

“GENDER IDEOLOGY” INCURSIONS IN EDUCATION

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- *Constitutional principles and the secular state* •

ABSTRACT

In 2015, several municipalities in Brazil sanctioned laws that prohibit teaching about gender diversity and sexual orientation in schools and the use of the word “gender” in classrooms and school materials. In response, in 2017, the Public Prosecutor’s Office (PGR) filed a series of claims at Brazil’s Supreme Federal Court questioning the constitutionality of these laws opposing “gender ideology.” This article analyzes these cases, revealing that the topic of gender and sexuality in schools has sparked disputes around individual rights, the plurality of ideas and Brazil’s status as a secular state, as the Catholic Church and evangelical groups have organized campaigns to alter laws related to the issue at the federal, state, and municipal levels.

KEYWORDS

“Gender ideology” | Secularism | Education | Religion | Constitutionality

1 • "Gender ideology" and anti-gender education policies

In his inaugural address, on January 1st, 2019, President Jair Bolsonaro declared in National Congress his aim to "rebuild the country" and free it from "ideological submission." In his words, his political project would "unite the people, rescue the family, *respect religions and our Judeo-Christian tradition*, combat *gender ideology*, conserving our values."¹ This inaugural address attacking gender ideology and defending religious values found resonance with the base that elected Bolsonaro, whose slogan was "Brazil above everything, God above everyone." During the electoral campaign, Bolsonaro even argued for ending Brazil's secular state.² Politically aligned with the far-right, Bolsonaro's electoral platform included the defense of conservative Christian values.

While "gender ideology" gained notoriety during Bolsonaro's inaugural address, this controversy has been on the radar of religious groups since the 2000s. The term "gender ideology" – which has been strongly contested by the academic and scientific community – was coined as part of the dogmatic thinking of the Catholic Church in the 1990s. Later, evangelical groups adopted the term as an accusation category related to the teaching of gender and sexuality, especially in public schools. Anti-gender positions have advanced in European and Latin American countries.³ In Latin America, the configuration of this phenomenon has unique contours, intertwining with "anti-left" and "anti-communist" positions. In this context, the anti-gender struggles have joined forces with an ideological and political party struggle against "leftist" thinking or, worse, totalitarian positions inherited from "communism."⁴

In the Brazilian case, many lawmakers have adopted the fight against what both Catholics and Protestant Evangelicals have called "gender ideology" as their political platform. In the specific case of education policy, the topics of gender and sexuality are at the core of recent controversies, including the so-called "gay kit," which had significant protagonism in the 2018 elections.⁵ In addition to the combination of "gender ideology" and fake news manipulation in the lead-up to the election, anti-gender positions also include questions around requirements regarding teaching religion in public schools and the impartiality of the Brazilian State *vis-à-vis* religion.⁶

The debates, disputes, and controversies around "gender ideology" also include related topics, the most prominent being Escola Sem Partido (School Without Party), which prohibits any discussion considered "political," "ideological," or "indoctrinating" in schools and proposes legal protections "against the abuse of the freedom to teach." In this realm, political and religious groups use the concept of "gender ideology" to attack policies that protect gender diversity and extend rights. The constitutionality cases explored here, taken to the Supreme Court in response to municipal anti-gender laws within Brazilian education, are examples of this phenomenon.

2 • The conflict between municipal anti-gender laws and the Federal Constitution

In 2015, at least seven municipalities in six different Brazilian states sanctioned anti-

gender education laws. Known instances occurred in Novo Gama/GO, Cascavel/PR, Paranaguá/PR, Blumenau/SC, Palmas/TO, Tubarão/SC e Ipatinga/MG. Several unconstitutionality claims (ADPFs) moving through Brazil's Supreme Court today are targeting these laws.⁷ An analysis of ADPFs 457, 460, 461, 462, 465, 466 e 467 reveals how religious demands and anti-gender policies seeking to alter education laws are advancing in Brazil.

The Federal Public Prosecutor's office took the ADPFs (Claims of Non-Compliance with a Fundamental Precept) mentioned above to the Supreme Court through the work of Federal Prosecutor for Citizens' Rights (PFDC). These legal claims call for the anti-gender laws passed in Novo Gama/GO (ADPF 457), Cascavel/PR (ADPF 460), Paranaguá/PR (ADPF 461), Blumenau/SC (ADPF 462), Palmas/TO (ADPF 465), Tubarão/SC (ADPF 466) e Ipatinga/MG (ADPF 467) to be declared unconstitutional.

The relevance of these legal claims goes beyond the impacts of anti-gender policies and also raises questions about the role of the Brazilian Supreme Court in disputes among religious and other civil society groups around issues of gender and sexuality. The proposal and defense of anti-gender policies can be understood, in part, as a response to the Supreme Court's engagement with the "moral issues" of gender and sexuality.⁸

To analyze this recent Supreme Court action, one must understand the changes in legislation around "constitutionality control" and the Supreme Court mechanisms for ruling whether or Brazilian state actions are constitutional. The mechanism of the ADPF itself raises questions around the attributions and activities of the Judicial Branch and the separation of the three powers.

One of the themes that arises in this debate is "judicial activism." This term refers to the action of the United States' Judicial Branch in the 1950s and 1960s, in which significant changes in political practices and fundamental rights took place without passing through the Executive and Judicial branches. In the Brazilian case, some suggest that STF decisions in the 2000s and 2010s were unconstitutional, as the Court was exercising responsibilities that fall under the purview of the other powers of the tripartite system. This debate considers the legality *versus* legitimacy of the actions, expressed, above all, in the forms of constitutionality control that the Supreme Court exercises.

Constitutional amendment number 3 of 1993 established the ADPF mechanism for exercising constitutional control, adding the first paragraph of article 102 of the 1988 Federal Constitution. It wasn't until 1999 that law 9.882 detailed the action of this institution, establishing how the process and judgment of ADPFs would happen in the Supreme Court. In other words, this approach to constitutionality control is new in Brazil. The Supreme Court could only work to "avoid or repair injuries to the fundamental precepts of government action (in the Federal, State, Federal District, and Municipal realms)" beginning in the year 2000.⁹

In summary, ADPFs have served as a mechanism for protecting the Constitution and, consequently, Democratic Rule of Law since the 2000s. They have become essential aspects of the system of judicial protection and fundamental rights. What is at stake from the legal perspective in the cases on municipal anti-gender policies is not just the policies themselves. The cases also regard the defense of *fundamental principles* of the Brazilian State. These are implicitly or explicitly present in the Federal Constitution and include fundamental rights, liberty, and the separation of church and state.

3 • Anti-gender laws: ADPFs 457, 460, 461, 462, 465, 466 and 467

Former Federal Prosecutor Rodrigo Janot wrote the ADPFs that are analyzed here. He understood "gender ideology" as a "debatable concept, which has improprieties and unreasonable aspects that make it an unacceptable basis for action of a federal entity that interferes in educational processes and blocks sexual diversity." This passage is from the text of ADPF 461, which challenges an anti-gender law in the municipality of Paranaguá/PR that prohibits the use of teaching policies that apply "gender ideology," or the terms "gender" or "sexual orientation."¹⁰

The rest of the municipal laws to which the ADPFs refer have a similar tone. The sections of the anti-gender laws that the Federal Prosecutor declared unconstitutional are highlighted below:

ADPF 457 (Novo Gama-GO)

Article 1 The distribution of material making reference to gender ideology is prohibited in the municipal schools of Novo Gama-GO.

Article 2 All teaching materials must be analyzed before being distributed in the municipal schools of Novo Gama-GO.

Article 3 Materials that mention or influence students about gender ideology cannot be included in the teaching materials used in the municipal schools of Novo Gama-GO.

Article 5 Donated materials that make reference to gender ideology must be substituted with materials without references to gender ideology.

Article 6 This law takes effect on its publication date.

Article 7 The contrary dispositions are revoked.

ADPF 462 (Blumenau/SC)

§ 5º The inclusion or maintenance of expressions of ‘gender identity,’ ‘gender ideology’ and ‘gender orientation’ is prohibited in any supporting documents to the Municipal Education Plan, as well as in curricular guidelines.

ADPF 465 (Palmas/TO)

The discussion and utilization of teaching materials about gender ideology or theory are prohibited, including its promotion and behaviors, the granting of permission for activities that induce the theme, and all topics connected to sexuality and erotization.

In the case of ADPFs 466 and 467, the arguments in question regard the exclusion of subjects that include “gender ideology,” the terms “gender” and “sexual orientation” and their synonyms from municipal teaching policies. In the case of ADPF 466 (Tubarão/SC), the claim reveals non-compliance with a fundamental precept found in the following text:

Article 9 The municipal teaching policies of Tubarão will not include gender ideology or the terms “gender” or sexual orientation or their synonyms in the school curricula, mandatory or elective subjects, play spaces or teaching materials.

ADPF 467 (Ipatinga/MG) regards the exclusion of any reference to gender diversity and sexual orientation from municipal teaching policy:

Article 2 The Municipal Executive Power will adopt, in addition to the guidelines defined in Article 214 of the Federal Constitution and Article 2 of Federal Law 13.005 (2014) – carrying out what is called gender diversity – the specific guidelines of the Municipal Education Plan: [...]

Article 3 The Municipal Executive Power will be responsible for the adoption of necessary governmental measures for the implementation of strategies to reach the goals laid out in the Municipal Education Plan. It cannot adopt, not even within its guidelines, any educational strategy or action that promotes gender diversity. It cannot implement or develop any teaching strategy or approach that refers to gender ideology or sexual orientation. The inclusion of any theme related to gender diversity in teaching practices or daily life in the school is prohibited.

The Federal Prosecutor’s position is that these municipal laws contradict the Constitution of the Republic in its aim “to construct a free and just society, with solidarity (Article 3), the right to equality (Article 5), the prohibition of censorship in cultural activities (Article 5) and the maintenance of a secular state (Article 19).” The Federal Prosecutor points to the unconstitutionality of these municipal laws in their *material aspects*, arguing that they are incompatible with the fundamental precepts of liberty, pluralism of ideas, and a secular state. In addition to discussing the content of the laws, the Prosecutor discusses the unconstitutionality of their *formal aspects*, pointing to the violation of the constitutional precept that determines that only the Federal Government can make legislation about educational guidelines in Brazil.

Different Ministers of the Supreme Court ruled on the ADPFs, and Luís Roberto Barroso wrote the first decision regarding ADPF 461. In a final decision, Justice Barroso suspended the impacts of the Paranaguá (PR) municipal law that prohibited teaching about gender and sexual orientation. The full Supreme Court must give final approval for the decision. The remaining cases are either still moving through the Supreme Court or have been forwarded to the Superior Court of Justice.¹¹

4 • Final considerations

The controversies around the ADPFs regarding anti-gender laws within education described here inaugurate a new moment of rights disputes around gender and sexuality in Brazil. Constitutionality control through ADPFs is a new practice in the Brazilian justice system. These actions make possible Supreme Court disputes with high media visibility that include the participation of both religious groups and groups from other sectors of civil society, including feminist and LGBT movements. This raises some questions, specifically about *amicus curiae* (a Latin term that means “friend of the court”), which allows a person, entity or organ with demonstrated interest in the question to provide information to the Court. This happened in ADPF 467. Justice Gilmar Medes allowed for the participation of Grupo Dignidade – Pela Cidadania de Gays, Lésbicas e Transgêneros (Dignity Group – For the Citizenship of Gays, Lesbians and Transgender people) and of the Aliança Nacional LGBTI (LGBTI National Alliance) to present memoranda and oral arguments to Court regarding the anti-gender law of the municipality of Ipatinga/MG.¹² The understanding is that, even though these associations are not themselves making a claim, they have demonstrated interest in the question and can contribute to amplify the Court’s understanding of the topic.

The ADPFs raise further questions about the attribution of the three powers and the role of the Brazilian Supreme Court in positioning itself on questions deemed moral and religious, specifically those regarding reproductive health and broader questions about gender and sexuality. Some have raised critiques that the Court is going beyond the responsibilities of the judicial branch and blocking legislative action. The members of the Supreme Court have been the targets of accusations that they are benefitting certain political and ideological positions through a type of “judicial activism” around

controversial subjects that conflict with morality and religious dogmas.¹³

If the legislature received privileges in the past, since the previous decade, the courts have become a significant arena for disputes between representatives of the legislative and judicial branches. In the legislative realm, even though superior courts previously blocked laws based on their unconstitutionality, they have advanced, especially in the municipal sphere. In the political field, the mobilization of these moral and religious positions has become an essential and strategic platform, especially for political party disputes within Brazil's far-right.

Finally, it is necessary to emphasize that although some municipal anti-gender laws have been the targets of ADPF claims, this does not mean that the regulations do not have social impacts. Even though they are considered not to have legal implications because of their unconstitutional character, these laws and measures have been in place in municipal education plans in Brazil since 2015. Their grave and negative impacts on freedom of expression in the educational field and their contribution to the criminalization of discussions on gender and sexuality in schools still cannot be measured. Since a legal claim regarding these laws can only be initiated through a complaint, the number of municipalities that approved or are moving these types of measures through their legislatures is not known. It is known, however, that municipal legislative houses have become a significant arena for disputes around fundamental rights and religion.

NOTES

1 • A transcript of the address can be found at: "Discurso do Presidente da República, Jair Bolsonaro, Durante Cerimônia de Posse no Congresso Nacional," Planalto, Presidência da República do Brasil, January 1st, 2019, accessed on July 31, 2019, <http://www2.planalto.gov.br/acompanhe-o-planalto/discursos/2019/discursodo-presidente-da-republica-jair-bolsonaro-durante-cerimonia-de-posse-no-congresso-nacional> (italics added).

2 • The excerpt of a recording of a Bolsonaro rally was shared on Twitter by the Partido Socialismo e Liberdade (Socialism and Liberty Party - PSOL) as an event that took place in 2017. In it, the then candidate affirms: "Since we are a Christian country, God is above everyone. We don't have this little story about a secular state, it is a Christian

state. And if anyone disagrees, they can change their opinion." See PSOL 50. Twitter post. October 16, 2018, 10:26. <https://twitter.com/psol50/status/1052249493788389378>.

3 • There are a number of recent works that trace the genealogy of the category "gender ideology" in the field of religion and its propagation through Brazil. Regarding this, see the article by Maximiliano Campana and Richard Miskolci, "Ideologia de Gênero: Notas para a Genealogia de um Pânico Moral Contemporâneo," *Revista Sociedade e Estado* 32, no. 3 (september/december 2017), accessed July 31, 2019, <http://www.scielo.br/pdf/se/v32n3/0102-6992-se-32-03-725.pdf>; and the article by Sonia Corrêa, "A 'Política do Gênero': Um Comentário Genealógico," *Cadernos Pagu* no. 53 (2018), accessed July 31, 2019,

http://www.scielo.br/scielo.php?pid=S0104-83332018000200401&script=sci_arttext.

4 • Regarding anti-gender policies in Latin America, the international panels on *Gender and Politics in Latin America*, coordinated by the *Sexuality Policy Watch* forum has produced about the spread of "gender ideology" in the region. Regarding the Brazilian case, the works of Sonia Correa and Isabela Kalil discuss the influence of the Vatican's intellectual and political production and the trajectory of anti-gender crusades in the field of education. Specifically on the relationship between anti-gender and anti-communist positions, see Isabela Kalil, "Quem São e O Que Pensam os Eleitores de Jair Bolsonaro." Fundação Escola de Sociologia e Política de São Paulo, October 2018, <https://www.fespsp.org.br/upload/usersfiles/2018/Relat%C3%B3rio%20para%20Site%20FESPSP.pdf>.

5 • The circulation and dissemination of a series of false news articles marked the presidential campaign of 2018. One of the widest shared pieces of *fake news* suggested that when Fernando Haddad (Worker's Party) was Education Minister, he had distributed educational material that would teach students to "become gays." News articles also circulated suggesting that when Haddad was Mayor of São Paulo, he had distributed penis-shaped baby bottles in order to stimulate sexual practices in children.

6 • "It is prohibited for the Union, the States, the Federal District and Municipalities to: I - establish religious communities or churches, subsidize them, become involved in their functioning or develop relationships of dependence or alliance with them, save in cases of collaboration with the public interest." "Artigo 19," Constituição Federal de 1988, 2019, accessed July 31, 2019, https://www.senado.leg.br/atividade/const/con1988/con1988_03.07.2019/art_19_.asp.

7 • Constitutional control seeks to impede the passage of laws or norms that violate the Federal Constitution. In Brazil, the claims include: Ação Direta de Inconstitucionalidade (ADI - Direct

Unconstitutionality Action); Ação Declaratória de Constitucionalidade (ADC - Declaratory Action for Constitutionality); Arguição de Descumprimento de Preceito Fundamental (ADPF - Claim of Non-Compliance with a Fundamental Precept); ou Ação Direta de Inconstitucionalidade por Omissão (ADO - Direct Unconstitutionality Action by Omission).

8 • These are the cases in which the STF ruled in favor of the right to gender identity in all of its dimensions without biomedical requirements (Ação Direta de Inconstitucionalidade 4.275/2009); the recognition of civil unions for same-sex couples (ADPF 132/2011); granting women of the right to abort a fetus with encephalitis (ADPF 54/2012); and, most recently, the criminalization of homophobia through ADO 26. In the case of ADPF 54/2012 involving abortion, Minister Marco Aurélio, the author of the action, affirmed that the matter in question was one of the most important ever brought in the history of the court and defended the need to treat abortion in cases of fetal encephalitis separate from "any dogma or moral or religious paradigm." See "ADPF 54 / DF - Arguição de Descumprimento de Preceito Fundamental 54 Distrito Federal," STF, 2012, accessed July 31, 2019, <http://www.stf.jus.br/arquivo/cms/noticiarnoticiastf/anexo/adpf54.pdf>.

9 • Gilmar Mendes and Celso Bastos wrote the first draft of the project regulating ADPFs and forwarded it to a commission of jurists (Celso Bastos, Arnaldo Wald, Ives Gandra Martins, Oscar Dias Corrêa, and Gilmar Mendes). At the same time, a bill with the same objective written by congresswoman Sandra Starling (Worker's Party) moved through National Congress. The authors of the project merged it with the congresswoman's bill. Regarding this, see Gilmar Mendes and Paulo Branco, "Origens da Lei sobre a Arguição de Descumprimento de Preceito Fundamental," in *Curso de Direito Constitucional* (São Paulo: Saraiva, 2008).

10 • See "ADPF 461," Ministério Público Federal, Procuradoria-Geral da República, June 6, 2017, accessed on July 31, 2019, <http://www.mpf.mp.br/>

pgr/documentos/adpf-461.pdf/view.

11 • This is the case of another claim that was not addressed here (ADPF 479, sent by Minister Alexandre de Moraes to the STJ). This ADPF addresses law 4.576, February 15, 2016, municipality of Nova Iguaçu/RJ, that prohibits the utilization of any type of material that contains orientations about sexual diversity in municipal public schools.

12 • See petition report nº 4.479/2018 signed by

Gilmar Mendes.

13 • This tension between the members of the legislature from the religious lobby and the Court's decisions is visible. An example is the case of congressman Marcos Feliciano (PODE), who presented a project that criminalized homophobia in response to a Supreme Court decision. With this, representatives from the religious sectors sought to go around the STF and vote on a decision that left religious discourse out of the crime of homophobia.



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