

ADO 26¹

Criminalization of Homophobic and Transphobic Conduct

Country:

Brazil

Court:

Federal Supreme Court

Competent Court:

Full Court

Format of the Session:

In-person

Rapporteur:

Justice Celso de Mello

Decision Date:

June 13, 2019

Matter:


CASE SUMMARY

A Direct Action of Unconstitutionality by Omission (ADO) filed due the National Congress' inaction in passing a law to outlaw discrimination based on sexual orientation (homophobia) and gender identity (transphobia). The plaintiffs request (i) that the Law against Racism be applied to homophobic and transphobic conduct until a law specifically prohibiting such conduct is enacted; (ii) that the Federal Supreme Court recognize the delay of the National Congress to legislate on the matter; and (iii) that the Supreme Court impose a one-year deadline for the enactment of a law prohibiting all forms of homophobic and transphobic conduct.

LEGAL REASONING

- 1.** The 1988 Federal Constitution assigned the Legislative Branch with the duty of enacting laws against discrimination, including discrimination based on sexual orientation (homophobia) and gender identity (transphobia).
- 2.** A homosexual individual is a person attracted to people of the same sex. That refers to one's sexual orientation. A transsexual individual, on the other hand, is someone who identifies with the gender opposite to their biological sex. This is someone's gender identity. Sexuality can have many variations, grouped under the acronym LGBT². The LGBT population in Brazil faces severe stigmatization and discrimination.
- 3.** Sexuality is an intimate and fundamental part of one's own personality, connected to their dignity, autonomy, and freedom to pursue happiness, as well as to choose who should be the subject of their affection and desire.
- 4.** It has been more than 30 years since the enactment of the 1988 Federal Constitution, and the National Congress has failed to pass a law prohibiting homophobic and transphobic conduct yet. This situation violates article 5, items XLI and XLII of the Federal Constitution, as well as the state's duty to protect a particularly vulnerable group.

¹ This case was heard alongside MI 4,733 (Rapporteur Justice Edson Fachin). We opted to sum up ADO 26 (Rapporteur Justice Celso de Mello) as it proved to be more relevant according to the Supreme Court's publicizing and social interest (*amicus curiae*) criteria.

² Currently known as LGBTQIAPN+.

5. In the Ellwanger Case (HC 82,424/RS), the Supreme Court defended that racism is not restrained to anthropological or biological aspects. Rather, it is connected to social behaviors aimed to unfairly degrade an individual or a group of individuals by stigmatizing and subjugating them, in contravention of the right to human dignity.
6. Hence, homophobic and transphobic actions constitute a social dimension of racism. For this reason, they are punishable under the Law against Racism (Law 7,716/1989) until the National Congress passes a piece of legislation specifically regarding these subjects.
7. This conclusion does not disregard freedom of speech or freedom of religion. Freedom of speech grants the free articulation of ideas, whereas freedom of religion supports the right to preach according to one's own dogmas and sacred scriptures. Both are respected as long as they do not constitute hate speech, i.e. speech that incites discrimination, hostility, or violence.

DECISION OF THE COURT

The Federal Supreme Court recognized that the National Congress's omission to criminalize homophobic and transphobic conduct is in breach of the 1988 Federal Constitution (article 5, item XLI and XLII). The Supreme Court determined that, until the National Congress enacts a law on the matter, homophobic and transphobic conduct are considered a social dimension of racism and punishable under the Law against Racism (Law 7,716/1989).

ADDITIONAL NOTES

Rule Statement: "1. The Court decided that homophobic and transphobic conduct, which involves hateful aversion to someone's sexual orientation or gender identity, are comparable to expressions of racism, in a more social acceptance of the word. Henceforth, until the Brazilian Congress legislates on the matter, as demanded by the writs of injunction set forth in the Federal Constitution (article 5, items XLI and XLII), such behaviors are equaled to the crimes defined in Law No. 7,716 of August 1, 1989. In the case of a murder, these circumstances are deemed aggravating factors, as they constitute dishonest reasons as per the Criminal Code, article 121, paragraph 2, item I, final part. Criminally repressing homophobic and transphobic behavior does not restrict the exercise of religious freedom, regardless of the professed faith. The followers of a faith and its leaders [...] have the right to freely preach and spread [...] their ideas, express their beliefs according to their sacred texts and codes, and teach on their theology and doctrines [...]. However, these expressions must not constitute hate speech, i.e. speech that inspires discrimination, hostility, or violence against other individuals based on their sexual orientation or gender identity. The concept of racism, understood in its social dimension, extends beyond the biological or phenotypic aspects. As a manifestation of power, it is a result of historical and cultural constructions intended to justify inequality. It also serves the purposes of ideological control, political domination, social subjugation, and the denial of the otherness, dignity, and humanity of a vulnerable group (LGBTI+). As LGBTI+ individuals do not occupy a dominant position within the social structure, they are perceived as distinct and marginalized within the legal system. They are subjected to an unfair and harmful situation of exclusion from the general protection of the law due to being hatefully diminished and perversely stigmatized."



**AMICUS
CURIAE**



Trial's
VIDEO

part 1



Trial's
VIDEO

part 2



Trial's
VIDEO

part 3



Trial's
VIDEO

part 4



Trial's
VIDEO

part 5



Trial's
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part 6



Trial's
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part 7



Trial's
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part 8



Trial's
VIDEO

part 9

