

(Mis)gendering and naming practices in appellate decisions in Santa Catarina's state court

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Abstract. *This study investigates practices of misgendering in appellate decisions involving claims for gender identity rights at the Tribunal de Justiça de Santa Catarina (TJSC). To do so, it relies on theoretical and analytical frameworks from Critical Discourse Analysis and Systemic Functional Linguistics (Fairclough, 2001; Halliday e Matthiessen, 2004; van Leeuwen, 2008), focusing on the representation of trans social actors within the representation of the social practice of the judicialization of gender identity rights. The data consist of five appellate decisions produced by TJSC between 2007 and 2015. The analysis revealed that all five appellate decisions included misgendering practices at least at the linguistic level, either referring to trans individuals in a way that indicated/revealed their assigned birth name and/or gender in nominal and pronominal choices, or referring to them by using reductionist biological language. The analysis also revealed that the amendment of the official documents of trans social actors depends on their physical characteristics and on clinical reports attesting to a mental condition, thereby reinforcing the idea that their identity derives from a pathological condition.*

Keywords: *Critical discourse analysis, judicial discourse, gender, gender pathologization, gender identity rights.*

Resumo. *Este estudo investiga práticas de legitimação e deslegitimação de gênero em acórdãos produzidos pelo Tribunal de Justiça de Santa Catarina em relação a demandas por direitos à identidade de gênero. Para tanto, ancora-se em princípios teórico-metodológicos da Análise Crítica do Discurso e Linguística Sistêmica Funcional (Fairclough, 2001; Halliday e Matthiessen, 2004; van Leeuwen, 2008), focando na representação de atores sociais dentro da representação da prática social da judicialização de direitos à identidade de gênero. Os dados consistem em cinco acórdãos produzidos pelo Tribunal de Justiça de Santa Catarina entre 2007 e 2015. A análise revelou que as cinco sentenças produziram práticas de deslegitimação de gênero das pessoas trans ao menos a um nível linguístico, referindo-se a elas de modo a revelar seu gênero atribuído ao nascimento através de escolhas nominais e pronominais, ou através do uso de linguagem biológica reducionista de suas identidades. A análise também revelou a retificação dos documentos civis de pessoas*

trans condicionada às suas características físicas e laudos médicos atestando uma condição patológica de saúde mental, desta forma reforçando um entendimento de que suas identidades derivam de uma desordem mental.

Palavras-chave: *Análise crítica do discurso, discurso judicial, gênero, patologização de gênero, direitos à identidade de gênero.*

Introduction

Western societies, by overlapping the concepts of gender and sex, traditionally read gender in accordance with the birth sex of each person. Such overlapping of and epistemological confusion between the concepts of gender and sex rests on the values of a heterosexual, cisgenderist, white matrix with binary and essentialist categories to recognize gender (i.e. people have to be either male or female). These values are constantly reproduced in judicial and medical discourses, dominant institutional discourses that help legitimate patriarchy and regulate its operation.

Heteronormative values also have a central role in the designation of the gender of a person on the occasion of their birth, which might result in a conflict in case later on their identity does not conform to their birth assigned gender. As far as trans people are concerned, their understanding of their own gender will have been delegitimized and invalidated by medical and judicial institutions long before they acquire agency and symbolic power. In practical terms, failing to accept a person's own gender designation constitutes a form of oppression that results in marginalization, affecting the quality of the mental health of the trans community.

Cohen (2013) argues that names are an important part of our identity, and they are usually chosen and given to us at the time of our birth. In languages such as Portuguese, gender is grammatically marked in most names and most pronouns. However, since names are usually attributed at the time of birth, they are also given according to the birth-assigned gender.

Names are attributed long before the named has a chance to say whether or not they are comfortable with their names. As a result, when a person acquires a certain awareness in relation to their gender, they may want to change their name as well as their gender as stated in official documents. However, in Brazil the allowing of this change is usually conditional, in judicial terms, on medical practices that pathologize trans people, even though such practices do not necessarily guarantee that they will have their rights recognized.

Brazil has no specific law regulating gender identity rights. As a consequence, judicial decisions concerning changes to official documents vary considerably. On the one hand, there are some judicial decisions that link the change of name and of gender markers to transgenitalization surgery, hormonal therapy and psychological treatment. On the other hand, there are some decisions that indicate that some judges have a better understanding of gender issues as seen from a sociological perspective (that is, an understanding of gender as a social construct), rather than from a medical and pathological one (that is, understanding gender as a biological construct or as the result of a pathology). Such a viewpoint results in the absence of pressure by judicial and medical institutions for transgenitalizations and/or other invasive medical procedures.

The present article is based on an MA dissertation (Rieger, 2016) whose general purpose was to investigate the positioning of the Tribunal de Justiça de Santa Catarina (TJSC)¹, a Brazilian state court located in the south of the country, about the gender identity rights of transsexuals. The focus was on the linguistic practices of (mis)gendering within appellate decisions produced by this court, more specifically decisions related to the changing of names and gender markers in official documents. In the sections below we discuss how, mainly due to the lack of specific legislation in Brazil, the processes of name and gender marker change have usually been dependent on practices of medicalization and pathologization and we consider the implications of such dependency.

Theoretical background

This research is theoretically based on Critical Discourse Analysis (CDA). Adopting CDA as an approach to any study involves a concern with social change. As Fairclough (2001, 2003) argues, discourses are part of social practices, since they are an integral element of material practices, thus representing and constituting realities at the same time. Therefore, CDA is an approach that seeks practical results and practical relevance, supported by the understanding that changes in discourse are changes in reality (Fairclough, 2003; Figueiredo, forthcoming; Wodak e Meyer, 2001). To have a social impact, CDA focuses on power relations, which can be explicit or implicit in discourses, and relies on Systemic Functional Linguistics (SFL) as a linguistic theory and source of analytical tools which allow us to describe representations in discourse according to their organization, structure and prominent elements.

Texts create and represent realities in certain ways depending on the actors who are producing them and the position they occupy in the social practice(s) being recontextualized. From a critical perspective, language production is associated with ideological and institutional values (Fairclough, 1989; van Dijk, 2001; Caldas-Coulthard e Sciar-Cabral, 2007; van Leeuwen, 2008). In other words, producing discourses (either written or spoken) implies assuming positions (either conscious or unconscious) towards what we communicate.

Fairclough (2001) argues that “CDA is analysis of the dialectical relationships between semiosis (including language) and the other elements of social practices” (2001: 123), aiming to understand how the ways of creating and representing reality in texts are connected to the social context of actions. According to the author, semiosis is realized in three different ways in social practices: first, as part of the social activity (for instance, the actions that a person performs and the language these actions require). Secondly, in representation, since social actors produce semiotic representations of other practices and represent their own practices in recontextualizations, positioning themselves and other actors in specific circumstances and in relation to specific actions. Thirdly, semiosis is realized in performances of specific social positions within a social practice, which here we call specific social roles. These positions, and whether or not they exert power, will always be related to who the actors represented are within a matrix of class, gender and ethnicity.

The politically oriented agenda of CDA proposes that any study within this approach should concern a social problem which has a semiotic aspect. In this article, the social problem is the lack of legislation regulating gender identity rights in Brazil, resulting in the production of different judicial decisions when members of the trans community

make a petition to change their official documents. The discrepancy between the official name and gender markers (in documents) and the social name and gender performance in everyday life often results in public humiliation, aggression and even the murder of members of the trans community, especially when they are recognized as trans persons and suffer gender-based discrimination. According to a study conducted by the NGO Transgender Europe², 802 gender-motivated murders of trans people were registered in Brazil between 2008 and 2015. Brazil has the world's highest rate of hate crimes motivated by homo/transphobia, being alone responsible for 39.78% of the gender-based murders of trans people in the whole world between 2008 and 2015. In 2014 alone, 50% of the reported murders of transsexuals in the world took place in Brazil (Grupo Gay da Bahia, 2014).

In fact, currently there is a growing wave of fundamentalism and fascism in Brazil, with discourses of discrimination emerging in every social context and acquiring sufficient strength to infiltrate institutions of power which should be concerned with the protection of human rights (see Rieger, 2016 for an analysis of the sociopolitical conjuncture in Brazil at the time the study was published). Different countries deal differently with the issue of the legal recognition of gender identity. These differing understandings of gender identity rights³ reflect the cultural values of each country and how they are sustained by local legal institutions, that is, they either express a concern with promoting quality of life or with promoting gender discrimination.

With regard to international policies concerning gender identity and sexual orientation rights, we should mention the Yogyakarta Principles, which were devised by a series of human rights experts (judges, lawyers, scholars and members of the UN) in 2006 in response to documented forms of abuse in society related to gender and sexual orientation. The principles assert the primary obligation of all states to implement human rights policies, including the ones regarding gender identity and sexual orientation rights, and emphasise the responsibility of every social actor towards the promotion and protection of human rights.

Fairclough's framework for CDA (2001) also requires the analysis of the network of social practices that involves the social practice under investigation, which in this article is the judicialization⁴ of gender identity rights. In Brazil, as we argue, this practice has become dependent on the presentation of psychiatric/psychological reports attesting that the trans person suffers from a condition called 'gender dysphoria'.

Unfortunately, the role of medical discourse in this network of practices is not that of pointing out that failing to accept a person's self-declared gender and name constitutes a practice of aggression with severe implications in terms of mental health. Medicalization and pathologization reinforce the structures of the heterosexual cisgenderist matrix by regulating trans bodies and controlling how they should perform their subjectivity to be accepted as 'legit' individuals who belong to their self-declared gender. Therefore, the trans community, in fighting for their rights, see themselves forced to participate in the practices of medicalization and pathologization, and later on in the practice of judicialization of their identity rights.

All these practices (medicalization, pathologization, judicialization) and their linguistic realizations interact and complement each other in the data gathered. In fact, the medicalization of trans identities and bodies needs judicialization in as much as ju-

dicialization depends on and demands medicalization, with both phenomena operating as biopolitical⁵ strategies upon trans individuals to control their subjectivity and their bodies.

A final step of CDA's analytical framework is to investigate whether the social practice somehow needs the problem. In order to cast a critical view upon medicalization and judicialization as social phenomena, it is necessary to contextualize them within the neoliberal capitalist mode of production. Fairclough (2001) argues that capitalism in the contemporary world is gaining ascendancy in a restructured form that involves the creation and circulation of new discourses and, hence, the imposition of new ways to represent the world. Within this context, socioeconomic differences between certain groups increase at the same time that democracy, security and sustainable practices decrease in order to attend hegemonic market interests, redefining relations between the economy, the state and society (Holborow, 2013). In highly semiotized societies such as the contemporary ones, language has acquired a pivotal role in guaranteeing the creation and circulation of discourses that implement and justify market relations.

Holborow (2013) claims that the role of neoliberal politics is to transform ideas into processes that could be assimilated as products, therefore acquiring economic value. Neoliberalism is also characterized by how the signs produced with language figure as elements of these material processes and their construction. If language can be considered part of material processes and thus gain market value, it can also be used to shape subjective aspects of life so that they figure as commodities.

The processes of medicalization and judicialization of trans identities involve powerful industries. The pharmaceutical industry is involved in the sale of hormones and, in many cases, psychopharmaceuticals; the surgery industry benefits from transgenitalizations, mastectomies, hysterectomies, sterilization procedures, and cosmetic plastic surgeries and procedures; and so does the legal profession – actors such as lawyers and expert witnesses also benefit from these practices, since trans people are their clients. All these entities and actors are economically involved in the judicialization of identity rights. In countries such as Brazil, the mandatory judicialization of gender identity rights leaves the claimants no option but to engage in this network of economic practices.

Misgendering

Hird (2003) claims that the way clinical psychiatry addresses gender identities illustrates the use of stereotypical notions of gender that provide the framework for treating those labelled by others or self-identified as transsexual and/or intersex in terms of pathologies. That comes from the understanding that creating a discourse of dysphoria to explain gender nonconformity means putting trans citizens mandatorily against their own bodies and their own selves, since they have to produce discourses claiming to be dissatisfied, unhappy and disturbed by their bodies if they want to have access to such basic civil rights as changing their names and official gender.

The processes of pathologization and marginalization result in specific linguistic practices, for instance, misgendering – defined by Ansara and Hegarty (2014) as:

The use of gendered language that does not match how people identify themselves, such as when people who identify as women are described as men. Although anyone may be misgendered by others, being misgendered is a particularly common experience shared by women in professions stereotypically as-

sociated with men (e.g. surgeons who are described by surname are often automatically described as 'he', see Reynolds *et al.*, 2006, Stout e Dasgupta, 2011 and people whose own designations of their genders and/or bodies are not granted official recognition in social, medical, or legislative contexts. In English, this includes those who may self-identify and/or be labelled by others as 'transgender', 'transsexual', or 'genderqueer' due to their own descriptions of their genders being independent from their assigned 'sex'. (2014: 260)

According to the authors, misgendering consists of a form of sexist and cisgenderist⁶ language that delegitimizes trans people. In more specific linguistic terms, misgendering happens along with the practice of *mis-pronouncing*, which is defined by the authors as the practice of misgendering through the use of pronouns such as s/he, neglecting or delegitimizing the gender preferred by the person who is being referred to. These practices draw from and reinforce the binary gender system which, according to Hird (2003), requires that individuals restrict their gender expression to the two socially determined subjectivities male/female or s/he.

Medicalization of gender and mental health

Medicalization, from a sociological perspective, is defined by Conrad (2007) as the process by which non-medical problems are defined and treated as having a medical solution, usually in terms of illnesses and disorders. According to Foucault (2008), from the 19th century on the medical sciences, and specially psychiatry, started appropriating and problematizing all types of behavior considered deviant from the dominant sociopolitical norms. The human body and human social behaviors became the targets of politics as objects of knowledge and corrective intervention. In the 1980s this was the case of individuals whose gender did not conform to hegemonic social norms, when the American Psychiatric Association, in the third American Psychiatric Association (1980), started considering as an official disorder what they referred to as "transsexualism". From then on, trans identities, which have traditionally been considered in Western societies as deviations from the binary and essentialist possibilities of gender, started being pathologized and subjected to medical interventions.

Caponi (2009) claims that, in modernity, new diagnoses and diseases started to emerge so as to associate every deviation from sociopolitical norms with mental illnesses. As a consequence, many of the present discourses produced by the medical sciences represent social and subjective aspects of life in reductive and predominantly biological terms, which deny the existence of identities and subjectivities produced by and located within complex sociocultural contexts.

Since the emergence of the DSM-III (1980), several nomenclatures have been coined to refer to gender identities from a pathological perspective, the current one being Gender Dysphoria. Interestingly, the American Psychiatric Association claims that gender nonconformity itself is not a mental illness. The 'illness' would supposedly be the dysphoria caused by gender 'fluctuation'. However, this does not prevent medical and legal institutions from referring to transgender people as pathological subjects. Sadly, transgender people in Brazil actually depend on this process of pathologization to ensure that their rights will be somehow respected.

Data selection and analytical categories

As noted above, the data analysed comprises five appellate decisions (AD for short) involving the judicialization of gender identity rights, produced by TJSC during an 8 year period (2007-2015). Three of the decisions granted changes to gender or to first names in official documents, while two of them denied such changes. Appellate decisions ('acórdãos' in Brazilian Portuguese) are a specific genre produced by appellate courts.⁷ A genre is a conventionalized, socially recognized form of using language with the purpose of developing relationships, performing actions and thus constituting social realities (Kress, 1989; Hyland, 2002).

We applied the framework proposed by Fairclough (2001) concerning the contextualization of the social practice under analysis (in the present case, the judicialization of identity rights) in relation to other social practices, that is, its contextualization in local and global contexts. To conduct the linguistic analysis, the research deployed analytical categories from Systemic Functional Linguistics (Halliday e Matthiessen, 2004) – more specifically, the Transitivity System –, coupled with Van Leeuwen's (2008) proposal for the analysis of the representation of social actors in texts.

For SFL, language expresses three different types of meaning – interpersonal, ideational and textual –, which correspond to the three metafunctions language plays in social life (Halliday e Matthiessen, 2004; Eggins, 2004). In the present work, only ideational meanings will be investigated. Ideational meaning is concerned with the representation of experience in language, with how language is used to represent social actors and social actions.

When we think of the ideational metafunction and its main system, transitivity, we think of grammar in the clause as representation (Eggins, 2004). Transitivity provides tools to identify agents, process types and circumstances used to represent a social practice. Process types can indicate different perspectives towards how the social action happened; they are usually connected to an agent and, depending on the case, another participant who benefits or suffers from the action performed. The relation between agent and process type offers a perspective on how agency is represented, that is, on the social roles attributed to each participant in a social practice.

To further expand the investigation of agency in the data, the transitivity system was combined with Van Leeuwen's (2008) socio-semantic proposal to analyze how social actors are represented in texts. Of the many categories that compose that framework, only the following ones were investigated: (1) inclusion/exclusion, (2) role allocation, (3) nomination and categorization and (4) personalization and impersonalization.

Due to length restrictions, the analysis of only two ADs will be presented in this article: AD1 denying and AD4 granting the change of name and gender markers. English translations of all the excerpts and lexical selections from the two ADs are also provided. The translations have been produced by the authors.

Analysis and discussion

The micro-analysis of the appellate decisions examined the clauses in which the trans persons who were requesting name and gender change were represented. This mapping of the nominal references to these actors allowed the classification of their representations according to Van Leeuwen's (2008) analytical categories. After that, we analysed

which processes (according to the transitivity system) were attributed to the trans participants, to envisage their agency within the practice of judicialization of gender identity rights. Since one of the focuses of this work was agency, passives and nominalizations were included and analysed.

Finally, we assessed which elements were given prominence by the judges in the representation of the practice of judicialization of gender rights and how their combination with the representation of the social actors creates a general picture of the judges' understanding of gender and sexuality. We begin with AD1.

AD1

AD1 is the response from TJSC to an appeal by the Public Prosecutor's office (MP – Ministério Público – in Portuguese) against a first instance decision which granted the change of name and gender markers to a trans woman. Below is a summary of the main aspects of AD1:

Appellant	Appeal's legal base	Final decision
MP	The MP (Public prosecutor's office) claimed that the document presented by the claimant and attested by a health expert was not proof beyond reasonable doubt that s/he had gone through a transgenitalization surgery. In addition, the MP alleged the judicial impossibility of changing the claimant's name due to the non-existence of the necessary legislation. It also requested detailed examination to check whether or not the claimant had undergone transgenitalization and whether the surgery had 'efficacy'.	Appeal accepted: the name and gender marker of the claimant's documents were not changed.

Table 1. Relevant information on AD1 (produced in 10/04/2007).

In lexico-grammatical terms, the claimant (in other words, the trans woman) was represented as:

Linguistic choice	English translation	Activated	Passivated
Autor	Applicant (male gender inflection)	2	1
Agravado	Appellee (male gender inflection)	7	3
Ricardo José Pereira		1	1
Pessoa do agravado	Person of the appellee (male gender inflection)	–	1
R.J.P.		1	–
Parte autora	The initiating party (feminine grammatical gender inflection but actually contextually gender neutral as there is no masculine option available)	1	–

Table 2. Claimant representation in AD1.

In terms of inclusion and exclusion, the judges predominantly included nouns that grammatically marked the claimant’s birth name and gender, not her self-declared gender. They suppressed the claimant’s social name, thus practicing misgendering in 95% of the times they referred to her. The only choice which grammatically neutralizes gender was “a parte autora”, which, however, does not indicate an attempt to remove gender inflections, but rather is a common expression in judicial jargon.

In terms of transitivity choices, the claimant was predominantly activated when she was represented as the author of the original lawsuit (i.e. “The claimant requires legal adaptation of sex”; “The request made by the appealed”; “[lawsuit] brought by Ricardo José Pereira”⁸); she was passivated in relation to the MP (Public Prosecutor’s Office), the appellant (“Appealing the MP, and appealed against Ricardo José Pereira”⁹); and she was represented as the goal of material processes performed by medical experts (“P [the judge] dismissed a technical examination of the person of the appellee”¹⁰). Whenever she was mentioned as “o agravado” (“the appealee”, male inflection in Portuguese), the choice denoted a hidden actor, the MP, who performs as “o agravante” (“the appellant”).

After analyzing the naming patterns and transitivity choices relating to the claimant in AD1, it was possible to produce an overview of the representation of the social practice of the judicialization of gender identity rights in this particular case. The purpose of this overview is to assess which elements are given prominence by the judges in their representation and how the combination of prominent elements with the representation of the social actors creates a general picture of the judges’ understanding of gender and sexuality.

AD1 dates from 2007 and derives from an appeal made by the MP aiming to quash the lower court decision that had been favorable to the claimant. The main argument presented by the MP was that the lower court had failed to put the claimant through a “technical examination” to “confirm” whether or not she had gone through a transgenitalization.

In fact, the claimant had presented a medical report stating that she was a transsexual woman to the lower court, which had accepted it. However, although seen as reliable by the single judge, the report was not considered by the MP to be a proof beyond reasonable doubt that the claimant was indeed a trans person. In accepting the appeal, the appellate judges thus accepted the argumentation scheme constructed by the MP, delegitimizing the claimant’s self-declared gender.

In addition, the judges alleged that the request made by the claimant ‘was not supported by the current juridical order’:

Even though a transsexual and having undergone a surgical procedure to change sexual traits, with the excision of male genitals, biologically and somatically [the claimant] stills belongs to the male sex. [Name/gender change] is not feasible due to the absence of any error or falsehood in the public register and also because we cannot consider this rectification as a solution to a psychic against a somatic conflict. [...] An apparent change, that is, an external change of the genitals resulting from surgical procedures, not supported by the Brazilian juridical order, does not imply the transformation of a man into a woman, a metamorphosis that nature does not allow and genetic engineering has not yet managed to achieve.¹¹

They also claimed that there was a lack of proof beyond reasonable doubt that the claimant’s official name exposed her to embarrassing situations – although she had argued this in her defense – and, therefore, alleged she could not rely on the current ‘juridical order’ to be granted the change of her birth name. In doing so, the judges neglected the LGBT-phobic scenario in which Brazilian trans people live. This might either be due to their lack of instruction with regard to gender-based violence, or to their lack of interest in it, that is, their interest in sustaining a heteronormative cisgender matrix. Thus, in disregarding the Brazilian transphobic social context and accepting the appeal, the judges neglected the claimant’s rights to identity, security, and mental and physical integrity.

AD4

AD4 is the response from TJSC to an appeal by Milton, a trans man, against a first instance decision which granted him the change of his birth name, but not of his gender marker, that is, the inclusion of the word ‘male’ in his official documents.

Appellant	Appeal’s legal base	Final decision
Milton	Milton claimed that a lower court had changed his name without changing the gender marker in his documents, thus exposing him to embarrassing situations.	Appeal accepted: gender marker changed.

Table 3. Relevant information on AD4 (produced in 11/05/2015).

In AD4, the judges vary considerably in their linguistic choices when referring to Milton (his original female name is only mentioned with the initial M), classifying him in relation to different roles in the legal process and at the same time marking distinct gender inflections:

Linguistic choice	English translation	Activated	Passivated
A autora	The applicant (female gender inflection)	19	4
Apelante	Appellant (can be used for both males and females, depending on the article used with it – ‘o/a’.	1	–
M.C.J.	Female initials	1	–
A apelante	The appellant (female gender inflection)	2	6
A requerente	The claimant (female gender inflection)	–	3
Milton	Male name	2	4
O requerente	The claimant (male gender inflection)	–	3
‘o’ (functioning as ‘ele’)	Male referent	–	2
O transexual	The transexual (male gender inflection)	10	6
Redesignado	Redesigned (male gender inflection)	–	3
O indivíduo	The individual (neutral gender inflection)	5	3
A parte autora	The initiating party (neutral gender inflection)	3	3
A depoente	The deponent (female gender inflection)	3	3
M.	M. (initial for either male or female gender inflections)	17	7
Ela	She	11	1

Table 4. Claimant representation in AD1.

The judges activated Milton in 60% of the occurrences, mainly as senser in mental processes related to his state of mind, will and self-perception (i.e. “M wishes to undergo a redesign surgery”¹², “M always preferred the color blue”¹³, “The deponent does not identify with the female gender”¹⁴, “The applicant confirmed she did not feel as a woman”¹⁵), and as actor of material processes related to actions performed by him to shape his body (i.e. “The applicant has typically male facial traits”¹⁶, “She cut her long hair short and, around a year and a half ago, she underwent a mastectomy, began hormonal treatment and got psychiatric support”¹⁷). In relation to grammatical gender marking, the gender inflections vary, as the judges refer to Milton as “o requerente”, “Milton”, “o transsexual”

(male gender inflections), but also “a autora”, “a apelante”, “a depoente” (female gender inflections). These do not seem to be mere random choices, but rather an indication of the unclear and oscillating judicial position towards transsexual people in this particular case.

In short, there is an instability in relation to the understanding and the representation of Milton’s gender in AD4, which was inflected as female in 42,5% of the occurrences and as male in 28,5% of the occurrences. In addition, in constructing their favorable argumentation, the judges made use of jurisprudence which referred to a trans person as “o transsexual redesignado”, thus categorizing trans people by combining physical identification and impersonalization through somatization – that is, addressing them both through their gender identity (“transsexual”) and through a term which refers to changes in their genitals (“redesignado”, or “redesigned”).

In terms of a general picture of the representation of the social practice of judicialization of gender identity rights, AD4 was produced in response to an appeal made by the author of the initial lawsuit, Milton, contesting the lower court’s decision that granted the change of his name in his documents, but not of the gender marker. The lower court decision was based on Resolução n 1.955 of the Federal Council of Medicine (which authorizes transgenitalization procedures), and considered that a transgenitalization could assure Milton’s definitive gender identity.

In the summary of AD4 presented by the judges, it is possible to have a clear view of the medicalized and biological perspectives/arguments that orient the decision. The judges refer to Milton as ‘a autora’, as if they saw him as a woman and not as a man. In the sequence, they state his psychiatric-medicalized condition, using elements of the social practice of medicalization, including the argument that Milton’s physical traits are ‘typically’ male. The summary is the first part of the appellate decision, thus it is the first piece of information that a reader reads. By giving prominence to these elements in the summary, the judges indicate that these are the central elements supporting their decision.

The combination of three elements – the attribution of mental processes to construct Milton’s sense of identification; the constant use of female nouns and pronouns; and the occurrence of the word ‘transsexualism’ to describe his situation – reinforces the construction of a psychological condition/disease. The combination of these lexicogrammatical resources indicates that the judges do not see Milton as a man, but rather as a cisgender woman with a psychological problem. We should keep in mind, for instance, that there is a difference between these two verbalizations – ‘she will continue to be a man’ and ‘she will continue to feel as a man’:

The applicant **declared** that, in summary, she **did not see herself** as a woman from the age of five or six, and that even then she **had the perception** that her anatomical sex did not correspond to her personality. However, only during adolescence did she **learn** that her condition was **transsexualism** [...] She **explained** that she never **talked** specifically about this with her psychiatrist, as she **believes** that the issue of gender goes beyond the physical dimension, which means that, with or without the transgenitalization surgery, she **will continue to feel** as a man.^{18 19}

However, in spite of portraying Milton as someone with a psychological disorder, the judges contradict themselves when they claim, for instance, that trans individuals should not be treated as sick individuals, but rather they should be guaranteed, by society and by the State, the right to their identity:

In addition, I observe with reservation the decisions in which the request for name and gender change by transsexual people is granted grounded on the notion that transsexualism is a 'psychological disorder', as stated by the WHO. Psychic sexual identity is inherent to an individual's personality, and should be protected by the law and the judiciary and not classified as a disease, which only reinforces discrimination against these individuals. Psychological and psychosomatic diseases will occur, without doubt, if the sexual identity of a transsexual person is repressed, as a consequence of their not being able to express and manifest the attributes which are inherent to their personalities.²⁰

The judges employ different argumentation strategies to legitimize their decision. They argue on the basis of the constitutional principles of dignity, right to health, identity and psychic integrity. Moreover, they resort to medical legitimation to sustain their argument that this case involves Milton's psychic identity. They also resort to medical-psychiatric legitimation to sustain the diagnosis of gender dysphoria, and to recommend the need for other kinds of medical support (such as from endocrinologists). Finally, they resort to social legitimation, that is, to how Milton is seen by social actors from the network of social practices in which he participates. The combination of these elements resulted in the change of his official documents without the necessity of a transgenitalization surgery. However, at a linguistic level, the judges constantly selected misgenderist gender inflections, thus reinforcing a perspective that delegitimizes Milton's gender.

Final remarks

There are several ways of practicing *misgendering*, such as: using nouns and pronouns grammatically marked with the wrong gender inflection; using biological objectifying language which reduces people to biological identities; and finally, not recognizing a person's self-declared gender institutionally or socially (Ansara e Hegarty, 2014).

The analysis of the data revealed these three forms of misgendering in the decisions produced by TJSC. Of the five appellate decisions examined, four approach the decision in terms of a disorder or a mental disease. Only one of the decisions explicitly recognizes the discourse of the American Psychiatric Association on gender non-conformance (i.e. that gender nonconformity is not a mental disease). However, all the appellate decisions practice misgendering at least at one level (linguistic or sociological), either by referring to trans people with the grammatical inflections of their birth-assigned gender and not their self-declared gender, or by denying their requests for the changing of their documents. From the five appellate decisions, three determined the change in the documents and two accepted the appeals made by the MP, thus denying the requests for change.

In fact, in the Brazilian legal system the construction of a psychically sick identity, coupled with an emphasis on biological identity traits, is a key element for trans people to achieve gender identity rights. In four of the five appellate decisions analysed, the construction of a hegemonic gender expression was a central element in the representation, since the judges constantly referred to the social actors in terms of how

their gender expression was aligned with their self-declared gender. In addition, the pathologization of the claimants was also central. Medical institutions and medical expertise were prominent elements in the ADs. Despite the lack of legislation regulating the change of trans people's documents, it is apparently impossible to achieve it in Brazil without the legitimation of medical institutions.

All of the claimants verbalized that they wanted to or that they already had gone through transgenitalization. This is similar to what Borba (2016) observed in a group of trans people with whom he worked. According to the author, declaring that they wanted to go through a transgenitalization surgery was a way of trans people being seen as “*real*” men or women, and thus of being medically and judicially accepted as ‘legit’ trans people. This corroborates Giami’s (2013) claim that trans people have to go through a series of medico-legal boundaries to achieve the possibility (not the certainty) of having their identity socially and legally recognized. Since Brazil does not have specific legislation regulating gender identity rights, the decisions vary considerably, depending on each court’s understanding of the concepts of sex, gender and sexual orientation, which results in many unfavorable decisions to the trans claimants when the judges overlap or misunderstand these concepts.

Nonetheless, as the analysis revealed, even when the decisions were favorable, misgenderist nominal choices were made. Data analysis revealed that gender is the mechanism of regulation of social roles and the embodiment of physical attributes. Thus, in denying many trans people the right to change their documents, the judiciary is implying that they have failed to comply with gender regulating norms that encompass the body (genitals, breasts, uterus, ovaries, testicles, prostate, hair-length, voice pitch) and the way of thinking, dressing, speaking and acting in society. These are all indexes that will characterize a trans person first as *ill* and then as *legit* or *real*.

The impacts that negative decisions rejecting trans identities have upon trans people’s lives are many. First, they impact their mental health. Second, they impact their dignity. Third, they impact their social safety. Fourth, they impact their work conditions. These institutional misgendering practices are elements that contribute to the marginalization of trans people, often resulting in their death by suicide, murder or their exclusion from health care.²¹

Notes

¹<http://www.tjsc.jus.br/>

²Trans Murder Monitoring Update – Transgender Europe: http://transrespect.org/wp-content/uploads/2016/03/TvT_TMM_TDoV2016_Tables_EN.pdf

³For an overview of gender identity legislation worldwide, see (Rieger, 2016).

⁴“The judicialization of politics – the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies – is arguably one of the most significant phenomena of late twentieth and early twenty-first century government. Armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues from the scope of expression and religious liberties and privacy to property, trade and commerce, education, immigration, labor, and environmental protection.” (Hirschl, 2008: 119)

⁵Foucault describes biopolitics as the control that the state holds upon society and individuals in terms of explicit calculations and management of populations. Biopolitics begins in the body and operates through it (Foucault, 2008; Caponi, 2009).

⁶Ansara e Hegarty (2012, 2014) claim that cisgenderism describes a “prejudicial ideology”, and define cisgenderist language as a type of sexist language that delegitimises people’s own designations of their

gender, placing trans people as a class of people in contrast to a “healthier” or “ideal” class of cisgender people.

⁷<http://legal-dictionary.thefreedictionary.com/> defines appellate courts as ‘courts having jurisdiction to review decisions of a trial-level or other lower courts’. These decisions are produced by a committee of three judges (lower decisions are produce by a single judge).

⁸‘o agravado postula a adaptação jurídica do sexo’; ‘O pedido formulado pelo agravado’; ‘[ação] ajuizada por Ricardo José Pereira’. In all three references the male inflection was used.

⁹‘é agravante o representante do Ministério Público, e agravado Ricardo José Pereira’.

¹⁰P [a juíza] dispensou a realização de perícia técnica na pessoa do agravado’.

¹¹“Embora sendo transexual e tendo se submetido à operação para mudança de suas características sexuais, com a extirpação dos órgãos genitais masculinos, biológica e somaticamente continua sendo do sexo masculino. Inviabilidade da alteração, face a inexistência de qualquer erro ou falsidade no registro e porque não se pode cogitar dessa retificação para solucionar eventual conflito psíquico com o somático [...] A mudança aparente, ou seja, exteriormente, de órgãos genitais, em virtude de operação cirúrgica, vedada pelo ordenamento jurídico brasileiro, não implica em transformar um homem numa mulher, metamorfose que a natureza não admite e a engenharia genética ainda não logrou atingir (p. 3).”

¹²“M. deseja realizar cirurgia de redesignação”.

¹³“M. sempre preferia a cor azul à rosa”.

¹⁴“a depoente não se identifica com o gênero feminino”.

¹⁵“autora confirmou que não se sentia como uma mulher”.

¹⁶“a autora possui traços fisionômicos tipicamente masculinos”.

¹⁷“ela cortou o cabelo comprido e, há cerca de um ano e meio, realizou a mastectomia, o tratamento hormonal e a visita ao psiquiatra”.

¹⁸“A autora relatou, em suma, que não se enxerga como mulher desde os cinco ou seis anos de idade e que, já naquela época, possuía a percepção de que o seu sexo anatômico não correspondia à sua personalidade. Porém, apenas na adolescência é que veio a saber que esse quadro se tratava de transexualismo [...] Explicou que nunca conversou especificamente sobre este assunto com o seu psiquiatra, pois acredita que a questão do gênero ultrapassa o aspecto físico, o que implica em dizer que realizando a cirurgia, ou não, continuará a se sentir como um homem.”

¹⁹The English translation of this excerpt is more female than the original in Portuguese which, on account of the possibility of dropping personal pronouns, only marks gender explicitly in the words ‘autora’ and ‘mulher’.

²⁰“Acrescento que observo com reservas os julgados em que o pedido de retificação do nome e do gênero de transexuais foi deferido sob o fundamento de que o transexualismo é um ‘transtorno psicológico’, como declarado pela Organização Mundial de Saúde. A identidade sexual psíquica é inerente à personalidade da pessoa, e deve ser protegida pela lei e pelo Judiciário e não classificada como doença, o que apenas reforça a discriminação contra esses indivíduos. Doenças psicológicas e psicossomáticas existirão, isso sim, se houver repressão à identidade sexual dos transexuais, como consequência por não poderem expressar e manifestar os atributos que são inerentes a sua personalidade.”

²¹Trans people whose name and gender have not been changed in their documents will probably avoid seeking medical care in order to escape from the embarrassing situation of presenting themselves with one gender, but being referred to publicly (usually in front of other patients and health professionals) by another gender.

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