



## Religious freedom and hate speech against LGBTQIAPN+ people: analysis of ADO 26 and MI 4733

*Religious freedom and hate speech against LGBTQIAPN+ people: analysis of ADO 26 and MI 4733*

**Bruno Mendes Figueiredo<sup>1</sup>**  
**Maycon Raulino Coelho<sup>2</sup>**

### SUMMARY

Religious freedom is a fundamental right guaranteed by the Brazilian Federal Constitution and is essential for pluralistic coexistence in a democratic society. However, this freedom encounters limits when it overrides other fundamental rights, such as the right to dignity and non-discrimination. In this context, hate speech against LGBTQIAPN+ people emerges as a challenge to be addressed, as the protection of this group must be balanced with freedom of expression and religion. This article, using a qualitative methodology of bibliographic, legislative, and jurisprudential analysis, analyzes the tension between religious freedom and hate speech against LGBTQIAPN+ people in light of Direct Action of Unconstitutionality by Omission (ADO) 26 and Writ of Injunction (MI) 4733.

Furthermore, these actions are relevant in this context, offering guidance on the applicability and limits of religious freedom in light of the need to protect the dignity of LGBTQIAPN+ people. This research is justified by the importance of ensuring that fundamental rights coexist in a balanced manner, promoting a more humane and inclusive society. The general objective of this study is to analyze how the jurisprudence of the Supreme Federal Court (STF), through ADO 26 and MI 4733, addresses the intersection between religious freedom and hate speech against LGBTQIAPN+ people. The specific objectives include: exploring the concept of religious freedom and its scope of constitutional protection; examining hate speech and its impacts on LGBTQIAPN+ people; analyzing the STF decisions in ADO 26 and MI 4733, identifying the main arguments and rationales used; and assessing the implications of these decisions for the protection of fundamental rights in a context of religious plurality. The analysis of ADO 26 and MI 4733 aims to understand the Supreme Federal Court's considerations and how it has balanced religious freedom with the need to combat hate speech. The aim is to identify criteria and parameters that can guide future judicial decisions and public policies, promoting the effective protection of the rights of LGBTQIAPN+ people without unduly infringing on religious freedom. Furthermore, the study will highlight the importance of ongoing dialogue between different social and institutional actors to build a more inclusive and respectful society.

**Keywords:** Fundamental Rights. Religious Freedom. LGBTQIAPN+. Hate Speech.

<sup>1</sup> Bruno Mendes Figueiredo is a Master's student in Law from Unifieo (Unifieo), specializing in Administrative Law and Tax Law, and holds degrees in Law, Philosophy, and Mathematics. He is a university professor at Florence University Center, where he has served as coordinator of undergraduate and graduate programs. (Lattes ID: 2682466483000845)

<sup>2</sup> Maycon Raulino Coelho holds a Master's degree in Law from Unifieo (Unifieo). He specializes in Tax Law and Constitutional Law. He was a university professor at the Florence University Center and is currently an advisor to the State Public Prosecutor's Office. (Lattes ID: 2575019419675344)



## ABSTRACT

Religious freedom is a fundamental right ensured by the Brazilian Federal Constitution, being essential for pluralistic coexistence in a democratic society. However, this freedom finds its limits when it infringes upon other fundamental rights, such as the right to dignity and non-discrimination. In this context, hate speech against LGBTQIAPN+ individuals emerges as a challenge that must be combatted, as the protection of this group needs to be balanced with freedom of expression and religious freedom. This article, through a qualitative methodology of bibliographic, legislative, and jurisprudential analysis, examines the tension between religious freedom and hate speech against LGBTQIAPN+ individuals in light of the Direct Action of Unconstitutionality by Omission (ADO) 26 and the Writ of Injunction (MI) 4733.

These actions are significant in this context, providing guidelines on the applicability and limits of religious freedom in the face of the need to protect the dignity of LGBTQIAPN+ individuals.

The investigation is justified by the importance of ensuring that fundamental rights coexist in a balanced manner, promoting a more humanized and inclusive society. The general objective of this study is to analyze how the jurisprudence of the Federal Supreme Court (STF), through ADO 26 and MI 4733, addresses the intersection between religious freedom and hate speech against LGBTQIAPN+ individuals. The specific objectives include: exploring the concept of religious freedom and its scope of constitutional protection; examining hate speech and its impacts on LGBTQIAPN+ individuals; analyzing the STF's decisions in ADO 26 and MI 4733, identifying the main arguments and grounds used, as well as evaluating the implications of these decisions for the protection of fundamental rights in a context of religious plurality. The analysis of ADO 26 and MI 4733 aims to understand the STF's considerations and how it has balanced religious freedom with the need to combat hate speech. It is expected to identify criteria and parameters that can guide future judicial decisions and public policies, promoting effective protection of LGBTQIAPN+ rights without unduly infringing upon religious freedom.

Furthermore, the study may highlight the importance of continuous dialogue between different social and institutional actors to build a more inclusive and respectful society towards diversity.

**Keywords:** Fundamental Rights. Religious Freedom. LGBTQIAPN+. Hate Speech.

## 1 INTRODUCTION

Religious freedom is an essential right guaranteed by the Federal Constitution Brazilian Convention of 1988, being fundamental for pluralistic coexistence in a society democratic where all beliefs are respected without state intervention, as well as any discrimination associated with them.

However, this freedom has limits when it clashes with other fundamental rights, such as the right to dignity and non-discrimination, and in this scenario, hate speech against LGBTQIAPN+ people emerges as a challenge to be faced, since the protection of this group needs to be balanced with freedom of expression and religion, but valuing life as an unconditional pillar.

This article, using a qualitative methodology of bibliographic, legislative analysis and jurisprudence, investigates the tensions between religious freedom and hate speech against LGBTQIAPN+ community in light of the Direct Action of Unconstitutionality by Omission (ADO) 26 and the Injunction Order (MI) 4733.



These actions are of great relevance, as they provide guidelines on the applicability and limits of religious freedom in the face of the need to protect dignity of LGBTQIAPN+ people, this time, the research is justified by the importance of ensure that fundamental rights are respected in a balanced manner, promoting a more humanized and inclusive with the plurality of existing individuals.

The general objective of this study is to examine how the jurisprudence of the Supreme Court Federal Court (STF), through ADO 26 and MI 4733, addresses the intersection between freedom religious and hate speech against LGBTQIAPN+ people. Furthermore, the objectives specific include: exploring the concept of religious freedom and its scope of protection constitutional; investigate hate speech and its effects on LGBTQIAPN+ people; analyze the STF decisions in ADO 26 and MI 4733, identifying the main arguments and grounds used; and assess the implications of these decisions for the protection of rights fundamental in a context of religious plurality, in parenthesis in the investigation the Minister de Mello's position.

The analysis of ADO 26 and MI 4733 aims to understand the STF's considerations and how he has balanced religious freedom with the need to combat hate speech., and In this way, it is expected to identify criteria and parameters that can guide future decisions judicial and public policies, promoting the effective protection of people's rights LGBTQIAPN+ without violating religious freedom when in its inherent right to it, in other words, without discriminatory nature towards people through religion.

Furthermore, the study may underline the importance of an ongoing dialogue between different social and institutional actors to build a more respectful society with diversities.

## 2 RELIGIOUS FREEDOM AS A FUNDAMENTAL RIGHT

Religious freedom is one of the fundamental rights recognized by the constitution Brazilian and is consistent with human rights, thus, this right is essential for dignity human rights and self-determination, allowing individuals and groups to choose, practice and express their religious beliefs without fear of persecution or discrimination. Freedom religious includes not only the right to profess or change religion, but also to manifest religion or belief through worship, observance, practice and teaching.



The protection of religious freedom is essential for peaceful coexistence in societies pluralists, where different religious beliefs and traditions can coexist side by side, this being right is guaranteed in several international instruments, such as the Universal Declaration of Human Rights, which states in Article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom to manifest his religion or belief in teaching, practice and worship, in public or private .

In national contexts, many constitutions guarantee religious freedom as a fundamental right. In Brazil, for example, the Federal Constitution of 1988 guarantees, in Article 5, items VI and VIII, the inviolability of freedom of conscience and belief, guaranteeing the free exercise of religious worship and protecting places of worship and their liturgies, and expressly:

Art. 5 [...] VI - freedom of conscience and belief is inviolable, ensuring the free exercise of religious worship and guaranteeing, in accordance with the law, the protection of places of worship and their liturgies;  
VII - the provision of religious assistance in civil and military collective internment institutions is guaranteed, in accordance with the law;  
VIII - no one shall be deprived of rights on grounds of religious belief or philosophical or political conviction, unless they invoke them to exempt themselves from a legal obligation imposed on everyone and refuse to perform an alternative service, established by law (Brazil, 1988).

Religiosity establishes a unique universe of reflection in life, whether individual or social, as it involves a commitment in which hope and meaning in life are elements essential for human development throughout their earthly journey, thus, in America Latin, religiosity has been constructed from European influence, incorporating elements of Amerindian and black cultural diversity, and in this way, a religiosity deep developed in different regions as a result of a culture that was formed in the undergrounds of colonization and in the corners of the republics, but which manifests itself in a way exuberant in rituals, devotions, pilgrimages, dances and has its own iconography, represented by magnificent or modest temples, it can be said that these manifestations are

<sup>3</sup> UDHR. **Universal Declaration of Human Rights**. Adopted and proclaimed by the United Nations General Assembly (resolution 217 A III) on December 10, 1948. Available at: <https://www.unicef.org/brazil/declaracao-universal-dos-direitos-humanos>. Accessed: July 12, 2024.

intrinsically linked to life, local space and territory, as formative elements of integrality of the human being<sup>4</sup>.

Religious freedom, however, is not an absolute right and may be subject to certain restrictions to ensure public order, security, health, or rights and freedoms fundamental principles of other people, such as, especially for this article, respect for LGBTQIAPN+ community.

However, the recognition of fundamental rights by the legal and political order was being shaped gradually, following the dynamic and complex course of history, which gave them a relative character, as they are always related to the social context experienced, and as a result, the acceptance of its value and social validity are the result of the union of wills and beliefs of society, which serve as the basis for the selection and political and legal imposition of its effectiveness<sup>5</sup>, and the legal enforcement of fundamental rights is a responsibility of State, with the aim of preserving and improving human living conditions for all.

This legal imposition is based on three main characteristics: the rights fundamental rights are inalienable, that is, they cannot be transferred or renounced; they are irrevocable, that is, they cannot be voluntarily abandoned by a person; and they are imprescriptible, that is, they do not lose their validity over time, and thus, they are intended for all individuals and cannot be enjoyed by each individual if others also do not enjoy them, the reciprocity and universality of their exercise are essential for ensure its protection for everyone.

In modern times, globalization and migration have increased diversity religious in many countries, challenging States to develop inclusive policies that respect and protect the diversity of beliefs, however, it is important to highlight the secularity of Brazilian state, it cannot oppose or protect any religion to the detriment of another.

Ribeiro and Scorsolini-Comin<sup>6</sup> indicate that each religion's view on the subject can have an impact on the lives of people with homosexual orientation, who may accept it or seek it

---

<sup>4</sup> BERNARDI, CJ; CASTILHO, MA Religiosity as an element of human development.

**Interactions Magazine**, 4, 747, 2016.V. 17, n. p. Available at in: <https://www.scielo.br/j/inter/a/5D44rZBWRJ5d8YCpX4GP83H/>. Accessed on: July 10, 2024.

<sup>5</sup> COELHO, EM; ABRAHÃO JÚNIOR, W. Religious freedom as a fundamental right and duty of non-intervention. **Journal of Legal Studies of UNESP**, v. 21, n. 33, p. 319, 2020. Available at: <https://periodicos.franca.unesp.br/index.php/estudosjuridicosunesp/article/view/3007>. Accessed on: July 10, 2024.

<sup>6</sup> RIBEIRO, LM; SCORSOLINI-COMIN, F. Relationships between religiosity and homosexuality in religious young adults. **Psychology & Society Journal**, v. 29, p. 8, 2017. Available at:



a "cure" or solution to the "problem", however, even if the religious institution establishes standards and conduct to be followed, not all members adopt them, as evidenced by several studies that show that individuals belonging to the same religious denomination do not necessarily share the same experience.

In other words, even if the institution establishes guidelines, not all members follow them or follow them strictly, and another important aspect to be considered concerns the cultural aspects that influence the expressions of institutions religious in our contemporary society, expanding the possibilities of understanding and, consequently, of experiencing sexualities based on the dogmas originally transmitted by different beliefs.

Therefore, religious worldviews cannot be considered uniform, static or devoid of reflexivity, just as scientific worldviews do not can be considered culturally neutral and fully rationalized, and this complexity unequivocally permeates the way we analyze the relationships between religiosity and sexuality, highlighting the ecological contexts that permeate the development and life trajectories of individuals.

In this scenario, education and interreligious dialogue play a relevant role. in promoting mutual understanding and mitigating conflicts, as the promotion of a healthy and pluralistic culture of respect for human rights and the dignity of all people, are essential to the well-being of human beings, regardless of their beliefs religious.

In short, religious freedom as a fundamental right is one of the central pillars of human dignity and peaceful coexistence in diverse societies with their numerous beliefs. It requires not only legal protection, but also respect and mutual understanding between different religious traditions, moreover, the guarantee of this right is an indicator significant democratic and commitment to human rights.





### 3 HATE SPEECH AGAINST LGBTQIAPN+ PEOPLE PRACTICED BY “RELIGIOUS”

Hate speech against LGBTQIAPN+ people by individuals or groups who identify as religious add issues of prejudice and intolerance against these people, furthermore, reveals conflicts between fundamental human rights and interpretations particular religious beliefs. This type of discourse, masked under the protection of freedom of expression and religion, attracts devastating consequences for dignity, security and well-being. being of LGBTQIAPN+ people in a scenario that this community has already been facing discrimination and multiple forms of violence.

According to Silva<sup>7</sup> when people considered "normal" and those who suffer stigmatization come face to face, they objectively and directly face the causes and effects of this stigma, highlighting the individual's inability to be fully accepted, which inhibits the completeness of being in the face of interpersonal relationships typical of life in community, and stigma is defined based on a highly derogatory attribute and can be related to physical abominations, individual and tribal guilt, issues of race, nationality and religion.

Thus, although there is a constant attempt to neutralize these differences, either by through the media, scientific discourses or public initiatives, there is also a movement that requires individuals to take a stand and define their place in society, and this happens because discrimination and stigma are interconnected concepts, where stigma provides all the elements for discrimination and the segregating policies resulting from it to materialize, thus, the essence of these discourses is marked by heteronormativity, a mechanism biopolitical that establishes the heterosexual standard in societies, especially in Westerners, and individuals who do not fit this standard are subject to marginalization and violence.

Therefore, it is relevant to consider the perception of homosexuality in the context religious, since the dimensions of religiosity and spirituality have accompanied the

<sup>7</sup> SILVA, JCP; CARDOSO, RR; CARDOSO, AMR; GONÇALVES, RS Sexual diversity: a reading of the impact of stigma and discrimination in adolescence. **Revista Ciência & Saúde Coletiva**, 26, 7, 2649, Available p. <https://www.scielo.br/j/csc/a/TCJ6mXyyK4pB94F0NhcjZZc/>. Accessed on: July 15, 2024.

humanity throughout history, and its influence encompasses interpersonal relationships, the scope sociocultural and the intrapsychic aspect of the individual, through beliefs, values, emotions and behaviors, in this way, religions can exert influence over their followers, providing principles for socialization, the organization of society and guidelines for life everyday life, and these principles also encompass social practices, sexuality and sexual behaviors.

Some religious institutions accept homosexual practice, considering it normal. or even natural, while others see it as sinful, thus, from this, different beliefs contrary to this practice can be found, arguing that homosexuality is a "disease" that can be cured or that desires must be controlled, and these positions diverge from the progress achieved, for example, at legal levels and in the field of health. Thus, each religion's conception of the subject can influence the lives of people with homosexual orientation, who can accept it or seek a "cure" or solution for it "problem", however, even if the religious institution establishes norms and conducts to be followed, this does not mean that all members follow them<sup>8</sup>.

The 1988 Brazilian Constitution guarantees freedom of expression as a right fundamental and its exercise can be interpreted as an important means of protecting minorities and diversity, this is because it allows these groups to exercise rights that are generally suppressed or limited by the majority, which holds greater representation social and political, so, on the other hand, although this constitutional provision allows groups minorities to express themselves freely, it also allows the dominant majority to use these same mechanisms to legitimize their power, which often occurs through hate speech<sup>9</sup>.

Religions, in their diversity, play significant roles in the formation of cultural values and identities and do not preach discrimination in their essence, however, many religious traditions have texts and doctrines that, when misinterpreted,

---

<sup>8</sup> RIBEIRO, LM; SCORSOLINI-COMIN, F. Relationships between religiosity and homosexuality in religious young adults. **Psychology & Society Journal**, v. 29, p. 10, 2017. Available at: <https://www.scielo.br/j/psoc/a/DHhdy85vxNPF7qsSK7Y5my/abstract/?lang=pt>. Accessed on: July 9, 2024.

<sup>9</sup> COSTA, FV; PINTO, AA Religious freedom and the fundamental right to non-discrimination based on sexual orientation. **Revista Jurídica da FA7**, v. 18, n. 1, p. 98. Available at: <https://periodicos.uni7.edu.br/index.php/revistajuridica/article/view/1212>. Accessed on: July 12, 2024.



old-fashioned or conservative way, condemn behaviors or identities not heteronormative.

Thus, this hate speech against LGBTQIAPN+ people manifests itself in several ways: forms, from preaching and sermons that condemn these identities to public campaigns that promote discrimination and exclusion. Arguments used in this context often appeal to notions of "morality" and "natural order" supposedly derived from sacred texts, even those about "gay cures." This kind of rhetoric not only dehumanizes and stigmatizes LGBTQIAPN+ people, but also legitimizes violence and discrimination against them.

It's important to recognize that hate speech has real, tangible implications. It contributes to an environment of hostility and fear, where LGBTQIAPN+ people can find themselves feel insecure and vulnerable. Hateful rhetoric can encourage acts of physical violence and psychological, affecting the mental and emotional health of victims. Furthermore, discrimination systemic can limit LGBTQIAPN+ people's access to essential services, including education, health and employment, perpetuating cycles of marginalization and exclusion.

In this context, Natividade<sup>10</sup> concludes in his investigation that the belief in the devil and division of the cosmos between the things of God and the things of evil still persists, however, notably- if a reinterpretation of these concepts, for example, homophobia (and not homosexuality) is considered to be the result of demonic influence, and in this scenario, there is a constant search for the "cure of homophobia", so this can be seen in campaigns such as "Homophobia has a cure", which promotes a week of ritual activities with the aim of help relatives and family members of participants to overcome homophobia, thus, the author emphasizes that These campaigns have been identified in several locations, including congregations in Rio de Janeiro, São Paulo and Fortaleza, and considering that "homophobia" can be transformed by through Jesus, prayers and mystical experiences of "deliverance" and "touch of the Holy Spirit", as witnessed by him in accounts of gays and lesbians who shared experiences of family acceptance through "intersection" by the family, which ultimately involves prayers for the "healing" of family rejection, participation in "family" rituals, and involvement in a inclusive religious community.

To combat religious hate speech against LGBTQIAPN+ people, it is necessary that inter-religious and intra-religious dialogues are free from intolerant interpretations and open

<sup>10</sup> NATIVIDADE, MT Singing and dancing for Jesus: sexuality, gender, and religion in inclusive Pentecostal churches. **Religião & Sociedade Journal**, v. 37, n. 1, p. 20, 2017. Available at: <https://www.scielo.br/j/rs/a/BvvqHqF9VHmMnnRfsgHrxQM/>. Accessed on: July 14, 2024.



space for inclusive and affirmative perspectives, as education and awareness are means fundamental to dispelling prejudices and promoting a more empathetic and understanding inclusive of LGBTQIAPN+ issues within religious communities.

Natividade<sup>11</sup> emphasizes that the aim is to emphasize the way in which subjects create new meanings for their sexual identities and practices when joining inclusive churches, and in these churches, pathologizing views of homosexuality that are prevalent are confronted in traditional churches and which support the sexual reorientation efforts promoted by interdenominational evangelical movements at global levels and local initiatives, this In this way, the ethnography of inclusive communities therefore highlights the connections between religion, sexuality and politics in the context of the production of positive discourses in relation to difference, therefore, the goal is not to live gay or lesbian sexuality in secret, as many believers do homosexuals who live in constant tension in Pentecostal evangelical churches, but rather defend the ideals of visibility and social acceptance of sexualities that diverge from the norm.

Therefore, the fight against religious hate speech also involves defending and promotion of human rights as universal principles that transcend differences cultural and religious, thus, freedom of expression and religion are fundamental rights, but these rights are not absolute and must be balanced with the protection of the rights and dignity of others, and rhetoric that incites hatred and violence cannot be tolerated under the pretext of religious freedom.

Thus, building truly inclusive and respectful societies depends on social commitment to equality and dignity for all people. And this path depends of reflection on the essence of beliefs and respect for diversity, thus, the defense of rights of LGBTQIAPN+ people in religious settings reverberates in breaking the cycle of discriminatory of this community regarding religious beliefs that are denied to it, and this denial, comes from people who incite hatred by perpetuating stigmas and prejudices.

---

<sup>11</sup> NATIVIDADE, MT Singing and dancing for Jesus: sexuality, gender, and religion in inclusive Pentecostal churches. **Religião & Sociedade Journal**, v. 37, n. 1, p. 28, 2017. Available at: <https://www.scielo.br/j/rs/a/BvvqHqF9VHmMnnRfsgHrxQM/>. Accessed on: July 14, 2024.

#### 4 ANALYSIS OF THE DIRECT ACTION OF UNCONSTITUTIONALITY BY OMISSION 26 AND THE POSITION OF MINISTER CELSO DE MELLO

Direct Action of Unconstitutionality by Omission (ADO) 26, judged by the Supreme Court Federal Court (STF), was fundamental in protecting the rights of LGBTQIAPN+ people, the ADO in question was moved to question the National Congress's failure to legislate on the criminalization of homophobia and transphobia.

According to Apolinário and Costa (2022) the Direct Action of Unconstitutionality by Omission (ADO) 26 was presented by the Popular Socialist Party, defending the argument that, in view of art. 5, items XLI and XLII, which establish the obligation to criminalize discriminatory behavior that harms vulnerable groups and minorities, and legislative inaction for more than three decades in regulating a law that punishes discrimination based on sexual orientation (homophobia and transphobia), the National Congress would have incurred in clear unconstitutional omission.

Here is the decision in express form:

**Decision:** The Court, unanimously, partially acknowledged the direct action of unconstitutionality for omission. By majority and to that extent, it found it admissible, with general effectiveness and binding effect, to: a) recognize the state of unconstitutional delay of the National Congress in the implementation of the legislative provision intended to comply with the writ of incrimination referred to in items XLI and XLII of art. 5 of the Constitution, for the purpose of criminal protection for members of the LGBT group; b) declare, consequently, the existence of an unconstitutional normative omission by the Legislative Branch of the Union; c) notify the National Congress, for the purposes and effects referred to in art. 103, §2, of the Constitution with art. 12-H, *caput*, of Law No. 9.868/99; d) provide an interpretation in accordance with the Constitution, in view of the constitutional writs of incrimination set forth in items XLI and XLII of art. 5th of the Political Charter, to classify homophobia and transphobia, whatever their form of manifestation, in the various criminal 7.716/89, [...] The concept of racism, understood in its social dimension, extends beyond strictly biological or phenotypic aspects, since it results, as a manifestation of power, from a historical-cultural construction motivated by the objective of justifying inequality and aimed at ideological control, political domination, social subjugation, and the denial of otherness, dignity, and humanity of those who, because they belong to a vulnerable group (LGBTI+) and do not belong to the class that holds a hegemonic position in a given social structure, are considered strange and different, degraded to the condition of marginalized people within the legal system, exposed, as a result of hateful inferiorization and perverse stigmatization, to an unjust and harmful situation of exclusion from the general system of legal protection. Minister Marco Aurélio, who did not subscribe to the proposed thesis, was defeated. They did not participate, with good reason, in the

fixing the thesis, Ministers Roberto Barroso and Alexandre de Moraes.  
Plenary, June 13, 2019.<sup>12</sup>

According to the STF, the precise argument of Minister Celso de Mello stands out, which states that the failure of the National Congress to legislate on the criminalization of homophobia and transphobia represent a contemporary form of racism, thus, the Minister Celso de Mello also considered this omission unconstitutional and interpreted the Federal Constitution in order to frame homophobia and transphobia, in all their forms manifestations, in the various criminal types already defined in existing legislation, such as the Law Federal Law 7,716/1989, which deals with crimes of racism, and also highlighted that the practices homophobic actions constitute social racism and voted in favor of the action proceeding effectively general and binding effect, thus, he declared that the effects of the decision will be applicable from the date of completion of the trial.

Garcia-Severino, Catoia and Kawakami<sup>13</sup> emphasize that the ADO 26 decision represented a step forward in recognizing the unconstitutionality of the National Congress's delay in legislating on protection against violence suffered by LGBTQIA+ people, declaring the omission of Legislative, and despite the long-standing demand of the LGBTQIA+ movement, it has not yet been enacted a law that explicitly regulates the criminalization of "homophobia and transphobia" (discrimination and hate crimes against LGBTQIA+ people), and in view of this omission, the STF gave an interpretation in accordance with the constitutional text to frame provisionally these practices in criminal types already defined in existing legislation, such as Law No. 7,716/89, until the National Congress approves autonomous legislation, thus, it is important to emphasize that the criticism presented here is not directed so much at the action of the STF, but rather to the possible consequences that may arise if this action, which is temporary, becomes permanent.

The intensification of the effect can be observed in the comparison of "lgbtphobia" with racism resulting from the absence of a term that refers to deaths, especially violent ones, the

---

<sup>12</sup> STF. Supreme Federal Court. **Direct action of unconstitutionality by omission. 26.** 2019. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=4515053>. Accessed on: July 13, 2024

<sup>13</sup> GARCIA-SEVERINO, FC; CATOIA, CC; KAWAKAMI, EA Feminoabjections, lgbticides and mariellecides: post-categories to tension realities. **Revista Estudos Feministas**, v. 31, n. 3, p. 5, 2023. Available at: <https://www.scielo.br/j/ref/a/TkBPjnWfMpWDzbDyVkct9Zb/>. Accessed on: July 10, 2024.



which reinforces its trivialization, and when death and life are considered disposable and "trivializable", the possibility of mourning is removed, and the possibility of mourning in death could break with the raw and precarious reality of life, conferring dignity, at least in death - the which would imply, at the very least, the need for denunciation, and in addition to producing abject, common lives and marginal, there is also the production of abject, common and marginal deaths, therefore, it is necessary to talk about death so that these lives can come to life, even if it is a posthumous life, so that other discourses can be generated, because when a murder occurs, there are murdered subjects (and not just dead, as death is a common part of life), and this discursive strategy present in phobias makes up a necropolitical device for managing lives<sup>14</sup>.

Therefore, in a historic decision, the STF recognized the legislative gap and equated acts of homophobia and transphobia to crimes of racism, applying Law No. 7,716, of 5 January 1989, which deals with crimes of racial or color prejudice. This decision not only filled the existing legal gap, but also strengthened legal protection against discrimination and violence directed at LGBTQIAPN+ people, reaffirming the Brazil's commitment to the principles of equality and human dignity.

## 5 THE WRIT OF INJUNCTION 4733

Injunction Order 4733, tried by the Supreme Federal Court, is a case of great relevance for the protection of the rights of LGBTQIAPN+ people in Brazil, thus, this legal instrument was used to question the lack of specific regulation on the criminalization of acts of homophobia and transphobia, similarly to what was addressed in the Action Direct Action of Unconstitutionality by Omission 26, thus, the STF, by recognizing the omission legislative, determined that homophobic and transphobic behaviors be classified under the Law 7.716/1989, which deals with crimes of racism, until the National Congress legislates on the subject, let's see the decision:

<sup>14</sup> GARCIA-SEVERINO, FC; CATOIA, CC; KAWAKAMI, EA Feminoabjections, lgbticides and mariellecides: post-categories to tension realities. **Revista Estudos Feministas**, v. 31, n. 3, p. 8, 2023. Available at: <https://www.scielo.br/j/ref/a/TkBPjnWfMpWDzbDyVkct9Zb/>. Accessed on: July 10, 2024.



**Decision:** The Court, by majority, heard the injunction request, with Justice Marco Aurélio dissenting, who did not accept the mandatory remedy. By majority, it upheld the injunction request to (i) recognize the unconstitutional delay of the National Congress and; (ii) apply, with prospective effects, until the National Congress legislates on the matter, Law No. 7,716/89, in order to extend the classification provided for crimes resulting from discrimination or prejudice based on race, color, ethnicity, religion, or national origin to discrimination based on sexual orientation or gender identity, in accordance with the Rapporteur's vote, with Justices Ricardo Lewandowski and Dias Toffoli (President) dissenting, to a lesser extent, and Justice Marco Aurélio, who considered the mandatory remedy inappropriate. Plenary, June 13, 2019 (STF, 2019).

Highlighting that, according to Fernandes<sup>15</sup> (2014) the complexity of these issues gained prominence in the legal field following debates related to Injunction Order No. 4,733, in which the Brazilian Association of Gays, Lesbians, Transvestites and Transsexuals (ABGLT) called for the specific criminalization of all forms of homophobia or transphobia, furthermore, the Attorney General's Office issued an opinion arguing that there is no provision specific constitutional provision that criminalizes homophobia, which means that the association The petitioner would be seeking to establish his own legislation, violating the principle of reservation legal in the criminal sphere (art. 5, XXIX of the Constitution).

Thus, this decision not only filled a legal gap, but also reinforced the relevance of the fight for equality and human dignity, which was alluded to in this important precedent that focused on the protection of fundamental rights of minorities in a context of religious diversity and plurality.

## CONCLUSION

In this article, it is concluded that religious freedom, although a fundamental right guaranteed by the Brazilian Federal Constitution and essential for pluralistic coexistence in a democratic society, has clear limits when compared with other rights fundamental rights, such as the right to dignity and non-discrimination.

<sup>15</sup> FERNANDES, EBD Unconstitutional omissions and constitutional warrants of criminalization: Injunction Writ No. 4733 and the criminalization of homophobia. **Constitutional Jurisdiction Observatory**, <https://www.portaldeperiodicos.idp.edu.br/observatorio/article/view/1007/669>. Accessed on: July 14, 2024.





Hate speech against LGBTQIAPN+ people represents latent discrimination that perpetuates stigma from a long historical context, and must be addressed taking into account consideration of the dignity of the human person, balancing the protection of this group with the freedom of expression and religion.

This article explored religious freedom and hate speech against people LGBTQIAPN+ in light of the Direct Action of Unconstitutionality by Omission (ADO) 26 and the Injunction Order (MI) 4733, as these were important legal frameworks that recognized the state's omission and decided that the crime of homophobia is comparable to that of racism supported by Law 7.716/1989, until specific legislation is created for this purpose to combat discrimination against this community.

MI 4733 strengthens legal protection against discrimination based on sexual orientation sexual and gender identity, as well as establishing an elementary precedent for the promotion of fundamental rights in an environment of diversity, and this mandate highlights the importance of the judiciary in ensuring essential rights, even in the face of inaction legislative, and highlights the continued need for measures that promote a more respectful and attentive to inclusive issues.

These actions are extremely relevant, providing guidelines and limits to freedom. religious in the face of the need to protect the dignity of LGBTQIAPN+ people, thus, the study was justified by the relevance of the topic, which aims to encourage discussions related to, for the purpose of a more humanized and inclusive society.

The analysis of the STF's decisions seeks to understand how the Court has balanced freedom religious with the need to combat hate speech, identifying criteria and parameters that can guide future judicial decisions and public policies, and furthermore, the study highlights the importance of frequent dialogue between different social individuals and institutional, to build a more empathetic and inclusive debate that accompanies the diversities.

## REFERENCES

APOLINÁRIO, MN; COSTA, VR Between “do as I say” and “do as I do”: an analysis of the coherence between what is taught and what is decided by the Ministers of the STF. **Constitutional Research Journal**, v. 9, n. 1, p. 201-227, 2022. Available at: <https://www.scielo.br/j/rinc/a/pwCcry3H9LKctv6ZhGyvbGC/>. Accessed on: July 12, 2024.

BERNARDI, CJ; CASTILHO, MA Religiosity as an element of human development. **Interações Journal**, v. 17, n. 4, p. 745-756, 2016. Available at: <https://www.scielo.br/j/inter/a/5D44rZBWRJ5d8YCpX4GP83H/>. Accessed on: July 10, 2024.

BRAZIL. **Constitution of the Federative Republic of Brazil of 1988**. Available at: [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm). Accessed on: July 12, 2024.

COELHO, EM; ABRAHÃO JÚNIOR, W. Religious freedom as a fundamental right and duty of non-intervention. **Journal of Legal Studies of UNESP**, v. 21, n. 33, p. 309-326, 2020. Available at: <https://periodicos.franca.unesp.br/index.php/estudosjuridicosunesp/article/view/3007>. Accessed on: July 10, 2024.

COSTA, FV; PINTO, AA Religious freedom and the fundamental right to non-discrimination based on sexual orientation. **Revista Jurídica da FA7**, v. 18, n. 1, p. 93-115, 2021. Available at: <https://periodicos.uni7.edu.br/index.php/revistajuridica/article/view/1212>. Accessed on: July 12, 2024.

UDHR. **Universal Declaration of Human Rights**. Adopted and proclaimed by the United Nations General Assembly (resolution 217 A III) on December 10, 1948. Available at: <https://www.unicef.org/brazil/declaracao-universal-dos-direitos-humanos>. Accessed on: July 12, 2024.

FERNANDES, EBD Unconstitutional omissions and constitutional criminalization warrants: Injunction Writ No. 4733 and the criminalization of homophobia. **Constitutional Jurisdiction Observatory**, v. 7, n. 2, 2014. Available at: <https://www.portaldeperiodicos.idp.edu.br/observatorio/article/view/1007/669>. Accessed on: July 14, 2024.

GARCIA-SEVERINO, FC; CATOIA, CC; KAWAKAMI, EA Feminoabjections, lgbticides and marielleicides: post-categories to tension realities. **Revista Estudos Feministas**, v. 31, n. 3, p. 1-10, 2023. Available at: <https://www.scielo.br/j/ref/a/TkBPjnWfMpWDzbDyVkct9Zb/>. Accessed on: July 10, 2024.

NATIVIDADE, MT Singing and dancing for Jesus: sexuality, gender and religion in inclusive Pentecostal churches. **Religião & Sociedade Journal**, v. 37, n. 1, p. 15-33, 2017. Available at: <https://www.scielo.br/j/rs/a/BvvqHqF9VHmMnnRfsgHrxQM/>. Accessed on: July 14, 2024.

NATIVIDADE, MT A family like any other: Equal marriage and new families in LGBT evangelical churches. **Sexualidad, Salud y Sociedad - Revista Latinoamericana**, v. 33, p. 343-372, 2019. Available at: <https://www.scielo.br/j/sess/a/gn6fCKgpZ5CVnHJ338cndVc/?lang=pt>. Accessed on: July 13, 2024.

RIBEIRO, LM; SCORSOLINI-COMIN, F. Relationships between religiosity and homosexuality in religious young adults. **Psychology & Society Journal**, v. 29, p. 1-11, 2017. Available at: <https://www.scielo.br/j/psoc/a/DHhdy85vxNPF7qsSK7Y5my/abstract/?lang=pt>. Accessed on: July 9, 2024.

SILVA, JCP; CARDOSO, RR; CARDOSO, AMR; GONÇALVES, RS Sexual diversity: a reading of the impact of stigma and discrimination in adolescence. **Revista Ciência & Saúde Coletiva**, v. 26, n. 7, p. 2643-2652, 2021. Available at: <https://www.scielo.br/j/csc/a/TCJ6mXyyK4pB94FDNhczZZc/>. Accessed on: July 15, 2024.

STF. Supreme Federal Court. **Direct action of unconstitutionality by omission. 26.** 2019. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=4515053>. Accessed on: July 13, 2024.

STF. Supreme Federal Court. **Dean declares legislative omission and states that homophobia represents a contemporary form of racism.** 2019. Available at: <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=403953>. Accessed on: July 4, 2024.

STF. Supreme Federal Court. **Injunction Writ No. 4733.** 2019. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=4239576>. Accessed on: July 13, 2024.