



Qualis A1 - Direito CAPES

Editorial

June 2022

Closing the first semester of 2022, we present the second edition of our thirteenth volume of the *Direito e Praxis* Journal! As always, this issue is full of exquisite articles, the fruit of competent research that is engaged in the critical analysis of juridical-political phenomena.

Our general section of unpublished articles brings a set of papers that address topics ranging from legal language, right to health, transitional justice, political violence, pan-Africanism, labor law, strikes, and platform economics, to articles in the fields of political theory and critical theory of law and Marxism.

This edition also includes a dossier, organized by guest editors Emerson Ramos, Alexandre Gustavo Melo Franco de Moraes Bahia and Renan Quinalha, entitled "New Directions for the Rights of LGBTI+ People". This section, also composed of unpublished articles, presents not only a balance of the achievements of the LGBTI+ population in the last ten years, but also points out the challenges that still need to be faced to give effectiveness to the advances achieved in the judicial courts. In addition, the articles selected to compose the dossier provoke reflection on the structural limitations of the recognition of rights by the judiciary. With an intersectional perspective, the articles in the dossier address fundamental issues for the mobilization of rights in the context of the struggles of LGBTI+ people.

The issue also includes two translations from English into Portuguese of articles by Drucilla Cornell and Michael J. Thompson. And finally, two reviews close this issue by



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analyzing various aspects of the work of Soviet jurist Eugeni Pachukanis from the perspective of his fundamental concepts and his approach to facism.

To conclude this presentation, as always, we would like to deeply thank everyone who contributed to this issue of the Journal: authors, translators, and guest editors. Collaborative work is fundamental to the quality of the Journal! We remind you that the editorial policies for the different sections of the journal can be accessed on our website and that submissions are permanent and always welcome! We thank, as always, the authors, reviewers, and collaborators for the trust placed in our publication.

Enjoy the reading!

Direito e Práxis Team



“New Directions for the Rights of LGBTI+ people”

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In Brazil, the 2010s were marked by the conquest of the main rights historically demanded by the LGBTI+ movement, especially by decisions of the Supreme Court (STF). The Direct Actions of Unconstitutionality (ADI) 4,277 and the Complaint of a Breach of a Fundamental Precept (ADPF) 132 that were judged in 2011 recognized the right to civil union between people of the same sex, which created the possibility of formalizing civil marriage by Resolution no. 175/2013 of the National Council of Justice (CNJ). Considered together, these actions are a milestone not only because they were the first and were based on extremely progressive reasoning but also because the decisions were unanimous.

In ADPF 291, upheld partially in 2015, the STF considered the mention of homosexuality in art. 235 of the Military Penal Code, which considers “pederasty” a crime. In 2018, the right to gender identity of trans people (as well as its legal consequences) was recognized through Extraordinary Appeal 670,422 and ADI 4,275, so that individuals could administratively request a change of name and sex on their birth certificates without the need for prior surgery or medical or psychological reports. In 2019, in Writ of Injunction 4,733 and ADO 26, the court decided to criminalize LGBTphobia by framing the conduct within the context of the Racism Law (Law 7,716/89). It is also worth mentioning



the May 2020 recognition of the right for gay men, bisexuals, transgender women and transvestites to donate blood (ADI 5543). Also in 2020, various actions taken by the Supreme Court declared the unconstitutionality of municipal and state laws that prohibited discussions of gender and sexuality in schools. Finally, ADPF 527, in the context of a precautionary measure granted in 2021, allowed transsexual and transvestite prisoners to choose to serve sentences in female or male prisons. All these actions were judged in the span of a decade, a very short period from a historical perspective.

After so many victories, the feeling is that, at least from a formal point of view, there would be nothing left to fight for. Apparently, so it seemed, the process of obtaining full rights for the LGBTI+ population had been guaranteed by the action of a Judiciary sensitive to the demands of sexual minorities, and they would be increasingly strengthened. This expectation, however, has not held up when confronted with the current reality.

Brazil remains the country that most kills and allows for the most killings of LGBTI+ people. In addition to this chronic and structural violence that persists despite the formal recognition of rights, there is a growing escalation of conservatism that has taken hold in society and among the institutions of the Brazilian State. Thus, if it is true that significant historical achievements have been obtained over the last decade, it is also the fact that there is still much to fight for in the context of permanent disputes and tensions concerning LGBTI+ rights, especially because the culture has not changed at the same pace as the decisions of the STF.

In this dossier, which we began to plan in 2020 and for which we received almost 80 proposals, revealing the great interest in the subject, we have prioritized research on the new directions of the fight for the rights of the LGBTI+ community in Brazil. The texts, chosen from among researchers in different regions of the country, take into account representations of race, gender, sexuality and gender identity. They dialogue with the following questions: what is the degree of effectiveness of the paradigmatic court decisions of the STF and their effects on society and Brazilian culture? What are the limits of the application of decisions that, despite promoting advances in the recognition of rights, are still guided by a binary view of gender and a family-based conception of sexuality? How do legal norms operate in the face of the fluidity of identities that escape the still strict contours of the subject of rights? To what extent can intersectionality be a



key to critical reading of these advances? Despite the fact that it has been more than ten years since the STF's decision on same-sex unions, why does the Congress continue to fail to legislate on this matter and any other questions related to the LGBTI+ minority? To what extent does the absence of laws in a formal sense make LGBTI+ rights even more precarious? How does the legislative omission to address the issue reveal a crisis in representative democracy in Brazil? What are the new frontiers of practices and identities not recognized by Brazilian law, such as those of intersex people? How does the moral crusade against sexual and reproductive rights underway in the country threaten the full rights of LGBTI+ people, including those in the judicial arena? In short, the central question that permeates the set of texts in this dossier concerns what is left for us to fight for in a complex conjuncture such as the current one, marked by the paradox of formal guarantee of rights and the persistence of violence and increased conservatism.

The dossier consists of nine articles whose order of presentation was defined following the same logic that guides the constitution of the acronym LGBTI+. Since cisgender women tend to have their gender reduced and their sexuality made invisible by a certain patriarchal ideology that constitutes them as people devoid of sexual desire, we chose to start the collection with texts that discuss issues more directly related to the feminine, dealing with the problems that involve both cisgender women, trans women, and transvestites, reaffirming the right of these people to the gender they claim.

In this sense, the dossier begins with the text, “Transfeminicídio: genealogia e potencialidades de um conceito,” by Emerson Erivan de Araújo Ramos, who is also a co-organizer of this issue, which deals with the origin and political-epistemological meanings of the concept of transfemicide as a category that explains intentional lethal violent crimes based on transmisogynist reasons against transgender and transvestite women. The article begins with the conceptual trajectory of the concept of femicide in which the author explains what is at stake when creating a term that brings together a certain narrative about a specific form of violence that affects women. The same narrative can be applied to crimes involving violence that sustain this discourse for transmisogynist reasons.

Also involving the rights of trans people, the article written by Leandro Colling, Mário Soares Caymmi Gomes and Sara Wagner York, entitled “Sistema ou cis-tema de justiça: quando a ideia de unicidade dos corpos trans dita as regras para o acesso aos



direitos fundamentais,” discusses how the right to correct the name and gender of transsexuals and transvestites in official documents is based on a binarity notion and a perfect opposition between male and female that are influenced by gender technologies that force trans people to pass as cisgender. Based on this context, the authors begin the text with a provocative question: do trans bodies need to “pass” to be recognized as possessing human rights? This question is central to reflecting on the limits of rights gained by LGBTI+ people in recent years, which is a major theme of this dossier.

One of these achievements is discussed in the article entitled, “A segregação do corpo travesti no sistema prisional brasileiro: comentários à Medida Cautelar na ADPF 527,” by Francielle Elisabet Nogueira Lima, Julia Heliodoro Souza Gitirana and Priscilla Placha Sá, who address the difficult question of the place where trans persons who are deprived of their liberty are sentenced, which was basis of the Action for Noncompliance with a Fundamental Precept (ADPF) 527, from which the authors' analysis starts. The text mainly questions the location of transvestites in the prison system and the absence of a penitentiary policy that meets the demands of trans people. According to the authors, by understanding subjects only from the point of view of the compulsory body-sex-gender order, the prison system reproduces gender norms that exclude and segregate those people who do not fit into the hegemonic, normatively defined, performances.

The fourth text, written by Samantha Nagle Cunha de Moura and Marcelo Maciel Ramos, entitled “A mulher lésbica é mulher para a Lei Maria da Penha?,” proposes an empirical analysis of a set of decisions of the Court of Justice of Minas Gerais, issued between 2010 and 2020, identifying a heterosexist pattern in the justice system related to domestic violence. Based on a historical recovery of the construction of this concept by the feminist movement in the 70s and 80s, the authors point out how the presupposition of the heterosexual relationship that excludes lesbian women from legal protection persists and has expanded in the judiciary system.

“A proteção dos direitos à identidade da criança intersexo: um olhar para além do registro civil” by Andréa de Souza, Isabela Lima and Roxana Borges discusses the right to civil registration of intersex children from the perspective of guaranteeing their gender identity. Adopting a socio-legal approach to the subject in addition to a normative review of the literature, the authors carried out semi-structured interviews at the Genetics Outpatient Clinic of the Professor Edgar Santos University Hospital (HUPES), linked to the



Federal University of Bahia. Its conclusions point to the limits that are still present, including in a recent resolution of the National Council of Justice, in the prevalence of the logic of binary identity logic that violates the personality rights of people and, especially, intersex children.

The sixth article, “A estratégia do neoconservadorismo revelada em suas intervenções como amici curiae no STF: da autoridade moral religiosa à luta contra a “doutrinação” LGBTQIA+,” by Estefânia Maria de Queiroz Barboza and Gustavo Buss, provides an important overview of the forms of performance of conservative segments in the arena where advances in sexual and reproductive rights are most noticeable in recent years. Through an analysis of the documents of conservative organizations who act as amicus curiae in five paradigmatic cases that were considered by the Federal Supreme Court, the article helps us to understand the intricacies of the neoconservative strategy, especially in the judicial sphere, in contemporary Brazil.

The text, “The Brazilian Data Protection Law for LGBTQIA+ People: Gender Identity and Sexual Orientation as Sensitive Personal Data,” addresses a very current discussion, that is, the new data protection law and how the discussion on the topic impacts LGBTI+ people. The text, co-written by Bernardo Fico and Henrique Nóbrega, explores the concept of “sensitive data” that deserves protection under the new law and legislators’ failure to include sexual orientation and gender identity in the list of that category. In any case, a hermeneutic exercise is carried out to try to include both as protected sensitive data when the law refers to “sex life,” which must be considered broadly, or even “race,” given the basis of the STF’s decision to regarding the criminalization of LGBTI+phobia.

The Dossier could not do without the discussion on the impact of the right to work for the LGBTI+ population, considering the moment we are going through, with the precariousness of labor relations and the increase in unemployment. Pedro Nicoli and Renata Dutra address these questions in “Direitos trabalhistas como direitos LGBTI+: uma leitura queer dos retrocessos sociolaborais no STF.” The authors make an extremely pertinent point about the contrast of perceptions of the STF regarding fundamental rights. The same court that presents itself as so progressive in recognizing the rights of the LGBTI+ minority violates fundamental constitutional rights when judging cases of



precariousness of labor relations, which, paradoxically ends up affecting that minority in a real way, since that population remains in a situation of greater vulnerability.

The final text in the dossier, “Lus Constitutionale Commune: a potencial expansão da proteção das minorias sexuais na jurisprudência do Supremo Tribunal Federal a partir do reconhecimento do status de ‘categoria suspeita’ e da incorporação dos precedentes da Corte Interamericana de Direitos Humanos,” by Mônica Clarissa Hennig Leal and Eliziane Fardin de Vargas, is an intriguing study on the history of decisions of the STF and the Inter-American Court of Human Rights in favor of the LGBTI+ minority and how this should imply that the former adopts questions on sexual minorities as a “special category,” as does the Inter-American Court. They also propose that Brazilian courts should consider the Court's precedents (i.e., conventionality control) as a way of better protecting that minority.

As noted in this brief presentation, these articles address urgent and current issues from different critical perspectives and dialogue with different branches of law to reflect on the challenges in obtaining full rights for the LGBTI+ population. With this dossier, we hope to collaborate not only in expanding the already fruitful academic debate established in the field of sexual and gender diversity, but also in strengthening the achievements and demands of the community and the LGBTI+ movement in the context of serious threats to human rights and democracy.



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