



## The Brazilian Federal Supreme Court and the issue of gender ideology in schools

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*ABSTRACT: On 23 June 2021, the Hungarian President János Áder issued a law which forbids schools and the media from “promoting or portraying” homosexuality or sex reassignment to minors and limits sexual education in schools, a situation similar to that which was verified in Brazil, where a law project with identical purpose is being submitted to the National Congress (the proposition of Bill 246/2019), having also been the subject of municipal regulations, whose constitutionality was questioned in specific actions at the Brazilian Federal Supreme Court (ADPF 457/GO). This article intends to answer the following question: is there a (dis)alignment between the content in the Bill 246/2019 and the foundations used by the Brazilian Federal Supreme Court in the decision of the ADPF 457/GO? For that purpose, the importance of the current gender and sexual diversity approach in the school environment for the protection of sexual and gender minorities, under the perspective of the state duties of protection (Schutzpflicht), resulting from the objective dimension of the fundamental rights will be analysed. Next, the foundations used by the Brazilian Federal Supreme Court in the ADPF 457/GO will be evaluated, as well as the existence (or non-existence) of a difference between the foundations of the Federal Supreme Court and the text of the Bill. It was concluded that there is a difference in the position adopted by the two Powers, because the highest Brazilian Court understands such themes may be developed in the student’s pedagogical formation, while the Bill moves in the direction of sealing references to these themes in the school environment.*

*KEYWORDS: Gender education in schools – Brazilian Federal Supreme Court – Protection of vulnerable and minority groups – Bill 246/2019 – Pleading for Non-compliance with a Fundamental Precept no. 457/GO (ADPF 457/GO).*

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## 1. Introduction

On 23 June 2021, the Hungarian President János Áder issued a law which forbids schools and the media from “promoting or portraying” homosexuality or sex reassignment to minors and limits sexual education in schools. The abovementioned law was approved by the Hungarian Parliament on 15 June 2021 and initially started as a way of introducing heavier sanctions on sexual crimes against minors, boosted by the scandal that happened earlier in the year involving the Hungarian ambassador to Peru, Gábor Kaleta, who was found in possession of nearly 20,000 pornographic pictures of minors. However, on 9 June 2021 MPs from the ruling party, Fidesz, submitted last-minute amendments to the law which targets sexual minorities, in practice linking homosexuality to paedophilia.

The law, which (including the last-minute amendments) proscribes any content featuring portrayals of homosexuality or sex reassignment being made available to minors, states that school sex educators can no longer “promote” homosexuality or sex reassignment and that sexual education classes can only be held by registered organisations. This is relevant for the more liberal NGOs, and finally puts restrictions on ads with LGBTIQ+ content. President Áder maintains that this new law only aims to protect children and give their parents control over their children’s over sexual education, and that it does not affect the right of adults to choose how they live their own lives, or the right to private life enshrined in the Hungarian Constitution.

A similar issue, associated with political issues identified with conservative political movements, aligned with the speech on the preservation of family values, advocated by the President of the Republic, Jair Bolsonaro, occurred in Brazil. In the face of the passing of laws stemming from some municipal legislatures that prohibited the approach of themes related to gender, sexual diversity and gender identity – or “gender ideology”, as stated in some of these rules – in schools, their constitutionally was called into question. Some of the reasons include the following: (i) it was argued that by forbidding these subjects from being part of school debates, they would be jeopardizing the children’s right to a plural education, the freedom to learn, teach, and disseminate freedom of thought; and (ii) that restrictions would affect the pluralism of ideas and pedagogical conceptions, rendering the part of society that belongs to these groups “invisible”. In the face of such relevant constitutional controversy of national interest, the dispute in question, more specifically the case involving the municipality of Novo Gama/GO, was taken to the Brazilian Supreme Federal Court, to be decided through the Pleading for Non-compliance with a Fundamental Precept no. 457/GO (“ADPF 457/GO”).

In the decision, the Brazilian Supreme Federal Court held unconstitutional Law no. 1.516/2015, of the municipality of Novo Gama, which prohibited the use of teaching materials that had references to “gender ideology”. However, in a manner contrary to the Court’s decision, the House of Representatives is currently dealing with Bill 246/2019, which proposes that such themes are not to be addressed in this context.<sup>1</sup> In view of the above, using the deductive approach, we intend to

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<sup>1</sup> The binding effect (*erga omnes* effectiveness) of the decisions of the Supreme Federal Court under the perspective of consolidated control of constitutionality binds all the bodies of the Executive and Judiciary Branches, but not the Legislative Branch, hence the “last word” of the Supreme Federal Court (SFC) is always “provisional”. This non-binding status provides the legislator with the dynamic exercise of its interpretative activity and the possibility of continuous constitutional

answer the following question: is there a (dis)harmony<sup>2</sup> between the rationale used by the Brazilian Supreme Federal Court in the ADPF 457/GO decision and the text of Bill 246/2019, currently being considered by the House of Representatives?

To this end, we will initially address the importance of the debate on gender and sexual diversity in the school environment for the protection of sexual and gender minorities through education, as a manifestation of the duty of state protection (*Schutzpflicht*), arising from the objective dimension of fundamental rights. Later, we will analyse the grounds used in the decision of ADPF 457/GO,<sup>3</sup> on which occasion the Brazilian Supreme Federal Court decided that the disputed law was unconstitutional. Finally, we will assess whether or not there is a discrepancy between the grounds used by the Supreme Court in ADPF 457/GO and the text of the aforementioned bill.

## 2. The debate on “gender ideology” in schools and the protection of sexual and gender minorities through education

When discussing gender, gender identity and sexuality in the school context, encompassing the right to equality and non-discrimination towards sexual and gender minorities, it is essential to open the debate by assessing the historical setting of the emergence of the exponential concern with the protection of human rights and democracy, since these rights are the main shapers of human dignity. These principles emerged with greater intensity after World War II, in view of the atrocities that occurred under the aegis of the totalitarian regimes that were in power at the time. This is why democracy, and the protection of human and fundamental rights, came to the fore in the legal-constitutional order. These objectives were considered fundamental elements for the consolidation of human dignity and helped the Constitutions overcome the criterion of protecting the majorities and start giving special attention to minority groups.<sup>4</sup>

It was not any different in the case of the Brazilian Constitution of 1988, especially considering the process of (re)democratisation of the country, thus evidencing this high concern with the protection of fundamental rights in its very first articles. Article 1, item III of the Brazilian Constitution (“BC”) lists the principle of human dignity, followed by the principle of non-discrimination, provided in Article 3, item IV of the BC, which lists as fundamental objectives

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adequacy and mutation and, in that sense, “it is not possible, therefore, to limit the legislative process by virtue of the binding effects derived from the concentrated control of constitutionality, so as to prevent the processing and voting of a bill contrary to the understanding of the SFC on a given matter”, Alexandre de Moraes, *Direito Constitucional*, 32. ed. (São Paulo: Atlas, 2016), 800-801.

<sup>2</sup> This mismatch can also be seen as a “backlash” effect, since the proposition of Bill 246/2019, in the opposite direction to that advocated by the Supreme Federal Court decision, embodies a reaction of intense disapproval of a judicial decision – disapproval that comes armed with measures of strong resistance to the content of the decision and that seeks to remove its legal force. In this sense, Cass R. Sunstein, “Backlash’s Travels”, *Harvard Civil Rights-Civil Liberties Law Review*, v. 42 (2007): 435 defines “public backlash”, in the context of constitutional law, as: “intense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force”.

<sup>3</sup> Brasil, Supremo Tribunal Federal (Tribunal Pleno), Arguição de Descumprimento de Preceito Fundamental no. 457/GO, Rapporteur: Min. Alexandre de Moraes, April 27, 2020, <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5192888>.

<sup>4</sup> Mônia Clarissa Hennig Leal, *Jurisdição Constitucional Aberta: reflexões sobre a legitimidade e os limites da jurisdição constitucional democrática – uma abordagem a partir das teorias constitucionais alemã e norte americana* (Rio de Janeiro: Lúmen Júris, 2007).

of the Federative Republic of Brazil the promotion of the welfare of all, “*without prejudice of origin, race, sex, color, age, and any other forms of discrimination*”. In the same vein, the first sentence of Article 5 of the BC states that “*all are equal before the law, without distinction of any kind*”.<sup>5</sup> It is noteworthy that the BC promotes not only formal equality between individuals but also material equality, recognising and respecting the existing differences between people, and it is considered the “*first of our constitutions to contemplate some degree of openness to multiculturalism, by undertaking the protection of the different cultural and ethnic identities that make up the Brazilian Nation*”.<sup>6</sup> Considering that in order to achieve equality of material goods, the State must undertake an activity that provides for its concrete implementation. According to the doctrine of Sarlet, it is important to emphasise that: “*What is certain is that fundamental social rights to benefits, unlike rights of defense, aim to ensure, by compensating for social inequalities, the exercise of real and effective freedom and equality, which presuppose active behavior on the part of the state, since material equality is not simply offered by itself, but must be duly implemented. Moreover, social fundamental rights aim for real equality for all people, attainable only through the elimination of inequalities, and not through an equality without freedom, and it can be stated, in this context, that, to a certain extent, freedom and equality are made effective through social fundamental rights*”.<sup>7</sup>

Both equality and education constitute fundamental rights of all people, and its promotion and protection are the State’s duties, making it responsible for providing the means necessary to ensure the exercise of these rights by individuals is effective. Such “*state duty of protection*” (*Schutzpflicht*) – which encompasses actions stemming from the State as well as private persons – derives from the objective dimension of fundamental rights, which includes the idea that fundamental rights develop key foundations that guide and bind all Powers and all Law.<sup>8</sup>

In view of the right foreseen in Articles 6, 205, 206 and 214 of the BC, based on the duty of state protection resulting from the objective dimension of fundamental rights, the Brazilian State has committed itself to provide an education with the purpose of generating the “*full development of the individual, his/her preparation for the exercise of citizenship and his/her qualification for work*”. Furthermore, one must observe the principles laid out in Article 206, items I and II, of the BC, which provides that the provision of the right to education will occur with strict observance and respect for the “*II - freedom to learn, teach, research and disseminate thought, art and knowledge; III - pluralism of ideas and educational design, and coexistence of public and private educational institutions*”.

In this sense, on the debate regarding gender, sexuality, women empowerment and equality between men and women, education – through school support – is a powerful knowledge leading tool, being able to raise awareness about the differences and prevent any prejudiced and harmful conduct towards people belonging to these groups, aiming at their integration into society. In this sense, Pereira *et. al.* states that: “*Brazilian democracy depends on a type of education which creates the pillars for the*

<sup>5</sup> Brasil, Constituição da República Federativa do Brasil, 1988, [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm).

<sup>6</sup> Cláudio Pereira de Souza Neto and Daniel Sarmento, *Direito constitucional: teoria, história e métodos de trabalho*, 2. ed. (Belo Horizonte: Fórum, 2016), 173.

<sup>7</sup> Ingo Wolfgang Sarlet, *A eficácia dos direitos fundamentais: uma teoria geral dos direitos fundamentais na perspectiva constitucional*, 10. ed. (Porto Alegre: Livraria do Advogado Editora, 2010), 199.

<sup>8</sup> Mônia Clarissa Hennig Leal, *Jurisdição Constitucional Aberta*.

*democratic society, aiming at the respect of diversity, and reproducing the principles and constitutional values so that such principles and values are reproduced in the social practices. For that objective, the Federal Constitution expressly adopts a conceptual approach of education that prepares students for the exercise of citizenship, one that respects diversity and thus makes it possible to live in a plural society with the most diverse expressions of religion, politics, culture, ethnicity, sexuality, or gender”.*<sup>9</sup>

Nevertheless, such understanding does not prevent the creation of laws<sup>10</sup> with the intent to ban the teaching in schools of the so-called “gender ideology”.<sup>11</sup> The obstruction of this approach at the school level, through municipal legislation, sometimes stems from the omission in the National Education Plan, since, when it was redacted and updated for the decade 2014-2024, the Bill of the House of Representatives no. 103/2012 was amended by the Federal Senate. The modification took place in the original wording, which provided that “*The guidelines of the NEP are: [...] III - the overcoming of educational inequalities, with emphasis on the promotion of racial, regional, gender and sexual orientation equality and the eradication of all forms of discrimination*”.<sup>12</sup> The aforementioned passage was removed, making room for the following wording: “*The NEP guidelines are: [...] III - overcoming educational inequalities, with emphasis on the promotion of citizenship and the eradication of all forms of discrimination*”.<sup>13</sup> Thus, the current National Education Plan (Law no. 13.005/2014), sanctioned on June 25, 2014, now refers only generically to discrimination, lacking any specific provision on overcoming gender and sexual orientation inequalities.

According to Hernandez, without the debate of these matters in school, “*we will place unprepared citizens within a new and transformed society in which they will not fit, and the consequences can be harmful to everyone, especially the LGBTI population*”.<sup>14</sup> In fact, with the inclusion of these themes in the educational plans, individuals would be developing the ideal of respect and recognition of the differences between people, preventing the onset of eventual prejudiced behaviours. One can argue that the NEP silences and hinders the possibility of the debate on gender, gender identity and sexuality in the school context, and, although this kind of content is not

<sup>9</sup> A. C. A. Pereira, A. C. M. Normanton and P. de A. Stempluk, “A inconstitucionalidade da proibição da educação sobre gênero”, *Cadernos da Defensoria do Estado de São Paulo*, v. 3, no. 8, (February, 2018): 14, [https://www.defensoria.sp.def.br/cadernos\\_defensoria/volume8.aspx](https://www.defensoria.sp.def.br/cadernos_defensoria/volume8.aspx).

<sup>10</sup> It can be cited as an example not only Law no. 1.516/2015 of the municipality of Novo Gama/GO - discussed by the Supreme Federal Court in the decision of ADPF no. 457/GO - as well as other municipal laws that are awaiting judgment by the Supreme Court, as is the case of the municipalities of Londrina (ADPF no. 600/PR), Foz do Iguaçu (ADPF no. 526/PR), Ipatinga (ADPF no. 467/MG), municipality of Blumenau (ADPF no. 462/SC), among others.

<sup>11</sup> The term “gender ideology” is used by people who support traditional family values and customs and argue that “gender ideology” is a synonym for the deconstruction of traditional gender roles, Toni Reis and Edla Eggert, “Ideologia de gênero: uma falácia construída sobre os planos de educação brasileiros”, *Educação & Sociedade*, v. 38, no. 138 (2017), [http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0101-73302017000100009&lng=pt&nrm=iso](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-73302017000100009&lng=pt&nrm=iso).

<sup>12</sup> Brasil, Câmara dos Deputados, Projeto de Lei no. 103, de 2012, *Aprova o Plano Nacional de Educação - PNE e dá outras providências*, Brasília, DF, 2012, <https://www25.senado.leg.br/web/atividade/materias/-/materia/108259> (emphasis added).

<sup>13</sup> Brasil, Senado Federal, Parecer no. 1.567, de 2013. *Redação final do Substitutivo do Senado ao Projeto de Lei da Câmara no. 103, de 2012* (no. 8.035, de 2010, na Casa de origem), Brasília, DF, December 17, 2013, <https://www25.senado.leg.br/web/atividade/materias/-/materia/108259>.

<sup>14</sup> Margareth da Silva Hernandez, “O silenciamento sobre as questões de gênero na escola: A inconstitucionalidade de leis e normativas recentes na área da educação”, in *O direito à diferença: contribuições para uma análise crítica do Direito*, Charles dos Santos Brasil (Rio Branco: Edufac, 2020), 57.

expressly prohibited, the omission ends up causing an invisibility of these issues in the educational setting.<sup>15</sup>

This “invisibility” of sexual minorities is alarming when taking into consideration the data contained in Bulletin no. 03/2020 of the National Association of Travestis and Transexuals of Brazil (ANTRA), which points to a total of 89 transsexual people murdered in the first half of 2020 alone, representing an increase of 39% compared to the same period in 2019. The same document also pointed out that the murder rates of transgender people have been increasing in the face of state inertia, given that Brazil still “*has not implemented any measure of protection with the LGBTI+ population, even after the decision of the Supreme Court that recognized LGBTI phobia as a form of the crime of racism*”.<sup>16</sup>

In the same vein, considering the gender minorities, the data regarding the practice of femicides in Brazil seems to grow exponentially, even after the issuing of Law no. 13.104/2015, popularly known as “Feminicide Law”. The Brazilian Yearbook of Public Security points out that, in the year 2019, there was an 11.3% increase in the rates of this type of crime in the country, victimizing 1,206 women who lost their lives due to gender-based violence.<sup>17</sup>

In the face of the heterogeneity and plurality which characterise contemporary society, as well as the exponential growth of the violence rates against sexual and gender minorities, Estefam highlights the importance of pedagogical actions to protect sexual diversity and counter homophobia, advocating the fundamentality of “*the existence of public education campaigns promoting equality among people of all sexual preferences and options*”, as well as that these actions should occur, including in the school environment, because from the earliest age “*it is necessary to make people understand that human beings deserve identical respect, regardless of sexual orientation*”.<sup>18</sup>

It is worth noting that this is not only about advocating for a type of education which prevents prejudice, but also one which is inclusive, since individuals that comprise these groups end up abandoning the school setting at an early stage, due to the violence and prejudice they suffer, making their permanence at schools unsustainable, subsequently leading to more situations of vulnerability. Data prove that on average 75% of transgender people abandon their studies and school “*due to prejudice, both from classmates and from teachers and school staff. This reason, along with the invisibility of transgender people and family exclusion, leads them to marginalization, hindering their access to the labor market*”.<sup>19</sup>

Hernandes argues that addressing these issues in classrooms “*would become an instrument for preventing bullying, physical violence, prejudice, and intolerance towards what is different. Teachers are constrained in this issue, hostages of an educational leadership pressured by the students’ own parents*”. In this way, the very freedom to teach and the pluralism of ideas and pedagogical conceptions of education professionals – rights protected in Article 206, items II and III, of the Federal Constitution – are disregarded when

<sup>15</sup> Margareth da Silva Hernandes, “O silenciamento sobre as questões de gênero na escola”.

<sup>16</sup> ANTRA, “Boletim no. 03/2020 sobre índice de assassinatos de pessoas transexuais no Brasil no 1º semestre de 2020”, accessed July 13, 2020, <https://antrabrasil.files.wordpress.com/2020/06/boletim-3-2020-assassinatos-antra.pdf>.

<sup>17</sup> Fórum Brasileiro de Segurança Pública, “Anuário Brasileiro de Segurança Pública”, June 26, 2019, [https://forumseguranca.org.br/wp-content/uploads/2019/10/Anuario-2019-FINAL\\_21.10.19.pdf](https://forumseguranca.org.br/wp-content/uploads/2019/10/Anuario-2019-FINAL_21.10.19.pdf).

<sup>18</sup> André Estefam, *Homossexualidade, prostituição e estupro: um estudo à luz da dignidade humana* (São Paulo: Saraiva, 2016), 147.

<sup>19</sup> Pereira *et. al.*, “A inconstitucionalidade da proibição da educação sobre gênero”, 16.

there is an omission concerning these issues in the National Education Plan or when there is a municipal prohibition on teachers addressing these issues in the classroom.

It ought to be emphasised that it is through pedagogical practices that one can change this unequal and violent reality: *“the school can be, therefore, a space for the construction of a plural, democratic and principled society, being the approach to gender and sexuality in elementary school for that purpose”*.<sup>20</sup>

Both the prohibition by municipal laws and the omission of the National Education Plan contribute to the silencing of the issues involving this part of society, which affronts the right listed in Articles 205 and 206, item I, of the BC, since they make it impossible to have an education capable of providing the *“full development of the individual person, its preparation for the exercise of citizenship and its qualification for work”*, also disrespecting the right to *“equal conditions for access and permanence in school”* of individuals integrating the above mentioned minority groups.

In this way, forbidding teaching of these themes by means of municipal legislation blatantly violates the provisions of Article 206, item II and III, of the BC, while, at the same time, the freedom to learn and teach as well as the pluralism of ideas and pedagogical design of the educational staff are excessively restricted. Even if teachers were aware of their commitment to shape citizens aware of the diversities that make up society, in order to promote, through education, a less violent and unequal social environment, their freedom to spread knowledge would be restricted by municipal restrictions.

Given the repeated occurrence of municipal laws in Brazil prohibiting the teaching of themes related to gender, gender identity and sexual diversity in schools, the following topic is especially aimed at analysing the grounds used by the Supreme Federal Court on the occasion of the judgment of ADPF no. 457/GO, in which the constitutionality of Law no. 1.516/2015 of the municipality of Novo Gama, which prohibited addressing these issues in the municipal school system, was debated.

## **2. The position of the Supreme Federal Court regarding the discussion on teaching gender ideology in Brazilian schools**

On April 27, 2020, the Supreme Federal Court adjudicated on ADPF 457/GO and declared Law no. 1.516/2015 to be unconstitutional. The aforementioned legislation prohibited schools in the municipality of Novo Gama from disseminating or making use of teaching materials that had references to gender ideology. The action was presided over by Justice Alexandre de Moraes and its requests were unanimously granted by the members of the Supreme Federal Court Plenary, according to the Rapporteur’s vote. Among the violations alleged by the Attorney General of the Republic, it is asserted that the law violates the rights to equality (Article 5, caput of the BC), the prohibition of censorship in cultural activities (Article 5, clause IX, of the BC), the substantive due process of law (Article 5, clause LIV, of the BC), the secular State (Article 19, clause I, of the BC), the Union’s private competence to legislate on the directives and foundations of national education (Article 22, clause XXIV, of the BC), the pluralism of ideas and pedagogical approaches (Article 206, clause III, of the BC), and the freedom

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<sup>20</sup> Pereira *et. al.*, “A inconstitucionalidade da proibição da educação sobre gênero”, 16.

to education, to teach, research, and to disseminate freedom of thought, art, and knowledge (Article 206, clause II, of the BC).

Initially, the formal (un)constitutionality of the norm was debated, with Justice Alexandre de Moraes asserting that the BC provides for the exclusive competence of the Union to issue legislation on guidelines and bases for national education, an authorisation that led to the enactment of the Law of Guidelines and Bases for National Education (Law no. 9.394/1996). He also pointed out the constitutional provision of concurrent competence of the Union, the States, and the Federal District to issue legislation on education and teaching, with the Union being responsible for establishing general rules, authorised by the States, to have a competence of supplementary nature (Article 24, item IX of the BC). Therefore, the Reporting Justice recognised the formal unconstitutionality of the municipal law, due to the usurpation of the Union's competence.<sup>21</sup>

In this sense, Justice Gilmar Mendes<sup>22</sup> asserted that the law of the municipality of Novo Gama constitutes a violation of the Union's private jurisdiction, provided in Article 22, item XXIV of the BC, and that it violates the "*fundamental principles and objectives of the Federative Republic of Brazil relating to political pluralism and the construction of a free, fair and solidary society, without any prejudice – Article 1, item V, and Article 3, items I and IV, of BC/88*". Complementarily, he recognised that the law in question has a defect of material constitutionality for affronting the BC norms materialised from Article 3 onwards of the Law of Directives and Bases of National Education, which state that:

*Art. 3 Education will be provided based on the following principles:*

I - equality of conditions for access and permanence in school.

II - freedom to learn, teach, research, and disseminate culture, thought, art, and knowledge.

III - pluralism of ideas and pedagogical conceptions.<sup>23</sup>

Therefore, both the precepts listed in the Law of Directives and Bases of National Education and the rights foreseen in the BC are affected by the content of the following excerpts from the Novo Gama municipal law:

Art. 1. The dissemination of material with reference to gender ideology is prohibited in the municipal schools of Novo Gama/GO.

Art. 2. All teaching materials should be analysed before being distributed in the municipal schools of Novo Gama/GO.

Article 3. Materials which mention or influence the student in regard to gender ideology will not be part of the didactic material in the schools of Novo Gama/GO.

Art. 4. Materials that are received even if by donation with reference to gender ideology should be replaced by materials without reference to it.<sup>24</sup>

<sup>21</sup> Brasil, Supremo Tribunal Federal (Tribunal Pleno), Arguição de Descumprimento de Preceito Fundamental no. 457/GO, Rapporteur: Min. Alexandre de Moraes, April 27, 2020, <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5192888>.

<sup>22</sup> Brasil, Supremo Tribunal Federal (Tribunal Pleno), Arguição de Descumprimento de Preceito Fundamental no. 457/GO, Rapporteur: Min. Alexandre de Moraes, April 27, 2020, <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5192888>, p. 07.

<sup>23</sup> Brasil, Lei no. 9.394, de 20 de dezembro de 1996, *Estabelece as diretrizes e bases da educação nacional*, [http://www.planalto.gov.br/ccivil\\_03/leis/19394.htm](http://www.planalto.gov.br/ccivil_03/leis/19394.htm).

<sup>24</sup> Novo Gama, Lei no. 1.516, de 30 de junho de 2015 (Lei declarada inconstitucional conforme decisão DPF no. 457, do Supremo Tribunal de Federal) proíbe material com informações de



The vote of Justice Alexandre de Moraes also emphasised the material unconstitutionality of the local norm in the sense that the aforementioned articles would affront the constitutional principles of Article 206, items II and III, of the BC, which list the constitutional principles of the freedom to learn, teach, research and disseminate thought, art and knowledge, the pluralism of ideas and educational conceptions, and that it violates the prohibition of censorship and freedom of expression protected by Article 5, item IX, of the BC.<sup>25</sup>

The Rapporteur stated that the respect for freedom of expression is the keynote of pluralism, since “*democracy will not exist and free political participation will not flourish where freedom of expression is cut down, because this is an essential condition for the pluralism of ideas, which in turn is a structural value for the healthy functioning of the democratic system*”.<sup>26</sup> Thus, he considered that the municipal norm in question “*adheres to the imposition of silence, censorship and, more broadly, obscurantism as dominant discursive strategies, in order to further weaken the boundary between heteronormativity and homophobia*”,<sup>27</sup> latently contributing to the perpetuation of prejudice and inequality, hindering an important mechanism – as is the case of education in schools – to contribute to overcoming these social stigmas that affect sexual and gender minorities.

Furthermore, Justice Gilmar Mendes added that, in the national legal framework as well as in the international system,<sup>28</sup> there are principles which forbid discrimination and promote the right to equality. He exemplified that, in the national setting, one can mention the dignity of the human person and the right to equality – respectively provided in Articles 1, item III and 5, caput of the BC – as manifestations of individual rights that demand “*respect for private autonomy and for people’s legitimate options regarding their existential choices*”.<sup>29</sup> Regarding the international sphere, he mentioned the existence of this protection in several documents – of which Brazil is a signatory – such as the Universal Declaration of Human Rights (Articles I and II), the American Convention on Human Rights (Article 1), the International Covenant on Civil and Political Rights (Article 26), and the Yogyakarta Principles (Principles 1 and 2).<sup>30</sup>

As an example of this dual provision, the Minister recalled that the highest Brazilian Court had already positioned itself to prohibit discrimination on the basis of sex, gender or sexual orientation when ruling on ADI no. 4. 277, which recognised the right of same-sex couples to marry and that, in the same vein, the United Nations (UN) published the document entitled “*Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*”<sup>31</sup> which presents five

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ideologia de gênero nas escolas municipais de Novo Gama/GO e dá outras providências, <http://acessoainformacao.novogama.go.gov.br/legislacao/lei/id=49>.

<sup>25</sup> ADPF no. 457/GO.

<sup>26</sup> ADPF no. 457/GO, 12.

<sup>27</sup> ADPF no. 457/GO, 13.

<sup>28</sup> According to Alexandre G. Melo Franco de Moraes Bahia and Rainer Bomfim, “Análise dos precedentes que envolvem discriminação por orientação sexual no Sistema Interamericana de Direitos Humanos”, in *Homotransfobia e direitos sexuais: debates e embates contemporâneos*, coord. Keila Deslandes (Belo Horizonte: Autêntica Editora, 2018), 48, within the Inter-American System for the Protection of Human Rights, “*a greater concern with LGBTI demands is perceived, and, for example, the IACHR has created a specific Rapporteur to address this issue and has been releasing reports of great repercussion about violence against LGBTI people, and the IACHR has already been generating precedents on the rights of this minority*”.

<sup>29</sup> ADPF no. 457/GO, 11.

<sup>30</sup> ADPF no. 457/GO.

obligations for states to protect the rights and fundamental freedoms of LGBTI+ people on the basis of their sexual orientation and gender identity.<sup>31</sup>

In line with what was exposed by Minister Gilmar Mendes, Minister Edson Fachin stressed the fundamentality of respecting the international dictates that deal with this matter, mentioning as a reference document on human rights involving gender identity and sexual orientation the one issued by the UN Human Rights Council, called “*Yogyakarta Principles*”. In the same sense, he also referred to the position of the Inter-American Court of Human Rights<sup>32</sup> on the recognition of gender identity as a manifestation of the freedom of self-determination of the human being, highlighting that its recognition should be observed as a free and autonomous identity construction of each individual.<sup>33</sup>

Despite the references made to the Inter-American Court of Human Rights regarding minority groups, the precedents cited in the decision of the Supreme Federal Court apparently work as a simple argument that reinforces the grounds of the decision (*obiter dictum*), and not as a central justification of the decision (*ratio decidendi*) – thus, it is understood that there was not an effective inter-jurisdictional dialogue, because, for this purpose, it would be necessary to further develop this articulation between jurisdictions and between Powers, “*since the purpose pursued by all should be the best enforcement of human and fundamental rights*”.<sup>34</sup> In that sense, putting into practice the dialogical theory is crucial for the broad realisation of rights – “*the openness to international jurisdiction through dialogue is not a limitation of state sovereignty, but rather a tool for the protection of rights*”.<sup>35</sup>

Justice Edson Fachin also stated that the due recognition of the individual’s gender identity is constitutive of human dignity and that “*the State, to ensure the full enjoyment of human rights, cannot deny students access to knowledge about their personality and identity rights*”.<sup>36</sup> In the same way, Justice Alexandre de Moraes highlighted the importance of the Advisory Opinion OC-24/2017, in which the Inter-American Court of Human Rights, when interpreting the Pact of San José da Costa, stated that: “*(i) The recognition of gender identity by the State is of vital importance to ensure the full enjoyment of the human rights of trans individuals, which includes protection from violence, torture*

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<sup>31</sup> ADPF no. 457/GO.

<sup>32</sup> In this sense, recognizing the right to equality and non-discrimination of individuals on the basis of their gender identity and/or sexual orientation, the jurisprudence of the Inter-American Court of Human Rights, in the exercise of its contentious jurisdiction, we highlight the decisions handed down in the cases *Atala Riffo e crianças vs. Chile* (Inter-American Court of Human Rights, *Caso Atala Riffo e crianças vs. Chile*: merit, reparations and costs, February 24, 2012), in the case of *Duque v. Colombia* (Inter-American Court of Human Rights, *Caso Duque vs. Colombia*: preliminary objections, merits, reparations and costs, February 26, 2016) and *Flor Freire v. Ecuador* (Inter-American Court of Human Rights, *Caso Flor Freire vs. Ecuador*: preliminary objections, merits, reparations and costs, August 31, 2016). In the same vein, but in the exercise of its advisory competence, the Inter-American Court of Human Rights issued Advisory Opinion no. 24/2017: requested by the Republic of Costa Rica: gender identity, and equality and non-discrimination for same-sex couples, November 24, 2017, see all jurisprudence at [www.corteidh.or.cr](http://www.corteidh.or.cr).

<sup>33</sup> ADPF no. 457/GO.

<sup>34</sup> Mônia Clarissa Hennig Leal and Maria Valentina de Moraes, “A margem de apreciação (nacional e do legislador) e o diálogo entre cortes e entre poderes: meios de compreensão dos mecanismos de proteção dos direitos humanos e fundamentais”, *Anuario de Derecho Constitucional Latinoamericano* (Bogotá: Fundación Konrad Adenauer, 2018), 515, <https://www.corteidh.or.cr/tablas/r39260.pdf>.

<sup>35</sup> Mônia Clarissa Hennig Leal and Maria Valentina de Moraes, “A margem de apreciação”, 515.

<sup>36</sup> ADPF no. 457/GO, 4.

*and mistreatment, the right to health, education, employment and housing, access to social security, as well as the right to freedom of expression and association*".<sup>37</sup>

Faced with the observation that the right to gender and sexual self-determination of the individual is a crucial part of human dignity, it is worth noting that *"the principle of human dignity involves both limits as well as pro-active action of the State and the society, thus cumulating defensive and demonstrative functions"*.<sup>38</sup>

Justice Gilmar Mendes asserts that the existence of norms with this content – both national and international – demonstrates the concern of legal frameworks with equality, and through these provisions *"it is possible to conclude the existence of a State duty to adopt policies to fight inequality and discrimination, including with regard to the cultural, social, and economic patterns that produce this situation"*.<sup>39</sup> Given the argument presented by the Justice, one can glimpse the Supreme Court's recognition of a "State duty of protection" (*Schutzpflicht*), according to which the state is obliged to *"take action, including preventive action, to protect the fundamental rights of individuals not only against public authorities, but also against attacks from private individuals and even from other States"*.<sup>40</sup> Additionally, Justice Gilmar Mendes mentioned that the presence of a State duty of protection against discrimination and inequality stems for the dual understanding of fundamental rights, asserting that the right to equality and non-discrimination both comprise a subjective sphere of rights regarding the individual and an objective dimension which sets a series of guidelines that bind the State's actions to promote these rights. In the same vein, he reinforced that equality should be understood in its negative dimension – forbid discrimination –, as well as in its positive dimension – providing effective means capable of generating the integration of stigmatised and marginalised groups.

In light of these considerations, the vote was given in the sense that the aforementioned municipal norms, *"by prohibiting the broadcasting of teaching materials that contain discussions on gender and sexuality issues, violate the general rules and fundamental rights to equality and non-discrimination, provided for in international standards and the 1988 Federal Constitution"*.<sup>41</sup>

We also recall that the objective dimension of fundamental rights not only generates the duty of State protection, but also develops a change in the relationship between rights and legislation, generating the so-called "irradiation effectiveness" (*Ausstrahlungswirkung*), from which results the understanding that all and any infra-constitutional law must comply with fundamental rights, so that *"all laws must be interpreted and limited by fundamental rights, whose value content must be protected"*.<sup>42</sup> Thus, the municipal legislation not only failed to comply with the "State's duty of protection" (*Schutzpflicht*) before the individual, but also disrespected the necessary binding of the infra-constitutional order to the precepts of the fundamental rights (*Ausstrahlungswirkung*). Given this, the recognition of the material and formal unconstitutionality of Law no. 1.516/2015 was unanimous, acknowledging that the challenged rule, by prohibiting *"the dissemination of material with reference to gender ideology in municipal schools, does not comply with the state duty to promote inclusion and equality"*

<sup>37</sup> ADPF no. 457/GO, 17.

<sup>38</sup> Daniel Sarmiento, *Dignidade da pessoa humana: conteúdo, trajetórias e metodologia*, 2 ed. (Belo Horizonte: Fórum, 2019), 90.

<sup>39</sup> ADPF no. 457/GO, 13.

<sup>40</sup> Ingo Wolfgang Sarlet, *A eficácia dos direitos fundamentais*, 148.

<sup>41</sup> ADPF no. 457/GO, 13-14-15.

<sup>42</sup> Mônia Clarissa Hennig Leal, *Jurisdição Constitucional Aberta*, 66.

*policies, contributing to the maintenance of discrimination based on sexual orientation and gender identity*".<sup>43</sup> In conclusion, in the face of several Brazilian municipal laws forbidding educational institutions to address issues related to gender, gender identity and sexual diversity in schools – or “gender ideology”, the term most popularly used when referring to these matters – one can assess that the Supreme Federal Court adopted a position opposite to that of the municipal legislatures, considered to be of an unequal and discriminatory nature.

The decision of the Supreme Court in ADPF 457/GO was based on the respect for human dignity (Article 1, clause III, BC), for the freedom to learn and teach (Article 206, clause II, BC), for the pluralism of ideas and pedagogical conceptions (Article 206, clause III, BC), and it also safeguarded freedom of expression (Article 5, clause IX, BC) and recognised the State’s duty to promote public policies capable of overcoming inequalities through plural education and to avoid discrimination that makes it difficult for these minorities to remain in the educational environments, consolidating the provisions of Article 3, clauses I, III, and IV, of the BC. The content of the Supreme Court’s decision is clearly contrary to these provisions. However, the position adopted does not prevent the proposal of new law initiatives in the other direction, as already highlighted. For instance, a bill<sup>44</sup> is currently pending in the House of Representatives that aims to establish the “School Without Party Program” in the Brazilian education system, which provides express prohibition on addressing gender issues in the school environment. Given the content of the bill and the current position of the Supreme Federal Court on the unconstitutionality of the prohibition made by municipal laws, we will now address, in the next topic, the possible mismatch between the text of the bill and the grounds used in the judgment of ADPF 457/GO.

### **3. (Mis)alignment between the legislative power and the Supreme Federal Court**

As previously mentioned, the Supreme Federal Court, in the judgment of ADPF 457/GO, adopted the position that Brazilian educational institutions may address issues related to gender, gender identity and sexuality in the school environment, due to the fact that these topics integrate human dignity and the right to information on the freedom of self-determination of the individual. It argued that the State, by forbidding students to have access to teaching materials that contain references to gender ideology, would be failing in its duty to promote inclusive public policies and equality, subsequently contributing to the continuity of discrimination on the basis of sexual orientation and gender identity.<sup>45</sup>

However, regarding the political and social sphere, there is a tendency to omit the discussion of matters regarding gender and diversity in schools, and one can assess this when analysing the suppression of the terminologies “gender” and “sexual orientation” in the National Education Plan 2014-2024, which, “*regardless of the party it is associated with, puts people’s human dignity at risk by upholding the idea that*

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<sup>43</sup> ADPF no. 457/GO, 2-3.

<sup>44</sup> Bill 246/2019, proposed by Congresswoman Bia Kicis, which is currently being addressed in the House of Representatives (Brasil, Câmara dos Deputados, Projeto de Lei no. 246, de 04 de fevereiro de 2019. Institui o “Programa Escola sem Partido”, <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2190752>).

<sup>45</sup> ADPF no. 457/GO.

*dissident identities are not 'normal' and that they should therefore be invisible to the state*".<sup>46</sup> One should recall that the suppression of the terms "gender" and "sexual orientation" in the wording of the National Education Plan 2014-2024 gave rise to interpretations that led to the issue, by municipal legislative powers, of anti-gender laws, and even though they were later discussed through ADPF's and lost their legal effectiveness due to their unconstitutionality, impacted society in a way, since they were in force "since 2015 in municipal education plans. Their impacts, negative and serious, against freedom of expression in the educational field and with the criminalization of gender and sexuality discussions in schools, still cannot be measured".<sup>47</sup>

Corroborating the ideas expressed in the municipal legislations mentioned above, there is a movement that defends not touching on these topics in the school environment, the so-called "School Without Party Program".<sup>48</sup> This movement, in its origin, sought to prevent a "Marxist indoctrination", but currently also turns to fight the "gender ideology", claiming that it is forbidden for education professionals to transmit to students values opposed to those followed by their parents, being their "main focus (...) the 'gender ideology', but its position also includes political stances on other issues and even the theory of evolution of the species or heliocentrism".<sup>49</sup>

In this sense, currently, the Bill 246, presented on February 4, 2019, by Representative Bia Kicis (PSL-DF), which aims to institute the "School Without Party Program", justifies the proposal as follows: "It is a well-known fact that teachers and textbook authors have been using their classes and their works to try to get students to adhere to certain political and ideological views, as well as to make them adopt standards of judgment and moral conduct – especially sexual morality – that are incompatible with those taught to them by their parents or caretakers".<sup>50</sup>

In apparent agreement with the rationale explained in the ADPF 457/GO decision by the Supreme Court, Article 1 of the Bill provides that it would act based on the principles of "III- pluralism of ideas and pedagogical conceptions; IV- freedom to learn, teach, research and disseminate thought, art and knowledge; V- freedom of conscience and belief".<sup>51</sup> However, it also states the following teachers' responsibility in the exercise of their activity: "Art. 4 - In the exercise of their duties, the teacher I - shall not take advantage of the captive audience of students to promote their own interests, opinions, conceptions or ideological, religious, moral, political and partisan preferences". Complementarily, Article 7 provides that the student will be granted the right to record the classes, with the purpose that it may "allow the better absorption of the content provided and to enable the full exercise of the right of parents or

<sup>46</sup> A. Rodrigues Neto, W. C. S. Nozu and A. C. S. Rocha, "Direito à educação cidadã: reflexões sobre o programa escola sem partido", *Educação em Revista*, v. 20 (2019): 90, [file:///C:/Users/ADMIN/Downloads/9374-Texto%20do%20artigo-30519-1-10-20191023%20\(1\).pdf](file:///C:/Users/ADMIN/Downloads/9374-Texto%20do%20artigo-30519-1-10-20191023%20(1).pdf).

<sup>47</sup> Isabela Oliveira Kalil, "Incursoes da 'ideologia de gênero' na educação", *Revista Internacional de Direitos Humanos*, v. 16, no. 29 (2019): 125, <https://sur.conectas.org/incursoes-da-ideologia-de-genero-na-educacao/>.

<sup>48</sup> Also called the "School Without Party Movement", it was founded in 2004 by lawyer Miguel Nagib, but it became more visible in the 2010s when it began to enter more actively into the field of debate on issues involving Brazilian education, advocating against "gender ideology" in schools. (Luis Felipe Miguel, "Da 'doutrinação marxista' à 'ideologia de gênero'- Escola Sem Partido e as leis da mordça no parlamento brasileiro", *Revista Direito e Práxis*, v. 7, no. 15 (2016), <https://www.redalyc.org/pdf/3509/350947688019.pdf>).

<sup>49</sup> Luis Felipe Miguel, "Da 'doutrinação marxista' à 'ideologia de gênero' ", 601.

<sup>50</sup> Projeto de Lei no. 246, de 04 de fevereiro de 2019 (emphasis added).

<sup>51</sup> Projeto de Lei no. 246, de 04 de fevereiro de 2019.

*guardians to be aware of the pedagogical process and evaluate the quality of services provided by the school*".<sup>52</sup>

With that, the movement "School without Party", through the aforementioned Bill, pledges a school free of ideologies, where, in the same way, matters regarding gender shall not be dealt with, according to Article 2 of the Bill, which mentions that "*the Public Authority shall not meddle in the process of sexual maturation of students, nor allow any form of dogmatism or proselytism in addressing gender issues*".<sup>53</sup>

We can observe a certain obscurantist bias on the part of the aforementioned bill – especially when analysing the text of Article 2 – regarding gender and sexual diversity themes, noting that "the 'School Without Party Program' gathers within itself the interest of silencing the issues of gender and sexual diversity and suppressing content that, by some nature, threatens alternation in culturally favored power relations".<sup>54</sup> Turning a blind eye to these matters – gender and sexual diversity – in schools seems to disregard the reality of educators who "*find themselves daily challenged by issues of gender and sexuality that erupt in their classrooms, hallways, and schoolyards*", a situation that demonstrates the importance of the possibility to deal with these issues in the educational environment, since plurality is part of both society and the school environment. Consequently, to assume that these matters are introduced in schools through "*didactic materials or specific activities is to demonstrate total ignorance of the school context and its conflicts, which exist precisely because the school – especially the Brazilian public school – is plural and diverse*".<sup>55</sup>

Both the political pedagogical projects and the teaching materials, as well as the work of educational professionals, must provide students with a broad vision of technical knowledge, as well as develop recognition and respect for differences and equality, which will play a decisive role in the development of their social behavior, thus providing them with greater possibilities to be part of society "*in a cooperative way, assimilating their rights and duties towards public order, recognizing themselves and their peers as worthy subjects and enabling the full development of each person individually, education builds citizenship*".<sup>56</sup>

Indeed, the misalignment between the Bill 246/2019 and the principles raised by the Supreme Federal Court in the ADPF 457/GO decision is evident. This decision advocated for the principles of freedom to teach and learn, as well as the pluralism of ideas and pedagogical approaches (Article 206, Item II and III, BC), enshrining the right to freedom of expression and self-determination, referring in the amendment of the decision that the activity led by the constitutional jurisdiction is based on the imperative duty of "*absolute respect for the Federal Constitution, there being in the evolution of modern democracies the absolute need to protect the effectiveness of fundamental rights and safeguards, especially for minorities*".<sup>57</sup>

At this point in the discussion, one must consider the "*counter-majoritarian challenge*" inherent to constitutional jurisdiction, arising from the fact that judges, even if not legitimised through popular vote, can "*invalidate the decisions adopted by*

<sup>52</sup> Projeto de Lei no. 246, de 04 de fevereiro de 2019.

<sup>53</sup> Projeto de Lei no. 246, de 04 de fevereiro de 2019.

<sup>54</sup> A. Rodrigues Neto, W. C. S. Nozu and A. C. S. Rocha, "Direito à educação cidadã", 91.

<sup>55</sup> Amana Mattos *et. al.*, "Educação e liberdade: apontamentos para um bom combate ao Projeto de Lei Escola sem Partido", in *Escola "sem" partido: esfinge que ameaça a educação e a sociedade brasileira*, org. Gaudêncio Frigotto (Rio de Janeiro: UERJ, LPP, 2017), 94.

<sup>56</sup> A. Rodrigues Neto, W. C. S. Nozu and A. C. S. Rocha, "Direito à educação cidadã", 89.

<sup>57</sup> ADPF no. 457/GO, 2.

*the legislator chosen by the people, often invoking constitutional norms of open character, which are subject to divergent interpretations in society*".<sup>58</sup> Souza Neto and Sarmento also argue that "democracy is not merely the prevalence of the will of majorities, but corresponds to a more complex political ideal, which also involves respect for fundamental rights and democratic values."<sup>59</sup>

Regarding this matter, Barroso, highlights that "[...] the Constitution must play two major roles. One is to ensure the rules of the democratic game, providing for broad political participation and majority rule. But democracy is not just about the majority principle. If there are eight Catholics and two Muslims in a room, the first group cannot deliberate to throw the second group out of the window simply because they are outnumbered. Therein lies the second great role of a constitution: to protect fundamental values and rights, even against the circumstantial will of those who have more votes".<sup>60</sup>

The interinstitutional dialogue, in this case, would contribute significantly to "the aggregation of knowledge coming from different sources and the counter-majoritarian challenge would be mitigated, since the other powers and the people would be participants in the construction of the constitutional meaning".<sup>61</sup> Thus, if all branches of the Powers "are open to listen and learn from perspectives different from their own, it can be expected that better answers will be formulated to the problems concerning the constitutional meaning in dispute".<sup>62</sup>

For instance, the Supreme Federal Court, considering the material unconstitutionality of the municipal law of Novo Gama, mentioned that the norm, by forbidding education on "gender ideology" in schools, would be failing to perform its state duty of promoting inclusive public policies and fostering equality, causing it to continue perpetuating discriminatory conducts on the grounds of sexual orientation and gender identity,<sup>63</sup> falling in line with the interpretation of Rodrigues Neto, Nozu and Rocha in the sense that "ensuring the integral formation of the individual, therefore, should be the true State commitment. Providing the individual with access to the multiplicity of sources of information and knowledge should prevail regardless of the political current in control of the State".<sup>64</sup>

It should be observed that, under the perspective of the interinstitutional dialogue between the legislative and judiciary powers, apparently, such dialogue did not occur. According to Leal and Moraes, for there to be concrete dialogue between those two powers, it may take place through "[...] the creation of a law by the Legislative power, its declaration of unconstitutionality by the Judiciary power and, as a result, the adoption of a new position by the Legislative power, both in the sense of modifying the law declared unconstitutional and reinforcing the constitutionality of that law, in order to seek the best decision".<sup>65</sup>

Therefore, it can be concluded that there was a misalignment between the foundations brought by the Supreme Federal Court Plenary in ADPF 457/GO and the text of Bill 246/2019, since its wording vehemently ignores the existence of a

<sup>58</sup> Cláudio Pereira de Souza Neto and Daniel Sarmento, *Direito constitucional*, 35.

<sup>59</sup> Cláudio Pereira de Souza Neto and Daniel Sarmento, *Direito constitucional*, 38.

<sup>60</sup> Luís Roberto Barroso, *Curso de Direito Constitucional Contemporâneo: os conceitos fundamentais e a construção do novo modelo*, 3. ed. (São Paulo: Editora Saraiva, 2011), 309.

<sup>61</sup> Clèmerson Merlin Clève and Bruno Meneses Lorenzetto, "Diálogos institucionais: estrutura e legitimidade", *Revista de Investigações Constitucionais*, v. 2, no. 3 (2015): 197, <https://revistas.ufpr.br/rinc/article/view/44534>.

<sup>62</sup> Clèmerson Merlin Clève and Bruno Meneses Lorenzetto, "Diálogos institucionais", 199.

<sup>63</sup> ADPF no. 457/GO.

<sup>64</sup> A. Rodrigues Neto, W. C. S. Nozu and A. C. S. Rocha, "Direito à educação cidadã", 92.

<sup>65</sup> Mônia Clarissa Hennig Leal and Maria Valentina de Moraes, "A margem de apreciação", 511.

heteronormative Brazilian social reality, and also diverges from the Supreme Court in relation to the State's duty to promote a plural education for the development of citizens capable of respecting equality and sufficiently aware to recognise the existing diversities among people – differences regarding gender, sexuality, gender identification, among many other possible ones. Such aspects point to an apparent disagreement and disregard for the importance of institutional dialogue between the powers, not only in the sense of mitigating the counter-majoritarian challenge, but also in the search for better alternatives for the resolution of the constitutional dispute regarding educating students on the themes of gender and sexual diversity in the school environment.

#### 4. Final considerations

Initially, we aimed to demonstrate how the school is an important purveyor of awareness and knowledge about differences, capable of bringing about a profound change in the citizen's way of acting and, consequently, shaping a less unequal society, through inclusive and plural education. Next, we addressed the grounds adopted by the Supreme Federal Court in ADPF 457/GO – a decision in which it ruled on the unconstitutionality of the municipal law that imposed a ban on teaching materials that allude to themes involving gender ideology in schools. This decision showed that the Judiciary power is aware of the importance of addressing these issues in the school environment, understanding that it is the State's duty to provide inclusive public policies for minorities, and emphasising the need to address these issues in the school setting, due to its educational and shaping nature – it is the space where individuals develop much of their future social conduct and exercise the recognition of differences and respect for equality. The decision was based on compliance with the constitutional provisions regarding the principles of solidarity and non-discrimination (Article 3, I and IV/BC), the right to education (Article 206, I, II and III/BC) and freedom of expression (Article 5, IX/BC), and it also referred to several international documents in the same vein.

To conclude, providing an answer to the question at issue in this article, we consider there was a mismatch between the principles of the Supreme Court's decision and the Bill currently in Congress, as they have several points in misalignment with each other, such as, for instance, the different understanding of the normative text from that listed by the Supreme Federal Court, which deviates from the understanding that it is the State's duty to promote inclusive public policies for minorities and is in favor of banning gender-related issues in schools. This is a topic of great relevance that has to be discussed, to ensure an inclusive and plural education, capable of shaping citizens with the appropriate level of awareness and respect for the differences of other individuals.