REVISTA CHILENA DE DERECHO
DEL TRABAJO Y DE LA SEGURIDAD SOCIAL

VOL. 14 NÚM. 28 (2023) • PÁGS. 95-114 • DOI 10.5354/0719-2584.2023.67870
RECIBIDO: 27/7/2022 • APROBADO: 4/10/2023 • PUBLICADO: 31/12/2023

ESTUDIOS

Cultural and structural violence against homosexuality in the labour market: A reflection on the protection of unjustified non-discrimination of workers in the Brazilian legal system

Violencia cultural y estructural contra la homosexualidad en el mercado laboral: Una reflexión sobre la protección de la no discriminación injustificada de los trabajadores en el sistema jurídico brasileño

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ABSTRACT Violence against homosexuals has both direct and structural sides, and many times has a veiled character that affects the performance of their employment contract, making it difficult to access employment, career progression, and even to maintain their job. Throughout the study of Labour Law from the Brazilian legal system's perspective and principles, this article seeks to investigate what measures can be taken to combat discrimination against homosexuals in employment relationships. Concerning the applied methodology, the hypothetical-deductive method was chosen as an approach. Regarding the procedure method, the monographic was chosen, while bibliographic research, in turn, will be used as a research technique.

KEYWORDS Homosexuality, violence, employment contract, non-discrimination.

RESUMEN La violencia contra los homosexuales tiene vertientes tanto directas como estructurales, y muchas veces de carácter velado que afecta en la ejecución del contrato laboral y dificulta el acceso al empleo, la progresión profesional e incluso el mantenimiento de su puesto de trabajo. A lo largo del estudio del Derecho Laboral desde la perspectiva del ordenamiento jurídico brasileño y sus principios, este artículo busca investigar qué medidas se pueden tomar para combatir la discriminación contra los homosexuales en las relaciones laborales. En cuanto a la metodología aplicada, se eligió el método hipotético-deductivo como método de aproximación. Para el método de procedimiento se eligió el monográfico, mientras que la investigación bibliográfica, a su vez, se utilizará como técnica de investigación.

PALABRAS CLAVE Homosexualidad, violencia, contrato de empleo, no discriminación.

Introduction

Even fulfilling all the requirements of a position or having the technical knowledge necessary for a certain occupation, the beginning of a professional career nowadays is one of the greatest challenges for young people. Access to the job market is difficult and is a challenge to remain active and prosper in the intended career, always proceeding with good references from past jobs on the professional journey. In all stages of an employment contract workers are subject to challenges, bureaucratic, organizational, and moral routines, intrinsic to each place of service provision. This is sometimes followed by exclusion and marginalization of employees based on discriminatory arguments, although the Federal Constitution and labour legislation prohibit it.

Companies seek information about the professional background and technical/intellectual qualifications of their job candidates, but also about their intimate lives and they indicate to their recruiters which types of candidates' profiles they are not interested in hiring based on subjective assessments. This continues during the employment relationship and, if the company is aware that any of its employees behave in a manner considered improper to their moral vision, they can be fired. After being fired the worker can suffer from a stigma that will chase him during his career and prevent him from being on an equal level with other professionals while pursuing a new position.

The research named *Observatório Sobre a Empregabilidade LGBT* (Observatory on LGBT Employability) carried out in 2020 by the LGBTQI+ nucleus of the Partido Político Cidadania (a brazilian political party), Diversidade23, analyzed discriminatory practices that affect the work routines of LGBTQI+ employees in Brazil, based on a «survey made with more than a thousand LGBT and heterosexual professionals from different sectors and regions of the country and is part of the #ProudAtWork campaign, which aims to debate the question» (Diversidade23, 2021: 11, translated from Portuguese).

The results showed that 35% of the interviewees experienced some form of discrimination, veiled or direct, in their work due to their non-heterosexual orientation, and half of them had not even admitted their sexuality to others at work. Only 25% responded by exposing their sexual orientation at work, while another 25% mentioned that they do not feel comfortable talking about the topic in this environment, of which 51% said they did not find any sense in exposing themselves and 22% feared retaliation, both by bosses and colleagues (Diversidade23, 2021). The study revealed that most of the time discrimination comes from coworkers themselves, with 12% of

cases attributed to leaders and managers. Furthermore, regarding LGBTQI+ employees: only 13% were in management positions, and 15% held coordination positions; only 32% reported that they felt welcome at work, while 82% converged with the fact that there is a long journey to embrace the difference (Diversidade23, 2021).

It cannot be forgotten that the employer has the power to direct the employee, define the best way to manage their business and seek its success. However, according to the Brazilian legal system, in the exercise of this attribution, there are situations in which discriminatory elements are created for hiring or retaining workers, with unreasonable distinctions that place similar ones in inequality (lower wages, unequal benefits, readjustments or increases in wages, postponed vacations, etcetera). Such situations bring a form of structural violence culminating in exclusion, marginalization, and prejudice to some groups, placing their members at a disadvantage without an acceptable justification. This scenario hinders the performance of work activity or creates a hostile work environment in which the worker feels oppressed and prefers to adapt to unreasonable demands or abusive conditions for fear of further threats. Even though this sort of obstacle or restraint of professional opportunities relates to different vulnerable groups in society, this article intends to show how this reality afflicts people with a homosexual orientation.

The following question was chosen as a research problem: which measures can be adopted to combat discrimination against homosexuals in the employment relationship? The hypothesis is that violence against homosexuals interferes with the performance of these workers and brings losses throughout the employment relationship, making it difficult to keep in the position or progress in their career, which isn't compatible with the principle of non-discrimination in the labour market and demands affirmative measures. About the methodological aspects of this article, the hypothetical-deductive method was chosen as the approach method. Regarding the procedure method, the monographic was chosen, while bibliographic research, in turn, will be used as a research technique.

This study will address the following objectives: a) to analyze the phenomenon of violence against homosexuals on its direct, cultural, and structural aspects, based on the theoretical framework of Johan Galtung (1990) and Carmem Leontina Ojeda Ocampo Moré and others (2014).; b) study the employment contract, understanding its stages and from which moment the employer can be held responsible for illegalities; c) examine the principle of non-discrimination, using Américo Plá Rodriguez (2000) as a reference, applied to employment contracts, bringing legal and doctrinal foundations on the matter; d) demonstrate the relevance of the discussion of the issue due to the offence to the dignity of homosexual workers and the impossibility of expressing their identity; and e) record the need to adopt measures to address this problem.

Violence that targets gays: Homophobia has a direct, structural, and cultural character

Defining words: Homosexuality and homophobia

It is necessary to make initial descriptions of fundamental words for better understanding and a delimitation of the discussion proposed herein, starting with sexual minorities as they are the scope of this study.

Sexual minorities can be understood as a group who express their sexual orientation or practices in a non-conforming way to the current and vastly accepted forms adopted by the present society's morality. Because of this, they suffer unmotivated discrimination. Examples of some of the victims are homosexuals, bisexuals, pansexuals, and asexuals (Vecchiatti, 2019: 162). Without disregarding the relevance of the debate to fight transphobia, the study carried out here aims to address the problems presented in face of *homosexuals*, defined as:

> They are people who feel erotic-affective attraction for people of the same gender, regardless of whether or not they consider themselves to be members of the homosexual community or even as homosexuals, because sexual orientation is a concept that takes as a parameter only the gender which the person feels erotic-affective attraction (for the same reasons, heterosexuals are people who feel erotic-affective attraction to people of the opposite gender). Unlike transsexual, a homosexual does not suffer dissociation between his «physical sex» and his gender: if they were designated as a man at birth, he understands himself as a man and, regardless of that, feels an erotic-affective attraction to other men (or if she was designated as a woman at birth, she understands herself as a woman and, regardless of that, feels an erotic-affective attraction to other women) (Vecchiatti, 2019: 162, translated from Portuguese).

It appears that homosexuality is the determining factor to conceptualize the attraction that someone has to another person of the same gender, despite their physical sex. That is the reason that there are transexual people who feel erotic-affective attraction for others of the same gender.

In turn, homophobia, objectively and respecting all the divergences, is characterized by violent, marginalizing, and discriminatory practices motivated by homosexual orientation, as states Borrillo (2000: 34, translated from Portuguese):

> Homophobia can be defined as the general, psychological, and social hostility against those who, supposedly, have sexual desires or practices with individuals of their sex. Specified form of sexism, homophobia equally rejects anyone who does not conform to the predetermined role for their biological sex. An ideological construction that consists of the constant promotion of one form of sexuality (straight)

over another (homo), homophobia organizes a hierarchy of sexualities and, from this stance, extracts legal consequences.

Therefore, homophobia oppresses not only homosexuals but also bisexuals and pansexuals, as it is motivated by the person's sexual orientation. Discrimination based on gender identity must be elaborated as *transphobia* (Vecchiatti, 2019: 161). According to this social construction, heterosexual people, morally accepted as having the predominant sexual orientation, would be in a superior and dominant social position than homosexuals. In this way, it is understood which behaviours are considered homophobic, and it is important to emphasize how these are impregnated in our society far beyond visible acts of violence, for which they deserve the same attention and combat.

Understanding the phenomenon of structural violence

When the word violence is mentioned during a message, almost automatically, the receiver will make a correlation to some act in which the agent has used force as an element to legitimize his attitude. That is, violence is usually related to a commissive action, disproportional to the event to which it relates, whether by orders, acts or words that impose a will or opinion on someone else. Some examples of manifestations of direct violence are assault, physical or verbal aggression, and homicide.

This interpretation, while not mistaken, is incomplete since it excludes certain behaviors that are not easily perceptible which demand an analysis not only of an act, but also of the context it is performed and whom it is performed against, as well as the consequences resulting from it. In this way, conducts that, in a perfunctory analysis, do not appear to be violent practices are essentially, and might have consequences, as harmful as the physically violent act.

For this reason, Galtung (1990: 294) defines the phenomenon of violence as constituted by three bases: direct, structural, and cultural violence. He explains it:

> Despite the symmetries there is a basic difference in the time relation of the three concepts of violence. Direct violence is an *event*; structural violence is a *process* with ups and downs; cultural violence is an *invariant*, a "permanence" (Galtung, 1977, ch. 9), remaining essentially the same for long periods, given the slow transformations of basic culture. Put in the useful terms of the French *Annales* school in history: *événementielle, conjoncturelle, la longue durée*. The three forms of violence enter time differently, somewhat like the difference in earthquake theory between the earthquake as an event, the movement of the tectonic plates as a process, and the fault line as a more permanent condition.

Moré and others (2014) analyze the issue of defining the word violence from the perspective of Galtung, considering the concept of intrinsic force to it and especially

when evaluating the action verbs that can be attributed to the violent act, within which are to rape, to force, and to violate. These authors, however, suggest that the interpretation of violence should be amplified to consider its different faces, demonstrating that it is a complex and multifaceted social phenomenon, whose manifestations are sometimes overlooked. To better understand this situation, three ways to understand an act as violent are presented:

> 1. Direct violence: here it refers to physical and/or verbal violence, easily visible in different forms of conduct, 2. Structural violence: situations of exploitation, discrimination, marginalization, or domination, and 3. Cultural violence: rationalizations, attitudes, and ideas that justify, legitimize and promote violence in its direct or structural forms (Moré and others, 2014: 65).

These new dimensions of violence —structural and cultural— were born from a broader analysis of this theme. However, such analysis proves to be essential for the study of any violent situation that is intended to be fought or discouraged, and by having this in perspective, other elements can be considered as essential for a full understanding of the reasons for the problem, which would enable a more effective proposal for preventive work.

Moré and others (2014: 67) mention that:

> The form, structure and dynamics present in the phenomenon of violence, plus the sociocultural context in which it takes place are aspects that are constantly affected and expressed in the interactional process, constituting a complex and difficult-to-understand plot when you do not have a broader, in-depth and problematizing view of its determinants (translated from Portuguese).

Based on Galtung arguments, the concept of violence may have a subdivision between a visible and invisible character. In the visible aspect, there is direct violence, with a clear and identifying element between the act and the intention to attack. On the other hand, structural and cultural violence escapes the field of vision, as the former is linked to social injustice and discrimination, and the latter is expressed in cultural traits and expressions of society that promote, legitimize, and justify other forms of violence (Amaral, 2015: 104-105). Therefore, direct violence is noticeable and embodied in acts, while the cultural functions legitimate such conduct, and the structural function is linked to the lack of means to satisfy the needs of the offended party (Amaral, 2015: 105).

It is important to make this clarification, especially about the expressions of cultural and structural violence, which can be as harmful as direct violence. However, they are not in the visible universe so their existence is neglected, they are legitimized socioculturally and considered common practices: but if they supposedly do not exist, there would be no motivation for their combat. The prejudice and marginaliza-

tion homosexuals suffer in several aspects, including in their work environment and all phases of the labour contract is a phenomenon that should be highlighted to be fought against, given the duty of equal treatment among all workers, and spread as a fallacy that says their problems do not exist.

In 2019, the Brazilian Supreme Court concluded the judgment of the Direct Action of Unconstitutionality by Omission, number 26, and of the Writ of Injunction, number 4733; criminalizing acts of homophobia and transphobia, equating them with crimes defined in the Racism Law (Law number 7716/1989) until the National Congress legislates on the issue. In this case, historic votes were issued accepting the request for such demands, among which the one drawn up by the Rapporteur Justice Celso de Mello stands out. During its elaboration, it brought to light historical elements that reinforce the existence in our country of an oppressive, systematic, and prejudiced treatment against homosexuals (not excluding the issue of gender ideology, considering that this aspect has gained greater reinforcement more recently), leaving members of this group deprived of several fundamental rights inherent to the dignity of the human being. Given these past facts, at this time no one must be restricted from any right based on their identity or sexual orientation:

> The issue of homosexuality, which emerged at a time when the topic concerning 'gender ideology' was not yet debated, has taken, in our country, over centuries of repression, intolerance, and prejudice, serious proportions that affect so many people because of their sexual orientation (or even their gender identity), marginalizing them, stigmatizing them and depriving them of basic rights, in a social context that is clearly hostile to them and violates the postulate of the essential dignity of the human being.
>
> That is why, Mr. Chief Justice, it is necessary to proclaim, now more than ever, that no one, absolutely no one, can be deprived of rights or suffer any legal restrictions on account of their sexual orientation or even on account of their gender identity (Brazilian Supreme Court, 2019: 29-30 and 35, our translation from Portuguese).

Therefore, it is important to understand that homosexuals, in addition to being victims of various expressions of direct violence, also suffer other manifestations of cultural and structural violence, which culminate in the marginalization and social exclusion of members of this group. This must be studied, exposed, and fought, aiming to ensure them all the fundamental rights inherent to human beings.

The principle of non-discrimination applied to labour contracts

As established in the previous item, structural and cultural violence, although not easily perceptible, are installed in the most diverse forms and social layers, and it is important to understand how it is expressed in employment contracts in all its phases as well as which are the main arguments to combat.

The definition of employment contract and its legal nature

It is necessary to clarify the correlation between work and employment contract to better define their legal nature. Article 442 of the Consolidation of Labour Laws (CLL) places the work contract as a synonym for the employment contract.[1] However, other legal relationships are also understood as employment contracts (for example, self-employed, independent, volunteering, etcetera), which are not exclusively work contracts. Therefore, in the Brazilian Labour Law system the work contract is a genus of which the employment contract would be one of its species (Garcia, 2014: 119).

Explaining this theme, Martinez (2016: 244-245 and 252) points out that the work contract regulates activities with the objective of the worker's self or family sustenance, this on their own or by others means, with autonomy or subordination, and with occasional or intermittent periodicity. Thus, it expresses a very broad genus that unfolds in several instruments, among which is the employment contract. However, this legal relationship will only be characterized when the following elements are present: personality, onerousness, and non-assurance by the service provider of the risks that are inherent to the business, continuity, and subordination.

Hence, the technical premise is that every employment contract is a work contract, but not every work contract will be an employment one. It is necessary to understand this small distinction about such forms of juridical acts, although the CLL places them as if they were a single entity. Considering, however, its equivalence, when this article references work contracts it is also directing its analysis to employment contracts.

The examination of the legal nature of the employment relationship and the discussion of its characterization as contractual is fundamental for the proper classification. There are two main understandings of this definition: the non-contractual and the contractual.

The non-contractual aspect "had the main concern of denying any relevance to the role of freedom and will —and thus the contract— in the formation and development of this specialized legal relationship", unfolding into two ramifications: the work relationship and the institutionalist one (Delgado, 2016: 326, translation from Portuguese). The working relationship understands that this does not need an expression of will or agreement to its characterization, being sufficient the existence of service provision that would attract the relevant rules, from which a relationship of statutory nature would emerge in as much as from the work of the employee, and would already be automatically inserted in the company (Garcia, 2014: 119). The ins-

1. Article 442 indicates that: "Individual employment contract is the tacit or express agreement, corresponding to the employment relationship" (Consolidation of Labour Laws, 1943, our translation from Portuguese).

titutionalist starts from the premise that the company is an institution, composed of a social body of people, governed by a determined hierarchical order whose participation and permanence are not subject to the will of its members, whereas they do not create anything by private initiative. That is, its volitional element is not considered individually but it is always linked to the idea of group and collaboration (Delgado, 2016: 326).

As can be seen, the non-contractual theory is based on authoritarian premises, disregarding the importance of the expression of will for the configuration of an employment relationship, moving towards autocratic labour management, which is not consistent with the primacy of good faith and social function of work.

For this reason, the contractual model of the employment relationship prevails. This is because the parties' expression of will is a fundamental element for the birth and maintenance of the employment relationship, albeit in a tacit way, above all because of the freedom to work as a fundamental guarantee. This is what Garcia understands, (2014: 120, from the Portuguese translation) and also points out: "Having in mind its contractual nature, the employment contract presents the nature of a legal transaction, that is, a voluntary legal act, with a business purpose, in which the bilateral declaration of will (consent) is manifested to produce its legal effects". Thus, this work is affiliated with the contractual approach, understanding the employment relationship as a contractual legal relationship, being essential to the existence of the employee's consent, albeit tacitly, so that this has recognized its existence and production of effects. Once the legal nature of the work contract has been established, by adopting the contractual model, it is possible to locate the phases of this legal relationship, including the stages of the constitution of a *lato sensu* legal transaction, as will be done next.

The civil doctrine points to the following phases of a contract: preliminary negotiations, proposal, acceptance, and end. That is, when there is an interest in contracting, a phase of speculation and data collection about the possibility of business begins, followed by the expression of such desire to another who agrees to such offer, also expressing a volitional act, and formalizing this relationship in an instrument and/or certain conduct of compliance with the obligations of each member of the relationship.

Therefore, a contract originates in the first moment of the manifestation of the will, born in the subjectivity of contractors, being concretized through a statement, which can be either expressed or tacit, bearing in mind that silence can also be characterized as a contract (for example, in article 111 of the Brazilian Civil Code). In short, contracts are the result of two declarations of will: on the one hand the proposal and on the other hand its acceptance. This introduction also warns that a contract is preceded several times by preliminary negotiations, consisting of surveys, studies, and debates. If the parties do not express their will, there would be no disclosure of

the legal transaction even with the existence of a project. However, if there is a "deliberate intention demonstrated, with the false expression of interest, to cause damage to the other party, causing him, for example, to lose another business or incurring expenses", the injured party can claim losses and damages, due to a civil tort (Gonçalves, 2014: 66, our translation from Portuguese).

The fact that the preliminary negotiations do not generate obligations between the members, it does not exempt them from certain legal duties that are inherent to any contracting party, among which there are those "arising from the incidence of the principle of good faith, the main duties of loyalty and correction, information, protection and care and confidentiality" (Gonçalves, 2014: 66, translated from Portuguese).

Pondering these characteristics of the preliminary negotiations, it is emphasized that:

> Saying, therefore, that there is a subjective right not to contract does not mean that the resulting damages should not be compensated, given that, [...] regardless of the imperfection of the positive rule, the principle of objective good faith also applies to this pre-contractual phase, notably the accessory duties of reciprocal loyalty and trust (Gagliano and Pamplona Filho, 2014: 136, translation from Portuguese).

If there are preliminary negotiations, these are followed by the "proposal" or, in the absence of it, it will be marked as the beginning of the contract. It can be defined as "a definitive willingness to contract on the basis offered, no longer subject to studies or discussions, but addressing the other party to accept it or not, being, therefore, a unilateral legal transaction, constituting an element of contractual formation" (Gonçalves, 2014: 67, our translation from Portuguese). All essential elements of the business such as price, time, payment method, etcetera, must be included. It is important to differentiate the offer from the preliminary negotiations as, at that time, the contracting party is no longer in the scope of surveys and discussions. The proposal is made on a definitive basis, which is why it will always bind the bidder, generating the latter's responsibility in case they unjustifiably fail to sign the deal.

Next, there is the "acceptance", which is the adherence to the proposal made in the past, which must be expressed with the full capacity of the accepting party, unless assisted or represented, freely and without any vice of consent under penalty of annulment of the legal transaction (Gagliano and Pamplona Filho, 2014: 142). After that, a definitive contract will be conceived when "there is a clash or meeting of wills originating from contractual freedom or private autonomy. From then on, the contract will be perfected, generating all its consequences, such as those arising from contractual civil liability" (Tartuce, 2014: 157, translated from Portuguese).

During all the contract phases, as well as in the post-contractual moment, the parties must bear in mind the principles of loyalty and contractual good faith, be-

cause "every contract must be based on good faith. The employee must fulfil his part of the employment contract, carrying out his activities normally, while the employer must also fulfil his obligations, hence the reciprocal loyalty" (Martins, 2000: 53, our translation from Portuguese). Also, the freedom to contract should be exercised and limited with attention to the principle of the social function of the contract, according to the arts. 421 and 422 of the Brazilian Civil Code.[2]

As noticed, the work contract has phases similar to civil contracts in general: an employee, based on several vacancy announcements by different employers, talks to them to obtain more information on how the activities of the advertised vacancies will be developed. Although there is no bond at this time, given the concrete expectations encouraged by the employer, they may be held responsible if they withdraw from the negotiations in violation of good faith through a negligent act (Martinez, 2016: 322).

The author goes further to add that preliminary contracts of work can be signed, as a way of delimiting the agreement that is intended to be signed definitively, imposing binding effects on the parties. Once this preliminary phase is done, the proposal is made to the employee with all its binding elements. And, although addressed to several recipients, it is not possible for the proponent to offer less advantageous conditions later to the hired person. Hence, the contractual cycle ends with the acceptance of the proposal by the employee.

An important element is also added to the work contract: the existence of *social responsibility* of the company towards its employees, revealing that employees are not only bound by the fulfillment of the intrinsic and inherent duties of this type of legal relationship, but also the obligation to ensure workers are provided of decent work in a healthy environment, with the main purpose of protecting and enforcing the precepts established by the principle of human dignity, which reinforces the existence of respect for the minimum rights of the worker-man, which includes:

> A minimum set of worker rights that correspond to the existence of work; freedom of work; equality at work; to work with fair conditions, including remuneration, and the preservation of their health and safety; the prohibition of child labour; freedom of association, and protection against social risks (Garcia, 2014: 156, translated from Portuguese).

Although the term has an erroneous nomenclature when mentioning the word man, which should be eliminated to avoid any possibility of interpretation limited to

2. Article 421 indicates that: "The freedom to contract will be exercised due to and within the limits of the social function of the contract". Article 422 stipulates that: "Contractors must keep, in the conclusion of the contract, as in its execution, the principles of probity and good faith" (translations from Portuguese).

male heterosexual workers, it seeks to demonstrate that a set of basic rights should be ensured to keep the performance of employee activities without regard to their physical and psychological integrity, safeguarding a list of minimum and inalienable guarantees.

The principles of equality and non-discrimination in labour contracts: Impossibility to use homosexual orientation as a differentiation factor

As stated before, the employment contract must always be guided by decent conditions that ensure the dignity of the worker, and this obligation is unavoidable to the employer. In this spectrum of duties, emerges equality amongst workers. Hence, within the scope of Labour Law, the principles of "equality" and "non-discrimination" appear.

Before analyzing the existing legal structure that supports those principles within the Brazilian legal system it is important to bring some theoretical clarifications about them, based on the perspective of Américo Plá Rodriguez. He explains that when it comes to the need to ensure equality within the scope of work contracts, there is no intention to establish a need for absolute equality among employees. The main objective is equal treatment of those in a similar position while treating equal people with different conditions is an expression of injustice. Therefore, distinctions are not prohibited if there is a reasonable justification for them, otherwise, they will be discriminatory (Plá Rodriguez, 2000: 186 and 189).

The author goes on to make a differentiation in the interpretation of these principles, which are often used as synonyms, but present sensitive differences:

- The principle of non-discrimination is more objective and intends to eradicate any form of unjustified differentiation between workers, for example: sex, nationality, race, skin colour, religion, political opinion, and social origin. The possibility of an entrepreneur adopting legitimate causes to freely decide on the conduct of the employment relationship, such as dedication to work and personal skills, is not excluded;
- The principle of equality rules that every worker who performs equivalent activity and function should have the same remuneration and benefits. However, considering that the Labour Law has several levels of protection, it cannot be limited to the remuneration issue, disregarding a wide range of other situations that must be considered. That is, it cannot simply be analyzed from the perspective of an employee who is more favoured than another, but of an employee who is disadvantaged in the face of generality.

For this reason, Américo Plá Rodriguez believes that it is more appropriate to admit the principle of non-discrimination, as it proposes to eliminate differences that

place the employee in an unfavourable situation in relation to the whole without legitimate reason, while the principle of equality arouses numerous conflicts due to its notion of equivalence.

With the differences in mind, the Brazilian Federal Constitution brings provisions that seek to ensure *lato sensu* isonomy to all areas of Brazilian Law, as noted in articles 3 and 5.[3] However, there are specific provisions that prohibit any expression of discrimination in Labour Law, for example, article 7, XXX, XXXI, and XXXII.[4]

Nevertheless, it is not forgotten that Convention number 111 of 1.958, of the International Labour Organization, deals with discrimination in matters of employment and profession, and Brazil signed it with the promulgation by decree 62.150/68. It provides that:

> 1. For the purpose of this Convention the term discrimination includes:
> a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
> b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies (International Labour Organization, 1958).[5]

Da Costa (2007: 92-94) also collates that there is legislation that prohibits discrimination at all stages of the work contract, as observed in the article 3, sole paragraph,[6]

3. Article 3 constitutes the fundamental objectives of the Federative Republic of Brazil: "IV. Promote the good of all, without prejudice of origin, race, sex, colour, age, and any other forms of discrimination". And article 5 stipulates: "All are equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security, and property, in the following terms: [...] XLI. The law will punish any discrimination against fundamental rights and freedoms" (our translation from Portuguese).

4. Article 7 indicates that the rights of urban and rural workers, in addition to others aimed at improving their social condition are: "XXX. Prohibition of differences in salaries, exercise of functions and admission criteria due to sex, age, colour or marital status; XXXI. Prohibition of any discrimination with regard to salary and admission criteria for disabled workers; XXXII. Prohibition of distinction between manual, technical and intellectual work or between the respective professionals" (our translation from Portuguese).

5. *Discrimination (Employment and Occupation) Convention*. Available at https://bit.ly/414NfIK.

6. "There will be no distinctions regarding the type of employment and the status of worker, nor between intellectual, technical and manual work" (Consolidation of Labour Laws, 1948, our translation from Portuguese).

and article 5 and 373-A of the CLL,[7] which although it was promulgated to protect women, it also applies to homosexuals. Finally, there is Law 9.029/95, article 1, which also brought an approach to this theme.[8]

This entire legal framework proves the existence of protective legislation regarding differences without plausible grounds, both in the preliminary phase and at the definitive moment of the work contract including purposes of remuneration. Even though none of these regulations provide a specific provision for sexual orientation, it recalls that the prohibition of discrimination by certain criteria is intended to exemplify situations that are usually characterized as arbitrary (race, colour, sex, age, and religion), as none of the presented lists is exhaustive but exemplary; emphasizing that these precepts will always be rooted in the principle of equality. Furthermore, sexual orientation can be covered by discrimination based on sex, as it is intrinsic to the issue of sexuality (Rios, 2001: 392-393).

Despite the existence of an axiological and normative legal framework protecting the discrimination against homosexual people in the labour market, this group sees itself vulnerable and compelled to deny or omit a condition inherent to its identity and dignity to obtain or keep a professional placement, for fear of reprisals if this fact comes to light.

It is therefore possible to understand that homosexuals suffer discrimination at all stages of the employment contract (Medeiros, 2007: 83-85):

- During the initial negotiations and the proposal: many times, questions and investigations are made about the candidate's private life, to find out about their sexual orientation. At this time, the employee is in a situation of considerable inferiority, which is why there must be limits to the questions made by the employer. Even though the homosexual worker (as well as any other) has the right not to answer the questions that are addressed to them, they often give in to the employer's insistence to try to secure their hiring.
- In the course of acquiring a definitive work contract: the worker's sexual orientation may be revealed, when they are subject to situations of exclusion, offenses, vexatious episodes, and psychological harassment, both by their colleagues and superiors. It can also happen when they see themselves as the object

7. "All work of equal value will correspond to equal pay, regardless of gender" (our translation from Portuguese).

8. "The adoption of any discriminatory and limiting practice for the purpose of accessing the employment relationship, or its maintenance, due to sex, origin, race, colour, marital status, family status, disability, professional rehabilitation, age, among others, is prohibited, except, in this case, the protection of children and adolescents provided for in item XXXIII of article 7 of the Federal Constitution" (Law prohibiting discriminatory practices, our translation from Portuguese).

of differentiated treatment regarding the granting of opportunities, progressions, or benefits, as well as when tasks that require greater responsibility are not transferred to them.

- Dismissal of the homosexual worker: it is indeed the employer's potestative right to dismiss any employee, however, it can never be done with discriminatory motivation, although it often occurs.
- There are also cases in which segregating behaviors go beyond the employment contract and occur in the post-contract: when employers draw up discriminatory lists and disseminate them to others, to prevent the hiring of the employee who was then dismissed. Not infrequently, such lists try to gather the names of homosexual workers.

All these discriminatory practices are expressed in different ways:

> i) Direct discrimination, when there is express conduct of prejudice regarding the person's condition (explicit prohibition of admitting people according to gender, religion, sexual orientation, origin, colour, age, union membership; and to highlight, also job advertisements containing discriminatory requirements regarding age, race, colour, appearance, religion, for example); ii) indirect discrimination, when not explicitly verified, but veiled, which can be verified by evidence and statistics (for example, observed in the constant rejection of admission or promotion of people from certain groups for discriminatory reasons); and iii) institutional discrimination, when discrimination affects the organization of the company itself, being inserted in the form of its organization and administration (Garcia, 2014: 85, our translation from Portuguese).

In other words, segregation acts are not always direct, visible, and perceptible. Often, this phenomenon is only evident with a certain study and particular attention to the problem, since there are practices of violence and discrimination that are structural and not explicit, yet they victimize many vulnerable groups such as homosexuals. This creates a scenario of homosexual invisibility in the workplace. As sexual orientation is not manifested by external or physical characteristics, unlike what occurs with skin colour or race, for example, workers prefer to avoid homo-affective public demonstrations to avoid homophobic reactions as well as any problem regarding their employment relationship. It is a real waiver of the right to express their identity and healthily exercise affection; both very personal and fundamental rights for anyone to find complete happiness (Medeiros, 2007: 85).

In addition, it is worthwhile mentioning what Krebs Gonçalves (2014: 23, our translation from Portuguese) adduces about homosexual visibility:

> The homosexual worker should not feel inferior, to the point of hiding his sexual orientation, as if he had no family, loves or friends, or even fear of some form of re-

taliation at work. On the other hand, having other people aware of this fact, by itself, does not authorize colleagues and superiors to make them a constant target of bad and embarrassing jokes and malicious comments.

Some argumentations could arise in the sense that the employer is free to conduct his business, under the principle of free enterprise, as well as considering having the intrinsic prerogatives of the directive power (stated in article 2 of the CLL). However, there are limitations to such prerogatives, arising from the worker's right to privacy and the entrepreneur's obligation to ensure a healthy and balanced work environment for their employees. If these requirements are not met, the employer can be held liable (Krebs Gonçalves, 2014: 24).

Calvo (2013: 57, our translation from Portuguese) explains that "the fundamental right of privacy and intimacy of the constitutionally protected employee [...] represents an intimate space insurmountable by intrusions by third parties, especially the employer". Thus, the Brazilian legal system has a legal provision that prohibits discriminatory practices within the scope of employment contracts based on the sexual orientation of employees, especially affecting their rights to freely express their identity and protect their privacy, as well as the impossibility for employers to exercise its directive power indiscriminately.

Discriminatory behavior by the employer motivated by homophobia is illegal, even those arising from veiled and indirect discrimination, forms of structural and cultural violence. This is especially because they affront the principle of non-discrimination, which applies to employment contracts. Therefore, the homosexual person who suffers discrimination can sue the employer to obtain due protection against such act or indemnity arising from excesses committed against them, given the uncontroversial illegality of the conduct.

Any form of discrimination against workers based on their homosexual orientation is unacceptable at any stage of the employment contract, under penalty of the employer's liability. The judicial answer is not enough to repress these situations, though: it is essential to adopt public policies designed to contain this phenomenon, especially considering that these segregating records are not always easily noticeable.

It is necessary to correct direct, perceptible, and more easily detectable practices of discrimination, but also indirect and structural ones, becoming imperative to adopt concrete affirmative actions aimed at minimizing this problem and providing full access and permanence to the job market for the homosexual public so they can perform their duties in a dignified way, without fear of expressing their identity.

Regarding these affirmative actions, they would have an essential function to establish different conditions of access for people belonging to groups that are segregated, thus aiming to produce equality between people but not to provide some form of privilege (Krebs Gonçalves, 2014: 23). This type of measure represents policies aimed

at correcting inequalities arising from various long-standing historical and cultural discriminatory processes. Examples of possible practices are the creation of a quota policy and others of a pedagogical nature, such as the provision of courses and campaigns in the workplace.

Final considerations

This article investigated the problems faced by homosexuals in their work relationships, especially by veiled forms of prejudice and marginalization unfairly practiced based on their about the person's sexual orientation, and proposes measures that are suitable to counteract this problem.

It was verified that in addition to the natural challenges that exist in the job market, several people face difficulties in their professional career due to their homosexual orientation, suffering acts of prejudice and marginalization not always noticeable, but that cause damages as or more serious than those resulting from explicit conducts. It was demonstrated that this set of practices is a homophobic expression of structural violence, embodying a historical and social process supported by cultural practices that deserve special attention and combat. Furthermore, there is an extensive list of laws in the Brazilian legal system that prevent this type of behavior that violates the constitutional principles of non-discrimination and human dignity.

It was agreed that the employer should be concerned about not allowing homophobic practices in their business, as they must ensure a healthy and balanced work environment, especially where the employee can express their identity without fear, this being a guarantee of their realization. This, in no way serves as an obstacle or hindrance to their career success.

It was explained that the relationship between employer and employee is contractual in its legal nature, which must always be guided by the principles of probity and good faith, and that there is great importance on the social function of work. Thus, it was concluded that if this burden is not fulfilled, given the illegality of the discriminatory practice —considering the legal apparatus that prohibits such attitudes—, the judicial answer would be essential and the employer would be held accountable for the conduct carried out from the preliminary to the post-contractual stages of the contract.

Nevertheless, in addition to the importance of the judiciary in the face of discriminatory practices, the importance of adopting affirmative actions, especially in the pedagogical sphere, emerges to curb the advance of the marginalization and segregation of homosexuals, considering that there are indirect discriminatory practices that go far away of an easily remarkable plan which leaves this discussion in the background. Meanwhile, the need to debate and combat this type of practice cannot be ignored. Then, it is necessary to invest in education so that inequalities can be fixed

and people have equality of opportunities and rights, with the main purpose of social inclusion of vulnerable or disadvantaged groups, and attention to their specificities.

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