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HERMENEUTIC INNOVATIONS ON THE CRIME OF RACISM: A CASE STUDY OF THE DIRECT ACTION OF UNCONSTITUTIONALITY BY OMISSION (ADO) NO. 26 AND LAW NO. 7,716/1989

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ABSTRACT

Due to the high numbers directly related to violence against the LGBT community, in addition to the recent decision of the Supreme Court in ADO 26/DF, concretizing the crime of homophobia, this work can study the legitimacy of this criminalization before the legal system and the social need, in addition to carrying out an analysis regarding the typification of a new conduct through a judicial decision. The objective of this study was to analyze the impacts of the decision in ADO 26 on the judicial interpretation of the crime of racism, homophobia and transphobia in order to understand the changes and developments in the application of anti-racism legislation. To this end, there was a bibliographic study, through articles and books related to the theme, being considered essential steps. The results made it clear that the STF has started to have a more active conduct in situations of crime of racism, seeking to give greater efficiency to the device created by the constituent, adopting the concretist theory. Therefore, it can be concluded that the change in the STF's stance regarding some issues, such as dealing with unconstitutional omissions, has still occurred slowly and gradually, even though it is necessary. The Supreme Court of Brazil has gained greater prominence in the national scenario to the detriment of the Executive and Legislative Branches, at the same time that it has contemplated their functions, precisely because they are inert in their respective typical functions.

Keywords: Unconstitutional Omission. Judicial activism. Criminalization of homophobia.

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INTRODUCTION

This article deals with the impacts of the decision in ADO 26 on the judicial interpretation of the crime of racism, homophobia and transphobia.

Law 7.716/89 is known in Brazil as the "Law of Racial Crimes". Article 26 of the Law establishes that practices of discrimination or prejudice based on race, color, ethnic origin, religion or nationality are punishable by imprisonment in the form of imprisonment according to the articles of the Law. Paragraph 1 of this article mentions that if discriminatory behavior occurs in public places, the penalty will be increased by one third.

The importance of ADO No. 26 for society in general, together with Law 7.716/89, is because both address fundamental theses of equality and the fight against racial and sexual discrimination in Brazil. ADO No. 26 originated in the equivalence of homophobia and transphobia to the crime of racism, expanding to legal protection of LGBT+ people.

However, this theme was chosen in order to address a little more about this law, and its importance to society, which changed after the Law was changed by the constitutional interpretation of the STF. In this way, it is possible to ascertain mechanisms of how society and those who suffer prejudice, whether ethnic, racial or sexual orientation, have become more assured, knowing that now their rights are no longer ignored.

The guiding problem of the present work is to answer the following question: What are the impacts of the decision in ADO No. 26 on the judicial interpretation of the crime of racism?

The objective of the study was to analyze the impacts of the decision in ADO 26 on the judicial interpretation of the crime of racism, homophobia and transphobia in order to understand the changes and developments in the application of anti-racism legislation. With regard to the specific objectives, they were: to identify the rationale and the main legal discussions present in ADO 26; to analyze the historical evolution of the judicial interpretation of the crime of racism in Brazil; investigate emblematic cases after the ADO 26 decision to understand the changes in the application of anti-racism legislation.

METHODOLOGY

For the construction of this work, a bibliographic and documentary survey was carried out. In other words, initially, a broad bibliographic and documentary survey was carried out on the Brazilian legislation related to racial crimes of homophobia and transphobia. This survey included not only legal texts, such as laws and obligations, but also academic studies, scientific articles, and official documents that address the subject. Then, the data were collected through documentary research, using sources such as

judicial decisions, extracted from the official websites of the Superior Court of Justice (STJ) and the Federal Supreme Court (STF), as well as official documents from government agencies related to homo-transphobic discrimination. After data collection, a detailed analysis and interpretation of laws and judicial decisions was carried out, identifying gaps, divergences and legal challenges in the penalization of these crimes.

RESULTS

Before expressing about the criminalization of Homophobia and Transphobia, it is necessary to understand what a Direct Action of Unconstitutionality by omission (ADO) is, where the author Flávio Martins, expresses the following view on this action:

> It is an action aimed at attacking the omission of the public power, in the face of a constitutional norm, and this action for omission occurs in two ways, one of which is the duty to complement the constitutional provisions pending regulation, they are the so-called constitutional norms of limited effectiveness of an institutive principle. If the State does not make these laws, determined by the Constitution, it is acting (or rather, not acting) contrary to the constitutional dictates (MARTINS, 2023, p. 571).

So, according to the thought of the author mentioned above, the ADO serves to remedy unconstitutional omissions, which are directly pending regulation, one of these cases being the criminalization of homophobia and transphobia.

The direct action of unconstitutionality by omission (ADO) No. 26, which according to Alves (2021, p. 36) the action proposed by the Popular Socialist Party (PPS) was proposed in order to impose on the legislative power the duty to draft criminal legislation that punishes homophobia and transphobia as species of the genus "racism".

According to Alves (2021, p.36), specific criminalization, according to the party, stems from the constitutional order to legislate on racism, a crime provided for in article 5, XLII of the Federal Constitution of 1988, or alternatively, discrimination that violates fundamental rights and freedoms (article 5, XLI), also subsidiary to the principle of proportionality in the sense of prohibiting the protection of the disabled (article 5, LIV).

The authors Nestor Eduardo Araruna Santiago and Luís Lima Verde Sobrinho, express the following thought about the criminalization of homophobia and transphobia brought about by ADO n° 26:

> The alleged right to legislation, invoked by the author of ADO No. 26, is only present when there is also a provision for the State's duty to create legal norms. In kind, the Federal Constitution affirmed an unquestionable incrimination warrant "the law shall punish any discrimination that undermines fundamental rights and freedoms" (art. 5, XLI), and "the practice of racism constitutes an imprescriptible and non-bailable crime (art. 5, XLII). The cause of action, therefore, was based on the Federal Constitution itself, in an express provision (SANTIAGO; SOBRINHO, 2022, p.14).

In relation to the principles that encompass the decision of the Federal Supreme Court, in terms of hermeneutics, it is directly supported by some principles, and the first principle must be highlighted being the dignity of the human person, expressed in article 1, III, of the Federal Constitution of 1988, which has the following positivity:

> Article 1 The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, is constituted as a Democratic State of Law and has as its foundations:
> III - the dignity of the human person; (BRAZIL, 1988).

Regarding the applicability of this principle to the criminalization of homophobia and transphobia, according to Valente (2020, p. 22) when it comes to the LGBT community, it is the duty of the State, in this sense, to assert not only the existence of these people, but, above all, a dignified existence. In a scenario like the Brazilian one, marked by the persecution of the minority composed of homosexuals and other individuals who break the heterosexist pattern, the criminalization of acts that threaten the lives of these individuals is a way to guarantee them their dignified existence, as guided by the constitutionally established fundamental principle.

Regarding the principle of freedom, which is also shaped by the case of ADO No. 26, the author Ana Karenyna Guedes Valente, expresses the following thought about the given principle:

> The fact is that the Citizen Constitution aims to promote rights in a broad way to individuals, without granting more privileges to some to the detriment of others. Thus, the criminalization of homophobic conduct, with the maintenance of freedom of religious expression, with its due limitations, is pertinent to the management of the conflict between the two groups and to the promotion of the right to freedom for both, according to the constitutional values set (VALENTE, 2020, p.24-25).

The principle of equality must be taken into account, as the non-criminalization of homophobia and transphobia generates a clear imbalance in the social balance, as it is a vulnerable group that needs specific protection from the state.

According to Valente (2020, p. 22), in relation to the principle of equality in relation to the criminalization of homophobia, it comes to deal with homophobia in the sphere of criminal law, in principle, it does not immediately provide equality to the LGBT population, which is the right of all individuals. It collaborates, however, for a cultural change, since discriminatory and violent acts will be grounds for punishment, eventually imprisonment. Now, if a conduct is criminalized and the subjects are punished, it tends, over the years, to be considered wrong and unjust.

At this moment, going deeper into the subject, the criminalization of homophobia by the STF from the Direct Action of Unconstitutionality by Omission 26, was only initiated

because of the Popular Socialist Party, constitutional representatives who have active legitimacy, which, after entering the ADO, was analyzed and determined by the STF, with the rapporteur of the case being Justice Celso de Mello, criminalize acts that threaten life, hurting the fundamental rights and guarantees of the LGBTQIA+ community, based on the criminalization of homophobia by Law 7.716/89 (Racial Discrimination Law).

According to Barioni (2022, p. 1):

> It is also important to highlight the technical requirement present in article 103 of the CF/88, those who have active legitimacy to file the lawsuit are only the President of the Republic, the Board of the Federal Senate, the Board of the Chamber of Deputies, the Board of the Legislative Assembly or the Legislative Chamber of the Federal District, the Governor of the State or of the Federal District, the Attorney General of the Republic, the Federal Council of the Brazilian Bar Association, Political Parties with representation in the National Congress and the Trade Union Confederation or Class Entity at the national level.

On this issue, in ADO No. 26, the invisibility of legal protection for the LGBTQIA+ community, as well as the lack of criminalization of homophobia and transphobia practices, was discussed before the Federal Supreme Court. In the case dealt with at this time, the STF recognized the legislative delay, that is, the duty of the National Congress to establish a more specific legal protection to meet the needs of this community. However, it determined the equivalence of homophobia and transphobia to crimes of prejudice of race and color, that is, the STF also determined that any practice equivalent to homophobia and transphobia should be considered a species of the crime of racism, until the National Congress enacts a specific law (BERRI; FERREIRA, 2020).

It became increasingly evident that on this occasion, the STF began to have a more active conduct, in order to give effectiveness to a provision that had little effectiveness, but at the same time wanted to fraudulently seize the competence of the Legislative Branch to create a criminal type that could only have been created by law *stricto sensu*, as provided for in the principle of legal reserve.

However, it must be noted that the proactive conduct of the STF may have been proven by the inefficient procedure of the ADO, which does not present effective measures. It is clear that even though its primary function is to attack any unconstitutionality resulting from omission by the public power, the regulation of the ADO in Law 9868/99 only confirms the inert state of the body responsible for the unconstitutional omission (CUNHA JUNIOR, 2022).

In the vote, Justice Celso de Mello, through a correct legal decision, justifies the vulnerability of this community, which stems from serious offenses to life, an inviolable principle, as provided for in the course of this work, as well as the unreasonable overcoming

of the time lapse necessary for the constitutional commandments of criminalization, instituted by the constitutional text in its article 5, items XLI and XLII, with the ADO being an instrument for the implementation of constitutional clauses frustrated, in their effectiveness, by unjustifiable inertia of the public power, since the omission of the legislative power in the face of the enactment of a specific law that contemplates the realistic situations of the community generates a limbo in the punishment of acts of discrimination based on the sexual orientation or gender identity of the victim (CUNHA, 2022).

Below, a part of the summary of the decision is clear:

> Until a law emanating from the National Congress is enacted to implement the criminalization warrants defined in items XLI and XLII of article 5 of the Constitution of the Republic, homophobic and transphobic conducts, real or supposed, that involve hateful aversion to someone's sexual orientation or gender identity, as they translate expressions of racism, understood in its social dimension, they fit, by the same reason and through typical adequacy, to the primary precepts of incrimination defined in Law 7.716, of 01/08/1989, also constituting, in the hypothesis of intentional homicide, a circumstance that qualifies it, as it constitutes a vile motive (Penal Code, art. 121, § 2, I, "in fine").

With the STF's decision, Minister Celso de Mello also justifies the enactment of a specific law, proclaims the jurisprudence in the case of intentional homicide against the LGBTQIA+ community, constitutes a qualification, as it constitutes a vile motive (art. 121, §2, I of the CP) and, furthermore, reinforces that the decision does not involve or penalize the exercise of religious freedom, as long as the acts of the faithful do not constitute hate speech about the referred community (CUNHA, 2015).

The understanding and provocation of the STF for the instruction of its atypical power, in character of omission by the Legislative Branch, now shows a total setback of our legislative representation, once again.

As stated, the control of constitutionality opens a precept to judicial activism, and the Judiciary already has an atypical power to be able to reverse the gaps that the Legislative Branch leaves in the dark or negligence, in practical cases, for the enactment of specific laws on certain social issues.

In the midst of the twenty-first century, the democracy that takes place in the Federal Constitution is not beyond valuations that are not usual, through the political power that is inferred in society. LGBTQIA+ entities point out that every 23 hours, a citizen of the community who is a victim of homicide or even suicide ends up dying (CUNHA JUNIOR, 2022).

The lack of regulation by the Legislative Branch to make changes in specific norms and laws is intolerable, in a democracy like Brazil's. As summarized, the Constitution has

an evolution to be understood and understood, and the three powers represent the needs of society and the people, if they neglect and omit their responsibilities, society does not find any support.

DISCUSSION

In the same proportion that the phenomenon of racism ended up being constructed and supplied as a social reality, present in the most diverse cultures, the terms race and ethnicity began to be used indiscriminately in other fields, such as in academic and media circles in a very controversial way, but their discussion was necessary. Countless times, the term ethnicity is used instead of race, however, it is important to point out that these terms, despite having intersections, have different explanations and specific definitions as one deepens their understanding. Regarding the discourses that persist between the term race and ethnicity, Hale (2014, p. 13) states that "the key concept of ethnicity has hindered the understanding of the phenomenon, the analysis and the discussion of racism".

However, even though the categorization of individuals into race and ethnicity has been widely used, both in diagnosis and in scientific research, their meanings most often end up being confused or even unknown, more precisely in the academic environment (SILVA; RAM; BORGES, 2020).

It is necessary to remember that the history of Brazil was built side by side with that of blacks, but since its abolition, the freedom so persecuted and now conquered ended up not happening, in the sense of the word itself. The former enslaved person remained on the social margins and saw in the following years, researchers develop the most diverse theories around the subject of racism, which in the end were justifications for the color prejudice that each descendant of blacks suffered and still lives in their own country.

Race classification can also be used to verify that randomized trials have obtained the expected result. In addition, it can also be of great use to readers as a description of the population participating in a particular study.

On this path, it is quite common to come across in various institutional and media fields, and even academics, erroneous expressions such as: "ethnic quotas", "ethnic debate" or "hetero-identification of ethnicity" boards. It seems that there is a certain resistance from some people to use the term "race". It is as if the expression were out of reach and belonged to a group of words that are politically inappropriate, or almost forbidden, because it brings up genetic or biological issues; or even as if it were circumscribed in the historical-cultural field as something undesirable or abominable, since

the natural sciences have already proven the non-existence of human races" (SANTOS, et al, 2010).

The term breed has a good amount of variety in relation to its definitions that have been used to describe a group of people who share certain morphological characteristics. A good part of the most renowned authors is aware that race consists of a non-scientific term that can only have a biological meaning when the being is homogeneous, strictly pure; A common example is some species of domestic animals. These conditions, however, are impossible to find in humans (SANTOS, et al, 2010).

The human genome is made up of 25,000 genes. The most common differences are skin color, hair texture, nose shape, these are determined by an insignificant group of genes. The differences between a black African and a Nordic white, for example, concern only 0.005% of the human genome. There is a broad consensus among anthropologists and human geneticists that, from a biological point of view, human races do not exist (MARTINS, 2022).

On the other hand, historically, the word ethnicity means "gentile", coming from the Greek adjective ethnikos. The adjective is derived from the noun ethnos, which means foreign people or nation. It is a polyvalent concept, which is part of the construction of an individual's identity, which can be summarized as: kinship, religion, language, shared territory, and nationality, not forgetting physical appearance (GOES, 2020).

The discussion about the non-existence of human races ends up being interpreted most of the time as an exhausted theme in the academic environment, and consequently in the field of social sciences and humanities. However, as Munanga (2006) points out, race should be seen and thought of as a fundamental theoretical construct for the discussion of the phenomena of racism, which are commonly discussed and seen in our culture.

In view of this information, he can make the suggestion that the understanding of the category "race" ends up making its trajectory through the social, political and ideological field, and is of paramount importance for the discussion of "racisms" that operate in the most different configurations. According to Schucman:

> (...) there is no need for the idea of race legitimized by science for racism to exist, and this is what explains the permanence of racism today, as the forms of social legitimation and discourse on human differences have been transformed, as well as the mechanisms that maintain positions of power between whites and non-whites (SCHUCMAN, 2010, p. 45).

The author also makes it clear that even though the use of the category Race occupies a place that has controversial contours in the scientific and academic world, its use cannot be discarded, given that it is extremely necessary, precisely because it enables

the discussion of racism and the implementation of public policies of affirmative action "for the positive recognition of the Brazilian black population, because if this population is discriminated against through the category of race – and, therefore, racism – this same category is the only one capable of unifying them" (p. 49).

In the same script as the conceptualization of the term "race", in the field of human and social sciences, the concept of ethnicity can also present controversy, and with a greater dose of complexity. When analyzing the various definitions of the expression ethnicity, it is possible to affirm that most of the time, the concept always ends up being connected to race, in others as a synonym for race and, in broader explanations, it has appeared as antagonistic to race. On the other hand, the expression race seems to have a connection to a biological basis, the notion of ethnicity is linked to a social base, associated with the notion of group, on which the differences of a people or nation are based (HITA, 2017).

In his questions about race and racism in Brazil, Guimarães (2011, p. 20) shows that the term ethnicity originally needs to be related to the field of human cultural diversity and, over time, ended up spreading to the field "everyday life of vulgar sociologies as a marker of quasi-irreducible differences, that is, as a synonym for race". The term ethnicity began to be used as something to replace the term race, as something to separate differences, since race ended up bringing a historical weight linked, for example, to eugenic movements that caused great impacts on sociological studies (PETRUCCELLI; SABOIA, 2013).

> Racial self-declation has been shown to be a challenging instrument for the identification of race/color in Brazil. This tool has been the object of investigation by many researchers in the search to understand which specific criteria have moved people to justify their self-declarations; or how the category "brown" has been constituted as an element endowed with complexity and confusion in identity processes. In other words, researchers seek to understand how the self-identification procedure has been used to ensure the right of beneficiaries of affirmative action policies in public exams and university access, for example (SANTOS, 2020, p. 29).

In this trajectory, the processes of miscegenation in Brazil and the different spectrums of color that were rooted in Brazilians, in addition to the old explanation that there is only one race (the human) are at the top of these debates. Other discussions about black identity and racial consciousness related to the recognition of a racist society are part of these discussions, a moment in which militant students stand out by presenting particularities of this awareness and the anguish experienced when belonging to the racial and the struggle in defense of the black population (MARTINS, 2016).

Another problem deserves special attention, as it is when self-declaration refers to the number of frauds in the selection of access to university:

> In other words, it works from the vacancy reservation system, the so-called racial quotas. Many people end up declaring themselves brown because they do not know what it means to be in this place, led to believe that because they have black parents or grandparents, they can ensure their ancestry as an acquired right, or even because they really believe that they can cheat the system, since many universities, until recently, did not organize any system to verify the candidates' self-declarations (SILVA; RAM; BORGES, 2020, p. 22).

The authors also deal with the challenges observed in the self-declaration procedures and the understanding of the race/color of some people, as it seems that there is a certain confusion regarding the phenotype in the understanding of some candidates, demonstrating a certain ambiguity in the ways in which some understand what it is to be white or black in Brazil, "allied to aspects such as "coexistence" with non-white people, miscegenation as an unequivocal propensity of Brazilian nationality and confusion around the "brown" identity (MARTINS; MELLO; RIBEIRO, 2021, p. 20).

Therefore, the conflicts that persist to this day between the notion of race and ethnicity continue to present a high degree of complexity, in the same proportion that they constitute analytical categories specific to the areas of social sciences and humanities and, in this sense, they are still far from being assimilated and understood in fact as an object of analysis that contains concrete elements, objective and empirically observable.

It is of paramount importance to bring a direct understanding of what the crime of racism is, which is typified within Law No. 7,716/89, and to understand its instruments. The provision for the crime of racism is expressed directly in the law mentioned above in this paragraph, specifically in article 20 of Law No. 7,716/89, which states the following wording:

> Article 20. Practicing, inducing or inciting discrimination or prejudice based on race, color, ethnicity, religion or national origin.
> Penalty: imprisonment from two to five years and a fine. (BRAZIL, 1989).

The criminalization and fight against racism, with the advent of the Federal Constitution of 1988, became a goal directly not only of Brazil, but of Brazil in cooperation with international entities, as provided for in article 4, VIII, of the Federal Constitution of 1988, being a governing principle of cooperation with other nations, with the following wording:

> Article 4 The Federative Republic of Brazil is governed in its international relations by the following principles:
> VIII – repudiation of terrorism and racism; (BRAZIL, 1988).

Still within the constitutional provisions, it should be noted that the fight against the crime of racism and the crimes related to it, is a right and a fundamental guarantee that is

expressed within the constitutional framework, having its specificity within article 5 of the Federal Constitution of 1988, which affirms the fundamental rights and guarantees of individuals, Thus, racism is a non-bailable and imprescriptible crime. The reasoning is as follows:

> Article 5 - All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, in the following terms:
> XLII - the practice of racism constitutes a non-bailable and imprescriptible crime, subject to the penalty of imprisonment, under the terms of the law; (BRAZIL, 1988).

It should also be noted that the crime of racism is not to be confused with the crime of prejudiced racial injury, which according to Greco (2020, p. 429) is practiced with the use of elements related to race, ethnicity, religion, origin or the condition of an elderly person or person with a disability.

However, with the advent of Law 14,532/2023, the crime of prejudiced racial injury leaves the Brazilian Penal Code, and migrates to article 2-A, of Law 7,716/89, thus becoming a crime that is also imprescriptible and non-bailable, which has the following criminal classification:

> Article 2-A Insulting someone, offending their dignity or decorum, on account of race, color, ethnicity or national origin.
> Penalty: imprisonment, from 2 (two) to 5 (five) years, and fine
> Sole Paragraph. The penalty is increased by half if the crime is committed through the concurrence of 2 (two) or more people. (BRAZIL, 1989).

There are still other equivalences to the crime of racism, such as: anti-Semitism and anti-Zionism (criminalized in 2004, through the case of Siegfried Ellwanger, a publisher from Rio Grande do Sul who wrote a book denying the Holocaust), and homophobia and transphobia through the Direct Action of Unconstitutionality by Omission (ADO) No. 26.

The first case that gave a new interpretation to the crime of racism was the Siegfried Ellwanger case, which according to Borges; Martins (2021, p.2), the "Ellwanger Case", became jurisprudence for decisions related to racism in Brazil, and the defense of the aforementioned citizen used as an argument that the Jewish people do not fit as a race, as they are all human beings, in a biological view and are part of the same race: homo sapiens.

> The crime committed by the defendant triggered a new interpretation of the crime of racism by the Federal Supreme Court, by equating anti-Semitism and anti-Zionism as crimes equivalent to racism, because in his "work" the defendant/plaintiff addresses anti-Semitic, discriminatory and racist messages, thus intending to induce discrimination, thus sowing feelings of hatred in his readers, contempt and prejudice against people of Jewish origin (BORGES; MARTINS apud Supreme Federal Court, 2021, p. 5).

A point already mentioned, which needs to be reiterated in this part, is the equivalence of the crime of prejudiced racial injury to the crime of racism. This criminal classification, with Law 14.532/2023, now has the same requirements as the crime of racism, so it is a non-bailable and imprescriptible crime.

Therefore, these cases, in addition to the case of Direct Action of Unconstitutionality by Omission (ADO) No. 26, were cases that changed the interpretation of the crime of racism, as it serves to comply with constitutional principles (such as human dignity, equality, freedom, autonomy of will), and that until the enactment of laws that criminalize anti-Semitism and homophobia/transphobia, the State, as the holder of the jus puniendi, comes to punish the offenders in the typification of the crime of racism, which is provided for in article 20 of Law No. 7,716/1989.

CONCLUSION

This study sought to answer the problem/objective that was to identify the impacts of the decision in ADO No. 26 on the judicial interpretation of the crime of racism. It was identified that ADO 26 criminalized homophobia and transphobia, framing them in Law No. 7,716/1989, which criminalizes discrimination and prejudice. In addition, ADO 26 recognized that homophobic and transphobic conduct can be considered racism, in its social dimension. And he recognized that aversion to sexual orientation or gender identity can constitute a vile motive for intentional homicide.

In 2019, the Federal Supreme Court (STF) judged the Constitutional Actions (number of actions). These judgments took a great historic step, recognizing the omission of the Legislative Branch in the treatment of discriminatory acts perpetrated against LGBTs and determining the enactment of a specific law for criminalization. The decision also accepted a request to classify homotransphobic practices as a species of the racism genus so that Law No. 7,716/89, known as the Anti-Racism Law, would also provide protection against homotransphobic discrimination, until specific legislation was published.

In turn, paragraph 3 known as 14.532 mentions that the offense is non-bailable and is not subject to statute of limitations. These provisions are very important for the law because they reinforce the seriousness of racial discrimination and establish tougher measures to punish these crimes, helping to protect human rights and promote racial equality.

Law 7.716/89 comes in the form of criminalizing discriminatory conduct, thus ensuring legal protection and promoting awareness about the importance of diversity and

respect that must exist between differences. In this way, promoting a fairer, more inclusive, and valuable society, always respecting the way of the other.

The new interpretations of criminal classifications that correspond to the crime of racism are a "legislative advance", because the State, as the holder of the jus puniendi (power to punish), needs to punish those who directly attack the fundamental rights and guarantees of individuals, because the "Citizen Constitution", brings in its article 5, in addition to equality and freedom, it also prohibits the attack on the rights and guarantees of individuals.

Therefore, the legal instruments used by the Federal Supreme Court to ensure an egalitarian social process are totally valid, because the attribution of the Supreme Court is to be the "constitutional guardian", and therefore to protect what is affirmed in the Federal Constitution of 1988.

However, if it is of paramount importance for the legislative power to act to remedy unconstitutional omissions, which end up violating the rights of minorities, who end up being disenfranchised.

In the judgment of ADO No. 26, the conduct of the STF in criminalizing homophobia and transphobia, equating it to the crime of racism, did not only result in safeguarding the rights of the LGBTQIA+ community, but also caused great dissatisfaction, accompanied by much criticism before society, as it was understood that the Supreme Court would not have observed basic principles of the Magna Carta.

The results made it clear that the STF has started to have a more active conduct in situations of crime of racism, seeking to give greater efficiency to the device created by the constituent, adopting the concretist theory.

Therefore, it can be concluded that the change in the STF's stance regarding some issues, such as dealing with unconstitutional omissions, has still occurred slowly and gradually, even though it is necessary. The Supreme Court of Brazil has gained greater prominence in the national scenario to the detriment of the Executive and Legislative Branches, at the same time that it has contemplated their functions, precisely because they are inert in their respective typical functions.

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To God and my family.

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