

Civil Partnership: The Desire And The Right To Have Children

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Sexuality, culture and politics A South American reader

Although mature and vibrant, Latin American scholarship on sexuality still remains largely invisible to a global readership. In this collection of articles translated from Portuguese and Spanish, South American scholars explore the values, practices, knowledge, moralities and politics of sexuality in a variety of local contexts. While conventionally read as an intellectual legacy of Modernity, Latin American social thinking and research has in fact brought singular forms of engagement with, and new ways of looking at, political processes. Contributors to this reader have produced fresh and situated understandings of the relations between gender, sexuality, culture and society across the region. Topics in this volume include sexual politics and rights, sexual identities and communities, eroticism, pornography and sexual consumerism, sexual health and well-being, intersectional approaches to sexual cultures and behavior, sexual knowledge, and sexuality research methodologies in Latin America.



Civil Partnership: The Desire And The Right To Have Children*

Anna Paula Uziel**

I will comment upon Brazil's Civil Partnership Project ("PCR" in Portuguese)¹ and the issue of homosexual parenthood. Although the final version of the PCR turned in by the Special Legislative Commission clearly bans adoption by homosexual couples, analysis of the congressional debates regarding the issue shows that the major barrier confronting the legalization of homosexual marriage in Brazil is the risk that this could lead to the recognition of same sex couples as a family, which in turn could lead to the recognition of said couples' right to raise children. Given this, I will explore three dimensions of parenthood: biological, legal, and personal desire, reflecting upon what has been stated and argued about the rights and desires of gays and lesbians regarding adoption.

In the 1990's, with the emergence of civil society responses to the AIDS crisis, legislation recognizing same sex marriage was proposed, voted on, approved, or withdrawn in many countries around the world. The bill submitted in to the Brazilian Congress in 1995 by Representative Marta Suplicy was substantially altered by the Special Legislative Commission appointed to review it. In the final version of the bill, "partnership" was swapped in for the prior term "union". This change sought to highlight the bill's patrimonial dimensions, which were present in the original project, but were just one of many legal aspects which the original proposal sought to address. If, on the one hand, the approval of same sex civil partnership would guarantee basic rights (such as resident status for foreign partners, inheritance of joint assets, health insurance and pension issues), on the other hand, it would eliminate the possibility of marital recognition in areas where greater moral regulations were in play, such as those which stipulated the legitimate constitution of families. An analysis of the arguments used at committee debates over the bill shows that the strategic substitution of the term "union" (a direct reference to marriage) by "partnership" (a much more generic term) was intended to avoid the conflicts that would inevitably be created by defining same sex conjugality as "family".

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¹ Bill No. 1151, from 1995.

That “risk” needed to be avoided for several reasons. One was the incompatibility between homosexuality (especially male homosexuality) and family, discussed by Claudia Fonseca (2005), which was particularly accentuated in the light of the belief that homosexuality means promiscuity. Another reason was the horror expressed at the idea that new homosexuals would be the result of homosexual parenting. A third reason expressed was the fear of extinction of the human species, which supposedly would occur if homosexuals ever became a majority.² Although it can be argued that gay and lesbian families already exist and that the law, at least in this case, would only regulate a *de facto* situation, fears linger that legislation regarding this issue will either awaken homosexual interests in people who may not be sure about their sexuality or may endorse a “shameless” attitude about homosexuality itself.

The next logical step after defining homosexual couples as family would be an increase in their demands to be allowed to raise children. This went beyond what was tolerable for many Brazilian congressmen and –women.³ If simply recognizing conjugality or thinking about relationships in terms of endearment, affection and love raises doubts about the acceptance of homosexuality, then raising children within same-sex conjugal homes can only be thought of as detrimental. It was rejected by congress, deemed harmful as it was believed it would cause irreparable damage to subjecthood as constituted under Brazilian law.⁴ In Brazil, then, is only thinkable to consider a child’s “horrible fate” of being adopted by homosexuals in situations deemed as or even more tragic, such as in the case of late adoptions of institutionalized children, or the adoption of children who have been the victims of severe abuse. We might ask, then “On what concepts of kinship are the arguments against homosexual parenthood based upon?”

The argument for keeping parenthood free of homosexuality—especially male homosexuality—is quite curious. Evoking the idea of natural abhorrence, it employs biology to anchor an argument which is often used to separate children from their biological fathers in cases of divorce following the confession or discovery of these men’s homosexuality. Homosexuality is understood as something unnatural, which denies or ruptures the perfect fit between man and woman understood as given, unchangeable, natural and proven by the body.⁵ There is no denying that same sex couples do not reproduce. However, it should be noted that from this strictly “biological” point of view, opposite sex couples are also not always fertile and this point is hardly ever raised by those who use “biological” arguments against homosexuality. In this regard, Western

² All these fears were raised in interviews I conducted with state attorneys, court experts and legal operators during my PhD dissertation research (Uziel, 2002).

³ It should be noted, however, that the definition of “tolerable” is negotiable and changeable in different situations. For further discussion, see Vianna (2002).

⁴ For a psychoanalytic debate on homosexual parenthood, see Hamad (2002) and Roudinesco (2003), among others.

⁵ Thomas Laqueur (1990) made an important contribution to the deconstruction of the natural in perceptions of men’s and women’s bodies when he discussed the eighteenth century construction of the idea of two bodies.

societies can thus be seen as establishing social practices of parenting that disregard biology, but which have legal and cultural support.

The same arguments are used to prevent parent-child relationships from being instituted via adoption or assisted reproduction. When the court system attributes that the heterosexual parent of a divorcing couple is better able to take care of the couple's children, or claims that a family environment that includes a homosexual is inadequate, it apparently bases these arguments on primordial biological nature, as discussed above. Such improprieties cannot be supported by the law, even though discrimination based on sexual orientation is not justified by the Brazilian legal system. Once again, this attributed "inadequacy" is cultural in origin, even though attempts are constantly made to find support for it in nature, so that it might seem unquestionable and immutable. The political dimension is thus relegated to a secondary role in this dispute, at least within the Brazilian context.

Homosexuality is therefore either understood as a deviation from nature or as a condition that the individual has to cope with, since he is not, in fact, capable of making a choice regarding it. These understandings inspire pity, charity and violence. In any case, they situate homosexuality as something out of place, inspiring the quip that "a homosexual who wants to adopt is like a vegetarian wanting to eat soy beef".⁶

Biology aside, different legal arguments point to both the universality of rights (denying them entails a form of discrimination) and to a more "narrow interpretation of the law". The latter is based on the explicit recognition that a stable union between a man and a woman is needed, made up of two distinct sexes, in order to form a family unit.⁷ Each argument has a different outcome.

Regarding desire (if it is possible to think about homosexuals as desiring to have children), both the literature and the homosexual rights social movements themselves point to a problem: to what extent does this desire imply the need to submit to a heterosexual order? There is yet another dimension that needs to be addressed, however: if parenthood, as a possibility, lies within the field of personal desire, what would be the obstacles to homosexual adoption? Instead of talking restrictively about homosexuals' desire to raise children, why not think about desire as a dimension that is constitutive of parenthood and thereby not restricted to a few not-so-central aspects of life? While biology and rights are clearly matters more easily apprehended and argued, desire is more elusive.

⁶ See Uziel (2002).

⁷ Recent developments in the field of law propose a different interpretation. Cf. Roberto Lorea, 2005; and Roger Raupp, 2006.

Our kinship system is bilateral and is sustained by an ideology that sees essential familial relationships as constructed through the sharing of substances, generally imagined as “blood” (Fine, 2000). Bilaterality is usually maintained during an individual’s early development, although its life-long permanency is not guaranteed—as in the case, for example, of a “bitter” separation or the loss of family members. In adoption by one or two people, whether hetero- or homo-, blood links are not present. Such an arrangement lacks “concreteness”, since filiation is symbolically constituted by two lineages and a blood link. Furthermore, while the matter of filiation is supposedly biological (and thus indelible) and its assurance is legal (and thus a fiction), it is sustained by *desire* (an instance which cannot be measured or managed). Parenthood is a voluntary act, a social and psychological reality marked by transmission and by belonging to a socially constructed lineage. Adoption is a good example of the insufficiency of biology: an instance of parenthood dominated by desire and legitimated by law. We might thus ask what is “natural” about impeding homosexuals from adopting children.

If we attempt to comprehend the issue based upon only one of these three dimensions, we ignore the complexity of parent-child relations in our society and end up supporting premises that we usually fight against. To give primacy to biology means considering adoption as a second-class form of parenthood, regardless the applicants’ sexual orientation, their commitment and investment, or their potential to become parents.

In order to further analyze this issue, I will share some findings of my PhD research on adoption cases involving openly homosexual applicants and my interviews with court experts and law professionals.

The legal dimension brings in certain complications. If, on the one hand, protection against discrimination indicates that any person should be allowed to adopt regardless of their sexual orientation, on the other hand State Attorneys have disguised their arguments and gone against court experts’ favorable considerations. In two cases, for example, the Attorneys claim that the court experts came to no conclusion⁸ and argued against the placement of children in families which have not yet been legally recognized (i.e. homosexual families), and therefore pose a risk to the children involved. Thus, while these legal professionals apparently seek to guarantee the children’s rights, they actually argue for the impropriety of the measure—adoption on legal grounds—by claiming that same sex conjugality is not recognized by law. However, the petitioner in one of these cases was not even a member of a stable partnership or cohabitating. In accordance with the 1998 Brazilian Federal Constitution, then, this should have qualified him as “one of the parents and their descendents” and the case should have been judged according to the rules set out for single parent families. In short, the State Attorney’s office states that it needs to guarantee that these children and adolescents

⁸ This type of complaint or request by legal operators is recurrent, pointing to another important debate about the role of psychologists and social workers role, their expertise and ethical parameters.

are offered healthy homes with real advantages, which it cannot verify in the petitions put forth by homosexuals because these individuals can only offer families that are not yet legally recognized, even in cases which do not involve families of any sort.

Desire is an even more delicate sphere and analyzing it is the responsibility of psychologists. However, it is possible to infer from court experts' discourse that they feel that when dealing with homosexuals, the desire to have children should be even more legitimate than it usually is in the cases of other (presumably heterosexual) petitioners. This "excess" is put forth as if it could compensate for a "fault" which cannot be qualified as such. Petitioners cannot speak for themselves, but their mothers are often invited to take part in the legal hearings as witnesses who know the petitioner intimately and who can testify—particularly true regarding male petitioner's claims and their abilities and desire to become a father. This entails a new form of tutelage (aside from the one exercised by the State) because these proceedings are dealing with children who are outside of family custody. Summoning relatives is not mandatory, but it is a recurrent practice in these cases. It is important to note that female homosexuals do not need their mothers to assure the court of their desire to become mothers, which is considered natural and instinctive.

Furthermore, the psych and social services experts seem to believe that certain qualities give legitimacy to the petitioner, since they attest to moral patterns (such as the capacity to desire another person and the ability to establish stable affective relationships) which are not taken as genuine when considering male couples. To the contrary: such patterns, when present, are often seen as creating even more risk for the adoptee, raising the specter of child sexual abuse. This illustrates how biology, law and desire become entangled in the arguments court experts and legal professionals construct regarding adoption by gay and lesbian petitioners.

Arguments emphasizing "less harmful" step adoption (Uziel, 2002) coexist with others, based on the value of the honesty of open homosexuality—an argument made by the appeals court in their favorable decision in one of the cases I analyze. Despite clashes, homosexuality has not been a barrier for adoption in the judicial district of the City of Rio de Janeiro, at least up to 2002. This does not mean, however, that a rupture has occurred from the traditional logic that feeds the reproduction of normative, normalizing relations.

References

- FINE, A. 2000. « Adoption, filiation et différence des sexes ». In: GROSS, M. (Ed.). *Homoparentalités, état des lieux*. Paris: ESF, p. 73-85.
- HAMAD, N. 2002. *A criança adotiva*. Rio de Janeiro: Companhia de Freud.
- LAQUEUR, T. 1990. *Making Sex: Body and Gender from the Greeks to Freud*. Cambridge: Harvard University Press.
- LOREA, R. A. 2006. “Acesso ao casamento no Brasil: uma questão de cidadania sexual”. *Revista Estudos Feministas*. V. 14, p. 488-496.
- LOREA, R. A. 2005. “O amor de Pedro por João à luz do Direito de Família: Reflexões sobre o”. *Revista Brasileira de Direito de Família*. Porto Alegre, v. 7, n.31, p. 31-38.
- _____. 2005. “Homoparentalidade por adoção no direito brasileiro”. *Revista do Juizado da Infância e da Juventude / Tribunal de Justiça do Rio Grande do Sul, Porto Alegre, RS*, v. 5, p. 37-44.
- RIOS, R. R. 2006. “Para um direito democrático da sexualidade”. *Horizontes Antropológicos* (UFRGS. Impresso), v. 12, p. 71-100.
- ROUDINESCO, E. 2003 [2002]. *A família em desordem*. Rio de Janeiro: Jorge Zahar Editor. [*La Famille en désordre*. Paris: Fayard.]
- UZIEL, A. P. 2002. *Família e homossexualidade: velhas questões, novos problemas*. Campinas: Unicamp. PhD Thesis.
- VIANNA, A. 2002. “Quem deve guardar as crianças?”. In: LIMA, A. S.. *Gestar e gerir*. Rio de Janeiro: Relume Dumará.
- FONSECA, C. 2005. “Sexualidade, Família e Legalidade: questionando fronteiras”. In: *Novas Legalidades e democratização da vida social: família, sexualidade e aborto*. ÁVILA, M. B. et alli. Rio de Janeiro: Garamond.