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Law's Lolita Paradox: Translating 'Childhood' In Statutory Rape Jurisprudence

Luisa Teresa Hedler Ferreira and Maj Grasten***

Abstract. This article addresses how normative views about 'childhood' are translated into statutory rape legislation and court judgments at the highest legal level in Brazil, in the Federal Supreme Court. The article draws on literature on the sociology of childhood to trace how courts translate societal narratives in the construction of agency, vulnerability and victimhood with regard to children and sexuality. Analysing historical and contemporary statutory rape legislation and Federal Supreme Court decisions over a 20-year period, we argue that the legal subjecthood of child victims of sexual crimes is constructed at the intersection of prevailing norms in society about childhood and moralising discourses about women's sexuality. Deviating from norms about childhood results in the prominence of women's sexuality and sexual desire in legal and judicial argumentation, situating children in a legal-semantic space in which they are simultaneously denied the agency that characterises adulthood and the special protection that compensates for this lack of agency in childhood protection laws. We refer to this legal situation and friction as the 'Lolita paradox' of statutory rape jurisprudence.

1.0 Introduction

He had the utmost respect for ordinary children, with their purity and vulnerability, and under no circumstances would he have interfered with the innocence of a child, if there was the least risk of a row. But how his heart beat when, among the innocent throng, he espied a demon child, 'enfant charmante et fourbe', dim eyes, bright lips, ten years in jail if you only show her you are looking at her.[1]

The picture formed is clearly astonishing, as we come to the conclusion that the minor, though so young, already led a promiscuous life and appeared to be older than she was. The statutory rape charges must cede in the face of the modification of our mores. … In our days *there are no children, there are 12-year-old women*. Precociously matured, the majority of them knows how to react to these situations,

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[1] Vladimir Vladimirovich Nabokov, *Lolita* (Knopf 1992) 20.

> even if they don't possess the adequate scale of values to know the consequences of their actions.[2]

The quotations above, separated by time and place, express a similar construction of subjecthood based on the distinction between the idealised innocence of childhood and the sexual agency of women. The first comes from the embattled protagonist of Vladimir Nabokov's novel from 1955, *Lolita,* while the second is from a 1996 judgement on statutory rape charges from the Brazilian Supreme Court. In the latter case, the Court's description of the victim resulted in discrediting the complainant for her failure to conform with the sexual and behavioural standards of the 'ideal child rape victim'. The practice of law, James Boyd White argues in *Justice as Translation*, consists in translating general narratives into particular narratives acceptable in court.[3] Translation, as this special issue on Law and Gender in Translation suggests, is a powerful process of knowledge construction and circulation. The language of law, in turn, is a coercive instrument that serves not only to distribute abstract rights and obligations, but also to actively interfere in the lives of people through judicial decisions.[4] Meanings of childhood in court narratives are instrumental for who is rendered vulnerable and who is attributed agency. Evidence in rape cases tends to be the narratives that victims and defendants tell.[5]

This article addresses how the agency of younger victims of sexual crimes is constructed in the courtroom and with what legal effects. We analyse the ways in which conventional ideas about childhood and sexual norms are *translated* into statutory rape cases by the argumentative practices of the defence and judges that constitute the sociolegal boundaries of violence, vulnerability, and victimhood in these cases. Statutory rape is a criminal offence defined as sexual intercourse between an adult with a person who has not yet reached the age of consent. The encounter does not have to be forced or coerced to be defined as statutory rape. Our analysis draws on 17 *habeas corpus* cases that reached the Federal Supreme Court of Brazil (STF) in

[2] Supremo Tribunal Federal [Supreme Federal Court of Brazil], HC 73662 MG (21 May 1996) (Marco Aurélio DJ) (HC 73662 MG) (emphasis added).

[3] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press 1990). See also Sharon R Ullman, *Sex Seen: The Emergence of Modern Sexuality in America* (University of California Press 1997); Wendy Larcombe, *Compelling Engagements: Feminism, Rape Law and Romance Fiction* (Federation Press 2005).

[4] Eleonora Zicari Costa de Brito, *Justiça e Gênero: Uma História Da Justiça de Menores em Brasília (1960–1990)* [Justice and Gender: A History of Juvenile Justice in Brazil (1960–1990)] (Editora Universidade de Brasília 2007).

[5] Lúcia Gonçalves De Freitas and Liliana Cabral Bastos, 'Sexual Abuse in Proceedings of Gender-Based Violence in the Brazilian Judicial System' (2019) 13(2) *Gender and Language* 153; Ulrika Andersson, Monika Edgren, Lena Karlsson and Gabriella Nilsson (eds) *Rape Narratives in Motion* (Palgrave 2019); Zsuzsanna Adler, *Rape on Trial* (Routledge and Kegan Paul 1987); Joanna Bourke, *Rape: A History from 1860 to the Present* (Virago 2007); Clare McGlynn and Vanessa E Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010); Joan McGregor, 'The Legal Heritage of the Crime of Rape' in Jennifer Brown and Sandra Walklate (eds) *Handbook on Sexual Violence* (Routledge 2012) at 69.

the period from 1996 to 2013. In these cases, the defence argued that the presumption of violence was *relative*, meaning that it could be overturned due to certain characteristics of the child victim. The article argues that the legal subjecthood of child victims of sexual crimes is constructed at the intersection of prevailing norms in society about childhood and moralising discourses about women's sexuality. Deviating from norms about childhood results in the prominence of women's sexuality and sexual desire in legal and judicial argumentation, situating children in a legal-semantic space in which they are concurrently denied the agency that characterises adulthood and the special protection that compensates for this lack of agency in childhood protection laws.[6] We refer to this legal situation and friction as the 'Lolita paradox' of statutory rape jurisprudence.

The Anglo-American institution of *habeas corpus* is a procedure by which a higher court may review the legality of a detention or imprisonment, ie 'restraints on physical liberty'. Brazil was the first country in Latin America to adopt this procedural institution in 1830.[7] According to the Brazilian Constitution, '*habeas corpus* shall be granted whenever a person suffers or is threatened with suffering violence or coercion in his freedom of movement through illegality or abuse of power'.[8] In practice, however, *habeas corpus* is utilized much more broadly than the Code of Criminal Procedure indicates. As a result of how Brazil's Supreme Court has construed its *habeas corpus* jurisdiction broadly, *habeas corpus* is routinely invoked to challenge the constitutionality of a criminal inquiry by a person required to testify, to challenge an indictment, to challenge a jury verdict or a criminal sentence,[9] or even the constitutionality of law, statutes and decrees.[10]

Habeas corpus cases at the Supreme Court level are a useful analytical resource for two reasons. First, these cases have reached the highest instance of appeal which testifies to the scope of the legal controversy around the matter. When *habeas corpus* cases reach the Supreme Court, it is not the facts of the case that are being judicially reviewed, but the interpretation of the law. Dissecting legal controversies permits us to see the more profound contradictions and paradoxes enshrined in law and the role of contending interests in the development of jurisprudence. Since the STF is the highest court in Brazil, it provides the most authoritative understanding in legal matters, and therefore can be said to accurately represent general trends in the Brazilian judiciary.

Second, juvenile criminal proceedings and records are, as a rule, confidential and thus sealed from public view. STF decisions involving minors are made public. However, this is only in part and what is made public depends on the judges'

[6] We define agency as the capacity to act, including to make considered decisions based on practical evaluation, within particular concrete life circumstances; see Mustafa Emirbayer and Ann Mische, 'What Is Agency?' (1998) 103(4) *American Journal of Sociology* 962.
[7] Keith S Rosenn, 'Judicial Review in Latin America' (1974) 35(4) *Ohio State Law Journal* 785.
[8] *Constitution of the Federative Republic of Brazil*, ch 1 art 5 (LXVIII). Moreover, according to article 5 (LXXVII), '*habeas corpus* and *habeas data* proceedings and, under the terms of the law, acts necessary to the exercise of citizenship are free of charge'.
[9] Keith S Rosenn, 'Procedural Protection of Constitutional Rights in Brazil' (2011) 59(4) *The American Journal of Comparative Law* 1009, 1016.
[10] As above.

discretion. What is revealed depends on what aspects of the case the judges find most important and legally relevant, and creates important silences as to other aspects of cases, notably race. Research has shown that race-based sexual stereotypes are both historically conditioned and play an important role in how jurors and judges decide in cases of child sexual abuse.[11] Why the parts of STF decisions made public do not include the issue of race might be explained by the myth of 'racial democracy' in Brazil, where race, racism and racial inequality do not play a role in Brazilian society.[12] The relevant inequality is economic.[13] This explains why this article's analysis does not and cannot address the role race plays in the judicial process around statutory rape. Recently, civil society actors and legal scholars have challenged this myth, contending that racial discrimination plays an important role in the Brazil's legal history.[14]

The first case in our dataset of 17 *habeas corpus* cases was decided in the Supreme Court in 1996. It sparked a considerable controversy among politicians and in the media, whilst it established a significant precedent for the following *habeas corpus* cases on statutory rape. The last case reached the court in 2013. Since this date, there have been no new STF *habeas corpus* cases on statutory rape. This is because of the 2009 penal law reform in Brazil which amended the current Penal Code of Brazil from 1940. Before 2009, statutory rape was defined by the *presumption* of violence in cases in which the victim was under the age of 14.[15] This legal ambiguity was reduced with the introduction of a new legal definition by which the mere act of having sexual intercourse with anyone under the age of 14 would be classified as rape.[16] The legal framework applied to the *habeas corpus* cases analysed in this article dates from before the 2009 reform. While these cases were judged between

[11] Deborah Alley and others, 'Race-Based Sexual Stereotypes Influence Ratings of Child Victims in Sexual Abuse Cases' (2019) 2(3) *International Journal on Child Maltreatment* 287; Bette L Bottoms, Suzanne L Davis and Michelle A Epstein, 'Effects of Victim and Defendant Race on Jurors' Decisions in Child Sexual Abuse Cases' (2004) 34(1) *Journal of Applied Social Psychology* 1; Rachel A Feinstein, *When Rape Was Legal: The Untold History of Sexual Violence During Slavery* (Routledge 2018). On the role of race on understandings of legal minority and age of consent, see Ishita Pande, *Sex, Law, and the Politics of Age: Child Marriage in India, 1891–1937* (Cambridge University Press 2020); Elizabeth Thornberry, 'The Problem of African Girlhood: Raising the Age of Consent in the Cape of Good Hope, 1893–1905' (2020) 38(1) *Law and History Review* 219.

[12] Stanley R Bailey, 'Group Dominance and the Myth of Racial Democracy: Antiracism Attitudes in Brazil' (2004) 69(5) *American Sociological Review* 728; France Winddance Twine, *Racism in a Racial Democracy: The Maintenance of White Supremacy in Brazil* (Rutgers University Press 1997).

[13] Evandro Piza Duarte, 'O Debate Sobre as Relações Raciais no Brasil e seus Reflexo no Ordenamento Jurídico Brasileiro' [The Debate on Racial Relations and Its Consequences in the Brazilian Legal System] (2004) 1 *Universitas Jus* 110.

[14] Marcos Vinícius Lustosa Queiroz, *Constitucionalismo Brasileiro e o Atlântico Negro: A Experiência Constitucional de 1823 diante da Revolução Haitiana* [Brazilian Constitutionalim and the Black Atlantic: The Constituent Experience of 1823 in the Face of the Haitian Revolution] (Lumen Juris 2021, 3rd edn); Flavia Rios, 'O Protesto Negro no Brasil Contemporâneo (1978-2010)' [The Black Protest in Contemporary Brazil (1978–2010)] (2012) 85 *Lua Nova: Revista de Cultura e Politica* [New Moon: Journal of Culture and Politics] 41.

[15] *Código Penal* [Penal Code] (Brazil) 7 December 1940.

[16] *Lei n 12.015, de 7 de Agosto de 2009* [Law No 12015 of 7 August 2009] (Brazil).

1996 and 2013, the facts of the individual cases took place before the current laws were in force and were therefore judged under the previous laws. As such, we can trace how the defence and judges constructed different narratives about the child's identity as a victim under the same law, in response to the diversity of situations and arguments presented in each case, and conditioned how ideas about childhood and sexual norms were *translated* into the Court. We identify three different narratives, two of which evolve around the 'Lolita paradox'. To reconstruct processes of translating, we coded the court decisions in two steps. The first round focused exclusively on assigning codes to descriptions of the 'victim' and the 'accused'. In a second round, we grouped our codes into categories identifying and dividing 'victimhood' according to three narratives in which 'childhood' intersected with women's sexuality in statutory rape jurisprudence: the corrupted child, the innocent child, and the vulnerable child.

The article contributes to socio-legal literature on the role of courts in framing sexual violence through their construction of the subjects,[17] particularly the relationship between assumptions about agency, vulnerability and victimhood,[18] as well as critical legal scholarship on how law 'sexes' its subjects and, in consequence, reproduces unequal power relations.[19] Complainants in rape cases are especially often discredited if they fail to comply with ideas of the 'genuine' rape victim, associated with traits of moral and sexual virtue and a lack of provocativeness.[20] We draw on literature in the field of the sociology of childhood[21] to show how social discourses related to children and childhood simultaneously construct an ideal of childhood as both a phase of innocence and sexual ignorance[22] and the child as a deviant subject, who is excluded from social and legal protection in society due to 'atypical behaviour'. In the

[17] Anthony G Amsterdam and Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Way We Understand Law – And Ourselves* (Harvard University Press 2000); Peter Brooks, 'Narrativity of the Law' (2002) 14(1) *Law and Literature* 1; Lynn S Chancer, *High-Profile Crimes: When Legal Cases Become Social Causes* (Chicago University Press 2005); Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Duke University Press 2008).

[18] Ulrika Andersson, 'Harmed Selves Harming Others: A Vulnerability Approach to the Criminal Justice System' in Martha Albertson Fineman, Ulrika Andersson and Titti Mattsson (eds) *Privatization, Vulnerability and Social Responsibility: A Comparative Perspective* (Routledge 2016) at 290; Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1; Nicola Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1997) 8(2) *Women: A Cultural Review* 143; Rebecka Stringer, 'Vulnerability after Wounding: Feminism, Rape Law and the Difference' (2013) 42(3) *SubStance* 148.

[19] Brito, above note 4; Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (Routledge 2001).

[20] Wendy Larcombe, 'The "Ideal" Victim v Successful Rape Complaints: Not What You Might Expect' (2002) 10(2) *Feminist Legal Studies* 131.

[21] Chris Jenks, *Childhood* (Routledge 2005, 2nd edn); Michael G Wyness, *Childhood and Society* (Macmillan Education 2019, 3rd edn); Paula S Fass, 'Children and Globalization' (2003) 36(4) *Journal of Social History* 963; Göran Therborn, 'Child Politics: Dimensions and Perspectives' (1996) 3(1) *Childhood* 29; Martin Woodhead and Heather Montgomery, *Understanding Childhood: An Interdisciplinary Approach* (Wiley Press 2003).

[22] See, for example, Michel Foucault, *The History of Sexuality: 1* (Penguin Classics 2020).

specific case of child victims of statutory rape, these ideals of innocence (or the absence of innocence) play a key role in constructing narratives of the 'ideal victim' in the courtroom and, importantly, the victim's agency. These narratives are instrumental in determining whether the child victim falls within the scope of legal protection against sexual contact with adults. 'Lolita' is used in this article to denote the ambiguous and dynamic relationship between childhood innocence and female sexuality, which has the power of inverting the polarity between victim and perpetrator in statutory rape cases.[23]

While the legal discussion surrounding rape already faces heavy discussions about the level of agency that the victim has in each situation (Small, 2020), the discussions about agency become even more complex when involving child victims. Their agency – especially when it comes to sexual consent – is explicitly denied by the law until a contingent, variable cut-off point under which any sexual contact can be considered statutory rape.

The article is structured in four parts. In the following section, we draw on the sociology of childhood to discuss how the agency of children is constructed (and denied) via dominant ideas about 'children' in society. We point to how these ideas about childhood translate into legal concepts in the development of children's rights. We then turn to outlining different iterations of rape laws in Brazil, including statutory rape, highlighting the influence of the traditional legal category of 'honest women' on the criminalisation of sexual violence against women. In a fourth section, we analyse 17 *habeas corpus* statutory rape cases (1996–2013) in which the defence argued that the child victim consented to sexual contact. We point to how general narratives about childhood and sexuality *translated* into the interpretation of the legal framework and argumentative practices applied in the courtroom of the highest legal instance of Brazil, the STF.

2.0 CONSTRUCTING CHILDHOOD IN LAW AND SOCIETY

Socially dominant views of childhood are potentially problematic when they are translated into law.[24] A key function of law is to reduce the complexities of reality into manageable propositions by imposing fixed concepts and normative and moral judgments in processing these concepts.[25] This regulates and stabilises social expectations and frames social conflicts in a way that a resolution through judicial sentence is made possible.[26] The legal system and doctrines maintain the normative and epistemic boundaries of childhood in its reduction of conflicting constructions of 'the child' and children's rights, in particular in their interaction

[23] Graham Vickers, *Chasing Lolita: How Popular Culture Corrupted Nabokov's Little Girl All over Again* (Chicago Review Press 2008); see also Brito, above note 4.
[24] See, for instance, John Eekelaar, 'The Emergence of Children's Rights' (1986) 6(2) *Oxford Journal of Legal Studies* 161; Andrew Bainham, 'The Privatisation of the Public Interest in Children' (1990) 53(2) *Modern Law Review* 206.
[25] Allison James and Adrian L James, *Constructing Childhood: Theory, Policy and Social Practice* (Palgrave Macmillan 2004) 80.
[26] Niklas Luhmann, 'Law as a Social System' (1989) 83(1–2) *Northwestern University Law Review* 136.

with notions of family and sexuality. We draw on sociological studies of childhood to trace how law translates and thus absorbs discourses about childhood.

A sociology of childhood argues that the concept of 'childhood' is an abstraction used to summarise and identify a biological basis for differentiating and classifying human beings.[27] Childhood 'is not a natural category but one constructed via social ideas and institutions that create boundaries irreducible to physical or maturational difference'.[28] These institutions include legal conventions, as well as 'lasting institutional forms like families, nurseries, schools and clinics, all agencies specifically designed and established to process the child as a uniform entity'.[29] Since 'childhood' is commonly recognised in society as a biological process (rather than a social construction), which ends with the child's final transformation into a rational adult, children are relegated to an ontological place of 'becoming'.[30] This perceived ontological incompleteness facilitates the negation of children's agency regarding their own experiences, even in matters where they are the main concern.[31]

Sociological scholarship on childhood suggests that there are two main archetypes based on which Western societies construct ideas about childhood.[32] Each archetype is related to a particular mode of social control.[33] While these archetypes can be analytically distinguished in terms of how they perceive the innate nature of children and the nature of power relations in which children are embedded, they often coexist in social – and legal – discourses about childhood.[34] In Nabokov's *Lolita*, for instance, the child – Dolores Haze/Lolita – is made sexually desirable (and deviant) because of (and not despite of) a romantic view of child innocence. One archetype is the 'Dionysian child', compatible with a negative Hobbesian perception of human nature.[35] This conception of 'childhood' has been shaped in Western culture by the doctrine of 'original sin' in Christianity. It imbues adult authorities with the task of turning 'uncivilised' children into moral and social beings through, for instance, the use of physical punishment, to beat the evil tendencies of the child into submission.[36] The mode of control is one of 'rigid codes of behaviour with little opportunity for individuality'.[37] Though this archetype, conveying the idea of hedonistic savagery being the natural state of the youth, is historically situated in pre-nineteenth century Europe, Chris Jenks suggests that it transcends this period;[38]

[27] Jenks, above note 21 at 6; Wyness, above note 21 at 8; see also Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* (Vintage Books 1965).
[28] Vikki Bell, 'Governing Childhood: Neo-Liberalism and the Law' (1993) 22(3) *Economy and Society* 390, 391.
[29] Jenks, above note 21 at 12.
[30] As above at 4.
[31] Fass, above note 21 at 963.
[32] See, for example, Jenks, above note 21; Wyness, above note 21; Woodhead and Montgomery, above note 21.
[33] Karen Smith, 'Producing Governable Subjects: Images of Childhood Old and New' (2011) 19(1) *Childhood* 24.
[34] Jenks, above note 21 at 64.
[35] Woodhead and Montgomery, above note 21 at 63.
[36] Jenks, above note 21 at 63.
[37] Smith, above note 33 at 26.
[38] As above at 54.

for instance, in Freudian conceptions about human nature and desires of early childhood.[39] It can be argued that this conception still has considerable impact on how childhood is commonly conceived today.[40]

In contrast to the 'Dionysian child', the 'Apollonian child' is based on a 'romantic' view of children, which emphasises positive and desirable aspects of childhood.[41] Children are perceived as being untainted, innocent and angelic; special and unique beings to be worshipped and adored.[42] However, the Apollonian child is equally seen as standing outside society, which belongs to the adult rational world. The power exerted upon this type of child differs from the Dionysian approach. Focus shifts from correction and control to the protection of child innocence, through 'monitoring the child in mind and body'.[43] This perception of childhood coincides with children becoming an object of special legal status in the nineteenth century. In the context of the formation and consolidation of Western nation-states, the state was granted the authority to intervene in the welfare of children, who were hitherto considered the sole property of parents.[44]

Traditionally, the Brazilian legal framework, transplanted from Portuguese medieval law through colonisation, protected the family as a collective under the leadership of adult men.[45] Children were primarily characterised by their lack of agency and complete submission to paternal authority. The 1927 Minor Code (*Código de Menores*), the first child protection law in Brazil, provided the State with a set of measures to address minors (defined as under the age of 18) who were either abandoned or considered 'delinquents'.[46] These measures included the right to either provide for or punish children if their family failed to do so. Moreover, the Minor Code included provisions for protecting children from exposure to 'libertine practices' by adults, such as prostitution or behaviour that might 'harm the modesty or morality of the minor, or provoke their bad or immoral instincts'.[47] The domestic promotion of children's rights was influenced by several global developments, including the International Labour Organisation's (ILO) 1919 Minimum Age (Industry) Convention and transnational alliances of scientists and health professionals publishing on child mortality, health and labour.[48]

A more agentic understanding of children as individual *subjects* of rights emerged in the late 1970s with the development of the international human rights

[39] Lutz DH Sauerteig, 'Loss of Innocence: Albert Mol, Sigmund Freud and the Invention of Childhood Sexuality around 1900' (2012) 56(2) *Medical History* 156.
[40] See, for instance, Vickers, above note 23.
[41] Woodhead and Montgomery, above note 21 at 65.
[42] Jenks, above note 21 at 64–5.
[43] As above at 68.
[44] Therborn, above note 21 at 29–30.
[45] Mariana de Moraes Silveira, 'Direito, Ciência Do Social: O Lugar dos Juristas Nos Debates do Brasil dos Anos 1930 e 1940' [Law, Science of the Social: The Place of Jurists in the Debates of Brazil in the 1930s and 1940s] (2016) 29(58) *Estudos Históricos* 441.
[46] *Decreto No 17.943-A de 12 de Outubro de 1927* [Decree No 17.943-A of 12 October 1927] (Brazil) art 1.
[47] As above at art 113.
[48] Nina Schneider, 'Origins of Child Rights Governance: The Example of Early Child Labour Legislation in the United States and Brazil' (2019) 26(3) *Childhood* 289, 295.

agenda.[49] This extended the scope of concerns beyond children whose families had failed to protect them to include *all* children, understood in terms of being 'capable of forming his or her own views'.[50] The influence of second-wave feminism deconstructed the hitherto private character of the family unit, highlighting the structural inequalities dominating and silencing women and rendering children visible as individuals.[51] This opened the possibility of framing children as individual rights bearers.[52] This idea is prominent in the 1989 United Nations (UN) Convention of the Rights of the Child (UNCRC),[53] which substantially influenced national legislation in Brazil. 'The Convention is frequently said to have recognized children as full human beings with significant moral agency, as opposed to merely vulnerable objects of protection, or pre-rational "human becomings"'.[54] The Convention was integrated into Brazilian domestic laws in 1990 with the adoption of the Child and Adolescent Statute (ECA).[55] In the ECA, 'minor' was replaced by 'child and adolescent', and children were recognised as subjects, and not merely objects, of legal rights.[56] While the idea of children as rights-bearers relies on an understanding of children as individual human beings, the child is still set apart from the adult world due to special needs for (legal) protection. The principle of 'best interest of the child', a central interpretational dispositive in the UNCRC[57] and the Brazilian ECA,[58] situates the child at the centre of deliberation in issues of their concern. The principle serves the clear purpose of limiting the power of the state and parents over children,[59] whilst it retains some ambiguity in terms of who is authorised to determine its content.

In addressing the possibility of children's sexual agency, two contradicting discourses can be identified from a children's rights perspective. The 'welfare model',

[49] Linde Lindkvist, 'The Child Subject of Human Rights' in Danielle Celermajer and Alexander Lefebvre (eds) *The Subject of Human Rights* (Stanford University Press 2020) at 211; see also Michael DA Freeman, 'Introduction: Rights, Ideology and Children' in Michael DA Freeman and Philip E Veerman (eds) *The Ideologies of Children's Rights* (Brill 1992) 3.

[50] *Convention on the Rights of the Child*, adopted on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12(1) ('UNCRC'); see also Therborn, above note 19 at 33.

[51] Wyness, above note 21 at 36–7.

[52] Therborn, above note 21 at 36.

[53] Lindkvist, above note 49. Prior to the UNCRC, other attempts at codifying children's rights included the Geneva Declaration of the Rights of the Child, adopted by the League of Nations in 1924, the 1959 UN Declaration on the Rights of the Child, and rules on protecting children in international labour law and international humanitarian law. However, as Lindkvist notes at 212, these legal instruments 'did not envision children as active, rights-bearing subjects. Their general objective was to spell out standards that would help to protect vulnerable and innocent children against suffering caused by adult exploitation and neglect or, more broadly, by the direct and structural violence of war, unregulated labor, and poverty'.

[54] As above at 212.

[55] *Lei n 8.069, de 13 de Julho 1990 (Estatuto da Criança e do Adolescente)* [Law No 8.069 of 13 July 1990 (Child and Adolescent Statute)] (Brazil) ('ECA').

[56] Airi Macias Sacco, Ana Paula Lazzaretti de Souza and Sílvia Helena Koller, 'Child and Adolescent Rights in Brazil' (2015) 23(4) *International Journal of Children's Rights* 818, 820.

[57] UNCRC, above note 50 at art 3(1).

[58] ECA, above note 55 at art 17.

[59] Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18(4) *International Journal of Children's Rights* 483, 485.

predominant in traditional legal thinking,[60] bases the need for protecting children on the assumption that children are vulnerable and immature, and lack the agency to protest when their needs are not being met. This social immaturity is translated into juridical terms as a lack of legal capacity, which leaves the consideration of the child's best interest with the parents and the state. Second, a 'substantive rights model' suggests that in constructing the child's best interest, the child's agency and voice are important factors.[61] In statutory rape cases, a welfare-centred approach privileges considerations of vulnerability and lack of agency in the formation of sexual consent. A substantive children's rights approach would entail questioning the degree to which legal systems and criminal codes in particular have incorporated a child's perspective in the situation. In the Brazilian legal system, children under the age of 18 have no legal capacity to press charges, and must be represented by their parents.[62] This means that parents can press charges *without* the consent of the child. In the particular cases discussed in this article, the perspective of child victims is only incorporated as evidence. The victim has no further involvement in the proceedings.

3.0 From 'Honest Woman' to 'Sexual Dignity': The Legal Development of Statutory Rape Laws in Brazil

Statutory rape victims are qualified by their age. Legally, this implies that, whilst the current legal framework in Brazil recognises children as right-bearers, statutory rape victims are entitled to a particular regime characterised by the absence of agency and the need for special protection. In terms of conceptualising children's 'sexual agency', neither international nor Brazilian childhood protection laws prescribe a minimum age of permitting sexual activity. Statutory rape regulations focus mainly on the state's duty to protect children from sexual exploitation and abuse. Several jurisdictions, including the Brazilian Penal Code after the law reform in 2009, employ categorical concepts to express the age of consent. Before 2009, statutory rape laws in Brazil allowed for more legal ambiguity. While rape was defined by article 213 of the 1940 Penal Code as 'forc[ing] a woman to intercourse, by use of constraint or violence',[63] article 224 defined *statutory* rape by *presuming* violence in cases in which the victim is under the age of 14, not of sound mind (and the accused was aware of this), or for any reason in no capacity to resist.[64] The indeterminacy of this particular formulation unveils a legal grey area where children's (ie under the age of 14) sexual agency can be explored in a potentially ambiguous way in terms of whether this presumption of violence is absolute, or if it could be relativised by, for instance, the

[60] John Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in Michael Freeman (ed) *Law and Childhood Studies: Current Legal Issues* (Oxford University Press 2012) at 55, 58–9.
[61] As above at 60.
[62] *Lei n 10.406, de 10 de Janeiro de 2002* (*Código Civil)* [Law No 10406 of 10 January 2002 (Civil Code)] (Brazil) art 3.
[63] *Decreto-Lei n 2848, de 7 de Dezembro de 1940* (*Código Penal)* [Law No 2848 of 7 December 1940 (Penal Code)] (Brazil) art 213 (1940 Penal Code).
[64] Ibid art 224.

appearance and behaviour of the victim. The legal ambiguity explored in this analysis is generated by the fact that the victim's age is coupled with the 'presumed violence' element of the crime. If this presumption is absolute, the required element of violence in order to characterise the act as rape is based on age alone. However, if this presumption is relative, other factors could render this *presumed* violence irrelevant.

In the *habeas corpus* cases analysed here, the defence stated that the child victim was capable of consenting. To understand how sexual behaviour of girls under the age of 14 is translated into jurisprudence, we have to turn to the legal concept of the 'honest woman' which – albeit absent in the present characterisation of statutory rape – was traditionally prominent in Brazilian legislation on crimes against sexual freedom:

> Although explicit requirements that the victim be an honest (or virgin) woman have been removed from the penal law regarding rape, if the rape survivor does not fit this stereotype, she is likely to be accused of having consented to the crime and the rape is unlikely to be investigated and prosecuted. There is strong evidence that the distinction between honest and dishonest women continues to influence the way rape is treated by the Brazilian criminal justice system.[65]

The legal concept of the 'honest woman' was present in the Brazilian Penal Code from the time of Portuguese colonisation until the penal law reform in 2009. It described a woman whose behaviour complied with a monogamous, marriage-centred pattern of sexuality; a woman who remained a virgin until marriage and only engaged in sexual activities with her husband. It is a direct legal translation of social notions of sexual respectability. We can trace back ideas about the 'honest woman' to the first Brazilian Penal Code of 1830, which, in its provisions on criminalising sexual activity with minors, prioritised the notion of virginity over age, and family respectability over the well-being of the victim:

> **Article 219**. *To deflower a virgin woman*, younger than 17 years of age.
> Punishment: Banishment from the parish where the deflowered woman resides, from 1 to 3 years, and providing her dowry. *If marriage follows, the punishment will be suspended.*
> …
> **Article 224**. *Seducing an honest woman*, younger than 17 years of age, and copulating with her. Punishment: banishment to outside her parish, from 1 to 3 years, and providing dowry.
> **Article 225**. There will be no punishment if the defendant gets married to the victim.[66]

Here, the relevance of 'virginity', and the mentioning of dowry and marriage, suggests that *honour* and *honesty* were far from abstract principles, but a particular gender-coded protection of family values, circumscribing the exercise of women's sexuality to the sphere of heterosexual marriage. This sexually-coded honour was

[65] Dorothy Q Thomas and Michele E Beasley, 'Domestic Violence as a Human Right' (1993) 15(1) *Human Rights Quarterly* 36, 55.
[66] *Codigo Criminal do Imperio do Brasil* [Brazilian Penal Code] (Brazil) 16 December 1830 (emphasis added).

both public and private, as it reflected upon the entire family.[67] The social importance of the family unit elevated the protection of these values to a matter of public concern. This explains its wide exception in cases of marriage. There is no separate protection of childhood from sexual contact *per se*. Sexual activity would no longer be criminalised if the child in question got married to the perpetrator.

In the 1890 Penal Code, following the proclamation of the Republic, rape laws were classified under 'Crimes Against the Security of Honour and Honesty of Families'. The intrinsic link between women's sexual behaviour and the collective value of the 'family' was made even more explicit with the added crime of 'corrupting underage women' by practicing 'licentious acts'.[68] This wording, which included acts beyond penetrative vaginal sex, suggests that innocence should be protected regardless of the constraints of virginity. These laws coincide with similar trends in Western countries towards state regulation, surveillance and control over '[e]xpressions of sexuality that did not conform to a marital, reproductive framework'.[69] In the United States, moral campaigns to protect young women and girls, following new ideas about childhood,[70] resulted in the amendment of the rape statute by raising the age of consent as well as the establishment of juvenile courts in the 1880s.[71]

The following – and current – Penal Code of Brazil came into force in 1940. The criterion of the 'honest woman' to characterise statutory rape was finally abandoned. Considerations about 'family morals' were formally decoupled from protecting children as a special category of rights. However, the idea of the 'honest woman' would still figure in the Brazilian legal landscape due to its legal relevance for other crimes in the Penal Code. For instance, Article 215 of the 1940 Penal Code criminalises 'sexual possession by fraud', but only against an honest woman.[72] Chapter 2 of its 'Crimes Against Morals' section dedicated to the 'seduction and corruption of minors', including sexual acts involving girls, retained several 'family honour' elements,

[67] Maria Helena Fávero, *Psicologia de Gênero: Psicobiografia, Sociocultura e Transformações* [Gender Psychology: Psychobiography, Socioculture and Transformations] (Editora UFPR 2010) 85.

[68] *Decreto n 847, de 11 de Outubro de 1890 [Código Penal]* [Decree No 847 of 11 October 1890] (Brazil) art 266.

[69] Mary E Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920* (University of North Carolina Press 1995, 2nd edn) 2.

[70] Stephen Robertson, 'Age of Consent Law and the Making of Modern Childhood in New York City, 1886–1921' (2002) 35(4) *Journal of Social History* 781.

[71] Odem, above note 69. Odem writes at 65,

> Although the age-of-consent law was intended to 'protect' young women, the prosecution of statutory rape cases proved to be *a punitive process* for them as well as for the male defendants. Young women and girls were frequently confined in the country detention home for delinquent youth to await court hearings. While in detention, all girls were subjected to compulsory pelvic exams to determine whether they were virgins. If the physician found evidence of sexual experience (a ruptured hymen or relaxed vaginal opening), the girls faced rigorous questioning about their sexual activities by female probation officers, who pressured them to reveal the names of their sexual partners, then turned these names over to the police. (emphasis added).

[72] 1940 Penal Code (n 61) art 215.

which had been left out of the legal definition of rape. The crime of seduction only applies to very limited circumstances:

> **Art 217.** Seducing a virgin woman, younger than eighteen and older than fourteen, and having intercourse with her, taking advantage of her inexperience of justifiable trust
> **Art 218.** Corrupting or facilitating the corruption of a person older than fourteen and younger than eighteen years, practicing libidinous acts with them, or inducing them to practice it or be witness to it[73]

The 1940 Penal Code is still in force in Brazil; though it has undergone several extensive reforms over time. For the purpose of this analysis, the most relevant change was introduced in 2009 (Law n 12.015/2009),[74] which significantly changed the definition of statutory rape. The title, 'Crimes Against Morals', was changed to 'Crimes Against Sexual Dignity'. Statutory rape was no longer a category attached to the crime of rape, but became an independent crime in a separate section, 'Sexual Crimes Against the Vulnerable'. Article 217-A states: 'Having intercourse or practising any libidinous act with someone under the age of 14'.[75] Discarding the presumption of violence, the mere act of having any sexual contact with anyone under the age of 14 (irrespective of gender or type of sexual contact) became classified as rape. The 'motive exposition' for the Law n 12.015/2009 reveals that the Mixed Parliamentary Inquiry Commission on Child Sexual Abuse and Sex Trafficking (CPMI) was the main factor behind this penal reform.[76] In the exposition of motives, the change in statutory rape law is based on the intention to strengthen the protection of children's rights. The CPMI argued that such a legal change would protect children from being in an unequal power relationship with an adult. A child's virginity and sexual innocence were not mentioned as causes for this change.[77] In 2009, the 'honest woman' standard was – formally – abandoned in Brazilian law and as a legitimate argumentative discourse by Brazilian legislators.

4.0 Translations of Childhood in the Brazilian Supreme Court

4.1. *Translation and the Legal Ambiguity of 'Presumption'*

Seventeen *habeas corpus* cases reached the STF between 1996 and 2013. All these cases involved an adult man (ie over the age of 18) who had had penetrative sex with girls younger than 14, and each case would evolve around how to interpret the legally ambiguous notion of *presumption* of violence. In all the cases, the

[73] 1940 Penal Code (n 61) arts 217–18.
[74] *Lei n 12.015, de 7 de Agosto de 2009* [Law No 12015 of 7 August 2009] (Brazil).
[75] 1940 Penal Code (n 61) art 217-A.
[76] Exposicão de motivos [Explanatory Memorandum], Lei n 12.015, de 7 de Agosto de 2009 (Brazil).
[77] Brazil, Congresso Nacional [National Congress] *Relatório Final da Comissão Mista Parlamentar de Inquérito: Criada por meio do Requerimento n° 02, de 2003-CN, 'com a finalidade investigar as situações de violência e redes de exploração sexual de crianças e adolescentes no Brasil'* [Final Report of the Joint Parliamentary Commission of Inquiry: Created through Request n°02 of 2003-CN, 'with the purpose of investigating situations of violence and networks of sexual exploitation of children and adolescents in Brazil'] (2004) <https://www2.senado.leg.br/bdsf/bitstream/handle/id/84599/RF200401.pdf?sequence=5>.

defendant argued the illegality of the accused's imprisonment, claiming that the child victim had consented to the act: the presumption of violence provided by Article 224 of the Penal Code should *not* be applied due to the victim's behaviour. The first case from 1996 was resolved in the defendant's favour, based on the decision to relativise the presumption of violence.[78] This case sparked a considerable amount of contestation, both in the media and among legislators. In Brazil's National Congress, two bills were tabled following the Supreme Court's decision. The first bill suggested that the age of consent should be lowered to the age of 12. The purpose of the second bill was to invalidate the legal argument of relativising violence by reaffirming that the presumption of violence in statutory rape cases is absolute.[79] The second bill was approved by Congress, but later vetoed by the President.

The 1996 case was significant in creating a precedent for relativising the presumption of violence. It was cited in eight of the following 16 *habeas corpus* cases on statutory rape. Several recent cases have completely rejected this argument, emphasising the vulnerability of the child victim as a constitutive element of the *absolute* character of the presumption. In particular after the 2009 penal reform, it was not found relevant to characterise the relationship between the victim and the defendant in several of the final STF decisions.[80] Though the 1940 Penal Code would still apply to cases after 2009, several judges in the STF explicitly mentioned that they were drawing on the new legislation as an interpretative framework in their decision-making, which provided that the presumption of violence in statutory rape cases was not relative but absolute. Among the 17 cases that reached the Court, only four cases were granted *habeas corpus* – all of them prior to 2009.

In several of the cases in which the presumption of violence was relativised, the defence alleged that the relationship between the victim and the defendant was 'romantic', or described it as 'casual sex'. Here, the most common arguments of the defence were either the victim's assumed knowledge about sexual matters or that the victim's behaviour made her appear older. Both positions draw largely on excluding child victims from the category of childhood, subjecting them to the traditional 'honest woman' standard. Whilst these cases focused on the child's consent in establishing a 'romantic relationship', only one case from 1997 considered the victim's statement in the decision-making process. In this case, the victim married another man after she was made pregnant by the defendant. She wrote an official letter to the Court, declaring she had no wish nor interest in the accused being imprisoned. The victim's expression of interest was met with ridicule and dismissal by the

[78] HC 73662 MG, above note 2.

[79] The two bills are: Projeto de Lei do Senado 111 de 1996 [Senate Bill No 111, 1996] (Federal Senate of Brazil) <https://legis.senado.leg.br/diarios/ver/7200?sequencia=59> (at 8.803); Projeto de Lei do Senado 135 de 1996 [Senate Bill No 135, 1996] (Federal Senate of Brazil): <https://legis.senado.leg.br/diarios/ver/7298?sequencia=55> (at 10.501).

[80] These cases are Supremo Tribunal Federal, HC 75.414-7 MG (Min Maurício Corrêa) (24 June 1997, 2nd term) (HC 75.414-7 MG); Supremo Tribunal Federal, HC 93.261-1 Rio Grande do Sul (Min Carmen Lúcia) (19 February 2008, 1st term); Supremo Tribunal Federal, HC 101.456 MG (Min Eros Grau) (9 March 2010, 2nd term); Supremo Tribunal Federal, HC 97.052 Paraná (Min Dias Toffoli) (18 August 2011, 1st term) (HC 97.052 Paraná); Supremo Tribunal Federal, HC 111.159 Bahia (Min Teori Zavascki) (24 September 2013, 2nd term).

judge-rapporteur, who considered the letter to be 'obviously induced' and a cheap defence strategy to gain financial compensation.[81] However, the Court still gave weight to the victim's voice – the only case in which the victim had already left all markers of childhood behind, speaking in her capacity as a married woman and a mother.[82]

In the face of the legal ambiguity of 'presumption', the STF constructed what we identify as three narratives about children and childhood, which became decisive for how the legal subjecthood of child victims was established in each case. These three narratives outlined below – the corrupted child, the innocent child, and the vulnerable child – were the result of how prevailing norms in society about 'childhood' were *translated* into legal reasoning in the Court. In these translations, prevailing ideas about childhood, ie the Apollonian and Dionysian archetypes, intersected with moralising discourses about women's sexuality. In the defence arguments and court reasoning, a child's deviant behaviour was a sign of moral corruption in the 'corrupted child' narrative and of childish ignorance according to the narrative on the 'innocent child' narrative. The third narrative – the 'vulnerable child' – allowed the judges to move away from an exclusive focus on the child victim's behaviour towards an assessment of the child's relationship with the defendant. This narrative was construed in the exchanges between the defence arguments which drew on the narrative of the corrupted child and the judges' reasoning which ultimately stressed Apollonian child references. These translations matter as they placed the child victims in these cases in a legal-semantic space in which they were simultaneously denied the agency that characterises adulthood and the special protection that compensates for this lack of agency in childhood protection laws. While the relativisation of the presumption of violence could have been a legal instrument to affirm the possibility of agency and even sexual autonomy of children, it was most commonly used in the 17 *habeas corpus* cases on statutory rape to confirm a normative idea of childhood as a state of sexual innocence, and to exclude deviant subjects that did not conform to this idea.

4.2 *The Corrupted Child*

The first narrative identified is 'the corrupted child'. Nearly all arguments for the accused as well as a few majority judgments describe the child victim as a sexually deviant woman. The traditional jurisprudential distinction between honest and dishonest women is indicative of the denial of protections afforded to children. This is in particular evident in the first case from 1996. It was praised for advancing Brazilian jurisprudence to match contemporary mores and values, and, at the same time, decried as a setback in protecting children from sexual violence and abuse.[83] This

[81] Supremo Tribunal Federal, HC 74700–1 Paraná (Min Maurício Corrêa) (4 March 1997, 2nd term) 473.
[82] As above at 472.
[83] Leonardo Barreto Ferraz Gominho and Filipy Roberto da Silva, 'A Relativização da Presunção de Vulnerabilidade dos Adolescentes como Forma de Adequação Social' [The Relativisation of the Presumption of Vulnerability of Adolescents as a Form of Social Adequacy] *Revista Jus* (online) 25 August 2016 <https://jus.com.br/artigos/51614/a-relativizacao-da-presuncao-de-vulnerabilidade-dos-adolescentes-como-forma-de-adequacao-social> (last accessed 22 February 2022).

section focuses primarily on this case due to its importance in establishing a precedent for relativising the presumption of violence.

The facts of the case resulted in different interpretations among the judges. The relationship between the defendant and the child victim, 12 years old at the time, was described as being 'casual'. The defendant and the victim had previously had sex twice. The victim had initially resisted the defendant's advances, after which she – in the words of the defendant – 'gave in to the caresses'.[84] In rape trials, describing women as passive receivers of men's irresistible sexuality is often a way to discursively construct the idea of consent in the legal process, which disqualifies the woman as a victim as men are simply reacting to women's expected sexual behaviour.[85] In the 1996 case, the victim's father reported his suspicions to the police when he saw the two coming back on a motorbike. Forced by her father to give a statement to the police, the report specified that the victim

> has already been with another guy named Valdir; she has had sex with the defendant three times, and after the last time, she was discovered by her father; she was not forced to have sex; she did it because she felt like it; the relationship between the deponent [the person who testifies] and her father is not very good and her father forced her to go to the police station; … she was very afraid of her father finding out that she was having sex with the defendant; there was no violence at any point; the deponent is not afraid of getting AIDS, nor of getting pregnant because if she has a child, she will raise it.[86]

The First Chamber of the STF, which consists of five judges, voted three to two in favour of the defendant, following the vote of Justice Rapporteur Marco Aurélio de Mello. The main argument, articulated by Justice Mello, suggested the victim did not act as a child due to her sexual behaviour:

> In our days there are no children, there are 12-year-old women. Precociously matured, the majority of them knows how to react to these situations, *even if they don't possess the adequate scale of values to know the consequences of their actions.*[87]

The victim was effectively placed outside of the framework of children's rights due to her deviant behaviour, while simultaneously being denied moral agency over her own actions. Whilst the majority vote disqualified the victim's status as a child, according to her deviance from an 'Apollonian paradigm' of innocence, ignorance and asexuality, two dissenting votes adopted an explicit 'Dionysian (semi-savage) child' standard. The two Justices insisted that the child victim's state of ontological incompleteness called for legal protection, suggesting she was irrational and not capable of conforming to social expectations and mores. One of the dissenting Justices affirmed that

[84] HC 73662 MG, above note 2 at 315.
[85] Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (Routledge 2001) 39–40; Susan Ehrlich, Diana Eades and Janet Ainsworth (eds) *Discursive Constructions of Consent in the Legal Process* (Oxford University Press 2016).
[86] HC 73662 MG, above note 2 at 315–16.
[87] As above at 320 (emphasis added).

sexual mores and agency should not be a judgment criterion as 'teenagers are dominated by hormones' and therefore cannot resist any sexual advances.[88] Biologically, the argument went, children are not ready to assume moral responsibility for their actions.

All votes explicitly deplored the deterioration of morals at the given time, stressing the problem of access to mass media for moral decadence. Even though this line of argument was progressively rejected by the Court, new cases were based on the same translation of 'childhood' as late as 2013. In one of these cases that reached the STF, a middle-aged man had exchanged money and food for sex with a 12-year-old girl who was desperate to feed herself and her family. The defence argued that the fact that the girl had had sexual relations with a previous boyfriend was proof that she was not innocent. The decision of the Court of Appeals, which was overturned by the STF, read as follows:

> though we cannot affirm that the victim was corrupted or had dissolute morals, the truth is that her behaviour does not paint a picture of innocence, *which is the legal value protected by law*, because, while she was meeting with the appellant to have sexual relations, even knowing that the appellant was married, she would do the same with her own boyfriend, with whom she already had a child. *The foundation of the presumption of violence, in the case of teenagers, is the innocence of the passive subject, that is, her complete lack of knowledge about sex*. It is apparent that the offended party, even though she was younger than fourteen years old, did not have the required innocence to be placed under the special protection of the law.[89]

In the defence argument, and in consonance with the understanding of the 1940 legislators, knowledge of sexual matters was enough to de-characterise the victims as subjects of the special legal protection granted to children. This argument was successful in another case from 1996[90] in which the victim's mother exchanged sex with her daughter for food and alcohol. The Court ruled partially in favour of the defendant to relativise the presumption of violence, since the 13-year-old girl was considered to be

> no ingénue, she was raised by a prostitute, and spent time in a [juvenile correctional facility] and a care home before she would return to live with her mother, who has always been a prostitute and never worked […]. According to her own sister, she already well knew what sex is.[91]

However, in this case, the victim's account of the sexual encounters as abusive and non-consensual was enough for the Court to ultimately decide that the charges should fall within the crime of rape, and not statutory rape.

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[88] As above at 332.
[89] Supremo Tribunal Federal, HC 119.091 São Paulo (Min Carmen Lúcia) (10 December 2013, 2nd term) 5–6 (emphasis added) (HC 119.091 São Paulo).
[90] Supremo Tribunal Federal, HC 74215–7 MG (Min Mauricio Correa) (24 September 1996, 2nd term) 558.
[91] As above at 589.

4.3 *The Innocent Child*

At the other end of the spectrum are cases in which the presumption of violence was considered absolute. The Court found that the victims possessed characteristics typical of 'children' and the cases included standard 'Apollonian child' references, such as frequenting school, playing with dolls, and the presence of caring parents.[92] In a case in 1996, it was noted that:

> It is exactly these girls – and they are still girls – who develop precociously and attract the 'cupidity' of adult men. Yet, emotionally and psychologically, they are still too childish; despite television's hedonistic bombardments. But they are still defenceless. They still play with dolls![93]

In response to the defence's argument that the victim looked older, the Court reasoned that, 'if [the defendant] picked up the victim after school every day, he should have known that the victim was in 5th grade'.[94] The judges underlined that the defendant was 'no dimwit himself' as he 'has a home, is married, and has a child'.[95]

Whilst this argumentative practice suggests children and their innate innocence should be protected, it denies any form of sexual expression and agency by accepting sexual mores as a relevant legal fact. This is particularly apparent in cases where parents initiated the accusations. In a case in 2011, the STF drew on the original sentencing to explain the case, which underlined statements made by the victim's mother:

> There was no proof that the victim was experienced in sexual matters, or that she led a depraved life; that she was immodest, corrupted, or had loose morals. Her mother declared that she did not allow her daughter to go to parties and balls; as far as she knew, her daughter had never had a boyfriend.[96]

In another case, which involved a 13-year-old and an adult whose relationship was described as 'a real romance', the Court noted that 'the defendant truly romanticised the victim, taking advantage of her inexperience and immaturity'.[97]

While 'Apollonian child' references to asexual, innocent behaviour were common in these cases in which the presumption of violence was considered to be absolute, they did at times entangle with 'Dionysian child' considerations. According to the 'Dionysian child' paradigm, the necessary corrective role of parents, teachers and

[92] Consider, for example, the following explanation: 'In terms of alleging consent, the accused was constantly persuading the victim to the point of following her to school where she studied, despite him being a married man. In such cases, the presumption of innocence [sic] is operative without exaggerating the norm's application'; compare HC 75.414-7, above note 80.
[93] Supremo Tribunal Federal, HC 74580–6 São Paulo (Min Ilmar Galvão) (17 December 1996, 1st term).
[94] As above.
[95] As above.
[96] HC 97.052 Paraná, above note 80.
[97] Supremo Tribunal Federal, HC 99.897 Paraná (Min Eros Grau) (17 November 2009, 2nd term) 243.

other authorities could – and should – supersede the child's agency for the purpose of civilising and transforming children into functional adults, even if children exhibit their own will to act in the world. In a case from 2008, an 11-year-old girl from a small, rural town had had sexual relations with an adult man. According to her own testimony, she experienced the situation as positive and 'something natural'.[98] Her mother's interpretation of the situation stressed the daughter's immaturity and how she was incapable of understanding the moral wrongness of her actions. The victim's positive experience of the relationship was a sign of her own innocence. This innocence should be protected by the Court by criminalising the accused, even though this would be against the child's will. In the case explanation, the Court noted:

> At the time, the child was only 11 years old. Despite her physical development, her mother affirms, she was still a completely innocent child. She was raised in the countryside with no knowledge that could result in her capacity to consent. She knew nothing about sex … According to her own deposition, she made it clear that she did not find it morally wrong to sexually satisfy someone's lust. This lack of awareness about the immorality of the act – as if it was something completely normal – shows that she had no possibility to consent.[99]

4.4 *The Vulnerable Child*

With the gradual invalidation of the morally 'corrupted child' as a legal argument, a new narrative was employed to cover cases in which the victim did not conform to normative views on 'childhood', including ideas about child innocence. Here, the situational *vulnerability* of the victim is of greater concern than considerations about innocence and morality. Even if the child's behaviour suggests they was not unaware of the situation or if they object to the prospect of legal protection, the child is entitled to be protected from an unequal power relationship with an adult. In the last *habeas corpus* case in the STF, a 57-year-old had had sex with a 12-year-old girl in exchange for food and money. According to the defence statement, the child victim had a boyfriend with whom she had a child. She was therefore no longer 'innocent' and as such had explicitly expressed consent in the given situation:

> the victim affirms, both when questioned by the police and in front of the judge, that she willingly came to the residence of the accused to have sex with him, since she would get, in exchange, food and money every time. She underlines that she was never threatened, and never suffered physical violence, and the accused was never violent … , which caused her to come willingly every time in order to get financial help for her and her family.[100]

The STF judgment focused on the *transactional* nature of the relationship to characterise the victim's vulnerability, overlooking considerations of innocence or sexual morality. The STF adopted the narrative of the 'vulnerable child' in its

[98] Supremo Tribunal Federal, HC 94.818-9 MG (Min Ellen Gracie) (24 June 2008, 2nd term).
[99] As above.
[100] HC 119.091 São Paulo, above note 89.

argumentation for why the presumption of violence was absolute. In the words of Justice Carmen Lúcia: 'It is important to clarify, that the behaviour described in this case is even more deplorable since the victim's motivation to engage in sexual acts was to secure money and food for her family. The situation underlines the vulnerability of the victim, *irrespective of her age*'.[101]

The 'vulnerable child' narrative also emerged in cases where the victim directly stated that the sexual encounter was *not* consensual or where the Court reasoned that the expression of consent was not possible based on its assessment of the relationship. In a case from 2012, a child had been sexually abused by her stepfather who had threatened to hurt the child's mother if the child did not comply to his demands. The Court ultimately based its argumentation on the consideration of the power dynamics and inequality in the relationship:

> It is impossible to define sexual intercourse with a ten-year-old child as anything other than rape, and it is impossible to not understand that violence and threat is inherent in such a relationship.[102]

While the legal and jurisprudential shift – from a relative to an absolute presumption of violence – explicitly emphasises age as the only factor to take into account in establishing the legal ground for statutory rape, judges still predominantly based argumentation on qualifying the victim as vulnerable in the more recent cases. This served to both justify the employment of the categorical cut-off point for statutory rape (ie age) and to counter defence arguments which evolved around the 'corrupted child' narrative. In the two cases above, their assessment of the relationship's repugnant character supported the argumentation of the judges, not the victim's appearance, behaviour, nor social status.

5.0 CONCLUSION

This article showed how prevailing norms in society about childhood were translated into legal language via defence arguments and court reasoning in Supreme Court cases on statutory rape in Brazil. According to the Brazilian Penal Code prior to reform in 2009, statutory rape is defined by the *presumption* of violence in cases in which the victim is under the age of 14. The legal ambiguity of this formulation rests on whether the presumption of violence should be interpreted as relative or absolute. This ambiguity considerably expanded the interpretive power of legal actors in court. Our analysis drew on 17 *habeas corpus* cases on statutory rape which reached Brazil's Supreme Court in the period from 1996 to 2013. We coded Court decisions according to how the victim and the defendant were described, producing narrative categories to identify how the legal subjecthood of child victims was construed in court arguments.

We argue that translations of childhood into legal idioms created a legal-semantic space in which child victims were simultaneously denied the agency that characterises

[101] As above at 394 (emphasis added).
[102] Supremo Tribunal Federal, HC 105.558 Paraná (Min Rosa Weber) (22 May 2012, 1st term).

adulthood and the special protection that compensates for this lack of agency in childhood protection laws. We refer to this legal friction as the 'Lolita paradox' of statutory rape jurisprudence. The legal-semantic space in which that paradox sits is defined by three narratives regarding the child victim that informed and justified how the judges reasoned in each of the cases: the corrupted child, the innocent child, and the vulnerable child. The article has demonstrated how translations of childhood in the courtroom intersect with traditional stereotypes regarding women's sexuality, including the distinction between honest and dishonest women which previously informed Brazilian penal law on rape.