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Anti-discrimination law and the protection of sexual orientation and gender identity.

Antidiscrimination Law and the protection of sexual orientation and gender identity

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SUMMARY

This article aims to critically reflect on anti-discrimination law in the context of protecting the fundamental rights of LGBTI+ people. Using a dogmatic and interdisciplinary approach, the text exposes the foundations of the right to material equality and the dignity of the human person, highlighting the social and institutional practices that sustain discrimination based on sexual orientation and gender identity. To this end, it defines essential concepts such as cisgenderism, heteronormativity, homophobia, and transphobia, demonstrating how these categories operate in the reproduction of symbolic, physical, and legal violence. Based on the jurisprudence of the Brazilian Supreme Court, especially in cases ADO 26 and ADI 4275, it argues that the judicial recognition of rights is a fundamental step, but insufficient in the face of persistent structural inequality. Finally, it defends the need for education, inclusive public policies, and conceptual clarity as pillars of effective anti-discrimination law.

Keywords: Anti-discrimination Law; Sexual Orientation; Gender Identity; Supreme Federal Court; Homophobia and Transphobia; Material Equality.

ABSTRACT

This article aims to critically examine anti-discrimination law in the context of protecting the fundamental rights of LGBTI+ individuals. Adopting a dogmatic and interdisciplinary approach, the text explores the foundations of material equality and human dignity, highlighting social and institutional practices that perpetuate discrimination based on sexual orientation and gender identity. To this end, it defines essential concepts such as cisgender identity, heteronormativity, homophobia, and transphobia, showing how these categories function in reproducing symbolic, physical, and legal violence. Drawing on jurisprudence from the Brazilian Supreme Federal Court, particularly the decisions in ADO 26 and ADI 4275, the article argues that judicial recognition of rights is a necessary but insufficient measure in the face of persistent structural inequality. Finally, it advocates for education, including public policies, and conceptual clarity as the foundations of an effective anti-discrimination legal framework.

Keywords: Anti-Discrimination Law; Sexual Orientation; Gender Identity; STF; Homotransphobia; Material Equality.



1. Introduction

The field of study of anti-discrimination law emerges with the intention of highlighting this issue. through the dogmatic and interdisciplinary convergence of various fields of law. Essentially Integrated into constitutional law, anti-discrimination law stands out for its purpose of To promote equality between different groups in society, starting from the identification of advantages among them. Individuals, who, although sometimes imperceptible, are commonly normalized in the social context.

In outlining the definition and central purpose of anti-discrimination law, Freire reveals that... The subject matter deals with one of the most dynamic and essential fields of constitutional law. contemporary, constituting a comprehensive protective system designed to reduce or eliminate significant disparities between social groups.”¹

In practice, anti-discrimination law represents a tool for achieving fundamental rights, as Rothenburg teaches, "correspond to the most important values for the human fulfillment, which translates into the main legal norms of the community"², with special emphasis on the principle of equality in its material dimension and on the principle of dignity. human rights, both constitutionally established in 1988.

Discrimination, in the legal context, as highlighted by Adilson José Moreira, is a term which has taken on a special interpretative focus, since, on the one hand, it can portray the categorization or classification of situations, things, or even individuals based on specific criteria with The objective is to assign some kind of consequence.

On the other hand, it can be used to express a situation in which someone subdues another. to treatment based on a negative moral judgment, resulting in an arbitrary situation of disadvantage.³

Therefore, the field of study of anti-discrimination law includes all topics that... They demonstrate the pernicious practice of unequal treatment among individuals, and even in a way... vertical integration between institutions and individuals.

Among these themes, we can cite, for example, discrimination arising from color, religion, and degree. educational background, national and regional origin, as well as sexual orientation and gender identity.

Although each form of discrimination has its own peculiarities, they all share a common denominator. common: discrimination as an act of violence against the discriminated against, whether stemming from an act of a... Interpersonal, institutional, both directly and indirectly. Far from seeking to assign a value. among groups that suffer discrimination, as if one group were more harmed than another, or even

¹FREIRE, Ana Beatriz Lopes. Anti-discrimination Law: theoretical, legal and practical framework for promoting substantive equality from the perspective of Adilson José Moreira. *Ibero-American Journal of Humanities, Sciences and Education*, [S. l.], v. 11, n. 6, p. 165–189, 2025.

DOI: 10.51891/rease.v11i6.19583. Available at: <https://periodicorease.pro.br/rease/article/view/19583>. Accessed on: July 3, 2025.

² ROTHENBURG, Walter Claudius. *Fundamental Rights*. São Paulo: Método, 2014.

³MOREIRA, Adilson José. *Anti-Discrimination Law*. São Paulo: Editora Juruá, 2020, p. 362



Even suggesting a degree of importance between them, one cannot ignore the public and notorious fact that, Among these groups is the LGBT community.

This is because homophobic and transphobic violence stems from a social order of hegemony. of heterosexuality and cisgenderism, which establishes a structure in which all subjects They must compulsorily integrate into a heterosexual sexual orientation and gender identity. binary, cisgender.

Silva, in this sense, clarifies that heteronormativity should be understood as:

[...] an entrepreneurial and perpetuating structure of the hegemonic sexual order where all subjects are designed to be heterosexual, or, even if they are gay or lesbian, possess the archetype of heterosexuality in their lives.

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For Miskolci:

[...] Heteronormativity is the sexual order of the present, founded on the heterosexual, familial, and reproductive model. It imposes itself through symbolic and physical violence directed primarily at those who break gender norms. In other words, heterosexism, compulsory heterosexuality, and heteronormativity are three different things, important concepts that help us understand heterosexual cultural hegemony in different dimensions.⁵

Thus, there is an undeniable social construct that affects not only horizontal relationships between individual-to-individual, but also vertical in nature between institutions (such as the State) and the individuals, which implies discriminatory practices against the LGBT community, in many cases even unconscious

It is in this context, for example, that several cases have arisen before the Supreme Court. Federal over the last two decades, especially in abstract review of constitutionality, aiming for an interpretation in accordance with the Federal Constitution of various Legal provisions aimed at protecting the dignity of LGBT people.

For example, consider the direct action of unconstitutionality by omission 26 ("ADO 26"), an opportunity in which the Supreme Court recognized that prejudice against sexual orientation and gender identity Sexual racism is a form of racism, as, in short, it was stated that homophobia and transphobia are forms of racism. of "denying the humanity" of LGBTI individuals, projecting onto them a deficit of citizenship. which undermines the very notion of a democratic state governed by the rule of law.

Another action brought before the Supreme Court that deserves to be mentioned is the direct action of unconstitutionality action 4275 ("ADI 4275"), filed by the Attorney General's Office to ensure that if an interpretation in accordance with the Constitution were given to article 58 of the Public Records Law (Law No. 6.015/1973), in order to allow the alteration of first name and gender in the civil registry by means of Registration is recorded regardless of whether the individual has undergone gender reassignment surgery.

4SILVA, Danler Garcia. Judicial discourse and criminalization of homophobia and transphobia in Brazil: considerations from a queer theory and criminology. 2020. 126 p. Dissertation (Master's in Law) - Federal University of Uberlândia, Uberlândia, 2020. DOI <http://doi.org/10.14393/ufu.di.2020.400>, p. 16-17.

5MISKOLCI, Richard. Queer theory: a learning through differences. Belo Horizonte: Autêntica Editora, 2017, p. 47-48.



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Although it is not the objective of this article, it is worth highlighting that the *ratio decidendi* of constitutional actions had the same premise in common: the principle of equality arising from directly stemming from human nature and being inseparable from the dignity of the human person, as well as being a The State has a duty to refrain from taking actions that, in any way, cause or legitimize, directly or indirectly. directly related to situations of discrimination, whether legal or de facto.

Regarding the principle of equality, Dias (2016):

The principle of equality is linked to the principles of anti-discrimination and anti-subjugation, which are related to the principle of human dignity, meaning that equal rights and equal value should be granted to all people, regardless of their condition or sexual orientation.

Although the results of these constitutional actions have, fortunately, guaranteed the Equal and dignified treatment of the LGBT population in the cases mentioned is still not ignored. This population suffers from prejudice, violence, and discrimination from society, which is still very much... embedded in a heteronormative and cisgender matrix.

And, in the proposal of this article, part of this picture of intolerance stems from misinformation. Misinformation is caused, for example, by the common confusion between concepts that is often mistakenly applied. present in the social, legal, legislative and even academic spheres.

Sexual orientation, for example, is often referred to as a "sexual choice," suggesting as if it were an individual's choice to be attracted to a particular gender, or even confused. with the concept of gender identity.

In this context, international instruments have served as a guide for the harmonization of these [agreements/standards]. themes. The North, without a doubt, is in the Yogyakarta principles formulated back in 2007, which synthesized the fundamental, interpretative, and conceptual parameters of non-discrimination. based on sexual orientation or gender identity, including a lexicon that comes influencing constitutional courts and international organizations in the formulation of public policies.

This brief contextualization therefore highlights that the fight against LGBT discrimination It connects directly to the defense of the most basic fundamental rights, and presupposes clarity. conceptual understanding of terminologies, such as gender identity and sexual orientation, for to promote public policy measures for raising awareness and educating those who are unaware. the reality of homosexual and/or transgender people, reaffirming the constitutional commitment. with a genuinely substantive equality.

2. Establishing concepts and premises

One of the (many) points that makes understanding the topic of law difficult. The lack of consensus on the concepts and terminology is certainly a sign of anti-discrimination.



inherent to the LGBTI audience among national and international organizations and groups.

While it is undeniable that establishing concepts can ultimately lead to labeling and Categorizing individuals in a problematic way, on the other hand, is invariably only through It is through the conceptualization of at least some common terms that education and awareness will be achieved. of the community.

The importance of establishing concepts was also highlighted by the Minister of Supreme Federal Court Justice Marco Aurélio, when voting in Direct Action of Unconstitutionality 4.275/DF ("ADI 4275"), which dealt with the possibility of changing the first name and gender in the civil registry by transgender people. At the time of that trial, Minister Marco Aurélio, right at the beginning of his In his vote, he stated that "the proper resolution of the issue presupposes the establishment of correct premises regarding the appropriate terminology, otherwise expressions and vocabulary will be confused."⁶

Based on this premise, this topic aims to establish concepts commonly encountered in... dialogues on anti-discrimination law, particularly regarding what should be understood by Sexual orientation and gender identity, as will be pointed out in this article.

First, it's important to note that the definitions of gender and sex are not necessarily synonymous. Using the term "sex" itself, we have the question of the biological characteristics of males and females. female, observable from the sexual and reproductive organs, hormones, and chromosomes of beings humans.

On the other hand, the concept of gender, according to Piscitelli, "[...] is on the plane of culture, of habits and learning do not derive from the genitals which 'remain' in nature, in biology"⁷

Gender is linked to a sociocultural construct, as it refers to characteristics. socially constructed and artificially assigned to different sexes, according to their positions. social. The conception of "who is a man" and "who is a woman" stems from characteristics. constructed in (and by) society, sometimes with a negative associative character, inherent to pre-existing ideals. established in society.

To give a more illustrative example: the male sex, of the male gender, should play at football; while the female sex, of the female gender, should play with dolls. Therefore, if the sex masculine, plays with dolls, is associated with the female gender, coining the expression "man effeminate".

This is precisely because the concept of gender is social, and not merely biological, and Historically, men have been associated with strength, leadership, rationality, and even violence. while women are associated with delicacy, subordination, being more emotional and fragile,

6BRAZIL. Supreme Federal Court. Vote of Justice Marco Aurélio. Direct Action of Unconstitutionality No. 4275/DF. Rapporteur: Justice Marco Aurélio. Decided on March 1, 2018. Electronic Official Gazette, Brasília, DF, March 7, 2018. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=2691371>. Accessed on: July 2, 2025, p. 6.

7Piscitelli, A. (2009). Gender: the history of a concept. In: Almeida, HB & Szwako, J. (Org.). Differences, equality. (pp. 116-150). Campinas: Berleandis, p. 124



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resulting in a patriarchal society. However, as Caceres Gonçalves and Peres point out...

Gonçalves argues that sex is much more than a biological fact (hormonal, genetic, and morphological), and that "bodies acquire social meaning" and people "[...] may or may not identify with their biological sex."⁸

Thus arises the concept of what gender identity is, understood by various possibilities for individuals to recognize themselves as belonging to a particular gender, or even if they assume (or do not assume) socially established characteristics for a man or woman, without to distance themselves from the gender they identify with.

Regarding gender identity, the Yogyakarta International Principles stipulated... which refers to the individual, internal, and particular aspect of self-understanding regarding disposition of gender (and not of sex), namely:

We understand gender identity to be each person's deeply felt internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, including a person's personal sense of their body (which may involve, by free choice, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including clothing, speech and mannerisms.⁹

In the context of gender identities, a cisgender person is considered to be someone whose gender The identity assigned at birth corresponds to the one with which she identifies throughout her life. Conversely, transgender people are those whose gender identity is not aligned with their sex. biological sex assigned at birth, claiming recognition of their true perceived identity.

Furthermore, there are non-binary people, who do not strictly identify with the gender. male or female, possibly identifying partially with both, with neither, or even to present a fluid gender identity, transitioning freely between these identifications throughout life. of time.

These concepts are fundamental to understanding human diversity beyond the... Traditional patterns and rigid social norms. That is why, as Piscitelli argues, when "[...] talking about gender we cannot restrict ourselves to men and women, to masculine and feminine. It is necessary to include all these categories of people"¹⁰, because only in this way will we be able to eliminate discrimination against Non-cisgender people.

Discrimination based on gender identity is called transphobia. According to Vecchiatti, transphobia:

[...] is hegemonically used in a broader sense to signify discrimination based on the victim's real or perceived gender identity, thus encompassing oppressions against the

8CACERES GONÇALVES, Marllon; PERES GONÇALVES, Josiane. GENDER, GENDER IDENTITY AND SEXUAL ORIENTATION: concepts and determinations of a social context. *Revista Ciências Humanas, [S. l.]*, v. 14, n. 1, 2021. DOI: 10.32813/2179-1120.2021.v14.n1.a600. Available at: <https://www.rchuntau.com.br/index.php/rch/article/view/600>. Accessed on: July 10, 2025, p. 2.

9 Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity. Translated by Jones de Freitas. July 2007, p. 6. Available at: <http://www.dhnet.org.br/direitos/sos/gays/principios_de_yogyakarta.pdf>. Accessed on: July 1, 2025

¹⁰ Piscitelli, A. (2009). Gender: the history of a concept. In: Almeida, HB & Szwako, J. (Org.). Differences, equality. (pp. 116-150). Campinas: Berleandis, p. 145



On the other hand, it is also necessary to promote a correct understanding of the terminology of Sexual orientation, as previously mentioned, should not be confused with gender identity.

As already mentioned, gender identity relates to an internal relationship of the individual regarding their gender, regardless of sex assigned at birth (also called gender assigned at birth).

birth), whereas sexual orientation refers to a propensity, an affective inclination.

directed towards the outside world.

According to Maria Berenice Dias, sexual orientation "indicates sexual drive."

of each individual, points to the way he will channel his sexuality"¹².

In the well-established definition of the Yogyakarta Principles, right in its introduction, it states that...

Sexual orientation can be understood:

We understand sexual orientation as a reference to each person's capacity to have a deep emotional, affective, or sexual attraction to individuals of a different gender, the same gender, or more than one gender, as well as to have intimate and sexual relationships with them.
people. ¹³

In effect, sexual orientation is an individual's affective, attractive, and sexual inclination.

in relation to a particular gender. Following this logic, if an individual is attracted to a gender of the same type,

This is a same-sex relationship; if there is attraction to the opposite gender, it is a heterosexual relationship.

If there is attraction to both the opposite gender and the common gender, then the person is bisexual.

We should also mention asexual people, who experience low or no sexual attraction;

And pansexual people, who are those who are attracted to qualities, not being...

Determining gender, sex, or sexual orientation.

Discrimination based on sexual orientation is called homophobia, as Vecchiatti states.

The terminology "is hegemonically used in a broader sense, to signify discrimination."

based on the victim's real or perceived sexual orientation, thus encompassing oppression against lesbians, gays, bisexuals, pansexuals, and asexuals."¹⁴

From 2019 onwards, both homophobia and transphobia, following the landmark trial of

ADO 26, as recognized by the Supreme Federal Court, is a form of social racism.

The Supreme Federal Court stated that racism should not be interpreted solely in its

biological or phenotypic dimension, but also from a broader socio-political perspective. Such

The view of social racism is based on the understanding that discrimination occurs when

¹¹ Vecchiatti, Paulo Roberto Iotti The Federal Supreme Court, homotransphobia and its recognition as a crime of racism/ Paulo Roberto Iotti Vecchiatti - Bauru, SP: Spessotto, 2020. p. 5

¹² DIAS, Maria Berenice. Homoaffectivity and LGBTI rights. 6th edition. São Paulo: Editora Revista dos Tribunais, 2014, p. 42.

¹³ Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity. Translated by Jones de Freitas. July 2007, p. 6. Available at: <http://www.dhnet.org.br/direitos/sos/gays/principios_de_yogyakarta.pdf>. Accessed on: July 1, 2025.

¹⁴ Vecchiatti, Paulo Roberto Iotti. The Federal Supreme Court, homotransphobia and its recognition as a crime of racism/ Paulo Roberto Iotti Vecchiatti - Bauru, SP: Spessotto, 2020. p. 5



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certain social groups are treated as inferior to others, regardless of specific physical characteristics.

In this sense, the Supreme Court's decision did not represent the creation of a new type of crime. The analogy is prohibited; instead, an interpretation in accordance with the Constitution is sought, giving it a broader meaning and is consistent with the concept of racism already existing in Brazilian criminal law.

It is worth highlighting that this understanding, that racism should be understood through the emphasis social commentary has already been used when the Supreme Court concluded that antisemitism is also a form of discrimination. A form of racism.

The ruling reinforces the idea that the State has an obligation not only to refrain from discriminatory practices, but also to ensure effective protection against human rights violations. fundamental acts committed by third parties. With this, the Supreme Federal Court reaffirmed its counter-majoritarian role. intervening to protect vulnerable minorities and ensuring effective safeguarding of substantive equality. and human dignity.

3. Final Considerations

The fight against discrimination based on sexual orientation and gender identity is not a choice. It is not an optional policy, but a constitutional imperative that stems directly from the entrenched clause of human dignity and the republican principle of equality in its material dimension.

Anti-discrimination law, as an emerging and necessary branch of law. Contemporary constitutional principles express a civilizational imperative: that the State and the societies recognize and respect human diversity in all its legitimate forms of being and to exist.

Homophobia and transphobia, in their multiple symbolic, institutional, and physical manifestations, do not It not only subjectively offends LGBTI+ people, but also aims to deny them the full condition of subjects of rights.

As stated by the Supreme Federal Court in the judgment of ADO 26, this is a This is a form of social racism, as it reduces individuals to a subordinate position based on identity traits that... They cannot be repressed and discriminated against. In this scenario, the constitutional interpretation must be... guided by an emancipatory rationality that understands that equality is not merely equal treatment. formal, but the guarantee that everyone, including those who deviate from hegemonic cisgender standards heteronormative people can live with freedom, security, and respect.

The legislative omission in protecting these groups is not only unconstitutional, but also criminal, in a moral and now legal sense. It must be stated clearly: denying the right to name, gender, affective expression, to existence itself, constitutes a direct violation of foundations of the 1988 constitutional order.



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There is no such thing as neutrality when it comes to fundamental rights. The right to identity.

Rights related to gender and sexual orientation are not concessions from the state, but pre-existing guarantees to the individual constitutional pact, which must be recognized, protected and promoted.

To conclude, therefore, that anti-discrimination law is a marginal appendix of law.

To deny the constitutionality of the 1988 Constitution is to negate its own project of a democratic society established. The commitment to the human rights of LGBTI+ people requires state action and education. social, inclusive public policies and, above all, a legal practice that abandons omission. complicit in adopting a radical stance affirming equality.

Therefore, the issue is not one of ideology, but rather of constitutional legality. And, in this Period, there is no room for concessions.

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