of consumer law and protection, and the need to consider human rights in a broader sense, that

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<sup>565</sup> Illas Bantekas, *supra* note 574; Ewelina Cata-Wacinkiewicz, *supra* note 574.

<sup>566</sup> Ewelina Cata-Wacinkiewicz, "Consumer's Rights as a Special Category of Human Rights" (2013) 1 Int J Consum Law Pract 14–22 at 20-22.

<sup>567</sup> Ewelina Cata-Wacinkiewicz, "Consumer's Rights as a Special Category of Human Rights" (2013) 1 Int J Consum Law Pract 14–22 at 20.

<sup>568</sup> Ewelina Cata-Wacinkiewicz, "Consumer's Rights as a Special Category of Human Rights" (2013) 1 Int J Consum Law Pract 14–22 at 22.

<sup>569</sup> Ewelina Cata-Wacinkiewicz, "Consumer's Rights as a Special Category of Human Rights" (2013) 1 Int J Consum Law Pract 14–22 at 20-21.

<sup>570</sup> Sinai Deutch, *supra* note 376.

<sup>571</sup> Ewelina Cata-Wacinkiewicz, *supra* note 574.

<sup>572</sup> Illas Bantekas, *supra* note 574.

<sup>573</sup> Monika Jagielska & Mariusz Jagielski, *supra* note 402.

breaks from the traditional liberal idea that human rights are protection against arbitrary infringement from states. At different levels and from different angles, they all observe that due to the economic power of corporations and the imbalance and inequality that mark consumers' relations with providers, human rights protections should be extended to consumers as well. Underlying these claims, there is a constant tension between public and private laws, and relationships that happen within the public or private domains, as well as how to incorporate public norms (such as human rights law) into private relationships (that take place between an individual and a company). Feminist scholarship contributes to this debate by contending through advocacy and litigation that private matters can be subjected to human rights law, and that the state has the duty to interfere in private relationships to ensure the observance of fundamental human rights. This has been shown in the case of violence against women, by the approval of International Conventions, national laws, and successful litigation strategies presented at the national and international levels, by feminist groups.

It is in this context, reaffirming consumer law as a hybrid legal space which requires the enforcement of public laws within private relations, that I now look at how international human rights documents, which have been signed and ratified by Brazil, can support a gender-sensitive definition of the concept of discriminatory advertising in the Brazilian *Consumer Code*.

Remembering that the *Consumer Code* does not provide any guidelines or instructions to define or on how to identify discriminatory advertising (despite the principle of consumers' dignity - article 4), I believe that understanding the legal framework regarding discrimination in Brazil can be helpful in supporting any further discussion on sexist

advertising. Taking this into account, what are the legal documents that can be used to support interpretations of what discriminatory means? Seeking to answer this question, in this section I describe relevant legal documents that deal with discrimination in general and gender-based discrimination in Brazil, starting from human rights treaties that have been ratified by Brazil and that have a Constitutional status, and federal laws on this topic.

It is important to remember that the Brazilian Constitution establishes a general rule on equity, specified as equality between men and women, in article 5:

Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA No. 45, 2004)

**I – men and women have equal rights and duties under the terms of this Constitution,<sup>574</sup>**

As already discussed, Brazil has signed different international human rights treaties which have Constitutional status,<sup>575</sup> imposing on the Brazilian state the obligation to uphold human rights standards. These international documents determine Brazilian obligations to fighting sexism and gender discrimination, among other issues. I argue that these treaties can offer helpful guidelines to interpreting the concepts of “discriminatory advertising” and the expression “that promotes violence” used in the Brazilian *Consumer Code*.

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<sup>574</sup> *Constitution of the Federative Republic of Brazil*, *supra* note 45.

<sup>575</sup> Flávia Piovesan, *supra* note 398.

#### 4.7.2.1 International Human Rights Instruments

The UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was approved by the General Assembly in 1979,<sup>576</sup> ratified by Brazil in February 1984, and incorporated into the Brazilian legal system.<sup>577</sup> In its first article, the Convention defines discrimination against women as any kind of distinction, exclusion, or restriction based on sex that intends to undermine the recognition, fruition, or exercise of fundamental freedoms and rights by women. CEDAW uses the word discriminatory in a very broad sense and calls on all state parties to ensure no discrimination against women, including those perpetrated by enterprises (article e - in a more traditional interpretation this relates more specifically to non-discrimination within the workplace or work opportunities). Article 5 “a” urges countries to adopt measures to change socio-cultural patterns that promote discrimination against women.

Violence against women is not explicitly addressed by the Convention but can be considered to be a more severe kind of discrimination, according to General Recommendation<sup>578</sup> number 19,<sup>579</sup> which was updated in July 2017 by General

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<sup>576</sup> *United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979 [*United Nations Convention on the Elimination of All Forms of Discrimination Against Women*].

<sup>577</sup> *Decreto 4.377/2002*, 4.377 (13 September 2002).

<sup>578</sup> General Recommendations are a way that United Nations’ Treaty Bodies update concepts, clarify the meaning of specific articles, and provide guidance regarding the interpretation of the Convention. These Recommendations are a relevant way by which Committees make sure the Convention is serving current human rights demands. See: United Nations - Human Rights, Office of the High Commissioner, *The United Nations Human Rights Treaty System - Fact Sheet n. 30 - Rev. 1* (United Nations) at 36-37.

<sup>579</sup> General Recommendation 19 - Violence Against Women, United Nations CEDAW Committee, 1992, A/47/38.

Recommendation n. 35.<sup>580</sup> When analyzing both the Convention and these two General Recommendations, we can see the connections between symbolic violence, perceived as discrimination, and other forms of violence, following the idea that violence against women happens in a *continuum*, as explored in chapter 2. The Convention urges states to adopt measures to change the cultural and social environment that might favour discrimination and violence against women, including measures related to symbolic violence perpetuated throughout social and cultural values:

Article 5. States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

The CEDAW's General Recommendation 35, in its paragraph 8, indicates that both General Recommendations (19 and 35) should be read together, as they complement each other; in paragraph 9, it acknowledges the cultural and social aspects of gender-based violence against women, noting that in an intersectional perspective, different women and girls, or people identified as women, could face challenges to fully enjoying a life free of violence. In CEDAW's General Recommendation 35, paragraphs 19 and 20, the dimension of socio and cultural aspects of gender-based violence is stressed and the Committee observes that such violence can take place in different spaces, such as: "spheres of public interaction, whether public or private, including in the contexts of the family, the

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<sup>580</sup> Committee on the Elimination of Discrimination against Women - CEDAW Committee, *General recommendation n. 35 on gender-based violence against women, updating general recommendation n. 19* (United Nations, 2017).

community, public spaces, the workplace, leisure, politics, sport, health services, and educational settings, and the **redefinition of public and private through technology-mediated environments, such as contemporary forms of violence occurring online and in other digital environments** (bolded added by the author).<sup>581</sup>”

On the topic of media, CEDAW’s General Recommendation 19, paragraph 15, (c), urges states to: “adopt and implement effective measures to encourage the media, including **advertising and information and communications technologies to eliminate discrimination against women in their work**, including negative and stereotypical portrayal of women and girls (...).”<sup>582</sup> Through this recommendation, the CEDAW Committee suggests states should strengthen “the institutional capacity of national human rights institutions to confront media that portray images or content that are gender-discriminatory and objectify or demean women or promote violent masculinities.”<sup>583</sup> Here we can see a clear definition of discrimination in advertising as a human rights issue, in the understanding of the experts that compose the Committee.

CEDAW’s General Recommendation 35 deals with the topic of media and stereotypes in paragraph 30 (a), (b), and (d) (iii). In these sections, the Committee urges states to:

(a) Adopt and implement effective legislative and other **appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes**, inequality in the family and the neglect or denial of women’s civil, political, economic, social and cultural rights, and to promote the empowerment, agency and voices of women;

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<sup>581</sup> *Ibid.*

<sup>582</sup> *General Recommendation 19 - Violence Against Women*, United Nations CEDAW Committee, 1992, A/47/38, paragraph 15 (c).

<sup>583</sup> *General Recommendation 19 - Violence Against Women*, United Nations CEDAW Committee, 1992, A/47/38. In the same Recommendation, the Committee also encourages the creation of self-regulatory bodies.

(b) **Develop and implement effective measures**, with the active participation of all relevant stakeholders, such as representatives of women's organizations and of marginalized groups of women and girls, **to address and eradicate the stereotypes, prejudices, customs and practices set out in article 5 of the Convention**, which condone or promote gender-based violence against women and underpin the structural inequality of women with men.

(d) **Adopt and implement effective measures to encourage the media to eliminate discrimination against women, including the harmful and stereotypical portrayal of women or specific groups of women**, such as women human rights defenders, from their activities, practices and output, **including in advertising**, online and in other digital environments. Measures should include the following:

(iii) **Establishing or strengthening the capacity of national human rights institutions to monitor or consider complaints regarding any media that portray gender-discriminatory images or content that objectify or demean women or promote violent masculinities;**<sup>584</sup>

As we can see, in the General Recommendation 35 the CEDAW Committee expands its definition of gender-based violence, and the understanding of where it can occur. It talks specifically about the non-fixity of the public and private divide, clarifying that women should be protected in all spheres, regardless of how we want to define it in public or private. If in the previous recommendation the Committee made a general observation on media, in the latter it broadens its reach and specifies the concepts to explicitly include advertising that objectifies women as a form of gender-based violence, and also to encompass protection in digital spaces, such as the internet.

Feminist activism at the international level was also key for putting women's claims on the agenda for the Programme of Action adopted at the International Conference on Population

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<sup>584</sup> Committee on the Elimination of Discrimination against Women - CEDAW Committee, *supra* note 593.

and Development that took place in Cairo, in 1994. On this occasion, feminists were able to include gender equality, equity, and women's empowerment as key principles of the Program of Action (principle 4).<sup>585</sup> Principle 4 is a landmark in defining sexual and reproductive rights as human rights at the international level and is key in guiding public policies nationally; it also reinforces the idea that women's rights are human rights and that discrimination against women must be eradicated. These debates were later deepened during the Fourth World Conference on Women, which was held in Beijing in 1995, and had a specific section on women and media.<sup>586</sup> Paragraphs 33 and 77 of the Conference's report note the relevant power mass media holds in potentially reverting stereotyped images of women,<sup>587</sup> while paragraph 44 urges states to pay close attention to stereotypical images of women within the media, and their possible harm.<sup>588</sup> There is an emphasis on media as a potential space for education, and paragraphs 244 and 245 encourage media and advertising

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<sup>585</sup> "Principle 04: Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes. The human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in civil, cultural, economic, political and social life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex, are priority objectives of the international community." *Programme of Action* -, (1994).

<sup>586</sup> *Report of the Fourth World Conference on Women*, (1995).

<sup>587</sup> "33. In the past 20 years, the world has seen an explosion in the field of communications. With advances in computer technology and satellite and cable television, global access to information continues to increase and expand, creating new opportunities for the participation of women in communications and the mass media and for the dissemination of information about women. However, global communication networks have been used to spread stereotyped and demeaning images of women for narrow commercial and consumerist purposes. Until women participate equally in both the technical and decision-making areas of communications and the mass media, including the arts, they will continue to be misrepresented and awareness of the reality of women's lives will continue to be lacking. The media have a great potential to promote the advancement of women and the equality of women and men by portraying women and men in a non-stereotypical, diverse and balanced manner, and by respecting the dignity and worth of the human person." *Ibid.*

<sup>588</sup> *Ibid.*

organizations to act proactively in preventing the perpetuation of stereotyped images of women.<sup>589</sup>

The United Nations Guidelines for Consumer Protection (UNGCP)<sup>590</sup> address advertising issues from a commercial perspective, focusing on the veracity of advertising and environmental claims.<sup>591</sup> These guidelines were approved in 1985 and updated in 1999 and 2015.<sup>592</sup> Although not legally binding, the guidelines are an important reference and demonstrate the concern of UN bodies regarding consumer protection. On advertising, the

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<sup>589</sup> “244. By the mass media and advertising organizations: (a) Develop, consistent with freedom of expression, professional guidelines and codes of conduct and other forms of self-regulation to promote the presentation of non-stereotyped images of women; (b) Establish, consistent with freedom of expression, professional guidelines and codes of conduct that address violent, degrading or pornographic materials concerning women in the media, including advertising; (c) Develop a gender perspective on all issues of concern to communities, consumers and civil society; (d) Increase women’s participation in decision-making at all levels of the media. 245. By the media, non-governmental organizations and the private sector, in collaboration, as appropriate, with national machinery for the advancement of women: (a) Promote the equal sharing of family responsibilities through media campaigns that emphasize gender equality and non-stereotyped gender roles of women and men within the family and that disseminate information aimed at eliminating spousal and child abuse and all forms of violence against women, including domestic violence; (b) Produce and/or disseminate media materials on women leaders, inter alia, as leaders who bring to their positions of leadership many different life experiences, including but not limited to their experiences in balancing work and family responsibilities, as mothers, as professionals, as managers and as entrepreneurs, to provide role models, particularly to young women; (c) Promote extensive campaigns, making use of public and private educational programmes, to disseminate information about and increase awareness of the human rights of women; -102-188 (d) Support the development of and finance, as appropriate, alternative media and the use of all means of communication to disseminate information to and about women and their concerns; (e) Develop approaches and train experts to apply gender analysis with regard to media programmes.” *Ibid.*

<sup>590</sup> According to the United Nations website: The United Nations Guidelines for Consumer Protection (UNGCP) are “a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States and encouraging the sharing of experiences in consumer protection.” In 2015, these guidelines were reviewed and approved by the General Assembly. At the United Nations level, there is a specific working group that discusses policies on consumer protection, the: “Intergovernmental Group of Experts on Consumer Protection Law and Policy.” According to: UNCTAD - United Nations Conference on Trade and Development, “United Nations guidelines for consumer protection”, online: *UNTAD - U N Conf Trade Dev* <<https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-for-consumer-protection>>.

<sup>591</sup> For more on the UNGCP background and its importance for defining consumer rights as human rights, see: Sinai Deutch, “Are Consumer Rights Human Rights?” (1994) 32:3 *Osgoode Hall Law J* 537–578 at 564-574.

<sup>592</sup> *Resolution adopted by the General Assembly on 22 December 2015. 70/186. Consumer Protection.*

UNGCP briefly mentions the need for member states to adopt “measures regarding misleading environmental claims or information in advertising and other marketing activities” in close collaboration with manufacturers, distributors, and consumer organizations (section 30).

When these first UN conventions were adopted, human rights were always identified as protection for people against state force, a definition that highlights violations that take place in the public arena, such as torture and violations of freedom of expression and religion. The same is observed when economic, social and cultural rights are established. Defining women’s and children’s rights in international regulations requires human rights to be considered within the private sphere as well. That is to say, human rights should be observed by individuals in their relationships with other individuals, and not only as protection against the state. Therefore, for women’s and children’s rights it was necessary to create human rights protection that could be invoked within relationships between individuals, with human rights being claimed in this private sphere. This advancement was focused on these intimate relationships, and the market was not encompassed in this definition of “private.” For discussing economic and market relationships at the international arena, the World Trade Organization (WTO) was created.

From a more contemporary perspective, boundaries between private and public life are becoming less clear, while transnational companies are increasingly present in intimate relationships and in people’s lives through advertising. Fueled by people’s desire to own products, companies around the world take part in the diffusion of materialistic values,

gender stereotypes, and social distinctions.<sup>593</sup> In 2014, for the first time, the United Nations formally addressed this issue with the publication of a report presented by the Special Rapporteur for Cultural Rights to the United Nations General Assembly. In this document, the Special Rapporteur expresses a major concern about how the lack of public spaces interferes negatively with the enjoyment of fundamental rights, such as cultural rights. The Rapporteur highlighted how widespread advertising contributes to the reduction of cultural diversity and social tolerance and cohesion, along with the impoverishment of public space, while limiting freedom of choice:

76. Public spaces are spheres for deliberation, cultural exchange, social cohesiveness and diversity. The growing commercialization and privatization of public spaces pose significant challenges to the realization of the right to participate in cultural life and to the protection of public spaces reflecting cultural diversity. People engaging in creative activities encounter manifold difficulties in using public space.<sup>594</sup>

The Special Rapporteur recommended that countries strengthen their regulations on advertising, especially to protect children, women, Indigenous people, and other vulnerable groups. This report illustrates the UN's concern that advertising might violate human rights (especially social and cultural rights).<sup>595</sup>

In 2019, Phumzile Mlambo-Ngcuka, current Executive Director for UN Women, in her opening remarks at the Unstereotype Alliance Global Member Summit, observed the power stereotypes, in particular gender stereotypes, have in limiting women's rights and

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<sup>593</sup> Tim Kasser, *The High Price of Materialism* (Cambridge: MIT press, 2002) at 9.

<sup>594</sup> *Report of the Special Rapporteur in the field of cultural rights*, United Nations General Assembly, August 2014, A/69/150.

<sup>595</sup> *Report of the Special Rapporteur in the field of cultural rights*, United Nations General Assembly, August 2014, A/69/150.

empowerment.<sup>596</sup> In this context, we can see how more and more concerns about social harm caused by discriminatory advertising have been perceived as a form of human rights violation, or at least a process that undermines efforts to promote human rights.

Turning to the Inter-American System, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (the Convention of Belém do Pará) was adopted by the Organization of American States (OAS) General Assembly on June 6<sup>th</sup> 1994,<sup>597</sup> and ratified by Brazil on November 27<sup>th</sup> 1995.<sup>598</sup> This Convention is the first international human rights treaty that explicitly addresses the subject of violence against women, acknowledging it as a human rights violation and an offense to fundamental freedoms (preamble), imposing on state-parties the obligation to condemn all forms of violence against women and adopt, by all necessary means, public policies designed to prevent, punish, and eradicate this kind of violence (article 7). Thirty-two states in the region ratified this document (only the Bahamas presented reservations). With regard to social and cultural values that undermine women's right to equal treatment and non-discrimination, Article 8 reads:

The States Parties agree to undertake progressively specific measures, including programs:

**b. to modify social and cultural patterns of conduct of men and women,** including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on **the stereotyped roles**

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<sup>596</sup> ““I want to change the way the world looks at itself” - Executive Director”, (28 March 2019), online: *UN Women* <<https://www.unwomen.org/en/news/stories/2019/4/speech-ed-phumzile-unstereotype-alliance-summit>>.

<sup>597</sup> *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* “*Convention of Belem do Para*”, (6 June 1994).

<sup>598</sup> *Decreto 1.973/96*, 1.973 (1 August 1996).

**for men and women which legitimize or exacerbate violence against women;**

(...)

**g. to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women;**

Even if advertising is not expressly mentioned, there is clear guidance for States to stimulate and promote non-stereotypical images of women in mass media, which includes advertising.

#### **4.7.2.2 National Laws**

Looking at national regulations on discrimination, Law 7.437/85<sup>599</sup> defines discrimination regarding sex, colour, or civil status as a misdemeanor. This regulation forbids refusal by the supplier to: offer or sell products due to sex, race, or civil status (article 4); ensure accommodation in hotels (art. 3); or make registration in educational institutions (article 7). Penalties vary from detention (15 days to one year) to payment of fines. Additionally, law 9.459/97<sup>600</sup> and law 7.716/89<sup>601</sup> define racism as a criminal offense.

Law 4.117/62<sup>602</sup> establishes the National Code on Media and Communications. Because this law was approved during the dictatorship, it still contains many provisions that reflect the reasoning and ideology of that time. Social movements have been fighting to change this law, but the debate on media regulation is blocked by Congress, as any attempt to

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<sup>599</sup> *Lei 7.437/85*, 11.437/85 (20 December 1985).

<sup>600</sup> *Lei 9.459/97* [*Lei 9.459/97*].

<sup>601</sup> *Lei 7.716/89*, 7.716 (5 January 1989).

<sup>602</sup> *Lei 4.117/1962*, (27 August 1962).

regulate media is immediately associated with the dictatorship, even if the regulatory framework on this matter was passed precisely during the dictatorship and does not reflect democratic principles and values. Law 4.117/62 is known for favouring media concentration and making it difficult to address human rights violations within the media. There is no accountability regarding violent content in television, for example, and in many cases social organizations have reached out to the judiciary to claim compensation for television shows that violated human rights. One of the main critiques from social movements is that there is no administrative body monitoring the media, leaving the judiciary as the only option to contest human rights violations perpetrated within the media. This is a context that many social movements have been calling “electronic oligarchy,” since debate on even the discussion of material distribution of power within the media is blocked, preventing a more transparent and democratic way of approving television and radio concessions.<sup>603</sup>

Focusing on discrimination, Law 4.117/1992, Article 53 provides that using the liberty to broadcast to perpetrate crimes or misdemeanors is abusive, including when such acts involve, among others, making propaganda in favour of war or of the subversion of the

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<sup>603</sup> “Diretrizes fundamentais apresentadas pelo FNDC - 20 pontos para democratizar as comunicações no Brasil”, (27 September 2018), online: *Fed Nac J - FENAJ* <<https://fenaj.org.br/diretrizes-fundamentais-apresentadas-pelo-fndc-20-pontos-para-democratizar-as-comunicacoes-no-brasil/>>; Carlos Henrique Demarchi & Maria Teresa Miceli Kerbauy, “Ações do FNDC no debate sobre a democratização da comunicação: breves apontamentos” (2017) 18:37 *Comun Inov - PPGCOMUSCS* 119–132; Redação FNDC, “Plataforma para um novo Marco Regulatório das Comunicações no Brasil”, (18 October 2011), online: *Fórum Nac Pela Democr Comun - FNDC* <<http://fndc.org.br/noticias/plataforma-para-um-novo-marco-regulatorio-das-comunicacoes-no-brasil-736321/>>; Laura Haje, Sayonara Leal, & Fernando O Paulino, *Políticas de Comunicação e Sociedade Civil: movimentos pela democratização das comunicações no Brasil em 2007/2008* (Natal, RN, Brazil, 2008); Mabel Dias, “Violações na mídia e as conquistas do movimento pelo direito à comunicação”, *Monde Dipl - Bras* (12 May 2022), online: <<https://diplomatie.org.br/violacoes-na-midia-e-conquistas-do-movimento-pelo-direito-a-comunicacao/>>.

political and social order; promoting campaigns that discriminate based on class, colour, race or religion; or offending the family and public morality.

More recently, sexist advertising regulations have been debated in the Brazilian Congress. A law proposed in 2015 intended to make gendered discrimination within consumer relations illegal. Discriminating against one's gender (when selling a product or in a contract) or reinforcing or promoting gender stereotypes in advertising, in particular in advertising to children, would also have become illegal practices.<sup>604</sup> Another bill proposed in 2016 (proposal 6191/16) focused on "advertising that is misogynous, sexist, or able to promote violence or sexual assault," forbidding this kind of advertising and establishing a fine for corporations that promoted such messages.<sup>605</sup>

Even if no law explicitly addresses gender discrimination in advertising in Brazil, I contend that it is possible to understand the *Consumer Code* dispositions on discriminatory advertising in a gender-sensitive way by invoking the legal references incorporated in the Brazilian legal system, especially by the CEDAW and Belém do Pará Convention, together with the MPL. The feminist movements use all the laws that protect women's rights to support their claim that sexist advertising causes social harm and undermines state and feminist efforts to promote gender equality, but they do not link human rights law to consumer law. What I offer here is a human rights law framework to understand the Brazilian *Consumer Code*, further merging the private and public domains. In this sense,

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<sup>604</sup> Projeto de Lei do Senado n.º 332/2015, proposed by senator Vanessa Grazziotin, Communist Party in Brazil (PC do B – AM). Complete information available at: Senado Federal, "Projeto de Lei do Senado n. 332, de 2015", online: *Senado Fed - Atividade Legis* <<https://www25.senado.leg.br/web/atividade/materias/-/materia/121563>>.

<sup>605</sup> *PL 6191/16*, PL 6191/16 (3 March 2017).

discrimination against women within the media, understood according to the international documents supra mentioned, would contribute to identifying and clarifying the concept of discrimination in consumer law.

#### **4.8. Self-regulatory Initiatives Related to Advertising**

The market also has a role in self-regulating advertising through CONAR (*Conselho Nacional de Autorregulamentação Publicitária*), the Brazilian National Council of Self-Regulation in Advertising, which is a non-profit association comprised of a total of 392 members, distributed throughout an array of corporations from all sectors (representing a big share of all markets), advertising agencies, and media.<sup>606</sup>

The Brazilian Advertising Self-Regulatory Code was approved in 1978 during the Third Brazilian Congress of Propaganda. This Congress was held by market and advertising agencies in Brazil, which, fearing State regulation on advertising in the final years of the 1964 dictatorship, decided to get organized and promote self-regulatory limits to advertising. In 1980, as a follow-up to this Congress and the approval of the Self-Regulatory Code, the Brazilian National Council of Self-Regulation in Advertising (*Conselho Nacional de Autorregulamentação Publicitária* - CONAR) was created to implement this Code.

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<sup>606</sup> Complete list available at CONAR's website (<<http://www.conar.org.br/>>), retrieved in June 13<sup>th</sup> 2017. CONAR - Conselho Nacional de Autorregulamentação Publicitária, "CONAR - Conselho Nacional de Autorregulamentação Publicitária", online: *CONAR - Cons Nac Autorregulamentação Publicitária* <<http://www.conar.org.br/>>.

CONAR operates as a private mechanism of control for advertising and as such can only suggest a change in an advertisement or recommend the suspension of its broadcasting if the company responsible for the advertisement is among CONAR's members.<sup>607</sup> However, not all companies in Brazil are affiliated with CONAR and CONAR's rules can only be imposed on its associates, leaving smaller companies outside of CONAR's regulations and rulings. CONAR's decisions have a high level of compliance, because the media sector tends to follow the Council's recommendations. This is quite different from PROCONs' administrative sanctions, which are very often contested before the courts.<sup>608</sup> CONAR's options regarding advertising that does not conform to its Code of Ethics are very limited when compared to PROCONs' powers, given that being state bodies, PROCONs can act and impose fines even if the advertisement is not being aired anymore.<sup>609</sup>

Some argue that Brazil has a hybrid system to control advertising, combining state and industry regulation.<sup>610</sup> I disagree because the public and private institutions operate independently, in a very different way than compared to co-regulatory models like the British Office of Communication (OFCOM),<sup>611</sup> for example. In the latter, the state concedes to the private sector the ability to regulate a specific area (in this case food advertising), but the implementation of this private regulation by the regulated sector is

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<sup>607</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 39-41.

<sup>608</sup> Andressa Kutschenko Nahas, *supra* note 518; Ivan Ventura, *supra* note 524.

<sup>609</sup> PROCONs are administrative bodies that ensure enforcement of consumer law at an administrative level.

<sup>610</sup> Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 39.

<sup>611</sup> See more at: OFCOM, "OFCOM - What is Ofcom?"; online: *OFCOM* <<https://www.ofcom.org.uk/about-ofcom/what-is-ofcom>>.

monitored by the state.<sup>612</sup> That is not the case in Brazil, where private and public regulations are implemented separately and there is little dialogue between both systems.

CONAR's code has some general principles for advertising. Article 19 establishes that advertising must respect human dignity, intimacy, social interest, national institutions and symbols, authorities, and families. Article 20 declares that advertising should not favour or instigate racial, social, political, religious, or nationality-related offenses. There is no mention of sex or gender identity in these principles. Article 26 states that advertising should not contain "anything" that might lead to violence. The code includes sections about: veracity, identification of advertising, comparative advertising, safety and accidents, protection of intimacy, pollution and ecology, children and youth, copyrights and plagiarism. The code has 21 annexes, each covering a specific topic (alcoholic beverages, beer and wine, motorized vehicles, education, and many others). Relevant to this research are the sections regarding alcoholic beverages, including beer and wine. The separation of the two topics seems to follow the reasoning of Law 9.294/96, which separates alcoholic drinks as those with more than 13% alcohol according to the Gay Lussac scale.

CONAR's self-regulatory Code on Advertising has specific regulations on alcohol advertising, including one that explicitly prohibits sexual objectification and appeals to sexuality (Self-Regulatory Advertising Code, Appendix A on Alcohol Advertisement, article 3, "a"). Annex A of CONAR's code regulates advertising for alcoholic beverages

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<sup>612</sup> Harvard Law & International Development Society, *Self-Regulation of Food Advertisement to Children: Comparative Findings from Four Countries – Prepared for ANDI* (News Agency for Children's Rights) and Instituto Alana (Boston, 2013).

and article 3 (a) recommends that appeals to sexuality and sexual objectification should not be used in alcohol advertising. Subsection “c” provides that images, language, or arguments that suggest that consuming the product is a sign of maturity, that it might contribute to a better social or professional performance, or to increase the consumers’ power of seduction should be avoided. Annex P refers to beer and wines and repeats some of the restrictions of Annex A. Letter “a” states that “appeals to sensuality should not constitute the center of the advertising message and models should never be shown as sexual objects,” and “b” states that “ads will not contain scenes, illustrations, audio or videos that suggest the consumption of the product.” Both annexes contain specific rules regarding children and youth and detailed explanation on how the directions of Law 9.294/96 regarding the warnings must be placed in the advertisement.

Despite its regulations, and the offer of a space to discuss advertising, CONAR’s role is quite limited in mediating problems between society and corporations and marketing professionals. Such limitations are related to at least 5 issues: i) CONAR can only decide on cases involving its members; ii) CONAR’s rulings are not binding, they are suggestions made to the companies and marketing enterprises involved in a particular case; iii) CONAR cannot act if an advertisement is not being broadcast anymore, which implies a time-sensitivity to its actions; iv) CONAR lacks diversity, since its members come from and represent the market, with few or virtually no members with other backgrounds; v) CONAR sessions are not accessible to the public. In this context, CONAR works more as an institution to represent the market, validating the market’s values and perspectives; than

a democratic space to deal with society's discomfort about particular advertising messages.<sup>613</sup>

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<sup>613</sup> Laura Hastenpflug Wottrich, "*Não podemos deixar passar*": *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 207.

## Chapter 5 - Litigation around the *Skol* Summer Muse Campaign

In this dissertation, I am looking at two sites of representation and symbolic violence as political issues: i) women and the feminine body in advertising as reflecting structural social inequalities, and ii) legal interpretations of discriminatory advertising, which might reveal specific understandings of women's social roles, imagined or performed. Since law can be considered both "coercive and discursive,"<sup>614</sup> and representation issues are more frequently debated in other fields (sociology, political science, media), by focusing on representation in advertising and its relation with the Brazilian consumer law, I advance feminist debates about gender-based discrimination in advertising, connecting the fields of law, sociology, political science, and media.

I begin this chapter by outlining how I learned about the Skol Summer Muse Campaign and why it is a relevant case to be analyzed. I have included a brief note on language and translation since these are issues I have been struggling with since the beginning of this research project. Next, I describe all the advertisements that compose the Skol Summer Muse Campaign and explain how I accessed the documents related to my case analysis. Interestingly enough, it was the inaccessibility of this case's documents that led to my first encounter with this campaign and related litigation. This is worth considering since the lack of accessibility of such public documents can have an impact on public debates on the matter. Finally, I present an overview of the litigation, in the multiple venues it was

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<sup>614</sup> "[...] deeply linked to normative claims, high among them equality, liberty, individualism, and the rule of law, that are used to justify and contest the way in which power relations are organized." Judy Fudge & Brenda Cossman, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 30.

discussed, and close this chapter by presenting information on subsequent campaigns promoted by AMBEV for the same brand.

### **5.1 My Relationship to the *Skol* Summer Muse Campaign**

The 2006 *Skol* Summer Muse campaign marked an intersection in my own professional path: between my volunteer work with the Brazilian feminist movement and my paid work with consumer law and children's rights. Later on, as I continued to work with consumer rights in the Brazilian Ministry of Justice, I observed that the discussion of sexist advertisement was not very prominent amongst state bodies that oversaw consumer law. This discussion was very present in feminist networks, in particular those dedicated to the discussion of women's images within the media.

I started asking myself: why were feminists not using consumer law to discuss sexist advertising? Why did they approach this issue indirectly relating it to public concession of television channels<sup>615</sup> and international human rights law, particularly considering that the debates on the concession of television channels are so marked by fear of censorship in Brazil? Were the feminists aware that the National System to protect consumers (SNDC)<sup>616</sup> could receive and deal with discriminatory advertising, as per the Brazilian *Consumer Code*? At the same time: are the State bodies in the SNDC sensitized to gender issues and ready to discuss sexist advertising? In view of these questions, I became increasingly

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<sup>615</sup> On this issue, please refer to note 347, on page 108.

<sup>616</sup> The National Consumer Defense System (SNDC), as defined by article 105 of the *Consumer Code*, is composed of federal (SENACON), state, and municipal administrative bodies (PROCONs), as well as state and federal public prosecutor's offices, public legal defense offices, consumer police offices, Special Small Claims Courts, and non-profit organizations, that enforce the consumer law in Brazil. Detailed information on the SNDC is provided in chapter 3.

interested in the intersections between consumer law and international human rights law, from a feminist perspective. Could we discuss advertising regulation through a human rights framework? How do consumer rights and human rights connect, considering that we live in a world intensely influenced by branding and advertising? What legal tools could we use to address the social harm, sustained by advertising that promotes discriminatory messages, especially those that reinforce gender stereotypes and the objectification of women, leading to further symbolic and real violence?

Rachel Moreno<sup>617</sup> is a psychologist who has been part of the Brazilian feminist movement at least since 1974, actively engaged in discussing public concessions of television channels and public democratization of the media in general.<sup>618</sup> Combining both agendas, she is one of the most active militants for the right of women to a more libertarian representation within media. She is one of the founders of *Rede Mulher e Mídia*, a national network of activists focused on discussing women and media and has written a book on how beauty ideals imposed on women oppress them.<sup>619</sup>

In 2006, Rachel Moreno filed a formal complaint with the São Paulo Federal Prosecutor's Office against AMBEV,<sup>620</sup> one of the biggest Brazilian brewing companies, for promoting *Skol*, a beer advertised to young adults<sup>621</sup> in Brazil, through sexist advertising that was

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<sup>617</sup> More info: Ciranda Internacional da Comunicação Compartilhada, "Rachel Moreno", online: *Ciranda Int Comun Compart* <[https://www.ciranda.net/\\_Rachel-Moreno\\_?lang=pt\\_br](https://www.ciranda.net/_Rachel-Moreno_?lang=pt_br)>.

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<sup>619</sup> Rachel Moreno, *A beleza impossível: Mulher, mídia e consumo* (Editora Ágora, 2008).

<sup>620</sup> Enterprise created in 1999 with the fusion of *Cervejaria Brahma* and *Companhia Antarctica*. Ambev currently produces and commercializes 30 different brands, operating in 17 countries in the region: AMBEV - Companhia de Bebidas das Américas, *supra* note 18.

<sup>621</sup> According to Law 12.852/2013, youth in Brazil are people 15 and 29 years old. People under the age of 18 are not supposed to drink, since according to Law 8.069/90, it is forbidden to sell alcoholic drinks to people

contributing to deepening discrimination against women in Brazil and promoting violence against women. As already described in chapter 1, the video of the campaign showed a blonde woman dressed in a small bathing suit being cloned and delivered to (mostly white) men in bars, together with beers, encouraging consumption (of women and beers?). Unable to access information on further developments related to *Skol* Summer Muse Campaign, Rachel asked for my help, since she knew that I was a lawyer who worked with consumer rights issues, but who was also committed to the Brazilian feminist movement.

In 2008, when Rachel Moreno asked for my help, the case that was initially presented to the Federal prosecutor's office was being discussed at the department specialized in consumer issues at the São Paulo State Prosecutor's Office. We did not clearly understand how or why the case had been sent from the federal body to the state one. When we accessed the case files containing all of the submissions made until that moment, we learned that meetings were being held between AMBEV and the São Paulo state Prosecutor's Office representing consumer issues. This development was intriguing and we could not understand: (1) Why was the case being discussed at the state level instead of the federal level?; (2) Why she, as the initiator of the case, was not being informed of its developments?; (3) Why a campaign about HPV (Human papillomavirus) was being discussed by the São Paulo state Public Prosecutor's Office and AMBEV as a way to make up for promoting sexist advertising?

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less than 18 years old. However, data from Brazil shows that 60% of teenagers aged 13 to 15 years old in public schools and 70% in private schools have already drunk alcoholic beverages. Isabella Costa de Resende et al, "As consequências do consumo de bebidas alcoólicas durante a adolescência: uma revisão sistemática" (2022) 5:1 *Braz J Health Rev* 2893–2899 at 2895.  
Law 12.852/2013: *Lei n. 12.852, de 5 de Agosto de 2013*, 12.852 (5 August 2013). ; Law 8.069/ 1990: *Lei n. 8.069, de 13 de Julho de 1990.*, 8.069 (13 July 1990).

Seeking answers to these questions, I use the Skol Summer Muse Campaign to support my investigations about discriminatory advertising as a human rights issue and as a point of encounter between human rights law and consumer law in Brazil, from a feminist perspective, grounded in feminist political economy as a framework to connect both symbolic representations and concrete social inequalities that disproportionately affect women.

## 5.2 The *Skol* Summer Muse Campaign Litigation

Litigation around the *Skol* Summer Muse Campaign started in 2006, and in 2022, a final decision from the São Paulo state court is still pending. It involved many social actors and different administrative and judicial bodies. The *Skol* Summer Muse campaign was contested in 4 arenas: i) the National Council of Self-Regulation in Advertising (CONAR - Conselho Nacional de Autorregulamentação Publicitária),<sup>622</sup> which analyzed the advertisement in view of CONAR's Code; ii) the São Paulo Public Federal Prosecutor's Office (Ministério Público Federal de São Paulo),<sup>623</sup> which analysed the claim presented by

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<sup>622</sup> CONAR - Conselho Nacional de Autorregulamentação Publicitária, *supra* note 619.

<sup>623</sup> The 1988 Brazilian Constitution states that the Public Prosecutor's Office is dedicated to promoting justice in society. This institution operates within the state and federal judicial system:

1988 Constitution:

“Article 127. The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests. (CA No. 19, 1998; CA No. 45, 2004)

Article 128. The Public Prosecution comprises: (CA No. 19, 1998; CA No. 45, 2004) I – the Public Prosecution of the Union, which includes: a) the Federal Public Prosecution; b) the Labour Public Prosecution; c) the Military Public Prosecution; d) the Public Prosecution of the Federal District and the Territories; II – the Public Prosecutions of the states.

Article 129. The following are institutional functions of the Public Prosecution: (...) III – to institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests; (...) VI – to issue notifications in administrative procedures within its competence, requesting information and documents to support them, under the terms of the respective supplementary law (...).”

the feminist movement (Rede Mulher e Mídia – National Network Women and Media)<sup>624</sup> based on international human rights treaties such as CEDAW and Belém do Pará Convention; iii) the São Paulo state Prosecutor’s Office (Ministério Público do Consumidor de São Paulo),<sup>625</sup> which, after receiving information about the case from the São Paulo Federal Prosecutor’s Office proposed a collective action<sup>626</sup> based on the prohibition of discriminatory advertising in section 37, second paragraph of the Brazilian Consumer Law; and iv) the São Paulo State PROCON,<sup>627</sup> which imposed a fine against the company for this advertisement on the same grounds that justified the collective action proposed by the São Paulo state MP (offense to the rules on advertising in the *Consumer Code*).

The litigation started when Rachel Moreno, a feminist activist, and later on CEPIA, Instituto Patrícia Galvão, and CLADEM experienced discrimination through the 2006 *Skol* Summer Muse beer advertisement, understanding it as a violation of women’s fundamental right to dignity and equal treatment within society, according to rights granted by the 1988

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<sup>624</sup> Rede Mulher e Mídia, “Rede Mulher e Mídia”, online: *Rede Mulher E Mídia* <<http://mulheremidia.org.br/>>.

<sup>625</sup> Federal and state Prosecutor’s Offices have the same general objective in protecting collective and diffuse interests, but their responsibilities follow the jurisdictional division for federal and state justice.

<sup>626</sup> In common law countries, collective demands are usually proposed before courts through class action lawsuits. In Brazil, class action lawsuits do not translate precisely to our mechanisms for collective demands. In this research, I will use collective action lawsuits and public civil action as synonyms to refer to lawsuits that are presented in favour of a collectivity. For more information on this topic, refer to chapter 3.

<sup>627</sup> In Brazil consumer protection was pushed by governmental bodies even before legal consumer protections were established. Likewise, the first state office (PROCON) to promote consumer protection was created in 1976 by São Paulo state, before the approval of a unified law that would regulate consumer relations, which only happened in 1990. The example was followed by other states and from 1976 to 1985, almost all of them creating similar institutions. Thus, consumer protection in Brazil started to be discussed and implemented before a specific consumer law was passed, largely pushed by PROCONs. In part, also, this is related to the economic context: the high inflation and economic crisis and an attempt to control prices and protect consumers from this situation. The *Consumer Code*, in 1990, incorporated PROCONs as members of the National Consumer System it established, together with other institutions, like the Specialized Public Prosecutor’s Office, for example. *Supra* note 250 at 133; also see chapter 3 for more information on PROCONs and their development.

Brazilian Constitution and international human rights treaties such as CEDAW and Belém do Pará Convention. These activists called attention to how problematic the representation of women in the campaign was, where a woman was shown as a sexual object, passive, with no voice or agency; this problem that was aggravated by the fact that the advertisement was broadcast through mass media, which is a public concession. For Rachel Moreno, representatives of CEPIA, CLADEM, and Instituto Patrícia Galvão, sexist advertising was also a violation of the rules that regulate the right of broadcasting, being connected to broader issues, such as the democratization of media itself, and the need to establish ways to submit marketing messages to social control. In legal terms, these feminists focused their arguments on constitutional law and on international human rights law. The *Consumer Code* was not mentioned in the submissions made by the feminists, which focused more broadly and politically on the issue of promoting democratic access to and critique of mass media.

### **5.3 Chronology**

Even if litigation started with feminist action, bodies from the National Consumer System (Sistema Nacional de Defesa do Consumidor, SNDC) took action, with the São Paulo state MP and the São Paulo state PROCON as the main social actors pushing to punish the beer company for the sexist, discriminatory beer advertising. Chronologically, the decision from the Market Self-Regulatory Body, CONAR, came first, starting off the debates around the *Skol* Summer Muse Campaign. The arguments presented by AMBEV before CONAR were repeated and expanded as the case grew in other directions: a collective lawsuit proposed by the São Paulo state prosecutor's office and the PROCON's fine (which turned into a judicial battle later on). Therefore, the litigation around the *Skol* Summer Muse Campaign

is complex and interrelated, and I decided to use an infographic to make the litigation visually clearer.<sup>628</sup>

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<sup>628</sup> I am thankful for work done by Elcio Horiuchi, who made this infographic after many conversations and explanations about the case.

## CONAR

Supplier's, advertising agencies and media representatives' non-profit association that monitors advertising promoted by their associates, suggesting a change in an advertisement or recommending its broadcasting suspension

## Public Prosecutor's Offices

Public Prosecutor's Offices act on behalf of society's best interests, protecting fundamental rights and monitoring law implementation. They protect consumers' rights at state (MP) and federal levels (MPF) through specialized sections that propose collective lawsuits (civil and criminal) and seek to settle agreements with corporations in cases of collective damages

## PROCONs

Administrative bodies that coordinate and implement state and municipal consumer public policies; inspecting the fulfillment of local suppliers' obligations and receiving and finding solutions for consumers' complaints. Besides supporting consumers individually, PROCON impose fines upon suppliers when violations of consumer law affect the whole society. There are two administrative instances within PROCON

## Judiciary

- First instance: judicial procedures/actions are assigned first to single judges to make a decision on the case. The judiciary is broadly divided between criminal, civil, work law and juvenile justice. A consumer law case will likely be sent to a judge
- Courts: if one of the parts in a case is dissatisfied with the first instance decision, appeals can be submitted to the courts. In this second instance, cases are decided by groups of three senior judges (chambers, in a literal translation for "câmaras"). These groups are formed around themes and a consumer law case will likely be distributed to a private law civil chamber

### Proceeding before CONAR

March 7th, 2006

Based on consumer claims, CONAR starts a procedure against AMBEV for broadcasting the Skol Summer Muse Campaign

April 6th, 2006

CONAR decides to dismiss the claim and archive the case, with no sanctions imposed to AMBEV

### Proceeding before the São Paulo Federal Prosecutor's office (MPF)

#### Unsuccessful Administrative Procedure before MPF

April 18th, 2006

Based on a feminist claim, the São Paulo Federal MP (MPF) starts an investigatory procedure against AMBEV for broadcasting the Skol Summer Muse Campaign

January 17th 2007

MPF declines its competency on the matter and sends the procedure to the São Paulo state MP (MP/SP)

March 5th 2008

Case formally arrives at the MP/SP

June 22nd 2009

MP/SP proposes collective action against AMBEV

May 5th 2010

First instance judge dismisses the collective action

June 16th 2010

MP/SP appeals the first instance decision to the São Paulo State Court (TJ/SP)

April 26th 2012

TJ/SP dismisses the appeal. Without any appeal from the MP/SP, the case ends

June 10th 2014

Case is sent to the public archives

### Proceeding before São Paulo PROCON (PROCON/SP)

#### Decision by PROCON/SP imposing a financial sanction against AMBEV

July 31st 2006

PROCON/SP imposes a fine against AMBEV for the Skol Summer Muse Campaign

August 25th 2006

AMBEV contests the fine, submitting appeal to the second administrative instance within PROCON/SP

October 3rd 2007

Fine, with a reduced amount, is confirmed by superior administrative authority within PROCON

October 18th 2007

AMBEV appeals to the PROCON's executive director, requesting a reduction on the fine amount

May 15th 2009

Fine is confirmed by PROCON's Executive Director (administrative second instance), and the fine is maintained as applied on October 3rd

#### AMBEV judicializes the case, by contesting the fine before the judiciary. This initial debate focuses on a procedural issue, whether the payment of the fine is requirement to file an appeal

Feb 23rd 2010

AMBEV proposes a judicial action against PROCON to cancel the fine  
Subsidiary, AMBEV requests to not pay the fine in advance

Feb 26th 2010

Judge in the first instance accepts the action and decides that the fine imposed by PROCON is due to be paid right away, before the merit decision on the case

March 15th 2010

AMBEV appeals to TJ/SP

June 2nd 2010

PROCON contests the appeal

July 26th 2010

TJ/SP decides that the fine imposed to AMBEV is not due in advance

#### Judicial decisions referring to the merit of the case

June 26 2012

AMBEV submits request to the first instance judge to end the case against AMBEV due to the favorable decision taken in the class action proposed by MP/SP on the Skol Summer Muse Case

July 16th 2013

First instance (single judge) declares merit decision, receiving the action but declaring the fine undue because the advertisement is considered legal

April 9th 2014

PROCON/SP appeals to TJ/SP

Dec 3rd 2014

AMBEV contests the appeal within TJ/SP

August 5th 2015

Court receives the appeal proposed by PROCON/SP

March 11th 2016

Court decides that the advertisement is illegal and that PROCON's fine is due

April 28th 2016

AMBEV appeals within the TJ/SP (Embargos Infringentes)

June 23rd 2016

PROCON contests the appeal

August 8th 2016

Court dismisses the appeal (Embargos Infringentes)

August 31st 2016

AMBEV appeals within TJ/SP (Embargos de declaração)

Oct 3rd 2016

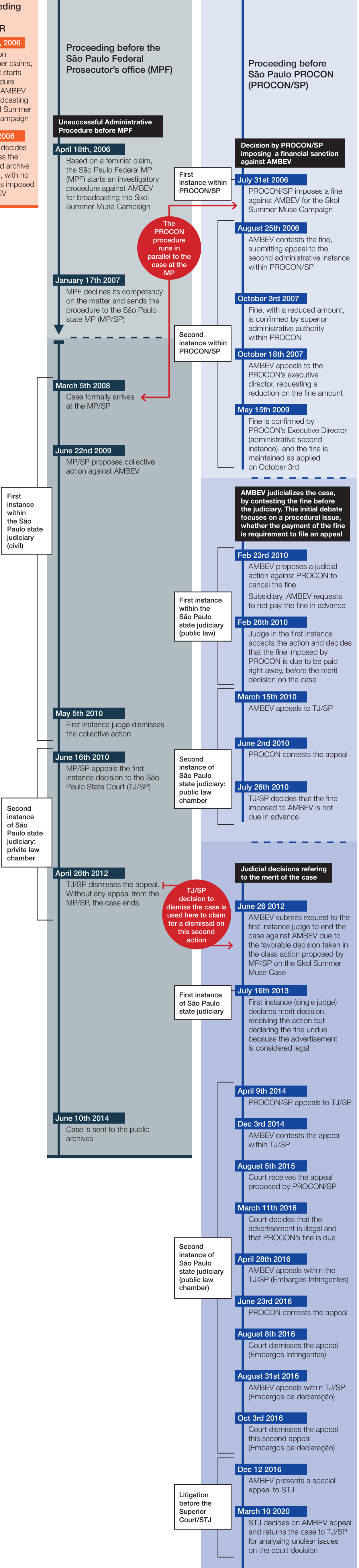
Court dismisses the appeal this second appeal (Embargos de declaração)

Dec 12 2016

AMBEV presents a special appeal to STJ

March 10 2020

STJ decides on AMBEV appeal and returns the case to TJ/SP for analysing unclear issues on the court decision



## 5.4 Accessing the Documents and my Fieldwork in Brazil

Documents unveil important narratives about the dispute at the center of the *Skol* Summer Muse Campaign and its related litigation, in particular whether the word “discriminatory” can encompass a gendered perspective. By documents, I mean all of the images, the texts that compose the decisions made by the market self-regulatory body and the judicial and administrative authorities, as well as the arguments presented by citizens, whether activists or not, and AMBEV, voicing the perspective of the market. Having in mind that “narratives bridge the gap between daily social interaction and large-scale social structures,”<sup>629</sup> the documents pertaining to the case and related litigation provide “multiple narratives” on how discourses about the feminine body and social roles are being disputed in Brazilian society and by whom.

To better understand the litigation around the *Skol* Summer Muse Campaign, I needed to access all these documents/submissions presented in the multiple arenas. This meant I needed to go to Brazil. Before landing in São Paulo in October 2016, I had mapped the places I needed to go to access the *Skol* Summer Muse Campaign documents, as well as people who could help me find and obtain copies of them. I started conversations and requests a couple of months before traveling, as some documents were not readily available to the public. While I could consult (and make copies) of the documents pertaining the PROCON fine just by going to the judicial branch where it was being analyzed, for the

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<sup>629</sup> Patricia Ewick & Susan Sibley, “Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative” 29 *Law Soc Rev* at 197.

collective action proposed by the São Paulo state MP and for the CONAR' documents, I had to do more specific research.

The collective action proposed by the São Paulo state MP had been sent to the public archives of the judiciary years ago, which meant that I had to make a special request to access them. No questions were asked when I requested the files, but I had to make a formal request, in person, on one day, and come back on a later date. I initially thought about making copies of the documents, but I soon realized that it would not be a good idea. There were simply too many documents! I decided to take digital photos.

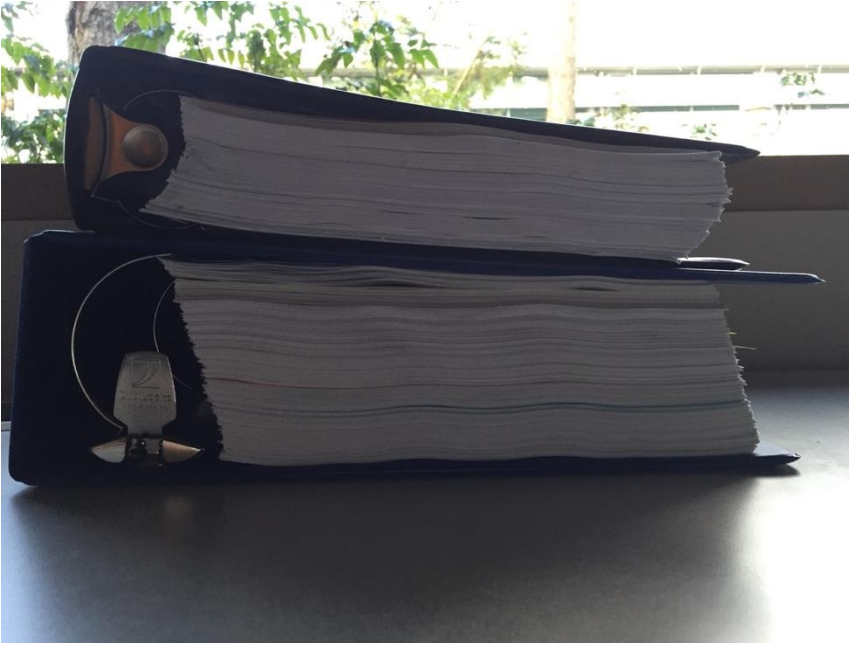
My next visit was to the São Paulo state PROCON. PROCONs' internal procedures (such as investigative procedures and decisions for imposing sanctions) are not usually open to the general public. You have to be one of the parties in the case to be able to access the documents. I was not a party in the case, but once again, I made a formal request to access the documents. I was not granted permission to access the physical files, but I was given a digital copy of the most relevant documents. Such documents were also included in the files related to AMBEV's action to repeal the fine imposed by the PROCON.

CONAR's documents were also not available to the public. Once again I made an official request, this time by email, and was given permission to consult the files related to the 2006 *Skol* Summer Muse Campaign. Kindly, the CONAR team also offered printed copies of the procedure, and I was allowed to consult other procedures related to the topic (I was also given a copy of those). The CONAR representative who answered my request was also available to answer any questions I might have.

To find the specific branch where the action proposed by AMBEV to contest the fine imposed by the PROCON was being analyzed, I was helped by Mariana Hassen Bellei Nunes de Siqueira and Letícia Ueda Vella, both law interns who kindly accompanied me in my search and helped me with taking pictures of the files. They were working for a non-profit organization in Brazil (Alana Institute) and were interested in the topic of sexist advertising and were happy to support me. I am very grateful for their help, as taking the pictures with someone else's help is far easier and faster than doing it alone, especially considering that often the files are attached together in ways that make taking the pictures difficult. It was also a long and tiring task. We could access the files and take pictures, but we could not take away the files to do so, which meant hours standing to take all the pictures (in contrast to the public archives where chairs and tables were offered for people consulting files).

When I arrived in Canada, I printed out all the documents and organized them into binders, chronologically and by procedures. Next, I read the documents several times, identifying the main social actors who were interacting, the most relevant documents (submissions, decisions), the main topics being discussed, and the more relevant arguments presented by all the parties involved in the litigation.

Image 16 – Photocopies of the documents related to the Skol Summer Muse Litigation.



Next, I describe the submissions made by the multiple parties in this case, as well as the rulings and administrative decisions that can be found in the self-regulatory, administrative, and judicial proceedings regarding the *Skol* Summer Muse Campaign.

#### **5.4.1 Litigation Venues**

##### **5.4.1.1 CONAR**

Both AMBEV, responsible for producing and distributing *Skol*, and F/Nazca Publicidade Ltda., the advertising agency in charge of developing the *Skol* Summer Muse Campaign, are members of CONAR, meaning that CONAR was able to act on claims related to this case.

On March 3<sup>rd</sup> 2006, in response to 15 emails sent by consumers complaining about AMBEV's *Skol* Summer Muse Campaign, CONAR, the self-regulatory body that oversees operates as a private agency for monitoring and controlling advertising in Brazil, started a

procedure against AMBEV.<sup>630</sup> Nine of the fifteen emails were sent by women, who, using different words and descriptions, referred to the advertisement as being discriminatory, sexist, misogynous, and offensive to women. Most emails asked CONAR to recommend the advertisement stop being broadcasted<sup>631</sup> due to its discriminatory nature. Just one of the emails, sent by a man, declared that he found the advertisement funny and that claiming otherwise would be a “waste of time with futile things.”

On March 21<sup>st</sup> 2006 AMBEV presented its defense,<sup>632</sup> arguing that the company never had any intention of offending women<sup>633</sup> and that:

(...) the advertisement deals in a respectful and superficial way with the unconscious and the simplest masculine fantasy, in this case consisted in cloning the summer muse to naively beautify the consumers’ lives and houses, fulfilling their desires.<sup>634</sup>

On April 3<sup>rd</sup>, the CONAR board members assigned to decide on the case convened and heard an oral defense presented by AMBEV. As per CONAR’s usual practice, no

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<sup>630</sup> Conselho Nacional de Autorregulamentação Publicitária, Processo 041/06. Denunciante: grupo de consumidores; Denunciada: Cia. Brasileira de Bebidas – AMBEV e F/Nazca S&S Publicidade Ltda.; Objeto: Anúncio ‘Skol – Musa do Verão’.

<sup>631</sup> Unlike PROCONs, CONAR can only suggest a change in an advertisement or recommend the suspension of its broadcasting if it the responsible for the advertisement is amongst CONAR’s members. Lucia Ancona Lopez de Magalhães Dias, *Publicidade e Direito*, 2d ed (São Paulo: Editora Revista dos Tribunais, 2013) at 39-41.

<sup>632</sup> For this submission, the lawyer acting on behalf of AMBEV was a woman.

<sup>633</sup> “No advertiser, however insane, would ever go so far as to offend a potential buyer of his products, either directly or indirectly, and in this condition, too, the advertisements produced and conveyed by the Respondents would never tend to offend the woman, who, alongside her professional work away from home, is undeniably still the administrator of our homes and the guidance of our families.

He would never attempt to offend women, disrespect them, or treat them as merchandise. It is only a play, undeniably subtle, but effectively non-offensive, easily recognized as such by anyone who does not go beyond common sense.” Conselho Nacional de Autorregulamentação Publicitária, Processo 041/06. Denunciante: grupo de consumidores; Denunciada: Cia. Brasileira de Bebidas – AMBEV e F/Nazca S&S Publicidade Ltda.; Objeto: Anúncio ‘Skol – Musa do Verão’, p. 40.

<sup>634</sup> Conselho Nacional de Autorregulamentação Publicitária, Processo 041/06. Denunciante: grupo de consumidores; Denunciada: Cia. Brasileira de Bebidas – AMBEV e F/Nazca S&S Publicidade Ltda.; Objeto: Anúncio ‘Skol – Musa do Verão’, p.40.

representative from the consumers was invited to the session, since CONAR's sessions are not open to the public, and only board members are invited to take part in the debates and declare their votes. One of CONAR's board members on duty to decide on the case was Mr. José Francisco Queiroz,<sup>635</sup> who was responsible for preparing a report on the case. His decision was followed by the majority of other board members, and the single non-conforming vote was not transcribed into the files (this is not usually done in CONAR's proceedings).

Mr. Queiroz voted to dismiss the case without any sanctions by stating that the advertisement was merely playful and reflected one's natural desire of having a muse at home, something that is celebrated in Brazilian culture and a normal human dream (not only a macho thing): to have beautiful people.<sup>636</sup> He ruled that no offense and no violence against women happened in this case, deciding it was not worthy of imposing any sanction, since taking home a muse is just a common desire. He claimed women also have this desire (of having a muse) and for this reason, the advertisement could not be considered discriminatory. He mentioned that there was no offense to the Civil Code (when analyzing whether there was any offense to personality rights), but completely ignored any regulation imposed by the *Consumer Code*. Following his vote, on April 6<sup>th</sup> 2006, CONAR decided to dismiss the Skol Summer Muse case by 8 votes against 1. Only one of the board members

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<sup>635</sup> According to a quick search online, Mr. José Francisco Queiroz was one of the directors of one of the most renowned marketing faculties in Brazil, ESPM (*Escola de Comunicação e Marketing*): José Francisco Queiroz, "José Francisco Queiroz", online: *Linkedin* <<https://br.linkedin.com/in/jos%C3%A9-francisco-queiroz-4b306048>>.

<sup>636</sup> Conselho Nacional de Autorregulamentação Publicitária, Processo 041/06. Denunciante: grupo de consumidores; Denunciada: Cia. Brasileira de Bebidas – AMBEV e F/Nazca S&S Publicidade Ltda.; Objeto: Anúncio 'Skol – Musa do Verão', p. 104-6.

on duty analyzing the case was a woman, but we do not have information about how the board members voted to determine whether the dissident vote was declared by this woman or another person on the judging committee.

#### **5.4.1.2 São Paulo Federal Prosecutor Office (MPF)**

On April 18<sup>th</sup> 2006, Rachel Moreno,<sup>637</sup> a psychologist who has been engaged with the Brazilian feminist movement since at least 1974, representing the Women's Watchdog (*Observatório da Mulher*), sent an email to the Federal Prosecutor's Office representative in São Paulo<sup>638</sup> complaining about the *Skol* Summer Muse Campaign.

Her complaint to the MPF claimed that the *Skol* Summer Muse Campaign objectified women by comparing them to objects offered as a gift/souvenir together with the purchased beer. She highlighted two aspects of the ad that for her made clear the objectification of women: the fact that a man complains that only his muse came with a defect, referring to the moustache his muse had; and that an older man in the video asks whether his muse is an imported good. She argued that these lines clearly demonstrate that women are being objectified in the campaign. In her e-mail, she advised that a complaint was also made before the market self-regulatory body (CONAR), resulting in no penalty to the company, and that the topic has been discussed in the media. She requested that the MPF act to: i) ensure AMBEV stopped broadcasting the campaign, in any kind of media (print, television, internet); ii) impose upon AMBEV the obligation to sponsor activities/workshops led by

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<sup>637</sup> More info: Ciranda Internacional da Comunicação Compartilhada, *supra* note 628.

<sup>638</sup> The São Paulo federal prosecutor's office can act to protect citizens' collective rights that have a national dimension. More information on this topic, please refer to chapter 3.

feminists to discuss the topic of sexist advertising with the general public, as a penalty for profiting on the objectification of the feminine body; iii) use media to publicize any penalties imposed on AMBEV, as an example of punishment to discourage other companies from objectifying women when selling products.

In attention to Rachel Moreno's email, on May 9<sup>th</sup> 2006, the federal prosecutor's office in São Paulo, Citizenship Rights Division, started an investigatory proceeding against AMBEV,<sup>639</sup> and requested that AMBEV submit a recording of the campaign and for CONAR to report any measures taken regarding the case. On June 8<sup>th</sup> 2006, the MPF's representative requested that Rachel Moreno submit an analysis of the ad, focusing on gender issues. In January 2007, Rachel Moreno made her submission,<sup>640</sup> observing that the right to broadcast is a public concession, which means that the state offers the companies the ability to use television channels under a public concession, subjected to rules bound by public interest defined in the Brazilian Constitution. According to her, due to this legal framework, companies operating television channels are responsible for what is broadcast and should have in mind that they are using a public good (the television channel). She also argued that television shows and often advertising are attuned to the social values of a given community, reflecting such values. For her, however, the *Skol Summer Muse Campaign*, would be an example of a dissonance between the social values and a marketing campaign, since the message brought by the *Skol Summer Muse Campaign* did not reflect

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<sup>639</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 26.

<sup>640</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 287-296.

women's advancements in the Brazilian society, in particular women's achievements as equal subjects.

Rachel Moreno engaged with AMBEV's arguments, and affirmed that the campaign fostered men's proprietary instincts or feelings toward women, who have been transformed by the ad into an object (either a perfect clone of the Summer Muse or a defective object that can be disposed of).<sup>641</sup> She also contested the representative value of the opinion poll regarding the brought to the files by AMBEV, considering that the interviewees' ages ranged from 18 and 25 years old and concentrated on men from the upper classes (AB), and only a few women (18) answered the poll. Moreno points out that responses were not stratified by gender, making it impossible to see whether women had a different perspective than men on the issue. She informed the MPF's representative that in contrast to the unclear opinion of 18 women from classes AB, 23 other women took the time to formally complain about the issue before the CONAR and the São Paulo state PROCON. She concluded by saying that the poll is not diverse enough to be considered representative and does not serve to inform society's perception on the issue (whether the ad is discriminatory or not) and that it measured only the impact of the creative idea of the ad amongst a very particular community (and impact, here, seen as people noticing the advertisement as somehow different from the regular beer advertisements). Finally, she compiled multiple documents

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<sup>641</sup> "O modelo que se introjeta ao ver tal anúncio leva aos homens a crerem todos intitulados ao modelito-único-e-'perfeito' da mus, dada como brinde, ou comprada a custo de cerveja, e ofende as mulheres, ao reduzi-las a um objeto produzido em massa a um brinde, a uma mercadoria entregue aos consumidores." Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 268.

proving that women presented claims to CONAR about the campaign, as the excerpt below shows:

I have never seen the concept of woman-object so clearly. There is even one actor that says his [muse] came with a defect because she had a moustache. I think that exploiting women to sell beer is dreadful, but in this case, it is off limits: the ad shows a ‘fabric’ of beautiful women. So many years fighting for equal rights for women, this is just outrageous.<sup>642</sup>

On February 7<sup>th</sup> and 27<sup>th</sup> 2007 the MPF’s representative called for a meeting to reach an agreement between the two parties, a TAC, as explained in chapter 3. To support the discussion on a possible agreement between AMBEV and Rachel Moreno, the MPF’s representative made a report assessing all the information submitted in the case before March 6<sup>th</sup>, 2007. Seeking additional information on the case, the MPF reached out to Conectas Direitos Humanos,<sup>643</sup> a non-profit organization that defends human rights in Brazil and asked for advice as to which organizations specialized in women’s rights should be contacted to present a submission on the case. Conectas Direitos Humanos suggested that the MPF request a formal opinion on the case from: Coletivo Feminista Sexualidade e Saúde<sup>644</sup> (Simone Diniz), SOS Corpo<sup>645</sup> (Maria Bethânia D’Ávila), CEPIA - Cidadania,

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<sup>642</sup> “Nunca vi o conceito de mulher-objeto de forma tão evidente. Há inclusive uma gag, de um ator que diz que ‘a sua veio com defeito’, por ver um bigode. Acho deplorável a exploração da mulher para vender cerveja – agora, a falta de limite chegou a níveis insuportáveis – o anúncio chega a mostrar uma ‘fábrica’ de mulher bonita. Tantos anos de luta da mulher por sua igualdade de direitos é ultrajada por esse anúncio.” Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 292.

<sup>643</sup> More information on *Conectas Direitos Humanos* available at: Conectas Human Rights, “Conectas Human Rights”, online: *Conectas Hum Rights* <<https://www.conectas.org/en>>.

<sup>644</sup> More information on *Coletivo Feminista Sexualidade e Saúde*: Coletivo Feminista Sexualidade e Saúde, “Coletivo Feminista Sexualidade e Saúde”, online: *Colet Fem Sex E Saúde* <<https://www.mulheres.org.br/>>.

<sup>645</sup> More information on SOS Corpo – *Instituto Feminista para a Democracia*: SOS Corpo - Instituto Feminista para a Democracia, “SOS Corpo - Instituto Feminista para a Democracia”, online: *Corpo - Inst Fem Para Democr* <<https://soscorpo.org/>>.

Estudo, Pesquisa, Informação e Ação<sup>646</sup> (Leila Barsted), Geledés – Instituto da Mulher Negra<sup>647</sup> (Sueli Carneiro), CFEMEA<sup>648</sup> (Guacira Oliveira), AMB – Articulação de Mulheres Brasileiras,<sup>649</sup> and Instituto Patrícia Galvão<sup>650</sup> (Jacira Melo and Fátima Jordão).<sup>651</sup> The MPF’s representative requested additional information from: CEPIA,<sup>652</sup> Instituto Patrícia Galvão,<sup>653</sup> and CLADEM.<sup>654</sup> Arguments presented by the three feminist organizations will

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<sup>646</sup> CEPIA was founded in 1990 as a non-profit organization dedicated to strengthening human rights and the citizenship of marginalized groups within Brazilian society, including women in its diversity. To achieve its goals, the organization conducts research, education and social intervention projects, advocacy and other activities, focusing on sexual and reproductive rights, violence and access to justice, empowerment of women and youth. More information on CEPIA – *Cidadania, Estudo, Pesquisa, Informação e Ação, Who we are: CEPIA: Cidadania, Estudo, Pesquisa, Informação e Ação*, “CEPIA: Cidadania, Estudo, Pesquisa, Informação e Ação”, online: *CEPIA Cid Estudo Pesqui Informação E Ação* <<https://cepia.org.br/en/a-cepia/>>.

<sup>647</sup> More information on Geledés – *Instituto da Mulher Negra*: Portal Geledés, “Portal Geledés”, online: *Portal Geledés* <<https://www.geledes.org.br/o-que-e-geledes/>>.

<sup>648</sup> More information on CEFEMEA – *Centro Feminista de Estudos e Assessoria*: CEFEMEA - Centro Feminista de Estudos e Assessoria, “CEFEMEA - Centro Feminista de Estudos e Assessoria”, online: *CEFEMEA - Cent Fem Estud E Assessor* <<https://www.cfemea.org.br/>>.

<sup>649</sup> More information on AMB – *Articulação de Mulheres Brasileiras*: Articulação de Mulheres Brasileiras, “Articulação de Mulheres Brasileiras”, online: *Articul Mulh Bras* <<https://ambfeminista.org.br/>>.

<sup>650</sup> *Patrícia Galvão* Institute was established in 2001 as a non-profit organization that works strategically articulating women’s claims for their rights, and bringing visibility to such debates within the media. For them, the media is a privileged space for debates on public policies and laws on gender equality. Amongst their projects is the management of national opinion polls on relevant matters for gender equality. In 2009 the *Agência Patrícia Galvão* was founded, as an umbrella organization that has the Institute as an important part of their activities. More information on Instituto Patrícia Galvão: Instituto Patrícia Galvão, “Instituto Patrícia Galvão”, online: *Inst Patrícia Galvão* <<https://agenciapatriciagalvao.org.br/sobre-o-instituto/>>; and on the umbrella organization Agência Patrícia Galvão: Agência Patrícia Galvão, “Agência Patrícia Galvão”, online: *Agência Patrícia Galvão* <<https://agenciapatriciagalvao.org.br/>>.

<sup>651</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 315.

<sup>652</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 336.

<sup>653</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 326.

<sup>654</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 324.

More about CLADEM: (*Comité de América Latina y el Caribe para la Defensa de los Derechos de las Mujeres* – Latin American and Caribbean Committee for the Defense of Women’s Rights) is a regional network created in 1987 in San José, Costa Rica, and formalized in 1989 in Lima, Peru, focused on working to promote and strengthen women’s rights in Latin America and Caribe, using the law as a tool for change. Since 2002, the network holds an advisory status before the Inter-American Organization. Focused on women’s human rights with an intersectional approach, the network works on three main axes: feminist education (for its own members and for the community), following up human rights treaty obligations from a gendered perspective through shadow reports, and promoting gender equality via strategic litigation internally and internationally. CLADEM has branches in fifteen countries in the region (Argentina, Bolivia, Brasil,

be discussed over the next chapters (5, 6, and 7), and here I briefly mention their recommendations to settle an agreement with MPF.

CEPIA suggested that Skol prepare and broadcast a new campaign, focused on the CEDAW Convention. This campaign should be supervised by the Woman's Observatory and the Patrícia Galvão Institute. Instituto Patrícia Galvão is a national reference on debates about women and media in Brazil. The Patrícia Galvão Institute suggested that, as compensation for the discriminatory advertisement, AMBEV should: i) conduct an opinion poll with teenagers from 10 to 17 years old, from classes C, D and E,<sup>655</sup> asking their opinion on the *Skol* Summer Muse Campaign; ii) publish a book with the results and analysis of this research (5 thousand books); iii) support the creation of symposiums on sexist advertising and violence against women in different marketing schools in each capital of the 27 states and in the federal district; iv) publish in 5 relevant publications (newspaper and magazines) the most important results of the poll. CLADEM supported these remedies and referred to two other cases where feminist groups acted against sexist marketing campaigns and obtained favourable results, such as the creation of regional seminars all over the country to discuss violence against women, promoted by the companies who sponsored sexist advertisements, and affirmed that the “Skol Summer

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Colombia, El Salvador, Guatemala, Nicaragua, Honduras, México, Panamá, Paraguay, Peru, Puerto Rico, República Dominicana, Uruguay), in addition to its regional representation. CLADEM, “CLADEM - Comité de América Latina y el Caribe para la Defensa de los Derechos de las Mujeres”, online: *CLADEM* <<https://cladem.org/>>.

<sup>655</sup> See *supra* note 244 and related information on page 83.

Muse Campaign” violated the key principle of human dignity, which guides the legal, political, ethical and social boundaries in the contemporary world.<sup>656</sup>

After trying unsuccessfully to reach an agreement, the federal prosecutor’s office concluded that eventual judicial measures could not be proposed within the federal justice system,<sup>657</sup> since the issue at stake was a consumer matter, and not a matter of public concession in broadcasting.<sup>658</sup> The MPF declined its jurisdiction and sent the case to the specialized body that deals with consumer issues at the São Paulo state prosecutor’s office. All the submissions made by the feminists became part of the instructions for the case before the São Paulo state MP, but in the end, none of the feminists’ requests, such as the offering of seminars and workshops, were requested by the São Paulo state MP’s collective lawsuit. As the MP/SP collective lawsuit was dismissed, no sanction to AMBEV resulted from that proceeding. As to the case that started at the São Paulo PROCON, only a fine was imposed and had not yet been paid by the company, as will be further discussed in this chapter.

If one understands that sexist advertisement is a form of abuse, and therefore illegal advertising according to the Brazilian *Consumer Code*, then it is the members of the SNDC’s responsibility to oversee the matter and enforce the *Consumer Code* in cases of violation. It is possible to interpret the law more broadly and discuss sexist and therefore discriminatory advertisement as an issue of misrepresentation within the media in general,

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<sup>656</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 382.

<sup>657</sup> According to article 109 of the Federal Constitution, the MPF can propose collective actions only in cases where the federal government is involved, which would be the case if the discussion referred to broadcasted contents.

<sup>658</sup> For more information on the public prosecutor’s offices, federal and state ones, please refer to chapter 3.

related to the overall lack of representation and democratization in the media, as Rachel Moreno, CEPIA, Instituto Patrícia Galvão, and CLADEM did, since the Constitution and International human rights treaties support this claim. If we consider the matter from the perspective of these feminist groups, the responsibility to deal with the matter belongs to the Federal MP, which is responsible for issues involving the Union. Considering that television concessions are regulated and overseen by the federal government, the responsibility to deal with this case would indeed fall under the Federal MPs

However, I understand that framing sexist advertising as problem related to a public concession of television channels might not be strategic, considering two main issues: the difficulty on discussing media regulation in Brazil, and the fact that the consumer law explicitly regulates discriminatory advertising. As to the first item, debates on democratizing the media and social control over the media are generally perceived by Brazilians as a form of censorship that brings uncomfortable memories of the dictatorship, causing most citizens to refuse any imposition of controls or limits on media content. In connection to this, the media market is highly concentrated in Brazil and tied to the interests of many Congressmen, a situation that does not favour a broad debate on reviewing legislation on media in Brazil, making it a blocked debate in the Congress. Second, the Brazilian *Consumer Code* offers a direct rule on advertising. It does not define abusive advertising, but indicates that discriminatory advertising is abusive and consequently, illegal. Considering this more straightforward direction in the consumer law, I consider that reaching out to the SNDC to discuss sexist advertising is a “shortcut” that could help the debates to flourish and move forward, possibly with fewer challenges than the discussion related to democratizing the media.

In this context, I see the course of action taken by the MPF in declining jurisdiction and sending the materials to the São Paulo state prosecutor's office as correct. What I do not fully understand is why the MPF spent so much time investigating the matter, listening to the parties and trying to reach an agreement if the representative understood that the case fell outside of its jurisdiction. Should this case have been sent to the state level earlier, some issues, like limitation, might not even have been raised by AMBEV. Next, I take a closer look at what happened once the claim reached the specialized section on consumer protection at the state prosecutor's office.

#### **5.4.1.3 São Paulo State Prosecutor Office (MP/SP)**

On March 5<sup>th</sup> 2008, the case arrived (physical volumes) at the São Paulo state prosecutor's office, and the MP/SP representative immediately called for a meeting with AMBEV. Several meetings occurred (March 18<sup>th</sup>, April 2,<sup>nd</sup> April 22,<sup>nd</sup> and May 6<sup>th</sup> 2008) and AMBEV kept promising to work on a proposal for an agreement. In contrast to what happened at the meetings at the federal level, at the state level only the company was called to the meetings. Rachel Moreno, who first denounced the advertisement, and the feminist organizations that made submissions, were not notified or invited to these meetings.<sup>659</sup>

It is in this context that Rachel Moreno made a submission to the São Paulo state prosecutor's office, claiming to have lost track of the negotiations of the extra-judicial agreement with AMBEV, and that the draft of this agreement was not made available in the files. She expressed concerns that AMBEV was committing to promoting a campaign on

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<sup>659</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 482-92.

preventing cervical cancer, a topic unrelated to the initial claim and the problems identified in the advertisement. Moreno reinforced the need to address the issue of objectification and hyper-sexualization of women in media, since objectification is the first step in dehumanizing people, leading to permissive violent standards in the treatment of women. Having this in mind, she observed that it would be important that the extra-judicial agreement related to the topic of the claim, addressing issues of discrimination and violence against women. She offered to support the São Paulo state MP and offered to be part of the next steps of the negotiation with AMBEV. Finally, she requested access to the draft of the extra-judicial agreement being discussed, and the scheduling of a meeting with the prosecutor's office representative in charge of the case.<sup>660</sup> In response, the public prosecutor's officer informed her that it is MP's responsibility to design, negotiate, and supervise the extra-judicial agreements that he did not foresee the need to meet with her at the moment. He also reminded the claimant that if desired, her own association could propose a class action<sup>661</sup> against AMBEV, following the *Consumer Code's* provisions (article 82, IV<sup>662</sup>). Here we note that the São Paulo state MP, instead of working in partnership with the feminist movement who initially made the claim against AMBEV before the Federal MP, denies them any participation or engagement with discussions at the state level.

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<sup>660</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 498-500.

<sup>661</sup> In Brazil, collective actions such as the one discussed in this dissertation can be proposed by the Public Prosecutor's Office or non-profit organizations, as observed in chapter 3.

<sup>662</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 504.

At this point, starting from a claim submitted to the federal prosecutor's office on April 2006, we arrived at November 2008, more than 2 years later, with no concrete compensation or remedies and a discussion that shifted from regional seminars on violence against women in the media and within society in general, to be supported by AMBEV, to the partial funding of a mammography machine by AMBEV for a specific hospital in São Paulo. The discussion of cervical cancer and mammography equipment emerged after the case was received by the state prosecutor's office and when the representatives of the feminist movements were no longer invited to the discussion.

After many meetings between AMBEV and the São Paulo State MP, January 20<sup>th</sup> 2009 was determined as a deadline for AMBEV to present a more detailed proposal on how to implement the extra-judicial agreement suggested by the public prosecutor's office.<sup>663</sup> On January 27<sup>th</sup>, AMBEV indicated its intention to partially fund the acquisition of a specific kind of mammography machine, pointing out the relevance of such equipment for women.<sup>664</sup> On February 16<sup>th</sup> 2009, the public prosecutor officer informed AMBEV that an extra-judicial agreement will not be possible in this case and that he is considering proposing a collective action against AMBEV.<sup>665</sup>

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<sup>663</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 527.

<sup>664</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 529-31.

<sup>665</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 534-5.

On June 22<sup>nd</sup> 2009, the collective action<sup>666</sup> was proposed by the São Paulo state prosecutor's office, and information about previous<sup>667</sup> similar actions were incorporated as appendices.<sup>668</sup> In the documents that are part of the files of the case there is no explicit reason as to why or what led to a change in the attitude taken by the MP/SP, but I believe that the prosecutor realized that the company was constantly postponing discussion of the final terms of the agreement, without a real commitment to concluding or implementing the agreement. However, the prosecutor's office in charge, when informing AMBEV of its intention of proposing a collective action, also left room for an agreement to be decided before the judge of the case (something that is allowed by the Brazilian law on collective actions).

Grounding its collective lawsuit on the idea that the advertisement offended diffuse rights by promoting discrimination against women, the São Paulo state MP used the concept of moral violence as a key aspect to justify its action,<sup>669</sup> stating that moral violence is expressed by the images that were used in the advertisement to encourage beer consumption, as well as in how Brazilian women were represented as a target for sexual

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<sup>666</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000.

<sup>667</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 545.

<sup>668</sup> A previous extra-judicial agreement with another beer company is incorporated into the files of this case (pages 537–44), in which the company supported the creation of 5 regional seminars (in Porto Alegre, Brasília, Manaus, São Paulo and Natal), and committed to making a campaign focused on respecting women. The seminars were organized by CLADEM, a feminist organization. Also added to the files was a memo from the Federal Council of Counsellor in Brazil analyzing the campaign that motivated the extra-judicial agreement.

<sup>669</sup> “A violência moral corresponde a toda forma de desqualificação de uma pessoa por razões decorrentes de seu sexo, classe social e etnia. Muitos preconceitos se nutrem das imagens estereotipadas das mulheres. É uma violência moral, por exemplo, a exposição das mulheres como objetos sexuais, como apêndices de nádegas e seios. No imaginário do “primeiro mundo”, somos (o Brasil), um paraíso de mulheres sensuais rebolando ao som dos tambores, num eterno carnaval tropical (o que favorece, entre outras coisas, a exploração do chamado turismo sexual). Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 11.

tourism.<sup>670</sup> The petition focused on the fact that the advertisement treated women as merchandise, as “things” that can even come with a “defect.” The defect issue, represented by the moustache, appeared repeatedly throughout the multiple submissions and documents related to the litigation of the *Skol* Summer Muse, either to support the argument that the advertisement objectifies women as claimed by the MP or to convey the idea of humour (as argued by the company and some judges that sided with AMBEV). For the MP/SP the advertisement clearly compared women to beer, as equivalents, both things used to satisfy men.<sup>671</sup>

On May 5<sup>th</sup> 2010, the first instance judge, Dimitrios Zarvos Varellis, decided to dismiss the action deciding that limitation had occurred according to the Civil Code, in a 3 years’, siding with AMBEV, and not welcoming the arguments from the MP/SP that the timeframe for limitation to be observed should be 5 years, following the *Consumer Code*, considering that the matter at stake referred to a subject regulated by the consumer law. Therefore, in his six pages ‘decision, he found that the applicable law was the Civil Code, and not the *Consumer Code*, and based on this technical issue (limitation), he dismissed the claim.<sup>672</sup>

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<sup>670</sup> From 2013 to 2015, at least 3,350 websites, in multiple languages, would associate Brazil with pornography or sell the country as an optimal destination for sexual tourism, including the association of Brazil with child pornography. Some websites even sell all-inclusive options to come to Brazil and enjoy some sexual tourism, focusing on Brazilian women as their main product/service, as one of the websites states: “Our young women won’t be only your sex goddesses, they will also be your touristic guides, translators, partners for dancing and personal girlfriends”. “nossas jovens mulheres não apenas serão suas deusas do sexo, como também serão suas guias turísticas, tradutoras, parceiras de dança e namoradas pessoais.” André de Souza, “Levantamento mostra que mais de 3 mil sites vendem turismo sexual no Brasil”, *O Globo Online* (28 June 2015), online: <<https://oglobo.globo.com/brasil/levantamento-mostra-que-mais-de-3-mil-sites-vendem-turismo-sexual-no-brasil-16581696>>.

<sup>671</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 12.

<sup>672</sup> “Furthermore, the *Consumer Code* is unenforceable in this case, in which we are not debating a defect in the product or the service, which shies away completely, the enforcement of the Consumer’s Code article 33, §2<sup>o</sup><sup>672</sup> because there is no inappropriate information regarding the product or the service in this case, that is about a diffuse damage caused by advertising that for the MP treats the woman as a merchandise (abusive

The MP/SP appealed. In Brazil, when the public prosecutor's office that acts in the first level appeals, the MP at the appeal level provides a submission on the case. The one presented for the Summer Muse case is a very short one<sup>673</sup> in which the public prosecutor's officer acting in the second instance briefly recalled the advertisement (highlighting the cloning process and the fact that one muse comes with a defect, a mustache, and a consumer asking if his muse is an imported good).<sup>674</sup> In this piece, he reaffirmed that the limitation period that should be considered in this case is the one prescribed by the Civil Code because this is "not a consumer relation."<sup>675</sup>

The appeal presented by the first instance MP strongly defended that the limitation did not occur.<sup>676</sup> Being a consumer rights issue, the limitation timeframe to be observed was the

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advertisement). This moves away the possibility of considering the 5-year period for limitation that is prescribed in the *Consumer Code*.

Considering all that have been presented in these files, I declare the end of this case, after knowing/studying its content, by recognizing that the limitation period occurred, according to the article 269, IV of the Procedural Civil Code."

No mais, o Código de Defesa do Consumidor é inaplicável ao presente caso, em que, à toda evidência, não se está a discutir vício do serviço ou do produto, o que afasta, e por completo, as referências à legislação respectiva em réplicas lançadas, inclusive em relação ao artigo 33, § 2º, do CDC, pois não há informação inadequada alguma em relação ao produto ou serviço na causa de pedir desta ação, que, como se sabe, refere a ocorrência de dano moral difuso por propaganda que estaria, no entender do requerente, a tratar a mulher como uma mercadora (propaganda abusiva), o que inclusive afasta o pedido de reconhecimento de que o prazo decadencial ou mesmo prescricional é o de cinco anos em proveito do requerente.(...)

Ante o exposto, e de tudo o mais que dos autos consta, **julgo extinto o processo, com conhecimento do mérito**, reconhecendo a prescrição, o que faço com fundamento no artigo 269, IV, do Código de Processo Civil." Sentença. Poder Judiciário do Estado de São Paulo, Comarca da Capital, 11ª Vara Cível, processo nº 583.00.2009.165.466-9, p. 614-5.

<sup>673</sup> Apelação 9000005-45-2009.8.26.0100, Ministério Público do Estado de São Paulo, Procuradoria Geral de Justiça, p. 677-80.

<sup>674</sup> Apelação 9000005-45-2009.8.26.0100, Ministério Público do Estado de São Paulo, Procuradoria Geral de Justiça, p. 678.

<sup>675</sup> Apelação 9000005-45-2009.8.26.0100, Ministério Público do Estado de São Paulo, Procuradoria Geral de Justiça, p. 679-80

<sup>676</sup> Ministério Público do Estado de São Paulo. Promotoria de Justiça do Consumidor. Apelação em Ação Civil Pública, processo 583.00. 2009.165466-9, p. 620-32.

one prescribed by the *Consumer Code*, not by the Civil Code.<sup>677</sup> The procedural arguments were not as relevant as the affirmation that this was a case that dealt with advertisement, an issue regulated by the *Consumer Code* (which lead to the other procedural arguments that justify the limitation of 5 years and not 3). Having settled this issue, the MP/SP discussed why the law was violated by the *Skol Summer Muse Campaign*.

On the appeal level, the case is usually decided by a group of three more experienced judges.<sup>678</sup> On March 27<sup>th</sup> 2012, the leading judge described the case as:

the plaintiff understands that promoting an advertisement showing a woman in bikini and being reproduced in an industrial production line (“cloning process”) just to be delivered to men would stimulate what is called the “feminine objectification” and her presentation as a mere sexual object to satisfy the masculine pleasure. (...) When it comes to the reasons/grounds for the action, the plaintiff reinforces that the offensive aspect of the advertisement is precisely the fact that women are produced as things and delivered to male consumers.<sup>679</sup>

The judge dismissed the appeal. This decision of the leading judge was followed by the other two judges, who agreed that there was no reason for the appeal, confirming the first instance sentence and deciding that the advertising was not illegal. Starting with the procedural issues, the leading judge decided that the limitation time was regulated by the *Consumer Code*, therefore being five and not three years. He ruled that the case was subject to consumer law because it discussed abusive/offensive advertisement, a topic regulated by

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<sup>677</sup> Ministério Público do Estado de São Paulo. Promotoria de Justiça do Consumidor. Apelação em Ação Civil Pública, processo 583.00. 2009.165466-9, p. 630-2.

<sup>678</sup> On the court/tribunal level, the cases are distributed to smaller groups of 3 judges, divided into “chambers.” There are chambers specialized in private law and in public law for the civil cases. Usually, one of the judges makes a brief summary of the case so far and proceeds to his opinion/vote on the case.

<sup>679</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4<sup>a</sup> Câmara de Direito Privado, p. 682.

the *Consumer Code*.<sup>680</sup> However, the leading judge did not see reason for imposing a fine upon AMBEV or reasons to consider a collective damage since in his opinion (and siding with the company) beauty contests are part of the Brazilian culture and exploring such contests in a humorous way is not illegal:

The fact that the advertisement focuses on the worship of the body, beauty, and sensuality does result in any devaluation of women and their uncountable virtues, which, as known, go way beyond their physical attributes.<sup>681</sup>

His understanding of the case is aligned with the arguments presented by AMBEV, in the sense that AMBEV argued that the advertisement just used humour to promote the consumption of a specific brand of beer, and had no intention to discriminate against women, but solely to sell beer.<sup>682</sup> This decision put an end to the collective lawsuit

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<sup>680</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 693-4.

<sup>681</sup> “Logo, a circunstância de ter sido realçando (sic) o culto ao corpo, à beleza e à sensualidade, na espécie, não implica desvalorização generalizada às mulheres e às suas inúmeras qualidades que, sabidamente, superam o aspecto físico.” Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 700.

<sup>682</sup> “However, what we see in this case is just a humorous satire, without any pejorative or discriminatory intention. It is clearly absurd to imagine that the advertisement’s goal was to convince the spectator that buying the beer would result in the distribution of beautiful, cloned women. The advertisement does not propose this unrealistic connection and does not stimulate people to be more or to be less sexist. Everybody knows or should know (regardless of the advertisement) that consuming an alcoholic drink will not bring the announced souvenir, which is clear considering that the image of the woman in bikini is unreal. It is not any unfortunate joke and without any intention to offend that will be able to generate more or to generate less value to women’s role, intelligence, capacity, and importance. The truth is that the advertisement –even if it can be considered rude– does not undermine women or their desires and social positions.

The advertisement’s intention, contradicting the offensive aspect claimed by the plaintiff, is to promote creativity or playfulness, associating beauty, hot weather and minimal clothes, good sense of humor, joy, and the summer to beer’s consumption. Even if this can be criticized, it is a quite normal association in a tropical country. Beer advertising is well known by its originality, even if sometimes it can be scoffing. Under these circumstances and considering what can be seen in the advertisement discussed in this case, the main goal here is not to objectify women, but to attract with humour, by creating a fictional scenario that make all consumers laugh, comment, and remember the brand and the product being promoted. Therefore, there is no offense to article 37, §2º, CDC. (...)

The advertisement can be considered distasteful, which does not mean prejudice and discrimination, and does not offending women’s dignity.”

proposed by the São Paulo state MP. Even though the case started with a complaint presented by Rachel Moreno, representing Observatório da Mulher and Rede Mulher e Mídia, having also received support from CEPIA, Instituto Patrícia Galvão, and CLADEM, none of them or their representatives were invited to present written submissions or take part in the hearing when the judges decided the case, either at the first level, or at the appeal level. They sought to engage with the ongoing case at some point but were repelled by the MP. No more appeals were presented, and it was the end of this case (June 10<sup>th</sup> 2014).<sup>683</sup>

#### **5.4.1.4 São Paulo PROCON**

As already explained, PROCONs are administrative bodies responsible for coordinating and implementing state and municipal consumer public policies, inspecting the fulfillment of local suppliers' obligations, and receiving consumers' complaints. PROCONs can act to solve consumers' individual problems, mediate agreements between consumers and

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“Porém, verifica-se, no caso, mais uma sátira com bom humor do que qualquer intenção pejorativa ou discriminatória. Chega a ser absurdo cogitar que o que se pretendeu foi convencer o telespectador de que a compra da cerveja ‘skol’ acarreta a distribuição de mulheres bonitas ‘clonadas’ aos seus consumidores. A propaganda não faz essa ligação inverossímil e não estimula que as pessoas sejam mais ou menos machistas. Todos sabem ou deveriam saber (independentemente do anúncio) que o consumo de bebida alcoólica não produz o brinde informado, até porque a figura da moça de biquíni como sendo a figura perfeita escapa da realidade. Não é um comercial com qualquer piada infeliz e sem intuito ofensivo que irá trazer mais ou menos valorização ao papel, inteligência, capacidade e importância da classe feminina. A verdade é que, a peça publicitária, em que pese possa ter aspecto grosseiro, não anima inferiorizar a mulher ou lesar seus anseios e posições sociais.

A intenção do comercial, ao contrário do caráter ofensivo que se pretendeu impor, é a de promover criatividade ou brincadeira que associa beleza, o clima quente e as vestes reduzidas, o bom humor, a alegria e o verão ao consumo de cerveja, o que é natural (mesmo que possa ser criticável ou equivocado) em um país tropical. As propagandas de cervejas são das mais comentadas e conhecidas pela originalidade, ainda que, por vezes, possam ser consideradas jocosas. Nessas circunstâncias e considerando o que foi mostrado no filme em comento, o objetivo não é de ‘coisificar’ mulher nenhuma, mas sim, causar impacto com humor, criar uma ficção para que os consumidores deem risada, façam comentários, enfim, lembrem da marca e do produto divulgado. Ausente, pois, ofensa ao art. 37, §2º, do CDC. (...)

O anúncio em referência poderá ser tido de mau-gosto, o que não significa preconceito e discriminação, não sendo apto a ferir a dignidade da mulher.” Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 700-1.

<sup>683</sup> Tribunal de Justiça do Estado de São Paulo. Comarca de São Paulo, Foro Central Cível, 11ª Vara Cível. Processo n. 0165466-28.2009.8.26.0100. Ação Civil Pública.

providers, and impose fines upon suppliers when identifying violations of consumer law in collective cases.<sup>684</sup> These fines, when paid by suppliers, are not given directly to the consumers, but go to the municipal, state, or federal (in case of fines imposed by Senacon) funds and contribute to supporting the SNDC's<sup>685</sup> member activities in the long term. The fines are deemed to have both a repressive and preventive role. The idea is that the imposition of a fine would inhibit suppliers' future similar behaviours.<sup>686</sup>

PROCON São Paulo had a key role in responding to the *Skol* Summer Muse Campaign, by initiating an investigation against AMBEV and imposing a R\$ 458.240,00 fine on July 31<sup>st</sup> 2006 due to abusive advertising, in violation of the *Consumer Code*:

The provider here specified [AMBEV] promoted, in March 2006, on the television, a marketing campaign for its product, the Skol beer, under the name of 'Skol's Muse'. In this advertisement, the company promoted sexist gender discrimination, by referring to the main actress as an object, something to be consumed. By doing so, the company promoted offensive advertising, violating article 37, § 2º of the law n. 8.078/90 – the *Consumer Code*.<sup>687</sup>

AMBEV contested the amount of the fine, arguing that the amount due was exorbitant, unreasonable, and disproportional. However, it is worth remembering that according to the investigation conducted by the Federal MP (MPF), AMBEV paid R\$ 11,618,083.73<sup>688</sup> (CAD \$ 4,043,604.2496)<sup>689</sup> to have the *Skol* Summer Muse Campaign broadcast 5,730

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<sup>684</sup> *Supra* note 352 at 378-381.

<sup>685</sup> Information on who is part of the National System to Protect Consumers, SNDC, in Portuguese, is available in chapter 3.

<sup>686</sup> *Ibid* at 383.

<sup>687</sup> Governo do Estado de São Paulo, Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor – PROCON, Auto de infração n.º 1037. 31.07.2006.

<sup>688</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 424.

<sup>689</sup> According conversions checked on January 13th 2019, <https://www.bcb.gov.br/conversao>.

times on national television. These were only the costs of broadcasting, not including any expenses to create the advertisement itself (marketing team, actors, etc.) While the fine was R\$ 458.240,00, it represents only 2.5% of that amount.

On October 3<sup>rd</sup> 2007, the fine upon AMBEV for causing collective damage related to the broadcasting of its marketing campaign was confirmed by PROCON with a reduction of 13% in its original value, considering that AMBEV did not have previous sanctions imposed for the same reason.<sup>690</sup> AMBEV appealed this decision on October 18<sup>th</sup> 2007, which was denied by PROCON second instance, with the fine and its reduction maintained, accounting for a total amount of R\$ 290.218,66.<sup>691</sup> This marked the end of the procedure before PROCON. AMBEV then sought annulment of the fine imposed by PROCON before the judiciary. So far in this case, the debates in the MPF, MP/SP and the judicial arena occurred independently from those that took place before PROCON, even if AMBEV presented the same arguments before all the different instances: CONAR, MPF, and MP/SP. The annulment action connected the collective action proposed by the MP/SP (and which had originated from a claim presented to the MPF) and the PROCON administrative procedure.

On February 23<sup>rd</sup> 2010, AMBEV started a judicial procedure to annul the fine imposed by PROCON,<sup>692</sup> claiming that nobody, except a “fundamentalist association, that was seeking

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<sup>690</sup> Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor, Diretoria de Programas Especiais, PROCON/SP. Processo n. 803/06, p. 150.

<sup>691</sup> Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor, processo n. 0803/2006, p. 230-4.

<sup>692</sup> Processo n. 053.10.005431-8, Ação ordinária com pedido de tutela antecipada contra a Fundação de Proteção e Defesa do Consumidor – PROCON/SP.

institutional promotion and financial support for its articles and workshops”<sup>693</sup> complained about the advertisement. For the company, this was evidence that the fine imposed by PROCON was arbitrary. AMBEV also informed the judge that this issue had already been discussed by the judiciary, in the collective lawsuit proposed by the MP/SP, and that at that time, the court found no reason for imposing any sanctions on AMBEV, by concluding that the *Skol* Summer Muse Campaign was not a very good advertisement, but that it was not offensive or illegal either.

Repeating the same arguments presented in previous proceedings, AMBEV argued that:

- nobody complained about the advertisement,
- the advertisement merely played with humour to increase *Skol*'s sales,
- to see discrimination against women in the *Skol* Summer Muse Campaign would be a sign of radicalism,
- sanctioning this campaign would mean the end of the fun in advertising,
- there is no way to advertise beer if not using images that refer to summertime, which necessarily includes people on the beach wearing bathing suits, “since in Brazil people don’t wear burkas,<sup>694</sup>”
- the advertisement only builds upon an already existing cultural imaginary, the beauty contests that take place in Brazilian society,

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<sup>693</sup> “A denúncia partiu de uma associação fundamentalista que, na busca da promoção de seus fins associativos de defesa dos direitos da mulher, queria mesmo um acordo em troca de patrocínio para seus seminários e artigos.” Processo n. 053.10.005431-8, Ação ordinária com pedido de tutela antecipada contra a Fundação de Proteção e Defesa do Consumidor – PROCON/SP.

<sup>694</sup> “women in Brazil “don’t wear burkas or fur coats, but bathing suits.” Contestação da ação Civil Pública n. 583.00.2009.165466-9/000000-000, p. 578.

- the advertisement praised women,
- the reasonable man and consumer (“*pater familias*”) would never see the advertisement as problematic, as the poll conducted by AMBEV supposedly proved,
- the advertisement clearly referred to a fantastic, unrealistic environment,
- the amount of the fine imposed is unreasonable,
- the fine should not be paid until a final decision on the case is reached by the judiciary.

On February 26<sup>th</sup> 2010, a judge (the first female judge to look at this case)<sup>695</sup> rejected the request of temporary remedy (AMBEV asked to suspend the fine that was imposed by PROCON). In a brief reasoning, she stated that:

The plaintiff’s treatment of the woman in advertising is far from respectful, nor can it be understood as a ‘humorous satire’. In fact, the woman is treated as an object, she is the beer itself, ready to be consumed and available to any man who wants to buy it and receive the ‘good’ at home.<sup>696</sup>

On March 15<sup>th</sup> 2010, AMBEV appealed this decision (*Agravo de Instrumento*) to the São Paulo state court. The judge (male) suspended the first instance decision and the payment of fine until the action on the annulment of the fine was fully analyzed by the court. The judge’s reasoning was that the fine represented a large amount of money and paying it in advance, before a final decision on the matter was reached by the judiciary, could result in

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<sup>695</sup> Does being a woman judge make a difference? This question is still open to debate and it is not possible to provide a straightforward answer to it. For a deeper debate on this issue, see: Marie-Claire Belleau & Rebecca Johnson, “Judging gender: Difference and dissent at the Supreme Court of Canada” (2008) 15:1–2 Int J Leg Prof.

<sup>696</sup> Processo n. 053.10.005431-8. 9º Vara da Fazenda Pública da Capital, processo n. 316/10, p. 349.

negative repercussions for the public image of the company, which would cause irreversible damage to AMBEV.<sup>697</sup> On March 23<sup>rd</sup> 2010, the São Paulo state court validated this decision, suspending the fine until the merits of the case are analyzed and decided.<sup>698</sup>

On June 26<sup>th</sup> 2012, AMBEV informed the judge that the collective lawsuit proposed by the São Paulo public prosecutor's office had a final decision, which concluded that the advertisement was not discriminatory and therefore, not illegal. This was yet another reason to annul the fine imposed by PROCON.<sup>699</sup> On July 16<sup>th</sup> 2013, the judge in this case (another woman) decided to follow the arguments used by the court to deny the collective action proposed by the MP and determined that there was no illegal advertisement and therefore the fine imposed by PROCON was undue:

Since the practice of discriminatory advertising has not been confirmed, the administrative proceeding [before PROCON] is null and void, as well as the fine resulting therefrom. For the foregoing, I receive the action, under the terms of art. 269, I of the CPC, to declare null the fine imposed upon the plaintiff in the Notice of Infringement n. 1037 series D-3.<sup>700</sup>

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<sup>697</sup> Agravo de Instrumento n. 990.10.113520-5. Tribunal de Justiça do Estado de São Paulo, Sétima Câmara de Direito Público, Des. Guerrieri Rezende, relator, p.p. 409-10.

<sup>698</sup> Poder Judiciário, Tribunal de Justiça do Estado de São Paulo, Sétima Câmara de Direito Público, Agravo de Instrumento n. 990.10.113520-5. Guerrieri Rezende, des. Relator, followed by judge Coimbra Schmidt and Constança Gonzaga, pp. 527-541.

<sup>699</sup> Processo n. 053.10.005431-8, Ação ordinária com pedido de tutela antecipada contra a Fundação de Proteção e Defesa do Consumidor – PROCON/SP, p. 474-81

<sup>700</sup> “Descaracterizada a prática de propaganda discriminatória, o auto de infração é nulo, assim como a multa dele decorrente.

Pelo exposto, JULGO PROCEDENTE a ação, nos termos do art. 269, I do CPC, para declarar nula a multa imposta à autora no Auto de Infração n. 1037 série D-3.” Tribunal de Justiça do Estado de São Paulo, Comarca de São Paulo. Foro Central, 9<sup>a</sup> Vara de Fazenda Pública, processo n. 005431-07.2010.8.26.0053, p. 577.

On April 9<sup>th</sup> 2014, PROCON appealed (document also signed by a woman), contesting the court decision that deemed the fine null.<sup>701</sup> On December 3<sup>rd</sup> 2014, AMBEV responded to PROCON's appeal, repeating the arguments already presented and defending the illegality of the fine, having in mind that the case had already been decided by judiciary, which ruled the advertisement was not illegal (reference to the collective lawsuit presented by São Paulo MP).<sup>702</sup> On August 5<sup>th</sup> 2015, the court accepted PROCON's appeal,<sup>703</sup> and on March 11<sup>th</sup> 2016, the case was decided by the São Paulo state court, resulting in the understanding that the advertisement was illegal and the fine imposed by PROCON was due. The decision was reached by a consensus of two judges, with the third one dissenting.<sup>704</sup>

Judge Luiz Sergio Fernandes de Souza was the leading judge for this case. He started by refusing the argument that if the case had been already decided by the courts in the collective lawsuit brought forward by the MP/SP, AMBEV could not have been sanctioned by PROCON. He stated that the decision on the collective action did not affect how the court should decide on the annulment action proposed by AMBEV against PROCON/SP, since what was at stake in the case *sub judice* was the validity of the administrative act conducted by PROCON, in imposing a fine on AMBEV, and PROCON/SP's legitimacy to do so; this was different from the object of the collective lawsuit proposed by the MP/SP,

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<sup>701</sup> Apelação interposta pela Procuradoria Geral do Estado de São Paulo, a favor de PROCON – Fundação de Proteção e Defesa do Consumidor, pp. 555-74.

<sup>702</sup> Resposta ao Recurso de Apelação interposto por PROCON/SP, processo n. 0005431-07.2010.8.26.0053, pp. 578-94.

<sup>703</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, decisão monocrática, reg. 2015.0000552603, Oscild de Lima Júnior, relator, 11<sup>a</sup> Câmara de Direito Público, pp. 604-610.

<sup>704</sup> 7<sup>a</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, pp. 613-42.

which had the advertisement itself at its core.<sup>705</sup> He defined advertisement as an artistic activity aimed primarily at stimulating the consumption of goods<sup>706</sup> and acknowledged that the *Consumer Code* defines abusive/offensive advertisement in a very broad sense, leaving room for multiple interpretations. However, for him, the Constitution and social values offer a robust enough framework allowing for understanding what “abusive/offensive” advertising means, by establishing human dignity as a clear limit to the marketing activity.<sup>707</sup> He concluded that the campaign had an unfortunate narrative and that it objectified women by showing cloned muses being delivered to men, which is problematic considering advertising’s powerful influence on people.<sup>708</sup> He ruled:

This is not about exercising the right to tolerance, or breakthrough a particular kind of social hypocrisy, aligned with the ‘political correct’, but realizing that feminine aesthetics, as pleasing as it can be, cannot be mistaken by cans of beer, a product that people consume and then throw away.<sup>709</sup>

The judge decided that women’s fight for equality must be supported by the whole society and not seen as a position uniquely pursued by radical groups, showing surprise that a multinational company, such as AMBEV, invested so much money in an archaic and

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<sup>705</sup> 7ª Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 167.

<sup>706</sup> 7ª Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 168-9.

<sup>707</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 620.

<sup>708</sup> 7ª Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 10-11.

<sup>709</sup> 7ª Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 14.

discriminatory advertisement, unfit for the 21<sup>st</sup> century.<sup>710</sup> To stress how much advertising can influence people, he argued that marketing invades people's houses by being broadcast through public concessions such as television channels (here making a reference to the feminists' arguments, even if they did not take part in the PROCON's procedure).<sup>711</sup>

Judge Moacir Peres agreed with the leading judge that the PROCON's fine must be maintained. He decided that the concept of discriminatory advertising had been open to interpretation by legal scholars and jurisprudence over the years, and that the judiciary had understood this provision of the *Consumer Code* as protecting consumers' vulnerability,<sup>712</sup> such as in the case of advertising to children. For him, the Summer Muse Campaign objectified women by showing them as things to be consumed, ignoring that women are consumers too.<sup>713</sup> He ruled that this case referred to a collision of fundamental rights,

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<sup>710</sup> 7<sup>a</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 11.

<sup>711</sup> 7<sup>a</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p.13.

<sup>712</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do segundo desembargador (des. Moacir Peres) p. 633.

<sup>713</sup> "By this [the advertisement], it creates the idea that the woman is a commodity to be produced in series and freely consumed by men. By discriminating against the woman, the piece discriminates, separates, separates the genres, treating the male sex as the consumer and the feminine as a good to be consumed, which must be perfect (the advertisement alludes to a copy of the 'Musa' that would have a 'defect') to satisfy the wishes of consumers.

(...)

Currently, there is research indicating that a significant portion (about 1/3 to close to half) of the Brazilian beer market is made up of women. Of course, a brewing industry campaign should consider and value this considerable portion of its relevant market.

However, marketing issues aside, the advertisement in question is abusive/offensive because, by objectifying the woman, treating her as a product that should be distributed by the manufacturer for male consumers, it creates discrimination and offends the values of a niche population.

It is not my intention to analyze the actual offensiveness of the advertising piece (since each potential consumer would react differently to it), but like in the case of the treatment given to children's advertising, we should look for the potentially abusiveness of the message." 7<sup>a</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do segundo desembargador (des. Moacir Peres) p. 634.

having the freedom of expression of the company on one side, and the protection of consumers and the collective right not to be subjected to discrimination on the other.<sup>714</sup>

The third judge who took part on this case, Coimbra Schmidt, dissented. Schmidt found that, as it was previously analyzed by the courts, the advertisement could not be re-assessed. But because the other two judges provided their understandings on the issue, he decided to do the same. His decision sided with AMBEV's arguments, in the sense that this was just a funny, humorous advertisement and that it is natural to show women in bikinis if they are at the beach.<sup>715</sup>

On April 28<sup>th</sup> 2016, AMBEV appealed again (*Embargos Infringentes*), demanding that the court review its previous decision. This is an appeal that can be presented when votes from the court are not unanimous. AMBEV claimed that the analysis and the sentences on the topic were clearly controversial, since the ruling was not unanimous. AMBEV repeated all

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<sup>714</sup> 7<sup>a</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do segundo desembargador (des. Moacir Peres) p. 634.

<sup>715</sup> “[In said advertisement] I saw, just like Judge Zuliani, humorous material permeated with complete nonsense underlying the absurd possibility of reproducing a beautiful, young woman, elected ‘Muse of the Summer 2006’ so that every dreamer could have her not as a distant, imaginary figure, but as something palpable, material, at their fingertips. I tried hard not to laugh, even when I was in session examining the play, because I did not know it (I do not usually watch television).”

It is quite true that the concept of abusive advertising is broad. [Abusive advertising is the] one that does not qualify as misleading, being indeterminate its legal concept (...). *Data vênia*, judging it must not dissociate itself from reality: it is a fact that, on the beaches, women's attire is increasingly summary. It is a fact that the ideal of the muse is a component of the male imaginary – and this since very ancient times. What did the commercial on trial do? It transposed to the world of advertising this reality of our resorts to the dream world of the audience receiving the message, in a film of great impact for its originality, radiated from its authors' intense dose of creativity. Advertisers who knew how to synthesize these factors in a piece filled by the GOOD humor characteristic of the naughtiness of the Brazilian men associated with the immanent joy of cheering in breweries: *in vino veritas ...*, *in cervisia felicitas!* And the result of punishing the advertiser with a heavy fine is precisely to confine this creativity, inherent to freedom of expression – a fundamental guarantee enshrined in the Constitution – through an act of economic censorship, just because some saw daring as an offense to the female condition. It definitely was not my reading.” Chamber of Public Law, case no. 00005431-07.2010.8.26.0053, Judge Luiz Sergio Fernandes de Souza, Judge Moacir Peres, Judge Coimbra Schmit, vote of the third judge (Judge Coimbra Schmit) p. 639-40.

the arguments already presented, and noted that the case happened more than 10 years ago (a reason why it should be forgotten?), requesting a reduction in the total amount of the imposed fine.<sup>716</sup>

On June 23<sup>rd</sup> 2016, PROCON replied to this appeal defending its fine, and arguing that only the issue (the allegedly offensive advertisement) was the same, but that the parts in the two cases were different (one had the MP as the plaintiff and the other had AMBEV in this role), which made the lawsuits different enough to allow for different judicial decisions.

PROCON defended the position that the advertisement stimulated violence (sexual violence), and irresponsible sexual behaviour.<sup>717</sup> In a court session held on August 8<sup>th</sup> 2016, the five judges assigned to decide the appeal dismissed it. The leading judge on this case, Magalhães Coelho, ruled that the fact that the issue was previously decided in a collective lawsuit did not affect the measures taken by PROCON in this case and the fact that the collective lawsuit was decided did not prevent this case from being heard.<sup>718</sup> He ruled that the advertisement was discriminatory by objectifying women and offending women's dignity.<sup>719</sup> The judge upheld PROCON's fine, reaffirming that the advertisement was discriminatory and undermined efforts to promote gender equality, especially considering Brazil is still a very unequal society and that there is still much to be done for achieving

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<sup>716</sup> Companhia de Bebidas das Américas – AMBEV, embargos infringentes, apelação cível n. 0005431-07.2010.8.26.0053, pp.645-75.

<sup>717</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON. Impugnação aos embargos infringentes, 0005431-07.2010.8.26.0053, pp. 677-91.

<sup>718</sup> Poder Judiciário, Tribunal de Justiça do Estado de São Paulo. Voto 33.046, Des. Magalhães Coelho, embargos infringentes n. 005431-07.2010.8.26.0053/50000, p.706-8.

<sup>719</sup> Poder Judiciário, Tribunal de Justiça do Estado de São Paulo. Voto 33.046, Des. Magalhães Coelho, embargos infringentes n. 005431-07.2010.8.26.0053/50000, p.712-5.

gender equality in view of the archaic values that form Brazilian society and that stand in opposition to ideals disseminated by early feminists like Simone de Beauvoir.

The dissident vote, by judge Coimbra Schmit, siding with AMBEV, decided that the advertisement only played with fantasy and humour. For him, to maintain PROCON's fine was a mistake that could transform Brazil into a sad nation with no sense of humour. He goes as far as to say that the imposition and maintenance of the fine meant 'killing' advertising in Brazil and validating censorship, by offending a fundamental right and an activity that boosts the development of Brazilian society just to 'please' a minority group.<sup>720</sup>

On August 31<sup>st</sup> 2016, AMBEV presented yet another appeal (*embargos de declaração*),<sup>721</sup> which was denied by the São Paulo state court on October 3<sup>rd</sup> 2016.<sup>722</sup> After this, AMBEV appealed to the Superior Court (STJ) in Brazil, which in 2020 returned the case to the São Paulo state court for a final decision on the case. By the time this dissertation was concluded, such a decision had not been made yet.

## **5.5 Skol subsequent Campaigns**

My case analysis is from 2006, but according to Victor Reis Mazzei, Agatha Sabanelli Becelli, and Gabriela Pulino Melatte, in 2014 AMBEV still used white, blonde, and

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<sup>720</sup> Poder Judiciário, Tribunal de Justiça do Estado de São Paulo. Voto 33.046, Des. Coimbra Schmidt, embargos infringentes n. 005431-07.2010.8.26.0053/50000, p.721-4.

<sup>721</sup> AMBEV. Embargos de Declaração, pp. 727-33.

<sup>722</sup> Poder Judiciário, Tribunal de Justiça do Estado de São Paulo, Embargos de declaração n. 0005432-07.2010.8.26.0053/50001. Voto n. 33.492, Des. Magalhães Coelho, p. 735-41.

perfectly shaped beautiful women serving men in multiple advertising campaigns.<sup>723</sup> In 2015, *Skol*'s national campaign for Carnival involved billboard ads showing women ready to party, accompanied by the message: “Esqueci o não em casa” [“I forgot ‘no’ at home”]. There was a lot of protest on social media which went viral and resulted in the beer company changing its national campaign within 24 hours, and replacing the marketing director.<sup>724</sup> It is also important to note that the change in the billboards incorporated some of the messages/content claimed by those who contested the advertisement on social media.<sup>725</sup> In this context, Laura Hastenpflug Wottrich pointed out that the activism around this campaign in 2015 indicated a shift in the ways society was reacting to advertising, by exploring the public space of the internet and social media, rather than traditional arenas such as state bodies, and CONAR.<sup>726</sup>

The “Esqueci o não em casa” [“I forgot no at home”] campaign also faced an administrative proceeding before CONAR, after the self-regulatory body received at least 17 complaints about it (5 signed by men and the others by women). Comparing how the complaint was made and the arguments presented by the consumers in 2006 and in 2015, I

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<sup>723</sup> V́ctor Reis Mazzei, Agatha Sabanelli Becelli, & Gabriela Pulino Melatte, “Análise do Uso de Estereótipos A Partir Das Campanhas Da Marca Skol” (2018) 14:1 *Comun - Reflexões Experiências Ensino* 9–28 at 18.

<sup>724</sup> Ivan Paganotti, “A negação da negativa em um palímpeto de propaganda: conflitos entre liberdades em expressões sobre a campanha de carnaval da Skol em 2015” (2016) 2:1 *Revista Observatório*; Laura Hastenpflug Wottrich, “*Não podemos deixar passar*”: práticas de contestação da publicidade no início do século XXI (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 217-218, 229-232.

<sup>725</sup> Laura Hastenpflug Wottrich, “*Não podemos deixar passar*”: práticas de contestação da publicidade no início do século XXI (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 247.

<sup>726</sup> Laura Hastenpflug Wottrich, “*Não podemos deixar passar*”: práticas de contestação da publicidade no início do século XXI (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 17.

noticed that in the latter the argumentation became more sophisticated and engaged society in broad discussion on the role of language in building meanings and conforming to ideologies within societies. In the 2015 contestation, the *Consumer Code*, article 37,§ 2º is mentioned in several emails sent to CONAR, therefore clearly claiming consumer protection against a sexist advertisement, in contrast to what happened in 2006. Another key point brought up by the consumers was that the campaign would stimulate and reinforce rape culture, establishing a connection with recent discussions proposed by the feminist movement through social media, the mass media, and academia. On February 13<sup>th</sup> 2015, CONAR started a procedure against AMBEV and F/NAZCA S&S PUBLICIDADE LTD.<sup>727</sup>

On March 11<sup>th</sup> 2015, AMBEV and the advertiser presented their defense. Accordingly, the marketing campaign had nothing to do with rape culture and the promotion of sexual violence; instead, it was a campaign that suggested that: “life makes invitations all the time and to live it intensely, and we must accept these opportunities.”<sup>728</sup> For AMBEV and the advertising company, the billboard would be part of this larger campaign and would only have the intention to imply that: “Incredible things will happen if one accepts life’s invitations.”<sup>729</sup> The defense stated that the campaign’s motto did not have any sexual connotation nor suggested any sexual content (even if one of the advertisements showed a

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<sup>727</sup> Conselho Nacional de Autorregulamentação Publicitária – CONAR. Processo 27/15, Conselheiro relator Fábio Barone. Anunciante: AMBEV S.A., Agência: F.Nazca S&S Publicidade Ltda, p. 81.

<sup>728</sup> “(...) a vida faz convites o tempo todo e, para vivê-la intensamente, é preciso aceitar essas oportunidades.” Conselho Nacional de Autorregulamentação Publicitária – CONAR. Processo 27/15, Conselheiro relator Fábio Barone. Anunciante: AMBEV S.A., Agência: F.Nazca S&S Publicidade Ltda, p. 55.

<sup>729</sup> “(...)Aceitando os convites da vida coisas incríveis acontecerão.” Conselho Nacional de Autorregulamentação Publicitária – CONAR. Processo 27/15, Conselheiro relator Fábio Barone. Anunciante: AMBEV S.A., Agência: F.Nazca S&S Publicidade Ltda, p. 56.

consumer stuck in an elevator with a famous actress, considered ‘hot’), and refuted accusations of promoting rape culture:

The advertisement reinforces people’s power to choose what they want to do and encourages them to not say no to the good things in life. An act of violence would never be a good thing and neither would rape be a choice for the victim.<sup>730</sup>

AMBEV argued that the people who felt offended by the advertisement could not apprehend its real intention, misunderstanding the point of the whole campaign. To support this point of view, the company presented a quote from an opinion article which analyzes feminist reaction to the advertisement and is entitled “Why so many feminists are crazy?”<sup>731</sup> Here we can see that almost ten years later, AMBEV keeps up with the same argument that feminists are somehow crazy, radical, and their opinion should not be considered. Finally, AMBEV reported that the company contacted the consumers who made the original posts on Facebook and changed the wording of the billboards. Considering all this and arguing no offense to the self-regulatory code, AMBEV requested that the case be dismissed.

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<sup>730</sup> “A peça publicitária em questão reforça o poder de escolha das pessoas sobre o que querem fazer e as estimula a **não dizerem não às coisas boas da vida**. Ora, um ato de violência jamais seria uma coisa boa e tampouco o estupro seria uma escolha da vítima.” Conselho Nacional de Autorregulamentação Publicitária – CONAR. Processo 27/15, Conselheiro relator Fábio Barone. Anunciante: AMBEV S.A., Agência: F.Nazca S&S Publicidade Ltda, p. 57.

<sup>731</sup> “É importante esclarecer que a interpretação dos queixosos não representa a da grande maioria de consumidores, os quais souberam captar a intenção da Skol em sua campanha, acima esclarecida. A título de exemplo, segue abaixo a reprodução de um trecho de artigo de autoria de Leandro Nasrloch, publicado na Revista Veja, intitulado ‘Por que tantas feministas são doidas?’, que ao analisar a defesa de causas feministas e o anúncio ora questionado...” Conselho Nacional de Autorregulamentação Publicitária – CONAR. Processo 27/15, Conselheiro relator Fábio Barone. Anunciante: AMBEV S.A., Agência: F.Nazca S&S Publicidade Ltda, p. 60.

In this case, CONAR dismissed the claim by the majority of the votes of their board members action on the case, but in contrast to what happened in 2006, the dissident vote was recorded. The dissident vote considered that the wording of the billboard, if considered as a separate piece from the whole campaign (as it was presented to the public) and during Carnival time, could in fact lead to the interpretation brought up by the consumers' claims, that it stimulated sexual violence and rape culture and therefore, it should be changed.<sup>732</sup> The vote that was followed by the majority of the members of the committee ruled that the message was not clearly directed to women and that a company cannot be punished by some individuals' delusional perceptions.<sup>733</sup> Two women took part in the analysis and judgement of the case, the others were men.

The debates around the 2015 campaign signal that despite agreeing with the public and rapidly changing the campaign within 24 hours, the company still fought and defended the original campaign before CONAR. We can see the public vs. private tension emerging: to preserve the brand before the public, given all the reaction on social media, the company recognized its mistake and changed the campaign, but in the private sphere, when discussing the advertisement more technically, the company fought for it and claimed that the interpretation that motivated the claims should be dismissed because they come from an incorrect interpretation of the advertisement, made by "crazy feminists."

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<sup>732</sup> Conselho Nacional de Autorregulamentação Publicitária – CONAR. Processo 27/15, Conselheiro relator Fábio Barone. Anunciante: AMBEV S.A., Agência: F.Nazca S&S Publicidade Ltda, p. 60.

<sup>733</sup> Conselho Nacional de Autorregulamentação Publicitária – CONAR. Processo 27/15, Conselheiro relator Fábio Barone. Anunciante: AMBEV S.A., Agência: F.Nazca S&S Publicidade Ltda, p. 80.

For the 2016/2017 Summer Campaign, AMBEV repositioned its brand<sup>734</sup> and drastically changed the core message of their marketing strategies, whose main slogan was “To be round, we need to think outside the box,”<sup>735</sup> and “Round is to get off your square;”<sup>736</sup> promoting ideas of acceptance and diversity. The advertisement showed very different people coming to the beach and to the swimming pool, claiming that we are all different but we are all equal at the same time. There was a focus on racial discrimination too, reinforcing that humans are all colours and that they are all beautiful.<sup>737</sup>

It was also through a Facebook post in 2017 that *Skol* acknowledged that the brand made many mistakes in the past regarding how women have been represented in advertising campaigns,<sup>738</sup> and as a way to correct such mistakes, invited female artists to re-work the images from past campaigns to show how they would rather be seen.<sup>739</sup>

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<sup>734</sup> Victor Reis Mazzei, Agatha Sabanelli Becelli, & Gabriela Pulino Melatte, “Análise do Uso de Estereótipos A Partir Das Campanhas Da Marca Skol” (2018) 14:1 *Comun - Reflexões Experiências Ensino* 9–28 at 20-24.

<sup>735</sup> “Redondo é sair do Quadrado”.

<sup>736</sup> “Redondo é sair do seu quadrado”. Video available at: <https://www.youtube.com/watch?v=LOtzgr38hSg>. More info on the campaign: <https://www.publicitarioscriativos.com/skol-exalta-diferencas-em-comercial-de-verao/> and <https://www.mercantilrodrigues.com.br/blog/no-verao-skol-o-que-importa-e-se-divertir>.

<sup>737</sup> “Skol prega verão com mais diversidade”, *Meio E Mensagem* (19 January 2017), online: <<https://www.meioemensagem.com.br/home/ultimas-noticias/2017/01/19/skol-prega-verao-com-mais-diversidade.html>>.

<sup>738</sup> “O pedido de desculpas da Skol ao público foi apresentado na forma do projeto Repôster, uma campanha que convidou seis ilustradoras para reconstruir campanhas e anúncios do passado da marca, no qual os corpos femininos eram usados como chamariz para a exposição da cerveja. “Não adiantava nada assumir que tínhamos uma visão incorreta em relação a representação da mulher se, novamente, restringíssemos a nós a responsabilidade de apresentar essa nova visão. Por isso, decidimos convidar essas mulheres para que elas pudessem fornecer uma interpretação própria de como querem se ver representadas”, explica o criativo. Maria Fernanda de Albuquerque, diretora de marketing da Skol, reforça que a ação não pretende apagar a História, mas sim frisar que os estereótipos ficaram no passado. Toda vez que nos deparamos com peças antigas de SKOL, que mostram posicionamentos distantes do que temos hoje, surge uma vontade de redesenhá-las e reescrevê-las. Queremos cada vez mais dar voz a quem defende o respeito. Amplificando e aprofundando ações que conversem com o posicionamento da marca”, disse.” Bárbara Sacchitiello, “Skol assume passado machista e ressalta a importância de evoluir”, *Meio E Mensagem* (9 March 2017), online: <<https://www.meioemensagem.com.br/home/comunicacao/2017/03/09/skol-assume-passado-machista-e-ressalta-a-importancia-de-evoluir.html>>.

<sup>739</sup> *Ibid.*

The 2021 Summer Campaign focused on how *Skol* can encourage fun during the summer, but such fun is focused on being at the beach and doing fun things and not on the feminine body as a vehicle for having fun.<sup>740</sup> Therefore, over time there has been a significant change in how the brand approaches gender/race and the feminine body.

This chapter presented an overview of how litigation around the *Skol* Summer Muse campaign unfolded, including the most relevant decisions made by members of the administrative bodies, the judiciary, and the market self-regulatory body. I also provided information on future campaigns and how the company reacted to contestation around its campaigns over time. Next, I explore in more detail the many issues raised by the *Skol* Summer Muse Campaign and related litigation, by looking at the multiple discourses that emerged from the different social actors involved with the case.

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<sup>740</sup> <https://www.skol.com.br/campanhas>.

## Chapter 6 – Laws: Struggles over Power and Authority

In this chapter and the next ones (chapters six and seven), I discuss how the multiple discourses on my case analysis produce, reproduce, reflect, and reinforce normative standards and ideas of normalcy and adequacy related to laws (their application and the public and private divide), bodies (heteronormativity and beauty standards), and subjects (women in the social roles of mothers, consumers, and women as social objects). I use quotations from the texts that comprise the multiple documents in the files related to the *Skol* Summer Muse Campaign litigation in the various arenas where it was discussed to support my analysis. I have organized the quotes around these three major axes, laws, bodies, and subjects, to exemplify how the social expectations, perceptions, and normative discourses are presented and might have changed throughout the case. The quotes are originally in Portuguese, for which I have provided an English translation. Translating the quotes was intense work, as I navigated the differences between the legal systems, different styles of reasoning, and ways of applying the law.<sup>741</sup>

In this chapter I focus on the legal questions that emerge from my case analysis including: what law is applicable to regulating sexist advertising? Is it a matter that concerns consumer law? Or Human Rights? Or the Civil Code? Or even broader discussions about democratizing the media? In this chapter I take a closer look at such questions, showing that these debates indicate a fight for boundaries and self-determination, as well as the state's role in regulating the market and marketing activities.

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<sup>741</sup> Some quotes in this section were kindly reviewed by Luciana Yonekawa, to whom I am indebted

Central to this debate is the idea of sexism in advertising itself, having in mind the boundaries between commercial “freedom of expression” and women’s rights as non-stable or completely demarcated. For example, has the beer company used the *Skol* Summer Muse Campaign to test out the limits of the consumer law—and society’s willingness to accept it (or not)? What are the connections or lack thereof between consumer law and feminism? Who do consumer law authorities see as legitimate stakeholders to dialogue on the topic of sexist advertising? Who does the feminist movement seek when in need to address issues related to sexist advertising? How do legal discourses reflect, reinforce, or push for changes in the ways women are seen in the Brazilian society?

One central question was present throughout the whole litigation: what is the appropriate, enforceable law in the *Skol* Summer Muse Case? This question was reflected in debates about:

- i) the limitation period that should be considered: according to the Civil Code or the *Consumer Code*? Therefore, what is the applicable law?
- ii) the legitimacy: who can discuss advertising, what is the appropriate forum to do so, and which authority is entitled to monitor and impose sanctions on advertising?

Although these questions are posed within the legal domain, they also have important political roots or effects. For example, legitimacy to discuss sexist advertising encompasses a political and a legal discussion: while the law on collective actions in Brazil specifies who is allowed to bring such actions, there is a political aspect connected to it: non-profit organizations in Brazil can propose collective actions if they can prove that the subject of

the lawsuit is connected with the organization's main purpose. Therefore, an organization that has as a core mission to protect consumer rights can propose collective actions on behalf of their associates or even in favour of the society, in a similar way to how the public prosecutor's office operates. But legitimacy can also be understood as who has the expertise and the political interest in defending a specific point of view, as for example, when feminists make public declarations on topics related to violence against women. Finally, it can refer to issues of authority, raising questions of who has or should have the power to regulate, oversee, and impose sanctions on advertising.

Another relevant question that is addressed in this chapter is whether the law applicable to the *Skol* Summer Muse Campaign is the Civil Code or the *Consumer Code*. At first this seems like a simple legal question, but it also conveys a debate about which issues should be regulated through private (civil law), public or hybrid (consumer law) law. And underlying this tension is the issue of whether and how the state should take part in regulating advertising. While the company, possibly representing the market, pushed for an understanding where the State should not get involved in issues related to advertising, a matter that should be dealt with in the private sphere of market self-regulation, the consumer rights administrative bodies, such as PROCONs, claimed their legal duty to oversee advertising and, according to the *Consumer Code*, impose sanctions when necessary. On the same theme, I also discuss how the debate about paying the fine in advance reflects the company's resistance to accepting an administrative sanction imposed by a PROCON, in what I see as a way to fight state authority in regulating advertising.

Intertwined with the issues about regulation comes the topic of censorship: is regulating advertising through law a form of censorship? In a society profoundly marked by the

trauma of the dictatorship, there is a constant tension in debating any form of media regulation. Additionally, the case itself, the legal discourses, and the struggles around the word discriminatory reveal “law as an important site of discursive struggle,”<sup>742</sup> and all the power disputes involving social roles assigned to men and women.

Therefore, debates around the applicable law become visible through the discussion of the following topics: which limitation period should be observed between the time the infraction happened and the proposal of the judicial action (Civil Code or *Consumer Code*), what law should be used to define discriminatory advertisement (and here I include eventual tensions regarding fundamental rights to non-discrimination and freedom of expression), and who is the authority to oversee such law and ensure its enforcement.

At last, I present some contributions regarding feminist strategy on how to use the human rights legal framework to support a gender-sensitive interpretation of the consumer law, and discuss AMBEV’s future marketing campaigns, as well as the company responses to the state bodies that contested the *Skol* Summer Muse Campaign in comparison to individual protests on social media.

## **6.1 The Power to Determine the Applicable Laws and Enforce them**

When analyzing the litigation related to the *Skol* Summer Muse Campaign, I noticed that there was a dispute about what law was applicable and what the case referred to. For

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<sup>742</sup> “Law is then an important site of discursive struggle. It is a terrain on which competing visions of the world are fought out; on which contesting normative visions struggle for the power to define legal and political concepts that give meaning to our world.” Ratna Kapur & Brenda Cossman, *Subversive sites* (New Delhi: Sage Publications India Pvt Ltda., 1996) at 41.

Rachel Moreno, CLADEM/Brazil, CEPIA, and Instituto Patrícia Galvão, who represented the voices of the feminist movement, it was a case of discriminatory and stereotypical representation in the mass media, an issue that reveals the lack of social monitoring and control over media, which is a public concession and needs to obey public standards, as well as a lack of democratic access to the media. This group claimed the applicability of constitutional and international human rights laws, which were violated when a discriminatory image of women was disseminated through advertising.

For the São Paulo state MP and PROCON, this was a case of discriminatory advertisement subjected to the consumer rules (*Consumer Code*, CDC): the advertisement objectified women, resulting in discrimination against women that is prohibited by the Constitution and the consumer law. For AMBEV, the *Skol* Summer Muse Campaign should not even be discussed before the courts or by PROCON, but only by CONAR. Alternatively, AMBEV claimed that the applicable law to the case would be the Civil Code.

Next, I show how this discussion was conveyed by multiple debates, involving the issue of limitation, paying the fine in advance before appealing, how to define discriminatory advertising, and who can enforce laws on these matters.

### **6.1.2 Limitation**

Limitation timeframes are defined differently in the Civil Code and in the *Consumer Code*, with the timeframe from the Civil Code being shorter. If the courts decide to apply the shorter limitation period from the Civil Code, understanding that the Civil Code rather than the *Consumer Code* rules the issue, the topic is settled as a private matter. The Civil Code regulates issues between individuals, and is in the realm of private law. The *Consumer*

*Code* is considered a hybrid law, because it regulates relationships amongst individuals and companies, which are private relations, but submitting them to the principles of public law. This is why the *Consumer Code* is known as “Private Law that protects the public interest,”<sup>743</sup> as supra mentioned (chapter 3). Therefore, when the courts and the parties are discussing the limitation timeframe for the proposed the judicial action, they are actually setting a boundary between private and hybrid law.

While AMBEV claimed that the limitation had expired according to the Civil Code (3 years), the MP/SP disputed it, considering that: i) AMBEV, by avoiding making an agreement and always promising to come back to the MP/SP with a proposal, had contributed to postponing the proposition of the action by continuously manifesting a supposed interest in having an extra-judicial agreement but never settling it;<sup>744</sup> and ii) limitation in this case is regulated by the *Consumer Code*, which prescribes 5 years for that, and not by the Civil Code (3 years). This division in the positions makes sense if we think that both the PROCON and the branch of the public prosecutor’s office that took action on this case are specialized in consumer matters. Therefore, they are claiming the responsibility and the authority to act in cases of contested advertising. By this claim, these specialized bodies are setting a relevant boundary, establishing that in cases involving abusive advertising, the applicable law is the hybrid norms of the consumer law, rather than the Civil Code, a private law, and that they have the authority to oversee it.

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<sup>743</sup> “Norma privada de interesse público,” in Portuguese.

<sup>744</sup> Réplica do Ministério Público do Estado de São Paulo, Promotoria de Justiça do Consumidor, processo n. 583.00.2009.165466-9, p. 598; see also: Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 645-9.

The first judge to decide on the collective lawsuit proposed by the São Paulo state MP against AMBEV, Dimitrios Zarvos Varellis, in a 6 pages' decision, ruled that limitation had expired, following the Civil Code deadline. He sided with AMBEV, and decided that limitation had occurred within the 3 year timeframe, making clear that the matter was subjected to the Civil Code, and not the *Consumer Code*:

Furthermore, **the *Consumer Code* is unenforceable in this case. We are not debating a defect in the product or the service, making it impossible to enforce Consumer's Code article 33, §2.<sup>745</sup> There is no inappropriate information regarding the product or the service in this case, that is about a diffuse damage caused by advertising that for the MP treats the woman as merchandise (abusive advertisement). This makes it impossible to apply the 5-year period for limitation that is prescribed in the *Consumer Code*. Considering all that has been presented in these files, I declare the end of this case, after knowing/studying its content, by recognizing that the limitation period occurred, according to article 269, IV of the Procedural Civil Code.**(bolded added by the author)<sup>746</sup>

The São Paulo MP decided to appeal this decision, reinforcing the idea that the limitation timeframe to be observed is the one from the *Consumer Code*,<sup>747</sup> since the matter at stake is advertisement, an issue regulated by the *Consumer Code* (which leads to the other procedural arguments that justify the limitation of 5 years and not 3).

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<sup>745</sup> The article that is being discussed is actually article 37, § 2º and not the 33 of the *Consumer Code*. Article 33 refers to offers made to the consumer through the phone or the mail, and not about advertising.

<sup>746</sup> No mais, o Código de Defesa do Consumidor é inaplicável ao presente caso, em que, à toda evidência, não se está a discutir vício do serviço ou do produto, o que afasta, e por completo, as referências à legislação respectiva em réplicas lançadas, inclusive em relação ao artigo 33,§ 2º, do CDC, pois não há informação inadequada alguma em relação ao produto ou serviço na causa de pedir desta ação, que, como se sabe, refere a ocorrência de dano moral difuso por propaganda que estaria, no entender do requerente, a tratar a mulher como uma mercadora (propaganda abusiva), o que inclusive afasta o pedido de reconhecimento de que o prazo decadencial ou mesmo prescricional é o de cinco anos em proveito do requerente.(...) Ante o exposto, e de tudo o mais que dos autos consta, **julgo extinto o processo, com conhecimento do mérito**, reconhecendo a prescrição, o que faço com fundamento no artigo 269, IV, do Código de Processo Civil.” Sentença. Poder Judiciário do Estado de São Paulo, Comarca da Capital, 11ª Vara Cível, processo nº 583.00.2009.165.466-9, p. 614-5.

<sup>747</sup> Ministério Público do Estado de São Paulo. Promotoria de Justiça do Consumidor. Apelação em Ação Civil Pública, processo 583.00. 2009.165466-9, p. 620-32.

The fact that in his decision regarding the collective lawsuit proposed by the state MP, the judge, Dimitrios Zarvos Varellis, also did not invoke this discussion but instead, accepted AMBEV's argument related to the limitation time being regulated by the Civil Code and not the *Consumer Code* points to the fact that consumer law is not always enforced by the judiciary, even in cases where such enforcement is clearly stated by the law: advertising is a matter regulated by the *Consumer Code*, as pointed out in chapter 3, and as a consequence, it should be discussed within the scope of such law.

I see the refusal to apply the *Consumer Code* to a case that is explicitly regulated by this law as potentially related to two issues: i) lack of knowledge about the *Consumer Code*, despite the fact it was passed as a law 32 years ago; ii) the possible alignment of some part of the judiciary with liberal ideas that tend to maximize civil rights (both of individuals and of corporations) according to which the state should not interfere with market activity, in this sense siding with AMBEV and the market that advertising regulation should only be discussed and monitored by self-regulatory bodies.

Although the CDC has been in effect for 32 years, it is not always studied in depth by legal professionals, since consumer law is not a mandatory class required by the Ministry of Education.<sup>748</sup> The universities that do offer consumer law often offer it as a general post-graduate course, or as an elective class for undergraduate students. As to the second issue, related to the maximization of individual freedoms even if at the expense of causing social

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<sup>748</sup> Ministério da Educação, Conselho Nacional de Educação/ Câmara de Educação Superior, Resolução n. 5, de 17 de Dezembro de 2018: [https://www.in.gov.br/web/guest/materia/-/asset\\_publisher/Kujrw0TZC2Mb/content/id/55877799/imprensanacional](https://www.in.gov.br/web/guest/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/55877799/imprensanacional) .

harm, we note that this perspective is present within the judiciary when the judges side with AMBEV and refuse any form of limitation to advertising, even to an advertisement that so clearly offends women's rights.

On the limitation issue and the enforceable law, judge Ênio Santarelli Zuliani, who led the judging session on the appeal proposed by the São Paulo/MP, decided that the limitation time from the *Consumer Code*, five rather than three years, was applicable. He settled the matter on the application of the *Consumer Code* to the case, but dismissed the São Paulo state MP appeal and confirmed the first instance decision by ruling that the advertisement was not illegal.

For me, such confusion about which law on limitation is enforceable in this case is unnecessary, since the *Consumer Code* has explicit regulations on advertising, and the SNDC is in charge of its enforcement. The *Consumer Code* protects consumers by providing a principle-oriented framework that considers consumers to be holders of fundamental rights that need to be observed in their private transactions with companies. Because consumer rights are considered fundamental rights in Brazil, there might be some room to push consumer activism as a matter of citizenship, aligned with what was proposed by Canclini and others. CDC's regulation on advertising is not broadly acknowledged by the market and the advertising industry in general, who affirm that advertising is regulated by CONAR'S self-regulatory code and by the Civil Code under CONAR's supervision.

### **6.1.3 Tensions between Discriminatory Advertising and Freedom of Expression**

For the judges who decided the *Skol* Summer Muse Campaign, within the context of the collective lawsuit proposed by the São Paulo state MP, it was a case about freedom of

expression, a fundamental right which pertains equally to legal persons as to companies. For the majority of the judges who decided the case within the action proposed by AMBEV against PROCON, it was a matter of discriminatory advertisement against women, where the *Consumer Code* should be applied together with a gender-sensitive interpretation of the fundamental rights of equality and dignity. As for AMBEV, it claimed that advertising activity should not be limited by the state, but left to the monitoring of the market itself.

To determine whether restriction to advertising is legitimate, we need to investigate which rights the advertising could be infringing upon. Here we can see political tension emerging in Brazilian society: is advertising protected by the constitutional right to freedom of expression? If so, can it be limited? In which cases? As mentioned before, Brazilian society has a latent fear of any form of media regulation, which is promptly identified with censorship.

In this context, the idea of sexism in advertising itself offers an overview of the boundaries between commercial “freedom of expression” and women’s rights as non-stable or completely demarcated. For example, has the beer company used the *Skol Summer Muse* campaign to test out the limits of the consumer law—and society’s willingness to accept it (or not)? What are the connections, or lack thereof, between consumer law and feminism? Whom do consumer law authorities see as legitimate stakeholders? Whom does the feminist movement seek when it needs to address issues related to sexist advertising? How do legal discourses reflect, reinforce, or push for changes in the ways women are seen in Brazilian society?

To better understand whether we are talking about censorship and restriction to fundamental rights, we need to investigate what stands in opposition to the market discourse that self-regulation is enough to ensure ethical advertising.

In one of its submissions during the collective lawsuit proposed by the São Paulo state MP, AMBEV explicitly claimed that the case does not refer to women's rights:

**The case being discussed is not even remotely related to women's rights. After all, no woman is forbidden from drinking beer, and Skol is not only sold to men,** just because the advertisement makes a reference to a 'muse' instead of a summer 'Greek god'. Likewise, men are not forbidden to drink *Guaraná Antarctica*,<sup>749</sup> even though its marketing campaigns have Cláudia Leite and Débora Secco<sup>750</sup> as key players and consumers.<sup>751</sup>

For AMBEV, the way the advertisement is interpreted depends on a choice of the world we want to live in: one that radically sees discrimination everywhere and in everything, or in a funny, humorous, and enjoyable world? For the company, only one interpretation of the advertisement is possible: the one that sees it as a piece that plays with humour and uses such a sense of humour to distinguish the brand (*Skol*) from others. For AMBEV, it would be impossible to see anything other than playfulness and fun in the advertisement, this perception being grounded in the fact that a brand needs to be remembered by consumers, and humour is a useful tool for that.<sup>752</sup>

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<sup>749</sup> Popular pop drink in Brazil, possibly an equivalent to ginger ale in Canada.

<sup>750</sup> Famous singer and actress in Brazil.

<sup>751</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 578.

<sup>752</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 578.

On the other hand, taking into account the discriminatory characteristics of the advertisement, the MP argued that sanctioning it would not offend the constitutional right to freedom of speech:

**the companies' rights to express themselves through advertising – as it happens with all rights – is subject to limits**, does not accept abuses, and should respect the regulations on the exercise of the marketing activity and the **limitations on the *Consumer Code***, which limits marketing activities based on constitutional principles.

**Limitations on marketing activity are grounded on the same Constitution which assures freedom of expression.** There is no conflict, since every right can be constrained, and no freedom is absolute to be exercised at any time and under all circumstances.<sup>753</sup>

For the São Paulo state MP, commercial speech, such as advertising, cannot benefit from the same protection as cultural, ideological, artistic, literary, political, or religious speech. While acknowledging that marketing is central to boosting the economy and promoting freedom of enterprise, and has an informational dimension (by informing consumers about products and services made available in the market), the MP also notes that it is precisely this commercial aspect that grants advertising a lower constitutional protection when compared to other kind of speech, in particular those that are promoted within the market.<sup>754</sup>

The discriminatory perspective adopted by the advertisement broadcast by the defendant **offends the Brazilian legal order, in particular the equality principles stated by the Constitution, as well as all international prescriptions imposed with the intent to eradicate discrimination against the woman.** [The advertisement] opposes the idea that women have rights and dignity.<sup>755</sup>

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<sup>753</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 07-08.

<sup>754</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 09.

<sup>755</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 09.

For the São Paulo state MP, the core of the *Skol Summer Muse* case refers to article 37, §2º of the *Consumer Code* which establishes discriminatory advertisement as illegal. AMBEV, being responsible for the discriminatory advertisement, should be responsible for the moral damage caused to an unidentifiable number of people, an offense of diffuse rights (considering that the advertisement was broadcast through mass media):<sup>756</sup>

Summarizing it all, the **defendant's illegal action, by treating women discriminatorily, caused collective moral damages**. There is no need to digress too much about it to realize that this discriminatory treatment directly offends the self-esteem of those who are discriminated [against in the advertisement].<sup>757</sup>

To justify the fine imposed for the collective damages, besides the *Consumer Code*, the São Paulo state MP grounds its request on the Civil Code (articles 186 and 927), the Belém do Pará Convention (article 7, 7), and the collective action law (Law 7.347/85, art. 1, II).

Finally, the state MP requested that: i) the collective damages caused by the campaign be assessed in an amount that surpasses the total costs for production and broadcasting,<sup>758</sup> a sum that should be reverted to the collective interests' fund;<sup>759</sup> and that ii) the inversion of the burden of proof according to the *Consumer Code*, meaning that AMBEV should be responsible to prove that it did not act illegally or cause collective damage. Therefore, the São Paulo State MP contended that commercial speech, such as advertising, cannot benefit

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<sup>756</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 14.

<sup>757</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 15-6.

<sup>758</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 18-9.

<sup>759</sup> As explained in chapter 3, the financial resources resulting from fines imposed on companies for infringing on consumer law will be directed to municipal, state, or federal funds. Such funds support the activities conducted by the SNDC over time *Supra* note 352 at 383.

from the same protection as other cultural, ideological, artistic, literary, political, or religious forms of speech.<sup>760</sup>

Along the same lines, for the São Paulo state PROCON, the advertisement was illegal because it violated the law and social values, and therefore, limitations should apply:

**The advertisement being discussed in this case is not consistent with the Brazilian law, which results in the violation of moral and ethical values, and likewise to all women, resulting also in an offense to the principles and rights defined by the Brazilian Federal Constitution, in particular art. 5°. It also constitutes an illegal practice, according to the article 37, paragraph 2, of the *Consumer Code*.**

Nothing that was argued by the company is supported by the law and does not allow the company to act in the way it did. There is no doubt about the fact that the advertisement disrespected ethical and moral values, exposing the woman as an object to be bought and consumed by the target audience of the company, just like the product (beer), which is produced and commercialized by AMBEV.

(...) On the contrary, what can be seen is that the advertisement did not praise women, but in fact satirized through daily situations a perverse consumer dream: one about acquiring women, as if they were consumer goods. This intention is explicit in the documents presented by the company. To be truthful, the company, in its search for promoting its beer, did not care about offending fundamental rights and key values that guide social relationships, attacking human dignity when ‘satirizing’ the woman as a product being made in an industrial line of production. The proof supporting this understanding within the files is abundant and undeniable.<sup>761</sup>

(...)The commercialization of women’s image and body represents an advertising resource that opposes efforts made by society and the State to promote ethical standards of civility and respect between men and women. Thus, **the right of companies to express themselves through advertising**

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<sup>760</sup> “the companies’ rights to express themselves through advertising – as it happens with all rights – is subject to limits, does not accept abuses, and should respect regulations on the exercise of the marketing activity and the limitations on the Consumer Code, which limits marketing activities based on constitutional principles. Limitations on marketing activity are grounded in the same Constitution which assures freedom of expression. There is no conflict here, since every right can be constrained, and no freedom is absolute to be exercised at any time and under all circumstances.” Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 07-08.

<sup>761</sup> Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor, processo n. 0803/2006, p. 225-6.

**has limitations, not admitting any abuses, they must respect the legislation that regulates the advertising activity, especially the precepts contained in the Federal Constitution and the *Consumer Code*.**<sup>762</sup>

In deciding the collective lawsuit proposed by the São Paulo state MP, judge Ênio Santarelli Zuliani ruled that the case is subject to the consumer law because it discusses abusive/offensive advertisement, a topic regulated by the *Consumer Code*,<sup>763</sup> but that individuals should have the freedom to interpret advertising as they wish:

The relevance of advertisement to boost markets and healthy competition is clear, as it is marketing should not be used without limits or monitoring, considering the power of discourse and image is able to cause social repercussion and influence behaviours. This is exactly why the subject is regulated by the *Consumer Code*, which imposes limits to advertising in Brazil, preventing abuses (transcription of article 37, CDC).<sup>764</sup>

**To the viewer is left the job of understanding what is fiction and what is real, filtering what is acceptable and rejecting the vulgarity and the vanity**, but always keeping in mind that advertising must be distinctive and awaken the desire to consume to achieve its purpose (bolded added by the author).<sup>765</sup>

Judge Ênio Santarelli Zulian also claimed that it can be hard and controversial to analyze advertising and frame its limits based on fundamental rights, avoiding the adoption of radical and strict views.<sup>766</sup> For him, the *Skol Summer Muse* advertisement is not an example of good marketing, but it does not offend the law either:

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<sup>762</sup> Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor, processo n. 0803/2006, p. 227-8.

<sup>763</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 693-4.

<sup>764</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 695.

<sup>765</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 695-6.

<sup>766</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 696.

The ‘Summer Muse Campaign 2006’ is not an advertisement to be praised, precisely because of the image of the young woman in a bikini being cloned, multiplied and delivered door to door to many consumers can lead to different interpretations, including the one that sees the way the woman was showed as representing an object aimed to satisfy the masculine desires, just like the beer. The ‘defect’ that is mentioned at the end of the film aggravates the context, because it explores the idea of a defect of a merchandise produced by irregularities found in the mass production line. **The good law does not align with similar practices, but the case does not constitute an illegal practice either.**<sup>767</sup>

We can see here that even if Brazilian consumer law forbids discriminatory advertising, gender blindness obstructs its application in concrete cases, since sexist campaigns, such as the one in my case analysis, are not always considered discriminatory by the courts. This might be related to the fact that women are still the minority in Brazilian courts,<sup>768</sup> and/or may indicate more general social bias and perceptions about gender roles in Brazilian society. This restricted view of discriminatory advertising, excluding sexist advertisement from this illegal category, can also be related to the lack of gender sensitivity in the training of legal professionals, revealing a state that is very little open to gender debates and a more comprehensive understanding of gender justice.

In my study, mostly male judges made decisions regarding what could be considered discriminatory against women. This reflects the fact that in the majority of Brazilian state courts, the judges are men. According to official data, around the time of the first court decision on the *Skol Summer Muse* case (2012), at the court of appeal level, in Brazil, in

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<sup>767</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 696.

<sup>768</sup> Brazil, Conselho Nacional de Justiça, *Censo do Poder Judiciário*, (Brasília: Conselho Nacional de Justiça, 2014) online: <<http://www.cnj.jus.br/images/dpj/CensoJudiciario.final.pdf>>.

2013, 78.5% of the judges were men and 21.5%, women. Historically considered, men are still the majority in the Brazilian judicial system: from 1955 to 1981, 78.6% were men and 21.4% women; in the period from 2012 to 2013, 64.1% were men and 35.9% women.<sup>769</sup> In 2019, this reality had not changed much, with the Brazilian judiciary having just 38.8% of its judges being women.<sup>770</sup> In the judiciary on the state level, in 2019, women represented only 37.4% of the judges.<sup>771</sup>

Even if having more women in the judiciary acting as judges does not immediately solve the complex issue of a more gender sensitive justice, as pointed out by Marie-Claire Belleau and Rebecca Johnson,<sup>772</sup> or ensure a feminist perspective on judicial rulings, as Carol Smart reminds us,<sup>773</sup> this continuing gender imbalance in the courts suggests that the litigation of the *Skol* Summer Muse campaign is conducted in a male dominated field. Therefore, it is not without struggle that women's perspectives are taken to the courts, when the feminist movement, through litigation, tried to push for a legal boundary that could allow identifying sexist advertisement as an offense to women's and consumer rights as seen in my case analysis.

I conclude that some state actors have accepted this view to a certain extent: the São Paulo State MP who refused partnership with the feminist movement but proposed a collective

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<sup>769</sup> Brasil, Conselho Nacional de Justiça, *Censo do Poder Judiciário*, (2014) online: <<http://www.cnj.jus.br/images/dpj/CensoJudiciario.final.pdf>>.

<sup>770</sup> *Diagnóstico da participação feminina no Poder Judiciário*, by Conselho Nacional de Justiça (Brasília, DF, 2019) at 7.

<sup>771</sup> *Diagnóstico da participação feminina no Poder Judiciário*, by Conselho Nacional de Justiça (Brasília, DF, 2019) at 19.

<sup>772</sup> Marie-Claire Belleau & Rebecca Johnson, *supra* note 706.

<sup>773</sup> Carol Smart, "The Woman of Legal Discourse" (1992) 1:SAGE Soc Leg Stud 29–44.

lawsuit against AMBEV, grounding it in the *Consumer Code* and the Belém do Pará Convention, and the São Paulo State PROCON, which had a strong discussion of sexist advertisement and objectification through advertisement, and also used these two legal documents to justify imposing a fine upon AMBEV. This shows that these institutions, albeit not engaged with the feminist movement, are somehow sensitive to the agenda. Hence, partnerships between them could be articulated, amplifying both agendas (consumers' rights and feminist ones).

#### 6.1.4 Objective Liability

Judge Ênio Santarelli Zuliani, when deciding on the appeal proposed by the São Paulo state MP, claimed that it was necessary to investigate the social context in which the advertisement was promoted and the company's intention to offend or discriminate, since:

**(...) discrimination is a problem which involves an intentional and subjective element**, that should be contemplated in view of the cultural level and people's traditions. It is also advised that the reasonability of specific content should be analyzed considering its targeted audience.(bolded added by the author)<sup>774</sup>

In this context, he decided that defending women's rights was a valid cause and should be pursued, but that not all jokes or playful references to women or the differences between men and women should be perceived as outrageous and offensive to the law. For him, the *Skol Summer Muse* campaign only mirrored the recurrent appeal to the 'battle of sexes' existing in our society by creating funny stories in advertising, films, or soap operas:

Defending women's deserved space [within society] is a continuous fight that will only be over when society, by unanimity, recognizes isonomy.

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<sup>774</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 697.

**However, not all comments, manifestations or jokes about the differences between men and women should be understood as a synonym of offenses to the law.**

Humour involving the tastes, the qualities, the defects and the conflicts of men and women is a social reality and, often, has an inoffensive character, including by reflecting the well-known ‘battle of sexes’, something that can be used by the media, soap operas, films and advertising agencies with moderation. (bolded added by the author)<sup>775</sup>

**The advertisement being discussed in this case, even if doubtful and not pleasing everybody, does not denigrate women’s image, despite what has been alleged. Even using a stereotype for women that does not correspond to reality and [working with] a kind of masculine desire that is not to be complimented or generalized, there is no intention of being disdainful to women. (...) The intention is to sell one kind of beer and nothing more.** (bolded added by the author)<sup>776</sup>

Here the judge investigated the manufacturer’s intention when promoting the advertisement, agreeing with the company’s argument that its only intention was to sell beer and not to discriminate against women. But he also went further in justifying the advertisement as a proper way of conveying a message about beer consumption in Brazil, given the cultural aspect surrounding it, such as the fact that beer is consumed on the beach in Brazil, where it is expected that people wear minimal clothes. Being part of the Brazilian cultural reality, such images would not be a form of discrimination *per se*:

Another social aspect that should be taken into consideration refers to the fact that in Brazil consuming beer has always been associated with summertime and, obviously, we could not think about it [summer] without beaches, swimming pools and people showing, with minimal clothing, their bodies. To this scenario, we should add as an essential ingredient a script involving fun, flirting, parties, vanity, humour, happiness. And it is precisely in this context that this joke about the masculine desire of possessing one

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<sup>775</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 697-8.

<sup>776</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 698.

muse being produced industrially emerges. **Even if the marketing departments are highly skilled, there is no alternative to these instructions/guidelines when making a fruitful advertisement.** This should be considered in the analysis of this case.

And this reflects a cultural aspect from the Brazilian reality and not, truly, a discriminatory or a biased action. The situation could well be represented as reversed (with women charmed by a beautiful man) and, as already mentioned, the evolution of egalitarian social relations shows that, within the media, we are also moving forward towards an equalization.<sup>777</sup>

Likewise, it is important to note that if the advertisement focused on the feminine beauty created to please men, in other campaigns, this attraction piece is reversed, focusing on women's admiration of masculine beauty and men also presented as models, with few clothes and promoting a wide range of products, from alcoholic drinks to cars, underwear and chocolates.

**This market choice does not allow moralist or radical interpretations, because achieving equality between the sexes should also come with wisdom, with maturity and proper tolerance to face and discuss the more emblematic topics and manifestations involving the genders, always observing values such as sobriety and decency.** (bolded added by the author)<sup>778</sup>

For judge Ênio Santarelli Zuliani, the advertisement merely reflects a cultural aspect of Brazilian society, in which during summertime, fun is expected, with fun being represented by beaches, swimming pools, and people flirting in bathing suits. In this context, the idea of a woman being cloned would represent just a funny way of playing with this inescapable script for selling beer. Also, for him, considering the advancement in equality between men and women, nothing would prevent images of beautiful men being used to increase sales.

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<sup>777</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 699.

<sup>778</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 698.

Consequently, for him, there would be no reason to impose any sanctions on AMBEV and limit commercial freedom of advertisement.

The strongest arguments to limiting marketing activity came from the PROCON's decisions and all its submissions, which were positively reflected in the 2016 judicial decision on the action proposed by AMBEV against PROCON. According to PROCON, in one of its submissions:

**PROCON's fine is a necessary reaction to the evident abuse in the exercise of freedom of creativity, which has damaged socially relevant values, especially the protection of women, who have been fighting for their rights for decades.** And this does not mean that similar measures will be taken against other companies that may act likewise.

And to say that the figure of the 'fragile sex' was relegated to the pages of textbooks, as the image of a distant past (item 10, item 25) means to ignore the current legal and social framework.

Of course, if we want to build an egalitarian society, we must clearly convey these values, and **the advertisement being contested perpetuates precisely a stereotype that needs to be tackled.**

(...)Humor is not necessarily innocuous and advertising informs, creates, and stimulates patterns of behaviour. **The sexist discourse used in the advertisement in question does nothing to build a more egalitarian society between men and women.**

**And no behaviour can be excused if it serves to disseminate, and legitimate ideas that discriminate, that places the woman in the condition of a consumable object.**<sup>779</sup>

Even if advertising should attend to its social function, being a powerful instrument to increase the selling of products and services, **it is still limited by the interests of the whole community.**

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<sup>779</sup> Apelação interposta pela Procuradoria Geral do Estado de São Paulo, a favor de PROCON – Fundação de Proteção e Defesa do Consumidor, pp. 572-3.

(...) We see that this topic [offensive advertising] has been broadly discussed, which shows **that this kind of advertisement offends not only women, but the entire society.** (bolded added by the author)<sup>780</sup>

Amongst the feminist groups that made submissions to the MPF, CLADEM/Brazil is the one that most discussed the issue of freedom of expression, probably because CLADEM has in its mission the use of the law to foster social change that promote gender equality. CLADEM defended the restriction of the content in advertising not as a matter of consumer law, but as a broader question of discrimination being promoted by television channels that are public concessions and must follow Constitutional principles. CLADEM recalled corporations' social responsibilities in fighting and ending social inequalities,<sup>781</sup> and presented a list of rights ensured by the Brazilian legal system that the Summer Muse campaign offended: article 1, III of the Brazilian Constitution – human dignity - ; article 5, I – equality between men and women; CEDAW's 1<sup>st</sup> article (defines discrimination against women) and Belém do Pará Convention's article 4 and 6, reaffirming women's rights to a life free from any form of violence. CLADEM also brought up the Beijing Platform of Action and the IV UN Conference on women as important sources of international commitments assumed by the Brazilian state regarding gender equality.<sup>782</sup> National documents such as the “National Plan for Public Policies for Women,” a result of the National Conference on Women's rights (2004), were also recalled as they establish actions

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<sup>780</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, p. 97-8.

<sup>781</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 369.

<sup>782</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 376.

the Brazilian state should implement to fight gender and racial stereotypes in general, and in the cultural landscape and mass communication.<sup>783</sup>

CLADEM stressed that both Conventions (CEDAW and Belém do Pará) impose on states the obligation to act proactively to change socio-cultural values and stereotyped gender roles present in customs and formal and informal educational practices. Aligned with this direction, states should also work to ensure that content broadcast by mass media contributes to eradicating violence against women and praises women's dignity. Following this argument, CLADEM claimed that television companies, being a public concession, should closely monitor the content that is broadcast, not to censor but to ensure that national and international human rights norms were not violated. Accordingly:

Therefore, men and women are equal before the law, with no discrimination. **When an advertisement is broadcasted through mass media showing sex-based behavioural differences, and is addressed to a male audience suggesting that men can “consume” women, such an advertisement is acting in a sexist way, violating the equality principle and, at once, the freedom principle, which includes sexual freedom.** For this reason, the discrimination that is based in a differentiated sexual behaviour is against the equality and freedom principles.<sup>784</sup>

CLADEM argued that misrepresentation in the media affects the development of identities, and that such misrepresentation was a form of oppression. Finally, CLADEM discussed freedom of expression and its limits as a fundamental characteristic of democracies. For CLADEM, the rule of law established constitutional limits to the freedom of expression,

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<sup>783</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 377.

<sup>784</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 372.

like the restrictions imposed on Nazi or racist propaganda, which are forbidden in Brazil. They add that respect for human dignity, and women's human dignity, are also fundamental for democratic societies. Likewise, protesting the violation of the principle of women's dignity (equality and freedom) and right to non-discrimination could never be taken as a form of censorship.<sup>785</sup>

PROCON and the São Paulo State MP also refuted the idea that restricting advertising that is discriminatory against women constituted censorship, anchoring their actions (proposal of collective lawsuit and imposition of the fine) on the legitimacy of the *Consumer Code* to discuss and impose limits on commercial activity, which includes advertising. This is supported by the idea that consumer rights are fundamental rights, as defined by the Brazilian Constitution, and that economic activity should respect such rights (as explained in chapter 3).

We see that the debate was whether or not to impose a sanction on AMBEV, possibly violating the company's fundamental right to freedom of expression through advertising. Permeating this debate are the following issues: is the restriction on a fundamental right (freedom of expression) justified? Is the sanction imposed by PROCON reasonable? What legitimates the imposition of such a fine? For AMBEV and the judges who acted on the case and followed judge Ênio Santarelli Zuliani's ruling in 2012, the *Skol Summer Muse* campaign was not discriminatory and could never justify imposing a sanction on AMBEV,

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<sup>785</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 372.

risking violating the Constitutional right of freedom of expression. Another reason for not imposing a fine would be that the company never had any intention of discriminating against women, but was only trying to sell beer using a funny commercial that would help consumers remember the brand *Skol*. However, it is important to remember that according to Brazilian consumer law, the intention of the company is irrelevant when we confirm that the company's actions caused social harm, with liability being defined by objective liability.

The idea that objective liability, as defined by the *Consumer Code*, should guide the matter was claimed by São Paulo state PROCON against the argument repeated over and over by AMBEV that the company's intention was to promote their products and not to discriminate. Technically, from the legal point of view, the *Consumer Code* states that if damage is caused to society by a company, compensation is due regardless of the company's intention, and the fine imposed should be enough to restore or compensate the damages caused to the collectivity, not to individuals. This is because the *Consumer Code* is based on the idea of objective liability, which means that responsibilities can occur independently from any investigation into the intention of the actor who caused the damage: it is enough to prove that there was damage caused by that actor (individual or company) who represents the provider and administrative sanctions can be imposed (apart from the other civil and criminal sanctions).

Article 56 of the *Consumer Code* lists the sanctions that can be imposed by the administrative bodies of the SNDC, the DPDC, and Senacon at the federal level, and the PROCONs at the state or municipal level. The most common sanction applied is the

imposition of a fine, but the Code allows many other remedies, including counter-advertising:

Art. 56. Any infraction against consumer Defense norms becomes subject, depending on the case, to the following administrative sanctions, not excluding any civil, penal, or any other sanction defined in specific norms:

I – **fine**;

II - product apprehension;

III - product deactivation;

IV - annulment of the product Registry at the appropriate agency;

V - prohibition against manufacturing the product; VI - suspension of product or service delivery;

VII - temporary suspension of activities;

VIII - the revoking of concessions for usage license

IX - the revoking of commercial establishment license or activity license;

X - the total or partial closing of the establishment, work in progress, or activity;

XI - administrative intervention;

XII – counter-advertising imposition<sup>786</sup>

Therefore, by the law and the understanding of collective rights in Brazil, civil liability on matters of consumer rights is objective and a sanction can be imposed even if no single individuals are identified as affected by the provider's conduct. It is enough to prove that there was damage caused to the community. This is why this insistence on the fact that no individual consumers were listed on the files does not make sense within the legal framework established by the *Consumer Code*.

Confirming this understanding and PROCON's authority, in 2016 Judge Luiz Sergio Fernandes de Souza not only established that offensive advertising can happen regardless of the intention (objective liability) but also that the constitutional right to freedom of

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<sup>786</sup> Law 8.078/90:

[http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC\\_Novembro\\_2014\\_Ingles.pdf](http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf).

expression is limited by constitutional values, non-discrimination being one of them,<sup>787</sup> aligning with the claims made by CLADEM, CEPIA, Instituto Patrícia Galvão, and Rachel Moreno. The judge upheld PROCON's fine in this case, ruling that the fine was a reflection of social values and the collective consciousness that does not allow showing women as disposable merchandise. Briefly, he addressed the issue of public concession of television channels and media's responsibility in respecting women's rights:

PROCON's performance is the result of the collective consciousness that inhabits our society, in the sense that **it is not possible to stimulate improbable associations between the woman's body and objects of consumption.**

It is not a question of exercising the right of tolerance, nor of breaking with a certain social hypocrisy, in the line of 'political correctness', but of realizing that feminine aesthetics, however attractive they may be, cannot be confused with a beer can, that people consume and then throw away. It is certain that, in times of instrumental rationality (Horkheimer) and liquid modernity (Bauman), everything is available, disposable. But contemporary philosophy, while interpreting the world around us, it also denounces, makes us think. **And it's terrible to realize how disaggregating/harmful an advertising message can be, by penetrating people's homes without asking for permission.** Moreover, television is a public service and companies operating in this field do so through concession. (bolded added by the author)<sup>788</sup>

Regarding the tensions between discrimination in advertising and freedom of expression in marketing activities, the São Paulo State Court, when judging the action proposed by AMBEV against PROCON, ruled that the applicable law is the *Consumer Code*. Judge Luiz Sergio Fernandes de Souza decided that both PROCON and the São Paulo state MP

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<sup>787</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza).

<sup>788</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 622-4.

could have acted on the *Skol Summer Muse* case without creating any problems related to *lis pendens* (an argument presented by AMBEV).<sup>789</sup> He ruled that advertising is an artistic activity aimed at stimulating the consumption of goods<sup>790</sup> and that the broad definition of abusive advertising in the *Consumer Code* has to respect the Constitution and social values, offering a framework for understanding what “abusive/offensive” advertising means.<sup>791</sup> He ruled that the intention of a marketing campaign is irrelevant when considering the potential social damage such a campaign could cause:

And the abuse/offense can happen regardless of the subjective element, that is, of the intention, the good or the bad faith of the promoter of the advertising campaign or of the agent who sponsors it. **The abusiveness is characterized by the potential harm that it can cause to non-economic values, regardless of the extent or intensity.**

(...) This is not a question of putting aside or disregarding freedom of expression, guaranteed constitutionally, but of conforming its exercise to the ethical and moral values that have to be taken into account in any segment of human activity. An advertising piece cannot even suggest a depreciative or offensive message to a certain social group. (bolded added by the author)<sup>792</sup>

Judge Moacir Peres, who concurred with judge Luiz Sergio Fernandes de Souza, decided that the *Skol Summer Muse* campaign was a case involving a clash of fundamental rights between the right to non-discrimination and the right to freedom of expression. He decided that the right to non-discrimination should limit the company’s freedom of expression,

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<sup>789</sup> 7<sup>a</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 167.

<sup>790</sup> 7<sup>a</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 168-9.

<sup>791</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 620.

<sup>792</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 620-1.

since advertising is bound by commercial characteristics and economic activities are restricted by consumer rights according to the Constitution:

There is in this case a collision between fundamental rights: on the one hand, the freedom of expression and creation of the advertiser; on the other, the protection of the consumer and society in general against discrimination. (...)

The freedom of expression of intellectual, artistic, scientific, and communication activity must be guaranteed, as specified in article 5º, IX of the Constitution. However, this freedom is broader when it does not refer to a consumption relation, in which case the manifest vulnerability of the consumer must be considered.

**And this differentiation takes place for two reasons. Firstly, because any person may be involuntarily exposed to propaganda, when, for example, one watches television or travels through the city..** For example, when watching a humorous play, the spectator is prepared for what is to come, which does not occur in relation to propaganda, which is usually produced in order to trigger the more primitive instincts of the consumer, stimulating in his spirit the desire to buy.

**Thus, with no damage to the right of freedom of expression of the advertiser; in this case, the need to defend the potential consumer against the abusive nature of gender discrimination and the offense against a significant part of the population must prevail.** (bolded added by the author)<sup>793</sup>

In view of all these debates, the *Skol Summer Muse* campaign showed that the meaning of the word “discriminatory” and its possible gendered dimensions were disputed by multiple social actors. Such social actors were engaged in challenging the advertising images through legal claims, and did so using different strategies and legal frameworks. The Civil Code, the *Consumer Code*, the Brazilian Constitution, the Maria da Penha Law, the CEDAW Convention, and the Belém do Pará Convention were invoked to defend the

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<sup>793</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do segundo desembargador (des. Moacir Peres) p. 634 and 636-7.

different positions that emerged in the case. The social actors engaged with my case analysis disputed, in a broader sense, state power to regulate the market and marketing activities themselves, by exploring and deciding on whether discriminatory advertising can set a legitimate limit to marketing activity, and whether such marketing activity is protected by the fundamental protection of freedom of speech. Some of the decisions related to the *Skol* Summer Muse campaign raised important questions regarding the role of law in a neoliberal context, demonstrating that national and transnational corporations are advocating for the maintenance of market freedoms, and, particularly, the right to explore the freedom of commercial expression, even when fundamental rights such as to non-discrimination are violated. In the end, the view defended by Rachel Moreno, CEPIA, CLADEM, Instituto Patrícia Galvão, São Paulo state MP, and São Paulo state PROCON prevailed in the 2016 decision on the case, which affirmed that advertising can and should be limited when offending human dignity and women's rights.

### **6.1.5 The Power to Sanction**

The debates over the limitation period, how to define discriminatory advertisement, and about the fine imposed by PROCON on AMBEV, reflect broader discussions about the power to determine which law is applicable, and who is entitled to enforce such laws about advertising: can PROCONs do it? Can the MP at the state level do it? What about the MP at the federal level? Should only CONAR do it? Establishing who can legitimately sanction advertising could lead to answers to these questions.

Regarding the fine that was imposed by PROCON, I find it particularly interesting to contrast the amount that is due with the costs the company paid to broadcast the television advertisement. The amount of the fine imposed by PROCON represents 2.5% of the

amount the company paid to broadcast the advertisement.<sup>794</sup> Considering this small financial amount, I understand that there are more complex symbolic issues at stake pushing the company to keep the case going through multiple appeals, including to the STJ. If one considers the costs of hiring lawyers and sustaining a judicial process for more than 16 years, it becomes evident that what is at stake is not the amount that is due, as claimed by AMBEV. I see that AMBEV represents more than a single company or the beer market, but ends representing the whole market and the marketing sector. If a sanction imposed by PROCON against an advertisement is confirmed by the judiciary, this confirms the idea that advertising regulation is done through the state via the *Consumer Code* and the state bodies who enforce it through SNDC, and not by the market through self-regulation, as often claimed by CONAR and the companies in general.

One important legal question that emerged in this context relates to the obligation to make a deposit to secure the payment of the fine in advance, as a condition to submit an appeal. If the court decides that the fine is due as a condition for appealing, the money is saved in a trust account until a final decision on the matter is made. If this at first looks like a bureaucratic procedural question, when observing it more closely, it seems related to a legal strategy to gain time, and avoid public scrutiny and discussion about the issue. With this strategy, when the fine is finally confirmed by a judicial decision, possibly 16 years after the initial sanction from PROCON, the chances of an engaging public debate about it are

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<sup>794</sup> The *Skol Summer Muse* advertisement was broadcast 5.730 times at a cost of R\$ 11.618.083,73<sup>794</sup> (CAD \$ 4.043.604,2496 - According conversions checked on January 13th 2019, <https://www.bcb.gov.br/conversao>). The PROCON final fine was in the total amount of R\$ 290.218,66 (Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor, processo n. 0803/2006, p. 230-4.).

less likely to occur, since the time between the legal infraction and the sanction is so large that the topic might become irrelevant. It also suggests a strategy of prolonging as much as possible the establishment of relevant jurisprudence and judicial precedents that would confirm state authority to regulate advertising, avoiding any limit to the economic activity. Even if in Brazil, as a civil law legal system, “stare decisis” do not produce the same binding legal effect as in common law traditions, companies try to avoid having judicial precedents regarding sanctions to the *Consumer Code* as much as possible, seeking to limit any kind of “negative jurisprudence” that could affect their economic freedom.

In this context, defending the need to pay the fine in advance supports PROCON’s legitimacy to act on behalf of consumers’ interests, monitoring and enforcing the Brazilian *Consumer Code*, including in matters related to advertising. As already discussed, one of the main arguments presented by AMBEV and supported by some judges who acted on the case was that PROCON’s fine was not due because the company did not have any intention to “discriminate.” This, however, is not a problem when it comes to consumer rights issues in Brazil, since the *Consumer Code* imposes a regime of objective liability, in which there is no need to investigate and prove any intention of doing harm: with the existence of a harm that is related to a product or service, there is the need to provide compensation. As the feminists and PROCON argued, a social harm was caused by from the advertisement, generating AMBEV’s obligation to repair by paying a fine. PROCON also observed that that the beer sector had made a public agreement to stop using sexualized images of women to sell beer, something that is not being observed. As a general conclusion, PROCON stated that the advertisement undermined efforts to build a more equal society, and for this reason it clearly offended society and the public interest, and must being sanctioned:

Creative advertising that uses humor in its pieces are welcome, what we are fighting, as in this case, is the woman being portrayed in a stereotyped way, further increasing the existing challenges in combatting discrimination.<sup>795</sup>

Supporting PROCON's fine, in this case, was also a matter of defining and condemning discriminatory advertisement, showing that the state should take action to ensure non-discriminatory representation of women in advertising. Throughout the litigation, PROCON defended the imposition of the fine as legitimate, but also defended its right to oversee and sanction advertising, invoking the *Consumer Code*:

The company can use advertising to improve the sale of its products. But it cannot discriminate against women as a way to achieve such a goal. Increasing profits is not (nor should not be) a final goal, but rather it is connected to a broader one, which is society's right to obtain information about products and services made available in an ethical and moral way. Considering society's position on this issue, including women and men, from different social classes, professionals from different areas, from Brazil and other countries, **the consumer bodies have a fundamental role in fighting sexist advertising.**

**And this is why, once the violation of article 37, paragraph 2 of the Consumer Code was confirmed, the fine imposed by PROCON is due. (...) the damage caused to all consumers lies precisely within the fact that the 'Summer Muse' advertisement is offensive, violating the rights of personality, like the woman's image and honour, according to article 5º, X, of the Federal Constitution, and article 12 of the Civil Code.** (bolded added by the author)<sup>796</sup>

Additionally, my case analysis showed that although the MP and the PROCON are both part of the SNDC, they do not always work together, but rather in parallel, reinforcing the perception discussed by Val Napoleon of the multiple legal orders/authorities coexisting

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<sup>795</sup> Apelação interposta pela Procuradoria Geral do Estado de São Paulo, a favor de PROCON – Fundação de Proteção e Defesa do Consumidor, pp. 558.

<sup>796</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, p. 106-7.

laterally and vertically in complex societies.<sup>797</sup> If acting in a more coordinated way, both state institutions could have saved time and resources, and probably achieve a higher public impact, strengthening the SNDC and consumers' rights defense.

Due to the uncoordinated action, both initiatives lost strength and impact and make us wonder how well-integrated the SNDC is, especially considering that in this case both state institutions belonged to the same state of the Federation (São Paulo). As already stressed, PROCON is an administrative body that can act to protect consumers by enforcing the *Consumer Code* and related litigation. PROCONs usually act fast and offer quick answers both to consumers individually and in cases that affect a collectivity of consumers. They are extremely powerful, and society relies heavily on them to solve disputes with producers, sellers etc. However, especially when it comes to actions that involve an answer to a collective problem, like a fine imposed due to an infraction of the *Consumer Code* that potentially offends consumers' rights as a collectivity, it is common for the companies to seek judicial measures to contest the fines and avoid paying them altogether, as also previously discussed.<sup>798</sup>

In this context, what happened to the *Skol* Summer Muse campaign is not uncommon: the PROCON imposed a fine, which was contested before the courts. The judicial analysis can last many years. As seen in my case analysis, more than 16 years, due to the extensive appeals available to postpone the fulfillment of the sanction. And here lies the issue of the

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<sup>797</sup> Val Napoleon, "Thinking about Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues Hum Rights Leg Plur* (New York: Dordrecht Heidelberg: Springer Netherlands, 2013).

<sup>798</sup> Please see discussion on pages 180-182, footnotes 512 to 519.

effectiveness of consumer law enforcement: a fine was imposed in 2006 but was not paid yet, due to judicial contestations. This signals a power struggle between state institutions in effectively protecting consumer rights, in particular when addressing advertising that promotes social harm.

## **6.2 The Power to Speak and to Silence**

Who is authorized to speak to, analyze, and judge advertising? Who has the power to speak and be heard on such issues? This is one of the issues that permeates the 16 years of litigation (so far) of the *Skol Summer Muse* campaign: who is entitled to discuss discriminatory advertising and who should be responsible for monitoring and imposing sanctions if needed. These debates became evident in at least two ways: when AMBEV questioned the feminist movement's legitimacy to discuss the *Skol Summer Muse* campaign, and when the self-regulatory body (CONAR) is invoked as the authority to monitor and sanction irregular advertising. Here I focus on the question of who is entitled to discuss discriminatory advertising, as this was one of the most recurrent arguments used by AMBEV to indicate that the advertisement should not be sanctioned.

In all its submissions, AMBEV disqualified the claims presented by Rachel Moreno, CEPIA, Instituto Patrícia Galvão, and CLADEM/Brazil, (representing feminists and feminist organizations), by describing them as radicals.<sup>799</sup> These arguments were exhaustively repeated. This disqualification was made in at least two different ways: i) by dismissing the feminist associations as qualified to discuss advertising; ii) by stating that

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<sup>799</sup> See for example the section "Discrimination or Radicalism," in *Contrarrazões de Apelação*, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 654-7.

the organizations are only interested in self-promotion and do not represent any offended consumer. I see this debate as referring to who can speak, and who can silence discussions about sexist advertising.

One way by which AMBEV discursively dismissed and ridiculed the feminists who engaged in the litigation is by referring to them as an unidentifiable group, never naming them; or by insisting that “nobody ever complained about the advertisement, except some radical feminists.” By framing the feminists as radicals whose point of view should be dismissed, AMBEV suggested that feminists do not represent part of society, as if they were some sort of lunatic group set aside, they are “nobody.” They are not included in the shared community that is composed of the “average consumer” (in its male form as presented by AMBEV). An example of these exclusionary arguments can be noted when AMBEV contested Rachel Moreno (a psychologist herself), CLADEM, Instituto Patrícia Galvão, and CEPIA’s positions that were grounded on the analysis of sociologists and psychologists who work with issues related to women and media:

**Needless to say, a sociologist cannot judge discriminatory or abusive advertising. The obvious bias and tendency to promote a ‘victimization’ view of the feminine, present in feminist associations, which always see giant machismo where there are only windmills, also disallows their opinion for the judgment of the case. Only sparse texts from the Internet are left [to support the fine/conviction].<sup>800</sup>**

The “spare news articles” referred to by AMBEV are the documents compiled by Rachel Moreno in her first claim before the MPF, when she submitted an opinion article signed by

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<sup>800</sup> Processo n. 053.10.005431-8, Ação ordinária com pedido de tutela antecipada contra a Fundação de Proteção e Defesa do Consumidor – PROCON/SP.

the sociologist Berenice Bento, entitled “The beer and the killing of the feminine” (*A cerveja e o assassinato do feminino*) and an interview with Nilcéia Freire, the former head of the Ministry of Women (head of SPM<sup>801</sup>). In the latter, Nilcéia Freire talked about how women recurrently complained about beer advertisements and noted that SPM has been reaching out to CONAR on this issue. Nilcéia added that SPM is organizing national seminars to discuss women and media regularly and that she, as the head of SPM, is often upset when SPM needs to do a campaign and hire an advertising company to do so.

According to her, advertisers have a hard time understanding what the SPM team is saying and they do not properly translate the message the government wants to disseminate.<sup>802</sup>

AMBEV claimed that the marketing sector and corporations, the market, in general, as being in a better position to analyze, understand, and discuss marketing campaigns than feminist associations, psychologists, or sociologists.<sup>803</sup> The underlying argument here is that monitoring and eventually punishing advertising should be left for sector self-regulation, and not be in the realm of the state. By disqualifying the feminist associations as greedy and non-representative, and depicting them as extremists and radicals, and by refusing the application of the *Consumer Code* (as in the limitation issue), the company reinforces the market’s discourse that regulating the marketing through the state is a form of censorship that threatens the freedom of expression that marketing activity requires.

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<sup>801</sup> Special Secretariat for Women’s Policies Presidency of the Republic, SPM. More information on SPM, see chapter four.

<sup>802</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 294-95.

<sup>803</sup> Processo n. 053.10.005431-8, Ação ordinária com pedido de tutela antecipada contra a Fundação de Proteção e Defesa do Consumidor – PROCON/SP; Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, pp.158-9.

But for the São Paulo state prosecutor's office, psychologists are competent to analyze advertising and their opinion matters when settling the discriminatory aspect of the *Skol* Summer Muse campaign. This is why the MP/SP grounded its understanding of the abusiveness of the advertisement on a technical opinion provided by the Federal Council of Psychology<sup>804</sup> in their submission:

(...) a relationship amongst people that is based on inequality and discrimination, becomes evident when a human being, in this case the woman, is shown as if she was an object, matched with the beer. This also suggests that such human being can be treated as if she was a drink (or food), perpetuating an old relationship where men used to treat women as if they were 'objects' presented for their consumption.<sup>805</sup>

The MP/SP uses the Federal Council of Psychology submission to discuss a definition of moral violence:

Moral violence is all forms of one's disqualification/depreciation based on sex, social class or ethnicity. Many prejudices are fed by stereotypical images of women. It is moral violence, for instance, to expose women as sexual objects, as bottoms and breasts' appendices. In the "first world's" imaginary, we (Brazil) are a paradise of sensual women rolling back down at the sound of drums, in an eternal tropical carnival (which, amongst others, favours the exploitation of sexual tourism).<sup>806</sup>

According to the MP, the definition of moral violence fits very well into the images that are used in the advertisement to encourage beer consumption and the issues related to sexual tourism.<sup>807</sup>

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<sup>804</sup> The Federal Council of Psychology is a public law agency that oversees the professional practice of psychology in Brazil, but also promotes relevant debates that can improve(?) the services offered by psychologists in the country. More information at: <https://site.cfp.org.br/cfp/conheca-o-cfp/>.

<sup>805</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 06.

<sup>806</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 11.

<sup>807</sup> From 2013 to 2015, at least 3,350 websites, in multiple languages, associated Brazil with pornography or sold the country as an optimal destination for sexual tourism, including associating Brazil with child pornography. Some websites even sell all-inclusive options to come to Brazil and enjoy some sexual tourism,

To reinforce the idea that feminists are “nobody” and are not representative of women’s interests, the company stressed the lack of information on the concrete consumers who are affected by the advertisement:

As extensively proved throughout these files, there has been no information regarding citizens that complained about this advertisement, precisely because this advertisement is not discriminatory or offensive to anybody, but rather, shows a healthy good sense of humour, this being precisely what captivated the public’s attention.<sup>808</sup>

As it will become clear throughout this defense, there has never been any sort of discriminatory or abusive advertisement. And this is so BECAUSE THERE HAS NEVER BEEN A SINGLE COMPLAINT FROM A DISSATISFIED OR OUTRAGED CONSUMER<sup>809</sup> – regarding the funny advertisement. If carefully looked into the files of this case, and I could not find a single complaint of such dissatisfied or outraged consumer. But you can find – and this is what started this case – complaints presented by feminist associations that defend women. However, such entities, with due respect, do not have a legal interest in the matter, and obviously, never showed or listed who are the consumers who felt hurt by the allegedly sexist advertisement promoted by AMBEV. Clearly, there never was an outraged consumer. And the association’s motivation is only their own greed in obtaining resources to auto-promote their institutional interests, via an extra-judicial agreement to be settled with the prosecutor office, benefiting these entities and never the supposed offended consumers – where are they?<sup>810</sup>

In another submission, in a section entitled “Imaginary Consumer/Non-existent damage,<sup>811</sup>” AMBEV reinforced the argument that no consumer was ever offended by the advertisement and that the single complaint came from feminist associations, who did not intend to protect

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focusing on Brazilian women as their main product/service, as one of the websites states: “Our young women won’t be only your sex goddesses, they will also be your touristic guides, translators, partners for dancing and personal girlfriends. “nossas jovens mulheres não apenas serão suas deusas do sexo, como também serão suas guias turísticas, tradutoras, parceiras de dança e namoradas pessoais.” André de Souza, *supra* note 681.

<sup>808</sup> Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 645.

<sup>809</sup> Capitalized as in the original.

<sup>810</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 570-2.

<sup>811</sup> “Consumidor Imaginário/Dano Inexistente”. Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 649.

anyone's interests but their own greed in receiving money from AMBEV to pursue their activities:

**More likely, there has never been a single outraged consumer. And these feminist organizations' motivation was only their greed in obtaining resources for their institutional promotion through an extra-judicial agreement to be settled favouring such institutions and never the supposed offended consumers – where are they???**

(...) In this context, it is clear that **no woman felt offended or affected by the supposed discriminatory advertisement**. Therefore, AMBEV cannot be punished by promoting the 'Summer Muse' because in theory, and only in theory, such an advertisement would be offensive to the feminine sex—as claimed by feminist organizations—as it is every beer ad! (bolded added by the author)<sup>812</sup>

Therefore, according to the law, a collective lawsuit can only be proposed if there is collective moral damage to consumers, this being both a condition for the collective lawsuit and requisite that grounds the public prosecutor's office legitimacy to propose it [the collective lawsuit]. However, if no consumer has ever complained about the disputed advertisement and if no consumer has ever felt the advertisement caused damage, the logical consequence is that this collective action has no reason to be/no cause; or at least, there is no legal interest grounding the public prosecutor's office action.

This leads to the undoubted conclusion that **women, supposedly affected by the advertisement and the focus of discrimination as presented in the action, did not feel offended by this advertisement**. Therefore, AMBEV cannot be responsible for broadcasting this advertisement, since, in theory, and only in theory, it [the ad] would be offensive to the feminine sex—as alleged by the feminist organizations—as all other beer advertisements. (bolded added by the author)<sup>813</sup>

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<sup>812</sup> Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 650-1.

<sup>813</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 572.

This is not true, as Rachel Moreno, when she presented the claim before the MPF, included information about women who complained about the *Skol* Summer Muse campaign to the CONAR.<sup>814</sup>

AMBEV reinforced the argument that the advertising did not raise any social concerns by presenting an opinion poll that would demonstrate that society approved of the advertisement. However, as pointed out first by Rachel Moreno and later by the São Paulo MP and PROCON, the poll basically interviewed young upper class men: the opinion poll conducted by the AMBEV showed that 82% of the respondents were men (declared masculine sex), 67% belonging to classes AB and 69% were between 18 to 29 years old,<sup>815</sup> therefore not reflecting society's opinion of the advertisement and its acceptance, or women's opinion and perceptions of the issue. According to her, the poll more likely represented the mentality of those targeted by the company as consumers, reflecting archaic, patriarchal, and sexist values that structure Brazilian society.

AMBEV also claimed that the São Paulo state MP went on a moralist crusade, reflecting the personal and subjective values of the MP representative, somehow aligning with the 'radical feminists:'

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<sup>814</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 292.

<sup>815</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 268; Inquérito Civil, Promotoria de Justiça do Consumidor da Capital, MP n. 43.161.139/08-1, 6º Promotor de Justiça do Consumidor, p. 55; .” Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor, processo n. 0803/2006, p. 229-30; Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, pp.164; IBOPE Solution, Avaliação de Propaganda SKOL ‘Musas’ Job 248/06, Março/2006, p.p.2, 4, 9, 10 and 11; Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, p.214; Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, p.173-223.

Additionally, psychologists and fundamentalist defenders of women rights cannot analyze discriminatory or abusive advertisement. The evident partiality and the tendency to “play the victim” by feminist associations and their members, who always see enormous sexism where there is only windmills – please forgive the appropriation of the notable Cervantes’ figurative language –, also disavow their opinion to judge this case. What is left are some internet articles about offensive beer advertisement.<sup>816</sup>

We can see that AMBEV defended the marketing sector or the companies, the market in general, as being in a better position to analyze and understand the marketing campaign than feminist associations. But a marketing campaign is not created and aimed at the market, but at the society as a whole. And feminist associations, feminist activists, sociologists, and psychologists are part of the society. This makes evident who, in the corporate sector, has or should have the discursive power in society.

However, once a television advertisement is out, its meaning and how it should be interpreted is not held by the company that approved it or the marketing team that produced it. It is open to interpretations by different groups in the society, who can read the piece in multiple ways, alongside the theoretical discussions on critical reception of media content as proposed by Jesús Martín-Barbero, Stuart Hall, and others.<sup>817</sup> According to these theorists, the interpretation of media content by the public happens through the combination

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<sup>816</sup> Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 658-9.

<sup>817</sup> Discussions on how the consumer perceives advertising has been a productive field of research in Brazil, as pointed out by Laura Hastenpflug Wottrich. See: Laura Hastenpflug Wottrich, “*Não podemos deixar passar*”: práticas de contestação da publicidade no início do século XXI (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 24-38; Ana Escosteguy & Nilda Jacks, “Comunicação e Recepção. Uma visão latina-americana” (2007) 12:57 Razón Palabra, online: <<http://www.redalyc.org/articulo.oa?id=199520710003>>; Jesús Martín-Barbero, *Dos meios às mediações: Comunicação, cultura e hegemonia* (Rio de Janeiro: Editora UFRJ, 1997) at 280-299; Stuart Hall, “Encoding, Decoding” in *Cult Stud Read*, second edition ed (London and New York: Routledge Taylor & Francis Group, 1999) at 511-513; Robert A. White, *supra* note 117.

of one's personal experiences, which are mediated by one's origins and the social groups they belong to (family, school, church, friends, and so on).<sup>818</sup> Positionality, then, is key to forming an understanding, an opinion, and a critique of any media content. To invalidate one's view by stating that they are not authorized to speak about something could be exclusionary and discriminatory; and constitute an attempt to silence contestation.

AMBEV goes as far as to disqualify the decision of one of the judges who decided in favour of PROCON in the action proposed by AMBEV:

**As will be demonstrated, *data máxima vênia*, the judge's decision is wrong. She [the judge], clothed with stiffness, exaggerated the degree of realism and in the content of seriousness that must be seen in a simple TV advertisement made for the Brazilian summer on a beer brand.**

The question that is put to judgment here is not the hypothetical possibility of punishment by discriminatory advertising, never decided the now appealed decision not even - with all due respect – the most learned Judge's personal opinion about the content of the advertisement in question, but the certain and unequivocal existence of vile prejudice against women in the content of the advertisement

(...) The absolutely metaphorical comparison between the 'summer muse' and the *Skol* [beer] was - and you just have to watch the commercial to find it out - just an allegorical way of showing the beer to the consumer, **that the 'blonde' of the summer could also be yours**. If the advertiser made a mistake (or displeased other consumers) by focusing their advertising film to the male audience, that's another story. But clearly there is no discrimination in this joke. (bolded added by the author)<sup>819</sup>

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<sup>818</sup> Ivan Paganotti, "A negação da negativa em um palimpsesto de propaganda: conflitos entre liberdades em expressões sobre a campanha de Carnaval da cerveja Skol em 2015" (2016) 2:1 Rev Obs 318–339; Heloisa Buarque de Almeida, núcleo de estudos de gênero, PAGU, UNICAMP. Consumidoras e Heroínas: gênero na telenovela; Heloísa Buarque de Almeida, "Consumidoras e heroínas: gênero na telenovela" Rev Estud Fem; Laura Hastenpflug Wottrich, "*Não podemos deixar passar*": *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 40-41; Jesús Martín-Barbero, *Dos meios às mediações: Comunicação, cultura e hegemonia* (Rio de Janeiro: Editora UFRJ, 1997) at 280-299.

<sup>819</sup> Companhia de Bebidas das Américas – AMBEV. Agravo de Instrumento com efeito suspensivo, nos autos da ação ordinária n. 053.10.005431-8) contra PROCON/SP, p. 360.

Apart from the fact that the case received submissions from relevant feminist organizations in Brazil such as Instituto Patrícia Galvão, CEPIA, and CLADEM/Brazil supporting the individual claim originally presented by Rachel Moreno to the MPF, it is important to remember that when we are discussing collective damages in consumer societies, it is sometimes impossible to precisely identify all the people who were concretely affected and suffered damages, this being the reason why collective and diffuse rights were established in Brazil. This is the case of social harm caused by advertising. Considering that the effects of mass communication in consumer societies are hard to quantify (but not impossible to prove), Brazilian consumer law provides the ability to address such social harm through collective actions that protect diffuse rights. In this case, both the collective lawsuit proposed by the São Paulo state MP and the fine imposed by the São Paulo state PROCON seek to financially sanction AMBEV for social harm caused by advertising.

Even though the law that regulates collective lawsuits in Brazil does state that the collective action can be presented once moral or material damage is caused to the consumer (Law 7.347/85, article 1, II), this does not mean that the plaintiff needs to present a list of all the consumers affected or who have suffered a moral or material damage. On the contrary, Brazilian legislation and the way the development of the diffuse rights evolved in Brazil – as discussed in chapter 3 – allows for companies to be deemed responsible for collective damages without the need to nominate or list all the individuals affected. This is basically the essence of diffuse rights: rights that belong to all and that are impossible to divide or individualize. In such cases, because the damage happens on a broad scale, you do not have a list of individuals affected, but rather the whole community is considered to be affected.

CEPIA, CLADEM, and Instituto Patrícia Galvão, as well as Rachel Moreno, representing feminist activists and institutions that engaged with the discussion in this case, also did not refer to the *Consumer Code*, but mostly to international human rights law, the Brazilian Constitution, and the law that punishes domestic violence in Brazil (Lei Maria da Penha). One of my key arguments is that this human rights law framework that they rely on could be a useful tool to support a definition and an interpretation of what abusive advertising, due to its discriminatory nature as defined in the *Consumer Code*, means. PROCON explores the debates on law from a gendered perspective a bit more, and in some ways aligns with the feminist arguments, but I believe that a more robust connection can be made, including having feminists explore the SNDC bodies to channel discussions on sexist advertising and the social harm it causes.

A coalition between the feminist movement and the SNDC bodies to discuss, prevent, and punish discriminatory advertising against women seems like a challenge not only in the field of legal arguments, but also in terms of political articulation. The feminists started the debates around the *Skol* Summer Muse campaign before the MPF, and were actively participating in the discussion of an agreement with AMBEV. But when the case transitioned to the São Paulo state MP, the feminists were not invited for the meetings that the MP was leading to try to reach an agreement, nor were they invited to or informed of the sessions where the case was decided. They were also not notified of the final decision.

Before the state MP proposed the collective lawsuit, the feminists presented a submission offering support and requesting more information on the negotiations made in the case so far, as well as a meeting with the MP representative, which was denied, as explained in chapter 4. Here we note that the São Paulo state MP, instead of working in partnership with

the feminist movement who initially made the claim against AMBEV before the Federal MP, denied them any participation in or engagement with the unfolding of discussions at the state level.

Feeling excluded from the litigation which they started, the feminists were seeking partnership and to support the state MP in its collective lawsuit or TAC. This coalition could have been proven helpful, since the feminists are not familiar with the consumer law and do not engage with the SNDC but could have offered backup support in terms of the legitimacy of the collective lawsuit as well as more arguments related to the fact that the advertisement was sexist and offended women's rights.

If the state MP was reactive to the feminist engagement, PROCON's decision that confirms the imposition of the fine validates the activities of non-profit organizations, also making explicit the opposition of individual vs. collective in this debate. While AMBEV centered its defense on attacking the non-profit organizations and repeating exhaustively that no one had complained about the advertisement (since there was not a list of individuals who complained about it), PROCON argued that such institutions (and here PROCON adds the consumer rights organizations to the feminist ones) are important because they bring the concerns of the often oppressed or marginalized social groups they represent to the authorities, and that the way AMBEV referred to them was unethical and disrespectful:

The company, in a simplistic and unfortunate discourse, typical of those who do not respect the essential values of our society, instead of defending the advertisement, direct its defense to an attack and a disregard for the arguments presented by representative entities of society (consumer protection, women's rights, and others). Thus, it disqualifies ideas, and principle, also harassing the defenders of such ideas, imputing to them extremist conducts that would reveal a temporal, social or other kind of disconformity.

This strategy adopted by AMBEV for defending itself—sometimes frivolous—by pointing out alleged extremism and disqualification of those minorities, social groups that represent oppressed or marginalized groups whenever they denounce abuses, is not uncommon.<sup>820</sup>

Therefore, PROCON showed solidarity towards the non-profit organizations, seeming to have a sensibility or a tendency to look at or listen to such social movements, or at least defend the importance of these movements and associations in contemporary societies. This might be linked to the fact that PROCONs were created by social pressure in the 1970s, and that despite being a state body, it often aligns with civil society in its actions to enforce consumer law.

### **6.3 The Power to Contest and Propose New Ways of Seeing and Interpreting the Laws**

As discussed earlier, litigation has been a consistent strategy of the feminist movement in Brazil regarding sexual and reproductive rights and violence against women, but when it comes to contesting advertising, litigation is rarer and does not always take place in the field of consumer law, but rather, as shown by the *Skol Summer Muse Case*, is grounded in international human rights law and the discussion about concession, by the state, of the right to broadcast through television channels.

The feminist movement did not reach out to specific consumer bodies, but presented its claim to the Federal MP, articulating the discussion of sexist advertising with television concessions to broadcast and international human rights. I believe that combining the

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<sup>820</sup> Secretaria da Justiça e da Defesa da Cidadania, Fundação de Proteção e Defesa do Consumidor, processo n. 0803/2006, p. 226.

strategies of the feminist movement through engagement with specific state bodies (PROCONs and MPs) could produce better results. The feminist organizations hold the legitimacy, the studies, the references, and the voices of so many Brazilian women, adding legitimacy to future claims. The state MPs and PROCONs, however, are not so attuned to these demands and these arguments, but hold the power to enforce consumer law in Brazil. A cooperation between these social actors could result in fruitful legal action to promote a better symbolic representation of women in advertising. Next, I show how the discussions brought forward by the feminist movement can contribute to clarifying the meaning of discriminatory advertising, from a gendered and feminist perspective.

Bringing a feminist perspective to cases debated in the consumer rights arena is quite new in Brazil. Generally, the feminist movement has grounded its claims regarding discriminatory advertising in other domains, like human rights, general media regulation, and others, and rarely uses the National Consumer System or legislation. As a result, the focus is not always the advertisement itself, but the use of a public good (a television channel) operated through a concession contract, to promote misrepresentation of women within media. Although gender-based discrimination in advertising and the democratization of the media can (and should) be discussed together, in the case of the latter the debate is broader, encompassing the concession process itself and the misuse of a public good to foster stereotypical images of women. If advertising is challenged considering this broader debate (for example, contestations of an advertisement as a way to use mass media to promote an unfair or inadequate image of women), the claim is not framed as a consumer law issue. This means that consumer law is not at the centre of the dispute. Rather, it is the public concession process of television channels and their responsibility to ensure non-

stereotypical gender representation, a claim that finds support in international Human Rights Treaties ratified by Brazil, such as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”), and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW Convention”).<sup>821</sup> Even if, in a way, sexist advertising is part of the problematic representation of women in the media, I understand that due to the traumatic history of censorship in Brazil, and the blocked debate of such topics within the Congress, discussing it through this avenue can be more challenging and face more public resistance.

Grounding the discussions in sexist advertisement according to the *Consumer Code* could be an easy way to amplify the debates in this area. The international human rights law references could be used to inform the meaning of the word “discriminatory” in the *Consumer Code*, considering that the code itself does not provide a definition for it. However relevant and useful as a background debate, the discussion on democratizing media in Brazil seems not to be helpful in advancing debates on sexist advertising, for a couple of reasons: i) society fears and resists discussing any sort of media regulation, often seen as censorship, due to the traumatic history of dictatorship in the country; ii) claims presented on these grounds have been unsuccessful because there is no specific law that prohibits sexist advertising within the broader regulation of media. Therefore, pursuing this

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<sup>821</sup> Examples of this kind of litigation can be found in: Vera Fátima Gasparetto, *A busca por uma cidadania da imagem: organização, lutas e articulação de políticas públicas no Brasil pela Rede Mulher e Mídia* (MSc mémoire, Universidade Federal de Santa Catarina, Centro de Filosofia e Ciências Humanas, Programa de Pós-graduação em Sociologia Política, 2014) [unpublished] at 106.

path requires the use of an indirect argument, using laws that do not address advertising directly. Consequently, when the debate on sexist advertising is presented as related to the issue of democratizing media and social regulation of media, it risks falling into this much more complex debate on freedom of expression and censorship, rather than being an issue of regulating economic activity.

On the other side, Brazilian consumer law offers regulation frameworks to repress discriminatory advertising and advertising that might lead to violence, a framework that could be used to address social harm caused by advertising that objectifies women. Brazilian consumer law occupies a hybrid space. It is a public law, codified into the *Consumer Code*, that regulates relationships amongst individuals and the market, and therefore in the domain of private relationships as defined in capitalist systems. Likewise, laws that seek to protect women's rights grounded or derived from international human rights law regulating individual (therefore private) relationships through public lenses (human rights law), also occupying a hybrid space. Somehow, it seems to me that as much as the feminist movement displaced the definition of human rights from the realm of the state/public law into the private/intimate relationships, consumer law in Brazil operates in a similar way. As such, both bodies of law represent disruptions of a static idea of a public/private divide and show that these boundaries are less clear than the mainstream order might have us think. I argue that this displacement can be pushed by the feminist movement, when using consumer law to debate discriminatory advertisement. This would mean further exploring the *Consumer Code* to promote a debate on sexist advertisement within the SNDC.

## Chapter 7: Bodies and Identities: The Norm and the Deviant

In this chapter I delve into issues related to normative ideas of bodies and identities, which I link to social roles performed by women or imagined (or expected) by society to be performed by them. To think about women's social roles in emergent Brazilian consumer society, I draw on discourse analysis to explore how social discourses produce, reflect, foster, and reinforce these roles through advertising promoted by mass media in Brazil. I am interested in the connections between such representations, social inequalities, and legal discourses about discriminatory advertisement, using the *Skol* Summer Muse campaign as my field of exploration.

I rely on Foucault to discuss questions of power and agency, which I connect to representations of women in cultural products and in advertising. To discuss the images of women explored by advertisers throughout the *Skol* Summer Muse campaign, I look at theories around the construction of the 'feminine,' supported by feminist scholars who rely on Foucault's work, like Teresa de Lauretis. As De Lauretis reminds us, media has an important role in constructing representations of gender through discourses, which affect all spheres of social life.<sup>822</sup> I look at how a specific "technology of gender"<sup>823</sup> organizes a disciplinary and normative discourse that structures some of the hegemonic representations of the feminine and investigate whether claiming sexist advertising as a human rights issue

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<sup>822</sup> "A starting point may be to think of gender along lines of Michael Foucault's theory of sexuality as a 'technology of sex' and to propose that gender, too, both as representation and as self-representation, is the product of various social technologies, such as cinema, and of institutionalized discourses, epistemologies, and critical practices, as well as practices of daily life." Teresa de Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction* (Bloomington, USA: Indiana University Press, 1987) at 2.

<sup>823</sup> Teresa de Lauretis, *Technologies of gender: essays on theory, film, and fiction* (Bloomington: Indiana University Press, 1987).

can contribute to organizing resistance against the objectification of women by the market.<sup>824</sup>

Discursive structures and representations (both in advertising and in the law), being shaped by historical and material social relations, reflect, produce, and reproduce the unequal social structures already existing in Brazilian consumer society, informing the political and visual political representation of subjects. Historical and social structures, together with representation (political and within the media) mutually feed each other and constantly reinforce inequalities. There is no dominant characteristic; both structural and representational aspects share the same importance in shaping and maintaining social inequalities by mutually constituting and inter-locking with each other, particularly in societies that are driven and organized by consumption, such as late-capitalist ones.<sup>825</sup>

These representations, however, do not go uncontested: various social actors are disputing different ways to see the feminine body and the social roles associated with women. The discussions around the *Skol* Summer Muse campaign reveal this ongoing dispute, and I show how the ideas of women as sexual objects, or as people whose primary social role is as a mother, are explored by the different social actors involved in my case analysis. I start

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<sup>824</sup> “Objectification is clearly evident in media genres such as pornography, but it is also prevalent in mainstream media representations of women, including TV shows, movies, music videos and lyrics, billboards, video games, and perhaps most preeminently, in advertisements within magazines and newspapers and on TV and the Internet. When objectified in media, women are depicted with a primary focus on their bodies instead of their faces, with special emphasis on body parts that have been sexualized such as their breasts, buttocks, legs, and lips. When people view such media, they unwittingly adopt an objectifying lens toward women.” Sarah J Gervais & Sarah Eagan, “Sexual Objectification: The Common Thread Connecting Myriad Forms of Sexual Violence Against Women” (2017) 87:3 Am J Orthopsychiatry at 226-227.

<sup>825</sup> Jean Comaroff and John L. Comaroff, “Millennial Capitalism: First Thoughts on a Second Coming” (2000) 12: 2 at 294-295; Frank Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (United Kingdom: Penguin Random House UK, 2016) at 1 -3; Gilles Lipovetsky, *A Felicidade paradoxal* (São Paulo: Companhia das Letras, 2007) at 26-27 and 32.

by looking at women as social objects, and then move on to discuss how the perception of women as the primary caregivers of families is used to justify the need to fight against visual representations that objectify women.

## **7.1 The Norm: Sexual Objects and Moms**

### **7.1.1 Sexual Objects**

Advertising in general, and the *Skol* Summer Muse campaign, in particular, use very specific discourses about women and the feminine body itself: women must be beautiful and please male observers, even when performing normal day-to-day activities. The ideal woman should be young, white, have long, blonde, straight hair, have a perfectly (from the supposedly heterosexual masculine standpoint) sculpted body and wear clothes that show this body, provoking men's desire. If we consider, as Susie Orbach proposes, that bodies "are and always have been shaped according to the specific cultural moment,"<sup>826</sup> the way women are represented by their bodies in many advertisements reveals much about the role and social place for women in Brazilian society. Brazil is a very diverse country, but this diversity is hardly ever present in advertising, both in terms of body type<sup>827</sup> and social roles,<sup>828</sup> as discussed in chapter 2. The *Skol* Summer Muse campaign is merely one example of this stereotyping process in Brazilian advertising, where women are not

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<sup>826</sup> Susie Orbach, *Bodies* (London: Profile Books, 2009) at 134.

<sup>827</sup> Luciana Araújo, "Para diretora executiva do Instituto Patrícia Galvão, pesquisa aponta que a publicidade representa a mulher de forma ultrapassada", *Agência Patrícia Galvão - Online* (23 September 2013), online: <<https://agenciapatriciagalvao.org.br/mulheres-de-olho/mulher-e-midia/pautas-midia/segundo-pesquisa-propaganda-representa-a-mulher-de-modo-ultrapassado/>>.

<sup>828</sup> Juliana Wallauer, "Menos de 20% dos comerciais contribui para a equidade de gênero e raça no Brasil" (28 October 2015), online: B9 (website).

considered as consumers, but as vehicles to increase beer sales. They are objectified and offered together with beer for men's consumption.

By looking at the campaign's images, one might think that such objectification and further discrimination against women was evident. However, what the public discussion about the Skol Summer Muse campaign, raised by the two court decisions reveals is that this understanding was far from being uncontested or unanimous amongst legal professionals who worked on the case. Also, the problem seemed not to be with a particular section of the law itself, lack of law, or inappropriate law, but rather with a deeply rooted normalization of the idea of women as consumer goods. This reflects the patriarchal values that deeply structure Brazilian society.

As discussed in chapter two, advertising promotes ideas of normalcy,<sup>829</sup> of what is acceptable and desirable, while also reinforcing the social values of a given society. This is what makes it so powerful, the fact that it dialogues with a given socio-cultural context, but also reinforces this same context by channeling stereotyped images of men and women through mass media. As also already discussed, women tend not only to be stereotyped, but to be shown through fragments of images of female body parts that represent women in erotic and hypersexualized ways. This fragmentation of the feminine body and the representation of its parts as the whole of a woman are common in advertisements that objectify women and show them and their body parts as of objects of consumption. This is

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<sup>829</sup> "Advertising often sells a great deal more than products. It sells values, images, and concepts of love and sexuality, romance, success, and perhaps most important, **normalcy**. To a great extent, it tells us who we are and who we should be. We are increasingly using brand names to create our identities." (bolded by the author) Jean Kilbourne, *Can't buy my love: How advertising changes the way we think and feel* (New York: Touchstone, 2001) at 74.

considered the first step in dehumanizing people and creating an environment that normalizes violence against the people who have been objectified, in this case, women.

Dehumanizing through objectification makes discrimination visible and also establishes a framework, an idea of normalcy, making it implicit that some levels of violence are accepted. As discussed in more depth in chapter 2, violence against women happens on a *continuum* that goes from psychological violence to femicide, and the multiple discursive and symbolic forms of violence contribute to create an idea of what is acceptable and what is not in terms of violence.<sup>830</sup>

One of the core issues of the case analysis is the process of objectifying women. When the Muse is cloned and delivered to men in bars, or is compared to products that have a defect or are imported goods, is this a way to objectify women? Not so for Mr. José Francisco Queiroz,<sup>831</sup> a CONAR board member on duty to decide the case who was also responsible for the majority decision vote on the *Skol* Summer Muse campaign. Mr. Queiroz saw humour in the advertisement, reflecting Brazilian culture and the natural human desire to have beautiful women in one's life, which would not necessarily mean sexism:

As a CONAR board member acting on this case, I see no abuse, or any extrapolation of the use of the female figure. **A natural thing, that has always been valued by Brazilians: a beautiful woman. And the image of 'taking her home' is surely in the minds of freer, bolder men.** Or even those who may have, without revealing it, the purest, most innocent and childish desires, dreaming of this possibility.

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<sup>830</sup> Márcia Tiburi, *Como conversar com um fascista: reflexões sobre o cotidiano autoritário brasileiro*, 5th ed (Rio de Janeiro: Record, 2016) at 77.

<sup>831</sup> According to a quick search online, Mr. José Francisco Queiroz was one of the directors of one of the most renowned marketing faculties in Brazil, ESPM (*Escola de Comunicação e Marketing*): José Francisco Queiroz, *supra* note 646.

**This cannot be understood as a macho vision because at times there are similar situations, reversing the role, where women desire, dream, and even make explicit the desire to bring a handsome young man home. Therefore, this seems to be a behaviour, a thought, or a psychological problem if you wish, of the human being and not only of the male or female.**

Another point: what would happen if this advertisement used a man as a cloned model? Were there men who would feel devalued, mere objects of consumption? If the tendency is to think that it would be not, then we can conclude that the problem lies then in the way some women think, and this cannot mean a contemptuous attack on them. This would be a non-sexist argument. It would be a sexist argument if there was an agreement with their [the feminist's] argument.

**One more argument: for everything that has already been seen in campaigns where women are present, particularly those of beers, this commercial does not appeal to the abusive use of eroticism, as so many have already done. Therefore, one does not see the incentive that binds the woman as a mere sexual object to take home.** It is a humorous fiction, dealing with a common subject between men and, of course, **the desire (or the unrevealed dream) of some to have beauties like that to take home.** Repeating: exactly the same way some women would think about the opposite sex.

Even if you want to continue in this line, the rapporteur understands that there is no injury to the human being, discarding any injury to a person's rights and the Civil Code, because the distributed 'gift' is a puppet, a clone, a fiction.

**With the tranquility of those who have already restrained in this house a lot of advertising pieces that have crossed the same path as this commercial, but extrapolated the common sense, or were clear aggressions to ethical principles, the rapporteur votes for archiving the representation.** (bolded added by the author)<sup>832</sup>

CONAR's leading board member for the *Skol* Summer Muse campaign clearly and textually stated that he did not see any problem with the advertisement that also did not

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<sup>832</sup> Conselho Nacional de Autorregulamentação Publicitária, Processo 041/06. Denunciante: grupo de consumidores; Denunciada: Cia. Brasileira de Bebidas – AMBEV e F/Nazca S&S Publicidade Ltda.; Objeto: Anúncio 'Skol – Musa do Verão', p. 104-6.

violate any ethical principles established by CONAR to guide advertising. He concluded that the desire to bring a muse home is something inherent to any person, but that only more liberal men would be brave enough to verbalize such a dream. His decision was followed by the majority of board members on duty to decide on this case.

CONAR's perception of the advertisement, voiced by Mr. Queiroz, is aligned with the arguments presented by AMBEV, which makes sense if we consider that CONAR represents the market and claims responsibility for overseeing advertising in Brazil, without the need for state intervention. In a section entitled "Far away from reality," AMBEV, showing close alignment with marketing professionals' perspectives, argued that advertisement does not create realities or change the world, but only designs scenarios, capturing some desires from consumers to attract their attention.<sup>833</sup> The main goal of advertising, then, would be to capture the consumer's attention, using creativity to attract them through the expression of people's most basic desires,<sup>834</sup> never influencing social changes or affecting social behaviour.<sup>835</sup> In this context, in identifying who is the consumer and who is consumed, both the company and CONAR use an interesting discursive

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<sup>833</sup> Laura Hastenpflug Wottrich, "*Não podemos deixar passar*": *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 87.

<sup>834</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 590.

<sup>835</sup> "Therefore, advertising that shows, for example, men choosing dish soaps, doing the dishes or taking care of children have minimal potential in boosting social change. Likewise, advertising which shows beautiful and attractive women does not promote violence or discrimination against ugly women. As a consequence, it can never be said that the "summer muse" promotes the enslavement of women, hurting their equality [rights], which was achieved after strenuous battles over the last two centuries.

On the contrary, if it is true that women have obtained massive social and political achievements, it would be to disregard her intelligence to assume that a mere advertisement can – even if minimally – destroy all such important achievements. And all this in a blink of eyes. Therefore, it is not necessary to be redundant and declare that the woman thinks and rationalizes, leading to the conclusion that a marketing campaign could never be responsible for objectifying someone." Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 590.

strategy: when referring to the consumers, they always deliberately use the masculine form in Portuguese, which is *consumidor*. Therefore, there is the assumption that the consumer, by default, is a subject identified with the male identity.<sup>836</sup>

There is a lot of discussion throughout the case about the fact that the Summer Muse wears a bikini. AMBEV claimed that it is impossible to sell beer to Brazilians in the summer without resorting to depictions women wearing bikinis and men wearing speedo swimsuits<sup>837</sup> (even if in the advertisement there are no men in such clothes, only women). Reproducing CONAR's arguments, AMBEV stated that the beauty contest in the advertisement only shows in a funny way something that is already part of Brazilian reality, convening the ludic idea that every man, if he wants to, can possess his own. Such representation should not be seen as discriminatory, but only as a humorous way of selling beer.<sup>838</sup> For AMBEV and CONAR, the *Skol* Summer Muse campaign is aligned with the general principle of advertising, stated in the advertisers' autoregulation code, according to which "advertising should be in tune with the economic and developmental objectives, the education and national culture."<sup>839</sup> Proof of this alignment would be the fact that CONAR did not act against the *Skol* Summer Muse Campaign, considering that it respected the ethical guidelines for the category/sector.<sup>840</sup> Considering that beauty contests are common

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<sup>836</sup> This observation does not apply when consumers are referred to in the plural form, as in Portuguese the plural in the masculine is used to refer both to women and men: *consumidores*, then, would be used to refer to a group of consumers that are composed of men and women, or men only.

<sup>837</sup> *Contestação da ação Civil Pública* n. 583. 00. 2009. 165466-9/000000-000, p. 581 and 584.

<sup>838</sup> *Contestação da ação Civil Pública* n. 583. 00. 2009. 165466-9/000000-000, p. 582.

<sup>839</sup> *Contestação da ação Civil Pública* n. 583. 00. 2009. 165466-9/000000-000, p. 583.

<sup>840</sup> A full analysis of the CONAR procedure and decision can be found on chapter 04.

in Brazil and that AMBEV did not create them, showing women as a muse, would, therefore, valorize women, intensifying what women represent for men:

And this needs to be said right away: **the summer muse campaign is not offensive and does not stimulate prejudice, as it does not treat women as objects, depreciating their image. On the contrary, it [the campaign] valorizes the woman;** and intensifies what she represents to all of us, old or young, rich or poor, fat or skinny, bald or hairy, beautiful or ugly, **it signals that we all can have our own ‘summer muse’**. This is the spirit of the advertisement and this is how it should be understood.<sup>841</sup>

We can see how AMBEV seeks to discursively normalize the objectification of women shown in the advertisement by repeating (ad nauseam ) the argument that the company never had any intention to discriminate against women, but simply to make a humorous video showing that every man, if desired, can have his own muse:<sup>842</sup>During summer, everybody wants their own ‘muse’ and everybody wants their favorite beer: Skol.<sup>843</sup>

While claiming that the advertisement does not objectify women, the company used language that reinforced the idea of ownership of women by men: beautiful women, muses, should be accessible to all men in an ideal world. This accessibility is desirable and men can “have” women, men have the right to have their own muses, as they have the right to have beer. Essentially, this language evokes ownership, equating women to beer. No interpretation is needed here. The choice of words makes it very clear and explicit: **“everybody wants their muse and their beer.”** These two items come together as something that is desirable for the summer, reinforcing the objectification discourse. Here it

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<sup>841</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 583.

<sup>842</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 585.

<sup>843</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 585

is evident that men and women are not equal, for those who created the advertisement and consented to it being aired: while men own women, women are owned. This contradicts the company's argument that they believe in equality between men and women and that this equality is a reality in Brazilian society.

The São Paulo state MP took the opposite position, highlighting the intense power of advertisement in influencing people, something even acknowledged by the advertisers in their Code of Ethics: "the cultural order is heavily influenced by advertising, affecting mass societies."<sup>844</sup> This is an interesting point: if marketing is not able to influence people, change behaviours and convince people to act in specific ways, like buying a particular product or service from one brand and not from another, then why do corporations invest millions annually in advertising?

On the topic of objectification, Rachel Moreno, in her initial claim to the MPF, vehemently contested the idea that the *Skol* Summer Muse would valorize women:

**The model that is incorporated when one watches such an advertisement, leads men to think they are entitled to the only-and-perfect-model of the muse, here given away as a souvenir, or bought at a beer price, which offends women by reducing them to an object made through mass production, a souvenir, a good to be delivered to consumers.** (bolded added by the author)<sup>845</sup>

(...)It is hard to believe that the advertisement seeks to valorize women, and in such case, what kind of valorization could it be? **What does it mean to valorize a woman by objectifying her? It means that only through someone else's eyes, through the desiring eyes of this other, can a woman have value.** Therefore, women are only valued as a men's desired object. This also means that a less beautiful woman and less sexually

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<sup>844</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 07.

<sup>845</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 268.

desirable than the Summer Muse would have less value (what kind of value? Use-value? Exchange-value?). And this would be truth regardless what a woman does, think or act in any other aspect of her life.<sup>846</sup> (bolded added by the author)

She then stated that to believe that reducing women to objects (to the object of men's desire) is a way to valorize them would mean stepping back a couple of centuries, denying women their accomplishments and achievements for equality, as well as advancements in the sciences, and work opportunities.

Similarly, in its collective lawsuit against AMBEV, the São Paulo State MP focused on the fact that the advertisement treated women as merchandise, as “things” that can even come with a “defect,” leading to the understanding that the advertisement clearly compares women to beer as equivalents, both things used to satisfy men.<sup>847</sup> The fact that the women are produced in an industrial line of production, to be delivered to men on trolleys used to transport heavy merchandise, is evidence that the representation of women in this advertisement is discriminatory. The collective lawsuit included an image of a trolley being used to carry things and compared it with the image used in the *Skol* Summer Muse campaign to show, visually, how the advertisement treated women as things:

What is highlighted, and now reaffirmed, as a cause for [AMBEV's] abusive behaviour is the fact that the woman is shown as a merchandise, her objectification.

The advertisement, included in these files, clearly shows a woman being cloned in an industrial line of production. Afterwards, such clones are delivered by employees to the male consumer's houses, and they are carried in dollies typically used to transport merchandise, notably bottled gas:

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<sup>846</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 268.

<sup>847</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 12.

*Image 17 – Dolly with can canister, São Paulo state MP class action..*



Is there any similarity with the Skol Summer Muse?:

*Image 18 – Frame from the 2006 Skol Summer Muse TV advertisement.*



This is clearly treating women as a commodity, as a thing!<sup>848</sup>

Similarly, the São Paulo State PROCON also pointed out that AMBEV, while defending the advertisement, clearly stated that women are things to be consumed, and that such behaviour harms the whole society by promoting discriminatory values:<sup>849</sup>

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<sup>848</sup> Réplica do Ministério Público do Estado de São Paulo, Promotoria de Justiça do Consumidor, processo n. 583.00.2009.165466-9, p. 602-3.

<sup>849</sup> Apelação interposta pela Procuradoria Geral do Estado de São Paulo, a favor de PROCON – Fundação de Proteção e Defesa do Consumidor, pp. 558.

In other words, using an ironic speech, very close to an informal conversation at a bar, AMBEV shows that, in its view, woman and beer are consumer goods ... ‘things’ ... Clearer than that, impossible.

(...)Humour is not necessarily innocuous and advertising informs, creates and stimulates patterns of behaviour. The sexist discourse used in the advertisement in question does nothing to build a more egalitarian society between men and women.

And no conduct can be excused if it serves to disseminate, and legitimate ideas that discriminate, that place the woman in the condition of a consumable object.<sup>850</sup>

CLADEM/Brazil, in its submission to the MPF, called attention to the symbolic power of the images in the *Skol* Summer Muse Campaign, arguing that the stereotyping process that is observed in the advertisement reflects the cultural environment but also reinforces idea of women as subordinated to men:

The look over women promoted by the “Summer Muse” [Campaign] is the stereotypical look that subjugates women, that deprives them of individuality, diversity, humanity. It is the look that imposes discrimination and inequality. This is not what women want. Women want and deserve – by what they are, by the rights conquered through many decades, and including by their condition as consumers – respectful marketing campaigns, and which respect women’s intrinsic human dignity, free from sexist and ethnic-racial representations that only reinforce the stereotypes that contribute to the massive social inequalities.

Considering the symbolic order, advertising uses some characteristics that are associated with femininity – anchored on the body as cultural capital – and with masculinity – anchored on the ownership of goods, suggesting ways in which the relationship between men and women is structured. This is precisely what we see in the *Skol* Summer Muse campaign, in which this stereotype is disguised in a pretense sense of humour. It is the sexual imaginary that reifies the feminine body as the attractive aspect of the advertisement.<sup>851</sup>

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<sup>850</sup> Apelação interposta pela Procuradoria Geral do Estado de São Paulo, a favor de PROCON – Fundação de Proteção e Defesa do Consumidor, pp. 572-3.

<sup>851</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 381.

The *Patrícia Galvão* Institute presented their submission on the case,<sup>852</sup> recalling the United Nations' IV Conference on Women (1995), according to which, in item J2, chapter J, states should promote a balanced and non-stereotypical image of women in the media, and condemns the advertisement:

This image [women being delivered to men] is intolerable in our society. This is an advertising device that is against all efforts made by the society and the State to promote ethical and civilian standards of respect between men and women.<sup>853</sup>

Along the same arguments, the São Paulo state PROCON argued that the 'moustache issue' and the lines in the advertisement that implied that the muse could be an imported good<sup>854</sup> are used to support the understanding that the advertisement objectifies women, by comparing them to beers that can be consumed:

In other words, if the 'guy' who created *Skol* had also created the summer muse, she would be within reach of every man, just like the *Skol* beer. Let's analyse a couple of scenes from the advertisement: the muse is cloned and **delivered on dollies** to many men. One of them complains that his muse **was a defective product** (because she had a moustache), and an older man asks if his muse was **an imported good**. We know that only a thing (and not a person) can be put on a dolly and delivered to consumers, or even be defective or be an imported good.

**Well, by comparing the muse to a product, in this case to the *Skol* beer, which is available to all men, the 'Summer Muse' advertisement objectifies the woman and, consequently, shows her in an inferior and subordinated position in relation to men. Men dominate, while women are dominated.**

It is important to remember that this advertisement video is part of a larger campaign entitled 'Inventions', promoted by the company, and it was

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<sup>852</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 347-355.

<sup>853</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 348-349.

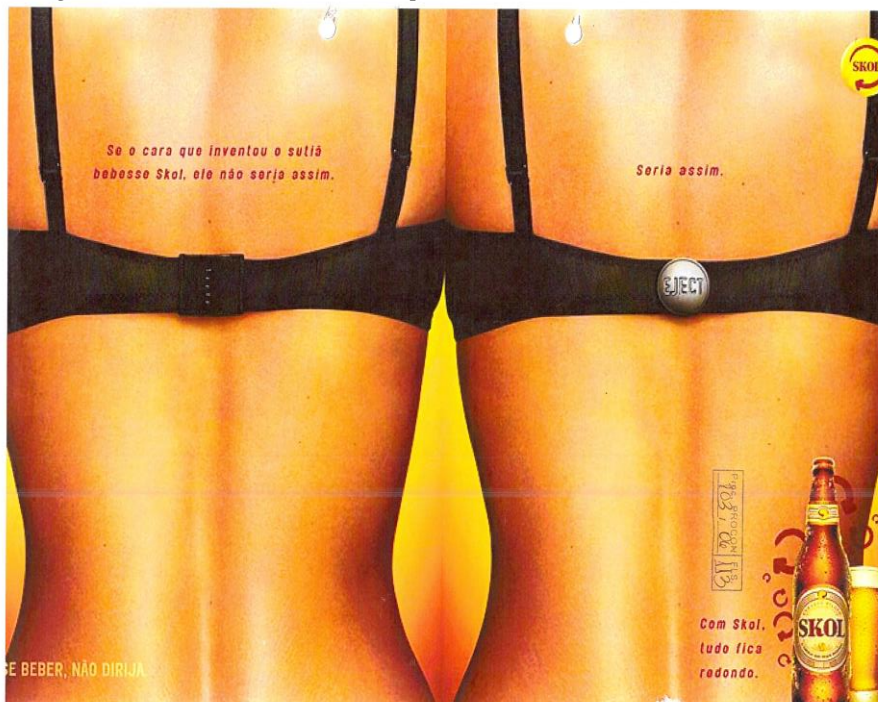
<sup>854</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, p. 92.

broadcast along with other advertisements, such as the ‘censorship tag’, ‘bra’, ‘changing room’ and ‘water fountain’.(bolded added by the author)<sup>855</sup> Curiously, we can notice that all the images in this campaign are rounded: the woman’s body, her breasts, her legs, her bottom, the beer label, the censor tags on each breast, the eject button that makes the bra easier and faster to open, the changing room curtain that only covers the woman’s face, leaving her body exposed, the water fountain that is only a few centimetres from the floor allowing anyone to see her legs and bottom. This circularity alludes to the slogans: ‘with *Skol* all is round’ or ‘*Skol*, the beer that goes down round.’

**In conclusion, the ‘Summer Muse’ advertisement is offensive because it treats women unequally and disadvantageously by showing them as an object that can be consumed, available to all men. The advertisement, therefore, contains a sexist message, being an instrument to perpetuate violence and discrimination against women.**<sup>856</sup>

The images referred to in this quote are the ones reproduced on the next pages:

*Image 19 – 2006 Skol Summer Muse printed advertisement, Bra.*



<sup>855</sup> Please refer to the images in chapter 3, “printed ads.”

<sup>856</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, pp. 92-3.

Image 20 – 2006 Skol Summer Muse printed advertisement, Bra.

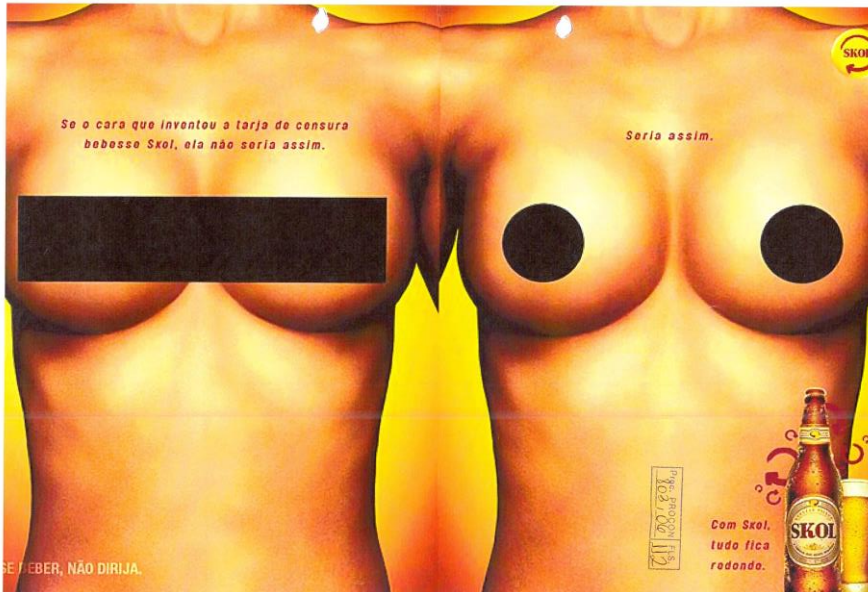


Image 21 – 2006 Skol Summer Muse printed advertisement, Changing room.



Image 22 – 2006 Skol Summer Muse printed advertisement, Water Fountain.



In another submission, the São Paulo PROCON defended the idea that this kind of advertisement is unacceptable in our times and that objectification of women has a clear connection with violence against women:

At the beginning of the last century it was unthinkable for a man to marry a non-virgin woman, nowadays it does not make the slightest difference. The advent of the contraceptive pill changed behaviours of men and women who no longer cared so much about unwanted pregnancy. Over time, behaviours have been changing, and advertising had played a big role in this process.

(...)We see girls, children still, carrying baby in their arms, since sexuality is stimulated by soap operas, movies, advertisements that show naked bodies, rampant consumerism (having to have), sex without barriers.

**In this sense, by transforming women into objects of men's desire, it is obvious that over the years advertising takes them [men] to treat women just like that: simple objects of pleasure.**

**Today, we face frightening news of collective rape by teenagers.**<sup>857</sup> And such violence doesn't seem to be enough: there is still the absurdity of filming the horrific events and publishing them on social networks! (...) **By lowering the woman to the object of men's desire, as a means of amusement, of seeking pleasure, one arrives at this chaotic state in which we find ourselves.**

(...)Advertising, when using these resources to sell products, which are often unnecessary, instils in the popular imaginary, little by little, a drop of water seeping into crevices, the idea of pleasure as essential, no matter the means used to obtain them.

**It is in this sense that the advertising conveyed by the manufacturer is considered abusive.**(bolded added by the author)<sup>858</sup>

This is the most objective and clearest discussion of the advertisement as being discriminatory amongst the submissions made by state bodies such as the São Paulo state PROCON, and the state MP,<sup>859</sup> in a way incorporating some of the claims made by Rachel Moreno, Instituto Patrícia Galvão, CLADEM, and CEPIA. In the PROCON's administrative procedure, images of the printed advertisements are also compiled, indicating that, together with the 30-second video advertisement, they compose a broader marketing campaign entitled "Inventions." In the printed versions of the advertisement, the intention to expose the feminine body, or focus on very specific parts of this body to sell products, is even more evident than in the video. For the general attorney representing

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<sup>857</sup> Collective rapes have been an ongoing problem in Brazil. Data from the Ministry of Health in Brazil shows that in 2019 Brazil had 5,372 cases of collective rape in the country, which would mean 14 cases a day or a case every 100 minutes. According to: Luiza Souto, "A cada 100 minutos, Brasil registrou pelo menos um caso de estupro coletivo", *Universa - UOL Online* (11 May 2021), online: <<https://www.uol.com.br/universa/noticias/redacao/2021/05/11/estupro-coletivo.htm>>.

<sup>858</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON. Impugnação aos embargos infringentes, 0005431-07.2010.8.26.0053, pp. 677-91.

<sup>859</sup> A few documents presented by the company were signed by a woman together with a man, but most were signed by men. The investigation at the federal prosecutor's office was, at some point, conducted by a woman too, but no concluding pieces/analysis were made at that stage. Coincidentally or not, this is the first document in the files signed only by a woman (with the exception of the feminists' stances).

PROCON, the focus on body parts, usually those that are most commonly associated with sex, like breasts and bottom, makes clear the process of sexualizing women in the *Skol* Summer Muse campaign.

This analysis offered by the São Paulo state PROCON was followed by a brief history of women's advancements within the last centuries, pointing out that even if much was achieved, within the media, women's representation is still a challenge, considering the common focus on fragments of women's images, on their body parts.<sup>860</sup> Their submission argued that this form of representation contributed to intensifying violence against women:

Whereas the word and image have such strength to produce what is said and what is seen, allowing this type of advertising is equal to potentiate violence against women and to refuel the discrimination they have suffered over the centuries.<sup>861</sup>

Here the power of language and images are acknowledged as powerful social discourses that can shape our attitudes towards individuals, in this case defining how we see women (as objects) or how we treat them: with violence and discrimination. PROCON also discussed whether the message conveyed in the advertisement harmed the whole of society or not:

We must keep in mind that advertising must meet its 'social function,' which means that, despite being a powerful tool to increase the sale of products and services, it cannot fail to respect the interest of the whole community. (...)

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<sup>860</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, pp. 93-4.

<sup>861</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, p. 96. State Attorney General's Office, Legal Advice to the Consumer Protection and Defense Foundation, - PROCON, case no. 803/2006. Technical manifestation, p. 96.

We see that the issue has been widely debated, which shows that this type of advertising not only hurts women, but society as a whole.<sup>862</sup>

In PROCON's submissions, many quotations from legal scholars and feminists follow, all of them claiming that showing women as things is not only a bad choice from the creative point of view, but extremely disrespectful to women's dignity: being sexist, an advertisement could not be seen as a joke. The PROCON submission also observed that in 2003 the sector (advertising agencies and producers of alcoholic drinks) made a public commitment to limiting sexual appeal in their marketing campaign,<sup>863</sup> something that has been not observed, as this case would be an example.<sup>864</sup> To this debate, PROCON added that using highly sexualized or stereotypical images of women in advertising dissatisfies women as consumers:

According to an opinion poll conducted at the time [July 2001], 50% (fifty percent) of the women who were heard felt disgusted when they saw the female body half-naked as a pretext for the sale of all kinds of products. Another survey conducted in June 2001, which asked 'what kind of advertising shocks you the most?', the answers were: those that show women in sexually provocative attitudes; those who stereotyped women [showing them]: on the stove, driving, as object women; those that show women entirely naked; those that show women who have suffered violence.<sup>865</sup>

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<sup>862</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, p. 97-8. State Attorney General's Office, Legal Advice to the Consumer Protection and Defense Foundation - PROCON, case no. 803/2006. Technical manifestation, p. 97-8.

<sup>863</sup> Fabiane Leite, "Cervejarias descumprem veto a erotismo", *Folha São Paulo Cotid* (30 January 2007), online: <<https://www1.folha.uol.com.br/fsp/cotidian/ff3001200701.htm>>.

<sup>864</sup> "It is clear that [the beer companies] keep ignoring their public commitment by using the woman as if she was a product, which can be bought and consumed by men, in this case the beer which goes down 'round' [smoothly] as the woman's body curves." Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, p. 101-2.

<sup>865</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, processo n.º 803/2006. Manifestação técnica, p. 105. State Attorney General's Office, Legal Advice to the Consumer Protection and Defense Foundation - PROCON, case no. 803/2006. Technical manifestation, p. 105.

In this regard, AMBEV claimed that one of the main goals of marketing is to make a difference so that people remember the advertisement and the product, calling the consumer's attention to a particular product or service. For the company, this is what led them to create this advertisement for *Skol*, and to choose to show a well-known television actress<sup>866</sup> (Bárbara Borges)<sup>867</sup> in the role of the summer muse:

**democratizing the chosen summer muse, always seen as someone who is distant and inaccessible, making her closer and tangible to all...just like a good beer should be.**<sup>868</sup>

(...)We argue that the 'Summer Muse' – and this is crystal clear for all those who watch the ad – is just an ad that shows a fantasy world and plays with fiction, it can't ever be mistaken for reality. The ad has to be seen as what it really represents: an ad aimed to promote beer: during summer time, we all want our 'muse', and we all want our favourite beer, *Skol*.(bolded added by the author)<sup>869</sup>

To support its claim that the advertisement is merely humorous and did not bother the consumers, AMBEV presented an opinion poll conducted on their behalf,<sup>870</sup> according to which only 3% of the interviewees declared that the *Skol* Summer Muse campaign objectifies women. The fact that only a few consumers saw a "problem" with the campaign, would be enough, for AMBEV, to ensure the end of any administrative or judicial

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<sup>866</sup> Global here refers to the most popular and influential TV channel in Brazil, called *Rede Globo*.

<sup>867</sup> "Instilled with this spirit [*animus jocandi*], in mid-March 2006 AMBEV launched the 'muse of the summer' campaign to promote *Skol* beer. The ad, starring global star Barbara Borges, aimed to democratize the then-elected muse of summer, always seen as distant and inaccessible, making it close and tangible to everyone ... just as a good beer should be." Processo n. 053.10.005431-8, Ação ordinária com pedido de tutela antecipada contra a Fundação de Proteção e Defesa do Consumidor – PROCON/SP.

<sup>868</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 575

<sup>869</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 39.

<sup>870</sup> This opinion poll is submitted in all venues where the case was discussed: MPF, São Paulo state MP, São Paulo PROCON, and CONAR.

proceeding against the company, being proof that the majority of Brazilians did not see any discrimination in the campaign.

AMBEV hide the fact that the opinion research was conducted on the company's behalf and that only people who had seen the advertisement and could remember it, in busy locations of São Paulo city were interviewed . This resulted in the sample being as following: 82% of the respondents were men, 67% belonging to the classes A and B, and 69% were between 18 and 29 years old, precisely the targeted audience for this beer.<sup>871</sup> Therefore, the sample is quite limited to an urban population, and made up mostly of young men. When asked what they remembered from the advertisement, 62% recalled the cloning process, 59% mentioned the moustache (and 61% pointed out that this was showed as a defect), and 52% recalled the delivery of muses to consumers at home. Only 2% of the interviewees said it was a funny advertisement.<sup>872</sup> The moustache is something that shows up at many points in the poll and one of the concluding remarks pointed out that: “91% of the respondents understood the advertisement. The main point that was not understood was the muse with moustache.”<sup>873</sup>

Rachel Moreno argued that the opinion poll was not representative considering the age and social class of the interviewees. She also noted that only a few women (18) answered the

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<sup>871</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 55.

<sup>872</sup> IBOPE Solution, Avaliação de Propaganda SKO1 ‘Musas’ Job 248/06, Março/2006, p.p.2, 4, 9, 10 and 11. Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, p.173-223.

<sup>873</sup> “91% entenderam a propaganda. O principal ponto não entendido refere-se à aparição de musa de bigodes.” IBOPE Solution, Avaliação de Propaganda SKO1 ‘Musas’ Job 248/06, Março/2006, p. 42. Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, p.214.

poll and that the results were not stratified by gender, making it impossible to see if women had a different perspective than men. She informed the MPF's representative that against the unclear opinion of 18 women from social classes AB, 23 other women took the time to formally complain about the issue before the CONAR and the São Paulo PROCON. She concluded by saying that the poll was not diverse enough to be considered representative and did not serve to indicate society's perception on the issue (whether the ad is discriminatory or not) and that it measured only the impact of the creative idea of the ad amongst a very particular community (and impact, here, seen as people noticing the advertisement as somehow different from regular beer advertisements). As a closing argument, she compiled multiple documents proving that other women were troubled by the *Skol* Summer Muse campaign and complained to CONAR and that São Paulo PROCON was also investigating the issue. One of the women who reached out to CONAR stated:

**I have never seen the concept of woman-object so clearly.** There is even one actor that says his [muse] came with a defect because she had a moustache. **I think that exploiting women to sell beer is dreadful, but in this case, it is off limits:** the ad shows a 'fabric' of beautiful women. So many years fighting for equal rights for women, this is just outrageous.(bolded added by the author)<sup>874</sup>

Along similar lines, CEPIA's submission concluded that the *Skol* Summer Muse campaign was offensive to Brazilian women's dignity, and pointed out that the results of the poll presented by *Skol* only proved how much the Brazilian state still needed to work on the social and cultural values that promote and perpetuate a culture of stereotypes and prejudice

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<sup>874</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 292.

against women. CEPIA further concluded that it is still commonplace in Brazil to find the use of sexist stereotypes that offend women's dignity natural, funny, and even creative.

CEPIA argued that the *Skol* Summer Muse campaign, using humour as an excuse, reinforced the dehumanizing pattern which presents women as objects that are produced and delivered to men. For CEPIA, this idea reproduces the stereotype that Brazilian women are easily "consumable" and available through mass production to satisfy men's desires:

the supposedly humoristic characteristic of the Campaign hides the disrespect and the disregard to women's dignity and equality as established in the 1988 Constitution and the Human Rights International Treaties. **For CEPIA, in the Campaign the woman is presented in a sort of auction to excited men, while her clone ('the cloned muse') is delivered, as a product, in a cart to transport loads, like the ones that transport fridges and other objects, passing from hand to hand, from man to man, sometimes presented as coming with a 'defect' or even being considered an 'imported good'.** Likewise, in the advertising campaign, men are the protagonists, the ones who deliver and are gifted with 'something, a product to be consumed, under *Skol*'s sponsorship.

**It is clear that a particular kind of humour was used to disqualify, mark as inferior, devaluate, and dehumanize women and black people in Brazil, a population [women and black people] which accounts for a representative group in our society that historically, has been excluded from enjoying civil, political and social rights, and has been treated as second class citizens.** The protests of women's groups and movements against this sort of advertisement must be taken into account by advertising agencies and also by CONAR. (bolded added by the author)<sup>875</sup>

CEPIA's submission to the MPF also noted that there is substantial international sex tourism to Brazil, and that the advertisement would reinforce the idea that Brazilian women are always sexually available, therefore encouraging sex tourism. CEPIA is also the

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<sup>875</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 345.

organization that most clearly raises the issues of race and lack of representation of the diversity of the Brazilian society in the campaign.

CLADEM's submission to the MPF pointed out that Brazilian law allows beer advertising during the day, a time when children and teenagers are exposed to it, people who are still forming their identities and values. The use of resources as the cloning images and fantasy environment would be a way to draw young people's attention to the advertisement, harming future generations and violating not only women's rights but also children's rights:

By reinforcing negative stereotypes about the female image – the female representation in *Skol's advertisement enacts the idea of a 'woman-symbol', of an ideal woman, 'a woman-illusion', a 'perfect woman', here understood as one that does not have any will, no autonomy and serving to fulfill men's needs* – AMBEV promotes a bad image of women for the younger generations. This might be the most worrisome aspect of the *Skol Summer Muse* campaign, since we are looking at an advertisement that has great appeal towards the youth. The young people do not have yet enough critical view and could be easily taken by the campaign, absorbing it and taking it as just one more funny, ludic and entertaining campaign. (bolded added by the author)<sup>876</sup>

AMBEV tried to justify the advertisement as unproblematic by saying that if the advertisement showed women fraternizing in a bar, it would not be discriminatory, so why is it considered discriminatory when men are doing so? But the *Skol Summer Muse* did not show women as consumers of the beer, but as objects of consumption: women who were cloned and delivered to men in bars, coming as a souvenir with the beer. The Muse was never shown drinking the beer or toasting with the other consumers. Rather, she only stood there, speechless, in her bikini, waiting to be consumed. For myself and the feminist

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<sup>876</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 352-353.

organizations that engaged with the case, the fact that the woman had no will of her own, but was delivered and treated visually as an object, is a clear indicator of the objectification process that organizes the main ideas in the *Skol* Summer Muse campaign. CLADEM discussed this point in its submission to the MPF:

According to Begoña Ibarra, beer advertisements have been violating women's rights by stimulating the commercialization of women's image. By commercialization, Ibarra understands the process of **woman's dehumanization that happens when she is shown as if she was "a thing", as if she was part of the product that is being sold, or the product itself.** And this is clear in beer ads, since in these cases there is an attempt to merge the object being sold, meaning the beer and the woman.(bolded added by the author)<sup>877</sup>

That the use of highly sexualized women to increase sales is common within marketing strategies is not a secret or a claim made only by the feminist movement to the MPF; this association between beer and hypersexualized women is very common in Brazil, as well as in many other countries.<sup>878</sup> This is not by chance; instead, it is closely tied to social values, since: "Advertising works with values that circulate within societies, as if they were natural, when they are, in fact, constructed as social meanings and contexts."<sup>879</sup> In short, there is a constant negotiation and construction of personal values in relation to other social values, including values promoted by markets.<sup>880</sup>

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<sup>877</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 378.

<sup>878</sup> When it comes to women and alcohol advertisements, this is not only a Brazilian tendency. This happens in other countries as well, as in United States, for example: Jean Kilbourne, *Can't buy my love*, (New York: Touchstone, 2001).

<sup>879</sup> Heloísa Buarque de Almeida, *Muitas mais coisas: telenovela, consumo e gênero* (DCL Thesis), Universidade estadual de Campinas, Instituto de Filosofia, Letras e Ciências Humanas, 2001, at 219.

<sup>880</sup> "In the face of messages glorifying the path of consumption and wealth, all of us to some extent take on or internalize materialistic values. That is, we incorporate the messages of consumer society into our own value and beliefs systems. These values then begin to organize our lives by influencing the goals we pursue, the attitudes we have toward particular people and objects, and the behaviors in which we engage." Tim Kasser, *The high price of materialism*, (Cambridge: MIT press, 2002) at 26.

### 7.1.2 On Bikinis and Moustaches

At some point, AMBEV sought to frame the discussion as a problem related to women being shown wearing bikinis. By focusing on discussing the “bikini issue” and its supposedly moralist implications, AMBEV attempted to disconnect the discussion from the women’s rights standpoint and equate showing women in bikinis to showing men in speedo suits in advertisement. To AMBEV, showing women in bikinis at the beach is a natural thing, since women in Brazil “don’t wear burkas or fur coats, but bathing suits.”<sup>881</sup>

AMBEV argued that to show women in bikinis in an advertisement would not be obscene or excessive/fanciful and would not appeal to sensuality, but on the contrary, would promote an atmosphere of fun and humour and help consumers differentiate *Skol* from other beers.<sup>882</sup>

AMBEV insisted on this issue, stressing that the use of bikinis does not have any special connotation because an advertisement to promote underwear that showed soccer players wearing minimal clothes would not be discriminatory either.<sup>883</sup> Besides the fact that the discussion is not exclusively about how the characters are dressed in the advertisement, but that women are cloned and delivered to men, this inversion (men in speedo suits) is not exactly common in advertising. In general, women are the ones whose usually hypersexualized body parts represent them in advertising, especially when alcohol products are being advertised.<sup>884</sup> Otherwise, women are shown as mothers and professionals, who

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<sup>881</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 578.

<sup>882</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 575.

<sup>883</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 584.

<sup>884</sup> Killing us softly 4 [videorecording]: advertising’s image of women/ a Media Education Foundation production; directed by Sut Jhally. Northampton, MA: Media Education Foundation, 2010.

use products to handle all the tasks involved in both the unpaid care work and the paid work they do. In this context, when feminists demand more equality within the media, it is hard to believe that they seek practices that objectify men as women are objectified. This is not the kind of equality the feminist movement has been fighting for, and shows an impoverished understanding of substantive equality and fair representation in the media.

AMBEV argued that showing women wearing whatever they wanted to would not be discriminatory, but empowering, a liberating practice for women. Here we observe the appropriation of a feminist discourse to support the defense of the advertisement as not discriminatory: women should be able to decide what to wear. This is not a simple discussion: are women free to choose what they want to wear? And how much of what they wear is associated with the appropriateness of their sexual conducts (in the classic example of justifying sexual harassment or sexual violence based on how the victim was dressed)? In the case of the *Skol* Summer Muse campaign, as in other advertisements, the actors hired for the campaign did not choose what to wear, but rather were dressed and placed in specific positions to support particular discourses: everything in a marketing campaign is intentional, and is designed to capture the consumer's attention and convince them to consume the product being advertised. Therefore, the images in the *Skol* Summer Muse campaign cannot be taken as a proof that women dressed in bikinis are empowered and do so of their own will, as well as that the advertisement supports such liberation.

To support the point of view that women wearing bikinis in their campaign was a sign of liberalization, of women exercising their freedoms, AMBEV claimed that women largely 'benefit' from the hypersexualization of their bodies to obtain fame, money, and success. In this context, for AMBEV to complain about the Summer Muse campaign would be a

contradiction. As examples of women benefitting from the hypersexualization of their bodies, AMBEV cited the dancer Carla Peres, the hip-hop singer Tati Quebra-Barraco, and the model who played the “Mulher Samambaia” (Fern Woman) in a famous television show.

Carla Peres, Tati Quebra-Barraco, and Mulher Samambaia are women who became famous in Brazil by exposing their bodies in highly sexualized and erotic ways. Carla Peres was a dancer in a musical group,<sup>885</sup> which explored sensual movements and double meanings in the lyrics of their songs. In this case, we have the exploitation of the feminine body to boost the success of the group. Dressed in body revealing shorts and tops, she danced choreographies that enacted sexual practices.

In Brazil, many people have ferns in vases as decoration for their houses. Mulher Samambaia (Fern Woman) was a highly sexualized television character who wore a fern plant costume: a bikini with leaves attached to it. Her role during the television show was mostly to expose her body and look sexy (see Annex 2 and picture below). Here her body is exploited as an appealing image that could draw spectators to watch the television show. In both cases, the two women would barely speak: their job was to show perfect sculpted bodies and look or act sensually, being represented as things most of the time, as the name Mulher Samambaia (or Fern Woman) and its image clearly suggests. In the image below we can see the Mulher Samambaia, dressed up (or undressed?) as a fern. She was placed on

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<sup>885</sup> É o Tchan, musical group that became famous in Brazil in the 1990s: Wikipedia, “É o Tchan!”, online: *Wikipedia* <[https://en.wikipedia.org/wiki/%C3%89\\_o\\_Tchan!](https://en.wikipedia.org/wiki/%C3%89_o_Tchan!)>. They became so famous that they made presentations even in TV shows directed to children: *É o Tchan - A dança do Bumbum 1996 - Xuxa HITS*.

the stage as a “decoration” piece, as a vase, and would just stand there, as a plant, throughout the television show:

23/08/2021

image.jpg (620x728)

*Image 23 – Fern Woman, Pânico na TV – TV show, see appendix 01.*



[https://www.otempo.com.br/polopoly\\_fs/3.207958.1534215703!httpImage/image.jpg\\_gen/derivatives/main-photo-multi-article-f1-resize\\_620/image.jpg](https://www.otempo.com.br/polopoly_fs/3.207958.1534215703!httpImage/image.jpg_gen/derivatives/main-photo-multi-article-f1-resize_620/image.jpg)

1/1

Tati Quebra-Barraco is a more controversial character. She dresses provocatively and is considered the first successful woman in Brazil to do hip-hop, breaking “the barrier of

male-only funkera. ”<sup>886</sup> Although there is plenty of criticism about how women are dressed for funk parties in Rio de Janeiro (considered by many to be immoral and overly sexualized, among other critiques), women like Tati Quebra-Barraco argue that the way they dress and the way they expose their bodies is their own choice and business, and therefore, an empowering act. Being a form of empowerment, her way of dressing would also reflect choices and sexual freedom,<sup>887</sup> something equally present in her lyrics and songs, which in general have heavy sexual content. Another relevant issue is that most women (or really, most people) who attend the funk parties in Rio de Janeiro are black or racialized, and belong to under-privileged social classes. The *Skol Summer Muse*, on the other hand, is clearly white and belongs to the upper class. Therefore, comparing them and their relationship with their bodies and sexuality is, to say the least, very complex. Women like the Summer Muse and women like Tati Quebra-Barraco, although both having some sort of fame, belong to very different universes, just like their sexuality and their bodies are also perceived differently by the society.

AMBEV correlated these two different highly sexualized representations of women (Tati Quebra-Barraco on one side, and Mulher Samambaia and Carla Perez on the other) to justify and normalize the way the muse is shown in the advertisement. The argument here is that Brazilian culture normalizes this type of representation and that the *Skol Summer Muse*

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<sup>886</sup> *Ibid.*

<sup>887</sup> Bárbara Pereira, “Mulheres funkeiras reivindicam seu espaço na música com mensagens de liberdade sexual”, *O Estado São Paulo* (15 May 2019), online: <<https://emails.estadao.com.br/noticias/comportamento,mulheres-funkeiras-reivindicam-seu-espaco-na-musica-com-mensagens-de-liberdade-sexual,70002826956>>; Coletivo Doroteia, “Funk e feminismo: as MCs que provam que funk também é lugar de mulher”, *AzMina* (4 February 2019), online: <<https://azmina.com.br/especiais/funk-e-feminismo/>>.

was merely in conversation with this imaginary. But it is this imaginary that objectifies women, by showing them as objects of desire, often with minimal clothes, that is problematized and contested by feminists. One main critique is that we live immersed in a sexist culture that emphasizes women's bodies so much that often a woman's success within the media depends on how she shows her body. In this context, many singers exhibit their bodies in their seek for success. Is this a movement that fosters empowerment or that represents and reproduces the sexist structures of our societies? This is precisely the debate, and it is this patriarchal and sexist structure that feminists are fighting against, including the normalization of the hyperexposition of female bodies to please men.

Throughout all of the litigation, AMBEV insisted that showing women in bikinis is a natural thing in a tropical country like Brazil, especially on the beach. To AMBEV, showing women in bikinis at the beach is obvious, natural, and all other companies use this strategy to promote their beer products.<sup>888</sup> In view of that, it would be unfair to impose a fine against AMBEV alone.<sup>889</sup> To be clear, the bikini itself was never a problematic issue raised by the feminists or the MPs. The feminists, the São Paulo state MP (authors of the collective lawsuit) and the fine imposed by PROCON focused less on the fact that the woman in the advertisement was wearing a bikini and more on the fact that she was

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<sup>888</sup> “Mostrar uma atriz de biquíni em um anúncio de cerveja é igual mostrar um ator de sunga, na propaganda de outros inúmeros produtos, de chocolates a salgadinhos. E, na praia, onde se bebe cerveja destinada ao verão Brasileiro, como a Skol, não se usa burka, xador ou casacos de pele!”. Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 578.

<sup>889</sup> “if everybody does it [show women in bikinis and hypersexualized], why would it be illegal when AMBEV does it in an advertisement?” Companhia de Bebidas das Américas – AMBEV. Agravo de Instrumento com efeito suspensivo, nos autos da ação ordinária n. 053.10.005431-8) contra PROCON/SP, p. 362-3.

delivered as a thing to male consumers. This is the key point being discussed by the social actors who deemed the advertisement discriminatory against women.

Brazil has a long history of hypersexualizing women, not only shown during carnival but overflowing into all aspects and most of the contexts in Brazilian society. Brazilian television shows frequently explore feminine bodies as part of their set dressing, as the *Mulher Samambaia* makes so evident. It is precisely this kind of representation of women in the media that the feminist movement fights against. It is because the *Skol Summer Muse* campaign aligns with this form of representation, and reinforces it, that the feminists stood up in the first place.

It is with this cultural context in mind that Rachel Moreno, CEPIA, CLADEM, Instituto Patrícia Galvão, the São Paulo MP, and the São Paulo PROCON, insisted that the problem was not that the Summer Muse wore a bikini, but that she was shown as an object to be delivered to men, a thing that can come “with a defect,” such as the moustache; or that looks so nice that is “considered an important good,” an object of desire that can “beautify” men’s lives. The reference to the “imported good” needs to be seen in the context of a late development consumer society, typical of peripheral economies.

In one of the frames of the *Skol Summer Muse* television advertisement, an older man is surprised by the muse he receives and asked if it is an imported good. This surprise reflects a cultural aspect of Brazilian society, linked with the late process of industrialization. In Brazil, the industrialization process has focused more on exporting basic supplies and importing complex manufactured goods. Imported goods have always been very expensive and inaccessible for the majority of the population. Therefore, there is a level of glamour

that is related to consuming imported goods, both because it shows a higher social status and because it shows refinement and taste in tune with places at the centre of capitalism, like Europe and United States.

On the topic of refined tastes and imported goods, I note how visual representations of the muse feature a very specific kind of beauty, aligned with the valorization of European aesthetics: the muse is white, blonde, and young, revealing a kind of beauty that is highly valued in Brazil but does not represent the physical type of the majority of our population, which is racialized (as shown in chapter 2). Most of the consumers in the advertisement are also white and young. Therefore, the lack of visibility of other bodies (in terms of shapes, colours, and identities) visually reflects the structural racism in our country. Here, the Summer Muse body is seen as the norm, as what it should be, as what is desired. And this body is seen as non-conforming, as deviant, when it has a moustache, a physical characteristic associated with masculinity.

This happens in another frame of the video advertisement, where the beer-shaped-muse delivered to one of the consumers has a moustache. In the next frame, the consumer says, while receiving his muse, in a complaining tone: “Only mine came with a defect!”

Throughout the litigation, this sentence generated an intense debate about what the moustache, considered as a “defect” means: would the moustache be evidence that the advertisement objectifies women or would it simply qualify the advertisement as humorous? While Rachel Moreno, CEPIA, CLADEM, Instituto Patrícia Galvão, the São Paulo state MP and the São Paulo PROCON argued that the moustache clearly showed how the woman was being objectified, since only objects “come with defects” from the

manufacturers (people don't "come" with defects), the company used this frame to show how explicitly humorous the advertising was.

It is in this context that we can see that the advertisement, both video and printed versions, works within a clear heterosexual framework. It supposes that the consumer is a heterosexual man, who praises the beauty of the perfect woman, a "muse" as she is called. All the muses look alike, since they have been cloned in the consumer's imagination, except the one that has an ostentatious moustache. The fact that such a characteristic is considered a defect makes explicit the strictly heteronormative construction of the images and the gender identities of the characters in the advertisement.

The moustache "issue" makes evident gender rules and expectations regarding what is acceptable and what is not when it comes to women's body hair: women are not supposed to have moustaches, especially women who are muses. Having a moustache is a sign of something "being wrong", a "defect," according to the narrative of the ad. It is considered a defect because moustaches, in our patriarchal societies, are traditionally a sign of masculinity, and women should not show body hair of any kind.<sup>890</sup> In a way, this discourse reflects and reinforces the perception of a heterosexual matrix that naturalizes, by defining as opposites, the differences both in terms of sexuality and gender, as Maria Filomena Gregori observes:

The heterosexual matrix naturalizes this kind of composition that is at once both sexual and gender, embodied and behavioural, establishing a dimorphic

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<sup>890</sup> Gordon B Forbes et al, "Sexism, Hostility toward Women, and Endorsement of Beauty Ideals and Practices: Are Beauty Ideals Associated with Oppressive Beliefs?" (2007) *Sex Roles* 265–273; Samantha Kwan & Mary Nell Trautner, "Beauty Work: Individual and Institutional Rewards, the Reproduction of Gender, and Questions of Agency" (2009) *3:1 Sociol Compass* 49–71 at 55-57.

relationship; it creates a relationship that defines the difference between men and women as impossible to quantify but also as necessarily complementary. Therefore, this relationship is set between men and women, masculine and feminine, penis and vagina.<sup>891</sup>

From a conservative and misogynous perspective, body hair on the legs, armpits, and face are visually and clearly identified with masculinity and overly showing it brings suspicions about a woman's status as a woman. That means that not conforming to particular beauty standards may indicate a deviant gender identity. So, the 'defect' here plays with gender rules in a way that reaffirms such rules by establishing how men and women should look according to the heterosexual matrix. For John Berger, omitting women's body hair in paintings and images is historically associated with conferring and denying power:

Here and in the European tradition generally, the convention of not painting the hair on a woman's body helps towards the same end [focus on his sexuality]. Hair is associated with sexual power, with passion. The woman's sexual passion needs to be minimized so that the spectator may feel that he has the monopoly of such passion.<sup>892</sup>

In this context, a woman with a moustache does not conform to the idea of how a woman should look or behave, and is expected to appear and be positioned. It visually represents expectations about female behaviours. By making the defect a funny thing, the advertisement reinforces the heterosexual matrix visually and symbolically. While using such a defect as a form of "humour," it conveys ideas of exclusion and discrimination to make a joke: women who somehow do not conform to the beauty standards of the Summer Muse by being black, Indigenous, or Asian, older, or any person in the LGBTTQ+2

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<sup>891</sup> Maria Filomena Gregori, *Prazeres perigosos: Erotismo, gênero e limites da sexualidade*, 1st ed (São Paulo: Companhia das Letras) at 107.

<sup>892</sup> John Berger, *Ways of Seeing* (London, UK: Penguin Random House UK) at 55.

spectrum that has any sort of supposed “non-conformity” could be subjected to the joke. Therefore, the supposed gender non-conformity expressed by the moustache only “works” as a joke in this very strict and limited environment of the heterosexual matrix. The issue of humour and exclusion is discussed further in this chapter.

Another topic that was highly debated was whether the cloning process could be seen as evidence of objectification. According to AMBEV, the Muses’ cloning process merely signalled the fantasy world in which the advertisement took place, and just like in sci-fi novels and films, would only make it evident to the viewer that the video is a fiction and does not represent reality:

What we are trying to say/state is that the ‘summer muse’ – and this is evident for all everyone who sees the advertisement – is an advertisement that takes place in the fantasy and fiction world, like a Spielberg or Jerry Bruckheimer’s film; and therefore can’t be seen as the real world, but simply as what it truly is: a TV advertisement that aims to sell beer.<sup>893</sup>

Judge Ênio Santarelli Zuliani, the leading judge for the class action proposed by the São Paulo state MP (2012), siding with AMBEV, ruled that the *Skol* Summer Muse campaign did not objectify women:

Additionally, the ‘cloning process’ and the ‘home delivery’ shown in the advertisement, **although they can transmit an idea that women are being commercialized, do not mean that women were objectified**, since such representations are limited to the image of a muse from a specific summer (2006).<sup>894</sup>

(...) Therefore, the fact that the **advertisement focuses on the worship to the body, to the beauty, and to sensuality, in the present case, it does not mean any form of devaluation of women** and their uncountable virtues,

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<sup>893</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 585

<sup>894</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 699.

which, as known, go way beyond the physical aspects.(bolded added by the author)<sup>895</sup>

He decided that the advertisement can “transmit” the idea of women being commercialized, but for him, this did not mean objectification. It was only a way to praise women’s beauty through a humorous narrative intended to sell beer:

However, what we see in this case is only more humorous satire than any pejorative or discriminatory intention. **It is even absurd to imagine that the advertisement’s goal was to convince the spectator that buying the beer would result in the distribution of beautiful cloned women.** The advertisement does not propose this unrealistic connection and does not stimulate people to be more or less sexist. Everybody knows or should know (regardless of the advertisement), that consuming an alcoholic drink will not bring the announced souvenir, which is clear considering that the image of the woman in bikini is unreal. It is not any unfortunate joke and without any intention to offend that will be able to bring more or less value to women’s role, intelligence, capacity and importance. **The truth is that the advertisement, even if can be considered rude, does not undermine the woman or her desires and social positions.**

The advertisement’s intention, contradicting the offensive aspect claimed by the plaintiff, is to promote creativity or playfulness, associating beauty, the hot weather and the minimal clothes, the good sense of humor, the joy, and the summer to the beer’s consumption. Even if this can be criticized, it is a quite normal association in a tropical country. Beer advertising are well known by their originality, even if sometimes they can be playful and funny. In light of these circumstances and considering what can be seen in the advertisement discussed in this case, **it is clear that the main goal is not to objectify women, but to attract with humour, by creating a fictional scenario that make all consumers laugh, comment, and remember the brand and the product being promoted.** Therefore, there is no offense to article 37, §2º, CDC.

(...) **The advertisement can be considered distasteful, which does not mean prejudice and discrimination, and not offending women’s dignity.**(bolded added by the author)<sup>896</sup>

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<sup>895</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 700.

<sup>896</sup> Poder Judiciário. Tribunal de Justiça do Estado de São Paulo, voto n. 23627, juiz relator Ênio Santarelli Zuliani, 4ª Câmara de Direito Privado, p. 700-1.

Judge Ênio Santarelli Zuliani seems to embody the market discourse, also permeated by misogynist perceptions about men and women and their status in the society. As discussed in the following section, this idea of excusing discriminatory behaviour as a form of humour reveals positions of power and privilege: who is in a position to laugh and who is in a position to be laughed at? Additionally, as already discussed, in the legal framework of the Brazilian *Consumer Code*, the intention of the provider is irrelevant: if damages are proven to have been caused, reparation is due.

But if in 2012 the majority of the judges acting on the case decided that the *Skol* Summer Muse campaign was a funny narrative that should not be addressed, in 2016 things started to change. On objectification, Luiz Serio Fernandes de Souza, deciding on the action proposed by AMBEV against PROCON (2016), explained why he considers the *Skol* Summer Muse campaign offensive to women, by objectifying them:

This is not only a matter of saying that the campaign is manifestly artificial, since it gives a thousand turns just to show the female body, associating the consumption of beer to the access of men to aesthetically perfect women. More than this, **the advertising campaign gives the message that it would be good if someone who ‘invented’ a beer brand appreciated by most men could also ‘invent’ a woman ready to be consumed at any time.** Considering this process of objectifying women, gender issues cannot be disregarded to say, as the author does, that the advertisement merely invokes symbols of the summer, such as the sun, the sea, a scene in which men and women appear to party in bathing suits. In fact, what you see in the advertisement are 'cloned women', loaded into carts, the kind you see in supermarkets, being delivered by men to men. In the words of the author, the idea is to convey the message that, in that fantastic world, muses, or perfect women, would be at the disposal of any man, as well as beers of the brand Skol.

**The argument of the advertising is more than unfortunate, because it ‘discriminates’ the woman by serving her, by delivery, to the pleasure of consumers. In other words, the feminine gender becomes an object of consumption.** One might say that it is only a clone of a woman, not a

woman of flesh and blood. But the advertisements are never made of people of flesh and blood, and therefore the company's argument fades when faced with the power of suggestion that the marketing exerts.

(...) The women's fight for equality within society has been gaining more and more space in the world. At a time when society seeks to ban the idea that the female gender is merely an object of pleasure, one cannot legitimately claim that the women's value/rights is a flag of only a certain (radical) sector of society. **Everyone is engaged in overcoming gross stereotypes, a common place when the subject is advertising. It is striking to remember that in the second half of the last century it was common to use the image of housewives being beaten by their husbands in advertising, as happened in an iconic advertisement sponsored by an American coffee company in the 1960s, among many other examples. It is also impressive that in the 21st century a multinational, multibillion-dollar company is investing in an overtly prejudiced advertising campaign and then claims it to be just 'funny'.** It is worth to remember that in such advertisement one regrets that *Skol* does not have the same capacity to produce good, pleasant and affordable things when it comes to providing women with 'market consumption'. (bolded added by the author)<sup>897</sup>

On this issue, judge Magalhães Coelho, who ruled in the case on PROCON's fine in 2016, decided:

As it can be seen, an objective analysis of advertisement, that is, the simple description of its scenes shows two main figures: the man who is the subject/consumer man and the woman who is the object/product to be consumed. The man in the advertisement is not only the 'inventor' of the product 'Summer Muse' but is also its final recipient. The woman in the advertisement is compared to a bottle of beer, and this is confirmed by the affirmation that suggests that if the 'guy' who invented *Skol* beer had also invented the 'Summer Muse' it would look like this: beautiful and accessible to all who, of course, could pay for it.

Perhaps the transformation of women into the product of 'Summer Muse' is not shocking enough in a capitalist world where social relations are mediated by commodities and in which everything is valued.

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<sup>897</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do relator (des. Luiz Sergio Fernandes de Souza) p. 622-4.

However, while I accept the world we live in, I understand that human dignity cannot be equated with a bottle of beer, which is the reason why women are discriminated against in this advertisement, in my opinion. Discrimination is, therefore, the unequal treatment of men and women. The man is put as a subject, as one who holds control not only of production but also of the consumption of the 'Summer Muse.' To the woman, therefore, it is reserved the role of product, that is, of something without any autonomy and that can be valued only by its appearance. Were these not the roles reserved for the man and the woman in the propaganda, there would be no conclusion that one of the 'muses' was 'defective' for coming with a mustache.<sup>898</sup>

Judge Moacir Peres agreed with the leading judge (Luis Sergio Fernandes de Souza), ruling that the advertisement is abusive/offensive. He decided that the concept of discriminatory advertising has been open to interpretation by legal scholars and jurisprudence over the years, and that the judiciary have been understanding this provision of the *Consumer Code* as protection of the consumer's vulnerability,<sup>899</sup> such as in the case of advertising to children. For him, the Summer Muse campaign objectifies women, ignoring that women too are consumers:

By this [the advertisement], it creates the idea that the woman is a commodity to be produced in series and freely consumed by men. **By discriminating against the woman, the piece discriminates, separates, separates the genres, treating the male sex as the consumer and the feminine as a good to be consumed, which must be perfect (the advertisement alludes to a copy of the 'Musa' that would have a 'defect') to satisfy the wishes of consumers.**

(...) Currently, there is research indicating that a significant portion (about 1/3 to close to half) of the Brazilian beer market is formed by women. Of course, a brewing industry campaign should consider and value this considerable portion of its relevant market.

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<sup>898</sup> Poder Judiciário, Tribunal de Justiça do Estado de São Paulo. Voto 33.046, Des. Magalhães Coelho, embargos infringentes n. 005431-07.2010.8.26.0053/50000, p.712-5.

<sup>899</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do segundo desembargador (des. Moacir Peres) p. 633.

However, marketing issues aside, **the advertisement in question is abusive/offensive because, by objectifying the woman, treating it as a product that should be distributed by the manufacturer for male consumers, it creates a discrimination and offends the values of a niche population.**

It is not my intention to analyze the actual offensiveness of the advertising piece (since each potential consumer would react differently to it), but like in the case of the treatment given to children's advertising, we should look for the potentially abusiveness of the message.(bolded added by the author)<sup>900</sup>

Besides acknowledging that through objectification the *Skol* Summer Muse campaign excludes women from the consumer market, judge Moacir Peres added that the ‘moustache’ being seen as a defect contributes to corroborating the understanding that the advertising objectifies women. In his decision, he ruled on how such representation of women is incompatible with the current fight for women’s equality in Brazil. He observes how active the feminist movement in Brazil has been, including in its discussions on violence through social medias by popularizing specific hashtags(#meuprimeiroassedio<sup>901</sup> and #meuamigosecreto<sup>902</sup>):

In this context, feminism has intensified its struggle for equal rights. In the past year, campaigns carried out on social networks, such as #myfirstharassment and #mysecretfriend, had a great impact. Additionally, women’s mobilizations took the form of demonstrations such as those held against the approval of the law that would make it difficult to access the morning-after pill.

So even though some celebrities still use their physical image and their sensuality to promote themselves, **there is certainly a growing awareness of the need to break from old-fashioned stereotypes picture: ‘a good woman as pretty, stupid and obedient’**. Women have gained space in the

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<sup>900</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do segundo desembargador (des. Moacir Peres) p. 634.

<sup>901</sup> Suggested translation to English: #Myfirstharassment.

<sup>902</sup> Suggested translation to English: #MysecretSanta.

labour market and in the consumer market, so there are more and more advertising campaigns aimed at this public, including campaigns that promote acceptance of the real woman, the real body. (bolded added by the author)<sup>903</sup>

By talking about the feminist movement in his decision, this judge acknowledges its importance and recognizes it as a relevant and valid interlocutor.

Additionally, as extensively discussed by Rachel Moreno, CEPIA, Instituto Patrícia Galvão, and CLADEM, the visual representations of the Summer Muse refer not only to physical attributes: the ideal woman, the Muse, does not have a voice: she does not have a will of her own, she does not have desires (sexual desires or any other desires), she does not have a career; she exists to please men, and should act accordingly. The idea of women pleasing men, with their perfect bodies or their behaviour, is present both in the concrete lives of women in Brazil, where girls are raised very differently than boys, and in the social imaginary, in the sphere of sexual desire and pleasure.

In this context, in her extensive study about eroticism, gender, and sexuality in Brazil, Maria Filomena Gregori observes that according to salespeople in sex shops, the costumes that are most sought by men for their partners are maid and high school student.<sup>904</sup> My point here is not to engage in judgmental analysis of people's desires, but to note that both characters, the maid and the young student, evoke images of helplessness, powerlessness, and submission in the Brazilian sexual imaginary. They symbolically represent bodies that

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<sup>903</sup> Câmara de Direito Público, processo n. 00005431-07.2010.8.26.0053, des. Luiz Sergio Fernandes de Souza, des. Moacir Peres, des. Coimbra Schmit, voto do segundo desembargador (des. Moacir Peres) p. 635.

<sup>904</sup> Maria Filomena Gregori, *Prazeres perigosos: Erotismo, gênero e limites da sexualidade*, 1st ed (São Paulo: Companhia das Letras) at 76.

can be controlled and that can be disposed of. In Brazil, the figure of the maid is highly problematic, involving issues of race (maids in Brazil are usually black or racialized women) and social class, and they are often subjected to sexual abuse by their employers. That is why the Maria da Penha Law protects them against violence perpetrated by their employers, even if they have a work relationship. The discussion of sexual objects expands to the theorists who frame all forms of pornography as oppressive and affect social negotiations about what is acceptable, or what should be persecuted, medically treated, or punished in terms of sexual practices.<sup>905</sup> I am not engaging with the debate on pornography here, but as in traditional pornography,<sup>906</sup> the hypersexualized focus on particular parts of the feminine body through mass media can reflect very traditional, limited, and strict notions of what kinds of sexual experiences are valid, and how bodies should be positioned, according to a perception of the masculine as the one who desires, and the feminine as the one being desired. According to Filomena Gregori:

This model [input/output, Gallop, 1988] presupposes the idea that pornography implies the contestation of habitual and approved ways of living sexuality, and the most important: in this model the sexual differences are based on the impossibility to measure the differences and the complementarity between the body that desires and the body that is being constituted as object of desire. The first [body] is configured, all multiple variations and arrangements considered, by a group of signals that mark symbolically the idea of masculine; while the body that is positioned as

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<sup>905</sup> For an interesting debate on this topic in Brazil, see: Maria Filomena Gregori, *Prazeres perigosos: Erotismo, gênero e limites da sexualidade*, 1st ed (São Paulo: Companhia das Letras).

<sup>906</sup> If pornography was initially created by men and for men, Gregori shows a process of feminization of pornography in Brazil, connected with ideas of sexuality as a more libertarian practice, marked by the use of sex toys and access to sex shops that are appropriately designed for different audiences, segmented by social class, age, and geographical location. According to her, the market of sex and sexual practices in São Paulo, the largest city of Latin America, includes even workshops focused on evangelical communities. Maria Filomena Gregori, *Prazeres perigosos: Erotismo, gênero e limites da sexualidade*, 1st ed (São Paulo: Companhia das Letras) at 60, 61-105.

object of desire is marked by a collection of signs that mark symbolically the feminine.<sup>907</sup>

In advertising, this process is visually organized by the one who sees and the one who is being seen, in a complex process of positioning people and cameras, as well as the succession of images and how they are connected. As John Berger reminds us, in every image, and in the way it is built/made, there is an intention:

Every image embodies a way of seeing. Even a photograph. For photographs are not, as is often assumed, a mechanical record. Every time we look at a photograph, we are aware, however slightly, of the photographer selecting that sight from an infinity of other possible sights.<sup>908</sup>

Historically, this process of positioning and being positioned has placed men and women in very different positions. While men see, women are seen:

One might simplify this by saying: *men act* and *women appear*. Men look at women. Women watch themselves being looked at. This determines not only most relations between men and women but also the relation of women to themselves. The surveyor of women in herself is male: the surveyed female. Thus she turns herself into an object – and most particularly an objection of vision: a sight.<sup>909</sup>

As John Berger demonstrates, this is not a new process, but a historical one that has gained amplitude with mass media. Women are often shown in ways that awaken men's sexual desires. Women and their bodies are exposed to "feed an appetite, not to have any of their own."<sup>910</sup> Therefore, the ways women and the feminine body are exposed, placed, and depicted indicates their role in a relationship with another: who is always identified as

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<sup>907</sup> Maria Filomena Gregori, *Prazeres perigosos: Erotismo, gênero e limites da sexualidade*, 1st ed (São Paulo: Companhia das Letras) at 41-42.

<sup>908</sup> *Supra* note 892 at 10.

<sup>909</sup> *Ibid* at 47.

<sup>910</sup> *Ibid* at 55.

masculine and the subject, the one who looks and desires at a beautiful, intriguing, sexy object. The male's sexuality is at the centre, it is to provoke his desire that images are composed, and women's bodies are used to provoke desire. Women do not desire, they are desired, just like in the *Skol* Summer Muse campaign, women are the object of desire for men. They do not have a voice or desires of their own.

In this context and with the *Skol* Summer Muse campaign as an example, I see objectification in advertising as an imagetic process by which women's identities and desires are silenced. This might emerge in intimate relationships, where male partners expect women to submit to their wishes and commands. Even with the advancement of women's rights in Brazil, patriarchal, racist, and sexist behaviour is still very present in women's and girls' lives, often expressed through controlling attitudes from men in intimate relationships.

The poll #meninapodetudo (#girlscandoanything), conducted in 2015 by Énóis Inteligência Jovem, Instituto Patrícia Galvão, and the Instituto Vladimir Herzog, shows that the perception that women belong to men is still widespread amongst young people in Brazil. One concrete effect of this perception is the controlling practices used by men over their female partners.<sup>911</sup> This poll interviewed 2,285 young people in Brazil, aged 14 to 24 years old, living in 370 Brazilian cities, and who live in families with a monthly income of up to R\$ 6,000, belonging to social classes C, D, and E. According to the data, 57% of the girls reported that their boyfriends tried to control their friendship with other people or places

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<sup>911</sup> #meninapodetudo: como o machismo e a violência contra a mulher afetam a vida das jovens das classes C, D e E?, by Instituto Patrícia Galvão, Énóis Inteligência Jovem, & Instituto Vladimir Herzog (Brazil, 2015).

they could go; 39% declared that their boyfriend had asked them to change clothes before leaving the house; 55% said their boyfriends had tried to access their cellular phones, e-mail, or social media accounts; and 47% said they felt forced to have sexual relations with their partners. Even if the interviewees recognize these behaviours as violence, they report not knowing how to change it.<sup>912</sup>

As some of the interviewees said: “I did it because I thought I had to please him...” “We think we need to satisfy our partners. It happened that my ex-boyfriend made me have sex against my will. At the time, I didn’t know that this was wrong.”<sup>913</sup> For 86% of the girls, the image of women and girls in the media does not represent them, and also perpetuate stereotypes that create an environment where such forms of violence are tolerated. As one twenty-four-year-old woman stated: “The way women are shown within the media. This only reinforces her image in society as the fragile sex, the one that needs protection from a man and that because of that can be treated as his property.”<sup>914</sup>

Based on key arguments conveyed by the multiple social actors engaged with the *Skol Summer Muse* litigation, in this section I have explored issues related to gender stereotyping in advertising and the assumption of a heterosexual matrix that informs and organizes such processes of stereotyping, as well as highly sexualized images of women and how such images contribute to creating an environment that normalizes women’s objectification and multiple forms of violence against women.

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<sup>912</sup> *Ibid* at 15.

<sup>913</sup> *Ibid* at 16.

<sup>914</sup> *Ibid* at 20.

Overall, most of the arguments presented by the feminists were echoed by the São Paulo state MP, the PROCON, and the judges who made the 2016 ruling. The company's arguments were reflected in CONAR's decision and in the 2012 ruling. Underlying reasons for taking one position or the other reflect personal and social values around gender roles and social inequalities.

### 7.1.3 Moms

The litigation around the *Skol* Summer Muse campaign reveals not only discourses and disputes about women as sexual objects. Throughout the case, AMBEV, as well as the São Paulo State MP and the PROCON, refers to women as mothers, sisters, and wives, whose primary responsibility is to do unpaid care work related to the house or to raising children, for example. According to some social actors, the fact that women have such a relevant social role should prevent the use of images that encourage discrimination against them in advertising.

In one of the first submissions made by AMBEV to CONAR, the company highlighted the central role women play in organizing and providing care for families:

No advertiser, however insane, would ever go so far as to offend a potential buyer of his products, either directly or indirectly, and in this condition, too, the advertisements produced and conveyed by the Respondents **would never tend to offend the woman, who, alongside her professional work away from home, is undeniably still the administrator of our homes and the leader of our families.** (bolded added by the author)<sup>915</sup>

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<sup>915</sup> Conselho Nacional de Autorregulamentação Publicitária, Processo 041/06. Denunciante: grupo de consumidores; Denunciada: Cia. Brasileira de Bebidas – AMBEV e F/Nazca S&S Publicidade Ltda.; Objeto: Anúncio ‘Skol – Musa do Verão’, p. 40.

Here, paid work outside of the house is seen as a secondary activity for women, fitting into the very traditional gender roles assigned to women under capitalism, as extensively discussed in chapter 2.

The idea that women are responsible for the majority of the care work is reinforced by AMBEV, when the company proposes to finance a campaign on responsible alcohol consumption to repair the damages caused by the *Skol* Summer Muse advertisements. AMBEV claimed that because women are the primary caregivers for youth, a public campaign on responsible alcohol consumption would mostly benefit women:<sup>916</sup>

the campaign would be especially important **for women, because they are, in general, the ones who are responsible for raising and educating children.** Additionally, alcoholism in adolescence has been one of the biggest worries for parents and educators.(bolded by the author)<sup>917</sup>

AMBEV's assumption here is that because women are primarily responsible for raising children, and alcohol consumption is a common worry for parents, women would benefit from such a campaign, and AMBEV would thus have repaired the damage caused by promoting discriminatory advertising. This idea that women are the most interested in issues of raising kids reinforces the role of women as caregivers and contradicts the arguments put forward by AMBEV that Brazilian society is a place where equality between men and women prevails.

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<sup>916</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 495-6.

<sup>917</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 496.

The São Paulo State MP, while seeking to problematize women's role as sexual objects, also reinforced the traditional, gendered view of women as mothers and caregivers, implying that they should be respected as human beings because they are mothers and partners, more than anything else:

Even though many barriers have been overcome, women's image is still often disrespected. When exposed in a million dollar ads, women are still presented through the stereotypical ideal of physical beauty and sensuality, completely remote from **the role women occupy in real life, as wives, as mothers, as home instructors, as professionals.**<sup>918</sup>

I also see here the idea that beauty and sensuality are opposed to the roles of mothers and partners, sustaining that duality between “women to marry” and “women to have sex with,” as if women have to choose between these two forms of representation or social roles in their lives. In a way, according to this discourse, women cannot be sexy and be mothers at the same time, and we can see many more tensions than this dissertation can explore around the ideas of sexuality, desire, and representation. I am not discussing the possibilities of negotiation within sexuality of liberating or oppressive practices, but I am interested in how very limited representations of women constrict women's freedom more broadly. When women are considered consumers of cleaning products, but not of alcohol, this reflects a very strict assignment of social roles or expectations, one that supports the idea that women only fit into two spaces: as those responsible for care and reproductive work, and as sexual objects. Therefore, stereotypical images in advertising, by limiting women's visual identities and sexual roles, operate in prescriptive ways, establishing standards, the “norm,” and the “deviant.”

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<sup>918</sup> Ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 12

## 7.2 Laughing and Being Laughed at

In this section I explore how this case raised a discussion about sexist advertisement as a form of discriminatory and therefore abusive advertisement according to the Brazilian legal framework, and how the *Skol* Summer Muse campaign evidences tensions between humour and what is socially acceptable or not in a given society, in a particular historical context.

In all its submissions, AMBEV included a section on *animus jocandi*,<sup>919</sup> focusing on how the advertisement plays with humour and is merely a joke, which, in AMBEV's view, would excuse the company from being held responsible for promoting sexist advertising.<sup>920</sup>

It is not only AMBEV that believes showing women in bikinis can convey an idea of fun.

A study that conducted in-depth interviews with marketing professionals in Brazil identified this as common:

For this audience [18-40 year old men], showing a sexy woman in the ad, or creating a narrative which may involve the use of the product in attracting a woman as an object of sexual desire, suggests excitement, fun, pleasure, hedonism. These symbolic values are then transferred to the brand (Male Creative Director, aged 31).<sup>921</sup>

It is in this context that AMBEV discussed the *Skol* Summer Muse campaign as a joke, as the use of *animus jocandi* to improve sales, as a representation of women that simply reflects the way women are seen in Brazil. AMBEV used a poem by a famous Brazilian

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<sup>919</sup> Brazilian legal professionals often use Latin expressions. Here, the expression *animus jocandi* refers to the idea of using words that can be understood as offensive and degrading, but as a joke, without any intention to discriminate; it is most commonly used in Criminal Law.

<sup>920</sup> Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 652-4.

<sup>921</sup> According to: Karen Middleton, Sarah Turnbull, & Mauro José de Oliveira, "Female role portrayals in Brazilian advertising: are outdated cultural stereotypes preventing change?" (2019) 39:5 Int J Advert Rev Mark Commun 679–698.

poet, Carlos Drummond de Andrade,<sup>922</sup> to defend the view that gazing at beautiful women is a “natural” thing that does not mean discrimination against women:

*A moça e o soldado* (“the girl and the soldier”):

“Women go by,  
Soldiers go by.  
Beautiful girls are for dating  
Bearded soldiers are for fighting.

My eyes spy  
the legs that go by.  
Not all of them are plump<sup>923</sup>  
My eyes spy

(...)<sup>924</sup>

According to AMBEV, if one of the most important Brazilian poets declared that women are for flirting with and legs are to be seen, this could only lead to the conclusion that a woman’s physical appearance is the only thing that matters for the author, and still, his poem was not deemed discriminatory or offensive to women.<sup>925</sup> But the partial reproduction of the poem misleads the reader into a twisted interpretation. By reading the full poem, we understand that the author plays with gender stereotypes (girls are for flirting

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<sup>922</sup> One of the most important Brazilian modernist poets, whose poems usually use very informal language and refer to everyday happenings.

<sup>923</sup> This is a tricky word to translate, as the word used in Portuguese can have the meaning of being just big, fat legs belonging to the soldier or voluptuous legs belonging to the woman. So there is also a cultural difference in here that might make translation a bit more difficult.

<sup>924</sup> This is the only part of the poem that is transcribed. In Portuguese:

“Passam mulheres,  
Passam soldados.  
Moça bonita foi feita para namorar.  
Soldado barbudo foi feito para brigar.

Meus olhos espiam  
as pernas que passam.  
Nem todas são grossas...  
Meus olhos espiam  
(...)”

<sup>925</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 574.

with and men are for fighting) as a way to talk about his disengagement and distancing from the world. This interpretation is evident because of the choice of words like “spy,” which shows that the author is outside, is not taking part in what he is seeing, but just observing from a distance. AMBEV used the interpretation that the poet is gazing at women, who are to be looked at and for flirting with and in this process, equated literary production to marketing. Even though advertisement involves creativity, just like other artistic production, marketing is intended to sell products and services, as discussed in chapter 3. Therefore, in marketing, creativity is serving the very clear objective of increasing profits, which differs from other artistic creations.

Since consumer law does not provide a definition of discriminatory advertisement, AMBEV suggested one:

Discriminatory advertisement, far from being the marketing piece where it is only shown individuals from **a single race, sex or age, should be considered only the one that sells a discriminatory product or service, or that makes apology against one race or a certain kind of people.** Additionally, in the ‘Summer Muse’ case, AMBEV does not sell women (this, by the way, is quite clear!), but beer.

To escape from the stereotypical idea that women’s image would be disturbed by the simple broadcasting of an advertising campaign for a beer brand, we should remember that the feminine sex is not the ‘fragile sex’ anymore, the ‘poor little one’ who lives underneath her husband’s provider shadow, taking care of the kids or doing laundry (on this topic, the laundry soap and softeners advertisements, which only show women being interviewed, as if only they did laundry, are way more discriminatory!!!). No! Nowadays, equality prevails.

(...) What we intend to show is that the ‘Summer Muse’ is an advertisement that happens in the fantasy and fiction world, and should not be seen as a pungent reality, but only as what it really represents: **a TV advertisement aimed to sell beer, mainly for its biggest consumer, the male consumer: during the summer, all want their own ‘muse’, and all want his favorite beer: Skol.**

Obviously that we could not hope for a different position from the feminist organizations that were consulted, since they do not offer insights as a ‘reasonable man’, **but according to the extremist ideals they defend, which, as known, are against all forms of showing women with little clothes, as if such could offend their dignity.** And what about the man, can he be shown wearing speedo bathing suits? Would this make him less intelligent? Would this disregard him in society? (bolded added by the author)<sup>926</sup>

AMBEV proposed this definition of this discriminatory advertisement in one of its first submissions to the MPF, and throughout the whole litigation, the company repeated these same ideas, expanding them or merely duplicating them in the exact same terms. For AMBEV, the *Skol* Summer Muse was not discriminatory because it did not sell a discriminatory product and did not “discriminate against a race.”

AMBEV also claimed that feminists saw all images of women in “little clothing” as problematic. Again, in their submissions, Rachel Moreno, CEPIA, CLADEM, and Instituto Patrícia Galvão did not criticize the use of the bathing suit *per se*, but the fact that the muse was being cloned and delivered to men, and therefore treated as merchandise.

The company narrowed down the interpretation of the advertisement to a version that supposedly is not discriminatory, since it would show, in a humorous way, that every man can have his own muse. The São Paulo state MP contested the idea of *animus jocandi*, and concluded that:

“image speaks for itself” and that there are limits even for jokes and that this is not any informal conversation amongst friends, but an advertisement

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<sup>926</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 397-99; Also: Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 584.

broadcast in mass media for all the country, a reason to take the message seriously.<sup>927</sup>

In this context, I believe it is important to reflect on two issues: i) who is laughing at what, and ii) what is funny and what is not. As shown in the poll presented by AMBEV, young, upper class, and probably white men did not see anything wrong with the advertisement and even considered it funny. Aligning with this perspective, the dissenting judge for the action proposed by AMBEV against PROCON (Judge Schmidt – 2016 decision) decided the advertisement was funny, siding with AMBEV, and saying that imposing limitations on such a campaign would mean “killing” advertisement in Brazil and transforming our society into a sad place:

The question posed by this case goes beyond law, it is sociological. It is anthropological because it is tied with the Brazilian culture, the way of being of Brazilians, who are great at making jokes even out of their own tragedies.

**(...) Here we can clearly see the result of the work of one of these activist groups that, dissatisfied with the typical mote for beer advertisements, protested against one of the most creative campaigns, one that reached out to the deepest Brazilian imaginary of the average people, by broadcasting a short film that clearly appeals to the absurd and unreal, a common characteristic of the most refined kind of humour, a healthy humour, a very intelligent kind of humour.**

(...) This is why we conclude that the question [posed by this case] is above all else, political. **Brazil is in its way to become a sad country. A land of individualist people, that worries exclusively with their own desires and anxieties, for whom the simplest actions, even if candid, can be taken as offensive, aggressive, and be the cause of diverse consequences.** A country where the only way to avoid offending someone is to remain fortified in its own feud, only expressing one’s view anonymously (?) through internet or restricted to groups formed through social media.

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<sup>927</sup> Réplica do Ministério Público do Estado de São Paulo, Promotoria de Justiça do Consumidor, processo n. 583.00.2009.165466-9, p. 604.

**(...) It is a grotesque mistake to raffle the legal principle that most contributed to the advancement of science and of individual freedoms just to please members of minority groups.** (bolded added by the author)<sup>928</sup>

These debates about the *animus jocandi* bring questions about positionality and privilege: who laughs at whom and who is laughed at? Or: who is part of the joke and who is included or excluded from the joke. As Cochran reminds us, resorting to humour can be a way to try to justify the exclusions<sup>929</sup> of particular points of view:

Ridicule has the effect not necessarily of persuading the people whose words are ridiculed that they are wrong but of helping to draw the boundaries around legitimate argument. Ridicule communicates that the person's perspective is not worthy of consideration. Further, the evaluative character of common sense means that ridiculing a belief on the grounds that is contrary to common sense can also communicate the unworthiness of the speaker since common sense knowledge is what every rational person cannot help but believe.<sup>930</sup>

By presenting the argument of the advertisement as a joke, easily recognized by the average consumer, who according to the company is a man, AMBEV is delimiting the social actors that should have a voice in this debate. Accordingly, to a man who echoes the dream of having a muse of his own, this campaign could be funny. A woman, who is being seen as a 'thing', silenced, and delivered to men, might have a different opinion on how funny it would be to be in this situation, and thus how funny the campaign itself is. This also shows to whom this advertisement was directed and who was considered by the company as a

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<sup>928</sup> Poder Judiciário, Tribunal de Justiça do Estado de São Paulo. Voto 33.046, Des. Coimbra Schmidt, embargos infringentes n. 005431-07.2010.8.26.0053/50000, p.721-4.

<sup>929</sup> Patricia Cochran, *Common Sense and Legal Judgement: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen's University Press, 2017) at 60.

<sup>930</sup> Patricia Cochran, *Common Sense and Legal Judgement: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen's University Press, 2017) at 61.

relevant consumer; in other words, who exists as a consumer and who exists as an object of consumption. For AMBEV, in 2006, women were not seen as consumers, but as consumable goods. Therefore, the campaign can only be understood as a joke by a very particular social group: young, white, upper class, and heterosexual men.

AMBEV's defense of the legality of the advertisement was complemented by the idea that even if the woman had been shown as an object, this could have never been considered discriminatory since the advertisement was clearly a fictional piece that used humour (*animus jocandi*) to sell beer and not women.<sup>931</sup> Also considering that AMBEV is not selling any discriminatory product or service,<sup>932</sup> the company sees the collective action proposed by the São Paulo State MP and the fine imposed by PROCON as an attack on humour and freedom of expression.<sup>933</sup>

I have already discussed limits on freedom of expression and whether advertising is protected by this constitutional right in chapter 5. Here, I am discussing whether defining something as a joke can be used as an excuse to discriminate.

What AMBEV was trying to argue is that the average person, in this case the average consumer, would only find the *Skol* Summer Muse campaign humorous and not offensive in any way. But who is this average man that AMBEV invokes? What are the social values this person is immersed in that allows one to see humour in the advertisement? Who would see something different? In other words, how can we define the average person and identify

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<sup>931</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 589.

<sup>932</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 589.

<sup>933</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 576.

the community values such people share or represent? Who is excluded from this community by not sharing this particular perspective on the *Skol* Summer Muse campaign?

When disqualifying the opinion of those who were troubled by the *Skol* Summer Muse campaign, AMBEV defined the average consumer (always referred to by AMBEV by the masculine form, *consumidor*) as a ‘reasonable man,’ as the Roman *bonus pater familia*. According to the company, this average person, identified as a man, would be able to clearly understand the campaign as a funny satire of a “normal and common desire to possess his own.” To see it otherwise would “seem ridiculous to the ordinary man, someone who is not taken by silly issues and does not defend feminist ideologies, party ideologies or any other ideas based on religious beliefs.”<sup>934</sup> The only subjects who would be troubled by the advertisement and complain about it would be the extremist feminists:

To see the ‘summer muse’ [campaign] as offensive, is even less than seeing violence in child’s cartoons like smurfs or Pokémon, for example. Or seeing [violence and] prejudice in soap operas, where the stories are equally imaginative and whimsical, and deal with way more controversial subjects. All this [defending that the summer muse campaign is offensive and promotes violence] seems ridiculous to the average man, who is not bothered or infuriated by silly subtleties, and who does not defend radical feminist, partisan or religious ideologies.

For such average man – **who is someone like the roman bonus pater familia and the contemporary consumer** -, the *Skol*’s advertisement is not offensive or promotes a ridiculous image of women, but is only a humorous satire, which wants to captivate every one and everybody.(bolded added by the author)<sup>935</sup>

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<sup>934</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 38.

<sup>935</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 583.

Apart from the fact that the average consumer is referred to in the masculine form in Portuguese (*consumidor*), the comparison between the average man, who is also the average consumer, with the *bonus pater familias* reveals a very particular image of this average person. In ancient Roman society, the *bonus pater familias* was the concentration of patriarchal power, and the head of the household.<sup>936</sup> To Richard Saller, the use of the term in legal contexts reveals the gendered aspect of property, indicating male ownership. *Pater familias* means a male citizen who has power and authority over the family (children, wife, and slaves included) and over property, with a strong dimension of ownership/property in legal terms.<sup>937</sup> Saller argues that even though the term is heavily gendered as masculine, citizen women had some level of empowerment in ancient Rome, and that the masculine version of the term makes us lose sight of these nuances, since the term is essentially masculine (the term used in legal discourse is *pater* and not *mater*).<sup>938</sup> In this context, the choice of the term *bonus pater familias* to represent the average consumer does not seem to be unintentional.

To AMBEV, such a consumer is a man to whom the advertisement is clearly directed, since men are the only ones receiving the muses and drinking beer in the television advertisement. By invoking the “reasonable man” as the *pater familias*, both AMBEV and some representatives of the judiciary make it explicit how the perception of this figure is demarcated by gender, from a heterosexual and masculine perspective. Finally, it is

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<sup>936</sup> Richard P Saller, “Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household” (1999) 94:2 Class Philol 182 at 184 and 188.

<sup>937</sup> Richard P Saller, “Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household” (1999) 94:2 Class Philol 182.

<sup>938</sup> Richard P Saller, “Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household” (1999) 94:2 Class Philol 182 at 196.

interesting to note how the majority of the documents that compose the case, including the submissions and the rulings, are often signed by men. A few documents are signed by women, and amongst them, the majority are the ones submitted by the feminists.

We can see that AMBEV clearly defines who is “in” and who is “out,” the people who are reasonable and participate and share common values in Brazilian society, and in opposition, the extremists, in this case the feminists. The underlying argument relies on the idea of “common sense,” that some things are self-evident and obvious according to particular socio-cultural settings.<sup>939</sup> Therefore, the common or the average man would have shared values that would allow one to find the *Skol* Summer Muse campaign funny and just a joke. In the legal field, the problem with such a concept is that ideas of common sense or common or average man can be exclusionary. As Patricia Cochran shows, “‘Common sense’ is a powerful phrase, and when it is invoked in legal judgement without adequate reflection, it can harbour stereotypes, reproduce unjust power relations, and silence marginalized people.”<sup>940</sup> She observes that in complex and highly unequal societies, understanding what is ‘common to whom’ is essential when using ideas of common sense and average person/judgement,<sup>941</sup> since “common sense knowledge can be racist, sexist, or otherwise imbued with discrimination and unjust partiality.”<sup>942</sup>

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<sup>939</sup> According to Patricia Cochran, “it is impossible to give examples of common sense without drawing on particular background assumptions and cultural references.” Patricia Cochran, *Common Sense and Legal Judgement: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen’s University Press, 2017) at 28-29.

<sup>940</sup> Patricia Cochran, *Common Sense and Legal Judgement: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen’s University Press, 2017) at 5 and 9.

<sup>941</sup> Patricia Cochran, *Common Sense and Legal Judgement: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen’s University Press, 2017) at 15 and 17.

<sup>942</sup> Patricia Cochran, *Common Sense and Legal Judgement: Community Knowledge, Political Power, and Rhetorical Practice* (McGill-Queen’s University Press, 2017) at 33.

In a sexist and patriarchal society, one might anticipate that men might enjoy the idea presented in the advertisement, mostly because the ideas of masculinity and virility disseminated in such societies favour unequal relationships between men and women, with the not uncommon perception that women can be owned by men. This is expressed by violent homicides perpetrated by partners and ex-partners against women. In such cases, there is always an element of ownership being disputed, as well as an expression of masculine power that is imposed on women. Therefore, the message conveyed in the advertisement reflects sexist ideas existing in our society and symbolically normalizes violence against women. The latter would be a form of social discourse that allows high levels of violence against women to be perceived as “normal” or “expressions of masculinity,” as discussed in chapters two and six.

## Chapter 8: Subjects and Social Change

The very particular way in which consumer rights in Brazil were established (in a context of economic crisis rather than of economic abundance), combined with the patriarchal, racist, classist structure of Brazilian society compose the contextual background that made the *Skol Summer Muse* possible, and generated intense contestation.

The *Skol Summer Muse* campaign disseminated an undeniably sexist message, and still it was normalized at many levels: by the advertisers who created it, by the marketing department of AMBEV that approved it, by the members of CONAR who did not see any form of discrimination in it, by the judges at the São Paulo state court who dismissed the collective lawsuit proposed by the São Paulo state MP (2012 decision). Yet the sexist message did not go unnoticed: representatives of the feminist movement, starting with Rachel Moreno and followed by CEPIA, CLADEM, and Instituto Patrícia Galvão, together with the São Paulo state MP, and the São Paulo PROCON, looked for ways to sanction AMBEV for broadcasting such a discriminatory message. In 2016, a different group of judges ruled on the *Skol Summer Muse* campaign, this time condemning it for being discriminatory against women.

When I look at this case, I see contestation and change. Considering that the first judicial decision that discusses the merits of the *Skol Summer Muse* campaign is from 2012 and the second from 2016, both decided by the same court, I understand that they signal a change in understandings of the representation of women and the feminine body in Brazilian society, a change that is mediated by the enforcement of consumer law and its gendered dimensions.

Considering the law and its enforcement, we note that the same legal disposition generated two very different interpretations, one that considers the advertisement to be illegal, and one that considers it to be legal. The 2016 decision was more aligned with feminist approaches, while the 2012 decision was aligned with more traditional, neo-liberal ones, which tend to consider advertising as a form of freedom of expression, a constitutional right granted to corporations as well as to individuals, and that admits few limits. Also, according to this latter view, advertising should not be taken seriously, because it is often a joke, a fictional representation of society that should not cause any concern about social values. Therefore, there are two legal interpretations in dispute and under negotiation, revealing how perceptions about advertising and women themselves are in dispute and have been changing in Brazilian society. We saw that the judges who voted on the 2016 decision explicitly mentioned actions from the feminist movements and how important they were in the fight for equal rights for women. In a way, then, it seems that there was some sort of acceptance of feminist claims.

Another question that emerges from the litigation is whether the public/private divide is still stable, or whether it is much less strict or fixed than one might suppose. In law, this tension manifests in at least two ways: (i) in the establishment of hybrid legal systems, or hybrid spheres of law that impose the observance of public principles in private relations, and (ii) in the way legal documents are accessible to the public and subjected to public scrutiny. Overall, legal procedures still seem to be held in the somewhat unreachable sphere of the courts, and even interested parties might have difficulty accessing them. This became clear when Rachel Moreno, who initiated the case before the MPF, could not access the files after the case was sent to the São Paulo state MP, or when I had to make a special

request at the public archives to be able to see the files for the collective lawsuit that ended in 2012. Therefore, even though judicial procedures are supposed to offer public access to the files, they fail to communicate to the broader public or invite social participation, at times even repelling the engagement of interested networks and non-profit organizations, as we can see in my case analysis. Simultaneously, AMBEV's future campaigns went viral on individuals' private accounts on social media, pushing for change in how the company promotes its products.

The public/private divide also surfaced in the debates about women's roles in Brazilian society, when social actors presented women as mothers, responsible for the household or simply beautiful items to be added to one's house. That these debates are settled in the framework of consumer law also brings in questions about how capitalism plays out in the separation of public and private.

The public/private divide is central to feminist theories of political economy. As discussed in chapter three, in capitalist societies, gender plays a fundamental role in separating production/public and reproduction/private. The fact that in patriarchal systems women are identified with the reproductive/private functions supports specific discourses and actions towards women that affect their equal participation in the society. Such discourses revolve around sexuality, reproduction, motherhood, and women's role in the job market. This is a huge debate that many feminists have been engaging with over the years and here I just provide a limited contribution by exploring how legal discourses around sexist advertising play a role in advancing women's rights or maintaining the *status quo*, keeping things stagnant where they are. How women are represented in advertising and in the documents related to the *Skol* Summer Muse campaign litigation are an entry point to observing how

the public divide operates in Brazilian society and how perceptions about it might have changed over time (considering this litigation has been ongoing for over 16 years now).

With this context in mind, in this chapter I look at how the discourse of social change operates to justify or condemn the way women are shown in the *Skol* Summer Muse campaign, exploring two questions: (i) how the multiple social actors talk about women's advancement in Brazilian society; and (ii) how members of the Brazilian feminist movement acted to contest patriarchal and sexist views of women to promote social change.

### 8.1 The Fragile Sex and the Battle of Sexes

AMBEV repeated ad nauseam that the feminist were pushing a supposed battle of the sexes, resulting in “an excessive and unnecessary protection of women.” AMBEV claimed that the *Skol* Summer Muse campaign could never affect women because “times have changed” and women are not “the oppressed ones” anymore:

In order to escape from the stereotyped idea that women's image would be affected by the simple broadcasting of a TV ad for a beer brand, we must remember that the feminine sex, nowadays, is not the “fragile sex” anymore, “the poor woman” who lives on the shadows of her husband, the provider. **No! Nowadays, we have equality! The old taboos were broken!**<sup>943</sup>

(...) We argue that the ‘Summer Muse’ – and this is crystal clear for all those who watch the ad – is just an ad that shows a fantasy world and plays with fiction, it can't ever be mistaken by the reality. The ad has to be seen as what it really represents: an ad aimed to promote beer: during summer time, we all want our ‘muse’, and we all want our favorite beer, Skol.<sup>944</sup>

To divert from this stereotyped idea according to which the image of women feminine sex, for a while now, it's not the “fragile sex,” “the miserable

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<sup>943</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 38.

<sup>944</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 39.

woman” who lives in the shadow of her husband and provider, taking care of the children and doing laundry anymore (**and on this topic, advertisements for softeners and bleachers are way more discriminatory because they only interview women as if they are the only ones to do laundry!!!**). No! Nowadays, equality prevails! The old taboos were broken.<sup>945</sup>

AMBEV also flirts with the idea that advertising for cleaning or laundry products tends to be discriminatory for implying that only women are responsible for the household and the care of the children. This debate is repeated multiple times throughout the litigation. Such repetition can be seen as a way to reinforce an argument and to deny acknowledgment or understanding about what a particular interest groups (such as feminists) are talking about when contesting the advertisement. Often, the meaning of the images that compose the campaign are disputed among AMBEV, the feminist groups, and the state bodies that protect consumers and acted on the case (São Paulo MP and São Paulo PROCON). A clear example of such a dispute revolves around the situation of women in Brazil. While AMBEV argued that the advertisement only reproduced social values, Rachel Moreno, CEPIA, CLADEM, and Instituto Patrícia Galvão, representing the feminist groups, dispute this by saying that the advertisement represents a disconnect in relation to the advancement of women’s rights in Brazil. It is intriguing that both social actors argue that women’s rights and situation in Brazil have improved, but what such improvements mean seems to differ for AMBEV and for the feminists.

AMBEV posits that women’s situation in Brazil has changed so much that an advertisement would never have any impact on women’s lives:

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<sup>945</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 584.

Gone is the time when the simple possibility of humorous situations involving women, shown in ads, was taken as offensive and therefore ethically barred and morally not recommended.<sup>946</sup>

In order to escape from the stereotyped idea that women's image would be affected by the simple broadcasting of a TV ad for a beer brand, we must remember that the feminine sex, nowadays, is not the "fragile sex" anymore, "the poor woman" who lives on the shadows of her husband, the provider. No! Nowadays, we have equality! The old taboos were broken!<sup>947</sup>

We argue that the 'Summer Muse' – and this is crystal clear for all those who watch the ad – is just an ad that shows a fantasy world and plays with fiction, it can't ever be mistaken by the reality. The ad has to be seen as what it really represents: an ad aimed to promote beer: during summer time, we all want our 'muse', and we all want our favorite beer, *Skol*.<sup>948</sup>

Likewise, AMBEV reads the arguments presented by PROCON's defense as an ode to the fragile sex, to the "weak and oppressed women by their imposing husbands, recalling the repressive society of previous centuries."<sup>949</sup> For AMBEV, the imposition of the fine by PROCON results from an interpretation of women's situation that does not reflect society's opinion on the topic, but only "a sociologist opinion, studies published by organizations that defend women's interests [like the Patrícia Galvão Instituto], and some online newspaper articles."<sup>950</sup>

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<sup>946</sup> Conselho Nacional de Autorregulamentação Publicitária, Processo 041/06. Denunciante: grupo de consumidores; Denunciada: Cia. Brasileira de Bebidas – AMBEV e F/Nazca S&S Publicidade Ltda.; Objeto: Anúncio 'Skol – Musa do Verão', p. 42.

<sup>947</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 38.

<sup>948</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 39.

<sup>949</sup> Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, pp.158.

<sup>950</sup> Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, pp.158-9.

AMBEV claimed that the *Consumer Code* does not define the term “discriminatory,” which is left for interpretation.<sup>951</sup> For the company, the concept of discriminatory advertising relates to an offense to moral and respectable customs:

In the case being analysed, ‘discriminatory advertisement’ is an expression that cannot be expanded to find discrimination against middle-aged men, for example, in advertisements that only show young people; or against ugly people, when considering an advertisement that only show people of uncommon beauty.

And because human beings are all different from each other, ‘discrimination’ can be seen everywhere. This is why ‘discriminatory advertisement’ should be understood as: (i) the advertisement that offends the morals and respectable customs ; and (ii) the one that is fundamentally illegal, containing a message that causes aversion, is repulsive or causes damage to someone.<sup>952</sup>

AMBEV complements this definition by saying that an “abusive advertisement” is “one that offends basic social values, affecting society as a whole; one that exceeds the enterprise’s right to exercise its economic activity, affecting the good will and respectable customs.”<sup>953</sup> Having AMBEV’s definition of discriminatory advertisement in mind, the Summer Muse campaign would never have been offensive for the habitual consumer of the beer, which would lead to the conclusion that AMBEV acted according to the law, respecting the limits imposed by the *Consumer Code*.<sup>954</sup>

For AMBEV, the public prosecutor’s office sees women as the “fragile sex,”<sup>955</sup> someone who needs to be protected by her inferior nature. For the company, the collective lawsuit

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<sup>951</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 586.

<sup>952</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 587.

<sup>953</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 588.

<sup>954</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 589.

<sup>955</sup> Recurso à Diretoria Executiva do PROCON/SP, interposto por Companhia de bebidas das Américas – AMBEV, processo 803/06, pp.159-63.

proposed by the São Paulo state MP would be a way to protect women's fragile nature, something that would go against women's achievements in Brazilian society. For AMBEV, to protect women against discriminatory advertising would mean an alignment with the colonial discourses that define women as subjected to their husbands, confined in their houses, a woman who would no longer exist in Brazil, since nowadays women occupy important roles in politics, and in the economy. For AMBEV, claiming protection against a discriminatory advertisement would be a way to reinforce women's social status as vulnerable and inferior to men, by marking women as in need of protection.<sup>956</sup> Alongside these lines, to seek to protect women from an advertising message would be an assault on their intelligence and all the progress that women have achieved so far:

Therefore, advertising that shows, for example, men choosing dish soaps, doing the dishes or taking care of children have minimal potential in boosting social change. Likewise, advertising which shows beautiful and attractive women does not promote violence or discrimination against ugly women. As a consequence, it can never be said that the "summer muse" promotes the enslavement of women, hurting their equality [rights], which was achieved after strenuous battles over the last two centuries.

**On the contrary, if it is true that women have obtained massive social and political achievements, it would be to disregard her intelligence to assume that a mere advertisement can – even if minimally – destroy all such important achievements.** And all this in a blink of eyes. Therefore, it is not necessary to be redundant and declare that the woman thinks and rationalizes, leading to the conclusion that a marketing campaign could never be responsible for objectifying someone.<sup>957</sup>

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<sup>956</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 579; Companhia de Bebidas das Américas – AMBEV. Agravo de Instrumento com efeito suspensivo, nos autos da ação ordinária n. 053.10.005431-8) contra PROCON/SP, p. 369-70; Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 579.

<sup>957</sup> Contestação da ação Civil Pública n. 583. 00. 2009. 165466-9/000000-000, p. 590.

AMBEV recognized that the achievements of Brazilian women are unstable, and could be easily reversed. This topic of the fragile sex and of women needing protection from a discriminatory advertisement as a sign of “fragility” is explored by AMBEV throughout the whole litigation process. In one of its submissions, AMBEV discussed the issue<sup>958</sup> of the empowered woman versus the oppressed one in the section “From the oppressed woman to the modern woman.” Restating the arguments previously presented, AMBEV claimed that patriarchal society in Brazil is over because now women can do whatever they want and do not depend on their partners for anything. Even if not all Brazilian women enjoy such freedom (as would be the same for men in Brazilian society), it is clear, according to the company, that women do not represent the fragile sex anymore, not needing any sort of extra protection from the law.<sup>959</sup>

On this issue, the São Paulo state MP argued that not all women in Brazil are successful CEOs, judges on the Supreme Court, presidents, or prime-ministers, but that Brazilian women’s reality is quite different from these successful trajectories. Instead, a great level of diversity should be acknowledged, because a woman from the North of the country lives a very different reality than a woman in the South, realities that also change if the geographical locations (urban vs. rural), and ethnicity are considered.<sup>960</sup> Equality among women, as well as between men and women, is not a reality in Brazil.

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<sup>958</sup> Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 657.

<sup>959</sup> Contrarrazões de Apelação, processo n. 583.00.2009.165466-9, Ordem n. 1383/09, pp. 657-8.

<sup>960</sup> Réplica do Ministério Público do Estado de São Paulo, Promotoria de Justiça do Consumidor, processo n. 583.00.2009.165466-9, p. 604.

Likewise, PROCON, in one of its submissions defending its decision to impose a fine on AMBEV,<sup>961</sup> also argued that the advertisement was clearly discriminatory and offended the idea of equality between men and women:

As to the merits, in its extensive and repetitive reasoning AMBEV defends the legality of the advertisement being discussed in this case, by arguing that in Brazil, creative freedom is the norm; that PROCON's assessment was based on subjective and radical opinions and that the advertisement 'did not appeal to sensuality'. And, the most astounding of the arguments, that: 'Today, there is no longer inequality/vulnerability of the once considered the fragile sex.'

We just need to watch the advertisement's film to verify that the 'Summer Muse Campaign' is discriminatory because it alludes to a woman being consumed, just like a product, in violation of the provisions of art. 37, § 2 of the CDC [*Consumer Code*].

The technical statements in the file (pages 220/240 and 356/62) examined the question exhaustively; and clearly and objectively set out the reasons why the advertising was found to be illegal:

- a) By comparing a woman to a product that could be delivered in trolleys to several men;
- b) By showing a woman in an unequal and disadvantageous position, since she is used as an object of consumption made available to all men;
- c) By enhancing the exploitation of the female body, re-feeding the discussion about discrimination women suffered throughout the centuries;
- d) By stimulating the social view that a woman is an object that can be consumed;
- e) For neglecting the social function inherent in any commercial activity, by sacrificing the interest of the whole community, only to increase its sales.

(...) Discrimination against women over the centuries is a fact. It is also true that change comes at a slow pace, with discrimination being overcome. But the fight is not over, as we still see situations of inferiority in relation to men, whether in working conditions or in lower wages, or in responsibility for domestic activities, children's education, violence in the home.

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<sup>961</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON. Agravo de instrumento n. 990.10.113520-5, pp. 512-523.

The statements in the Agravo de Instrumento only demonstrate how much there is still to be done on the path of equality between men and women.<sup>962</sup>

The seriousness of the offense is obvious and deserves a fair reprimand in the administrative level. Discriminatory advertising affects the whole of society, by spreading the discriminatory idea that women, like the Skol beer, are something to be enjoyed by all, as if they [women] were things. Its [advertisement] content, as well highlighted in the decision of fls. 348/349, is clearly disrespectful to the female figure, which in the 21st century is inadmissible.<sup>963</sup>

Here we can see how PROCON connected many arguments presented by multiple social actors and concluded that the advertisement was discriminatory for promoting women's objectification, over exploiting women's sexuality through the focus on hypersexualized body images, and by doing so, offended public interest by reinforcing discrimination against women. PROCON asserted that the advertisement was discriminatory, and therefore illegal, because it was sexist, adopting as a broad definition of sexist the idea of a representation of men in dominating positions, and women in subordinated positions.

## **8.2 Contestation to Promote Change: Feminist Activism around the *Skol* Summer Muse campaign**

The *Skol* Summer Muse advertisements and the legal arguments presented in the multiple documents submitted through years of litigation are discourses, whose meanings were constantly negotiated by different social actors (feminist groups, lawyers representing the market, judges, public servants etc.). I am particularly interested in how the ideas of gender, femininity, sexuality, and motherhood were reflected and discussed through images and

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<sup>962</sup> Procuradoria Geral do Estado, Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON. Agravo de instrumento n. 990.10.113520-5, pp. 519-20.

<sup>963</sup> Procuradoria Geral do Estado. Assessoria Jurídica à Fundação de Proteção e Defesa do Consumidor – PROCON, autos n. 053.10.005431-8, pp. 432.

documents, and how such materials represented or expressed ideas about gender relations and women's social roles in Brazil. At the same time, by contesting these stereotypical representations in many arenas, feminists pushed for other forms of representation of women in the media. Laura Hastenpflug Wottrich observes that in Brazil, contesting advertising is a gendered practice, which has been expanded beyond feminist activism with women engaging in the debate through social media.<sup>964</sup>

Debate about traditional or stereotypical forms of representation in the *Skol* Summer Muse campaign emerged mostly through the feminist submissions before the MPF, starting Rachel Moreno's claim and followed by the submissions made by three renowned feminist organizations in Brazil: Instituto Patrícia Galvão, CEPIA, and CLADEM. They all connected the issue of a stereotypical representation in advertising as a matter that undermines public efforts to promote gender equality, as a form of violence against women, and as a practice that offends women's international human rights as defined in international treaties ratified by Brazil, as well as the 1988 Federal Constitution and national laws, such as the MPL Law. However, feminist submissions did not mention the Brazilian *Consumer Code*, they framed the issue as a human rights issue, as a form of discrimination against women.

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<sup>964</sup> Laura, "*Não podemos deixar passar*": *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 264 - 266.

In its submission to the MPF on August 20<sup>th</sup> 2007,<sup>965</sup> in a very sophisticated document, CLADEM Brazil discussed the power mass media holds through stereotyping, which permeates and shapes social relationships,<sup>966</sup> as well as the power to project gendered representations from and for society, deepening social inequalities, and also contesting such relationships from within:

(...) The ‘Summer Muse Campaign’ reproduces a perverse logic, quite common in advertising, in which, instead of treasuring women, subjugate them. It reveals the tolerance to a culture and mass communication system that acts to maintain and perpetuate the roots and the psychological, social and historical aspects that feed back the discrimination and the gender violence against women, promoting values, standards and products, instead of our rich and diverse reality and aspirations. This communication system (which is magnified by advertising such the ones being discussed in this case) perpetuates the reproduction of limiting stereotypes that influence the build-up of a poor and mutilated subjectivity, resulting in women’s low self-esteem, as they search for affirmation and pursue models and values that contrast with what can be more freely thought and desired by women and men in the society.<sup>967</sup>

CLADEM argued that the campaign offended human rights and more specifically women’s rights, established by national and international legal documents. The organization analyzed both the advertisement and the company’s arguments and concluded that Skol clearly intended to promote the fantasy that every man can own a woman whose condition as a

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<sup>965</sup> According to: Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 361-383. The submission was signed by Virginia Feix (CLADEM/Brazil’s national coordinator at the time and Valéria Pandjjarjian. Virgínia Feix: Graduated in law at the Federal University of Rio Grande do Sul (Universidade Federal do Rio Grande do Sul), with a specialization in Human Rights by Unisinos and a Master’s in public law from the Catholic University in Rio Grande do Sul (Pontifícia Universidade Católica do Rio Grande do Sul). Founder, member and ex-director of THEMIS – Gender, Justice and Human Rights (THEMIS – Gênero, Justiça e Direitos Humanos – [http://buscatextual.cnpq.br/buscatextual/visualizaev.do?id=K4230707A2\\_](http://buscatextual.cnpq.br/buscatextual/visualizaev.do?id=K4230707A2_) Valéria Pandjjarjian: CLADEM’s international litigation program director and member of CLADEM/Brazil at the time. She is a feminist lawyer and a long-standing member of CLADEM.

<sup>966</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 362.

<sup>967</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 362.

human being can be denied for his own pleasure. For CLADEM, this is evident, because the central argument of the advertisement is that men can take women (transformed into beer bottles) home, as they would do to any other object. This visual representation of women in the advertisement, according to CLADEM, would symbolically represent a woman who is controlled and manipulated, and by being treated as an object, denied the human condition, to promote or normalize violence against women:

What is represented by a woman in a bottle, placed in such a manner that every man can have one (woman/bottle) in his house, if not, symbolically, a woman who is depreciated and controlled in her actions and behaviours, beliefs and decisions; constraint and humiliated, manipulated, isolated and under constant supervision, insulted and ridiculed, exploited and limited in her right to come and go freely and her right to self-determination? Doing this simple imaginative exercise makes us realize how offensive and negative are the effects of *Skol's* advertisement, here clearly promoting and reproducing violence against women.<sup>968</sup>

Therefore, this discourse would be the foundation on which multiple forms of physical and sexual violence against women are justified. Additionally, the advertisement itself is a form of psychological violence inflicted on women, offending article 7 of the Maria da Penha Law.<sup>969</sup>

CLADEM described how the media in general contributes to creating meanings and social identities, offering a short literature review on the matter and stating that “media’s discourses are part of the process by which individuals elaborate meanings.”<sup>970</sup> CLADEM

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<sup>968</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 363.

<sup>969</sup> A comprehensive analysis of the Maria da Penha Law is presented in chapter 2.

<sup>970</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 363.

also observed that such discourses are historically and socially localized, and that these meanings, symbols, and ideas are appropriated and reproduced by companies like Skol when approving advertisements like the Skol Summer Muse.<sup>971</sup> The document cites Noëlle-Newmann, according to whom “what is not said does not exist, and its ability to be part of perceived reality is minimal.”<sup>972</sup> For her, media’s influence is predominantly unconscious.<sup>973</sup> Building on this idea, CLADEM argued:

On the one hand, both the explicit and the sublinear discriminatory content that are disseminated by this advertisement, through such a powerful a mass media vehicle as is the TV, cannot be ignored. On the other hand, [one cannot ignore] the consequent diminished ability of mediation and critical action from the viewers when bombarded by such messages [as the Skol Summer Muse Campaign].

It is through the power that such media operates and imposes – and mainly through ‘the eyes of the TV media’ – that the discriminatory values fostered by the ‘Summer Muse’ are disseminated in the collective unconscious, and reinforce the patriarchal and sexist background in which public opinion’s common sense rests, embedding the ‘social skin’ with fixed values and dismissing the possibilities for alternative and diverse forms of representation.<sup>974</sup>

CLADEM observed that companies, especially big ones like AMBEV, use mass media and television advertising to increase sales, a common strategy in consumer societies. However, considering the power and influence that mass media corporations hold, they should respect ethical norms and human rights guidelines established by the legislation. They also argue that the consumer’s vulnerability is aggravated since Brazil has few mechanisms to monitor

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<sup>971</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 365.

<sup>972</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 365.

<sup>973</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 365.

<sup>974</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 366.

and control media, a situation that reinforces the need to discuss the topic within the Judiciary.<sup>975</sup>

Due to the history of dictatorship and censorship in Brazil, any effort to remotely regulate the media (whatever aspect of it, including democratizing the process for public concessions of television channels) is tagged as censorship and has its debate blocked. As a consequence, many cases end up in the judiciary, particularly when there is an aspect of discrimination to it. The Brazilian judiciary is extremely conservative and often aligns with commercial interests when it comes to discussions about media regulation, as pointed out by Paganotti.<sup>976</sup> In this context, workshops and training aimed at legal professionals, particularly judges and members of the public prosecutor's offices, discussing the tensions between freedom of expression and discrimination from a gendered perspective would be more than welcomed.

CLADEM pointed out the need to have a central state body to oversee and monitor cases of human rights violation in the media, but to sensitize professionals who work in the judicial system to the topic as well. Here, I add that Brazil already has state bodies that can oversee cases of discrimination in advertising, as determined by the consumer law: the institutions

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<sup>975</sup> “Nevertheless, the use of this medium requires ethics and respect for principles and human rights established in the country's current norms, which was not done in the case under analysis, due to the sexist stereotypes and representations reproduced in the advertising piece ‘Summer Muse.’

To aggravate the fragility of consumers and spectators' situation, the country has very few mechanisms and channels of monitoring and social control in this sense. Hence the importance of also discussing the issue in the judicial scope.” Representation 1.34.001.002796/2006-95, Federal Prosecutor's Office, Attorney's Office in São Paulo - Regional Attorney for Citizens' Rights, p. 366. - Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 366.

<sup>976</sup> Ivan Paganotti, *supra* note 353.

that compose the SNDC, in particular the Senacon and DPDC at the federal level, and the PROCONs at the state and municipal levels.

CLADEM claimed that stereotyping is a matter of power, with those who hold power being able to stereotype, imposing such representations upon the stereotyped ones.<sup>977</sup> CLADEM explains that stereotyping processes are amplified by mass media and represent an imposition of the views of some over others. In this context, CLADEM defined mass media as a relevant gendered technology that establishes codes which create a common ground among the audience and that allow for visual representations of women within the parameters of such codes, creating images that reflect objectification and violence against women, such as the ones in the *Skol* Summer Muse campaign.<sup>978</sup>

Stereotype is defined as an image built on a group of people. From the moment a person belongs to a group, he/she is defined according to the simplifying categorization built by the group.<sup>979</sup>

(...) “The symbols are registered in the conscious mind – and in the unconscious, too. Language also plays an important role here, contributing to the construction of stereotypes and embedding the image of women with traditional meanings and culture so that, later, those who create advertising ads, have ‘brilliant’ and ‘original’ ideas to continue strengthening the

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<sup>977</sup> “The ones that hold the power in a particular group have the capacity to create stereotypes; while the ones without power are stereotyped, in general, in a negative way “Representation 1.34.001.002796/2006-95, Federal Prosecutor's Office, Attorney's Office in São Paulo - Regional Attorney for Citizens' Rights, p. 368. Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 368.

<sup>978</sup> “The study points that mass media is such a relevant ‘gender technology’ to strengthen traditional stereotypes and create new ones because they need massive audiences to reach the largest amount of people. To accomplish that objective, it uses codes that establish a minimum valid common ground, one that can be adaptable to all sorts of public, idiosyncrasies and interests. It is here that stereotypical elements are born, as they are used to define characters (for example, the object woman/the ‘Summer Muse’ souvenir), which will behave as the general audience’s common sense expects, according to the traditional cultural meanings that they have already interiorized”. Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 368.

<sup>979</sup>Representation 1.34.001.002796/2006-95, Federal Prosecutor's Office, Attorney's Office in São Paulo - Regional Attorney for Citizen Rights, p. 367.Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 367.

stereotype of women within a given category. (...) These values, associated with stereotype, generate the prejudices (preconceived negative opinions and ideas), expressed against the stereotyped group, and which, when taken as true beliefs, seem normal and logical. And in actions like the ‘Summer Muse’ campaign, they set up discrimination.”<sup>980</sup>

CLADEM highlighted the social responsibility of companies and enterprises in contributing to fight and end social inequalities<sup>981</sup> and presented a list of rights ensured by the Brazilian legal system that the Summer Muse campaign violated article 1, III of the Brazilian Constitution – human dignity - ; article 5, I – equality between men and women; CEDAW’s 1<sup>st</sup> article – discrimination against women and Belém do Pará Convention’s article 4 and 6 - reaffirming women’s right to a life free from any form of violence. The Beijing Platform of Action and the IV UN Conference on women were also cited as important sources of international commitments assumed by the Brazilian state regarding gender equality.<sup>982</sup>

CLADEM brought information on resolutions approved at the National Conference for Women and that were consolidated in the National Plan for Public Policies for Women. Since the 1990s, Brazil has been holding national conferences to discuss public policies, implementing a Constitutional mandate to amplify public participation in the definition of public policies. The universal health care system in Brazil, SUS, was created and designed through one of these conferences. But it was during the Worker’s Party Era in Brazil (2002

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<sup>980</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 368.

<sup>981</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 369.

<sup>982</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 376.

to 2016) that national thematic conferences gained momentum and were expanded to many different areas. Such conferences were a way to democratize the discussion of public policies, opening a space for public participation in the definition of national public policies. Usually, the federal government would call for a conference through a decree and from this moment, society and government would organize meetings at the municipal and state levels. Conferences would be held first in the cities, then in regions, and then at the state level, with the election of representatives from both government and civil society. A limited number of elected delegates would attend the national conference in Brasília, where debates would be held in thematic workshops that would approve resolutions. On the final day of the national conference, all delegates would vote on the resolutions, and those that were approved would be compiled and organized by the government in national plans of action directed to guide public policies at all levels. From 2002 to 2016, many conferences were held: on women's rights, children's rights, LGBTQ rights, health, and even one on media was held once in 2010, which, in contrast to all the other conferences, had the participation of delegates from civil society, government, and media corporations.<sup>983</sup>

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<sup>983</sup> See more at: Thamy Pogrebinski & David Samuels, "The Impact of Participatory Democracy: Evidence from Brazil's National Public Policy Conferences" (2014) 46:3 Comp Polit 313–332; Alfredo Ramos & Claudia F Faria, "Las Conferencias de Políticas Públicas en Brasil: hacia un sistema integrado de participación y deliberación a nivel nacional" (2013) 32 Rev Esp Cienc Política 43–63. On the National Conference of Communication, see also: Murilo César Ramos et al, eds, *Conferência Nacional de Comunicação 10 anos depois: velhos e novos desafios das políticas de comunicação no Brasil* (São Cristóvão, SE, Brazil: União Latina de Economia Política da Informação, Comunicação e da Cultura - Seção Brasil / Laboratório de Políticas da Comunicação da Universidade de Brasília, 2020). To see more on the National Conferences for Women, see also: Maria Camila Florêncio da Silva, "A Gente vai mandando recado pela existência": *Desafios da Conferência Nacional de Políticas para as Mulheres para a inclusão de mulheres de diferentes perspectivas* (Doutorado, Fundação Getúlio Vargas - Escola de Administração de Empresas de São Paulo, 2018) [unpublished]; Alecilda Aparecida Alves Oliveira, *O impacto das Conferências de Políticas Para as Mulheres nas Atividades do Legislativo Federal* (mestrado, Universidade Federal de Uberlândia, 2016) [unpublished].

As CLADEM recalled, National documents such as the National Plan for Public Policies for Women<sup>984</sup> indicated that the Brazilian state should fight gendered and racial stereotypes in the general cultural landscape, particularly within mass communication.<sup>985</sup> Such stereotypes, being limiting and problematic, would affect identity formation and constitute a form of oppression. Accordingly, CLADEM pointed out that particular sectors of the government, including the Ministry of Health, have already manifested concerns about how beer marketing campaigns negatively affect public health, which would justify stronger regulation on the matter.<sup>986</sup>

CLADEM also stressed that International Conventions (CEDAW and Belém do Pará) mandate states to act to change socio-cultural values and stereotyped gender roles present in customs and formal and informal educational practices. Accordingly, states should work to ensure that content broadcast by mass media contributes to eradicating violence against women and praises women's dignity, not the opposite. Following this argument, CLADEM claimed that television companies, being a public concession, should closely monitor the content that is broadcast, not to censor but to ensure that national and international human rights norms are not violated:

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<sup>984</sup> A document approved at the National Conference on Women's rights in 2004. Report available in Portuguese at: Secretaria Especial de Políticas para as Mulheres, *I Conferência Nacional de Políticas para as Mulheres - ANAIS* (Presidência da República, 2004).

<sup>985</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 377.

<sup>986</sup> As discussed in chapter three, alcohol advertisement is strongly regulated in Brazil (no advertisement is permitted from 6 am to 9 pm), but beer is excluded from the definition of alcoholic drink and therefore can be advertised on television at any time of the day. Beer companies often hire famous soccer players to recommend the beer in advertisements, which have an intense influence in the youth. Also: José Gomes Temporão, Ministry of Health, on April 09, 2007. Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 377-8.

Therefore, men and women are equal before the law, with no discrimination. When an advertisement is broadcasted through mass media showing sex-based behavioural differences, is addressed to a male audience suggesting that men can “consume” women, such an advertisement is acting in a sexist way, violating the equality principle and, at once, the freedom principle, which includes sexual freedom. For this reason, the discrimination that is based in a differentiated sexual behaviour is against the equality and freedom principles.<sup>987</sup>

CLADEM described two other cases of sexist advertising reported by feminist groups that resulted in good measures to repair the social harm caused by the marketing campaigns, like the organization of regional seminars all over the country to discuss violence against women, promoted by the companies who sponsored sexist advertisements. CLADEM finally concluded that “Skol Summer Muse [campaign] violates the key principle of human dignity, which guides the legal, political, ethical and social boundaries in the contemporary world.”<sup>988</sup>

CEPIA, another feminist organization invited by the MPF to contribute to the debate about the Skol Summer Muse campaign, focused on the issues of stereotyped representation as a form of violation of women’s rights. In its submission (March 30<sup>th</sup> 2007),<sup>989</sup> CEPIA

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<sup>987</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 372.

<sup>988</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 382.

<sup>989</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 341-346. Submission signed by Leila Linhares Barsted: Lawyer, Member and Ex-coordinator of MESECVI (**Follow-up Mechanism to the Belém do Pará Convention, done as** systematic and permanent multilateral evaluation methodology that is based on exchange and technical cooperation between the States Party to the Convention and a Committee of Experts), Founder and Executive Director of CEPIA, Emeritus Professor at the Rio de Janeiro Magistrate School (EMERJ), member of the Brazilian Lawyers Institute (IAB), member of EMERJ’s Domestic and Family Violence Forum, member of the Women’s Safety Commission within the Rio de Janeiro State Council on the Women’s Rights (CEDIM/RJ) and former editor of the Journal Feminist Studies. Complete information at: Leila Linhares Barsted, “Leila Linhares Barsted”, online: *Cons Nac Desenvolv Científico E Tecnológico - CNPQ* <[http://buscatextual.cnpq.br/buscatextual/visualizacv.do?id=K2732265H6&tokenCaptchar=03AGdBq256lDbFo\\_sHkfYa0tn1B36FcNVaOqfL9SEuKSkSCUtiOLFaiU05cLghoIA66Dyqh4mvyHsMhbgkB5Mh-](http://buscatextual.cnpq.br/buscatextual/visualizacv.do?id=K2732265H6&tokenCaptchar=03AGdBq256lDbFo_sHkfYa0tn1B36FcNVaOqfL9SEuKSkSCUtiOLFaiU05cLghoIA66Dyqh4mvyHsMhbgkB5Mh-)

observed that the 1988 Federal Constitution establishes human dignity as one of the foundations of the Brazilian Republic. It briefly describes the International Human Rights Treaties and the CEDAW Convention, according to which State-parties should ensure women's fundamental rights, which includes promoting changes in social and cultural patterns that undermine equality between men and women, and ending the promotion of stereotypical gender roles. The submission also argued that promoting women's rights is not enough because even in developed and democratic societies, women's rights are challenged by these longstanding socio-cultural norms that prevent women from enjoying equal rights. CEPIA noted that the concluding remarks made by the CEDAW Committee regarding the 2002 Brazilian report identifies and highlights that the media plays an important role in disseminating these social values and that any media content must be aligned with respect for human dignity and broader human rights principles.

Called by the MPF to join the discussion, the Patrícia Galvão Institute presented their submission on the case,<sup>990</sup> recalling the United Nations' IV Conference on Women (1995), according to which, in item J2, chapter J, states should promote a balanced and non-stereotypical image of women in the media, and condemns the advertisement.<sup>991</sup> Patrícia

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5e1lnr3cD003VYJad8HP1\_rTYoAWagvmT1pbQr8LtpSBflxpvdooUjy5\_DfKCXcNUyzM19TcWoow-NmRxxhR1O5fQYk4Kc--dSN\_m0ESdRRG4D4aYqDYeSoMprDNaf4Kd-VYmmHHYRUXZT4je3JEp7S-9fyKkW8vby-NmskgIezoFa-yfi4KSgv4Q\_uMlvKieJGKHw3mv0ibH9HbEbbAmdMQDIRl1dt25nSgLvD1GpaLWhQYI38-Qb4VF\_2bZLNrweWE6-8LnjT6ZDld0RDa8NP7QSLIXTO17Xqon1wNmzvldZAIq7m0BEE\_5jQP92czF2iUYcurb8Old8srX3Bm5wxVvK3WwYzWJmmkChfiXPhaCneVJcCfrwRjBeAj-MIU9u5Lu-z\_zWmQ>.

<sup>990</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 347-355.

<sup>991</sup> “Na Campanha ‘Musa do Verão’, a AMBEV, com um grau de liberdade sem limites e sem metáforas, oferece cervejas geladas e mulheres como uma única mercadoria para homens que buscam prazer. A mercantilização da imagem e do corpo da mulher, representada pela exibição na mídia de ‘musas’ silenciosas, passivas, que não esboçam reações, produzidas em série para serem entregues a homens sedentos, é

Galvão Institute stressed the huge influence mass media has in society, and claimed that AMBEV should be held accountable for symbolically perpetuating social inequality between men and women, sustaining ideas of discrimination against women, and negatively affecting future generations. The submission includes information on research done by advertising agencies showing that women are tired of seeing themselves as sexual objects in advertising, and that women would like to see advertisements that portray them as having not only bodies, but also intelligence. The *Skol* Summer Muse campaign, then, would clearly contravene these expectations by showing a woman with perfect appearance, with no will of her own, no autonomy, in a “body without soul” that is reproduced in series and delivered as a product to its male consumers. For the Institute, the campaign implies that men can consume the beer as if it was the woman of their dreams.<sup>992</sup>

As discussed in chapter two, social harm emerges from distorted or stereotypical representations in the media, but individuals do have some level of agency in fighting and pushing back against such stereotypes, as claimed by Buarque de Almeida and also shown in my case analysis. If advertising does influence behaviour, it also reflects the society we live in. In this sense, the claim proposed by the feminist movement is an example of critical reception of specific television content (advertisement) and a political action against it. If advertising mirrors who we are as a society to a certain extent, the feminist claims in my

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intolerável em nossa sociedade. Trata-se de um recurso publicitário que se coloca na contramão dos esforços empreendidos pela sociedade e pelo Estado para a promoção de padrões éticos de civilidade e respeito entre homens e mulheres.” Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 348-349.

<sup>992</sup> Representação 1.34.001.002796/2006-95, Ministério Público Federal, Procuradoria da República em São Paulo – Procuradoria Regional dos Direitos do Cidadão, p. 352.

case analysis are a claim against Brazilian society itself and its patriarchal and archaic social values.

The submissions from feminist groups are quite sophisticated and show a mastery of international human rights law, as well as constitutional law. Reflecting some characteristics of the Brazilian feminist movement as shown in chapter two, the submissions contribute with credible and substantial literature reviews and relevant information on the topics of: power relations through an intersectional feminist perspective, the influence of mass media in identity formation, the dangers of stereotyping through mass media and consequences for women of such representation in the field of violence against women. By bringing forth these arguments, feminists in Brazil take a stance on the issue of representation in advertising not only as a locus for relevant political action, but also as matter of human rights.

### **8.3 Swinging between the Public and Private divide: Changes in Future Campaigns for *Skol* beer**

Social change is a complex topic. Considering how advertising dialogues with social realities, the fact that the *Skol* Summer Muse campaign generated contestation and resulted in a relevant judicial precedent defining sexist advertising as abusive according to the *Consumer Code* reveals that some forms of social representation of women are less and less acceptable.

During the time this litigation has been ongoing, AMBEV repositioned its brand in the market, significantly changing its way of communicating. In this section, I explore how AMBEV moved from one point to another: from a sexist advertisement, to one that talks

about the importance of diversity, and how tensions between the public/private divide and women's role in such a context have been claimed and contested in my case analysis. I do not think that this change happened as a result of one specific action, but that it might be related to a combination of things, such as: (i) the litigation AMBEV faced with the *Skol* Summer Muse campaign in multiple venues, as described in this dissertation; (ii) individual mobilization against the brand during the Carnival of 2015; and (iii) a slow but consistent change in Brazilian society through women's and feminists' activism, to a point that these actions are recognized by the judiciary as a relevant social movement.

As to the latter, this is a complex issue: new technologies have been contributing to the dissemination of feminism among the younger generations. However, since 2016 Brazil has been ruled by very conservative groups, culminating with the far-right fascist government of Jair Bolsonaro. This political environment has been challenging the advancement of the feminist movement, including public policies to address violence against women, raising questions about how to sustain social change in times of democratic instability.<sup>993</sup>

Ideas and perceptions of social change are claimed throughout the litigation process. Both the collective lawsuit proposed by the São Paulo State MP and the company's defense state that things have changed and that women are not "what they used to be," they have gained the right to equality and equal treatment in society. But while for the public prosecutor's office such equality includes the right not to be discriminated against in a beer

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<sup>993</sup> Tamara Amoroso Gonçalves, "Violência contra as mulheres: avanços e limitações das legislações específicas aprovadas na Argentina, no Brasil e no Chile" in Lúcia Avelar Eva Alterman Blay & Patrícia Rangel, eds, *Gênero E Fem Argent Bras E Chile Em Transform* (São Paulo: Edusp, 2019) 211.

advertisement, for the company it means that women do not need any sort of special protection from the law, and therefore no protection against sexist advertisement, because they are equal to men.

Things have been changing in Brazil, mostly pushed by feminist activism. However, the reality is still quite different from what is claimed by AMBEV. Even if men and women are equal by law, Brazilian reality is quite the opposite: women are still highly discriminated against in workforce due to their reproductive capacities, and still struggle with domestic and other types of violence.<sup>994</sup> As shown in chapter seven, AMBEV argued that the contesting the *Skol* Summer Muse campaign is a form of unjustified victimization from radical feminist groups. As discussed in the section “The battle of sexes,” the company tries to make the argument that things have changed so much for women in Brazil that they cannot be considered “the fragile sex” anymore, that they have full equality with men and need no protection, from the law or the state.

Have things changed for women in Brazil? Undeniably yes. From the 1916 Civil Code (in force until 2002 in Brazil) which prescribed that the man was the head of the household, imposing multiple limitations on women’s autonomy, to now, we have come a long way. But that does not mean that we are where we could be, or want to be. Women are still largely discriminated against in Brazil, in all spheres of their lives, and suffer acutely from many forms of violence and patriarchal control, as demonstrated in chapter two. Especially

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<sup>994</sup> For more information on women in Brazil, see chapter two.

during Jair Bolsonaro's government, women in Brazil have been experiencing multiple forms of backlash.

In this context, I note that social change is unstable and advances and backlash alternate throughout history. My dissertation captures a change in perception of women's social representation in advertisement and social gender roles among the members of the São Paulo State court: while the first 2012 decision dismisses the claim by deciding that the *Skol* Summer Muse campaign is not discriminatory, the 2016 decision, although made by a different group of judges, condemns the advertisement for being sexist. This is a relevant change that might also reflect a change in the court's configuration: a political change, and the relative permeability of the judiciary to gendered claims. Considering that one decision is from 2012 and another from 2016, by the same court, I understand that the two judicial decisions might signal a change in understandings about the representation of women and the feminine body in Brazilian society, a change that is mediated by the enforcement of consumer law and its gendered dimensions.

Despite the fine imposed by PROCON and the 2016 São Paulo state court decision, over the years, the company continued to promote sexist and misogynist campaigns. Even with the feminist movement overtly criticizing the advertisements, and even after two legal processes, one collective action (which was dismissed), and one administrative proceeding that resulted in a fine, they seem not to have changed their marketing decisions. This situation shows how this way of depicting women is not always considered problematic, given that the campaigns have faced two completely different court decisions. On the marketing decision-making level, it also suggests that the consumers here are only men, as the ads are directed only to the male, heterosexual audience.

Apart from the legal disputes, things seemed to start to change in 2015, when a billboard for *Skol* was shown on the streets, and it went viral on social media. On that occasion, *Skol*'s national campaign for Carnival involved billboard ads showing women ready to party, accompanied by the message: "I forgot 'no' at home." Women took to the streets to protest this advertisement by adding the sentence "and I brought never" ("trashing the ad") to the billboards. These women took pictures of themselves with these ads (while making obscene gestures) and posted these images on Facebook, criticizing the beer company for promoting abusive and violent sexual behaviour during Carnival. The posts went viral and the beer company changed its national campaign within 24 hours, also replacing their marketing director.<sup>995</sup>

A double standard adopted by AMBEV can be observed. While in the Facebook case, because critiques went viral through Facebook, the company reacted promptly, changing the advertisement and replacing the marketing director; in the judicial, administrative, and self-regulatory proceedings, due to the technical language in which they were discussed (seldom reaching public debate), the company refused the idea that its campaigns are discriminatory or promote violence. There seems to be a tension here, between actions taken in "public" discussions and "private" ones, where public and private are not set according to traditional boundaries, including ideas of private and public within law. Even if the documents from the cases related to the litigation around the *Skol* Summer Muse

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<sup>995</sup> Ivan Paganotti, "A negação da negativa em um palímpseto de propaganda: conflitos entre liberdades em expressões sobre a campanha de carnaval da Skol em 2015" (2016) 2:1 Revista Observatório; Victor Reis Mazzei, Agatha Sabanelli Becelli, & Gabriela Pulino Melatte, *supra* note 734. Karina Santos Grassmann, "Vamos falar sobre cerveja? Um estudo de caso a respeito da campanha da Skol que não convenceu" (2016) 8:1 Comtempo - Rev Eletrônica Pós-grad Cásper Líbero.

campaign are public (any citizen can access the documents related to the cases),<sup>996</sup> the hermetic legal language makes it harder for the public to access and understand them. At the same time, even if the Facebook posts are individual actions, they reach a collective audience due to the nature of social media and the capacity of some content to go viral through re-posting and tagging friends and other social actors (such as the corporations themselves).<sup>997</sup>

While the law supporting the judicial and administrative proceedings is considered public law in Brazil and all the proceedings are available upon request by any citizen, the legal language in which the debates develop in these cases poses a challenge of accessibility to the public. On the other hand, a personal post on social media that went viral had the power to promote a change in the company's behaviour, generating public discussion. In terms of effectiveness, this might reveal a tension between the legal framework and its enforcement and informed social shaming in the context of the information society. This situation brings us to an interesting paradox: the private space of Facebook was publicized, and its use as an arena of public debate brought about a quick change in the company's behaviour.

Conversely, the public administrative and judicial proceedings, because they remain somehow private or non-accessed by society, generated completely different behaviour by

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<sup>996</sup> It is also possible, upon request to CONAR or to the courts, to obtain copies of the case documents. However, it is a challenge to even know that these procedures exist (if there is no information on the case in the media, probably not many people will know about it), followed by a second problem, related to language. When citizens access such documents, they are not always easily understood due to the formal, legal language they are written in, full of legal definitions and jargon.

<sup>997</sup> Laura Hastenpflug Wottrich, "*Não podemos deixar passar*": *práticas de contestação da publicidade no início do século XXI* (Doutorado, Universidade Federal do Rio Grande do Sul - Faculdade de Biblioteconomia e Comunicação, Programa de Pós-Graduação em Comunicação e Informação, 2017) [unpublished] at 233-239.

the company. It seems that public scrutiny and state accountability influence corporate behaviour differently.

In 2020, AMBEV significantly changed its communication style. Was it a result of the multiple and ongoing litigation started in 2006? Was it due to the negative repercussions on social media related to the 2015 campaign? It is hard to offer a definite answer on this issue, but maybe all these multiple forms of contestation over time have led to a change. Maybe such change also reflects a change in society, where feminism is gaining more space on social media and has pushed for a strong mobilization against Bolsonaro's campaign in 2018 (#Elenão campaign). I believe that both kinds of contestation, on social media and through litigation, were important in different ways. If the first brought visibility and amplified debates on the matter, the latter provided a relevant judicial precedent defining sexist advertising as abusive according to the *Consumer Code*. This precedent can be useful for future litigation and to encourage and support administrative bodies, such as PROCONs, to take action.

## Concluding thoughts

My dissertation shows that the feminist movement in Brazil has been questioning sexist advertising by using a human rights framework to disrupt unequal power dynamics and question traditional representation of women in the media as a strategy to seek gender justice. By relying on feminist political economy theory and conceiving sexist advertising as a visual representation of material social inequalities in a given society, I merge redistribution and representation issues based on Nancy Fraser's conception of bi-dimensional justice theory to argue that discussing discrimination in advertising can broaden the ideas of gender justice by presenting it as a human rights issue in consumer societies.

Through the analysis of the *Skol* Summer Muse campaign and its related litigation, I observe that ideas of public/private, as well as gender roles socially assigned are disputed by multiple social actors. This campaign was a typical beer advertisement that exploited female sexuality to increase sales, depicting images and ideas of cis-women, cis-men and heteronormativity. I could see that in opposition to this hypersexualized woman stands the image of the mother. These two representations were set in opposition, discursively supporting the heterosexual matrix and a misogynous perception of women, divided between those to "have sex, have fun," with, who can be objectified, and those to marry and who must be respected as mothers and sisters, reflecting the gendered division of labour established under capitalism. Since gendered representation is also its construction (Lauretis), these stereotypical representations contribute to upholding symbolically unprivileged places for women in Brazilian society. I noticed in analyzing the arguments presented throughout the litigation process that this dichotomy between the sexual object

and the mother persists. And as Fraser reminds us, there is a connection between redistributive and identity issues in terms of social justice. What I discovered is that advertising both reflects and reinforces subordinate positions and identities, mirroring social inequalities structured by social class, gender, race, and age, representing them visually and discursively.

If representation in advertising reflects and reinforces social roles assigned to men and women in deeply marketized societies, then discussing these representations can be a political action. Representation is often debated within the state-political system and the private sector (women in CEO positions and so on), but I argue that this debate, when expanded into the realm of advertising, can also be fruitful in terms of advancing gender equality. If we live immersed in highly commercialized and market-oriented societies, being represented as a consumer and not as an object of consumption could represent an advancement regarding gender and social inequality.

Despite the strict gender stereotypes in this advertisement and the discussion in its related litigation, I observe that the path that has been used by the feminist movement in Brazil, as well as the one suggested in this work (engaging with the National System to Protect Consumers (SNDC) could inspire other social movements (like LGBTQ2+ and the black movement) to act, independently or in coalitions.

Feminist activists in Brazil have been pushing for state intervention in private relationships as a matter of human rights for a long time, as is evident in the case of legislation on domestic violence against women. Legislation that protects women against domestic violence can be seen as a hybrid legal space. Likewise, consumer law in Brazil creates a

hybrid legal space, imposing public regulations within private relationships established between companies and consumers.

My dissertation advances discussions in law and in socio-legal debates about representation in advertising as a political issue in media-saturated societies and sexist advertising as a human rights issue. It also provides concrete suggestions about how the feminist movement in Brazil can explore consumer law and the resources of the National System to Protect and Defend Consumers (SNDC), by accessing PROCONs to promote gender justice.

My analysis of the *Skol* Summer Muse campaign and related litigation also revealed that feminists in Brazil presented sophisticated contributions to defining sexist advertising as discriminatory, grounded in academic socio-legal analysis and international human rights law; but they did not engage with the specific regulation on advertising in the *Consumer Code*. The *Consumer Code* law does not offer a definition of discriminatory advertisement, but I have argued that the Brazilian feminist movement's work on advertising could be used to ground a definition of discriminatory advertising, and to support claims related to social harm caused by advertising through the use of the concept of diffuse rights, protecting society against sexist marketing campaigns. Therefore, I suggest merging both fields of law through strategic litigation on sexist advertising.

The National System to Protect Consumers (SNDC) could be seen as a *locus* of activism for the feminist movement (and for other social movements as well), which would also require work to sensitize the members of the SNDC to the gender issues in advertising. This would require action to involve state actors with the issue, via workshops and programs aimed to sensitize public agents about the social harms caused by sexist

advertising. Having in mind that members of the SNDC have training in consumer law and possibly not a feminist perspective of gender relationships and the law, and that feminists are not familiar with the SNDC structure and consumer law, a coalition between the two groups could be fruitful for both, and supply both fields with knowledge they are missing.

A strong coalition between the feminist movement and the state-level consumer bodies (both MPs and PROCONs) could promote interesting debates and initiate a process of mutual support and strengthening, considering that feminists discuss the social harm caused by advertising as a human rights issue, and consumer law, through the concept of diffuse rights, offers a tool to address such social harm. By engaging with consumer law from a feminist perspective and grounding the claims as a human rights issue, feminists might contribute to expanding the debates around discrimination in advertising, setting boundaries for more ethical advertising.

The remedies proposed by the feminist groups during the discussions with the Federal Prosecutor Office Representative suggest interesting solutions to promote women's rights, and fight violence against women and sexist advertising. Article 56 of the *Consumer Code* describes multiple sanctions that could be applied in cases of consumer law violations. One of those is the imposition of "counter-advertising." If on one side PROCONs are bound to follow what is prescribed by the Code, on the other, feminist groups could contribute with the creation of such "counter-advertising" campaigns. Therefore, if a PROCON imposes this sanction, it could act in partnership or in consultation with members of the feminist groups, in particularly with Instituto Patrícia Galvão and the Rede Mulher e Mídia, who work specifically with issues related to women and media in Brazil. On the same note, the public prosecutors' offices have more freedom to determine different forms of sanctions,

through the agreements that can be made in conciliatory meetings before the issue reaches the judiciary. Those agreements, the TACs as they are called in Portuguese, when settled in a case of discriminatory advertising, could incorporate many (or even all) of the remedies suggested by Rachel Moreno and Patrícia Galvão Institute, such as: the organization and delivery of workshops to marketing and media professionals on gender-based discrimination in the media; conducting opinion polls on the matter to be disseminated and publicly discussed in the media, and others.

This displacement could also strengthen the SNDC, by affirming the state as responsible for overseeing marketing activities, and monitoring advertising as prescribed in the Brazilian *Consumer Code*. In neoliberal contexts, such as the one experienced in Brazil, the market tends to avoid legal regulations that could limit its activities. In this case, AMBEV, speaking for the whole market, sought to avoid, at all costs, a judicial decision imposing sanctions on advertising. The company defended CONAR, the market self-regulatory body, as the one who should be solely responsible for discussing advertising (by arguing that CONAR is appropriate to do so, while disqualifying what other social actors said about the advertisement), and defended the *Civil Code* as the one to be enforced in the *Skol* Summer Muse campaign, completely excluding the *Consumer Code*, which has an express article on discriminatory advertising, from the debates.

In this context, I believe that partnership and engagement with the feminist movement could support the SNDC in establishing its authority to regulate advertising. I argue that when the feminist movement accesses the SNDC, it will also support its legitimacy to impose sanctions on the market and contribute to defining a space for state action within the private market-oriented relationships. Such movement could then strengthen both

agendas: the feminist one that seeks fair gender representation in advertising, but also reaffirming the SNDC as the social actor responsible for overseeing advertising in Brazil.

This articulation would require effort from both the feminist movements and the SNDC members. For the feminists, it would be important to get acquainted with the *Consumer Code* and the SNDC as a structure, before fostering strategic litigation within it. As for the SNDC members, it would be necessary to be sensitized about gender relationships, from a feminist perspective. I hope that this work can inspire them to collaborate together to challenge, in a coordinated way, capital's resistance to answering to social movements and state interventions.

Finally, even if this dissertation is focused on Brazil and the Brazilian legal scenario, the discussion about sexist advertising as a human rights issue can be used by other social groups in other jurisdictions. After all, despite the local particularities, the combination of capitalism and patriarchy is not unique, and other countries besides Brazil share similar structures.

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## **Appendix 1**

Portal O Tempo > Diversão > Artigo

# Dani Samambaia fica nua no palco do "Tudo é Possível"



Por **DA REDAÇÃO**

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**Curtir** Seja a primeira pessoa entre seus amigos a curtir isso.

A modelo Danielle Souza, a Mulher Samambaia do programa "Pânico na TV!", aceitou o desafio feito por Ana Hickmann e reencarnou uma samambaia na tarde desta quarta-feira (30), no programa "Tudo é Possível".

Durante duas horas, Dani Souza ficou só de tapa-sexo enquanto o artista plástico W. Veríssimo, pintava vários galhos de samambaia em seu corpo. Depois, ela desfilou durante o quadro "Essa Moda Pega?"

"Demorou um pouco, mas foi bem legal. Adorei", disse ela.

O público pode conferir o resultado final no programa que vai ao ar no próximo domingo (4).

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