THE STUDY OF ADO 26/DF AND MI 4733 IN THE FEDERAL SUPREME COURT AND THE CRIMINALIZATION OF TRANSPHOBIA: NOTES ON CONSTITUTIONALISM AND DEMOCRACY

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ABSTRACT

The development of this research was due to the political scenario recently experienced in Brazil, of distrust of institutions, in which discussions between the limits of action of the Three Powers once again gained prominence. The time was marked by the judgment of the Direct Action of Unconstitutionality by Omission (ADO) 26 and the Writ of Injunction (MI) 4733, which aimed to criminalize conduct by the Judiciary due to the lack of protection for constitutional principles, such as equality. Given this, the research seeks to answer the following question: How did the Court position itself, under the dilemma between the Separation of Powers and the democratic deficit of judicial review, in the judgment of ADO 26 and MI 4733 for the criminalization of homophobic and transphobic practices? The hypothesis is that the Federal Supreme Court justices adopt a material conception of the concept of democracy, and use the method of constitutional interpretation to avoid criticism of the violation of the Principle of Separation of Powers by the Judiciary. In order to confirm (or not) the hypothesis, the work was carried out through descriptive and qualitative documentary research, comparing the bibliography developed in the area and using the analytical method applied to reading the research problem.

Keywords: democracy; separation of powers; judicial activism; homophobia and transphobia; legislative omission;

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ANÁLISE DA ADO/26 E MI 4733 PELO SUPREMO TRIBUNAL FEDERAL E A CRIMINALIZAÇÃO DA TRANSFOBIA: NOTAS SOBRE CONSTITUCIONALISMO E DEMOCRACIA

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RESUMO

O desenvolvimento da presente pesquisa se deu em razão do cenário político recentemente vivenciado no Brasil, de desconfiança às instituições, em que as discussões entre os limites de atuação dos Três Poderes voltaram a ganhar relevo. A época era marcada pelo julgamento da Ação Direta de Inconstitucionalidade por Omissão 26 e pelo Mandado de Injunção 4733, que tinha como objetivo a criminalização de conduta pelo Poder Judiciário em razão da ausência de proteção à princípios constitucionais, como a igualdade. Diante disto, a pesquisa busca responder a seguinte pergunta: Como se posicionou a Corte, sob o dilema entre a Separação de Poderes e o déficit democrático da revisão judicial, no julgamento da ADO 26 e do MI 4733 para a criminalização de práticas homofóbicas e transfóbicas? Como hipótese tem-se que os Ministros do Supremo Tribunal Federal adotam uma concepção material do conceito de democracia, e utilizam do método de interpretação constitucional para evitar as críticas relativas à violação do Princípio de Separação de Poderes pelo Poder Judiciário. Para confirmar (ou não) a hipótese, o trabalho se desenvolveram por meio de pesquisa documental descritiva e qualitativa, comparando à bibliografia desenvolvida na área e utilizando o método analítico aplicado a leitura do problema de pesquisa.

Palavras-chave: democracia; separação de poderes; ativismo judicial; homofobia e transfobia; omissão legislativa;

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INTRODUCTION

On December 19, 2013, a Direct Action for Unconstitutionality by Omission was filed with the Federal Supreme Court by the Popular Socialist Party, on the grounds that the Federal Legislative Branch was inertia, including frustrating the processing and appreciation of legislative proposals that had the object of incriminating all forms of homophobia and transphobia. The party argued that, as a consequence of this inaction, the Federal Legislative Branch was failing to provide effective protection to members of the LGBT+ community.

At this point, it is necessary to note the petitioner's request to classify homophobia and transphobia under the ontological-constitutional concept of racism, based on precedent in the Ellwanger case (HC82.424/RS), and thus criminalize these behaviors under the terms of the crime of racism in Article 5, XLII of the Federal Constitution. The initial request suggests that these behaviors be classified as specific crimes by judicial decision, in an atypical judicial action, given the inaction of the Legislator.

It is important to note that the ruling under analysis in this research was also the result of the writ of injunction filed by the Brazilian Association of Gays, Lesbians and Transgenders (ABGLT), seeking the same protection from the Judiciary.

In addition to other defensive arguments, the Advocate General's Office (AGU) contended that it was inappropriate for the Court to: a) impose a mandatory deadline on the authorities responsible for issuing a rule; b) remedy a legislative omission; and c) extend criminal protection due to the criminal nature of the law.

The great complexity of the present judgment is underscored by Alexandre de Moraes as essential for remedying the legislative omission, the need to reconcile the democratic principle of the majority, represented by the Legislative Branch, with the exercise of constitutional justice and the defense of fundamental rights and guarantees in a rule of law, represented by the actions of the Court (Brasil, 2019, p.252).

Furthermore, it is important to consider the Brazilian political context at the time of the trial under analysis, which was marked by Bolsonaro protests with strong criticism of the institution of the Supreme Court as well as individual ministers (Folha de São Paulo, 2019), protests that inflamed the political scene until the climax of the attacks on January 8, 2023.

Since that time and right up to the present day, there have been heated discussions about the respective roles and responsibilities of the three branches of government. Recently, at the International Sphere Forum in Paris, a major debate took place between the President of the Senate and the Dean of the Supreme Court, Gilmar Mendes. The current context is marked by the National Congress' demonstration of its displeasure with the judicialization of politics. Contemporary debates surround the legalization of abortion, the temporal framework of indigenous lands, among other delicate issues (Carta Capital, 2023).

Both Gilmar Mendes, representing the Judiciary, and Pacheco, representing the Legislative, agreed that the impasse regarding the limits of the constituted powers is due to the crisis of confidence in the institutions, created by the context of the attacks on democracy that have taken place in recent years (Carta Capital, 2023).

In this way, this research, which is qualitative in nature, is developed by analyzing the actions of the judiciary in criminalizing conduct, and for this, some topics related to the sphere of competence of the Powers, the reserve of law, especially in criminal matters, democracy and constitutionalism, will also be addressed.

It should be noted from the outset that the aim of this research is not to assess which argument is best to legitimize or not legitimize judicial action in classifying conduct as a crime. Instead, it aims to address the following question: How did the Court navigate the tension between the Separation of Powers and the perceived democratic deficit of judicial review in its decision to criminalize transphobic practices?

The hypothesis proposed is that the Ministers of the Federal Supreme Court adopt a material conception of the concept of democracy and utilize the method of constitutional interpretation to circumvent criticism regarding the violation of the principle of the separation of powers by the judiciary.

In order to answer the research question, the work begins by examining the origins of criticism surrounding the perceived hypertrophy of the Judiciary and the imbalance of the principle of Separation of Powers in contemporary Brazilian society.

In a second step, the arguments that support the Court's activist actions will be analyzed. These include situations of legislative vacuum and the protection of fundamental rights. Additionally, the constitutional actions that are the subject of the trial will be briefly analyzed.

Thirdly and finally, the entire content of the judgment given in the joint trial of Direct Action of Unconstitutionality by Omission 26 and the Writ of Injunction 4733 was analyzed with the aim of extracting from the votes of the Justices the arguments used to justify the criminalization of conduct by the Judiciary. This was done with a view to considering the dilemma presented in the two previous chapters about the principle of Separation of Powers and the legitimacy of the Judiciary in the judicial review of fundamental rights in cases of legislative vacuum.

1 THE LIBERAL DOCTRINES AND THE FOUNDING PRINCIPLES OF A DEMOCRATIC CONCEPTION

The cyclical replacement of types of government was regarded as the fundamental principle underlying the establishment of any political organization. Stability, however, would only be present in complex organizations, which combine characteristics of different governments, namely, monarchical, aristocratic and democratic. This structure allowed institutions to restrain themselves, thereby guaranteeing a lasting and stable government. This represents the first example in history of a government with "checks and balances" (Duarte Neto, 2009, p. 28).

The Federative Republic of Brazil, seen as a complex society, is marked by the presence of several mechanisms and instruments worthy of a democratic state, such as the system of checks and balances based on the principle of separation of powers, which was independent and harmonious among themselves.

In this context, contemporary debates focus on the supposed hypertrophy of the Brazilian Judiciary and a latent imbalance between the constituted powers, which has led to the perception of a democratic deficit in judicial review, which is why, in this present chapter, the fundamental principles of one of the conceptions of democracy will be examined.

The doctrines of the social contract that began to develop from the 16th century onwards, to gain in the 17th and 18th centuries all the relevance that they still have today, saw the contract as the source of society, from Hobbes, Locke and Rousseau, who, although they differed, had one point in common: society could only be correctly understood if it was supposed that it derived from an agreement between freely consenting men, without clauses harmful to any man (Ferreira Filho, 2014, p. 31-33).

Contractualism was practically the last step before the emergence of the doctrine of Constituent Power, and Rousseau's (2015) teachings, are the source of one of the interpretations of democracy, which recognizes only the government of the general will, the democratic government, as legitimate.

Democracy is thus associated with the execution of the decisions of the general will, while monarchy would be the concentration of decision-making in the hands of a single person and aristocracy the execution of decisions by a minority, an elite (Ferreira Filho, 2014, p. 33).

This is one of the points that the doctrines of the social contract, such as that of Rousseau (2015), gained importance. The scenario marked by of absolutist institutions in France and Europe directly influenced the revolutions that sought to end the old regime and establish new models of republican states based on the majority conception of democracy.

Thus, from this contractualist perspective, in order to remake the social pact, it would be necessary to create new institutions, suitable for the freedoms of individuals, associating the governed with the government, linking the idea of a Constitution, especially a written one, as a skillful instrument to put these changes into practice, ensuring respect for freedom, rights and the general will as the only legitimate one to give the last word (Ferreira Filho, 2014, p. 34).

In this sense, the main criticisms of judicial bodies in the exercise of atypical functions are rooted in the doctrines of the social contract and end up being based on interpretations of democracy such as that espoused by Rousseau, the democracy of the majority.

In the case under analysis, another major criticism of the judiciary, which also arose in the cradle of liberalism, imposes a ban on the use of analogy for the purposes of incrimination in order to avoid surprise and unpredictability regarding the conduct that criminal law seeks to avoid through its rules, is strict legality in criminal matters (Borges, Leão, 2020, p. 387).

It should be emphasized that the intention of this study is not to discuss or address the various models and interpretations of democracy and constitutionalism, or to present in detail the arguments that oppose the criticism of the judicial body having the last word, but only to elucidate the oppositions to this judicial action in such a way as to make it possible at the end of the work to analyze how these issues were substantiated by the ministers in the joint judgment of the Direct

Action for Unconstitutionality by Omission (ADO) 26 and the Writ of Injunction. (MI) 4.733.

1.1 Majority democracy and 20th century constitutionalism: criticisms of judicial activisms

Having overcome this first contextualization, in which we can see that the doctrine of constituent power has been strongly influenced by contractualist doctrines, it is necessary to observe that, today, constitutionalism - considered as a plurivocal concept - although it must be analyzed inseparably from the various existing conceptions of constitutions and according to the different eras, always has the same common denominator, the limitation of political power (Duarte Neto, 2009, p. 18-20).

Jeremy Waldron (2018, p. 53), one of the great critics of the judicial body having the last word, recognizes that constitutionalism cannot be seen only as the observance of constitutions, or as a recommendation that constitutional agreements be made in writing, but he sees in constitutionalism a commitment to popular sovereignty along with the ideology of restricted and limited government.

For Monica Caggiano (2011, p. 16), modern constitutionalism, built and known since the French Declaration of the Rights of Man, has its own characteristics, such as the imposition of the separation of powers, the sovereignty of the people, the defense of human rights and the universality of these principles, to the point where, in case of non-compliance with any of them, it would not even be possible to speak of a constitution.

On the other hand, the constitutionalism embodied in the French Declaration of Human Rights took on a new guise in the aftermath of the Second World War, in an attempt to combat the horrors of that period. Constitutions began to have a strong axiological charge and democratic and constitutional ideals began to converge more clearly, so that it was no longer possible to think of democracy without constitutionalism restricting the abuse of majority decisions (Sarlet, 2012, p. 2; Mendes, 2008, p. 8; Carbonell, 2007, p. 9).

The main feature of this change in Latin America has been the enshrinement of fundamental rights in constitutions and the protection given to constitutional courts and the traditional supreme courts, which now have counter-majoritarian mechanisms of rigidity, such as judicial review of legislation. This has significantly expanded the authority of the judiciary, including due to the extensive need to interpret these open principles. (Pulido, 2015; p. 17; Alterio, 2020, p. 25; Caggiano, 2011, p. 17).

> Particularly when it comes to judges, a new mission has been introduced. Because of the expanded territory in which it now operates - both due to the widening of the interpretative sphere and because it has the power to control constitutionality - the Judiciary takes on a different role. A different perspective, a different dimension, and its task now involves responsibility for constitutional interpretation and, consequently, for the

> concrete application of legal interpretation criteria resulting from hermeneutic efforts (Caggiano, 2011, p. 17).

In this sense, it has become more common for the judiciary to be given the "last word on the constitutionality of the law and on its interpretation" (Alterio, 2020, p. 123), which enhances the debate between the "balance that must exist between constitutional supremacy, judicial interpretation of the Constitution and the majoritarian political process" (Barroso, 2006, p. 30), which ends up generating discomfort among supporters of majoritarian democracy.

In the last decades of the 20th century, the system of government of constitutional democracy, also known as liberal democracy, spread throughout the world. It would be the combination of constitutionalism and democracy, a form of government far superior to a pure democracy or a non-democratic constitutional government, but despite being superior, there is no way of attributing to this combination a happy marriage free of tensions (Nino, 1997, p. 13).

For this new constitutional design, the Judiciary would move from being the guardian of the Constitution to being the guardian of democracy (Caggiano, 2011, p. 19), in contrast to the idea initially put forward of democracy based on social contract theories.

Thus, the idea of rigidity, superiority, stability and constitutional predictability for guaranteeing fundamental rights, which arose from the very evolution of the idea of the Rule of Law, was gradually replaced by a constitutional design that ended up assuming, according to Monica Caggiano (2011, p. 19), a stance uncompromising with legal certainty, with an idea of elasticity, flexibility and mutability of constitutions.

In this sense, it should be noted that a certain common sense of constitutional theory ends up recognizing that parliaments are the most direct expression of democracy, while on the other hand, constitutions, declarations of law and judicial review mechanisms are regarded as manifestations of constitutionalism, as a kind of brake on the government of the people or democracy itself, which is also manifested in a tension between parliaments and the courts (Mendes, 2008, p.1).

For Conrado Hubner Mendes (2008a, p.4) there is no complete and comprehensive democratic theory that can ignore the issue of the supremacy of the Constitution over parliamentary decisions. In this way, the final chapter of this research will analyze the grounds that legitimized the exercise of the Supreme Court's atypical function in the rulings of Direct Action of Unconstitutionality by Omission (ADO) 26 and the Writ of Injunction (MI) 4733, which ended up expanding the scope of the criminal type.

Conrado Hubner Mendes (2008, p. 78) notes that the main arguments in favor of legislative supremacy are seen in at least two values: a) electoral representation (representation of the people themselves); b) majority rule (procedural resource in the name of equality).

For Jeremy Waldron (1993, p. 32), because people cannot agree on a theory of justice, a theory of authority must be added to this theory, which must reflect on power and the person responsible for making decisions (Waldron, 1993, p. 32).

Thus, the argument that people or their representatives are incapable of making good laws, or that laws need to be reviewed by a judicial elite, must be taken more seriously. It cannot be disregarded that people have fought for the right to participate in politics, not only to have their interests taken into account, but also to have a say in shaping a good society, including the balance of individual rights and the integrity of the process, without these issues being swept away by constitutional restrictions (Waldron, 1990, p. 71).

In terms of criticism of judicial action, Roberto Gargarella (2006, p.28) even recognized the Judiciary as the least democratic branch of government, because its members are not elected by people, and its authority is not subject to ratification or any kind of control (Gargarella, 1997, p. 24).

In this context, Barroso (2016, p. 170) recognizes that a relevant space regarding the means and ways of carrying out the constitutional will should be reserved for the majoritarian process, conducted by elected representatives, however, in extreme cases, when ineffectiveness is installed, and the supremacy of the Constitution is frustrated, it would be up to the Judiciary to compensate for the deficit of democratic legitimacy of the Legislative branch. In his notes, Barroso (2016, p. 360) details his thinking, saying that the point of balance would be delicate, and could even characterize a certain democratic deficit in favor of the Judiciary, considering its performance as a positive legislator without the baptism of the electoral process.

In addition, Waldron (1990, p. 71) sees that it would be worrying to detect the similarity between the many arguments in favor of external restrictions on rights with the arguments in favor of the aristocracy against democratic forms of government

Thus, in opposition to the consolidation of judicial control that dictates the last word on questions of law, Waldron (2010, p. 157) sees the need to adopt procedures that respect the voices of all people, who must be treated equally in this process, which must responsibly and deliberatively guarantee the difficult and complex issues of the opposing arguments on the rights raised.

In more recent studies, Waldron (2010, p. 157) has positioned himself in such a way as not to reject judicial review of legislative acts altogether, allowing it in some exceptional circumstances, such as in the case of dysfunctional legislative institutions, corrupt political cultures, or the legacy of racism or other forms of endemic prejudice. However, the author warns that this judicial review should be limited in time and that defenders of judicial review should always defend its necessity with humility and shame about the circumstances that made it necessary.

In reasonably democratic societies, in which their members do not disagree about rights, the judicial review would be, for Waldron (2010, p. 157), inappropriate, and the argument of the dysfunctionality of legislative institutions is not the best way to legitimize them.

The Brazilian Court acquired a huge range of independence after the 1988 Constitution was promulgated, shaping the activism of judges, which ended up calling into question the spaces of representation and the institutional design of the Judiciary shaped by the Liberal State (Duarte Neto, 2020, p. 394).

Duarte Neto (2020, p. 394) had already recognized the activist stance of the Federal Supreme Court due to the absence of dogmatic parameters for guidance and also due to constitutional interpretation without limits that would allow verification. In a more recent study, he also recognized in the Brazilian Constitution the incentive for the broad exercise of interpretation (Duarte Neto, 2023, p. 207), which is why it is necessary to analyze the foundations of the judgment of ADO 26 and MI 4733 proves to be essential.

The Brazilian judiciary, reflected in the image of the Supreme Court, is seen as super-powerful in the democratic order, which can be seen in its dysfunctional activism in the informal transformation of the constitutional text through interpretation (Duarte Neto, 2023, p. 194-195).

> The very provision for reforming the Constitution - whether by revision or amendment - reasonably meets the need to adapt the Constitutions to practical reality. What's more, once constitutional stability and the hard core of the rule of law are broken, what legal structure would be solid enough to guarantee and preserve democracy? The fragility and expansiveness of the processes of constitutional interpretation have already demonstrated their flagrant failure when the democratic Weimar Constitution was annihilated, opening the door to Nazism. Legal certainty and democracy are still dependent on the old constitutionalism (Caggiano, 2011, p. 20).

Freitas and Bustamante (2017, p. 195) also see the institutional imbalance in favor of the Federal Supreme Court due to some characteristics, such as: (a) the life tenure of the justices; (b) the accumulation of attributions that go beyond the judicial review of all legislation; (c) the expansion of its jurisdiction, which crowds the court with actions and relevant issues that can be assessed; (d) the predominance of individual and external deliberation; (e) the broad discretion of the reporting magistrate in conducting the proceedings; (f) the existence of abundant cases to be scheduled, which results from the court's inability to choose the cases to be judged.

Although it is not the focus of this work, one cannot fail to mention the tensions between the actions of the Judiciary and the reserve of the Legislature in the creation of criminal law:

> [...] in the context of incriminating conduct, respect for the law is reflected as a guarantee of the Democratic State of Law, with legality being translated as a guarantee that only the law can impose a criminal sanction and describe conduct and, going further, prohibiting interpretative subterfuges that may make the incidence of the criminal norm unpredictable (Borges, Leão, 2020, p. 382).

For Rosa Weber, the principle of legality manifests itself as a structuring value of the democratic order, the rule of law and the concept of justice, a true guarantee for the courts (Brasil, 2019, p. 369).

Although the judicial review by omission is considered an instrument for protecting minorities and collectivities (Ferraz, 2014, p. 16), Borges and Leão (2020, p. 369) warn that we cannot ignore the fact that any practice that makes fundamental rights more flexible, with criminal guarantorism in mind, even if it is under the pretext of protecting these minorities, could end up turning against the very object of protection, due to the interests of those in legal and social power. In this sense, Rosa Weber:

> In an effort to promote the Republic's fundamental objective of promoting the good of all, without prejudice to origin, race, sex, color, age or any other form of discrimination (art. 3, IV), as well as to fulfill the state's duty to punish any discrimination that violates fundamental rights and freedoms (art. 5, XLI), the best intentions cannot be allowed to justify the fragmentation of institutional and procedural guarantees without which there is no rule of law (Brasil, 2019, p. 385).

Among the criticisms of criminal doctrine regarding the judiciary's exercise of a typical legislative function, and in line with the case under analysis in this work, it is worth highlighting Brazilian law's rejection of analogy to the detriment of the defendant (Borges, Leão, 2020, p. 386-387), a practice that is not compatible with the democratic rule of law.

Thus, having pointed out some criticisms - which are not exhausted - regarding the activist action of the Judiciary, especially represented by the tension between the judicial review (counter-majoritarian power) and the democracy of the majority, it is allowed to proceed with the study until reaching the central point of this research.

2 LEGISLATIVE VACUUM AND THE PROTECTION OF CONSTITUTIONAL RIGHTS

According to Pulido, in Latin America the importance given to judicial review was given in order to fill the void left by the insufficiency of the instruments of political control by Congress, which is why:

> Hyper-presidentialism has been attenuated by constitutional juristocracy. Judicial review aimed at protecting fundamental rights, which was conceived in principle as an objective and negative legal control, based on interpretative techniques developed by constitutional methodology and a dogmatic approach to fundamental rights, has been transformed into a control with clear political tendencies, in which the distinction between the law and the Constitution is no longer discussed, but rather the convenience or coherence of certain public policies. In the same vein, the Constitutional Court has given itself not only formal but also substantive control over acts to reform the Constitution, when these have been proposed by the

> government and carried out by Congress, the latter playing the role of secondary constituent (Pulido, 2015, p. 22).

In particular, from the time of independence until the enactment of the 1988 Brazilian Constitution, previous constitutions were marked by promises that were not fulfilled, creating a scenario of a real mismatch between the norm and reality. Therefore, there was a disconnect between the intentions of the constitutions and the actions of the Public Power (Barroso, 2016, p. 169).

In light of the aforementioned scenario, in which the rights enshrined in the Constitution are not guaranteed, it is imperative to recall the problem presented for this research, considering the criticisms addressed in the previous chapter: how does the Brazilian Supreme Court act and justify its democratic legitimacy to supply the role of the Legislative Branch through the use of judicial review mechanisms for omission?

Thus, in order to remedy the legislative omission in the face of the need to comply with constitutional texts, the Federal Constitution of 1988 created two instruments to overcome this omission, the Mandate of Injunction - in diffuse control - and the Direct Action of Unconstitutionality by Omission - in concentrated control of constitutionality (Ferraz, 2014, p, 34), which were the two actions subject to simultaneous judgment by the Federal Supreme Court in the case involving the criminalization of transphobic conduct.

In this context, it can be seen that the postulants of ADO 26 and MI 4733 argued that the negative behavior of the National Congress resulted in serious damage to constitutional principles that are essential and fundamental, such as those that punish the practice of racism and prohibit discrimination against fundamental rights and freedoms.

It is in this sense that this worldview, based on the idea that the biological differences between men and women dictate that men wear blue, and girls wear pink, for Celso de Mello, imposes unacceptable restrictions on the fundamental freedoms of members of the LGBT community, incompatible with diversity, pluralism and a democratic society. (Brasil, 2019, p.50).

Furthermore, in 2017, the Inter-American Court of Human Rights issued an Advisory Opinion to the effect that the recognition of gender identity by the state is of vital importance to guarantee the full enjoyment of human rights, including protection against violence, ill-treatment, health, etc. (IACHR, 2017, p. 46). Despite this, the data presented in the analyzed case showed that Brazil is the "world champion" in terms of crimes of violence against the LGBT population motivated by prejudice, placing the country in a state of true "banality of homophobic and transphobic evil" (Brasil, 2019, p. 72 and 75).

Thus, considering that the actions under analysis in this research - ADO26 and MI 4733 - were admitted by the Federal Supreme Court, one cannot fail to observe at this point, albeit briefly, some peculiarities of the actions subject to judgment, which are, according to Barroso (2016, p. 108) instruments created by the 1988 constituent to deal with unconstitutional omissions in order to address one of the main historical dysfunctions of Brazilian constitutionalism.

> One of the foundations of judicial review is the protection of fundamental rights, including and especially those of minorities, in the face of occasional parliamentary majorities. Its presupposition is the existence of material values shared by society that must be preserved from strictly political injunctions (Barroso, 2016, p. 24).

The Direct Action of Unconstitutionality by Omission was provided for in article 103, §2 of the Federal Constitution, indirectly (Ferraz, 2014, p. 34), as an object of the ADI - Direct Action of Unconstitutionality (Barroso, 2016, p. 170), and it should be noted that until 2008, the Federal Supreme Court made no distinction between the ADI and the ADO regarding their procedural autonomy (Mendes; Branco; 2012, p. 1724).

Judicial review by omission refers only to omissions of a normative nature (Barroso, 2016, p. 171) and is aimed at defending the legal order, with no objective of protecting individual situations or subjective relationships (Mendes; Branco; 2012, p. 1724).

The direct action for unconstitutionality by omission should be seen as an instrument for implementing constitutional clauses that have been frustrated in their effectiveness, and for Celso de Mello it is unacceptable to submit the implementation of the Constitution to the ordinary will of the legislator (Brasil, 2019, p. 80).

On the other hand, the injunction is intended to control the omission observed in the specific case in order to seek the protection of constitutional subjective rights, which are frustrated by the illegitimate inertia of the Public Power (Barroso, 2016, p. 108).

It is important to note that there are discussions about the purposes of the judicial decision in the writ of injunction, in terms of whether the Judiciary should order the competent authority or body to issue a rule regulating the constitutional provision or whether the decision on the right sought should fill the legal gap. Barroso (2016, p. 111-112) believes that the second hypothesis is the most appropriate, and that the injunction should represent an instrument for the effective protection of rights, in which the judiciary creates a rule for the specific case with effects limited to the parties to the process, in true substitution for the legislative or administrative body.

It should be remembered that the Federal Supreme Court, in its first precedent ruling on injunctions (MI 107-3-DF), had emptied the potential of this action, invoking the classic and rigid view of the principle of separation of powers, in the sense of the duty to communicate to the omitted body to adopt the necessary measures. However, from the end of 2007, the Court seemed to have given in to the appeals of the dominant doctrine, giving effectiveness to injunctions in cases (MI n. 670, 708 and 712) involving the right of civil servants to strike and the need for the analogous application of a law on a temporary basis to remedy a legislative omission (Barroso, 2016, p. 114-117).

The evolution of the Federal Supreme Court's jurisprudence ended up bringing effectiveness to the writ of injunction, which was previously seen only as an instrument to communicate the delay to the omitted body, but can now

be used to satisfy the subjective rights of specific minorities or not, when the possibility of the Court attributing *erga omnes* effectiveness to the decision is also considered (Barroso, 2016, p. 119), showing that the writ of injunction has a "double facet", as it has both a subjective and objective character (Brasil, 2019, p.222), making the criticism of the hypertrophy of the judiciary and the imbalance of powers more evident.

On the other hand, concerning the writ of injunction and the legitimacy of the judiciary to act in place of the legislature, Barroso (2016, p. 426) argues that it does not constitute a violation of the separation of powers, for at least two reasons: a) it was the Constitution that established this constitutional remedy and the attribution of general effectiveness to the temporary discipline would represent obedience to the principle of isonomy; b) the powers that be are subject to the Constitution, and the legitimacy of the judiciary's action only arises from the omission of another power. But can these arguments justify the Court's activist attitude?

In defense of these arguments, it is recalled that Barroso (2016, p. 170) acknowledges the possibility of the Judiciary acting to make up for the deficit of democratic legitimacy of the Legislative branch in extreme cases of installed ineffectiveness of rights concerning the text of the Constitution.

It should be noted that the Federal Supreme Court recognized, in the case under analysis, the impediment to the exercise of human dignity itself, among other fundamental rights that derive from this principle, arising from the Legislator's omissive conduct, justifies the admissibility of the actions being judged.

3 THE JUDGMENT OF ADO 26 AND THE MI 4733

It is at this point that this research reaches its high point, the analysis of the main arguments used in the votes of the Justices that legitimize the actions of the Judiciary to criminalize behaviors that had not yet been classified as criminal by the Legislative Branch, considering the criticisms presented in the previous chapters. It should be noted that the arguments used by the Justices were not analyzed in chronological order, in separate votes, but according to the topic under study.

It is recognized that there are several important themes and aspects in the joint judgment of ADO 26 and MI 4733 that deserve attention, but this work concentrates on those related mainly to the Separation of Powers and the democratic deficit in the actions of the Judiciary.

From the initial brief, the petitioner asked for homophobia and transphobia to be included in the ontological-constitutional concept of racism, based on the Ellwanger case (HC82.424/RS), consequently criminalizing these behaviors as racism under Article 5, XLII of the Federal Constitution. In addition, a request was made for these behaviors to be classified as specific crimes by judicial decision, in their atypical function, given the Legislative's inertia, and for various behaviors related to homophobia and transphobia, such as offenses, homicides, threats, etc., to be classified under the Racism Law until effective legislative action is undertaken.

The Federal Senate, through its Presidency, provided information for the dismissal of the claim in order to safeguard "(...) criminal legality, the separation of powers and the independence of the Legislative Branch, confirming its legal-political competence" (Brasil, 2019, p. 454).

Reporting Justice Celso de Mello, in the first vote of the ADO 26 judgment, addressed several important issues and concepts involving the need to protect the rights of the LGBT group, but did not fail to discuss issues involving judicial legitimacy, Separation of Powers and democratic deficit, including making this argument in a specific topic entitled "Legal-constitutional impossibility for the Federal Supreme Court, by means of a judicial provision, to typify crimes and impose sanctions under criminal law".

From this perspective, Rosa Weber recognizes that it is not possible for the Supreme Court to produce criminal rules in true substitution for the National Congress, the same understanding shared by the rapporteur, who believes that adopting such a stance would be inadmissible, a clear transgression of the constitutional postulate of the separation of powers, as well as an offence against the principle of the reservation of law in matters of a criminal nature (Brasil, 2019, p. 61 and 369).

For Rosa Weber, the democratic constitutional regime depends on recognizing at least the political and institutional centrality of the legislature, an expression of the representative popular will, obtained through suffrage, which must serve as the basis of legitimacy for all political decisions (Brasil, 2019, p. 385).

In the same line of thought, Barroso points out that the Federal Supreme Court should be deferential towards the Legislative branch's political choices, and should only invalidate them if there is reasonable doubt that they are in breach of the constitutional text, or act in the event of Congress' omission in the face of a constitutional command that obliges it to act, especially when the protection of fundamental rights or the democratic order is at stake (Brasil, 2019, p. 286).:

> In this case, the two factors that extend the frontier of constitutional interpretation in relation to legislative powers are present: there is an unconstitutional omission and it is a question of respect for fundamental rights - to freedom, equality, integrity and the very life of people who are members of the LGBTI+ group, an undeniably vulnerable group, as even the most hardened conservative will recognize (Brasil, 2019, p. 286).

Barroso recognizes the three roles of a constitutional court: a) counter-majoritarian, which justifies the possibility of unelected members invalidating a law originating from a majority process; b) representative, when it meets the desires of society that have not been met by the majority process; and c) enlightenment, which is an exercise in the promotion of civilizational advances that cannot depend on the will of the majority (Brasil, 2019, p. 286-287).

3.1 Justification for the action of the court

Minister Luiz Fux justifies judicial action on three grounds:

> First, by adopting a language anchored in arguments that defend the normativity of the fundamental rights listed in their respective constitutions. Secondly, by legitimizing themselves with the aim of protecting political minorities from possible situations of tyranny arising from the majority political game. Thirdly, it aims to preserve the opening up of structural channels for political participation (Brasil, 2019, p. 411).

In short, it emerged from the analysis of the judgment under debate that the justification of the legitimacy of the Federal Supreme Court was based on the three grounds pointed out by Fux, even though his vote came after five votes in favor of the main request presented in the initial brief, with some variations and peculiarities, as will be seen.

On the basis of the clause preventing discriminatory treatment, which is eminently constitutional in nature, Celso de Mello justifies the Federal Supreme Court's role in the duty to ensure the integrity of this proclamation, in order to make a truly democratic society possible by upholding the full values of freedom full values of freedom, equality and non-discrimination (Brasil, 2019, p. 139). To this end, he recognizes that the judgment in question has an essentially counter-majoritarian function, highlighting the role of the Federal Supreme Court: to protect these minority groups against possible excesses of the majority, even if these occur due to omissive conduct, such as state inertia (Brasil, 2019, p. 177).

It is then based on a material conception of constitutional democracy to assert that the suppression, frustration and annihilation of fundamental rights, due to a majority principle, cannot be accepted under penalty of de-characterizing the very essence that qualifies the Democratic Rule of Law (Brasil, 2019, p. 178).

It is important to note that Justice Fux does not support a constitutional jurisdiction without limits - acknowledging the criticism that the Court faces for its protagonism - and affirms that Parliament is the hegemonic body in the democratic rule of law, however, for him, the role of the Judiciary is imposed when it comes to defending minorities against the violence of majorities, showing that strong judicial action is more legitimate if it observes the legislative omission that makes the effectiveness of a constitutional rule unfeasible (Brasil, 2019, p. 405 and 475), aligning with the Dworkian current of democracy.

Another point noted in Justice Luiz Fux's vote is that, for him, these issues are only brought before the Judiciary for the following reasons: a) unelected judges; b) judicial independence, which prevents external influences and leaves judges free from a social price to pay; and c) absence of fear of unpopularity or displeasure when defending expressive moral values in the defense of minorities (Brasil 2019, p. 406-407), arguments that, when considered in light of the analyzed criticisms, are responsible for the imbalance between constituted powers.

In a manner analogous to Fux, Celso de Mello recognizes that the normative force of constitutional principles and the decisive intervention represented by the strengthening of constitutional jurisdiction represent strong arguments for the legitimacy of this action by the Federal Supreme Court (Brasil, 2019, p. 182).

Celso de Mello observes that the Federal Supreme Court's legitimacy to act as guardian of the constitutional order is due to the sovereign will and

deliberation of the original constituent power itself, performing its institutional functions in a manner compatible with the limits set by the Constitution itself (Brasil, 2019, p. 184 and 186).

Also from this perspective, Alexandre de Moraes argued that the basic premise of the Constitutional State is the complementarity between Democracy (of the majority) and the Rule of Law, which enshrines the supremacy of constitutional norms, edited by the original constituent, in which the duty to respect fundamental rights and the mechanisms of judicial review are imposed to protect the minorities in addition to the majorities (Brasil, 2019, p. 253).

Consequently, the rationale for the legitimacy of the Federal Supreme Court's action can be found in the necessity to uphold and enforce constitutional principles and fundamental rights that have been violated by the omission of the State itself. Accordingly, a contemporary state where the effectiveness of these rights is not respected cannot be considered a truly democratic state (Brasil, 2019, pp. 255-256).

Along the same lines as Moraes, Rosa Weber lectures on the concept of democracy, which cannot be viewed in contemporary societies solely from the perspective of the majority principle, but also from the complementarity between unelected institutions (the Judiciary) and popular representative institutions (the Legislative), developing distinct and complementary functions for the optimal functioning of the rule of law (Brasil, 2019, p. 394).

In another line of thought, Alexandre de Moraes believes that in honor of the balance and harmony between the powers, the Federal Supreme Court is not allowed to set a deadline for the Legislative branch to act, or even to set an improper deadline - non-compliance with which would not impose measures to remedy the recognized omission - under penalty of rendering the judicial decision ineffective. On the other hand, the Constitution determines that the Court must act to inform Congress and, within reasonable hermeneutic limits, rule out the atypical nature of the various forms of prejudice contained in homophobic and transphobic conduct (Brasil, 2019, p.258-259).

Notably, for Moraes, in a Constitutional State of Law, it is not possible to remedy the constitutional omission by creating a new criminal type, or by applying an analogy *in pejus*, and to do so, he bases himself on the principle of legal reserve and the principle of anteriority, which imposes the need for a manifestation of will by popular representatives holding elective mandates, not ruling out the possibility of the Court acting through the technique of interpretation in accordance with the Constitution (Brasil, 2019, p. 259-263), which is also recognized by critics as a method capable of inflating the Court's activist stance.

3.2 The Legislator's omission

In relation to the argument of the Legislator's omission, Celso de Mello believes that it would be evident in view of the incrimination mandate provided for in Article 5, XLI of the Federal Constitution, which provides for the need for the law to punish any discrimination that attacks individual rights and freedoms, including the LGBT population. Thus, the National Congress is in clear violation of an indisputable legal obligation (Brasil, 2019, p. 77). The same interpretation is

evident in the votes of the majority of justices, including Luiz Fux (Brasil, 2019, p. 566), Gilmar Mendes (Brasil, 2019, p. 530) and Lewandowski (Brasil, 2019, p. 509).

It should also be noted that during the vote by the ministers in the case under analysis, the National Congress finally initiated a voting process (Federal Senate Bill No. 515 of 2017). The possibility of suspending the trials was put to a vote, however, the majority ultimately decided to continue (Brasil, 2019).

Regarding this, Fux acknowledged that the start of a legislative process would not be enough to rule out the final word of the Judiciary and the judicialization of the issue, arguing that sometimes voices and votes are not sufficient, because until the law is properly enacted, various mishaps can occur, such as a veto, which could lead to a lengthy process until the legislation comes into force (Brazil, 2019, p. 405). In the same vein, Justice Cármen Lúcia recognizes that attempts to process bills do not remedy the Legislator's omission (Brasil, 2019, p. 468).

Although the Federal Supreme Court's assessment of the legislative omission in ADO 26 seems to have prompted Parliament to unarchive previous legislative proposals, for Gilmar Mendes this would not remove the court's competence to analyze the demands (Brasil, 2019, p. 524). In this sense, the ADO proves to be, for Celso de Mello, a jurisdictional reaction authorized by the Constitution to prevent the discrediting of its text in the face of omissions by the State, fully justifying the intervention of the Judiciary (Brasil, 2019, p. 80 and 85).

In light of the aforementioned omission, Celso de Mello identifies and lists two possible hypotheses for remedying it: a) informing the Federal Legislature to adopt the necessary measures within a reasonable period of time; and b) immediate recognition that homophobia and transphobia, by interpretation in accordance with the Constitution, fall within the conceptual notion of racism, recognizing discriminatory and offensive behaviour against the fundamental rights and freedoms of the LGBT group as a crime (Brasil, 2019, p. 100).

Observe that the first hypothesis is the literality of the text of the Constitution, especially §2 of its article 103, which for Celso de Mello did not prove throughout the experience to be an effective measure, which is why he justified the immediate adoption in his vote of the second proposed solution, in the same sense that had already occurred in the Ellwanger case, that "the notion of racism is not limited to a concept of a strictly anthropological or biological order, projecting itself, on the contrary, into an openly cultural and sociological dimension [. ...]" (Brasil, 2019, p. 100-115). The same reasoning was used by other ministers, such as Rosa Weber (Brasil, 2019, p. 370) and Cármen Lúcia (Brasil, 2019, p. 474).

From another perspective, the Senate's argument that the Federal Supreme Court's decision would unduly broaden the scope of the Racism Law, transforming the judgment into an additive sentence and consequently violating the principle of separation of powers and subverting the constitutional system of checks and balances (2019, p. 133-101), was rejected by Celso de Mello who stated that his decision did not deal with the formulation of criminal types, nor with the imposition of criminal sanctions, which would be unfeasible from a constitutional perspective to be carried out by action of the Federal Supreme Court, but with a decision of

a strictly interpretative nature, thus rejecting the Federal Senate's claim in this regard (Brasil, 2019, p. 130 and 134).

3.3 Constitutional hermeneutics

For Celso de Mello, constitutional hermeneutics imposes on the Judiciary the duty to extract the maximum effectiveness from the values that structure the Constitution, giving them a meaning compatible with the objectives indicated in the Political Charter, and for this, he warns that "[...] the interpretation of the positive order, especially when carried out by the Judiciary, is not to be confused with the process of normative production" (Brasil, 2019, p. 126), and thus does not constitute usurpation of attributions.

Barroso also says that the concept of racism has undergone constitutional mutation, which according to him is a mechanism of informal modification of the text without formal changes, allowing, however, the transformation in the meaning and scope of its norms, which can result from a new perception of the law, according to the change in the time of the good and the just, also justifying his decision in the sense that the reinterpretation of the concept of race, is not to be confused with the creation of criminal conduct by judicial means, or else by analogy *in malam partem* (Brasil, 2019, p. 298-299).

Still on the hermeneutic method of interpretation according to the Constitution, Rosa Weber holds the view that, as long as the state of unconstitutional delay persists, the Racism Law should be applied to crimes committed with homophobic and transphobic motivation (Brasil, 2019, p. 372).

Alexandre de Moraes recognizes that the space for the Court's interpretation appears in the constitutional text itself, which expressly prohibits, in addition to prejudices of origin, race, sex, color and age, any other forms of discrimination (Brasil, 2019, p. 265), broadening the field of protection against forms of prejudice.

In the same sense, Fux recognizes that the Judiciary would not be creating a criminal type, but interpreting infra-constitutional legislation in accordance with the constitution, on racism in the light of homophobia, and thus, based on Federal Supreme Court precedents, ensures that race are made up of men of flesh and blood, and racism occurs against human beings, regardless of their faith and sexual orientation (Brasil, 2019, p. 406).

3.4 The losing votes and their arguments

The justices unanimously rejected all forms of discrimination and prejudice based on sexual orientation, including those who had their votes defeated, namely, Lewandowski, Toffoli and Marco Aurélio, with only the latter not recognizing the legislative delay. We will examine the arguments used in the losing votes.

In this sense, Justice Marco Aurélio begins his vote by stating that:

> Alongside the structuring of political power, the 1988 constituent assembly placed special emphasis on the discipline of fundamental rights, all of which revolve around the dignity of the human person. There is a political project for the immediate

> rescue of democracy, for medium and long-term social transformation and, above all, for the permanent affirmation of freedom and equality. There is much to be done. Ensuring rights is a permanent task. Making the Federal Constitution a living body is an uninterrupted institutional and democratic project (Brasil, 2019, p. 546).

Therefore, he recognizes that it is up to the Court to watch over the Constitution, with the aim of preventing it from being emptied by the omissive conduct of the constituted powers, the Executive and the Legislative, by means of the instruments brought in its own Text, which are the Injunction Mandate and the Direct Action for Unconstitutionality by Omission (Brasil, 2019, p. 546-547).

Although he shares the same view, Lewandowski attaches great importance to observing the principle of legal reserve, which imposes that only the Legislative Branch can criminalize conduct, and that it is essential to create a law in the formal sense in order to do so (Brasil, 2019, p. 512). Thus, he based his vote on a precedent from August 12, 2014, which analyzed the receipt of a complaint due to the alleged practice by a federal deputy of a crime under the Racism Law, when the First Panel of the Federal Supreme Court unanimously did not receive a complaint, in accordance with the vote of the rapporteur (Marco Aurélio), who recognized that the Law did not cover the crime of discrimination or prejudice arising from sexual orientation (Brasil, 2019, p. 512).

Lewandowski also invoked a precedent from the Second Panel of the Federal Supreme Court, which emphasized the need to respect the legal reserve, especially in relation to criminal matters, with recognition of parliamentary prerogatives (Brasil, 2019, p. 513).

At the international level, Lewandowski based his vote on the fact that the case law of the Brazilian Court only admits domestic law as a formal and direct source of criminal law rules, and emphasizes the importance of observing the principle of legality set forth in Article 9 of the American Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights (Brasil, 2019, p. 513).

In this way, it recognized the legislative delay, and the need to inform the National Congress to adopt the necessary measures, without setting a deadline, but, unlike the majority, it did not recognize the possibility of interpretation in accordance with the application of situations of homophobia and transphobia to the Racism Law (Brasil, 2019, p. 514).

Marco Aurélio, for his part, did not see the writ of injunction as an appropriate instrument for the relief requested in this case, considering that the existence of a subjective right of the community to criminalize conduct has not been demonstrated, based on the argument of the guarantee of equality provided for in Article 5 of the Federal Constitution. (Brasil, 2019, p. 552).

Part of this same conclusion was attributed to the handling of the ADO, on the grounds that this direct action was declaratory in nature, and that what was sought by the plaintiffs would be incompatible with this nature. Furthermore, Marco Aurélio believes that the plaintiffs are confusing the very delimitation of the scope of the Federal Supreme Court's action in relation to the other Powers,

in his words: "in which it yields to the recognition of a principle that is intrinsic to any State of Law that claims to be democratic: that of the reservation of law in criminal matters." (Brasil, 2019, p. 552).

Therefore, based on strict legality, the interpretation of the Constitution in criminal matters would not allow the Court to empty the literal meaning of the text by supplementing criminal types. Marco Aurélio goes on to say that the Racism Law does not deal with discrimination or prejudice arising from sexual orientation, and there is no room for exegetical interpretation beyond the strict, that is, broader than that linked to the limits of the text, under penalty of usurping the competence of the National Congress (Brasil, 2019, p. 553-554).

Marco Aurélio also warns that allowing judicial interpretation in the application of criminal laws ends up replacing the delimitation of the scope of the criminal type by the law in the strict sense, to the scope through the subjectivism of the magistrates in the exercise of their functions, a flagrant violation of legal certainty and the prior delimitation of the conducts reached by the legal text (Brasil, 2019, p.554).

In this context, he concludes his vote by saying that he sees no warrant for criminalization on the part of the Constitution, and thus does not recognize the legislative omission in this case, and furthermore, that the criminalization of conduct must be carried out in another part of the Three Powers Plaza, not in the Plenary of the Court, and the omission cannot be supplanted by an extensive interpretation of legislation in force (Brasil, 2019, p. 556).

For his part, Dias Toffoli gave a brief opinion, saying that regardless of the dissent, all the justices repudiated discrimination, hatred, prejudice and violence for reasons of sexual orientation, and stated that he would to follow the dissent, in the sense of the opinion given by Minister Lewandowski.

It is important to note that some of the arguments presented in the dissenting opinions were also employed by researchers who align with the tenets of majoritarian democracy and with the theoretical framework put forth by Jeremy Waldron to critique the Court's ruling. These include critiques of the Court's competence, the necessity of parliamentary debate, and adherence to the principle of legality, particularly in criminal matters (Oliveira, 2020). It is noteworthy that Braga (2019), Portilho, Gonçalves, Caldas (2020), Gomes and Bolwerk (2022) have echoed these points. Conversely, some critiques have highlighted the inadequacy of criminal measures in addressing the structural issues of homophobia and transphobia in Brazil (Corbo, 2019), arguing that more than merely creating laws, effective protection will only be achieved through education (Gonçalves, 2020).

CONCLUSION

In the sense of the majority of the votes of the justices who recognized the constitutional criminalization order, we begin by reflecting on the following question: if Congress decided and legislated that acts of violence and prejudice against homosexuals and transsexuals should not be punished, or imposed trivial penalties by law, could the Court rule on an ADO? Certainly not. Would an ADI be the right way to go? If the ADI were upheld, would the legislative vacuum return?

It should be noted that regardless of the scenario of legislative omission, the necessity for the substantive protection of fundamental rights and human rights constituted the primary rationale invoked by ministers to justify the interpretative approach adopted. This stance of the Court indicates the adoption of a different conception of democracy from that coined in the liberal and contractualist movements of the early 17th century, approaching a Dworkian conception of democracy.

As seen in the Second Chapter, Waldron (2010, p. 157), a great defender of the concept of proceduralist and majoritarian democracy, admits judicial review in exceptional circumstances, and cites as examples the case of dysfunctional legislative institutions, corrupt political cultures, or the legacy of racism or other forms of endemic prejudice, warning that judicial review should be for a limited period.

An analysis of the ADO 26 and MI 4733 judgments showed that the majority of the justices recognized the scenario of unconstitutional omission by the legislative institution, the legacy of racism, embodied in a concept that encompasses homophobic and transphobic conduct, as well as endemic prejudice, in the sense of the examples given by Waldron.

In the same way, the majority of the Justices recognized the need to apply the Racism Law, in the sense of covering homophobic and transphobic acts as punishable conduct, until the National Congress legislates on the matter, also taking into account the temporary nature of the judicial action imagined by Waldron, considering that the judicial decision would expire upon the creation of a rule by the Legislative House.

Conversely, it is imperative to acknowledge the numerous deliberations within the Court regarding the imperative of respecting the principle of separation of powers, the reserve of law for the creation of incriminating norms, the potential democratic deficit in the Federal Supreme Court's actions, including divergence in the judgment at the end of the action (Lewandowski, Marco Aurélio and Dias Toffoli).

The research findings indicated that although the majority of ministers acknowledged the necessity to adhere to the principle of Separation of Powers and the legal reserve, they did not perceive that the Court would be encroaching upon their authority. This was because they would be employing the exegetical technique only to include homophobic and transphobic conduct within the concept of racism, without creating law or drawing an analogy. Conversely, the Justices were unable to provide a rationale for the application of this interpretative method in the face of criticism regarding its control.

Thus, the ministers' decisions in the judgment of ADO 26 and MI 4733 to consider homophobic and transphobic conduct as a crime, were based on two main factors: a) a material conception of democracy; and b) the need for the Court to defend fundamental rights in cases of legislative omission; failing to face criticism regarding the method of constitutional interpretation and considering its legitimacy as a universal dogma, confirming the initial hypothesis of this research.

In this way, considering the existing tension between different conceptions of democracy as viewed through the observer's lens, and the positive aspects of

each democracy approach discussed in this research, it is concluded, in Robert Dahl's assertion (2005, p. 31) that no fully democratized global system exists. Therefore, democratic mechanisms that enhance the quality of democracy should be pursued. Examples include judicial accountability and a preference for democratic deliberation, both in the dialogue between the branches of government and in effective popular participation. Future research must explore these topics.

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