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**Transgressing the Law**  
Rethinking the Brazilian LGBT Movement and its  
Relationship with the Law

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## Summary

The Brazilian LGBT movement has established in the last decades a strategy of action based on the achievement of social transformations through law. The struggle for human rights has become the focal point of the LGBT agenda in the country. For this reason, the linkages between the Brazilian LGBT movement and the law have multiplied. Having the objective of reflecting on the articulations arising from the Brazilian LGBT movement / law relationship, this research aimed at analyzing the contradictions and limitations emerging from this conjunction, as well as reflecting on new strategic forms to apply the law. In order to develop this analysis, a perspective of Cultural Studies and poststructuralist philosophy was applied. The identities, classifications extremely important for the composition of new social movements, were understood in this work as socially constructed elements and necessarily linked to the existence of a difference. The law, on the same note, was interpreted as a historical institution detached from any metaphysical perspective. From the application of these definitions, it was verified throughout this thesis that the struggle for rights of the Brazilian LGBT movement often causes hierarchies within the community itself, since the rights achieved are not enjoyed in a homogeneous way by all its members. This situation divides opinions: there are those who argue that the acquisition of rights necessarily leads to a social transformation; and, in opposition to this line of thinking, there are those who perceive law as a normalizing entity par excellence, being therefore an institution unable to perform structure changes in society. Taking these two views into account, this research was in line with a different perspective, namely: the possibility of using law as a strategic tool. Through the application of concepts such as “resistance” and “transgression”, it was argued in this study that social transformations through law are possible when performed from the inside out. In this sense, an agenda that focuses on the achievement of rights as the ultimate goal is not enough. Nevertheless, the application of law as a way of demonstrating its own inconsistencies seems to be a powerful weapon to destabilize the powers and knowledges that reproduce inequalities among dissonant bodies.

**Keywords:** Brazilian LGBT Movement. Law. Human Rights. Identities. Resistance. Transgression.

## Sumário

O movimento LGBT brasileiro estabeleceu nas últimas décadas uma estratégia de ação baseada no alcance de transformações sociais através do direito. A luta pelos direitos humanos tornou-se o ponto central da agenda LGBT no país. Por esse motivo, as alianças entre o movimento LGBT brasileiro e o direito se multiplicaram. Com o objetivo de refletir sobre as articulações advindas da relação entre o movimento LGBT brasileiro e o direito, esta pesquisa teve como propósito analisar as contradições e limitações provenientes dessa conjunção, bem como refletir sobre novas formas estratégicas de aplicação do direito. Para desenvolver esta análise, uma perspectiva dos Estudos Culturais e da filosofia pós-estruturalista foi adotada. As identidades, classificações extremamente importantes para a composição dos novos movimentos sociais, foram entendidas neste trabalho como elementos socialmente construídos e necessariamente ligados à existência de uma diferença. O direito, no mesmo sentido, foi interpretado como uma instituição histórica separada de qualquer perspectiva metafísica. A partir da aplicação dessas definições, verificou-se ao longo desta tese que a luta por direitos do movimento LGBT brasileiro muitas vezes provoca hierarquias dentro da própria comunidade, uma vez que os direitos alcançados não são usufruídos de forma homogênea por todos os seus membros. Essa situação divide opiniões: há quem argumente que a aquisição de direitos necessariamente leva a uma transformação social; e, em oposição a essa linha de pensamento, há aqueles que percebem o direito como uma entidade normatizadora por excelência, sendo, portanto, uma instituição incapaz de realizar mudanças estruturais na sociedade. Levando-se em consideração estes dois pontos de vista, esta pesquisa alinhou-se a uma perspectiva diferente, a saber: a possibilidade de se utilizar o direito como uma ferramenta estratégica. Por meio da aplicação de conceitos como “resistência” e “transgressão”, argumentou-se neste estudo que as transformações sociais por meio do direito são possíveis quando realizadas de dentro para fora. Nesse sentido, uma agenda que foca na conquista de direitos como meta final não é suficiente. No entanto, a aplicação do direito como forma de demonstrar suas próprias inconsistências parece ser uma arma poderosa para desestabilizar os poderes e saberes que reproduzem desigualdades entre corpos dissonantes.

**Palavras-chave:** Movimento LGBT Brasileiro. Direito. Direitos Humanos. Identidades. Resistência. Transgressão.

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## Introduction

Law, a tool historically used as a way of normalizing sexualities, has become, in a strategic turn, an important instrument of tension for the accomplishment of rights. Bodies that once were considered abject in this arena, have begun to breach the public sphere in search of recognition of their rights. Legal norms, considered for so long the expression of a social organization based on rigid schemes of binary sexual division, suddenly appear to be a powerful weapon to pursue changes. The Brazilian Federal Constitution<sup>1</sup> and all International Human Rights treaties which Brazil has ratified guarantee certain rights, being that the reason why the LGBT movement started to demand them.

The LGBT movement has become increasingly central to political discussions in contemporary Brazil. The advances achieved through its advocacy in the Brazilian courts cannot be ignored. Such facts mobilize the media, public opinion, governmental and non-governmental institutions in a variety of ways. The debate about which sexual and gender experiences are legitimate goes therefore beyond the legal sphere, having a great impact also in the social domain.

The LGBT movement and law are deeply intertwined. The analysis of law, especially in areas such as human rights, necessarily go through the approaches brought about by this movement. In the same way, the current configuration of the movement itself cannot be sufficiently analyzed if one does not consider the centrality of its relations with the law. Thinking about the LGBT movement is hence thinking about law.

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<sup>1</sup> CARRARA, Sérgio. A luta anti venérea no Brasil e seus modelos. IN: PARKER, Richard; BARBOSA, Regina Maria (orgs.). Sexualidades brasileiras. Rio de Janeiro: Relume Dumará: ABIA: IMS/UERJ, 1996. Pp. 131-147. p. 134. It is not possible to analyze the process of rights acquisition performed by the Brazilian LGBT movement without understanding the importance of using certain constitutional principles (such as freedom, dignity, equality, among many others) in the struggle strategies and discursive dispute of this movement.

In this context of intense interdependence, many interpretations are possible. There are lines of thoughts, for example, arguing that the acquisition of rights by itself has potential for social change still to be implemented. Likewise, there is also plenty of criticism from different areas of knowledge and activism, arguing that the strategies of action achieved through law would necessarily lead to an *identity prison*<sup>2</sup> and to a *normalization*<sup>3</sup>, destroying the revolutionary potential that is the very foundation of the movement.

Nevertheless, some convergences that have not yet been sufficiently investigated emerge when reflecting on this dichotomy. For this reason, this paper aims to propose a different perspective approach towards the LGBT movement / law relationship. It is intended therefore to suggest a liberation from the discourses that consider law only as a saving or a normalizing system.

In this sense, the objective here is to theorize that there is no impermeable separation between *normalization* and *transgression / resistance* in this relationship. These concepts are in mobilization all the time through cultural norms. For that reason, it is aimed throughout this thesis to reflect on how these mobilizations can emerge through strategies that are disputable within the legal and social domains.

Having the intention to reflect on these points more concretely, some questions arise: How do law and the LGBT movement articulate to one another? What are the *contradictions* that occur when the LGBT movement uses law and the identity politics approach as a tool to achieve full citizenship? Can the possible *limitations* resulting from these contradictions be rethought in order to boost the creation of new imaginaries?

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<sup>2</sup> The italics will be used throughout this thesis in order to emphasize a word due to its importance in the context of the ideas being presented.

<sup>3</sup> BOURDIEU, Pierre. O poder simbólico. Trad. Fernando Tomaz. 15ª Ed. Rio de Janeiro: Bertrand, Brasil, 2011, p. 28-29.



For the construction of the views intended herein, the method of critical discourse analysis<sup>4</sup> is applied and exchanges with other disciplines beyond law are proposed. This research is hence interdisciplinary. In fact, the gender / sexuality field can be characterized as a crossroads arena<sup>5</sup>. The field itself is, to some extent, produced by researchers from several areas of knowledge, who dialogue to one another in order to build their approaches. In this sense, anthropological, philosophical, sociological and historical texts play an important role in the construction of this analysis.

In addition, in order to analyze the contradictions and possible limitations arising from this LGBT movement / law relationship, other concepts need to be considered, such as: sex; gender; sexual orientation; and more importantly due to the purpose of this thesis, *identity*. To better understand these concepts and analyze how they interact with the LGBT movement and law, reflections build upon definitions brought by Cultural Studies, Sociology of Law and poststructuralist philosophy are proposed. This methodological choice is based both on theoretical interests and on political concerns that are understood as crucial to the development of this research.

Regarding the theoretical interests, these are the areas of knowledge which have been problematizing themes related to the *new social movements*, especially those linked with issues of sexual diversity and gender identity. Besides that, in a context in which transgressions multiply, any theory that seeks to seriously reflect upon identity must be detached from rigid perspectives. It is understood here to be impossible to think of deviant experiences of gender and sexuality having as basis theories that take the fixity of human experience for granted.

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<sup>4</sup> The method of Critical Discourse Analysis builds on critical social analysis, and it is useful tool not only to describe how discourses emerge but also to bring to light what mechanisms and structures these discourses are based on. FAIRCLOUGH, N. *Critical Discourse Analysis: the critical study of language*. Harlow, England, 2010.

<sup>5</sup> PIRES, Álvaro. Sobre direito, ciências sociais e os desafios de navegar entre esses mundos: uma entrevista com Álvaro Pires. *Revista de Estudos Empíricos em Direito*. vol. 2, n. 1, jan 2015, pp. 226-248.

Regarding the political concerns, the methodological choice is connected to the lack of articulation between social movements and academia, especially in law. This disarticulation can be demonstrated through the dichotomy mentioned above: on one hand, there are theories that think of law as a separate entity from reality, as if it could be profoundly democratic and supportive regardless of the context in which it emerges; and, on the other hand, there are critical responses to this first approach that remain understanding law as a fixed entity separated from the social world, but now only as oppressor and normalizer.

On that note, it also is important to deny the impartiality of the knowledge produced in this thesis. It is understood here that an alleged “impartial” work ignores the complexity embedded in the writing process. It needs to be taken into consideration that writing is not an act performed by abstract beings, but by humans. In such a way, it is necessarily the result of the reflections made by this Author through his readings and his experiences. That is to say, in other words, that the perspective character of this work will not be hidden. The perspective is, in fact, taken as an instrument of analysis.

For this reason, the knowledge shared here is not the absolute truth. If one assumes that behind the formation of things there is no essence, but rather social processes that make them look as such, one can get to the conclusion that there is no construction of knowledge without a certain perspective. This matter is especially sensitive when one thinks about issues related to gender and sexuality. Feminist theories have been denouncing for a while how perspective is the knowledge that declares itself universal<sup>6</sup>. In this sense, the issues addressed throughout this thesis are intrinsically part of the own existence of the person who is now writing. Thus, it is necessary to renounce a naive neutrality and to embrace the value that a perspective point of view can bring.

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<sup>6</sup> MALUF, Sônia Weidner; COSTA, Claudia de Lima. Feminismo fora do centro: entrevista com Ella Shohat. *Revista de Estudos Feministas*. Ano 9. 2º semestre 2001. pp. 147-163.

Moreover, it is necessary to clarify why, among many other possibilities available, the decision to use the terminology "LGBT" was made. Why not, for example, LGBTTT? Or LGBTI? Or LGBTQ?

As it will be shown throughout this dissertation, there is a variety of possible ways to experience gender and sexuality. In this way, the adoption of any of the aforementioned options is, to some extent, insufficient. For this reason, the decision to use the acronym LGBT (lesbian, gay, bisexual and trans), instead of LGBTTT (lesbian, gay, bisexual, transvestites, transsexual and transgender), or LGBTI (lesbian, gay, bisexual, trans and intersexual)<sup>7</sup> or LGBTQ (lesbian, gay, bisexual, trans and queer)<sup>8</sup>, is not due its ability to represent all these experiences, but rather due to its greater social adherence in Brazil. However, even recognizing that the acronym used does not encompass all people who experience gender and sexuality in dissonant ways, it is emphasized that this work indeed proposes to dialogue together with all of them.

Furthermore, taking into account that several concepts are raised when answering the questions proposed here, the delimitation of certain central notions is essential. In this way, the first chapter is devoted to theorizing through Cultural Studies and poststructuralist philosophy the manner in which identity and law will be interpreted.

Subsequently, since it is not possible to reflect upon the LGBT movement without thinking about the events that influenced its constitution, the second chapter aims to present a historical background of the creation of the

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<sup>7</sup> It must be emphasized that the use of the denomination LGBTI has been increasing in public manifestations of the Brazilian LGBT movement. Notwithstanding, this nomenclature has not yet been consolidated, which is why it is not being used in this thesis. Not using the acronym, however, does not mean that this Author denies the importance of debates surrounding intersexual people.

<sup>8</sup> The same reasoning above applies to the acronym LGBTQ. This Author understands the importance of the term "queer" and its representativeness as an umbrella term for people who do not feel represented by other denominations. However, since this term is not very widespread in Brazil outside the academic environment, it will not be used in this work.

homosexual identity in the West and, consequently, to stress the power relations crossing the movement from its inception. It seeks also to highlight how the events that happened in Europe and in the United States impacted the Brazilian context, as well as to emphasize the different approaches taken by the movement throughout the last decades in the country.

In the following chapter, an analysis of the processes responsible for putting law and the LGBT movement into articulation is proposed. For this purpose it is therefore discussed: i) the partnership among the LGBT movement and the State in combating the AIDS epidemic; ii) the proposal of bills related to the LGBT community in the Brazilian National Congress; iii) the creation of public policies at federal level such as the Brazil without Homophobia program (*Programa Brasil Sem Homofobia*); and, iv) the shift to a sensitization strategy towards the judiciary by the LGBT community. During the implementation of these measures mentioned above, there was a constant dialogue between the LGBT movement and the Brazilian State that was primarily based on the achievement of full citizenship through law. In this way, the manner in which this interaction took place is extremely important for the overall analysis proposed here.

The fourth chapter, on the other hand, seeks to underline how much law is intrinsically connected to an essentialist concept of identity. Thus, criticisms of identity politics are revisited in order to demonstrate the contradictions and possible consequent limitations of the LGBT movement / law relationship. It is intended, thereby, to theorize about the exclusions that this strategy produces within the LGBT community. Nonetheless the downsides outlined, the relevance of the notions of resistance and transgression in the achievement of social transformation will also be reflected<sup>9</sup>.

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<sup>9</sup> Law as a tool for social emancipation is a theme that brings great dichotomy. Nevertheless, it is necessary important to highlight that in postcolonial societies, strongly marked by dynamics of power based on inequality, law plays an important role as an instrument of social transformation. For further reflections on this discussion, see: SANTOS, Boaventura de Sousa. Poderá o direito ser emancipatório? *Revista Crítica de Ciências Sociais*, 65, Maio 2003. pp. 3-76.

To conclude, the analysis proposed here is also compromised with the possibility of constructing new imaginaries when thinking about law in a distinctive way. As Flores proposes: there are different forms to bring law, and especially human rights, closer to the social movements<sup>10</sup>. Those new ways of thinking this relationship can provide new solutions to overcome the contradictions and limitations arising from it - and those are the reflections this thesis aims at developing.

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<sup>10</sup> FLORES, Joaquín Herrera. La reinención de los Derechos Humanos. Valencia: Colección ensayando, 2008.

# 1. Conceptual Delimitations

## 1. Introduction

In order to develop an analysis from the questions formulated in the introductory chapter, some conceptual delimitations need to be established. For this reason, this chapter aims to exemplify through Cultural Studies and poststructuralist philosophy the manner in which *identities* and *law* will be interpreted throughout this thesis.

Before starting such delimitations, the connection among the LGBT movement and identity needs to be clarified. In general lines, since the LGBT movement is inserted within the definition of social movement, it could be defined as a form of sustained collective action, from which actors who share *identities* or *solidarities* challenge dominant social structures or cultural practices<sup>11</sup>. The LGBT movement can, therefore, be inserted under the category of the so-called “new social movements”<sup>12</sup>.

As can be seen in the above-mentioned definition of social movements, there is an assumption that its actors share identities or solidarities. In this same line of thought, Cultural Studies authors have been developing, since the 1960s, a committed analysis in understanding how the concept of identity articulates with these new social movements.

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<sup>11</sup> ABERS, Rebeca; BÜLOW, Marisa Von. Movimentos sociais na teoria e na prática: como estudar o ativismo através da fronteira entre Estado e Sociedade? Sociologias, Porto Alegre, ano 12, nº 28, 2011. p. 52-84.

<sup>12</sup> The expression "new social movements" implies differences in relation to traditional social movements. In principle, traditional movements were formed through a social class identity, basically consisting of labor-union movements. This classist reference of social movements became inadequate insofar as class positions lost their stability, with subjects assuming, throughout life and according to the circumstances, different identities that no longer flow solely from their social economic background. For further reflections on this, see: BUECHLER, Steven M., New Social Movement Theories, Sociological Quarterly, Volume 36 Issue, p. 441 - 464, 1995. and GOHN, Maria da Glória. Teorias dos Movimentos Sociais: Paradigmas Clássicos e Contemporâneos. São Paulo: Loyola, 1997.

In this sense, Hall, addressing the impacts of these new movements on Western societies, argues that they all invoke the social identity of their members as a way of understanding their own constitution<sup>13</sup>. Thus, it is impossible to analyze the LGBT movement without being committed to an identity analysis. The LGBT movement, together with the Feminist movement and the Black movement, makes use of the identity concept as an element capable of signaling who is placed inside or outside them. Hence, without this understanding, one cannot reflect on the contradictions and limitations arising from the LGBT movement / law relationship.

## 2. Reflecting on Identity Beyond Binarisms

For Cultural Studies authors<sup>14</sup>, identity is only defined and can only be understood in a relational way. For them, an identity is always defined through a symbolic indication of difference in relation to other identities<sup>15</sup>. In this sense, *identity* and *difference*, if traditionally seen as opposites, are here affirmed to be codependent elements. An identity is only formed by the indication of a difference in relation to other identities. To better understand this, one could ask: Would people have the need to assign identities if all of us were homogeneous beings? Probably not. In this way, it can be stated that identity depends on difference as much as difference depends on identity. They are therefore inseparable and dependent on each other<sup>16</sup>.

In other words, the notion of identity necessarily requires the existence of “the *Other*”<sup>17</sup>. Being the very existence of the Other intrinsically connected to the

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<sup>13</sup> HALL, Stuart. A identidade cultural na pós-modernidade. 12ª Ed. Rio de Janeiro: Lamparina, 2015. p. 27.

<sup>14</sup> The Author is referring to Stuart Hall, Kathryn Woodward, and Tomaz Tadeu da Silva.

<sup>15</sup> WOODWARD, Kathryn. Identidade e diferença: uma introdução teórica e conceitual. IN: DA SILVA, Tomaz Tadeu (org.). Identidade e diferença: a perspectiva dos estudos culturais. 15 ed. Petrópolis, RJ: Vozes, 2014. p. 13.

<sup>16</sup> DA SILVA, Tomaz Tadeu. A produção social da identidade e da diferença. IN: DA SILVA, Tomaz Tadeu (org.). Identidade e diferença: a perspectiva dos estudos culturais. 15 ed. Petrópolis, RJ: Vozes, 2014. p. 75.

<sup>17</sup> On this topic: “Otherness, the characteristics of the Other, is the state of being different from and alien to the social identity of a person and to the identity of the Self” IN:

notion of the *Self*. By defining "us", we are delimiting not just ourselves but also "them", independently of the delimitation criteria used.

Woodward, applying Derrida, challenges the construction of identity through binaries<sup>18</sup>, emphasizing that this construction leads to an imbalance of power between the parties involved<sup>19</sup>. In this line of thought, for one part to be considered *valued*, the other is necessarily *devalued*. According to her, this dichotomy maintains the *status quo*, allowing the perpetuation of power relations existing within binarisms<sup>20</sup>. She also points out, however, that although the construction of these binaries is often produced in a negative way, it can also be celebrated as a source of diversity and seen as enriching<sup>21</sup>. An example of this would be the social movements that fight for the recognition of deviant sexual identities through the celebration of differences<sup>22</sup>.

Regarding this same discussion, Da Silva affirms more forcefully that due to the fact that identity and difference are part of social relations, they are always influenced by the performance of contradictory forces and power relations<sup>23</sup>. Which means, in other words, that they do not simply define themselves, but are actually formed through *disputes*. In these terms, the demarcation processes of who is inside and who is outside of a group generate operations of inclusion and exclusion that are inherent to the very functioning of identities<sup>24</sup>. In this way, the "Self" and the "Other" are always in a constant firestorm relationship.

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MILLER, J. "Otherness". The Sage Encyclopedia of Qualitative Research Methods. Thousand Oaks: Sage Publications, Inc., 2008, p. 588-59.

<sup>18</sup> The Homo / Hetero binary, for instance.

<sup>19</sup> See ref. 15, p. 54.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, p. 51.

<sup>22</sup> This subject is discussed in more detail in Chapter 4.

<sup>23</sup> See ref. 16, p. 84.

<sup>24</sup> Ibid.



After this explanation, one can conclude that identities emerge within power relations. They are the effect of the demarcation of difference and exclusion and not the symbol of an identical unity which naturally constitutes itself<sup>25</sup>. Hence, the determination of an identity as legitimate or valuable leads invariably to the construction of illegitimate and non-valuable identities. Generally, it can be stated that in the binarism that constitutes the identity / difference process, there are not only patterns of diversity acting, but also delimitations of hierarchy that are manifested in determining who is considered normal or abnormal.

In the same way that difference constitutes identity, the abnormality also constitutes normality<sup>26</sup>. That is, from the moment a classification emerges in terms of normality, it is the abnormality that is used to give coherence to what is considered normal. It can be said, therefore, that hegemonic identities are permanently haunted by their "Other," without which they would lose their own sense<sup>27</sup>. However, it is necessary to clarify that hegemonic identities are rarely claimed as such since their force as homogenizing unities is proportional to their invisibility as identities<sup>28</sup>.

In order to deepen the concepts explained above, the following chapter discusses the historical formation of the homosexual identity which was a prerequisite for the emergence of the LGBT movement. As Foucault points out, thinking of homosexuality is thinking of a specific historical moment that has changed human sexual practices based on definitions of normal /

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<sup>25</sup> HALL, Stuart. Quem precisa da identidade? IN: DA SILVA, Tomaz Tadeu (org.). *Identidade e Diferença: a perspectiva dos estudos culturais*. 15ª Ed. Petrópolis, RJ: Vozes, 2014. p. 109-110.

<sup>26</sup> See ref. 16, p. 83

<sup>27</sup> Ibid.

<sup>28</sup> For a better understanding about the discussion: heterosexuality, being a hegemonic identity, is considered as universal. Homosexuality, on the other hand, is the exception to the rule. The heterosexuality, in this way, would be considered "normal", while homosexuality would be the abnormal, which escapes the rule, the deviant identity. Heterosexuality, in conclusion, does not need to be brought up as an identity often, since it is the definition of legitimacy from which other sexual identities diverge. For deepening the discussion, see: BRICKELL, Chris. *Sexology, the Homo/Hetero Binary, and the Complexities of Male Sexual History*. University of Otago, New Zealand. *Sexualities*. Sage Publications, Vol. 9(4), 2006, p. 423-447.

abnormal beings<sup>29</sup>; at the same time as sodomy, a sin that anyone could commit, has been transformed into a defining component of a special type of human: the homosexual<sup>30</sup>. Nevertheless, before beginning this discussion, it is necessary to develop some reflections about what is understood by "law" in this thesis. Without this clarification, it is inconceivable to think about the possible imaginaries that can emerge from the LGBT movement / law relationship.

### 3. Reflecting on Law and its Historicity

Defining "law" is an extremely difficult task. In most cases, it can be argued that law is a normative complex that regulates human action, but even this definition is not clear. What kind of complex is that? In what way does it differ from other complexes, such as morality or religion? In what ways are its regulations established? How effective are they?

Declaring that law is a normative complex does not solve any puzzle, on the contrary, as can be perceived through all the questions that emerge from this declaration. As a matter of fact, any statement that proposes to define law as an absolute entity for all societies or historical moments is bound to be insufficient.

Therefore, this work does not intend to establish an objective definition of law. In reality, it is intended here to point out the fundamental relationally of law with other social phenomena, highlighting its connection with the values derived from the modern era. This approach seeks to develop a way of thinking law that does not consider it as a separate entity from the social, historical and cultural domain in which it operates.

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<sup>29</sup> FOUCAULT, Michel. *História da sexualidade 1: a vontade de saber*. Trad. Maria Thereza da Costa Albuquerque e J. A. Guilhon Albuquerque. 1ª Ed. São Paulo, Paz e Terra, 2014.

<sup>30</sup> Ibid.

In order to develop this reasoning, it is necessary to understand how the hegemonic legal thinking of modernity influenced modern law. For that purpose, one must be aware of the historicity of law and its fundamental temporality. Only in this manner it will be possible to understand how the law has operated and what position it occupies in our current political scenario. In this sense, even the widespread concept of "subject of law" derives from this period<sup>31</sup>. It was from the 17th century on that thoughts based on rational and unitary individualism entered the philosophical and political discussions in the West<sup>32</sup>.

It was in modernity, according to Fonseca, that the individual became the central reference of politics, society, knowledge and also law<sup>33</sup>. This subjectivity that was inherited from the Enlightenment influences our social organization to the present day<sup>34</sup>. Thus, basic concepts of the period such as universality, autonomy, and individuality are integrated into our conception of law<sup>35</sup>. The deep dependence of modern legal discourse on its context of formation is therefore noteworthy.

Due to this dependence, it is noted that law remains rooted in the idea of individuals who are universally considered. Individuals who are composed of a reason that gives them autonomy to navigate the social world. This reason that moves them would, therefore, be considered as natural, innate. In this sense, the fundamental concerns of law are to protect this autonomy against the interference of the sovereign power. In this manner, the language of

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<sup>31</sup> DOS SANTOS, Andressa Regina Bissolotti. Movimento LGBT e direito: identidades e discursos em (des)construção. Tese de mestrado em direito. Setor de ciências jurídicas, Faculdade de Direito da Universidade Federal do Paraná, 2017, p. 60.

<sup>32</sup> Ibid.

<sup>33</sup> FONSECA, Ricardo Marcelo. Sujeito e subjetividade jurídica: algumas cenas setecentistas na formação da modernidade. IN: STAUT JÚNIOR, Sérgio Said. Estudos em Direito Privado: uma homenagem ao Prof. Luiz Carlos Souza de Oliveira. Curitiba: Luiz Carlos Centro de Estudos Jurídicos, 2014. p. 15-32. p. 22.

<sup>34</sup> See ref. 31.

<sup>35</sup> Ibid.

political and legal thought seems to have remained centered on the dichotomy between individual rights / democratic-state sovereignty<sup>36</sup>.

Reflecting on law beyond the maintenance of state sovereignty / innate individual rights is one of the bases of this dissertation. One should think of law not only as a mechanism for regulating social relations but also as a tool capable of establishing them. A tool for resistance and transgression. A tool able to create new possible worlds. This is, therefore, the concept of law that will be explored here. Not a concrete definition, but a historicization. It is understood that this is the only possible way of thinking about human rights, moving it away from its traditional / mainstream approach.

#### 4. Concluding Observations

With these clarifications in mind, one can understand more clearly what is being mobilized through the questions proposed in this thesis. It is only through these differentiations that it becomes possible to trace new paths arising from the articulations, contradictions and consequent limitations stemming from the relationship between the LGBT movement and law.

Lastly, it can be verified through the concepts briefly explained in this chapter, that social processes are responsible for the emergence of identities - being this the reason why the concept of identity is not reflected here as natural or fixed, but as mobile, crossed by different knowledges<sup>37</sup> and different powers. It was also defined how the law will be reflected; no longer as immutable, but also mobile, disputable, historical. In this way, if there are no innate identities, it would be very difficult to comprehend what the LGBT movement is without a historical understanding of its formation as a social movement. Likewise, if there is no fixed law, it is also necessary to grasp, within the limits of this work, the acquisition of rights by the Brazilian LGBT

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<sup>36</sup> Ibid, p. 61.

<sup>37</sup> HARAWAY, Donna. Situated knowledges: The Science Question in Feminism and the Privilege of Partial Perspective, *Feminist Studies*, Vol. 14.1988, pp. 575-599.

population and the manner in which this articulation has been established. These are, therefore, the discussions that will be brought in the next chapters.

## 2. The Historical Background of Sexual Identities and the Brazilian LGBT Movement

### 1. Introduction

This chapter aims to reflect on the constitution of sexual identities and the Brazilian LGBT movement. In order to achieve this goal, an analysis based on Foucault's thoughts about the influence of pathological discourses on dissonant sexual practices will be addressed. Subsequently, a discussion aimed at identifying the consequences of these pathological discourses in Brazil will be carried out. In this context, aspects related to the different phases experienced by the Brazilian movement will be raised, including the outbreak of AIDS and its consequences for LGBT activism.

### 2. The Birth of the Modern Homosexual through Pathologization

According to Foucault, the beginning of modernity<sup>38</sup> brought a new interpretation to the relationship between Western societies and sex<sup>39</sup>. Instead of the repression present for centuries in the Middle Ages, he verifies a real discursive outburst on the subject during modernity<sup>40</sup>.

In such a way, the period was not characterized by an omission in relation to sex. There was no excessive shyness causing Western societies to remain silent about their sexuality; in fact, a proliferation of several different discourses was occurring. During that time, multiple knowledges were scrutinizing sex and the sexual health of individuals<sup>41</sup>.

Nevertheless, it is necessary to highlight that the aforementioned facts are not intended to deny the *sexual misery* that people were experiencing in the period. Back then, there was a clear differentiation about who could and who

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<sup>38</sup> It refers more specifically from the late 18th century onwards.

<sup>39</sup> See ref. 29.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

could not talk about sex. There was, for example, no room for people to freely exchange impressions about sexuality in their daily lives. Truths about the subject could only be reached through the technical knowledge authorized by modern science.

From the end of the 18th century, sexual practices began to be described, cataloged, and had their causes and possible effects studied. The medicine of the time acted primarily on four fronts: (i) hysterization of the women's body; (ii) pedagogization of children's sex; (iii) socialization of procreative behavior; and (iv) psychiatrization of perverse pleasure<sup>42</sup>. Of all of them, the most central to this analysis is exactly the latter.

It was at this time that homosexuality was characterized by scientific knowledge as a perverse identity. People began to be classified as sick for engaging in certain sexual acts. The practice of sodomy, for example, gradually ceased to be referenced, since the homosexual identity had emerged as a threat to the established sexual order<sup>43</sup>. Miskolci, on this subject, affirms:

“Since its medical-legal invention in the late 19th century, homosexuality represented a supposed threat to order. Sodomy, a stigmatized sexual practice, came to be seen as the core deviation from normality, being the newly created homosexual identity a great concern for that society so embedded in rigid patterns of behavior”<sup>44</sup>.

Regarding the emergence of the homosexual identity, it is necessary to emphasize that it occurred as an attribution operationalized by the bourgeois. In this sense, Foucault describes that the concern to regulate sexuality was a

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<sup>42</sup> See ref. 29, p. 113-114.

<sup>43</sup> Ibid, p. 111.

<sup>44</sup> Free translation for: “Desde sua invenção médico-legal em fins do séc. XIX, a homossexualidade representou uma suposta ameaça à ordem. Uma prática sexual estigmatizada, a sodomia, passou a ser encarada como o cerne de um desvio de normalidade e o recém-criado homossexual tornou-se alvo de preocupação por encarnar temores de uma sociedade com rígidos padrões de comportamento”. MISKOLCI, Richard. Pânicos morais e controle social reflexões sobre o casamento gay. In: Cadernos Pagu, n. 28, Campinas: Jun/Jul 2007. p. 101-128.

bourgeois phenomenon. The concept of a "healthy sexuality" constructed in modernity had as main objective to differentiate the bourgeoisie from other social classes. Their purpose, therefore, was to establish acceptable standards of behavior that resembled their own image<sup>45</sup>.

Taking these facts into consideration, one can attest that the regulation of sexuality was a strategy that enabled the mobilization of power relations. Thus, truths about the bodies and sexual practices of individuals were inscribed. There was, therefore, the definition of certain people as abnormal, perverse and dangerous; while at the same time, others were defined as possessing a normal sexuality: the heterosexual, monogamous and procreative.

### 2.1 The Brazilian Scenario: From Pathologization to State Repression

The demarcation of sexually dissonant people as abnormal also occurred in Brazil in the late 19th century. Homosexuality was described as a deviation from normality, a threat to the order and even a danger to society, since it was considered a degenerative disease that allowed the occurrence of crimes, such as child abuse<sup>46</sup>.

Although being a homosexual was not a crime in Brazil, the police strongly went after the individuals identified as such. Police control of deviant experiences of gender and sexuality was constant throughout the 20th century, having intensified during the period of the military dictatorship in the 1960s. As Green points out, although homosexuality itself was not technically illegal, the Brazilian police had multiple mechanisms to contain and control it<sup>47</sup>.

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<sup>45</sup> See ref. 29, p. 135.

<sup>46</sup> CARDINALLI, Daniel; FREIRE, Lucas. O ódio atrás das grades: da construção social da discriminação por orientação sexual à criminalização da homofobia. IN: Sexualidade, Salud y Sociedad: Revista Latinoamericana, n. 12, dec. 2012, p. 42.

<sup>47</sup> GREEN, James N.. "Mais amor e mais tesão": a construção de um movimento brasileiro de gays, lésbicas e travestis. IN: Cadernos Pagu. n. 15. 2000. Pp. 271-296. p. 277.



The police were not the only body that reproduced the vision of abnormality and pathology aimed at deviant experiences of gender and sexuality. In fact, this logic was present in the justice system as a whole. According to Carrara and Vianna, the presence of homosexuals as the defendant or as the victim<sup>48</sup> of a crime, led to the elaboration of speeches that conceived homosexuality as a disease or a perversion by judges, prosecutors, and lawyers<sup>49</sup>. In Brazil, the law was constantly used as a legitimizing tool for hierarchical discourses based on the idea of normality and abnormality.

### 3. The Conception of the Brazilian LGBT Movement

Brazilian society experienced a paradoxical situation in the 1980s. Even after the end of the military dictatorship and the beginning of the redemocratization in the country, people considered as sexual deviants continued to suffer intense police repression<sup>50</sup>. Ocanha, for example, argues that the violent manner with which the State acted influenced directly the emergence of social movements such as the LGBT<sup>51</sup>. There was a substantial need for oppressed people to denounce police arbitrariness<sup>52</sup>. One of the mechanisms found for the accomplishment of these denunciations by the homosexual population was the creation, in 1978, of a newspaper called "Lampião da Esquina"<sup>53</sup>. This newspaper, which had male homosexuals as its target<sup>54</sup>, was extremely important for the consolidation of the Brazilian homosexual movement<sup>55</sup>.

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<sup>48</sup> Even when LGBT people were victims of crime, they were blamed. The aggressions against them were justified on the grounds that by choosing to live a marginal life, they would be putting themselves in dangerous situations.

<sup>49</sup> CARRARA, Sérgio; VIANNA, Adriana R. B. "As vítimas do desejo: os tribunais cariocas e a homossexualidade nos anos 1980". Pp. 365-384. IN: PISCITELLI, Adriana; GREGORI, Maria Filomena; CARRARA, Sérgio (orgs.). *Sexualidades e saberes: convenções e fronteiras*. Rio de Janeiro: Ed. Garamond, 2004. p. 376

<sup>50</sup> OCANHA, Rafael Freitas. *As rondas policiais de combate à homossexualidade na cidade de São Paulo (1976-1982)*. Pp. 149-175. IN: GREEN, James N.; QUINALHA, Renan (org.). *Ditadura e Homossexualidades: repressão, resistência e a busca da verdade*. São Carlos: EdUFSCAR, 2014, p. 165

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> SIMÕES, Júlio Assis; FACCHINI, Regina. *Na Trilha do Arco-Íris: do movimento homossexual ao LGBT*. São Paulo: Editora Fundação Perseu Abramo, 2009. p. 84.

<sup>54</sup> Ibid.

<sup>55</sup> The denomination "Brazilian homosexual movement" was widely used at the time due to the focus given to male homosexuals.

The “Lampião da Esquina” was intended to create a homosexual consciousness. The newspaper sought to encourage male homosexuals to accept themselves, to get out of the closet<sup>56</sup>. It was thus sought to establish an identification with the reader, presenting homosexuality as an identity to be regarded as a legitimate alternative to heterosexuality<sup>57</sup>. That is, the idealizers of the project used this tool to go beyond just reporting the social scenario they were inserted<sup>58</sup>. The "Lampião da Esquina" had a political bias, directly influencing the strengthening of the homosexual identities of the time.

The newspaper had a conception that the homosexuals were part of an oppressed minority<sup>59</sup>. In this sense, it aimed to bring the Brazilian homosexual movement closer to other identity movements, such as the feminist and other organized gay groups established in Europe and in the United States<sup>60</sup>. Despite this strong identity focus shared by its members, the "Lampião da Esquina" had internal disagreements. There was no consensus, for instance, on civil rights initiatives or on the level of collaboration the newspaper should maintain with newly emerging organized homosexual militant groups<sup>61</sup>.

The group "Somos" was the first collaboration set up by the newspaper<sup>62</sup>. The "Somos" was a group formed in the city of São Paulo by homosexual activists in 1979<sup>63</sup>. The group had as initial focus the holding of meetings where only male homosexuals and lesbians could participate<sup>64</sup>. Such meetings had the

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<sup>56</sup> RODRIGUES, Jorge Caê. Um lampião iluminando esquinas escuras da ditadura. Pp. 84-124. IN: GREEN, James N.; QUINALHA, Renan (org.). Ditadura e Homossexualidades: repressão, resistência e a busca da verdade. São Carlos: EdUFSCAR, 2014. p. 98.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> See ref. 31, p. 88.

<sup>60</sup> Ibid.

<sup>61</sup> See ref. 53, p. 95.

<sup>62</sup> See ref. 31, p. 88.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

purpose of establishing a place of sociability that was crucial for the strengthening of the homosexual identity<sup>65</sup>. It was sought through this initiative to settle a counterpoint to the pathologizing manner in which homosexuality was being treated by society in general<sup>66</sup>.

This first organizational stage of the movement was basically concentrated in the cities of Rio de Janeiro and São Paulo<sup>67</sup>. In addition, the movement also had an *anti-authoritarian* character, since it was correlated to the fight for redemocratization in the country<sup>68</sup>. The Brazilian homosexual movement was therefore classified as *alternative* and *libertarian*. Precisely because of this revolutionary character, initiatives emerging from within the movement began to question the hierarchy existing among the members of the LGBT community itself<sup>69</sup>.

Regarding this issue, both the "Somos" and the "Lampião da Esquina" faced problems. In the early 1980's, for example, the "Somos" had to manage the separation demanded by lesbians, who decided to create their own group called "Grupo de Ação Lésbica-Feminista" ("GALF")<sup>70</sup>. The separation occurred mainly because of their vision that women's agendas should be prioritized, adopting a feminist perspective<sup>71</sup>. This new organization was therefore intended to create a space where the specificities of lesbians could be discussed.

In order to enhance a dialogue with the lesbian community, the GALF launched its own newspaper called "ChanacomChana"<sup>72</sup>, which suffered

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> See ref. 53, p. 101

<sup>69</sup> Ibid.

<sup>70</sup> Ibid, p. 104.

<sup>71</sup> Ibid.

<sup>72</sup> See ref. 31, p. 90. It is a fact, therefore, how important these newspapers were in the formation of a sense of identity for the individuals back then. The sharing of experiences was extremely important for the creation of a homosexual consciousness.

several difficulties to circulate. Reacting to a ban in selling copies at a bar in São Paulo, the GALF organized a political act that became known as the “Brazilian Stonewall”<sup>73</sup> due to its remarkable impact at the time<sup>74</sup>.

Throughout the first half of the 1980's the homosexual movement and its anti-authoritarian and libertarian character lost strength. There was a drastic change in the number of militant groups, and both the “Lampião da Esquina” and the “Somos” stopped their activities<sup>75</sup>. The GALF, although also facing difficulties, managed to survive until the 1990s, but with a new name: “Rede de Informação Um Outro Olhar”<sup>76</sup>. One of the major factors in this loss of strength of the homosexual movement was the outbreak of AIDS, which was strongly associated with homosexuality. The problems brought about by the disease are central to understanding the directions taken by the movement from then on.

### 3.1. The Impact of AIDS

The emergence of AIDS in the 1980s has strongly altered the context of developing strategies related to sexual policies. As a consequence of the disease, the LGBT movement’s agenda on sexual liberation was replaced by the effort on fighting the epidemic<sup>77</sup>. There was, therefore, a profile change

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<sup>73</sup> The Stonewall Inn was a bar attended regularly mainly by non-heterosexual and non-white people in New York in the 1960s. The bar was often the target of authoritarian police raids. In June 27, 1969, during one of these police visits, there was an act of direct confrontation among the customers and the officers. That night, as police began their authoritative action, a crowd formed in the street booing them. The situation came out of control when police tried to jail a lesbian who resisted the arrest. This scene was the last straw, causing the crowd to attack the cops with bottles and stones. The riots spilled out throughout the night, with numerous confrontations between groups of transvestites and police officers. The following day, graffiti displaying the words “gay power” spread throughout New York, showing the feeling of fearlessness that was popping up among the gay community in the United States. The events in Stonewall massively influenced the gay movement in the United States.

<sup>74</sup> FERNANDES, Marisa. *Lésbicas e a ditadura militar: uma luta contra a opressão e por liberdade*. Pp. 125-148. GREEN, James N.; QUINALHA, Renan (org.). *Ditadura e Homossexualidades: repressão, resistência e a busca da verdade*. São Carlos: EdUFSCAR, 2014.

<sup>75</sup> See ref. 31, p. 92.

<sup>76</sup> See ref. 53, p. 104.

<sup>77</sup> FACCHINI, Regina. *Movimento homossexual no Brasil: recompondo um histórico*. In: *Cadernos AEL*, Vol. 10, No. 18/19, 2003, pp. 79-127. p. 93

regarding the institutionalization of the LGBT movement. In fact, after the onset of AIDS, several groups and organizations have emerged demanding public policies and health care for people affected by the virus<sup>78</sup>.

In this new scenario, the relationship between the LGBT movement and the State increased considerably, directly affecting the manner in which the LGBT groups organized themselves at the time. In this sense, the cooperation with NGOs (non-governmental organizations) became a priority for the Brazilian LGBT movement<sup>79</sup>. Simões and Facchini stress that the outbreak of AIDS and its consequences gave rise to an unprecedented social debate around homosexuality in Brazil<sup>80</sup>.

The spread of the disease also changed the way the Brazilian LGBT movement correlated with international LGBT militant groups. The libertarian and anti-authoritarian agendas were set aside since the LGBT movement had to confront the damage caused by AIDS. Moreover, before the epidemic, a refusal towards international LGBT movements could be verified, since there was a concern that the Brazilian LGBT practices could be somehow colonized based on Eurocentric and North-American practices; nevertheless, during the uprising of the disease, the establishment of partnerships with these international groups was claimed<sup>81</sup>.

In this sense, a change in the strategies of action of the Brazilian LGBT movement can be verified. Due to the outbreak of AIDS, new forms of organization for the movement had to be thought out. The establishment of partnerships with the State aimed at the implementation of public policies for the LGBT population was essential. In this way, the institutional organization

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<sup>78</sup> PARKER, Richard. *Abaixo do equador: culturas do desejo, homossexualidade masculina e comunidade gay no Brasil*. Trad. Ryta Vinagre. Rio de Janeiro: Ed. Record, 2012. p 131.

<sup>79</sup> It is necessary to emphasize that even with a plurality of needs in the creation of public policies brought by the LGBT movement nowadays, the fight against AIDS is often the only concern of the Brazilian state in the elaboration of projects.

<sup>80</sup> See ref. 77, p. 93.

<sup>81</sup> See ref. 31, p. 94.

of the movement through NGOs was the only possible way to stress the struggle for *rights*. In addition, the pursuit for assimilation by the LGBT community was evident at that moment. Building a *positive image* for homosexuality was thus desirable, since it was necessary to reduce the stigma and social exclusion caused by AIDS.

### 3.2. The Socially Accepted Homosexual: A Strategy

The attempt to create a positive public image for homosexuality was built through elements that sought to portrait it as a socially well-framed way of life. A campaign carried out by the NGO “Grupo Gay da Bahia” is a great example of this strategy; under the motto "It's cool to be homosexual"<sup>82</sup>, the group had the goal to highlight the positive aspects of homosexuality. However, the choice of what positive aspects would be stressed was deeply connected to those already considered more socially accepted. In this sense, by highlighting which characteristics defined homosexuality as positive, it is also defined which experiences were necessarily negative.

In this way, the pragmatic strategy of the LGBT movement to achieve civil rights ended up jeopardizing the most marginal ways to experience gender and sexuality. By defining what "a respectable public image" was, it ended up placing other experiences at the sidelines<sup>83</sup>. Paiva, in this sense, affirms that in defining conjugal, monogamous, white and urban middle-class homosexuality as ideal<sup>84</sup>, other sexually dissonant people who did not meet such a criterion were necessarily bound to an even more violent exclusion<sup>85</sup>.

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<sup>82</sup> See ref. 53, p. 126. Free translation for: “É legal ser homossexual”.

<sup>83</sup> Ibid, p. 127.

<sup>84</sup> PAIVA, Antônio Cristian Saraiva. Reserva e Invisibilidade: a construção da homoconjugalidade numa perspectiva micropolítica. Pp. 23-46 IN: GROSSI, Miriam; UZIEL, Anna Paula; MELLO, Luiz (orgs.). Conjugalidades, parentalidades e identidades lésbicas, gays e travestis. Rio de Janeiro: Garamond, 2007. p. 24.

<sup>85</sup> Ibid.

#### 4. Concluding Observations

Through the analysis of the facts presented in this chapter, it is clear how historical events shaped the sexual identities and the Brazilian LGBT movement. In this sense, it was possible to verify how a pathological medical discourse aimed at classifying human beings as normal and abnormal influenced the creation of the homosexual identity. In this way, by highlighting the artificiality of the creation of identities, the development of a reflection on the way in which these classifications were resignified by sexually dissonant people in Brazil was possible. The LGBT movement thus emerged from the need to establish a counterpoint to medical discourses and the State's repressive action.

Finally, it was emphasized that the strategies of action adopted by the Brazilian LGBT movement were fluid. Before focusing on an institutionalized organization, the movement had a libertarian, anti-authoritarian and questioning approach. However, the outbreak of AIDS was destabilizing for them. New strategies had to be thought from the onset of the disease. Partnerships with the State through NGOs and the attempt to create a positive and socially accepted image for homosexuality have become priorities for the movement. For this reason, an *identity strategy* focused on the *acquisition of rights* was developed. This strategy, however, did not bring homogenous results to the entire LGBT community.

### **3. Full Citizenship through Sexual Rights: The Strategies of the Brazilian LGBT Movement**

#### **1. Introduction**

The analysis of the articulations between the LGBT movement and law cannot be conducted abstractly. For this reason, this chapter aims to reconstruct the path taken by the Brazilian LGBT movement in establishing its alliance with law. In order to achieve this, the influence of AIDS in the increase of lawsuits filed by the LGBT population and all the strategies of action adopted by the LGBT movement from then on will be reflected. Such strategies include the attempting to pass bills, the implementation of public policies and the sensitization of judicial actors. Lastly, the approach adopted by the Brazilian Supreme Court on the same-sex unions judgment will be also theorized.

#### **2. The Legacy Left by AIDS**

In order to understand how the relations between the Brazilian LGBT movement and law intensified more concretely, it is necessary to emphasize once more the massive influence left by AIDS. The disease redefined the ways of experiencing sexuality in Brazil. According to Trovão, at the beginning of the epidemic, AIDS brought much more to the LGBT community than the attack of a deadly virus; it also contributed to the expansion of a conservative discourse that identified the disease as an intrinsic characteristic of marginal sexual lives<sup>86</sup>.

The interference caused by AIDS in the organization of the Brazilian LGBT movement and in the intimate life of sexually dissonant people was categorical. Therefore, the changes caused by this new scenario were responsible for bringing the movement closer to law. According to Oliveira,

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<sup>86</sup> TROVÃO, Flávio Vilas-Bôas. AIDS (verbete). IN: COLLING, Ana Maria; TEDESCHI, Losandro Antonio (orgs.). *Dicionário Crítico de Gênero*. Dourados, MS: Ed. UFGD, 2015. pp. 30-34.



for instance, when one partner of a homosexual couple died from AIDS, the other one usually remained in a position of extreme vulnerability<sup>87</sup>. Many partners found themselves in a very complicated situation where they were forced to dispute rights with their spouse's family<sup>88</sup>. The filing of lawsuits claiming the maintenance of the possession of the house where the couple used to live or pursuing to receive social security benefits was constant in the Brazilian courts<sup>89</sup>.

In this way, it is noted that the first lawsuits filed by homosexuals were aimed to satisfy very urgent individual needs. Regarding these individual demands, successful judgments came gradually. In the beginning, decisions rejecting the claim were based on the legal impossibility of the request<sup>90</sup>. Judges stated that it was impossible to give homosexuals the same rights guaranteed to heterosexuals, since same-sex relationships could not be considered as stable unions or marriages<sup>91</sup>. Oliveira, analyzing this situation, identifies that the Christian morality heavily present in the Brazilian society was a powerful factor motivating such decisions<sup>92</sup>.

In an attempt to counteract these unfavorable judgments, the LGBT movement began to establish strategic partnerships with state actors. Although the movement was to some extent settling a dialogue with actors who mastered the technical language of law<sup>93</sup>, their focus was not fully on this. In fact, the first strategic attempt of the movement to reconcile with the State occurred through the Legislative.

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<sup>87</sup> OLIVEIRA, Rosa Maria Rodrigues de. "Isto é contra a natureza..." acórdãos judiciais e entrevistas com magistrados sobre conjugalidades homoeróticas em quatro estados brasileiros. In: GROSSI, Miriam; UZIEL, Anna Paula; MELLO, Luiz. *Conjugalidades, Parentalidades e Identidades Lésbicas, Gays e Travestis*. Rio de Janeiro. Garamond, 2007. p. 136.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> See ref. 31, p. 109.

<sup>91</sup> Ibid.

<sup>92</sup> See ref. 87, p. 139.

<sup>93</sup> See ref. 31, p. 109.

### 3. The First Attempt: The Legislative

The Brazilian LGBT movement engaged with the Legislative for the first time during the elaboration of the Brazilian Federal Constitution of 1988. Formally organized groups, such as the "Triângulo Rosa", mobilized forces aimed at explicitly including in the Constitution the prohibition of discrimination based on sexual orientation<sup>94</sup>. Although efforts to achieve the inclusion of the term were not successful, the initiative made the fight against discrimination a priority for the movement<sup>95</sup>.

Following this strategy of achieving full citizenship and equality through the Legislative, the "Associação Brasileira de Gays, Lésbicas e Travestis" implemented a series of campaigns to raise awareness among politicians in favor of passing bills related to LGBT issues. The first bill to be introduced in the Brazilian National Congress was no. 1151/1995, aimed at recognizing the homosexual civil partnership; followed by no. 122/2006, which sought to criminalize homophobia.

In relation to these bills, it is important to emphasize how focused they were on an *identity* approach. The arguments adopted to justify their approval mostly relied on scientific knowledge, being highlighted that homosexuality was not considered a sexual deviation anymore, both by the World Health Organization and the Brazilian Federal Medical Council<sup>96</sup>. Moreover, an *essentialism*<sup>97</sup> discourse was applied, noting that homosexuality is not a choice, but actually an aspect that is innate to a person.

Nonetheless, even with greater visibility of the LGBT community in society, the bills did not advance in the Brazilian National Congress. Oppositions

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<sup>94</sup> Ibid.

<sup>95</sup> FACCHINI, Regina. História da Luta de LGBT no Brasil: movimento é referência fundamental para pensarmos temas como diferença, desigualdade, diversidade e identidade na sociedade brasileira contemporânea. IN: Revista Pré-univesp: Capitalismo e sustentabilidade. N° 60. Novembro de 2016.

<sup>96</sup> See ref. 31, p. 112.

<sup>97</sup> An in-depth discussion of essentialism will be conducted in Chapter 4.

made by deputies belonging to the Catholic and Pentecostal Churches mobilized great popular support, causing the discussions to remain stagnant within the Legislative framework<sup>98</sup>. The impossibility of advancing the agenda led the LGBT movement to implement new strategies to broaden the rights of LGBT people. In this sense, the movement began to intercede in favor of broadening<sup>99</sup> public policies for the LGBT population.

### 3.1. The Second Attempt: The Implementation of Public Policies

Public policies were the first institutionalized connections of the Brazilian LGBT movement with the State. The implementation of these measures was the most incipient way to ensure the promotion of certain rights to the LGBT population. In this sense, the way in which this relationship took place was extremely important for the movement to establish its priorities. The implementation of public policies awakened the LGBT people, who began to recognize themselves as *subject of rights*.

This feeling of self-recognition as a subject of rights necessarily intensified the relationship between the LGBT movement and the State. For the same reason, the movement also became more strongly connected with human rights NGOs at the national and international levels. It was through these alliances that the LGBT movement gained greater political reach.

An important milestone in this context was the implementation of “The Brazil without Homophobia Program” (*Programa Brasil sem Homofobia*) in 2004. According to Irineu, the creation and operationalization of the program reveal the high involvement between the LGBT activism and the State<sup>100</sup>, being undoubtedly the main partnership at the federal level established so far. The program had as its purpose the fight against homophobia and the promotion

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<sup>98</sup> See ref. 31, p. 111.

<sup>99</sup> The public policies in force at the time were only directed at combating AIDS.

<sup>100</sup> IRINEU, Bruna Andrade. 10 anos do Programa Brasil sem Homofobia: notas críticas. *Revista Temporalis*. Brasília (DF), ano 14, n. 28, p. 193-220, jul./dez. 2014. p. 197.

of human rights of LGBT people<sup>101</sup>. In this sense, the whole conception of the program was based on identity politics, dialoguing very closely with the human rights language promoted by the Brazilian NGOs<sup>102</sup>.

Although the implementation of public policy increased the debate over the acquisition of rights, the life of the LGBT population hardly changed on the ground. For a better understanding of this phenomenon, some clarifications are necessary: according to Queiroz, for instance, public policies are only a commitment assumed by the State<sup>103</sup>. That is, the public policies refer to a norm that cannot be automatically translated into rights, being only an expectation of rights<sup>104</sup>. The programs implemented therefore highlight what are the results to be achieved, without indicating the means to achieve them<sup>105</sup>.

In this sense, the public policies proposed by the Executive aimed at combating homophobia and promoting the full citizenship of the LGBT population can be defined as very pragmatic devices<sup>106</sup>. Nevertheless, the problem of this pragmatism is the discretion that surrounds it, since it delegates a lot of power of action to the public administration, without offering in counterpart tools to control the effectiveness of the policies<sup>107</sup>.

Considering this adversity, Barroso observes that due to this indefinite character of the Executive, the Judiciary cannot effectively interfere in the fulfillment of the public policies, being able only to verify if they are in conformity or not with the law<sup>108</sup>. Compliance with these policies is therefore

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<sup>101</sup> Ibid.

<sup>102</sup> See ref. 31, p. 117.

<sup>103</sup> QUEIROZ, A. F. de. *Direito Constitucional*. Goiânia: IEPC, 2002, p. 97.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> MELLO, Luiz; AVELAR, Rezende Bruno; MAROJA, Daniela. Por onde andam as Políticas Públicas para a população LGBT no Brasil. *Revista Sociedade e Estado - Volume 27 Número 2*, 2012, p. 293.

<sup>107</sup> Ibid.

<sup>108</sup> BARROSO, L. R. *O Direito Constitucional e a efetividade de suas normas - limites e possibilidades da Constituição Brasileira*. Rio de Janeiro: Renovar, 2001, p. 121.

entirely under the responsibility of the public administration. Notwithstanding this situation, the LGBT movement began to claim for the realization of the rights guaranteed by the programs. In order to enforce compliance, lawsuits were initiated, which used the policies directed to the LGBT population as a legal basis in their litigation for rights.

#### 4. The Struggle for Rights through the Judiciary

The increase of lawsuits punctuating the non-effectiveness of public policies for the LGBT population was only feasible due to the commitment of the LGBT movement. They established a political strategy of action directed at demonstrating the inertia of the State<sup>109</sup>. In this way, the movement, although not having at their disposal legal instruments with greater security and efficiency, made gradual strategic use of the few possibilities in hand<sup>110</sup>.

In general, it was possible to attest an ample work of sensitization<sup>111</sup> of supporters within the State. This advocacy strategy was mainly directed to professionals working in the legal field. This includes, in a general way, not only those who effectively work in the Judiciary (judges, assistants, civil servants of the courts, etc.) but especially those who are able to file lawsuits: members of the Public Prosecutor's Office, the Public Defender's Office, and lawyers.

This increase in the filing of lawsuits strongly impacted the LGBT movement. Such an impact occurred, as explained, through the strengthening of a political discourse based on rights, reinforcing an identity strategy that was already dominant back then. In this sense, there was also repercussion regarding the construction of a new model of citizen, namely: the subject of LGBT rights.

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<sup>109</sup> See ref. 106.

<sup>110</sup> Ibid.

<sup>111</sup> See ref. 31, p. 120.

#### 4.1. The First Victory: The Recognition of Same-Sex Unions

The high point of the sensitization strategy can be observed through the decision of the Brazilian Supreme Court (*Supremo Tribunal Federal* - “STF”) of May 2011, which recognized same-sex unions as stable unions in the same terms as the heterosexual ones<sup>112</sup>. This decision was the result of the ADPF (*Arguição de Descumprimento de Preceito Fundamental*) no. 132-RJ and the ADI (*Ação Direta de Inconstitucionalidade*<sup>113</sup>) no. 4,277. The verdict was aimed at avoiding conflicting decisions about the matter in the trial courts, establishing the legitimacy of same-sex relationships and extending the rights previously reserved only to heterosexual couples. This judgment was, therefore, a paradigm shift in thinking about the rights of non-heterosexual people in Brazil.

The argumentation of the advocates representing the LGBT movement during the trial revolved around a list of principles present in the Brazilian Constitution such as the dignity of the human person, equality, the prohibition of hateful discrimination and freedom. These principles were evoked precisely as a way to avoid maintaining the existence of second-class citizens in Brazilian society. It was argued that the non-extension of rights to LGBT people would necessarily reinforce such a scenario. It was sought, in this way, to remove sexually dissonant people from the limbo of non-legal protection that disqualified them as citizens in society. The differential application of the law would necessarily have the effect of authorizing society to perpetuate an environment of exclusion and violence that characterizes the incidence of hate crimes<sup>114</sup>.

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<sup>112</sup> RIOS, Roger Raupp. Direitos Sexuais, uniões homossexuais e a decisão do supremo Tribunal Federal (ADPF nº 132-RJ e ADI 4.277). IN: GOLIN, Célio; LEIVAS, Paulo Gilberto Logo; RIOS, Roger Raupp. (orgs.) Homossexualidade e Direitos Sexuais: reflexões a partir da decisão do STF. Porto Alegre: Sulina, 2011. Pp. 69-113.

<sup>113</sup> Both actions have the power to question the constitutionality of norms in Brazilian national law.

<sup>114</sup> See ref. 31, p. 141.

In addition, defense lawyers also relied on internationally enforced rights through International Declarations and Covenants<sup>115</sup>, which were interpreted by them under the lenses of the Yogyakarta Principles<sup>116</sup>. They also mentioned, in order to make the allegations stronger, manifestations of numerous international human rights bodies on the issue<sup>117</sup>. Besides that, comparative law data on the regulation of the topic in other countries were also addressed, especially the processes of recognition of same-sex unions developed in South Africa and Colombia - due to its similarities to the Brazilian case<sup>118</sup>.

#### 4.2. The Argumentation of the Brazilian Supreme Court

Throughout all the same-sex union procedure, homosexuality was characterized as having existed since the beginning of times. The judges and advocates shared an understanding of the homosexual identity completely different from the one explained in the first chapter of this thesis. In the judgment, homosexuality was treated as an element of nature, an inherent part of the Self.

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<sup>115</sup> The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are mentioned.

<sup>116</sup> Principles especially mentioned are: Principle 1 (Right to universal enjoyment of human rights), Principle 2 (Right to equality and non-discrimination), Principle 3 (Right to recognition before the law) and Principle 24 (Right to constitute a family).

<sup>117</sup> An understanding of the UN Economic and Social Council affirming that the Covenants prohibit discrimination based on sexual orientation. General Comment No. 4/2004 of the Committee on the Rights of the Child, which stated that no discrimination based on sexual orientation should be allowed. The report prepared after a visit to Brazil in 2005 by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, which concluded that the Brazilian homosexual population undergoes a double risk of suffering discrimination. The manifestation of the Human Rights Committee in the *Toonen v. Australia* case, where it was recognized that sexual orientation is part of the term "sex" present in articles 2 and 26 of the International Covenant on Civil and Political Rights. And finally, the final report produced by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, which stated that discrimination based on sexual orientation is inadmissible under international human rights law.

<sup>118</sup> In both cases decisions were handed down by constitutional courts that were responsible for regulating same-sex relationships.

Besides that, the judgment also focused on demonstrating that same-sex relationships do not differ in any degree from heterosexual ones<sup>119</sup>. According to the Court, the primary element of a relationship would be the *affection* and not the gender of the partners<sup>120</sup>. It can be perceived, in this way, an attempt of the Court to classify stable relations between persons of the same sex as a valid way of experiencing sexuality, without questioning whether this “stable” and "affectionate" manner would encompass all members of the LGBT community.

The strategy of the LGBT movement throughout all the procedure was focused on constructing an image of homosexuals as good citizens. As decent people who would be keen to build a family based on stability and affection. For this reason, it is necessary to emphasize that this approach connects greatly with the construction of the positive image of homosexuality addressed in the previous chapter.

## 5. Concluding Observations

It was possible to verify, through the analysis developed in this chapter, all the concrete strategies adopted by the Brazilian LGBT movement in order to establish a relationship with the State. This institutionalized approach adopted by the movement was directly influenced by the change caused by AIDS in Brazil. The outbreak of the epidemic and the efforts aimed at mitigating its effects allowed the emergence of an institutionalized LGBT movement.

The direct contact of the movement with NGOs enabled the creation of strategies based on the human rights language. In this way, the demands of the LGBT movement began to be heavily linked to the achievement of full citizenship and equality. In this chapter, therefore, it was highlighted the step-by-step of this struggle: the attempt to approve bills, the implementation of

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<sup>119</sup> See ref. 31, p. 143.

<sup>120</sup> Ibid.



public policies and, due to no major changes on people's lives on the ground, the strategic shift towards the Judiciary.

Through the analysis of these facts, it can be verified how the identity politics based on an essentialism approach was used by the Brazilian LGBT movement. As noted, the use of such a strategy resulted in the attainment of rights in accordance with the movement's agenda. However, the question that resists is whether these rights, although achieved, encompassed all those that the movement claims to represent.

## 4. The Articulations between the Brazilian LGBT Movement and the Law

### 1. Introduction

Through the analyses proposed in the previous chapter, it was possible to recognize how the strategy of action of the Brazilian LGBT movement has been dominated by legal discourses. As explained earlier, such discourses are intertwined with the concept of identity, which has been interpreted by the movement as something essential to human nature. That is, the emergence of identities via historical processes is not taken into account, since the focus of their approach has been the essentialist. In essentialism, identities are understood as an innate characteristic of a given individual, thus ignoring the historical and social processes that necessarily influence the construction of it.

The use of the essentialist approach has been the path found by the LGBT movement to boost its agenda. When one argues that identities are made up of innate factors, there is consequently the development of a line of thinking affirming that being an LGBT person is not a choice. In this way, homosexuality (or bisexuality, transsexuality, etc.) would be just something that one is. Through this argument, there is an attempt to sensitize society in order to broaden the civil rights of the LGBT population. The achievement of full citizenship is, therefore, based on an *equality* discourse. That is, as long as the same rights guaranteed to heterosexual people are available to their LGBT counterparts, the accomplishment of respect and social acceptance for the community would occur accordingly.

On this note, it is emphasized that this essentialist approach stimulates numerous questions that need to be analyzed at the hand of a non-essentialist conception<sup>121</sup> of *identity* and *law*. In order to carry out this analysis, it will be explored in this chapter the contradictions and limitations that emerge from

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<sup>121</sup> In the lines explored in the first chapter of this thesis.

the relationship between the LGBT movement and the State / law. Additionally, the effects of identity politics on LGBT people's lives will be reflected, concluding with the proposition of a new approach when applying the law in order to boost the creation of new imaginaries.

## 2. The State, the Law and the LGBT Movement: The Effects of Identity Politics

The strategy of the LGBT movement based on essentialism has been used as a platform to promote the granting of rights. Thus, the recognition of the human rights of the LGBT population is inevitably linked to a state declaration<sup>122</sup>. In this sense, certain reflections can be made regarding the movement's effort in achieving these declarations. In fact, taking into account the way our society is organized, the rights sought by the LGBT community can only be enforced through declarations of state bodies. For that reason, this dependence must be analyzed critically. One must question, for example, what it means to subordinate the advancement of the LGBT agenda to state discretion. Would it be useful for the movement to be so dependent on the states will?

Regarding this point, there is a perception that state declarations would be sufficient for sexually deviant people to achieve full citizenship. Thereby, the State becomes to the LGBT movement the most important tool in transforming their claims into realities; through its validation, LGBT lives would be ratified as important and, as a consequence of that, their rights would be publicly protected permanently. However, it must be highlighted that through this strategy only certain sexual deviant experiences are chosen to reach full citizenship, while others are set aside in a kind of "cleansing process"<sup>123</sup>. It is perceived in this sense what Butler calls "selective

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<sup>122</sup> Such a declaration can occur through the Legislative, Judiciary or even the Executive.

<sup>123</sup> See ref. 31, p. 188.

delegitimation"<sup>124</sup>, where a hierarchy among the members of the LGBT community takes place.

On that note, it is important to point out how this hierarchy issue is deeply linked to the identity approach assumed by the LGBT movement from the 1990s on. Such an approach assumes that identity is a fixed and unchanging unity, necessarily falling into the discourse of essentialism again. However, this view is limiting and does not dialogue with the criticism that is intended to be developed in this work.

In order to explore new possibilities for this analysis, it is necessary to highlight the perspective brought by Butler, which resembles the view of Cultural Studies, signaling that identity is the result of a sequence of historical and social processes. Through them, sexed bodies and gendered individuals come to life<sup>125</sup>. These individuals, in this sense, can be divided into several variations: i) those that socially present themselves as intelligible to the heteronormative norm, namely: the male body, cisgender and heterosexual; or, the female body, cisgender and heterosexual; and, ii) those bodies that do not fit into such strict classifications.

Taking this division into consideration, it can be concluded that identities are tied to the demarcation of *differences*. That is, people who comply with heteronormative norms are considered "normal", while those who do not comply are seen as "abnormal". In this way, it is intended to reflect here on how this concept of "difference" has been applied through the legal strategies assumed by the Brazilian LGBT movement. From this reflection, it can be acknowledged that the concepts of "normal" and "abnormal" have started to oscillate and consequently reach the LGBT community itself.

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<sup>124</sup> BUTLER, Judith. Is kinship always already heterosexual? *Differences: A Journal of Feminist Cultural Studies*. 13.1, 2002, p. 27.

<sup>125</sup> BUTLER, Judith. *El género en disputa: el feminismo y la subversión de la identidad*. Barcelona: Paidós, 2007. p. 225.

As explained in the second chapter of this thesis, the very constitution of the LGBT movement was only possible due to the resignification of historically produced demarcations of difference. It was through this demarcation that the movement has defined its strategies. The LGBT agenda thus emerged through processes of resignification aimed at giving a collective meaning to the experiences of sexually dissonant people.

According to Foucault, the LGBT movement organized itself as a consequence of the emergence of medical discourses targeting homosexuality. Those discourses classifying homosexuals as sick were, therefore, an important element driving the rise of initiatives aimed at *resisting*. People were determined to fight the control that the medical knowledge had on their bodies. It was due to the creation of an "abnormal" identity that the LGBT movement emerged, establishing its agenda and formulating its strategies.

For this reason, the purpose of this paper is not to criticize the fact that the LGBT movement has used identity classifications as a driving force for its activism. The criticism rests on the fact that the identities discourses based on essentialism have become the only possible narrative for the LGBT population, their absolute truth. The concern, therefore, lies in the conception of identity as something innate, a point of view that completely erases its historical character.

In this sense, if identity is always the result of a demarcation of difference, the determination of who is considered gay (or lesbian, bisexual, transgender) will always depend on the establishment of a border<sup>126</sup>. In establishing such a border one does not exclude only heterosexual persons, but also all those dissonant persons who do not fall into the definition of being homo, bi, or trans.

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<sup>126</sup> It refers to the functioning of identity in the identity-difference scheme, as explained in the first chapter of this work.

The issue of identity, when ruled in essentialist terms, produces fragmentations within the LGBT community. In this way, it is necessary to emphasize that certain LGBT people will always be considered more socially intelligible than others. The middle-class heteronormative white gay man is in a privileged position over a poor effeminate black gay man living in a *favela*, for example. For possessing such a privilege and for being in a position of greater social acceptance, the guidelines of the most acceptable subgroups will be taken as universal necessities for the whole community.

In this regard, discrepancies are revealed when certain agendas of the movement are prioritized over others, since internal hierarchies are the result of a strategy that was not defined by all members of the LGBT community equally. For this reason, it is necessary to keep in mind that by adopting an essentialist identity strategy, only part of the LGBT community is included. The political debate around the struggle for rights is hence made in a way that marginalized experiences remain on the sidelines, while the more palatable ones are centralized in order to win public opinion.

The creation of certain agendas as priorities within the LGBT movement is therefore intrinsically linked to these hierarchies. Through the definition of the most socially accepted LGBT narratives, supposedly universal demands are established as a way of making the acquisition of rights feasible. However, it is necessary to highlight that such a strategy is not exclusive to the LGBT movement / law articulation. In reality, it is an aspect that is inherent to the interpretation of identities through essentialism lenses. In this way, although such a strategy has an undeniable connection to law, it also has strong ties with other knowledge-producing fields, such as medicine and psychology.

Taking these points into consideration, it is argued here that the problem is not in the law itself, but in the way in which it has been applied. The identity discourse focused on essentialism erases the possibility of creating new types of resistance and new forms of transgression. The use of the principle of

equality as an argument to make the LGBT population enjoy the same rights enjoyed by heterosexual people raises some questions. There is, first, the strengthening of the State as a figure capable of defining which are the legitimate sexualities; and, furthermore, it is disregarded that even heterosexuality was constructed historically.

In this way, one must be aware of the downsides that a strategy that prioritizes discussions around the innate origin of LGBT identities can bring. Thus, the fight for rights under the argument that such identities are a natural condition leaves untouched the political position of heterosexuality as the standard model of experiencing sexuality. However, even with the finding of such a contradiction, it is argued here that law can be used effectively to enhance full citizenship to all LGBT people. In this sense, a reflection on the concepts of *transgression* and *resistance* that occur through the LGBT movement / law articulations will be proposed throughout the next topic.

### 3. Resisting and Transgressing: Rethinking the Potential of Law

As demonstrated throughout this thesis, the relationship between law and sexually dissonant people has been diverse. At first, law occupied a position that was only repressive; nevertheless, with the institutionalization of the LGBT movement, law started to be seen as an object of desire. By dialoguing with the criticisms regarding the strategy of identity based on the essentialism, it was possible to verify the exclusionary way with which law has been operating. In this context, questions arise: Is the relationship between law and the LGBT movement doomed to failure? Or the creation of new imaginaries emerging from this relationship could still be thought of?

In order to scrutinize the idea of new possible imaginaries between the relationship of the LGBT movement and law, a concrete case will be used as an example. From its enunciation, the notion of resistance will be reflected in a deeper way. The demonstration of the case seeks, therefore, to display how law can be thought beyond a merely normalizing entity inherently attached to the essentialist identity discourse.

The case taken as an example was narrated by the transsexual woman Indianara Siqueira in an interview she gave to the “*Canal das Bee*” on Youtube<sup>127</sup>. After denouncing the violent manner in which the police treat transsexual women who work as prostitutes in Brazil, she detailed the contents of a lawsuit in which she appeared as Defendant. In that incident, Indianara was arrested for pulling her shirt off in front of a bar in Copacabana, Rio de Janeiro. According to the authorities, she would have committed the crime of indecent assault. However, what Indianara did, in fact, was to expose a fundamental inconsistency present in the law. Being legally considered a man, she theoretically would have the right to remove the shirt in a public place, as several men were actually doing at the time she was arrested; however, this right was denied to her since she has female breasts. That is, in preventing her from removing the shirt as all the men around her were doing, the law would necessarily be recognizing her female social identity. After verbally presenting this dilemma at the first hearing, the trial judge preferred to drop the lawsuit rather than deal with the consequences that any judgment would bring.

This case demonstrates how law still acts repressively against LGBT bodies, regardless of the closer relationship established recently with the LGBT movement. Nonetheless, the non-recognition of Indianara's feminine identity while applying to her restrictions only suffered by female bodies shows contradictions that go far beyond law. Primarily, this contradiction is linked to the way our culture deals with the corporality of trans people. Law, if applied accordingly, has the specific power to be able to expose the issue. The contradiction is therefore explicit and clear through *law*, which makes it a very *powerful weapon* if used *strategically*.

In order to understand this ambiguous position of law, it is necessary to carry out an analysis of the concepts of *transgression* and *resistance*. Both of them

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<sup>127</sup> Canal das Bee. Direito, Prostituição e Ética: pergunte às bee 74. Available at: <<https://www.youtube.com/watch?v=BFYPiD6yw4I>>. Accessed on 21.05.2019.



dialogue very closely, since they arise aiming to think the possibility of a social transformation that is made by conscious and rational individuals. According to poststructuralist theories, the individual is not a starting point of anything, but always the result of a reiterated construction. In this way, there is no one who can be located outside power relations. For this reason, there is no revolutionary place par excellence from where resistance could emanate pure and complete.

It is recognized here that in order to achieve any kind of social transformation, certain contradictions need to be embraced. In this sense, one should be aware that no person exists prior to social constructions; but, at the same time, such constructions do not necessarily define who people are<sup>128</sup>. *Transgressions* are therefore possible. However, it will not occur from a spot placed outside the norm. On the contrary, transgressions only gain potency through the resignification of institutions that are functioning. It is sought, hence, to use the institutions against themselves. Denouncing its historicity, dismantling its apparent naturalness. In such a way of thinking resistance and transgression, there is room for questioning, widening the boundaries of what is considered culturally intelligible.

On this note, it is argued here that the achievement of effective social transformation necessarily goes through the need to challenge the elements - and institutions - that are sought to be transformed. The pursuit of social changes requires thus the renouncement of absolute ideas, at the same time it encourages working with contradictions in a strategic manner. The point would be then focusing more on the concept of *resistance* than on the concept of *revolution*.

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<sup>128</sup> BUTLER, Judith. *Cuerpos que importan: sobre los límites materiales y discursivos del 'sexo'*, 1 ed. Buenos Aires: Paidós, 2002, p. 183.

Foucault states that in every power relation there is an insubmission<sup>129</sup>. According to him, power is exercised only on free beings, who effectively have at their disposal various possibilities of conduct<sup>130</sup>. For this reason, there is no power relation without resistance, without an eventual turnaround<sup>131</sup>. In this way, the fact that people cannot put themselves outside power relations does not mean that they cannot transform them. There is always the possibility of generating political tensions aimed at creating less precarious living conditions.

Taking into account the concepts of transgression and resistance presented, some reflections can be made regarding the articulations between the LGBT movement and law. In fact, a contradiction is imminent; on the one hand, living on the margins without the benefits of identity recognition causes real suffering and enhances human precariousness; on the other hand, by claiming recognition through the law, new exclusions are revealed as a consequence of new social hierarchies formed within the LGBT community<sup>132</sup>.

Seeking to reflect on this dichotomy, a constant questioning about the effectiveness of identity politics needs to be maintained. However, it also must be kept in mind that the entire abandonment of the use of identities is not reasonable either. Poststructuralist critique demonstrates two understandings relevant to us at this point: first, they argue that identities are fictitious entities formed through historical facts and social influences; and, additionally, because identities are the result of cultural interactions, they are necessarily inserted within the knowledge / power relations.

Although identities are socially constructed, they have a tangible impact in practical terms. They characterize individuals and as a consequence produce

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<sup>129</sup> FOUCAULT, Michel. O sujeito e o poder (1982). IN: FOUCAULT, Michel. Ditos e Escritos IX: genealogia da ética, subjetividade e sexualidade. Rio de Janeiro: Forense Universitária, 2014. Pp. 118-140. p. 138.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> See ref. 124, p. 239-240.

realities. Therefore, reflecting on new possible imaginaries in a society organized by identities requires constant questioning of this concept, without, nevertheless, throwing it away. If identities are used to *unite* people as a result of the existence of differences, they can also be *politically powerful* as long as its meaning is routinely questioned.

After all, identities are not an individual or a conscious choice. They are the result of interpellations between the knowledge / powers that classify people and the resignification of these classifications by either single individuals or organized groups. In this way, choosing not to be part of this classification scheme is not possible - it will occur independently, in all social domains in which people are inserted. The aim is therefore to find the means to use identities strategically in order to demonstrate their artificiality.

The Indianara's case explored at the beginning of this topic exemplifies how the strategic aspect of identities can be applied. By demonstrating the incoherent manner in which the State handles gender issues, Indianara's behavior was able to produce a gap in the way law deals with gender. The law was simply unable to resolve the dilemma, thereby demonstrating its *limitation*. From the analysis of this situation, one notices that there is no completely stable political institution. Thus, the possibility of demonstrating inconsistencies within regulatory regimes always exists<sup>133</sup>.

The adoption of gender and sexual identities in these terms is an adoption that does not assume an essentialist approach, nor does it seek to place itself outside the norm or outside the power relations. In this way, fighting for rights alone is not enough to make a strategy of resistance through identities. The LGBT movement should focus beyond the acquisition of rights by the community, since the focus on strategies willing to deconstruct issues that are

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<sup>133</sup> See ref. 125, p. 32.

naturalized is just as important. Strategies that perceive the LGBT population not only as members of a vulnerable group, but also as a creative force<sup>134</sup>.

#### 4. Concluding Observations

In this sense, throughout this chapter the purpose was to reflect on the LGBT movement / law relationship beyond the limiting positions that either perceive law as emancipatory or as normalizing, erasing in this way all the potentialities that can be found in between. The aim was, therefore, to show how to make use of law without abandoning the criticisms directed at it.

As argued here, institutions are disputable. The possibility of opening gaps through their own operation is possible. In this line of thought, the law can be used against itself, destroying its imbalances and exposing its artificiality. Thus, the question is not about using the law or not, but in what way such use is operationalized, what are the strategies prioritized in its mobilization.

In reflecting, for instance, on human rights outside its traditional approach<sup>135</sup>, there is the possibility of imagining the construction of new forms of rights that are not necessarily limited to claims based on identities<sup>136</sup>. If human rights are constructed through processes aimed at the acquisition of human dignity, they may be the most powerful instrument to be used in order to detach law from its metaphysical roots.

In this way, it is necessary to think about human rights in other terms. Flores highlights the potential that human rights have to enable greater collaboration between law and social movements; however, to reach such a degree, the

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<sup>134</sup> FOUCAULT, Michel. Michel Foucault, uma entrevista. IN: FOUCAULT, Michel. *Ditos e Escritos IX*, p. 252

<sup>135</sup> It refers to the way in which law is related to the emerging law of modernity and its metaphysical approach.

<sup>136</sup> The Author emphasizes once more that he does not disqualify the importance of identities as a mechanism for sharing the solidarity of vulnerable bodies. However, as demonstrated throughout this work, strategies that rethink this concept are necessary if the goal is to encompass all dissonant experiences.

traditional conception<sup>137</sup> of human rights should be rethought. It is imperative to overcome the idea that law is only an abstract entity that hangs over society, normalizing and assimilating everything that resists. Moreover, reflecting on law from other angles can further reduce the separation between academia and LGBT activism, a segregation that has been extremely detrimental to the construction of new imaginaries in terms of gender and sexuality<sup>138</sup>.

Throughout this chapter, an analysis that conceives identities and law as historically and socially constructed entities have been developed. By applying this poststructuralist approach, potentialities arising from the articulation between the Brazilian LGBT movement and law were reflected. Through the study of this articulation and its consequent contradictions and limitations, it could be concluded that social transformations can occur when strategies of action are thought from the inside out. That is, when the institutions themselves show their own flaws. Law, in this sense, could be resignified by social movements in order to construct new possible imaginaries. It could be used as a way of demonstrating its own inconsistencies, its artificiality and its inability to deal with *difference*. For all these reasons, the LGBT movement should not abandon law as a mechanism for social transformation. Nevertheless, as it was argued here, the way law has been applied so far does not seem the best approach, since it does not encompass all members of the LGBT community equally.

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<sup>137</sup> It refers specifically to the non-recognition of human rights as a concept that has been historically shaped.

<sup>138</sup> MISKOLCI, Richard. Não somos, queremos reflexões queer sobre a política sexual brasileira contemporânea. IN: COLLING, Leandro (org.). Stonewall 40 + o que no Brasil? Salvador: EDUFBA, 2011. pp. 37- 56.

## 5. Conclusion

This research aimed to theorize about the contradictions and limitations arising from the articulations established between the Brazilian LGBT movement and the law. By explaining the tensions in this relationship, a line of reasoning that perceives law beyond absolute truths was exemplified. The objective was precisely to demonstrate how law can be used as a strategic tool by the LGBT movement in order to boost the creation of new possible imaginaries.

The path to this argumentation was built in steps. Firstly, it was necessary to deconstruct the essentialist discourse linked to identity and law. In this sense, identity was understood here in a relational way. From a Cultural Studies and poststructuralist philosophy perspective, it was reflect that any identity is codependent of a difference, a fact that necessarily leads to the establishment of an exclusionary border. In addition, it was argued that in order to explore new potentialities in law, one should take into consideration the inherent historicity of legal discourses.

Subsequently, the pathologizing and repressive environment that resulted in the creation of the homosexual identity in the West was highlighted. Moreover, it was analyzed the manner in which this pathological discourse influenced the Brazilian scenario, especially in relation to the promotion of the LGBT movement. The different stages of the movement were highlighted: the liberating and anti-authoritarian approach present in the 1970s with the consequent change towards a more institutionalized organization due to the onset of AIDS in the 1980s.

The impact of AIDS was essential for the emergence of a rights-based militancy. In this sense, the partnerships that the LGBT movement began to establish with human rights NGOs and with the State were stressed. In regard to the relationship with State, the strategies were diverse: the attempt to

introduce bills; the advocacy for the implementation of public policies at the federal level; and, a sensitization strategy within the judiciary.

The way in which all these strategies related to one another was theorized. Regarding the struggle for *rights* through *law*, it was possible to verify how much the LGBT movement was concerned about achieving the same rights entitled to heterosexuals. In order to reach this goal, a focus was placed on creating a positive image for homosexuality. Therefore, it was underlined how certain characteristics belonging to the most privileged portion of the LGBT community were taken as universal by the movement.

Throughout this work, it could be noted how the construction of an image of the homosexual as a good citizen was aimed primarily to achieve greater social acceptability. In this sense, the LGBT movement began to focus on an assimilation strategy, which necessarily continued to exclude the more marginal members of the LGBT community. It was highlighted, therefore, that the attainment of rights became the movement's ultimate goal. Due to this situation, a separation was created between those who faced law as a saving entity par excellence and those who faced it as an exclusionary tool, since it could not collaborate to the achievement of structure social changes.

It was from this dichotomy that this thesis proposed to reflect on new possible alternatives arising from the articulations between the LGBT movement and the law. It was argued here that absolute positions on the role of law should be abandoned. It was sought to face law as an institutional entity that is disputable, a mechanism that can be used against itself in order to show its own incoherences and inconsistencies. Through the application of the concepts of resistance and transgression, it was argued that the use of law can be powerful, as long as it is done strategically.

In this way, it was argued here that the achievement of rights should not be regarded as the ultimate purpose of the LGBT movement, but as a middle ground arena. The change, therefore, must be exercised from the inside out.

It is necessary to discuss the naturalized, to put it in constant doubt. Law, in this context, is only one of the areas where this discussion can emerge, since the power relations - and also the resistances - can emanate from many different places.



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