



## LGBTI Constitutionalism: a bottom-up approach to constitutional interpretation in Brazil

Constitucionalismo LGBTI: uma abordagem desde abaixo da interpretação constitucional no Brasil

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**RESUMO:** O artigo desenvolve uma análise da proteção constitucional dos direitos LGBTI no texto positivo brasileiro. A partir da perspectiva da legalidade cosmopolita subalterna, questiona se a Constituição Brasileira de 1988 protege de maneira satisfatória as pessoas LGBTI. Para responder ao problema, a investigação foi conduzida majoritariamente por meio da aplicação da técnica de *survey*, a partir da qual organizações da sociedade civil foram questionadas acerca de seu entendimento ideal de proteção. Após a análise, concluiu-se que a proteção fornecida pela Constituição brasileira é insuficiente, tendo em vista a ausência de diversos direitos específicos básicos, na visão do próprio movimento LGBTI. Além de concluir que a superação da discriminação contra LGBTI deve ser conquistada por meio da combinação de vários campos de conhecimento, como direito, educação e saúde.

**Palavras-chave:** Direito LGBTI. Orientação Sexual. Identidade de Gênero. Direito Constitucional.

**ABSTRACT:** The paper draws an analysis of the constitutional protection of LGBTI rights in positive text in Brazil. From the perspective of the subaltern cosmopolitan legality, it interrogates whether Brazil's 1988 Constitution protects satisfactorily LGBTI people. To

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answer the problem, the investigation is conducted mainly applying survey technique, through which civil society organizations are inquired regarding their understanding of an ideal protection. After the analysis, it concludes that the protection provided by the Brazilian constitution is insufficient, given the absence of several basic specific rights, in the view of the LGBTI movement itself. It also concludes that the overcome of discrimination against LGBTI has to be accomplished through the combination of various fields of knowledge, such as law, education and health.

**Keywords:** LGBTI Rights. Sexual Orientation. Gender Identity. Constitutional Law.

**SUMÁRIO:** INTRODUÇÃO; 1 A LEGALIDADE COSMOPOLITA SUBALTERNA; 2 METODOLOGIA E ANÁLISE DO SURVEY; 2.1 Direitos e justificativas; 2.2 A (falta de) proteção constitucional dos direitos LGBTI; 2.3 As causas do status de proteção constitucional; 2.4 Em busca de alternativas; CONCLUSÃO; REFERÊNCIAS.

**SUMMARY:** INTRODUCTION; 1 THE SUBALTERN COSMOPOLITAN LEGALITY; 2 METHODOLOGY AND SURVEY ANALYSIS; 2.1 Rights and justifications; 2.2 The (lack of) constitutional protection of LGBTI rights; 2.3 The causes of constitutional protection status; 2.4 In search of alternatives; CONCLUSION; REFERENCES.

## ▪ INTRODUCTION

Although controversial, the Brazilian Constitution of 1988 can be placed in the movement known as the New Latin American Constitutionalism (NCLA)<sup>3</sup>. Leonardo Avritzer (2017, p. 19-42) points out that the NCLA has three main characteristics. These would be: 1) the strong expansion of rights, that is, constitutions with broad substantive texts; 2) the expansion of forms of participation, mainly through democratic mechanisms of direct and indirect popular participation; and 3) the exercise of a new role by the judiciary. In this sense, the author indicates that this new form of constitutionalism is distinguished by the great extension of recognition of rights to historically oppressed categories, advancing, for example, on the protection of traditional communities and women.

Nonetheless, while a breakthrough in protecting oppressed collectivities can indeed be seen, this new constitutional movement seems to have ignored the demands of lesbian, gay, bisexual, trans and intersex (LGBTI) people<sup>4</sup>. The Brazilian Constitution not only fails to mention sexual orientation and gender

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<sup>3</sup> Some authors indicate that the 1988 Constitution lack enough democratic legitimacy to be understood within the NCLA, given the influence of politicians that supported the previous dictatorship in the constituent assembly. In this sense, see: (PASTOR; DALMAU, 2010). However, we understand that the Brazilian Constitution has enough similarity to the following ones to be placed at least in an early stage of the movement, as highlighted by: (FAJARDO, 2011).

<sup>4</sup>Only Bolivia and Ecuador have few constitutional provisions regarding the matter and they are yet insufficient. See: (LELIS, 2018).

identity in the role that prohibits discriminatory practices, but also constructs a deeply heteronormative text in the sections referring to family possibilities, expressly indicating the stable union between "man and woman".

Moreover, it must be noted that the absence indicated is not due to a mere unwilling negligence. As was the case in several other Latin American countries, the Brazilian LGBTI movement (back then, mostly homosexual movement) worked intensely in the Constituent Assembly, trying to convince the constituents to include the prohibition of discrimination based on "sexual choice" and, later, "sexual orientation" in article three of the Constitution (SIMÕES; FACCHINI, 2009, p. 122). In fact, some of the most progressist legislators heard the call and proposed several amendments to insert the term in the text. However, given the absence of descriptive (and a proper substantive) LGBTI representation in the Assembly and the majority of conservative (when regarding sexuality) parliamentarians, the proposal was rejected several times, based on extremely homophobic arguments. The issue was the subject of a variety of amendments (precisely 86 of them), either to include or exclude "sexual orientation" or "sexual behavior" from article three of the Brazilian Constitution. Among those, at least 60% did not have the intention of excluding the protection of gays, lesbians and bisexuals from discrimination (LELIS, 2019).

Thus, in the absence of express provision, LGBTI persons have depended on the judiciary to guarantee the protection of their constitutional rights, which entails great legal uncertainty regarding the fulfillment of their dignity. In this sense, the present work, based on the theoretical framework of the "subaltern cosmopolitan legality", proposed by Santos and Rodríguez-Garavito (2005), interrogates whether Brazil's 1988 Constitution protects satisfactorily LGBTI people. That is, if the abstract constitutional provisions are capable of guaranteeing the concretization of their rights. The initial hypothesis indicates that it does not, given that the recognition of basic rights has depended on the endorsement of the judiciary via judicial review.

Therefore, using an inductive method of investigation and applying the techniques survey analysis and literature review, a qualitative empirical research was conducted in order to try and answer the posed problem. The literature review had an important role in the comprehension of the theoretical framework and also important issues regarding LGBTI rights. On the other hand, the survey was used to capture the perception of the LGBTI movement about the status of the

constitutional protection of their rights, favoring a bottom-up approach to constitutional law. Thus, the general objective of the work was to verify the sufficiency or not of the constitutional protection of LGBTI rights from the perspective of social movements. In order to accomplish that, this paper is distributed in the following sections: 1) section one overly presents the idea sustained by the theoretical framework of subaltern cosmopolitan legality and its implication in constitutional interpretation; 2) after, section two draws upon the methodological aspects and describes the results of the survey analysis.

## 1 THE SUBALTERN COSMOPOLITAN LEGALITY

It would be too pretentious and arbitrary to label a given legal order as protective or not based solely on the view of the researcher or merely on the literature focused on this issue. Thus, within the proposal of this work, it is essential to support the construction of a transformative constitutionalism (*desde abajo*), which acts in a counter-hegemonic way and from the perspective and protagonism of the LGBTI themselves. After all, who better than the victims of violence themselves to say whether they feel protected or not? Or, what should or should not be covered by the constitutional text in order to protect its main interests?

In this sense, it is important to prioritize a bottom-up approach in the construction and interpretation of the law. Or, in the words of Santos and Rodríguez-Garavito (2005), a "subaltern cosmopolitan legality". In addition to this discussion, Boaventura de Sousa Santos (2010) asserts that in order to achieve the transformation of our present model of state and society, it would be necessary an appropriation of the hegemonic political instruments by those marginalized classes and groups. Thus, he classifies the counter-hegemonic use as contrary to the dominant ideology and that, in order to sustain itself, "needs [...] a permanent political mobilization that, to be effective, has to operate from inside out the institutions" (SANTOS, 2010, p. 60). In the constitutional field, the author characterizes that such mobilization would take place in a transformative constitutionalism *desde abajo*, opposing to the modern Eurocentric and liberal constitutionalism (SANTOS, 2010).

In this way, the perspective of subaltern cosmopolitan legality seeks to

palce victims in evidence, allowing them, who are excluded from the hegemonic (top-down) paradigm, to reshape institutions in order to be included and recognized, establishing a pattern that will no longer be hegemonic, but counter-hegemonic. It is to say: "subaltern cosmopolitanism calls for a conception of the legal field suitable for reconnecting law and politics and reimagining legal institutions from below" (SANTOS; RODRIGUEZ-GUARAVITO, 2005, p. 15).

Moreover, such an approach also aims to overcome the liberal paradigm of individual autonomy by incorporating alternative forms of legal knowledge. That is, legal interpretation that extrapolate the usually authorized interpreters of law and that come to understand the legal field as constituted of "elements of struggles that need to be politicized before they are legalized" (SANTOS; RODRIGUEZ-GUARAVITO, 2005, p. 16).

A lot of these factors were present in most of the Latin American constitutional processes. This has resulted in broadly transformative texts, especially as regards the rights of indigenous and traditional peoples, women and the environment. However, as previously observed, the same did not occur for the LGBTI population. And that needs to be changed through the protagonism of the affected individuals, which is illustrated in the construction of a LGBTI constitutionalism as opposed to the hegemonic heteronormative standard.

It is important to note that this counter-hegemonic action should not only occur at the time of the legislative creation of the law, but also in its interpretation. In this way, it is proposed an extension of the idea of pluralist interpretation conceived by Häberle (2002). The German author advocates for overcoming what he termed a "closed society of interpreters" (marked by the state monopoly of this function through judicial action) for an open society that would embrace a multiplicity of interpretive actors, beyond those traditionally authorized and legitimized. According to him, "everyone who lives in the context regulated by a norm (...) is indirectly, or even directly, an interpreter of this norm" (HÄBERLE, 2002, p. 15). Therefore, all citizens that experience or, in many cases, feel their absence, would be pre-interpreters or co-interpreters of the constitutional order.

The construction of a pluralistic constitutional hermeneutics is essential for the diversification of interpretation and for the amplification of interpretative legitimacy. However, it does not seem to be enough to be characterized as a bottom-up approach. Hence, we argue that when it comes to violation of human

and fundamental rights, those who live the norm (or their absence) should not only act as co-interpreter, but as the main interpreter and the most (if not the only) legitimized for such interpretation. Thus, the State function would be to convey the interpretation of the affected individuals. And this not only in the arenas formally legitimized to exercise jurisdiction (through, for example, *amicus curiae* institute and public hearings<sup>5</sup> or even strategic litigation), but also in their interpretation in other fields, such as in scientific, doctrinal, and political debates. That is, to hear the voice of those who really should be heard, for they are juridically and materially affected by the law.

Bearing this purpose, this paper is dedicated to the construction of the constitutional interpretation of Brazilian LGBTI movements about the protection or not of their rights by the constitutional text. Thus, making use of self-completing survey, it was sought not only to draw an ideal protective pattern (to be compared with our constitution), but also to understand the perception of the movement on the current LGBTI rights scenario in Brazilian constitutionalism, its causes and possible alternatives for its change.

## 2 METHODOLOGY AND SURVEY ANALYSIS

Epstein and King (2013, p. 47-56) highlight "replicability" as an essential rule to be observed by the researcher in empirical investigation. Thus, it is crucial to expose, in a detailed way, how the data used in the research was collected. In this sense, the authors point out that "good empirical work adheres to the pattern of replication: another researcher must be able to understand, evaluate, base on, and reproduce the research without the author providing any additional information". Therefore, this section is devoted to the description of the form of application, as well as to the analysis of the survey.

As already mentioned, one of the objectives of this research is to allow the construction of a constitutional bottom-up interpretation, with the leading role of LGBTI people. In this sense, considering the difficulty of delimiting the population (due to several factors, such as the condition of anonymity in relation to the non-heterosexual orientation or the non-cisgender condition), it was

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<sup>5</sup>It is important to note that these institutional means of legitimizing judicial decisions have often been used as mere formal legitimators, since there are few instances in which magistrates actually consider what has been raised by these actors. See: (ANDRADE, 2015).

considered that the best way to reach the needs of this population would be through organizations that are directly engaged in this issue. In addition, the use of organizations is even more propitious due to the profile of its members, usually more accustomed to the "legal language" due to the experience of activism. And also, to allow a more collective and less subjective perception of what the priorities of the LGBTI interests would be, while increasing the possibility of obtaining more inclusive results, attentive to the plurality of LGBTI experiences.

Regarding the instrument used to produce the data, although the survey is more usually linked to the execution of quantitative investigations, the choice was made due to the physical and financial limitations of this investigation. As the research cut is broad, covering all Brazilian states, it would not be possible to conduct interviews with representatives of each of the organizations at their headquarters. In addition, performing video-call interviews might not be acceptable to all organizations, or even impair the perception of information due to connection failures. Thus, the survey proved to be the best methodological option.

For its structuring, the survey was divided into four sections, predominantly open-ended questions, to enable maximum information capture and, also, a lower degree of influence on responses. The first section aimed only at obtaining general information about the organization, such as name, country and city of headquarters, as well as contact and e-mail. Then, in the second section, it was asked what rights the organization considered that, given their importance, should be expressly provided for in the Constitution, regardless of the current reality of the constitutional text. A gap was provided for inclusion of up to five rights and a justification for each of them, being mandatory only the inclusion of at least one right.

In the next section, the only one that had a closed answer inquiry (the options given were only "yes" or "no"), the question was: "Is constitutional protection of LGBTI rights satisfactory in your country?". Finally, the fourth section varied according to the answer given in the third, asking: why the organization considered the protection satisfactory or not; what they believed were the reasons for the protective status; and, in cases where an unsatisfactory protection had been identified, the question of what the means of solving the problem might be.

The organizations to which the survey was submitted were randomly

selected through a Google search. Thus, to compose the sample universe, the term "LGBT organizations Brazil", in Portuguese, was typed in the field of the Google search engine.

For the selection of organizations, only the first two pages of results shown by the Google search engine were taken into account. Both because they are considered the most relevant results and because, from the third page on, there were usually no results consistent with the research. As Regina Facchini (2005) points out, the profile of LGBTI organizations is quite diverse (ranging from collectives, NGOs and other forms of structuring) and this diversity has also proved true in the results found. Thus, all organizations that had some form of virtual contact (e-mail, facebook etc.) and that, therefore, could receive the survey to be answered, were selected. It is important to note that access to an organization's website only, in many cases, ended up containing contacts from several others; these were also selected for submission.

In the search following the above mentioned method, seven LGBTI organizations were found. Nevertheless, in order to obtain a broader sample of the country, a list of organizations working with the LGBTI cause in Brazil available in the "TODXS App", a mobile application created by the NGO TODXS, was also used. In the app, in addition to the list of organizations, there is access to all the Brazilian legislation that could be useful to LGBTI persons, as well as a mechanism to report of cases of LGBTI-phobia<sup>6</sup>.

The survey was sent to a total of 72 organizations, from which 10 responded. The survey was emailed to all the organizations in January 2018, with a deadline for response until mid-February. Later, they were resubmitted in February, extending the deadline for response until early March.

Regarding the method, the examination of the data was guided by a tripartite qualitative analysis of empirical documentation proposed by Mario Cardano (2017). The analysis method proposed by the author includes the following steps: segmentation, qualification and individuation of relations. Segmentation refers to the establishment of markers, "whose function is to identify relatively homogeneous segments to be subjected to comparison within empirical materials" (CARDANO, 2017, p. 273). In this sense, segmentation followed the division of questions in the survey, dividing the examination into four

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<sup>6</sup>More information regarding the app available at: <https://www.todxs.org/app/>. Acesso em: 13 March 2019.



categories: rights and justifications; the sufficiency or not of the protection and the reason for this characterization; the causes of sufficient or insufficient protection; and the suggestions for overcoming the lack of protection, in the cases in which they applied.

Further, the qualification stage is conceptualized by Cardano (2017, p. 293) as the "assignment of one or more properties to a given segment of empirical documentation, useful for its characterization". In this way, the technique allows one to deepen the analysis dimension of the document by means of its greater specification. Therefore, for the qualification of the segments, it was used the "template analysis" proposed by Nigel King (2012). The method consists in the composition of an analytical grid from the characterization of the identified elements in order to enable its comparison. The use of template analysis can be based on two main approaches: inductive (data-driven), in which the grid is composed by categories that were observed in the analysis of the material, or deductive (theory-driven), in which the data found in the analyzed document is allocated into predefined categories. In this investigation, all the data was inductively classified. Thus, all the categories were established from the content of the provided answers.

Finally, the individuation of relations consists of the analysis from the comparison of qualifications or even of the separation of a certain qualification for analysis. Thus, in this last stage, the analysis was performed through the cross-examination of the qualifications and also of the deviant cases, unraveling their distinction in relation to the others.

## 2.1 Rights and justifications

As already mentioned, the survey contained gaps to indicate up to five LGBTI rights that the organization considered essential and that should be expressly stated in the constitutional texts, each accompanied by a gap to justify the reason for choosing that right. The intention was to create an ideal parameter of protection that could be compared with the constitutional text. As has also been pointed out, it was mandatory to answer at least one right, the other four being optional.

From the analysis of the answers, it was verified the filling of 44 different

rights. Inductively, each of the rights suggested were embedded in 14 different categories, in some cases the answer being divided into two different categories. In Table 01, it is possible to identify the different appearances of each categorization in the survey and also to comprehend how each answer was labeled.

**Table 01 - Rights as presented in the survey and its categorization**

<b>Right</b>	<b>Mode of Appearance</b>
<b>Right to non-discrimination</b>	non-discrimination; right to non-discrimination; right to non-discrimination on grounds of sexual orientation and gender identity; against discrimination
<b>Right to work</b>	<b>Education and work</b>
<b>Right to a dignified life / security</b>	right to citizenship; State protection of the LGBT population; right to life safety; safety; [protection of] LGBTs in prison
<b>Equal rights and opportunities</b>	Ensuring equal treatment mainly of public services; the right to equality and citizenship; civil rights; <b>affirmative policies for transgenders</b> ; right to complete isonomy like that of other heterosexual citizens
<b>Right to gender identity</b>	Gender Identity Law known by João Nery; <b>the right to fulfill the custodial sentence according to gender identity and in an environment free of discrimination</b> ; <b>social name</b> ; right to change registration (name and sex); gender identity law; civil identification; right to free social expression of gender identity and sexual orientation
<b>Right to marriage and civil union</b>	right to equal marriage; equal marriage; <b>right to civil marriage and adoption by non-heterosexual couples</b>
<b>Right to health</b>	full access to health; quality health; right to health; <b>prevention of sexually transmitted infections</b> ; the guarantee of full LGBT health

<b>Criminalization of LGBTI-phobia</b>	criminalization of LGBTI-phobia; criminalization of LGBT-phobia
<b>Right to housing</b>	Home
<b>Right to plural education</b>	access to education; education for diversity; <b>education and work</b>
<b>Right to maternity / paternity / adoption</b>	adoption by same-sex couples; adoption; <b>right to civil marriage and adoption by non-heterosexual couples</b>
<b>Depathologization of transsexuality</b>	transsexuality is not a disease
<b>Right to gender affirming surgery and hormonal therapy</b>	right to reassignment and hormone therapy; the hormonal and surgical treatment in all cities with more than 300 thousand inhabitants
<b>Right to information about sexuality</b>	right to correct information about homosexuality

Source: created by the author.

The appearances highlighted in red correspond to those in which two rights were placed jointly in the answer. Thus, it was necessary to split them for better categorization. On the other hand, those marked in orange refer to appearances that, although allocated into larger labels, are so specific that they could have received an autonomous category. What was not done in an attempt to allow a better comparison and individuation of relations. In Table 02, it is possible to observe the frequency of appearance of each of the categories in the survey.

**Table 02 - Frequency of Appearance of Rights**

<b>Right</b>	<b>Frequency</b>
<b>Right to non-discrimination</b>	<b>5</b>
<b>Right to work</b>	<b>1</b>
<b>Right to a dignified life / security</b>	<b>5</b>

Equal rights and opportunities	5
Right to gender identity	7
Right to marriage and civil union	4
Right to health	5
Criminalization of LGBTI-phobia	3
Right to housing	1
Right to plural education	3
Right to maternity/paternity/adoption	3
Depathologization of transsexuality	1
Right to gender affirming surgery and hormonal therapy	2
Right to information about sexuality	1

Source: created by the author.

A quick examination of the previous table allows us to affirm that the protection currently existing in the Brazilian Constitution is definitely far from the ideal scenario, as pointed out and expected by the LGBTI movement. Selecting only the four most frequent rights (non-discrimination, equal rights and opportunities, marriage and gender identity), it is possible to emphasize that the Constitution has no specific provision regarding the LGBTI population, not even its most basic rights. This shows how much the constitutional text still need advancement for the full protection of LGBTI and their recognition as human beings and subjects of rights to be achieved. Thus, these data help to advance the understanding of the problem initially raised, pointing to the confirmation of the hypothesis formulated.

For a better understanding of the reasons why organizations consider such rights to be so essential, the justifications presented for those rights with a frequency higher than 4 (marked in green) have been cross-analyzed. In addition, it was also decided to examine the justifications for the right to maternity/paternity/adoption (marked in yellow), because of its proximity (and

sometimes even confusion) with the issue of marriage and civil union.

With regard to the right to non-discrimination, two groups of justifications stand out. The first is based on the history and intensity of discrimination as well as the number of LGBTI murders. The second grouping of justification refers to the symbolic weight and visibility occasioned by this inclusion, as well as to the legal substrate it would provide. In this sense, the following response from one of the organizations is worth mentioning:

The Federal Constitution foresees as fundamental objective of the Republic the promotion of the good of all, without prejudices of origin, race, sex, color, age and any other forms of discrimination (article 3, IV). Inclusion in this role of the prohibition of discrimination based on sexuality and gender identity would not create legal instruments for the eradication of such discriminatory practices, but would provide express constitutional support for the subject, in addition to its deduction from constitutional principles.

Turning to the analysis of the category "right to a dignified/safe life", two groups of justifications also emerged. The first, and more recurrent, sought to emphasize the numbers of violence and murders against LGBTI people in Brazil, perpetrated because of their sexual orientation and gender identity. They also distinguish the cruel features underlying the homotransphobic crimes. From another angle, it has been pointed out that the persecution of LGBTI prevents them from exercising their dignity and from enjoying basic rights enshrined in the constitutional text for all citizens.

The next category whose justifications have been analyzed ("equality of rights and opportunities") is closely linked to the right to non-discrimination. However, these two rights have been categorized separately, given that they appeared separately in several answers. This second analysis of justifications has also given rise to three distinct groups of arguments. The first emphasizes that this category includes all rights denied to LGBTI persons. On the other hand, the second group asserts that this is one way of ensuring the inclusion of LGBTI in services provided by the State. And finally, the third set of justifications points out that this would be the way to remove the precariousness of LGBTI lives.

Moving forward to the analysis of the right to gender identity, two main justifications have been identified. The first one refers to the need to respect the autonomy of trans people to be able to identify themselves in the way they want and without impositions by society. The second group, on the other hand, reflects

that gender identity is the gateway to the realization of all other fundamental rights for trans people, guaranteeing their dignity and mitigating their vulnerability before the State, which does not recognize them as citizens.

Still in relation to this category, two more highlights deserve to be made. The first refers to a very specific right pointed out by a Brazilian organization, which affirmed the need for "the right to serve the criminal sentence according to one's gender identity and in an environment free of discrimination". In its justification for the indication of such right, the organization points out that

currently only 8 male prisons in Brazil have galleries for trans women, transvestites and gay men. The custodial sentence must be maintained in a safe environment and, in the case of the LGBT population, the creation of specific wings, galleries or spaces for their permanence in the face of the constant threat and injury to the rights they suffer in masculine prisons and penitentiaries.

The passage draws attention to an intersection between the oppressions suffered by the incarcerated population and the trans persons, amplifying the suffering and violation of the rights of these people.

On the other hand, the second point concerns the procedure for rectification of register. One of the Brazilian organizations highlighted the need for the change to take place through administrative and non-judicial channels<sup>7</sup>. This is extremely important, given the difficulty of access to justice faced by LGBTI and the slowness of judicial procedures.

Regarding the demand for the fulfilment of the right to health, the organizations focused their justifications on two central motives. The first of these concerns was the lack of capacity of health professionals to deal with the specific demands of LGBTI persons, what is also linked to the frequent discriminatory acts perpetrated by professionals in this area with respect to such persons. In addition, it was highlighted that the absence of programs to "promote, protect and preserve" the LGBTI health plays an important role in the ineffectiveness of combating sexually transmitted infections among this population. Sex education, for example, when present in schools, has a biased approach that is notably heteronormative.

Finally, the analysis of the last two selected categories brings up some new reflections. A common ground between the two groups of rights (the right to

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<sup>7</sup>The answers were provided before the final ruling on the *Ação Direta de Inconstitucionalidade (ADI) 4275* by the Brazilian Supreme Court.

marriage and civil union and the right to maternity, paternity and adoption) is the importance of the normative provision of these values embracing the LGBTI population. That is, regardless of the conquest of this guarantee through the judicial system, it is essential the explicit and textual provision. Such concern is extremely relevant. Not only because the textual inclusion of the right has considerable symbolic value, but also because it ensures a greater amount of legal certainty to these individuals, whom will no longer depend on volatile judicial interpretations.

Further analysis reveals that the category of right to maternity/paternity/adoption has all of its justifications based on the need for equality of rights and recognition of the existence of a plurality of relational arrangements. On the other hand, the arguments related to the right to marriage and to civil union are more diverse, differentiating themselves into three groups. The first one relates to the possibility of guaranteeing visibility to same gender relationships, taking them from the private sphere and elevating them to public life. Differently, the second answer concerns the possibility of “stabilizing” this right through its prediction in the constitutional text, meaning that it would not be revoked by the mere approval an ordinary legislation. Lastly, the most recurrent argument refers to the rights derived from marriage or civil union, institutions that usually are a necessary step in most jurisdictions to the guarantee of various other civil rights.

In short, it is possible to conclude that all justifications are based on the need to recognize LGBTI persons as lives that matter and subjects of rights. They seek to realize their dignity and guarantee access to the same rights as heterosexuals and cisgenders. Rights that are historically and contemporaneously denied to LGBTI.

## 2.2 The (lack of) constitutional protection of LGBTI rights

The second segment to be analyzed also refers to the second section of the survey. It was asked whether the organizations considered the constitutional protection of LGBTI rights in their country sufficient or not. In addition, they were asked to state the reasons why they characterized the protection as sufficient or insufficient. The examination of the responses indicated a broad positioning with

regard to the lack of protection. All the organizations answered that the constitutional protection in Brazil is insufficient.

Turning to the cross-analysis of the motives pointed out by those who consider the protection of their country insufficient, five different reasons have been identified: 1) lack of access of LGBTI to basic rights; 2) advances in the concretization of rights based only on judicial decisions or administrative measures; 3) privileges that heterosexual and cisgender people have in our democratic system; 4) high rate of LGBTI deaths in Brazil; and 5) the inexistence of the crime of homotransphobia. Regarding the first point, the following answers stand out:

Issues such as sexuality, gender and gender identity are not explicitly addressed in the Brazilian Constitution, which, along with the absence of adequate infra-constitutional legislation, generates the LGBTI population's helplessness before the constitutional order.

The Brazilian constitution does not make in its text any mention of sexual orientation and gender identity, corroborating with the invisibilization process of the LGBTI + community. On the other hand, it reinforces traditional values of gender diversity in marriage (article 226, § 3, CF).

The second point raised refers to the risks and instabilities of a predominantly judicial protection. The lack of provision of specific rights in the constitutional text, allied to the composition of conservative legislative houses not open to the theme of sexuality and gender identity, led to a commitment of activists mainly in the judiciary, through strategic litigation. However, this approach poses a number of risks: not only the enforcement of the right is incomplete (due to the lack of regulation or coverage of all the nuances of the issue by judicial decisions), but also it generates greater legal uncertainty, because it depends on the interpretations promoted by a changing judiciary. In this sense, one of the Brazilian organizations stresses that the security and protection of LGBTI "depends very much on the interpretation and goodwill of the people who operate the state machine". This reflects, once again, the precariousness of the current panorama of recognition of rights to LGBTI people.

Moreover, that is exactly why this research focuses on the constitutional text itself, despite the existence of several important judicial decisions that recognize and affirm specific rights to LGBTI people (CARDINALI, 2018; VECCHIATTI, 2019; 2019a). Therefore, it means to highlight the importance of



specific positive rights as the ultimate protective safeguard. What does not imply that LGBTI people would not be protected by generical constitutional provisions, because they are (LELIS, 2019a).

Following, the third point raised is the structure of oppression carried by a cisheteronormative society, in which those who transgress the norm tend to be marginalized and undervalued. The fourth aspect, in turn, refers to the same factor that supported the initial hypothesis of insufficiency raised by this work: the dimension of the numbers of violence against the LGBTI population.

Finally, the last point concerns the non-criminalization of homotransphobia in the Brazilian legal system<sup>8</sup>. The idea of using the criminal system, a means of oppression and perpetuation of structural discrimination, to protect the interests of LGBTI is a controversial issue even among LGBTI activists and scholars. While appealing to criminal law can convey the seductive image that LGBTI lives are suddenly of importance to society, it must be borne in mind that not only this will not alter the perception of the majority of the population about such deviant identities and sexualities, but also it will act under an extremely limited and skewed scope, which already overwhelms black persons daily in Brazil.

That is to say: criminalization might only serve to imprison those whom the system already frames as transgressors before even any judgment. In this way, deep reflection is needed on its application, given that there are also good arguments, as highlighted by Rainer Bomfim e Alexandre Bahia (2019), for its adoption and its importance regarding the realization of dignity of LGBTI people.

### 2.3 The causes of constitutional protection status

In this penultimate segmentation, it was intended to ascertain which would be the factors that cause protective insufficiency. In this sense, it was possible to identify five different categories of causes. All of them are deeply connected and it is difficult to accurately trace what is encompassed by each. They are: 1) the formation of conservative legislatures; 2) the sociocultural heteronormative matrix present in Brazil; 3) the religious matrix of the country and its fundamentalist distortion; 4) the lack of education of the population in issues regarding gender and sexuality; and 5) the absence of dialogue between

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<sup>8</sup>The answers were provided before the final ruling on the *Ação Direta de Inconstitucionalidade por Omissão (ADO)n° 26* and on the *Mandado de Injunção n° 4733* by the Brazilian Supreme Court.

government and social movements.

The first cause refers directly to the political dimension of justice and to the idea of representation. Thus, since LGBTI persons cannot be elected and have access to the legislature, the chances that their real interests will be taken into account are proportionally lower<sup>9</sup>. This is aggravated by the composition of eminently conservative legislative houses, whose members, in addition to not having the experience of a LGBTI person, strive not to allow the advancement of their rights.

The two following causes refer to the heteronormative and religious sociocultural matrices, deeply rooted in our country. Although they constitute a separate group, they are directly related to the previous cause. And that is because it is precisely the existence of a heteronormative cultural tradition that, to a large extent, prevents the access of LGBTI people in positions of power (within public branches) and produces the conservative conformation of our legislative houses with respect to themes of sexuality and gender identity. Moreover, the great presence of religious actors in the legislative houses is one more factor that negatively influences the norm production on LGBTI issues. What we characterize as "religious fundamentalism" is, in fact, a form of distortion of religious values to support the violation of fundamental rights of LGBTI persons. And it is based on religious arguments that extremely conservative proposals have been legitimized (VITAL; LOPES, 2012). The maintenance of this reality and the difficulty of altering such mentality are directly related to the next causes examined, marked by the educational deficit.

As discussed, another cause highlighted was the lack of education of the population in the certain specific subjects. At this point, a key factor for advancing the realization of LGBTI rights is education. Without issues such as gender and sexuality being addressed from basic to higher education, there is no way to promote a profound change in the understanding of the general population about LGBTI issues. Prejudice, often driven by ignorance, must be countered by a broader debate and an education that deconstructs, mainly, biologically and religiously unduly naturalized and crystallized concepts in our society.

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<sup>9</sup>In empirical research conducted on the subject, Andrew Reynolds (2013) points to the existence of an association between the (even small) presence of out gay legislators and the approval of norms that advance on gay rights, given that the presence of gays in the legislature has a transformative effect on the vision and vote of their heterosexual colleagues.

The last group of motives is based on the same premise of this paper: the need to build the law from the bottom-up. That is, the unprotective framework regarding LGBTI rights is due to the lack of dialogue of public power with social movements. This is because, as already stated, it is the affected individuals who have greater legitimacy for the aid and the very creation of public policies. In this way, it is essential that both legislative, executive and judiciary turn their attention to the LGBTI movement and the organizations that represent it. In its response, one organization highlighted this point in relation to the Brazilian constituent assembly:

During the Constituent Assembly, despite concern for democratic debate, LGBTI+ groups had less influence on the content of the constitutional text. In the proceedings of the constituent, for example, with regard to art. 226, §3, there was a manifestation of a pastor for the express replacement of "stable union as a family entity" for "stable union between man and woman as a family entity", in order to avoid same-sex couples constituting a stable union. Since 1988, LGBTI+ groups have continued to struggle for the realization of their rights and the creation of protection mechanisms, but only recently some governments have begun to effectively address issues of sexual orientation and gender identity. In this sense, there is still a barrier that prevents dialogue between social movements linked to the cause and public power (still strongly linked to Christian values).

As we can see, the lack of dialogue tends from the public power itself and not from social movements. On the contrary, as identified by the survey, the LGBTI movement has striven to attain and influence public power in some way, seeking that its demands be at least heard and taken into account.

## 2.4 In search of alternatives

As we can see, the lack of dialogue tends from the public power itself and not from social movements. On the contrary, as identified by the survey, the LGBTI movement has striven to attain and influence public power in some way, seeking that its demands be at least heard and taken into account.

The last of the individualized segments for analysis sought to identify ways of overcoming the current paradigm of insufficient constitutional protection. To that end, organizations were asked how they believed that the insufficient protection could be addressed and overcome.

Exploring the answers given, it was identified that two main fields

encompassed most of the suggestions presented: legislative interventions/changes and educational policies. In a more specific way, five groups of solutions stand out: 1) legislative proposals; 2) elaboration of public policies; 3) changes in the educational framework; 4) conducting research related to the problems faced by the LGBTI population; 5) criminalization of LGBTI-phobia.

Regarding the legislative proposals, it was pointed the need to carry out advocacy with the legislative branch in order to affirm the fundamental rights of LGBTI persons, guaranteeing the status of citizens to these individuals. In addition, it was stressed the need for explicit inclusion of LGBTI rights in the constitutional text, as well as the "extensive interpretation of the principles of non-discrimination already envisaged to accommodate the protection of the LGBTI population".

In addition to the purely legislative approach, it was raised the need for the executive's elaboration and implementation of public policies directed to LGBTI, aiming to enforce the legal statutes. That is to say: it is not enough just the edition of a law or a constitutional norm, if it is not accompanied by a good public policy for its establishment and for the raise of awareness of the population.

In this sense, one of the most effective ways to change a sociocultural cisheteronormative context is in the restructuring of the educational system. This was pointed out by almost all organizations. A pedagogical-educational approach is needed not only to better inform individuals about all issues related to gender identity and sexuality, but also as a way of sensitizing and humanizing future legislators, public managers and judges. Without an interdisciplinary formation from basic to higher education, there is no way to completely change our homotransphobic reality.

The fourth proposal analyzed is aligned with the objective of this work. One organization highlighted the need to carry out investigations to produce data about the reality lived by LGBTI persons. As already pointed out, the scientific engagement in the theme is considered essential. Not only to provide arguments about the need to change the current paradigm, but also to deepen knowledge about a reality that in many ways lacks more reliable information. This is what this research has been trying to do. In this sense, the following answer, presented by one of the organizations, can be highlighted:

The first step to solving the lack of protection for the LGBTI+ community is the production of data that shows the relevance of the problems that this segment faces. In this way, it will be possible to inform the debate and to create a solid platform for the dialogue with public power and demand of these rights. In addition, the movement must organize itself to support LGBTI+ candidates and allies who will be able to influence the community agenda within the legislative and executive branches, contributing to the formation of legislation guaranteeing LGBTI+ rights and public policies to promote inclusion and combat violence.

Finally, it was suggested by another organization that the first step to change the current reality would be the criminalization of LGBTI-phobic practices. As already discussed, the issue of criminalization is extremely controversial, even among LGBTI, and should always be accompanied by a necessary critical insight from the penal institute. If criminalization is considered a way out (since it does not seem possible to rule it out at first), one must concurrently raise the discussion about the problem of structural discrimination in the criminal justice system in Brazil, as well as its use as *ultima ratio*, seeking to highlight what would be the legal situations that really deserve to be protected by this branch of law. Moreover, as Thula Pires (2012) points out, regarding the criminalization of racism, rules aimed at combating discrimination through punishment may lack effectiveness, since punitive institutions naturalize patterns of oppression and do not frame such acts of discrimination in the criminal conduct. Thus, understanding the best and most effective alternative, if criminalizing, also deserves reflection.

## ▪ CONCLUSION

Brazil is the country with the highest rates of LGBTI murders in the world. Although included in a constitutional movement marked by an extensive list of rights, the 1988 Constitution does not have any specific provisions regarding the protection of LGBTI individuals. In this sense, the present work investigated what should be the scope of the protection provided by the Brazilian Constitution, from the perspective of the social movements, favoring the construction of a right from the bottom-up and what could be called a LGBTI constitutionalism.

Based on the analysis, it was possible to conclude the evident protective insufficiency of our Constitution with respect to LGBTI persons, what was unanimously pointed out by all the entities that responded to the survey. In addition, the examination of the answers allowed to advance in the understanding

of the causes of the invisibility of LGBTI people in the constitutional text and also in the search of alternatives by which the present paradigm can be surpassed.

In this sense, it was also concluded that this overcoming should occur beyond the legal field, which has shown itself as extremely limited to achieve deep social transformation. Therefore, legal change needs to be articulated with actions in other fields, such as education and health in order to promote the realization of justice for LGBTI people.

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