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CRIMINALIZATION OF LGBTPHOBIA, LEGISLATIVE OMISSION AND THE PERFORMANCE OF THE FEDERAL SUPREME COURT – SOME PROVOCATIONS

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ABSTRACT

INTRODUCTION: Criminalizing conducts is an action that involves the analysis of facts in a given historical context and according to predetermined values. It is to bring to the field of Criminal Law a certain act that violates relevant legal assets and that need protection from the State. Few goods are as valuable today for world society – and Brazil is no exception – as security. In other words, security is currently a legal asset of great relevance and that deserves great attention and zeal from the State.

Keywords: LGBTphobia. Criminalization. Federal Supreme Court. Legislative omission

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INTRODUCTION

Criminalizing conduct is an action that involves the analysis of facts in a given historical context and according to predetermined values. It is to bring to the field of Criminal Law a certain act that violates relevant legal assets and that need protection from the State. Few goods are as valuable today for world society – and Brazil is no exception – as security. In other words, security is currently a legal asset of great relevance and that deserves great attention and zeal from the State.

The right to come and go, to be in society with a minimum of tranquility, added to the free exercise of rights inherent to the human person such as gender identity and sexual orientation, are in the end corollaries of the State's guarantee in relation to the safety of the individual. How can a citizen say he is free to exercise his rights if he does not feel safe even to express himself freely about what he really is? Every LGBT citizen, when leaving home, does with a flash of doubt, whether he will return without any aggression, be it physical or moral. And the numbers fully demonstrate that many do not even return.

The executioners of these people are at home, at work, in public office and making laws that theoretically should guarantee all citizens a more egalitarian society. Some attack them directly, others are not bothered by such aggressions and even feel justified in such acts. By moral and religious judgments, by an aversion to any idea of diversity, people are violated every day.

The State is not and cannot be a moral agent. In this way, it is up to him – regardless of who are the representatives who make up his powers and bodies – to guarantee the population as a whole. Having a Constitution that guides the entire State and its functions and the Dignity of the Human Person as a value and guideline to be followed, none of the Powers of the Republic can exempt itself from its obligations and much less be colonized by values that are not in line with the precepts of the Democratic Rule of Law and thus affront the very idea of what makes this country in fact a Republic.

BRIEF HISTORICAL CONSIDERATIONS ON VIOLENCE AGAINST MINORITY IDENTITY GROUPS IN BRAZIL

In Brazil, we are experiencing moments that intensely mix gains in terms of sexual freedom and true attacks and conservative advances. There is talk of the most conservative Congress since the Military Dictatorship in Brazil, which has a direct impact on the advances or setbacks that legislation and public policies end up attending.

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The naturalization of behaviors – which he addresses as being inherent to a certain condition, especially the idea of gender or sexual orientation, characteristics that are socially and socially constructed – added to a history that treated homosexuality as a sin, as a disease, as a crime, ends up sustaining violent behaviors to this day in Brazil and in the world (GARCIA, 2023).

During the Middle Ages, homosexuality was demonized by the Catholic Church, which persecuted homosexuals through the inquisition (DIAS, 2012). With the loss of space in the political scenario of the Catholic Church, homosexuality left the scene, no longer being seen as something to be persecuted by the state machine, until then directly linked to religion. However, it remained something morally unacceptable and that should be restrained both by the family, heterosexual, patrimonialist and patriarchal, as well as by the State organs that did not recognize these people any type of Rights.

If previously homosexuality was seen as a curse, as a sinful act, it is now identified as a disorder, being incorporated as a sexual disorder in the International Classification of Diseases – ICD, in 1975. As a pathology that, therefore, should be treated. Although it is currently unanimous in psychiatry as well as in psychology that homosexuality is not a pathology, given that in 1995 it ceased to be part of the ICD, losing the suffix *"ism"* which means disease and adopting the suffix *"ity"* which defines a way of being, ten years after being indicated by the World Health Organization – WHO, as for the fact that homosexuality is not a disease (MOREIRA FILHO, MADRID, 2009), there are still people who point the way to treatments with both medication and therapy to "cure" homosexuality.

For a long time, homosexuality was considered a perversion, that is, a psychiatric deviation related to sexuality. However, several scholars of the human mind and the phenomena related to it, such as Sigmund Freud, have already pointed out that it is not a disorder, but a manifestation of sexuality (ROUDINESCO; PLON, 1998). Freud adopts the theory that all human beings, as well as animals, are a priori bisexual, being a biological predisposition sometimes to the opposite sex, sometimes to the same sex (ROUDINESCO; PLON, 1998).

There are also studies, especially in the field of anthropology, that point to homosexuality as an issue also influenced by cultural aspects, as well as other aspects of human subjectivity such as sexual identity and practice. Regardless of whether it is something biologically determined or socially influenced, the fact is that homosexuality is definitely not in the field of pathologies (DIAS, 2012).

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In 1973, the American Psychiatric Association (APA) removed homosexuality from the list of mental illnesses. In Brazil, in 1985, the Federal Council of Medicine – CFM, removed homosexuality from the condition of sexual deviation. The Diagnostic and Statistical Manual of Mental Disorders – DSM-IV, also removed homosexuality from the classification of mental disorder. This document identifies all mental disorders through codes and serves as a guide for the medical profession. Finally, in 1993, the World Health Organization (WHO) removed the term homosexuality and adopted the expression homosexuality.

In 1995, the last version of the International Classification of Diseases (ICD), the term homosexuality was no longer included in the diagnoses (MIRANDA, apud TAVARES *et al,* 2010). And there was also in 1999 a resolution of the Federal Council of Psychology – CFP, prohibiting any type of action that favors the pathologization of homosexuality. In the case of transsexuality, the term has not yet been removed from the field of pathologies, and it is still considered a psychiatric disease, despite several studies pointing in another direction.

It should be noted that recently this issue of treatment for the cure of homosexuality was the subject of a draft legislative decree – PDL 234/2011 (BRASIL, 2013), presented by a Federal Deputy and even approved by the Commission on Human Rights and Minorities of the Chamber of Deputies – CDHM, this obviously because there is in the aforementioned commission an almost total composition of members of the religious bench, There is, therefore, a clear religious movement in the aforementioned project. The objective was to change the resolution of the Federal Council of Psychology that prohibits the treatment of homosexuality, since it is no longer considered a disease by both psychiatrists and psychologists as previously said.

It is a movement that means a real setback in the face of everything that has already been discussed, researched and concluded on the subject. This project was not voted on in plenary because it was removed from the agenda at the request of the one who presented it, in the face of pressure exerted by LGBT rights defense bodies, such as the Federal Council of Psychology itself, other parliamentarians and demonstrations by civilians in the streets demanding the shelving of this true legislative aberration.

With the social changes suffered and consequent implications for homosexuals and homosexual relationships, in addition to changes in the legal system itself that modified the way laws are read, leading to a more inclusive interpretation and more concerned with the

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promotion of the dignity of the citizen, there was a reasonable advance with regard to the rights of homosexuals and the protection of homosexual relationships.

THE CONSTANT VICTIMIZATION OF THE LGBT COMMUNITY – VIOLENCE, CRIMES AND SOCIAL SILENCE

Corrective rapes against lesbians. Transsexuals who cannot use bathrooms with which they identify. Gays who have been cursed since childhood. Violence against the LGBT community in Brazil is something common and often faced naturally by society. When analyzing the issue of violence from the perspective of feminist and gender theories - Joan Scott (1998), Sara Salih (2013), Helena Vieira (2016) - it is notorious that the conducts occur due to the maintenance of marginalized stereotypes, related to sexual orientation and gender identity. In other words, in a hegemonic and standardized idea of sexuality, anyone who does not fit in is considered a deviant and often deserving of aggressive behaviors (FERREIRA, GARCIA, 2024).

Brazil is the country in the world that kills the most transsexuals, according to the Transgender Europe group, noting that between 2008 and 2014, 604 (six hundred and four) transvestites and transsexuals were murdered in Brazil. According to the Gay Group of Bahia (GGB), in 2023, 257 (two hundred and fifty-seven) violent deaths of LGBTI+ people were recorded in Brazil. This number places the country as the most homotransphobic in the world. The crimes are characterized by extreme violence, such as several cases of torture and death of adolescents. As an example, a case that shocked nationally was the torture and death of Dandara, in the state of Ceará, given that, in addition to being beaten by 06 (six) men, with various instruments and then executed by gunfire, the killers filmed the entire process. This denotes a total lack of concern with any idea of punishability for the act committed.

Violent conduct against these sexual minorities is endemic. The G1 news site together with the Police Station for Racial Crimes and Crimes of Intolerance – DECRADI, carried out a survey on the map of violence in the state of São Paulo. In ten years, 465 (four hundred and sixty-five) victims filed police reports about crimes motivated by homophobia in the state (2017). In 2023, in the first half of the year alone, 13,800 (thirteen thousand eight hundred) violations involving the LGBTI+ community were registered by the Ministry of Human Rights.

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It is important to note that such numbers are those that were registered due to the complaint, and there are still cases that are not reported, either due to the social oppression suffered by such groups, or even because the commission of such crimes occurs by people close to them such as family members. Sexism and the discrimination arising from it is based on an idea of inferiority of each and every LGBTI+ person simply for being who they are. The social construction of man as a universal subject – a man forged on a premise of violent and sick masculinity – places these people as deviant, either because they do not serve their purposes – as in the case of lesbian women – or because they "pay attention" to the ideals of masculinity to which they salute, such as cis, homosexual men and transsexual women.

Just like the idea of feminine, masculine is also constructed. Therefore, there are ways in which the individual recognizes himself and is recognized as a man: the profile drawn by the media, the recognition of the group and the reaction aroused (KORIN, 2001). The idea of masculinity is something that clearly surpasses the individual man. And this is a vector of violence against groups that pose – even if merely because they are the way they identify themselves – some kind of questioning of this so-called masculinity.

Such an analysis is biased in the sense that this individual is not, *a priori*, the holder of this masculinity. In fact, it has always been formed to meet the dictates that this social idea establishes. You don't have just one type of man, and therefore it would be logical not to have just one format of masculinity. However, cultural practice based on a series of signs and signifiers structures a reality in which only the one who follows what it establishes is recognized and revered as a man – holder of this almost mythical idea of masculinity. Thus, the idea of a hegemonic masculinity is created. In this sense, Robert W. Connell and James W. Messerschimidt assert,

> "Hegemonic masculinity has distinguished itself from other masculinities, especially subordinate masculinities. Hegemonic masculinity has not assumed itself to be normal in a statistical sense; only a minority of men may adopt it. But it is certainly normative. She embodies the most honorable way of being a man, she demands that all other men take a stand in relation to her, and she ideologically legitimizes the global subordination of women to men." (CONNEL, MESSERSCHIMIDT, 2013)

In this way, what is experienced is a hegemonic masculinity that determines very closed standards of "being a man" and such standards pass not only through men's behaviors in relation to themselves, but especially in the contempt for everything that refers to or contacts with the feminine. It is precisely in the idea of a presumed inferiority of women

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in relation to any and all men – and the very idea of masculine as an essence – that serves as the basis for justifying the pernicious conduct of men in relation to women, transsexuals and homosexuals. Because when a man approaches the idea of feminine – whether by style of clothing, way of speaking or by the act of being with another man – he is putting in check the whole idea of masculinity and, therefore, deserves to be marginalized, if not eliminated.

LEGAL BASES FOR THE INTERPRETATION OF LBTPHOBIA AS A CRIME OF RACISM

There are often tensions about parliamentary performance, especially in a context of serious political crisis – accusations that call into question the credibility of a good part of the national political body – added to conservative tendencies that go against the Brazilian legal-constitutional project, causing great discomfort among the political and doctrinal fields.

However, in spite of the existence of political-ideological dissent, it is uncontroversial that certain aspects of social organization, which are guided by the law, cannot be left to the mere discretion of a contingency of power. In other words, certain rights and guarantees urgently need to be regulated, including as a constitutional commandment, so that the failure to attend to such issues fragrantely contradicts the higher law itself, putting in check the effectiveness of the law and consequently of the Constitutional Court – Superior Federal Court – as guardian of compliance with the Constitution.

When analyzing the Brazilian Legal System, the Legislature's performance with regard to constitutional commands are commands and not mere directives, that is, as a directing, programmatic constitution, there are definitions that outline programs to be prepared and put into practice by the public power (NOVELINO, 2009). Thus, the non-compliance with the constitutional command by itself is sufficient for the Federal Supreme Court to be invoked, in order to act for the proper fulfillment of the constitutional commands that are embodied as normative imperatives and not as advice to the legislator, under penalty of discrediting the entire constitutional text and undermining its effectiveness.

HOMOTRANSPHOBIA AS A CRIMINAL SPECIES OF THE RACISM GENRE – JUDGMENT OF THE ELLWANGER CASE (HC NO. 82.424-4/RS) BY THE FEDERAL SUPREME COURT

The crime of racism established by the Constitution in its article 5, item XLII and disciplined by Law No. 7,716 of January 5, 1989, prescribes that, *in verbis*, that "the

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practice of racism constitutes a non-bailable and imprescriptible crime, subject to the penalty of imprisonment, under the terms of the law", that is, the framing of a certain conduct in the criminal type in question has a great impact both from the point of view of the conduct and its judgment, as well as in relation to the view that society has about the fact, since the seriousness recognized by the State sells the community how harmful it is to the social fabric.

The idea of racism can be synthesized in several concepts, but all of them converge in the sense that there is a discriminatory act of one group in relation to another. According to the National Human Rights Program, "racism is an ideology that postulates the existence of hierarchy among human groups" (1998). Another meaning is the relationship that is established between the characteristics of a certain person and certain traits of their personality, intelligence or culture, which subordinates them to another group (SANT'ANA, 2008). It can be seen that in both concepts there is no direct link to race, but to social groups that are inferior by others.

In the case of homotransphobia – for the present work this expression encompasses discrimination based on gender identity and sexual orientation – the framing is justified because it is related to the constitutional idea of social racism. The Federal Supreme Court has already faced, in one of its judgments, an issue that deals with social racism during the judgment of *Habeas Corpus* No. 82.424-4 filed by Siegfried Ellwanger, from Rio Grande do Sul, whose rapporteur was Minister Moreira Alves, where the writer questioned the accusation of racism against the Jewish community, directly questioning the imprescriptibility factor regarding the crime committed.

The writer Ellwanger published a series of books through his publisher – Review – where facts that occurred during the period of World War II were discussed, allegedly from another perspective, even denying at times that the Jews had suffered the holocaust. He was tried in 1996, in Porto Alegre and appealed to the Superior Court of Justice, in 2001, where he was defeated. In the Supreme Court, he claimed that discrimination and anti-Semitism are not cases of racism, therefore, they are not racial crimes. He had the *Habeas Corpus* denied by eight votes to three at the time. (MARINHO, 2007).

Throughout the judgment, the justices make a great historical, cultural, biological and social effort to visualize and frame the conduct in question, that is, the discrimination practiced against the Jewish people as a crime of racism. And the indication was exactly in the sense that the practice of the crime of racism does not exclusively encompass the issue

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of race, but the act of inferiorizing one group in comparison to another. As stated in the judgment in question by Justice Maurício Corrêa,

> "Limiting racism to simple discrimination of races, considered only the lexical or common meaning of the term, implies the very denial of the principle of equality, opening up the possibility of discussion about the limitation of rights to a certain portion of society, which calls into question the very nature and prevalence of human rights (2004)".

At that time, the Federal Supreme Court pointed out that the interpretation of the crime of racism necessarily needs to be done in a way that meets the historical, cultural and social issues of the time and not only in a reductionist view, which clings only to the semantic-teleological idea of words. A hermeneutic that restricts rights to a certain portion of society that sees itself victimized daily frontally attacks the precepts of the 1988 political charter.

In this regard, there is no doubt that the practice of racism established in article 5, item XLII, of the Federal Constitution, covers homophobic and transphobic acts. After all, it is about understanding racism as any action that promotes discrimination against others, in order to undermine and attack their self-esteem and moral heritage, as well as that of a certain group, based on race or color, sex, sexual orientation, and economic status (BULOS, 2012).

Thus, the non-criminalization of homotransphobia as a species of the racism genus is an act that attacks the dynamics and integrality of the Brazilian Legal System, especially when considering that the discriminatory act is not criminalized in the Brazilian Penal Code, but in the Anti-Racism Law (Law No. 7,716/89) – Art. 20. practice, induce or incite prejudice or discrimination by race, color, ethnicity, national origin or religion – thus, the non-classification would remove the practice as a criminal act from the legal world. Failure to fit in would generate a hierarchy of oppressions, which is absurd in any context, whether social or legal.

HOMOTRANSPHOBIA AND THE VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS FROM THE PERSPECTIVE OF THE REALIZATION/MATERIALIZATION OF RIGHTS

The LGBT population in Brazil lives in a reality in which basic exercises of citizenship are still denied to them. When one analyzes the numbers of crimes committed against this portion of society – and crime is just one meaning of the violence that these people suffer

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since childhood, with humiliations and attacks of various kinds – every LGBT person in Brazil is a potential victim. This is a limiting factor for basic issues such as the act of coming and going and being in certain places. Therefore, insecurity is a factor that, currently, is a limiting factor for the free exercise of these people's rights.

The state's inertia in criminalizing homophobia is, therefore, contrary to what is expected in a Democratic State of Law, where it is its duty not only to stop interfering in the lives of citizens, but also to promote their well-being through public policies and with the law itself (DALLARI, 1995). Therefore, it is not covered by an idea of discretion of any of the powers of the Republic to criminalize or not criminal conduct based on issues of hatred.

When analyzing the experience of gay, transsexual, lesbian, transvestite, bisexual, intersex citizens and all other possibilities within the field of gender identity and sexual orientation, a systemic denial of rights is noted. Although achievements have occurred – equivalence of homoaffective stable union to heteroaffective union, administrative punishments to establishments for discrimination in some municipalities, use of the social name by transsexuals – there are still serious limitations, based precisely on the daily violence perpetrated against such people.

The fear of a possible attack – not unmotivated as the numbers show – is already capable of imposing a true social prison on the LGBT citizen. In other words, these people are prevented from fully living their sexuality and gender identification on a daily basis, due to the possible violence they may suffer. How can one say free someone who is at risk of his life by practicing simple acts such as walking hand in hand with his boyfriend or girlfriend? What is this equality that some try to defend exists, if the mere public existence of a transvestite is a reason for him to be attacked? What reasons justify the non-criminalization of homotransphobia – constitutionally stated – if people die and/or are violated every day? These are questions that should be part of the agendas of the National Congress, but that are simply not asked.

Free sexual orientation is at the heart of personality rights, since it is an unfolding, a corollary of the human condition itself. In the field of Civil Law, it is worth remembering what was coined as a general clause for the protection of personality rights within the phenomenon of constitutionalization of the other branches of law, as the manifestation of the principle of the Dignity of the Human Person in Civil Law (ROSENVALD, 2017). Therefore, the lack of guarantee on the part of the State regarding the development of such

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attributes configures a hierarchy between people, based on sexual orientation or gender identity, which hurts everything that knows about human dignity.

It is unequivocal that, if a certain group of people is protected by the State in the development of their skills and in the experience of their rights and another group is not, we are facing institutional discrimination. What would be a pillar of the current State paradigm is directly injured, that is, equality in its material meaning. The failure to protect all citizens in an equivalent manner in the exercise of their rights – especially when it is notorious that it is based on a prejudiced posture on the part of a certain state power – contradicts material equality (BOAVENTURA SANTOS, 2000) as a necessary social reality and constitutional principle.

Thus, the non-action of the State – in the case of the Legislative Branch in the first instance – must be corrected by the application of the principle of proportionality, in the sense of promoting an efficient defense. It is the duty of the State to protect people in the exercise of their rights, and this means ensuring adequate security. Deficient protection contradicts the Constitution, as the text brings the necessary effective punishment and the fight against conducts that are offensive to fundamental rights. As well put by Maria Luiza Streck,

> "The Democratic Rule of Law no longer requires only a guarantee of defense of fundamental rights and freedoms against the State, but also a defense against any de facto social power. It can be concluded, then, that the development of fundamental rights as rights of necessary and mandatory protection emerged as an unfolding in the conception of the notion of proportionality: infra-protection would also become an object of unconstitutionality. This means that, in this new paradigm, the legislator is obliged by the constitution to act in certain situations, protecting certain interests. (2009)".

In line with the teachings of the aforementioned author, the State's failure to act in the search for the effective protection of groups that are in a situation of insecurity generates unconstitutionality. Therefore, the Federal Supreme Court has an institutional duty to act in order to promote such protection. It is about understanding that fundamental rights in their negative sense, protect the individual from the State, while in their positive meaning they impose on the latter the duty to protect the individual against private actors, when faced with a situation of violence (STRECK, 2009).

It is important to emphasize that, even when analyzing the criminalization of homotransphobia from the perspective of the theory of minimum Criminal Law, there is no contradiction. According to the aforementioned theory, Criminal Law should be responsible

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for relevant legal assets – those that deserve criminal protection – when the other branches of law are unable to employ protection adequately (NUCCI, 2010). In the case of homotransphobia, attempts by other branches of Law – such as Civil Law in the promotion of these individuals, or Administrative Law when fining establishments that practice some kind of discrimination – have not proved to be sufficient in combating violence, since the numbers have not decreased.

The legal good in question is of the highest relevance, after all it is about the life and freedom of the LGBT population. What is at stake is the exercise of fundamental rights in an effective and reasonable manner. Thus, it is impossible to understand other than that within the theory of Minimum Criminal Law, the criminalization of homotransphobia is a duty of the State and a totally reasonable action within the modern understanding of Criminal Law and especially in compliance with the Federal Constitution and all International Treaties – especially those that deal with Human Rights – to which Brazil is a signatory.

THE ROLE OF THE FEDERAL SUPREME COURT IN THE JUDGMENT OF WRIT OF INJUNCTION NO. 4,733 AND DIRECT ACTION OF UNCONSTITUTIONALITY BY OMISSION NO. 26

In 2019, the Federal Supreme Court ruled on collective injunction No. 4,733 filed by the Brazilian Association of Gays, Lesbians, Bisexuals, Transsexuals and Transvestites (ABGLT), whose content requested action by the Court to set a deadline for the National Congress to criminalize homotransphobia. With the rapporteurship of Justice Edson Fachin. The Direct Action of Unconstitutionality by Omission – ADO number 26, which was reported by Justice Celso de Mello, was also judged. As a result, in addition to considering the National Congress in arrears unconstitutional for the absence of a rule that incriminates acts that attack the dignity of these people, the criminalization of LGBTphobic conduct was effected

The action dealt with the criminalization of LGBTphobia from two perspectives: as a species of the racism genre and as a defense of fundamental rights and guarantees. In both senses, the hermeneutic resource is sustained and makes it necessary for the Federal Supreme Court to act in the face of a clear omission on the part of the Legislative Branch. It was not judicial activism, but judicial action according to the competence of the judging body, given that it is the duty of the Court to ensure the proper compliance with the Constitution, therefore, what we have is an action expected of the Court perfectly

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respecting the separation of powers and the direction of the Constitution. It is also worth noting the counter-majority function performed by the Supreme Court in its jurisdictional function.

The inertia of the Legislative Branch in criminalizing homotransphobia – especially considering that this fact occurs due to movements strongly influenced by the so-called conservative/religious caucus of Congress – characterizes an act incompatible with the parliamentary exercise. A power of the Republic, by acts that contradict even the very idea of a Democratic State of Law, which has secularism as a principle, cannot be allowed to frustrate the fundamental rights of certain groups. The Constitution, in establishing the criminalization of any discriminatory act, is exhaustive and, therefore, imposes the practice in question as a command. As Miguel Calmon Dantas asserts,

> "Constitutional dirigisme is characterized precisely by the existence of constitutional impositions derived from programmatic norms that assign tasks or purposes to the Public Powers. As legal norms, they result in a wide range of effects, and the legislator is also subject to them, with the duty to legislate arising from it, whose deliberate inertia results in unconstitutionality by omission (2009)."

As presented, the control of constitutionality is one of the essential foundations of the contemporary approach adopted by the Judiciary. This activity refers to the analysis of the conformity and adequacy of a law or act of the public power in relation to the Constitution (CUNHA JR, 2011). Such control is an intrinsic result of the primacy of the constitutional text and, in the Brazilian context, manifests itself due to the rigidity of the Constitution.

> "The control of constitutionality, as a guarantee of protection of the supremacy of the Constitution, is an activity of monitoring the validity and conformity of laws and acts of the public power in view of a rigid Constitution, developed by one or more constitutionally designated bodies. (CUNHA JR, 2011, p. 263)"

This control, by its nature, requires the presence of an institution that has the competence to carry it out. In the Brazilian context, since the first republican constitution, which incorporated considerable influence of the American doctrine in relation to the control of constitutionality, the Judiciary has the responsibility to ensure that the laws and acts of the public administration are in line with the constitution.

> "Under the influence of the doctrine of the North American judicial review, the Constitution of the Republic of the United States of Brazil of February 24, 1891 provided for judicial control of the constitutionality of laws. [...] In short, in Brazil, it was only after the Constitution of 1891 that the Judiciary began to entitle the competence to exercise a control of the constitutionality of laws and normative acts of the public power, but under the influence of the "American" model of diffuse,

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> incidental (by way of exception or defense) and successive control of the constitutionality of normative acts in general of the public power, which lasted in the subsequent Constitutions until the current one. (CUNHA JR. 2011, pp. 300. 301)"

In any case, considering the wide range of competencies and instruments related to the control of constitutionality, this research will focus in a more in-depth manner on two of them: the Direct Action of Unconstitutionality by Omission (ADO) and the Writ of Injunction (MI).

> "In post-88 Brazilian constitutionalism, the principle of normative force was embodied in two institutes designed to give legal consequences to the state's duty to implement rules of limited effectiveness, the direct action of unconstitutionality by omission and the writ of injunction. (RAMOS, 2014, p. 2891)"

The role of the Supreme Court has become increasingly common in the resolution of social and political issues. Within its competences, when deciding on instruments that seek to correct unconstitutional legislative omissions, on some occasions, the court has assumed a role similar to that of the Legislative Branch.

In June 2019, after six sessions held over four months, the Supreme Court handed down a significant and controversial decision. The court recognized the unconstitutional omission of the National Congress for not having created a law that criminalized homotransphobia. The discussions arose from the protocol of two actions: 1) Direct Action of Constitutionality by Omission 26/DF, proposed by the Popular Socialist Party (PPS); 2) Injunction Warrant 4733/DF, filed by the Brazilian Association of Lesbians, Gays, Bisexuals, Transvestites, Transgenders and Intersexes (ABGLT).

The main basis of both requests revolved around the alleged delay of the National Congress to enact a law that criminalized offensive acts against members of the LGBT community. They requested the definition of a reasonable period for the National Congress to approve legislation that deals with the criminalization of acts of homophobia and transphobia. If the Legislature remained inert, they asked the Federal Superior Court itself to classify these practices as specific crimes, carrying out an atypical legislative activity, using the analogy with the terms of the Racism Law (Law No. 7,716/89) or some possible new legislation that would replace it. In addition, they pleaded for the civil liability of the State for the lack of action in reparation for the victims of homophobia and transphobia.

In this way, the Federal Supreme Court only exercised its role properly, acting in order to curb such practices and make effective the command of the political charter. To the same extent that there are limits to the discretion of the National Congress, for the Federal

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Supreme Court this rule is imposed in an even more relevant way. Precisely because this is the Brazilian Constitutional Court, submission to the Constitution and the daily struggle for its effectiveness is of the essence – or at least should be – of the house in question. The lack of knowledge on the part of the Federal Supreme Court in the judgment in question would be a refusal to promote adequate protection for the LGBT population. In compliance with the principle of proportionality in its bias of due protection, a population in a special situation of violence requires the State to take action to promote adequate guarantees to the same extent.

Therefore, it seems clear that the idea that the State must employ its efforts to ensure adequate protection – which is embodied in effective protection – is a presupposition of the current paradigm of the State, as well as a duty of all the powers of the Republic. LGBT citizens have systematically suffered from the violence used against them because of sexual orientation and/or gender identity, and even though there are a number of paths within the Law and following the commands, nothing or very little is done to minimally guarantee this portion of the population.

CONCLUSION

Analyzing the conduct of the Brazilian State towards the LGBT population, it is clear that there is a posture of omission and neglect towards this portion of the population. Such institutional prejudice materializes in the omission on the part of the Legislative Branch, which simply refuses to seriously bring to the debate the issue related to the criminalization of homotransphobia. This is despite the fact that the country has numbers that show that there is a real and intense persecution of these people.

Whether by placing homotransphobia as a kind of criminal genre racism – and, therefore, by making conduct feel the rigor that the law provides for such an act – or by the right to due protection of fundamental rights – here security as a fundamental right and also as a path to the real exercise of other basic rights and guarantees – it is a constitutional necessity and command, it is not up to the discretion of the powers of the State to simply neglect such an issue.

The manipulation of the public machine to meet the desires of certain groups without considering the well-being of society in general and what the law recommends is something unacceptable in a State that claims to be democratic and of law. It is necessarily up to the

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Federal Supreme Court to act in its counter-majority role, thus guaranteeing the rights of portions of society that are historically marginalized and violated.

Denying the daily violence suffered by the LGBT community, not criminalizing such conduct in a specific way is contrary to the Constitution and turning a blind eye to the facts. It is the maintenance of prejudices based on a naturalized and discriminatory social conduct, which contradicts the current Legal System and puts part of the population at constant risk. The Supreme Court is not facing a possibility, but a duty.

In the case in question, it is observed that the nature of the decision of the Federal Supreme Court, in the judgment known as the criminalization of homotransphobia, is clearly activist. However, this activist stance of the Supreme Court is justified by the legislative omission – which, by failing to create a regulatory norm to protect a certain portion of society – constitutes in itself a violation of the fundamental constitutional principles of the democratic rule of law.

The decision reflects a counter-majority trend and is representative of the Supreme Court which, in the light of constitutional principles, albeit gradually, advances in the trajectory in search of the realization of essential human rights.

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This process of reflection on the experience is what makes the research participant a point of resignification of their practices and experiences, allowing them to leave the intimate space of their conceptions for active reflection, based on an action of thinking about the previous experience (SANTOS, 2017, p. 28).

The interaction, for later capturing the narratives of each deafblind person participating in this research, happened in a distinct and unique way. In this investigative walk, I think retrospectively about what has happened and the experiences I will take with me throughout my life (VILELA, 2018, p. 26).

[...] moments of reflection regarding the mathematical and school knowledge of this work of training students/participants of Elementary School and in this sense, the students/participants evaluate their formative path and school knowledge and themselves, elaborating a mathematical knowledge of the formative experience lived (MORAES, 2018, p. 69).

The specific objective revolves around making explicit the role of the teacher in the construction of more effective practices and in the transformations of the students and teachers involved in the process. Another specific objective is to describe the experience of implementation and development of the Municipal Restorative Justice Program of the Municipal Department of Education of the city of Santos, State of São Paulo (SANTOS FILHO, 2019, p. 20).

The application of interviews, as a research method and as a way of approach, (...), is based on the assumptions of understanding and interpreting the students' formative process based on the learning expectations of the freshmen and the experiences, trajectories and (re)signification of this learning by the graduates of the CST15. (BORREGO, 2020, p. 30)

It should be based on the student's understanding, interpersonal relationships, pedagogical content and the use of technologies to which the parents were possibly not accustomed. There is an urgency to make teaching-learning in line with the life experience of learners and learners (JACOPUCCI, 2021, p.11).