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## Constituent power and the feminist approach: an analysis of the Constituent Assembly in Brazil in 1987

### *Poder constituinte e a abordagem feminista: uma análise da Assembleia Constituinte de 1987 no Brasil*

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#### Abstract

Constituent power is understood as the power to bring about constitutional change. In modern constitutionalism, ‘the people’ are the legitimate holders of this power and they can exercise their constituent power to write a new constitution. Studying participatory practices in constituent power is especially relevant to feminist constitutional studies, where the focus is on understanding how women have been included or excluded from constitution-drafting. Focusing on participation alone though has been shown to be insufficient to ensure the full protection of women and marginalized groups. Rather, it is essential to consider the complex relationship between the constituent subjects, practices and procedures

#### Resumo

O poder constituinte é compreendido como o poder de realizar mudanças constitucionais. No constitucionalismo moderno, “o povo” é o legítimo detentor desse poder e pode exercê-lo para redigir uma nova constituição. O estudo das práticas participativas no exercício do poder constituinte é especialmente relevante para os estudos feministas sobre o constitucionalismo, cujo foco está em compreender como as mulheres foram incluídas ou excluídas dos processos de elaboração constitucional. No entanto, focar apenas na participação tem se mostrado insuficiente para garantir a proteção plena das mulheres e de grupos marginalizados. É essencial, portanto, considerar a complexa relação entre os sujeitos constituintes, as práticas e os procedimentos

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within exercises of constituent power and their potential influence on the constitution itself. Situated within the studies on feminist constitutionalism, this study explores the role of representation within the constitution-drafting processes in Brazil.

**Keywords:** constituent power; feminism; women; participation; Brazil.

*envolvidos nos exercícios do poder constituinte e seu potencial impacto sobre a constituição propriamente dita. Inserido nos estudos sobre o constitucionalismo feminista, este trabalho investiga o papel da representação nos processos de elaboração constitucional no Brasil.*

**Palavras-chave:** poder constituinte; feminismo; mulheres; participação; Brasil.

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1. Introduction; 2. Constituent power and democracy; 3. Brazilian experience of constituent power; 4. Reflections on feminist constitutionalism; 5. Conclusion; References.

### 1. INTRODUCTION

Constituent power is understood as the power to bring about constitutional change. In modern constitutionalism, 'the people' are the legitimate holders of this power and they can exercise their constituent power to write a new constitution. As a concept in constitutional theory, it is conceptualized as the beginning of the constitutionalization process, establishing the framework of society and defining the political order of a state. There is a lot of debate in the literature on the scope and nature of constituent power, with studies that investigate who participates as constituent actors in particular historical moments of constitutional change, and who gets excluded or marginalized in these processes. Studying participatory practices in constituent power is especially relevant to feminist constitutional studies, where the focus is on understanding how women have been included or excluded from constitution-drafting. Focusing on participation alone though has been shown to be insufficient to ensure the full protection of women and marginalized groups. Rather, it is essential to consider the complex relationship between the constituent subjects, practices and procedures within exercises of constituent power and their potential influence on the constitution itself.<sup>1</sup>

Situated within the studies on feminist constitutionalism, this study explores the role of representation within the constitution-drafting processes in Brazil. The study is prompted by a question; what might have been different if the makeup of the constituent assembly for the 1988 Constitution had been different? Drawing on feminist speculative legal research, as seen in the work of Sullivan,<sup>2</sup> this study is motivated by a concern over whether increased diversity within the constituent assembly would have

<sup>1</sup> For a discussion see, PISCOPO, Jennifer M.; SUÁREZ-CAO, Julieta. New institutions, new actors, new rules: gender parity and feminist constitution writing in Chile. *European Journal of Politics and Gender*, [s.l.], p. 1–21, 2024.

<sup>2</sup> SULLIVAN, Kathleen M. Constitutionalizing women's equality. *California Law Review*, Berkeley, vol. 90, n. 3, p. 735–764, mai. 2002.

affected the types of rights that were protected in the constitution; in other words, whether women would have lobbied for the inclusion of women's rights, further protection of women's issues, and called for the constitution to take into account women's concerns if they had been part of the constitutional drafting team. As such, it investigates who participated in the constitutional-drafting exercise in the 1980s and it questions whether the composition of the constitutional assembly in the constitutional moment has an impact on the representative nature of the constitution that was drafted and adopted. Constitutions play an important role in the societal pursuit of gender equality worldwide, and so it is important to consider how the drafting of a constitution can shape gender relations and gender inequalities into the future.

Investigating how women have participated in constitutional change is a large part of the work of feminist constitutionalists because as Houghton and O'Donoghue note, 'women have long been overlooked as constituent actors'.<sup>3</sup> Feminist constitutionalism is a body of scholarship with diverse agendas. Whilst some projects are concerned with the doctrinal study of equality provisions and women's rights in constitutions, others have taken a "participatory turn" to study the ways in which women are actors within constitutional law – whether as judges, legislators, or constituent assembly members – and another branch of feminist constitutionalism is concerned with interrogating the fundamental concepts of constitutionalism using feminist theory. There are a number of studies that seek to uncover the ways in which women participate as constitutional drafters or seek to exercise constituent power. For example, feminist scholars such as Ruth Rubio-Marín<sup>4</sup> and Helen Irving<sup>5</sup> have considered how women have sought to bring about constitutional change and their role in constitutional reform in specific countries, and Ruth Houghton and Aoife O'Donoghue<sup>6</sup> look at the more informal ways in which women have sought to demand constitutional change. Studies within feminist constitutionalism revisit 'these histories [of constitutional change] to uncover the participation (and active exclusion) of women within constitutional change.' This study takes up this challenge and as such is situated within the participatory turn, so as to explore how feminist participation within processes of constitutional change can influence the constitution. In particular, this current work tries to understand how women

<sup>3</sup> HOUGHTON, Ruth; O'DONOGHUE, Aoife. Feminist Approaches to Constituent Power. In: NIESEN, Peter; PATBERG, Markus; RUBINELLI, Lucia (Orgs.). **Oxford handbook of constituent power**. Oxford: Oxford University Press, 2025. Accepted in: 29 jul. 2025. p. 1.

<sup>4</sup> RUBIO-MARÍN, Ruth. Women and participatory constitutionalism. **International Journal of Constitutional Law**, Oxford, vol. 18, n. 1, p. 233-259, jan./mai. 2020. p. 235.

<sup>5</sup> IRVING, Helen. Introduction. In: IRVING, Helen (Ed.). **Constitutions and gender**. Cheltenham: Edward Elgar, 2017. p. 1-15. p. 13.

<sup>6</sup> HOUGHTON, Ruth; O'DONOGHUE, Aoife. Feminist Approaches to Constituent Power. In: NIESEN, Peter; PATBERG, Markus; RUBINELLI, Lucia (Orgs.). **Oxford handbook of constituent power**. Oxford: Oxford University Press, 2025. Accepted in: 29 jul. 2025.

participated in the constitutional process in Brazil. Brazil is a useful case study because it has a plural society, which means needing to explore and uncover the role of a diversity of women.

To interrogate the participatory nature of the 1988 constitutional drafting process, the study used data analysis to compare the numbers of the Brazilian population at the time and number of drafters of the 1988 Constitution. The population data was sourced from an official institute of the country, the Instituto Brasileiro de Geografia e Estatística - IBGE. The numbers of the participants involved in the draft were taken into account, and how many women were among the participants. To explore the role of women's participation in the drafting process, a qualitative analysis was conducted to interrogate the Constituent Assembly's discussion of women's related topics. As part of this qualitative study, some words that could be related to women and women's issues were chosen. Drawing on feminist constitutional scholarship, the words chosen reflect concerns within this scholarship. Women's rights and women's reproductive health are central concerns, and as Shreya Atrey<sup>7</sup> notes, much of feminist constitutionalist work revolves around studying the constitutional protection of women's rights and access to abortion. Within modern constitutionalism, women have been regulated to the private sphere and the home. Indeed, the Irish constitution has a specific provision that protects the woman's place in the home. Given the role women were supposed to provide as care-givers and carers, there has been a turn within feminist constitutionalism to consider "care". Rubio-Marín<sup>8</sup> offers up a "care" model of constitutionalism and Sandra Fredman<sup>9</sup> explores the protection of care in comparative constitutional contexts. In Ireland there was a referendum to replace the constitutional protection of women's place within the home with a constitutional provision about care.

The words chosen included: *casa* (house / home); *cuidado* (care); *direito das mulheres* (women's rights) and *aborto* (abortion). A specific word search for these words was made within the constituent assembly documents, and it was recorded how many times the words appear and the context in which the words were used or comments about these words were made. However, a consideration must be made: there is a large number of documents in the constituent assembly paperwork, totaling 25 documents, and each with a large number of pages (something between 324 and 780 pages each). Given the scale of the endeavor, for the purposes of this investigatory study, the terms were searched to verify how many times the term appeared, and then specific examples

<sup>7</sup> ATREY, Shreya. Feminist constitutionalism: mapping a discourse in contestation. *International Journal of Constitutional Law*, Oxford, vol. 20, n. 2, p. 611-641, abr./jun. 2022.

<sup>8</sup> RUBIO-MARÍN, Ruth. Introduction: the when, why, what, and how of the book and how the personal becomes political. In: RUBIO-MARÍN, Ruth (Org.). *Global gender constitutionalism and women's citizenship: a struggle for transformative inclusion*. Cambridge: Cambridge University Press, 2022.

<sup>9</sup> FREDMAN, Sandra. Care as a constitutional value. *International Journal of Constitutional Law*, Oxford, vol. 22, n. 3, p. 741-771, jul./set. 2024.

of the usage were interrogated in more detail. There is also a consideration with respect to the terms used. Whilst it was one of the initial words chosen, the word *casa* (house / home) was eventually excluded from the search, because, during the search, not just the whole word comes up, but also the words that have these letters in that order among them, and the word in Portuguese is part of many other words. With the word *cuidado* (care) another problem arose, as in Portuguese the word not only means care, but also attention and caution, so most appearances were in other contexts. As such these words were excluded from the search because the number of appearances was not an accurate marker of how the assembly approaches women's issues as the contexts were not necessarily related to women.

This paper is divided into three sections. Section one of this piece explores the relationship between constituent power and democracy, to highlight the role of democratic representation in exercises of constituent power. Section two then analyses the Constituent Assembly in Brazil in 1987 to explore how many women participated and to evaluate how representative the process was. Section three follows on from the findings in the previous section to then reflect on the types of questions feminist constitutional scholars should be engaged with when interrogating constituent processes. In focusing on Brazil, as a plural country, this paper highlights the importance of Latin American constitutionalism for feminist constitutional scholarship. This shows the value of "local" examples for the broader project of global feminist constitutionalism.

## 2. CONSTITUENT POWER AND DEMOCRACY

Constituent power is a reflection of popular sovereignty, the population of a state has the power of self-regulation, creating a document which contains all the fundamental aspects of how that society wishes to be governed. There is a debate in the literature though about the relationship between popular sovereignty, constituent power and democracy. For Bodin, sovereignty is the permanent and absolute power<sup>10</sup>. The exercise of constituent power is just one of the powers that the sovereign has<sup>11</sup>.

Democracy sits in tension with constituent power. Some scholars argue that constituent power is synonymous with democracy, some argue that a democratic exercise of constituent power is fundamental to democracy, others argue that constituent power is unlimited and cannot be trammelled by the procedural requirements of democracy, whilst others perceive constituent power as a descriptive rather than

<sup>10</sup> CHUEIRI, Vera Karam de; GODOY, Miguel Gualano de. Constitucionalismo e democracia – soberania e poder constituinte. *Revista Direito GV*, São Paulo, vol. 6, n. 1, p. 159-174, jan./jun. 2010. p. 130-131.

<sup>11</sup> See LEE, Daniel. *Popular sovereignty in early modern constitutional thought*. Oxford: Oxford University Press, 2016 and HOUGHTON, Ruth. Feminist approaches to sovereignty. In: DIAMANTIDIS, Marinos; ROSENFELD, Michel (Orgs.). *Research handbook on the law and politics of sovereignty*. Cheltenham: Edward Elgar, 2025. Forthcoming.

normative idea that merely identifies an exercise of constitutional change that might be brought about democratically or not. For Chueri and Godoy<sup>12</sup>, democracy includes the power of the constitutional drafting:

*If democracy means the people deciding **the community meaningful political issues**, that includes the content of the nation's constitution, meaning, organizing the government institutions rules and establishing the boundaries to the government power. (translated by the author).*

Adopting the second approach to constituent power, the democratic exercise of constituent power plays a major role in the kind of democracy a state will experience, as it is the foundation of the decision processes and the moment the framework of society is established. As such, despite this tense relationship between constituent power and democracy, if an exercise of constituent power is to be “democratic”, then this raises questions about what “democratic” means. Democracy does not have any *one* meaning, it can be defined in a number of different ways. It can be direct, representative, and participatory. Since democracy means rule by the people, they can govern directly, elect representatives to act on their behalf, or elect representatives while also establishing mechanisms for direct participation. On the one hand, it might just refer to a procedural notion of democracy that points to a voting process (such as a referendum), but on the other hand “democratic” raises questions about the role of representation, the protection of minorities, and can mean a more substantive understanding of democracy. In a constitutional moment where the people have the power to decide important and foundational issues, for this to be a democratically legitimate moment, the people must be represented in an appropriate way, allowing them to be heard, especially the minority groups.

In modern democracy, representation is crucial because

*life frequently binds the action of people and institutions in a certain place to processes that happen in many other places and institutions. No one can be present in all deliberative bodies, whose decisions affect their lives, because they are many and spread. (translated by the author).<sup>13</sup>*

But with respect to the question of what representation entails then there are different approaches. Representation means not only that someone or some people are appointed to act on another's behalf, but representation can also include the need to act on another person's needs, thus looking at their wants and needs.

<sup>12</sup> CHUEIRI, Vera Karam de; GODOY, Miguel Gualano de. Constitucionalismo e democracia – soberania e poder constituinte. **Revista Direito GV**, São Paulo, vol. 6, n. 1, p. 159-174, jan./jun. 2010. p. 160.

<sup>13</sup> YOUNG, Iris Marion. Representação política, identidade e minorias. **Lua Nova**, São Paulo, n. 67, p. 139-190, 2006. p. 144.



Though some majoritarian democracy scholars defend that the majority should have the power of decision. Democracy is not just about a tyranny of the majority and as such the rights and interests of minorities and other under-represented groups need to be protected. As Higgins argues in an article about Democracy and Feminism,<sup>14</sup> democracy is always navigating the question: “How do we mediate the tension between respect for majoritarian will and the protection of individual autonomy?” For Young,<sup>15</sup> democracy involves political inclusion, and as such requires “measures that enable a better representation of the under-represented groups, especially when those groups are minorities or are exposed to structural inequalities.”<sup>16</sup> The importance of representation of minorities is to enable equality of opportunity.

It is also relevant then to establish a distinction between formal democracy, the one that treats everybody in the same way, without considering their differences, and substantive democracy, which looks to the differences so as to treat these differences in a different way. As Bobbio<sup>17</sup> puts it, democracy as a government of the people and democracy for the people. More formal approaches to democracy do not follow equality, and it originates from despotic government. In contrast, substantive democracy requires representation and participation, especially from minority groups, allowing them to be heard and to have their demands assisted. Women are considered an under-represented group, they are not a minority in numbers, but they are in terms of representation, and that is related to a historical process.

From a feminist perspective, for an exercise of constituent power to be considered democratic, women (their needs, concerns, interests, and voices) would need to be part of the process. Women would need to be represented in the processes of constitution-drafting. As noted above, feminist constitutionalist scholarship has exposed the extent to which women have been excluded or ignored in constitutional change historically, and they have instead called for measures to “facilitate women’s incorporation into the political and other public domains”, which would include constitutional processes<sup>18</sup>. As Baines and Rubio-Marín<sup>19</sup> put it: “women may be un-, or under-, represented among the ranks of those who draft domestic constitutions [...]”, and one result of this absence

<sup>14</sup> HIGGINS, Tracy E. Democracy and feminism. **Harvard Law Review**, Cambridge, vol. 110, p. 1657-1703, 1996-1997. p. 1658.

<sup>15</sup> YOUNG, Iris Marion. Representação política, identidade e minorias. **Lua Nova**, São Paulo, n. 67, p. 139-190, 2006. p. 140.

<sup>16</sup> Translated by the author.

<sup>17</sup> BOBBIO, Norberto. **Liberalismo e democracia**. São Paulo: Edipro, 2017. p. 61.

<sup>18</sup> BAINES, Beverley; RUBIO-MARÍN, Ruth. Introduction: toward a feminist constitutional agenda. In: BAINES, Beverley; RUBIO-MARÍN, Ruth (Orgs.). **The gender of constitutional jurisprudence**. Cambridge: Cambridge University Press, 2010. p. 1-21. p. 21.

<sup>19</sup> BAINES, Beverley; RUBIO-MARÍN, Ruth. Introduction: toward a feminist constitutional agenda. In: BAINES, Beverley; RUBIO-MARÍN, Ruth (Orgs.). **The gender of constitutional jurisprudence**. Cambridge: Cambridge University Press, 2010. p. 1-21. p. 1.



is that women are not well represented in the constitutions that are then adopted. In order to improve representation (and thus the protection of rights) in constitutions, it is necessary to turn to an assessment of the constituent power, so as to ensure the moment the constitutions were drafted and approved there is representation of women's voices, interests and concerns.

### 3. BRAZILIAN EXPERIENCE OF CONSTITUENT POWER

The most recent experience of an exercise of constituent power in Brazil was the 1988 Constitution, and the drafting processes and preliminary works that began in 1987. It was an important moment for the country, the military regime had been governing the country since 1964, after a coup d'état, carried out under the pretext of a communist threat. After a long period of this military regime, Brazil experienced the transition to a democratic regime, with popular participation. This 1988 Constitution is known to this day as the "Citizen Constitution", because it looks to social topics, and it aims for equality.

As argued above, for an exercise of constituent power to be considered democratically legitimate there has to be substantive democracy, which includes representation and specifically representation of minority and under-represented groups. This section interrogates how representative the Constituent Assembly and the constituent process was in Brazil in the late 1980s with respect to gender diversity.

In Brazil, the idea that women would be able to participate in the constituent assembly was not assured. Rather, in order for women to have the opportunity to take part in it, women had to call for inclusion. Two years before the election to the Constituent Assembly, there was already a movement calling for women's participation<sup>20</sup>. In 1987, a letter from this group, called "Letter of the Brazilian women to the Constituents", was addressed to Congressman Ulysses Guimarães, Chairman of the Assembly. Later, this movement was known as the "Lipstick Lobby", the name was originally used to diminish the women fighting for equality, as the Congressmen would say that the women wearing lipstick were coming; but the women used this as a slogan<sup>21</sup>. This Lobby aimed to have women's rights included and protected in the new Constitution<sup>22</sup>.

To understand how representative the constituent assembly was, a first step would be to analyze the number of participants, and in particular to consider how

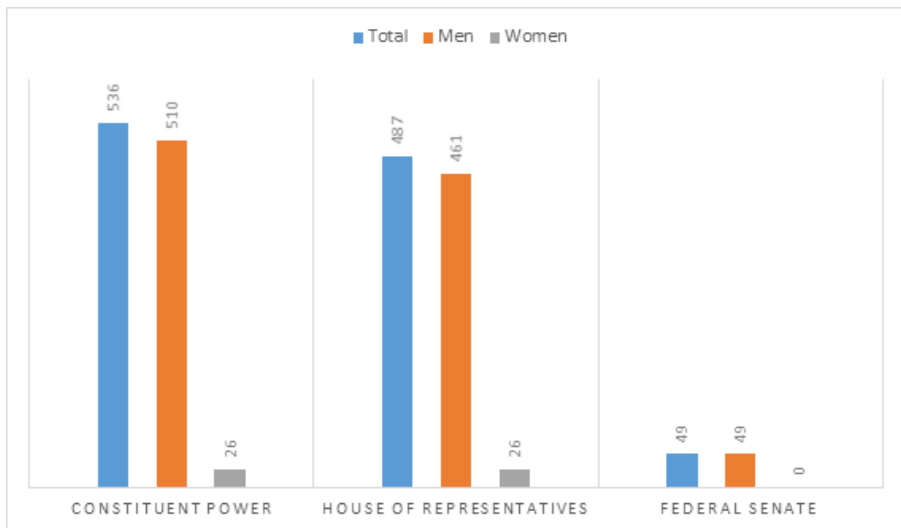
<sup>20</sup> MONTEIRO, Ester. Lobby do batom: marco histórico no combate a discriminações. **Senado Notícias**, Brasília, mar. 2018.

<sup>21</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 52.

<sup>22</sup> MONTEIRO, Ester. Lobby do batom: marco histórico no combate a discriminações. **Senado Notícias**, Brasília, mar. 2018.

many women took part. Souza<sup>23</sup> highlights the numbers for the Brazilian constituent assembly in 1987:

*During the elections in 1986, the 23 States, the Brazilian Federal District and two Brazilian territories, which were part of the Brazilian Federation, elected 536 constituent representatives, 487 for the House of Representatives and 49 for the Federal Senate. It was a historical plea: 26 women were elected to be part of the constituent assembly – all of them for the House of Representatives, none for the Federal Senate. (translated by the author).*



**Chart 1: The division of the representatives in the Brazilian Constituent Assembly**

To assess how representative this figure is, it is important to compare the number with the Brazilian population at that moment in time. A Brazilian institute (Instituto Brasileiro de Geografia e Estatística - IBGE), responsible for the population data, does not have accurate data from then, this is due to the large size of the country and the high costs associated with this type of large-scale data collection, but they do have some estimates<sup>24</sup>:

<sup>23</sup> SOUZA, Marcius Fabiani Barbosa de. A participação das mulheres na elaboração da Constituição de 1988. In: BRASIL. Senado Federal. **Constituição de 1988: o Brasil 20 anos depois. Os alicerces da redemocratização**. v. 1. Brasília: Senado Federal, [2008?]. p. 3. Available at: <https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/volume-i-constituicao-de-1988/principios-e-direitos-fundamentais-a-participacao-das-mulheres-na-elaboracao-da-constituicao-de-1988/view>. Accessed on: July 19, 2025.

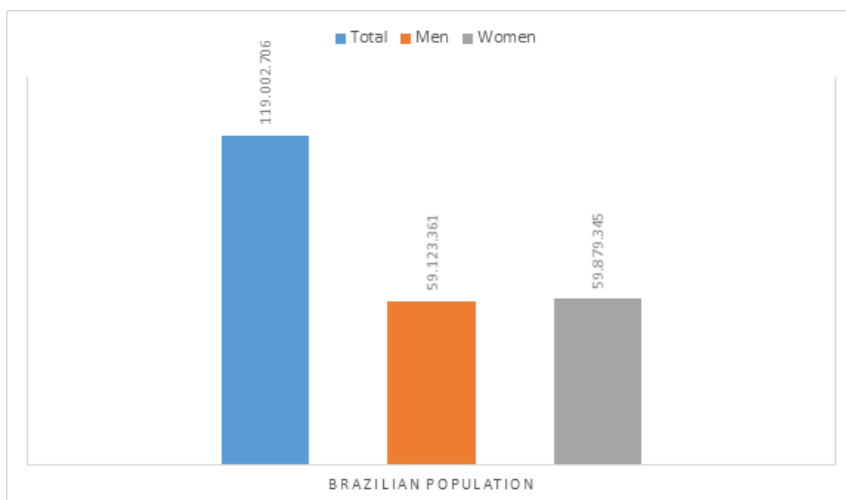
<sup>24</sup> Is also important to highlight that there are two surveys in Brazil, a shorter one, applied to the entire population, and a deeper one, applied to a fraction of the population, due to the high costs and the difficulties in

Tabela 4 – População Residente, por situação do domicílio e por sexo – 1940-1996

Anos	Total		Urbana		Rural	
	Homens	Mulheres	Homens	Mulheres	Homens	Mulheres
1940 (1)(2)	20.614.088	20.622.227	6.164.473	6.715.709	14.449.615	13.906.518
1950 (1)(3)	25.885.001	26.059.396	8.971.163	9.811.728	16.913.838	16.247.668
1960 (4)	35.055.457	35.015.000	15.120.390	16.182.644	19.935.067	18.832.356
1970 (4)	46.331.343	46.807.694	25.227.825	26.857.159	21.103.518	19.950.535
1980 (4)	59.123.361	59.879.345	39.228.040	41.208.369	19.895.321	18.670.976
1991 (4)	72.485.122	74.340.353	53.854.256	57.136.734	18.630.866	17.203.619
2000 (5)	83.576.015	86.223.155	66.882.993	71.070.966	16.693.022	15.152.189
2010 (5)	93.406.990	97.348.809	77.710.179	83.215.625	15.696.811	14.133.184

**Chart 2: The IBGE's chart from numbers<sup>25</sup> – from left to right: years / total: men and women / urban: men and women / rural: men and women.**

From the data, it is possible to notice the equality of numbers of men and women in the population. In 1980, it was predicted that there were 59.123.361 men and 59.879.345 women in Brazil. Therefore, the women's population was slightly higher.



**Chart 3: Brazilian population in 1980, a prediction from IBGE, the Brazilian institute responsible for the population data.**

Brazil (CENTRO DE ESTUDOS DA METRÓPOLE. **Universo e amostra**. Disponível em: <<https://web.centrodame-tropole.fflch.usp.br/foruns/index.php/pt/component/content/article/16-conceitos/9-universo-e-amostra>>. Acesso em: 17 fev. 2025.)

<sup>25</sup> Chart from the IBGE's website, available on: <<https://memoria.ibge.gov.br/historia-do-ibge/histori-co-dos-censos/dados-historicos-dos-censos-demograficos.html>> Acesso em: 17 fev. 2025.

Looking at all the numbers, it is possible to notice the discrepancies: more than half of the population in that time was women, but less than 5% of the drafters were women, showing a lack of representation of women in the Brazilian constituent assembly.

However, measuring the number of women participating in the Constituent Assembly is not necessarily sufficient to gauge whether there would have been a transformative change in the protection of women's rights in the constitution. This is for a number of reasons: firstly, just because women are participating does not mean that they are feminists or seek to promote feminist causes; and secondly, as Nancy Fraser<sup>26</sup> reminds us, we have to take into consideration the different power dynamics within deliberations and discussions, and 5% of the assembly being women means that those women made up a very small percentage of deliberators.

With respect to the women who were in the Assembly and whether they were feminists, Souza<sup>27</sup> analyzed who the women were. In his findings, he argues that the group of female representatives did not correspond to a feminist bloc, as only a few identified themselves as feminists. And most of them had the same political ideology as the rest of the Assembly representatives, they were moderate with a light tendency towards progressive politics. 'Among the female constituents, 42.3% were from the Brazilian Democratic Movement Party (PMDB), corresponding to 11 women. The Liberal Front Party (PFL) had six female deputies. The Social Democratic Party (PDS) and the Workers' Party (PT) each obtained two female parliamentarians<sup>28</sup>. As Araujo<sup>29</sup> put: in terms of the parties, women had a higher representativeness in smaller ones. And from the 23 States and the Federal District in Brazil, back then, the women were elected representing 16 of them in the Assembly<sup>30</sup>.

<sup>26</sup> FRAZER, Nancy. Rethinking the public sphere: a contribution to the critique of actually existing democracy. *Social Text*, Durham, v. 25/26, p. 56-80, 1990. p. 66

<sup>27</sup> SOUZA, Marcius Fabiani Barbosa de. A participação das mulheres na elaboração da Constituição de 1988. In: BRASIL. Senado Federal. **Constituição de 1988: o Brasil 20 anos depois. Os alicerces da redemocratização**. v. 1. Brasília: Senado Federal, [2008?]. p. 3. Available at: <https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/volume-i-constituicao-de-1988/principios-e-direitos-fundamentais-a-participacao-das-mulheres-na-elaboracao-da-constituicao-de-1988/view>. Accessed on: July 19, 2025. p. 5.

<sup>28</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 6.

<sup>29</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 54.

<sup>30</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 55.

We can also consider their diversity. Souza also related the professional occupation of those women, and the most common ones were: professors/teachers (7), journalists (7) and lawyers (4), and also a doctor, nursing auxiliary, actress, researcher, economist, social assistant, businesswoman and a health practitioner. With this data, it is possible to notice that all of the 26 female representatives had an occupation, in a society, in a time, with a great number of stay-at-home women.<sup>31</sup> Also in a country, as Brazil, especially in 1987, access to a higher education was only reserved for a small part of the society, limited to those from the richer part of society<sup>32</sup>. Araujo<sup>33</sup> also related that 21 of the 26 women were married, from which just one did not have children, and from the records available it appears that the other five were neither married nor mothers. Putting together these factors, it would seem that whilst there was some diversity, the women formed a fairly homogenous group (Monteiro, 2018).

As such there is a discrepancy of the representation, a small number of women were elected for the Assembly, and the ones who were, did not represent all the women in all their diversity in Brazil. Limiting the women representatives to a small homogenous group risks obscuring the needs and wants of a majority of the society's women who were not represented in the Assembly.

In order to consider whether women's participation in the constituent assembly was a factor in the increased representation of women's rights in the Constitution, it is important to reflect on the achievements of women's lobbies. For example, it is important to highlight that the Lipstick Lobby got 80% of their demands<sup>34</sup>, such as maternity leave, right to own an estate, equality on wages and mechanisms to prevent domestic violence. This is a noteworthy success, but as feminist constitutionalists have highlighted merely focusing on participation alone is not sufficient and it is worth considering in more depth the nature of the deliberations to highlight the challenges women representatives face in these sorts of public deliberations.

<sup>31</sup> According to Bruschini "The role of housewife, performed by the majority of adult women, is recorded as economic inactivity in the surveys. Given the wider diffusion and social acceptance of this feminine role, it is quite likely that it is declared as the main occupation of the respondent, even when she also performs other types of tasks." (translated by the author). (BRUSCHINI, Cristina. *O Trabalho da Mulher Brasileira nas Décadas Recentes. Revista Estudos Feministas*, [S. l.], n.e., p. 179-199, 1994. p. 179.)

<sup>32</sup> According to Corbucci: "According to Pinto, the privatist model of higher education expansion is not comprehensive enough, as it inhibits the access of Afro-descendants and the poor." (translated by the author). (CORBUCCI, Paulo Roberto. *Evolução do acesso de jovens à educação superior no Brasil*. Brasília: Instituto de Pesquisa Econômica Aplicada (IPEA), 2014. p. 8.)

<sup>33</sup> ARAUJO, Carolina Freitas Gomide de. *Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988*. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 217.

<sup>34</sup> MONTEIRO, Ester. Lobby do batom: marco histórico no combate a discriminações. *Senado Notícias*, Brasília, mar. 2018.

Carolina Freitas has undertaken an empirical study to chart the number of suggestions and amendments that women proposed as part of the Constituent Assembly and whether their suggestions were approved as part of the final text of the Constitution. In her findings, she shows that 3.6% of the suggestions to the Constitutional text were made by women and 5% of the amendments presented at the Constituent Assembly were by women<sup>35</sup>. She shows that the women proposed 3384 amendments, but only 437 were approved<sup>36</sup>. As such, 5% of the amendments that were approved had been made by women<sup>37</sup>. In the analysis, she also surveys which committees the women participated in and shows that the women had the least participation in the Committee on the Tax System, Budget, and Finance<sup>38</sup>. Moreover, it is important to highlight that none of the Committees or Subcommittees in the Assembly was presided over by a woman<sup>39</sup>. Aside from the amendments, Araujo<sup>40</sup> also gathered other numbers: the women gave 1,428 speeches, representing 3.3% of the total. This data shows that the lack of representatives also represented a low participation. These empirical figures can be supplemented with a qualitative investigation into whether key feminist concerns were engaged with during the Constituent Assembly.

By looking at the discussions in the Assembly around specific terms related to women's rights, we can see the barriers women faced. The words chosen were: *casa* (house / home); *cuidado* (care); *direito das mulheres* (women's rights) and *aborto* (abortion). The first one, *casa* (house / home) was excluded, due to the large number of instances it was used, and the word *cuidado* (care) was also excluded, because in Portuguese, this word has different meanings, as attention and caution. A review of *cuidado* (care), despite having other meanings, the times it had appeared in the women's rights

<sup>35</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 7.

<sup>36</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 10.

<sup>37</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 5.

<sup>38</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 12.

<sup>39</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 216.

<sup>40</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 217.

context, it had relation with working-mothers and the children alone at home, suggesting lack of proper care; health issues, like prenatal, which focused on the child's health and other medical issues, like women's health, reproductive matters. However, despite having some relations to women, the results on "care" demonstrated more of a concern with the rights and interests of children. Feminist constitutional scholars, and feminist international lawyers, have demonstrated how women and children are often conflated together; essentialized as being a vulnerable group, or indicative of the women's role as being predominately one of reproductive and child-rearing.

The other terms that were examined in the quantitative analysis were: *direito das mulheres* (women's rights) and *aborto* (abortion). The first term was barely mentioned, in 25 volumes with something between 324 and 780 pages each, the terms "women's rights" appeared just five times (once in the second volume and four times in the thirteenth one). This correlates with the number of amendments that Freitas found in her study, which showed that only 1.63% of amendments contained the term "woman"<sup>41</sup>. The second one, abortion, had come up 250 times, in almost all the 25 volumes, with the exception of volumes 19 and 21. It is important to mention that all the times that *direito das mulheres* (women's rights) appeared, it was in the context of children's rights, as if both of them had necessarily not just a connection, as they do, but they had to be related, as if it women's rights for their own sake could not exist, but the only reason to have them is to protect the role of women to procreate and to care for their children.

In the Constituent Assembly, the term *aborto* (abortion) was very controversial. There was a long discussion about it, many times it had appeared with a religious meaning, in the sense of life preserving; some of the representatives also used the term relating it to pornography and immorality; but there were some representatives in favor of the abortion as a constitutional matter. Some argued in favor of a plebiscite; some agreed that this is a public policy matter, that affects most poor women. The most interesting finding with respect to abortion was a survey with young students. The sample was 219 students (though their gender, race and ethnicity, nor socio-economic status is not given in the reports), answering if they were against or in favor of abortion or whether they abstain from voting. The results were: 50% were against; 44% were in favor and 5% abstained; the ones who voted against said that abortion was a form of murder and specifically the murder of an unwanted child. This was tied up with religious arguments, including that only god can take a life. Other arguments against abortion included that the women who do go through an abortion have to live with a trauma. There were also arguments in favor of allowing abortions. For example, there

<sup>41</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 12.



were arguments that invoked the practices of clandestine clinics practicing it, and how these clinics would favor the richer people.

Nowadays, abortion is forbidden in Brazil. The Constitution does not include anything about it, but the Penal Code forbids it, except in some cases, like, when it is performed by a doctor, and when the woman's life is in danger and when the pregnancy is a result of rape. The Brazilian Supreme Court has also decided that in cases of an anencephalic child abortion is also permitted. The question that inspires this paper is whether the situation with respect to a constitutional right to abortion would have been different if there had been more representation of women in the Constituent Assembly in 1987.

If there was increased participation of women in the constitutional drafting and in the deliberations of the assembly, would the role of women in Brazilian society be conceptualized differently so as not to be aligned with the interests of children nor tied up with the reproduction and care of children at the expense of women's autonomy and identities? In other words, we could ask whether we would have less problems with gender inequality in 2025 in Brazil if there had been more women as drafters in the constitution in the 1980s? Would something be different in the constitution if there were more women working as part of the Constituent Assembly during the constitutional drafting process? Such questions are a form of speculative legal methodology<sup>42</sup>, questioning whether something *could* have been different. It is difficult to test or measure such questions. Yet, what the Brazilian example highlights is the need to expand the types of questions feminist constitutional scholars ask when adopting the "participatory model".

#### 4. REFLECTIONS ON FEMINIST CONSTITUTIONALISM

An exploration of the Brazilian Constituent Assembly highlights the limitations of focusing on the participation of women alone as a test of democratic legitimacy in exercises of constituent power. Feminist constitutional scholars have highlighted the limitations of participation: "For Rubio-Marín, the increased inclusion of women in constitutional decision-making is not sufficient to destabilize the entrenched gender order."<sup>43</sup> Firstly, from an empirical point of view the Constituent Assembly lacked substantive representation. Only 5% of the Assembly were women and those women cannot be said to have been representative of the diverse interests and experiences of the women of Brazil. There are intersectional differences that women would experience

<sup>42</sup> SULLIVAN, Kathleen M. Constitutionalizing women's equality. *California Law Review*, Berkeley, vol. 90, n. 3, p. 735-764, mai. 2002.

<sup>43</sup> HOUGHTON, Ruth. Review of: RUBIO-MARÍN, Ruth. Global gender constitutionalism and women's citizenship: a struggle for transformative inclusion. *International Journal of Constitutional Law (I-CON)*. Cambridge, v. 22, n. 2, p. 611-615, abr. 2024. p. 3.

including how people live, their financial situation, their education, their societal background, and family situation. To have been more representative, and therefore to have been more democratic, increased diversity of the representatives would have been needed.

Secondly, Ruth Rubio-Marin highlights the need for a second participatory turn, to consider the activities of women and marginalized groups outside of the formal spaces where constituent power is traditionally constructed as operating<sup>44</sup>. Outside of the constituent assembly, or beyond the constitutional convention, publics lobby for changes to the constitution. In Brazil, there were a number of popular mobilizations, which includes “the ‘Woman and Constituent’ campaign organized by the National Council of Women’s Rights”<sup>45</sup>, there were thousands of letters and telegrams submitted by women to the National Council of Women’s Rights in response to their call for suggestions for the constitution, and two thousand women attended the “National Women and Constituent Meeting” in 1986<sup>46</sup>. One initiative for the participation of the people was to allow people to fill a survey in the post office to send to the Assembly, and whilst it was not possible to verify how women participated in this initiative, Araujo<sup>47</sup> says that it is possible to say that about 32% of the suggestions were made by women. Freitas shows that 23,617 suggestions for constitutional text were submitted by women as part of a public mobilization. These suggestions came from women who were across different states, ages and professions<sup>48</sup>. Houghton and O’Donoghue suggest that feminist manifestos are one potential source to highlight the claims to constituent power by women who might be outside of the formal institutions. In Brazil, the “Woman and Constituent” campaign which led to manifestos in the form of slogans such as “a constitution without a woman is half-done” and the “Letter from Brazilian Women to the Constituents”, which

<sup>44</sup> RUBIO-MARÍN, Ruth. Introduction: the when, why, what, and how of the book and how the personal becomes political. In: RUBIO-MARÍN, Ruth (Org.). **Global gender constitutionalism and women’s citizenship: a struggle for transformative inclusion**. Cambridge: Cambridge University Press, 2022. p. 206.

<sup>45</sup> The National Council of Women’s Rights were established by a law (Lei nº 7.353, de 29 de agosto de 1985), and aimed to promote policies to eliminate women’s discrimination, providing freedom and right’s equality, and the participation in political activities in Brazil (ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 49).

<sup>46</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women’s contributions in the 1988 National Constituent Assembly and the legacy of women’s rights in Brazil**. In: INTERNATIONAL WOMEN’S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen’s University, 2024. p. 4.

<sup>47</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 214.

<sup>48</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women’s contributions in the 1988 National Constituent Assembly and the legacy of women’s rights in Brazil**. In: INTERNATIONAL WOMEN’S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen’s University, 2024. p. 13.

was delivered to the National Constituent Assembly in 1987 is another example of a feminist manifesto<sup>49</sup>.

The Assembly Intern Regiment also predicted the possibility of civil society claims being incorporated into the Constituent Assembly as amendments, and there were 122 of them, with four of them relating to women, and from these four, three were promoted by feminist entities<sup>50</sup>. Araujo<sup>51</sup> relates the themes of these amendments proposed by the civil society: Amendment 19 was about the retirement of housewives (it was rejected due to the state's inability to afford it); amendment 20 was about equality between men and women / husband and wife; labor's rights, protecting women; free health protection to women, especially to the ones who had suffered from sexual abuse, among other things (it was incorporated to the final proposal of the women's caucus); amendment 23, the only one not presented by a feminist group, was about the retirement of working women (it was supported by the "Lipstick Lobby" and subscribed to by a Congresswoman); and amendment 65 was about the legalization of abortion<sup>52</sup>. This highlights though that demands made by women, including the recognition of domestic workers, were left out of the constitutional text<sup>53</sup>.

Thirdly, although the Lipstick Lobby reached 80% of their demands<sup>54</sup>, it is also essential to mention that it was a different time in the 1980s, with different feminist concerns. At this time, women were starting to accomplish equality, and it was the first time that women and men were shown as equals in Brazil, in the Constitution of 1988. This was then a great accomplishment, but the situation back then was very different, and the demands and concerns of women and marginalized groups in Brazil today would be very different. Exercises of constituent power are often frozen into constitutional moments, most obviously in the adoption of a constitution. The shifting perspectives

<sup>49</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024.

<sup>50</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 207.

<sup>51</sup> ARAUJO, Carolina Freitas Gomide de. **Poder constituinte originário das mulheres e seus reflexos no constitucionalismo de 1988**. Brasília, 2021. 294 f. Relatório Final (Programa de Iniciação Científica) – Centro Universitário de Brasília – CEUB. Available at: <https://www.publicacoesacademicas.uniceub.br/pic/article/view/8214>. Accessed on: July 19, 2025. p. 208-213.

<sup>52</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 14.

<sup>53</sup> ARAUJO, Carolina Freitas Gomide de. **Charting progress: women's contributions in the 1988 National Constituent Assembly and the legacy of women's rights in Brazil**. In: INTERNATIONAL WOMEN'S DAY ANNUAL CONFERENCE, 2024, Kingston, Canadá. Feminist Legal Studies, Queen's University, 2024. p. 15.

<sup>54</sup> MONTEIRO, Ester. Lobby do batom: marco histórico no combate a discriminações. **Senado Notícias**, Brasília, mar. 2018.

on feminist issues as well as the shifting nature of the demands of women, is one of the reasons why feminist constitutional scholars have interrogated the problematic approach to constitutional moments as final. Instead, Houghton and O'Donoghue<sup>55</sup> discuss the iterative and ongoing nature of constituent power, which will allow constitutional scholarship to capture the demands and protests against the constitutional calcification of women's oppression and inequalities.

Moreover, it is important to reflect on the role of the constitution in women's rights and feminist movements. Baines and Rubio-Marín<sup>56</sup>, in their studies, develop the importance of thinking about constitutional and non-constitutional rights, like motherhood, sexuality, reproductive rights, career, inheritance, marriage. However, there is a limitation with relying on rights within a constitution. For instance, Hunter<sup>57</sup> points out that a feminist method draws scholarly attention to, as she puts, "law in action", not just the formalities of law or law on paper. Feminist international lawyers – such as Di Otto<sup>58</sup> – have shown how the formalities of human rights law can further ostracize and oppress women. If the rights language is neutral, this can hide or obscure the specific situation of women. If the human rights language is specifically tailored to women it can reaffirm a problematic binary between men and women that can also disadvantage groups. Beverley Baines and Ruth Rubio-Marín<sup>59</sup> in their chapter "Toward a Feminist Constitutional Agenda" states "The flexibility of expressing constitutional rights abstractly may or may not assist women". There are similar concerns with respect to equality provisions within constitutions. As Rubio-Marín shows, equality provisions "forces women to phrase their claims always in comparative terms. Because the parameters for the comparison are provided by men's experience, presumably, this strategy has inherent limitations".<sup>60</sup> What Rubio-Marín shows is that if women have to formulate their rights claims within the frameworks of masculine rights as drafted by predominately men in male-dominated constituent assemblies (as was the case historically) then it is

<sup>55</sup> HOUGHTON, Ruth; O'DONOGHUE, Aoife. *Feminist Approaches To Constituent Power*. In: NIESEN, Peter; PATBERG, Markus; RUBINELLI, Lucia (Orgs.). **Oxford handbook of constituent power**. Oxford: Oxford University Press, 2025.

<sup>56</sup> BAINES, Beverley; RUBIO-MARÍN, Ruth. Introduction: toward a feminist constitutional agenda. In: BAINES, Beverley; RUBIO-MARÍN, Ruth (Orgs.). **The gender of constitutional jurisprudence**. Cambridge: Cambridge University Press, 2010. p. 1-21.

<sup>57</sup> Apud DIXON, Rosalind. *Feminism and comparative constitutional studies*. **Comparative Constitutional Studies**, [s.l.], v. 1, n. 2, p. 310–320, 2023. p. 313.

<sup>58</sup> OTTO, Dianne. Lost in translation: re-scripting the sexed subjects of international human rights law. In: ORFORD, Anne (ed.). **International law and its others**. Cambridge: Cambridge University Press, 2006. p. 318–356.

<sup>59</sup> BAINES, Beverley; RUBIO-MARÍN, Ruth. Introduction: toward a feminist constitutional agenda. In: BAINES, Beverley; RUBIO-MARÍN, Ruth (Orgs.). **The gender of constitutional jurisprudence**. Cambridge: Cambridge University Press, 2010. p. 1-21. p. 9-10

<sup>60</sup> BAINES, Beverley; RUBIO-MARÍN, Ruth. Introduction: toward a feminist constitutional agenda. In: BAINES, Beverley; RUBIO-MARÍN, Ruth (Orgs.). **The gender of constitutional jurisprudence**. Cambridge: Cambridge University Press, 2010. p. 1-21. p. 10.

not just that the rules within constitutions need to change, but also *how constitutions are made* need to change. The Brazilian example highlights that it is essential that constitutional drafting take into account the thoughts, wants, and concerns of women, so that constitutions are drafted by them and for them. This means that representatives participating at constituent assemblies need to know what their constituents want and what they expect from a constitutional settlement.

However, as the study of the different representatives highlighted, participation of women does not mean participation by feminists. Nor is there only one form of feminism that could be represented. One takeaway then is that there is a need to have different kinds of people acting as representatives, with, not just different gender representation, but with all kinds of different backgrounds, in terms of race, ethnicity, sexuality, economic, educational, and family. The more diverse the representation is, the more representative it is. Certainly, this increased representation would ensure that there was more democratic legitimacy in the constitutional process. But, as this case study showed, the barriers in the Assembly, and the societal biases that women have to overcome when acting within the public sphere, highlight that in addition to participation and representation, there needs to be a reimagining of constituent power through feminist perspectives. This would entail questioning *how* constitutions can be made differently and *how* we can ensure that the constitutions adopted are not calcifying oppressions and inequalities that cannot be contested in future.

## 5. CONCLUSION

This piece began with a speculative approach, as it asks the readers to think about whether things could have been different if the composition of the 1987 Constituent Assembly in Brazil had been different. In other words, it pondered whether, if there had been different drafters, would the situation of women in Brazil be different today? Would there be less inequality between men and women? Would women have more rights protected in the 1988 Constitution? Speculating on alternative worlds – on how things could be done differently – is a fundamental tool in the feminist movement and feminist political thought<sup>61</sup>.

After all the analysis, it is possible to conclude the importance and necessity of women's representation in constitutional drafting, not only in Brazil, but all around the globe. The Brazilian case showed the disproportionately small number of women representatives when compared to the population at large. This was despite the fact that the number of women in the population was estimated to be slightly higher than the number of men. But what the example also highlighted was that representation alone

<sup>61</sup> HOUGHTON, Ruth; O'DONOGHUE, Aoife. 'Ourworld': a feminist approach to global constitutionalism. **Global Constitutionalism**, [s.l.], v. 9, n. 1, p. 38–75, 2020.

is not sufficient, because mere participation does not necessarily overcome the structural biases that women as representatives would face once they were in deliberations. It was possible to notice from the Brazilian constituent assembly documentation that the terms related to women, when they were even discussed, were controversial, or related to children and motherhood.

Even today the representation of women and their participation in politics in Brazil is a delicate topic. Through a constitutional amendment in 2017, the Brazilian Constitution obliges every political party to spend 5% of the party funds to resource the spread of women's political participation; and 30% of the candidates of each party should be "other" gender, meaning, women; not only the candidacy, but there are provisions about the amount of money spent in the campaign and the time devoted to political propaganda as well. The results of the elections in Brazil<sup>62</sup> show that the participation of women remains near the minimum of 30% (in 2022, in the general election was 34% of candidates and 18% of elected). This journey towards equality, while gradual, underscores the essential connection between inclusive democratic participation and gender representation, as women's participation is inherently tied to the broader ideals of democracy. Yet, "For Rubio-Marín, parity democracy, or the equal political representation and participation of women, sits alongside the "democratization" of the family and of the private sphere (at 213)"<sup>63</sup>. In other words, merely focusing on the political representation of women or focusing on the participation of women in deliberative processes will not bring about the end of a system of modern constitutionalism that has undermined the rights and interests of women, that has placed them within a subservient role to men, and has siloed their demands and calls for change. Things might have been different if more women had participated in the constituent assembly, things might have been different if a more diverse body of women – with specifically feminist political views – had participated in the drafting of the constitution, we will never know. But in asking *could things have been different*, this paper highlights the types of questions that feminist constitutional scholarship needs to take into account when thinking about exercises of constituent power.

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<sup>62</sup> The statistics is available at the website: < <https://www.justicaeleitoral.jus.br/tse-mulheres/> > Acesso em: 17 fev. 2025.

<sup>63</sup> HOUGHTON, Ruth. Review of: RUBIO-MARÍN, Ruth. Global gender constitutionalism and women's citizenship: a struggle for transformative inclusion. **International Journal of Constitutional Law (I-JCON)**. Oxford, v. 22, n. 2, p. 611-615, abr. 2024. p. 3.

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***Data Availability Statement***

This study did not generate or use any datasets and is based exclusively on bibliographic and documentary research.