

Yale Law School
Yale Law School Legal Scholarship Repository

SELA (Seminario en Latinoamérica de Teoría
Constitucional y Política) Papers

Yale Law School SELA (Seminario en
Latinoamérica de Teoría Constitucional y Política)
Papers

1-1-2009

Adoption by Homosexuals: The Legal Discourse

Ana Maria de Oliveira Nusdeo

Carlos Alberto de Salles

Follow this and additional works at: http://digitalcommons.law.yale.edu/yls_sela

Recommended Citation

de Oliveira Nusdeo, Ana Maria and de Salles, Carlos Alberto, "Adoption by Homosexuals: The Legal Discourse" (2009). *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers*. Paper 69.
http://digitalcommons.law.yale.edu/yls_sela/69

This Article is brought to you for free and open access by the Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Adoption by Homosexuals: The Legal Discourse

Ana Maria de Oliveira Nusdeo*
Carlos Alberto de Salles**

1. INTRODUCTION; 2. BETWEEN SAMENESS AND DIFFERENCE: RIGHT TO RECOGNITION; 3. HOMOSEXUALITY IN BRAZILIAN LAW; 4. ADOPTION BY HOMOSEXUALS IN BRAZIL; 5. THE ARGUMENTATION OF DISCOURSE OVER ADOPTION BY HOMOSEXUALS; 5.1. THE ARGUMENTATION AGAINST ADOPTION BY HOMOSEXUALS; 5.2. THE ARGUMENTATION FOR ADOPTION BY HOMOSEXUALS; 6. CONCLUSIONS; 7. BIBLIOGRAPHY

1. INTRODUCTION***

An important factor in the transformations of sexuality in contemporary society was, no doubt, the possibilities for contraception created in the second half of last century.¹ They promoted a dissociation between sex and reproduction, allowing a new space for sexual pleasure in people's life, disconnected from concerns about reproductive and family bounds. "This change led to the possibility of seeing homosexual relationships in new ways – that have been

* ¹ Environmental and Economic Law Professor at the Universidade de São Paulo and at the Catholic University at Santos.

** Civil Procedure Law Professor at the Universidade de São Paulo Law School and Public Prosecutor.

*** We are thankful to José Reinaldo de Lima Lopes for the bibliographical citations, to Maybi Mota for the research that backed this paper and for Patricia Okada Sato's help with part of the translation to the English version.

¹ "The plastic sexuality is a decentralized sexuality, free of reproduction need. Its origins is the trend, that begun in the end of eighteenth century, to the limitation of the family but develops later as a result of the diffusion of new contraceptive technologies" GIDDENS, Anthony. *A transformação da intimidade: sexualidade, amor e erotismo nas sociedades modernas*. São Paulo: Unesp, 1993, p. 10.

stigmatized, partly because of its infertility. If heterosexual relationships for their own sake (i.e., without the finality of reproduction) were accepted, why not relationships between people of the same sex?”²

The transformations derived from the break of the association between sex and reproduction also brought important consequences for the legal ruling of matters related to sexuality. These range from the decriminalization of homosexual relations – *Lawrence v. Texas*³ is a telling example – to changes in the rules concerning parental responsibilities⁴ and those regulating marital property.

From this point of view, it may seem odd to discuss the question of homosexual adoption in that it can be seen as a step backward, as an attempt to make same-sex relationships identical to heterosexual ones, especially in the sense of raising a family. This paper, however, will not address the meanings of and motives for homosexual adoption. It is considered objectively inasmuch as there is a demand for adoption by homosexuals which is subjected to prejudice in attitudes and analysis.

Therefore, the equal participation in an adoption process may be seen as a right that may be exercised without discrimination, regardless of sexual orientation or the relevant motive for

² LOPES, José Reinaldo de Lima. Liberdade e direitos sexuais – o problema a partir da moral moderna. In RIOS, Roger Raupp. *Em defesa dos direitos sexuais*. Porto Alegre: Livraria do Advogado, 2007, p. 56.

³ **539 U.S. 558**. “For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board of gay and lesbian America*.” TRIBE, Lawrence. *Lawrence v. Texas: the “fundamental right” that dare not speak its name*. *Harvard Law Review*, n. 117, 2003-2004, p. 1.895.

⁴ Although omitting mention of same sex relationships, the Brazilian Federal Constitution states that “for matters of State Protection, it is recognized the stable relationship between the man and the woman as a family entity”. (art. 226, § 3º). The Civil Code of 2002, made a significant change by eliminating the “**paternal power**” (submission of the children to the father and, only in his absence, to the mother) and the establishment of the “**family power**” (**poder familiar**), that puts the children under the parents’ authority, and assumes that father and mother are on the same level. (arts. 1.630 e 1.631). The new Adoption Act (Lei 12.010, issued on August 3rd, 2009) changed the Children and Juvenile Act in order to eliminate the expression “paternal power” and replaced it by “family power”.

adoption of the would-be parents— since this motivation are not against the adoptable child interests. The first aim of this paper is to discuss how the homosexual adoption has been treated in Brazil and, its' second is to reflect about the meanings of such treatment from an equality and non-discrimination point of view.

The purpose of this paper, therefore is to discuss the legal discourse about adoption by homosexual people trying to identify whether the argumentation – for or against – deepens the debate over the right to recognition of homosexuality and incorporates the structural changes of the contemporary family in addition to the identification of recent changes in the legal rules or practices of Courts in the matters related to adoption.

The research done for this paper suffered from at least three kinds of difficulties: 1) the fact that the adoption involves secret proceedings, 2) the lack of an specific registry allowing a numeric identification of cases and results, and 3) the fact that homosexuality often goes unmentioned by would-be adoptive parents in order to avoid prejudices and increase the chances for the adoption to be approved, and 4) the lack of empirical surveys compiling data regarding homosexual adoption in Brazil.

Some of these difficulties make it difficult to draw a fair picture of homosexual adoption in Brazil. Others prevent a deeper legal debate from arising in the Courts. In order to overcome these deficiencies the paper relied not only on the analysis of the law and legal literature about the subject but also on interviews with significant actors, in order to obtain a closer picture of the subject. Such actors are professionals of law, psychology or from think tanks that are or have been practitioners in the adoption field in Brazil. Such professionals were the following: Antonio Carlos Malheiros, Justice in the São Paulo Supreme Court chair of Children and Juveniles State

Comission; Elisabeth Tonin Machado, former social worker of the Adoption Group of Capivari State District; Fermino Magnani, former judge of Children and Juveniles Court of São Paulo City and now Justice in the São Paulo State Supreme Court; Sérgio Gardenghi Suiama, member of work group on sexual rights of Federal Attorney General Office and Marlon José da Fonseca, lawyer, and Maria Paz, legal intern, both at the Non-Governmental Organization “O Quintal de Ana”, located in Niteroi in the state of Rio de Janeiro.

Before addressing the subject of adoption, the paper analyses the theoretical and ideological challenges of homosexual rights to recognition. Secondly, it shows the evolution and present status of the treatment of homosexual rights in Brazil. Then, it discusses the subject of adoption by homosexuals in Brazil as presented by family law literature and information from the significant actors. Finally, it tries to identify the argumentative trends used either for or against adoption by homosexuals. Due to the difficulties of accessing the argumentation in the activity of Courts in Brazil, the paper also brought to the discussion the precedents related to discrimination against homosexuals related to the custody of children and adoption at the European Court of Human Rights.

2. BETWEEN SAMENESS AND DIFFERENCE: RIGHT TO RECOGNITION

The presumption of equality in modern Law is blind as regards sex⁵. Everybody is equal before the law, regardless of sex differences or sexual orientation. Sex is considered legally irrelevant. Law does not see sex.

⁵ For a discussion of law’s neutrality in relation to social differences, see. MINOW, Martha. The Supreme Court 1986 Term – Foreword: justice engendered. *Harvard. Law Review*, n. 101, 1987/1988, p. 10/95.

Such presumption hides a very different reality of inequality and even submission of sexes in the social hierarchy, as the Feminist Theory of Law⁶ has been trying to denounce. In the case of gay and lesbian rights, a blind eye is turned to the defamation and stigmatization to which homosexuals are submitted.⁷

The dilemma faced by the Feminist Theory of Law seems to be identical to that of a non-discriminatory approach to homosexual rights, namely, how to reconcile equality and differentiation. As a matter of fact, the latter can only be true if the former is noticed, in order to avoid the bare formalism that should be denounced. Therefore, real equality requires a presumption of the recognition of differences. So, such rights present themselves as *rights to recognition*.⁸ The understanding and application of rights should be oriented by that logic.

Adoption by homosexuals is at the core of this question. Actually, such kind of adoption requires the recognition of homosexuality in a place reserved to differing sex mates: the family.

Brazil does not criminalize homosexual practices and shows reasonable tolerance towards it in the perspective of freedom and autonomy of adults with civic status. However, Brazilian society is far from recognizing homosexuality in a family model. That is why the research showed that in adoption by homosexuals, it is almost always the case of individual applications

⁶ For a synthesis of Feminist Legal Theory, developed in United States since the end of the seventies, v. MINDA, Gary. *Postmodern legal movements: law and jurisprudence at century's end*. New York: New York University, 1995, p. 128/148.

⁷ See. LOPES, José Reinaldo de Lima. Prefácio. In RIOS, Roger Raupp. *A homossexualidade no direito brasileiro*. Porto Alegre: Livraria do Advogado, 2001; also TRIBE, *op. cit.*, p. 1.905/1.907, describing sodomy's criminalization as a way of social stigmatization ; and See RIOS, Roger Raupp. *A Homossexualidade no Direito*, Livraria do Advogado: Porto Alegre, 2001, 31/62.

⁸ LOPES, Prefácio, *op. cit.*, quoting Nancy Fraser. See FRASER, Nancy. From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age. Disponível em <www.ethicalpolitics.org/blackwood/fraser.htm>, reach in 13.04.2009.

(one person adopting a child) without challenging the formal restriction of the Brazilian Civil Code.⁹

The adoption by a couple, even if could bring more advantages to the children regarding safety and the succession of assets, would meet legal obstacles related to the need to recognition of an implicit homosexual “stable relationship”¹⁰ or the obstacles to the child registration without the existence of a mother and a father. On the other hand, the evaluation of the adoptive parents capacity to materially provide for the well-being of the adoptable child tends to be based on a traditional family standard, which means a heterosexual couple as the one able to “to show actual advantages for the child”.¹¹

The possibilities of adoption analyzed in this paper reveal a serious limit to overcoming discriminatory barriers based on sexual orientation¹². The hegemony of the heterosexual family as a basic principle of social and interpersonal organization seems to be linked to a moral and ideological structure that runs deeper than could be imagined at first sight. That is the reason that, for example, one of the classical works criticizing bourgeois society is focused exactly on the family and the property¹³.

⁹ The new Adoption Act (Lei 12.010, issued on August 3rd, 2009) states that “For the adoption by two people, it is required that the applicants are married or live in a ‘de facto’ union, and that the family is stable” (Art. 42, § 2nd). The former provision stated that “Any person can be adopted by two people, except if they are husband and wife or live in stable relationship” (Art. 1.622, Civil Code).

¹⁰ Which in Brazil is recognized with similar *status* to marriage (art. 226. § 3^o, Brazilian Federal Constitution).

¹¹ Art. 43, Child and Juvenile Act (ECA). The former Art. 1.625 stated: “effective benefit for the child in process of adoption”.

¹² Denouncing the discriminatory approach of law to homosexual’s relationships in Brazil, v. LOPES, Liberdade, op. cit., p. 66/68.

¹³ See ENGELS, Friedrich. *A origem da família e da propriedade privada*. São Paulo: Centauro, 2006.

3.HOMOSEXUALITY IN BRAZILIAN LAW

The Brazilian Constitution expressly forbids discrimination based on sex (article 3rd, IV). Although sexual orientation is not mentioned, the article is interpreted in a broad sense that includes it.¹⁴ Homosexuality is not a crime in the Brazilian legal order,¹⁵ except in the Military Criminal Code¹⁶, applicable only to the military.

Despite the lack of specific recognition of homosexual relationships in Brazilian Law, the Federal Constitution protects the family, adopting a concept that is broad enough to allow for the recognition of stable unions between people of the same sex.¹⁷ This subject is very controversial in the Brazilian Courts¹⁸.

The trend in Brazilian Courts is to recognize homosexual couples as “de facto union” (*sociedade de fato*) subject to the same treatment as a civil association, but not as a family. Although such recognition is partial and discriminatory of homosexual relations as compared to heterosexual ones, it allows the establishment of joint property in the occasion of succession and also the possibility of a homosexual partner becoming a pension beneficiary.

¹⁴ The constitutional clause contains a rule of closure indicating “any form of discrimination,” which has been understood as “sufficiently comprehensive to collect also those factors that have served as a basis for inequality and prejudices.” SILVA, José Afonso da. *Curso de Direito Constitucional Positivo*. São Paulo: Malheiros, 2005, p. 224.

¹⁵ This kind of crime was abolished in the Imperial Criminal Code, of 1830. Cf. LOPES, Liberdade, *op. cit.*, p. 58/59.

¹⁶ Article 235.

¹⁷ Despite the fact that the Federal Constitution expressly contemplates only “stable relationship between a man a woman” (art. 226, § 3º).

¹⁸ State Courts have Jurisdiction over family matters, except when related to international treaties or pension rights, and there are sensitive differences in treatments between them. The Brazilian Supreme Court, responsible for the unity of constitutional interpretation, and the Brazilian Superior Court, who is the responsible for a uniform application of federal law, do not yet have a position about the recognition of the homosexual relations as a family relationship.

It is possible to conclude that homosexual relationships produce similar obligation effects as those of heterosexual families and stable unions but are not recognized as matter of family law.¹⁹

After 2008, however, the Superior Court of Justice changed its position in that the lawsuits referring to rights deriving from same sex relationships should be presented only in the Private Law Court's Divisions²⁰. In the decision of the Special Appeal to the Superior Court, number 820.475/RJ, it was stated that the appreciation of a stable union between people of the same sex is not forbidden, which would allow its submission to the Family Court Divisions. The understanding was that although legal rules mention that stable unions must be between a man and a woman to fulfill the legal requirements – public, lasting and continuous companionship – it does not use restrictive words in order to prevent the inclusion of same sex couples within the legal definition. On the other hand, according to the Court, “the subject comes from a factual matter that is well known but not yet ruled expressly by law, so an interpretative integration through analogy is allowed, in order to cover the situations that are not expressly contemplated but whose content is coincident to other ones ruled by the legislator.”²¹

It is important to mention that the judgment of the “Disregard of Fundamental Precept Action” (*Ação por Descumprimento de Preceito Fundamental – ADPF*) number 132 is pending in the Brazilian Supreme Court. It relates to the State of Rio de Janeiro Governor's requirement

¹⁹ Thus the position of the sites surveyed in Courts of Justice of the States of São Paulo, Rio de Janeiro, in Sergipe, Rio Grande do Norte, of Acre, Mato Grosso, from Goiás, the Federal District and Minas Gerais, Paraíba's . Note that the sites of courts in several states do not work (Bahia, Alagoas, Piauí, Tocantins and Amazonas), or do not offer enough sample base to infer whether they recognize stable relationship between homosexual couples (Paraná, Espírito Santo, Pernambuco, Pará, Amapá, Roraima, Rondônia and Mato Grosso do Sul).

²⁰ Cf. REsp 648.763/RS, Rel. Ministro César Asfor Rocha, 4ª Turma, j. 07.12.2006 In this judgment, the Court held that the relationship between persons of the same sex comprises a “de facto relationship”, in which the sharing of goods requires the proof of joint efforts in the acquisition of equity saved. The Special Appeal is partially known and, in part, provided.

²¹ See REsp 820.475/RJ, Rel. Ministro Luís Felipe Salomão, 4ª Turma, j. 02.09.2008.

for the application of article 1723 of the Civil Code – which describes the stable union between man and woman – to the union of same sex civil servants of the State in relation to rules of the Civil Servants Act of Rio de Janeiro State. Although the claim is specific to those parts, the decision could have strong impact on the understanding of the subject and establish a benchmark about the legal status and consequences of same sex stable unions.

As far as legislation is concerned, it should be pointed out that neither Bill number 1.151, proposed in 1995, concerning stable union contracts between same sex couples, nor Bill number 2.285/07 (Family Statute), nor even the Constitutional Amendment Bill number 67 of 1999, that adds “sexual orientation” to the constitutional clause that forbids discrimination (art. 3rd, IV, and art. 7th, XXX), have been approved yet.

Which regard to the legal literature, Maria Berenice Dias, a former Justice of Supreme Court of Rio Grande do Sul, the first State Court to recognize the stable unions between homosexual couples, is a militant for homosexual rights recognition. According to her position²², there is a gap in the Federal Constitution in relation to the legal treatment of homosexual relations and connected matters which allows for inequality. She states that most cases are ended without passing judgment on their merits. Some of them are limited to the Abridgment of Law number 380 (Súmula 380) of the Federal Supreme Court – that states that “once the existence of stable relationship is proved, it is possible to promote its judicial dissolution in order to distribute the assets acquired through common effort” – and then granting recognition of the de facto union derived of a common effort.

²² See Cf. DIAS, Maria Berenice. *União Homossexual: Preconceito e a Justiça*. 2ª Edição Livraria do Advogado: Porto Alegre, 2001; also, of the same author, A família homoafetiva e seus direitos. *Revista do Advogado*, n. 91 (Maio de 2007), p. 103/111.

Maria Berenice Dias' opinion is that the Constitution avoided the recognition of stable union between same sex couples solely on the basis of an ethical prejudice, opposing the principles of equality, liberty and human dignity. Since heterosexual and homosexual relationships are not different, legal rules should be applied by analogy.

The author admits, however, that not even the avant-garde literature believes that it is possible to apply Family Law legislation because of the wording of the Constitution. However, there is a trend to admit the removal of this Constitutional rule and the decisions by Courts on the basis of Constitutional Principles such as equality.

Álvaro Villaça Azevedo accepts the possibility of family creation from homosexual relationships.²³ However, he understands that changes in the legal rules are needed before recognition of stable relationship between homosexual couples is solicited before Family Courts²⁴.

There are many authors whose opinions call for limiting homosexual unions to Contract Law. Maria Berenice Dias quotes Basilio de Oliveira, Rainer Czajkowski e Fernanda de Almeida Brito as representatives of such a vision²⁵. Fernanda Brito states that it is a "Contract Law relationship, which has nothing to do with Family Law."²⁶ Other authors recognize stable

²³ União entre pessoas do mesmo sexo. *Revista Jurídica*. São Paulo: Consulex n. 28, abril de 1999, p. 53.

²⁴ With regards, see AGÊNCIA BRASIL, 02.09.2008, *Reconhecimento judicial de união homoafetiva vai exigir mudança na lei, diz advogado* (<http://www.agenciabrasil.gov.br/noticias/2008/09/02/materia.2008-09-02.8987080611>), acessado em 08.03.2009.

²⁵ See DIAS, *op. cit.*, p. 106.

²⁶ BRITO, Fernanda de Almeida. *União afetiva entre homossexuais e seus aspectos jurídicos*. São Paulo: Ltr, 2000, p. 66.

relationships as only existing between a man and a woman, such as José Afonso da Silva²⁷ and Guilherme Calmon Nogueira da Gama.²⁸

The most conservative opinion is exemplified by Celso Ribeiro Bastos and Ives Gandra Martins, who states "Such entities [gays and lesbians (sic)] are not recognized by the Constitution, it does not stand for the creation of a family entity and actually hurts the family concept adopted by the Supreme Law."²⁹

4. ADOPTION BY HOMOSSEXUALS IN BRAZIL

The rules concerning adoption in Brazil are generally established by Federal Law number 8.069/90³⁰, named the Child and Juvenile Act (ECA), that does not refer expressly to adoption by homosexual people.

ECA establishes as a fundamental parameter for the admission of adoption the "actual advantages for the child in process of adoption". Legislation also sets forth some requirements, such as the consent of parents or legal representatives and child if older than twelve years.

With regard adoption by homosexual couples, the main identified legal barrier to it is the ECA's provision that the child may only be adopted by two persons if they are married or have a stable relationship.³¹ In this sense, the possibility to exist adoption by homosexual couples

²⁷ *Comentário Contextual à Constituição*. 5ª ed. Malheiros: São Paulo, 2008.

²⁸ *O Companheirismo: uma espécie de família*. São Paulo, RT, 1988, p. 489.

²⁹ BASTOS, Celso Ribeiro, MARTINS, Ives Gandra. *Comentários à Constituição do Brasil*, vol. 8. Saraiva: São Paulo, 1998, p. 949.

³⁰ Articles 39 and the following.

³¹ Article 42, § 2nd The Civil Code used to have a similar rule (Art. 1.622).

depends on the acknowledgement of homosexual relations as a stable relationship,³² since Brazilian law does not allow marriage between persons of the same sex.

However, adoption by a homosexual person has not in fact been prevented. One reason is that the adopter usually does not inform the court that he or she is homosexual (which is neither demanded nor necessary, according to the law), since this information in itself does not change the way the Court's teams perform the psycho-social evaluation. In some cases, this question is mentioned and then presented to the judge in charge of the procedure. A significant example is in the Roraima State Supreme Court. On its website, it is clearly stated: "The Law does not provide for adoption by homosexuals. In this case, authorization is under the criteria of the judge in charge of the procedure."³³

In fact, the interviews with the significant actors revealed that any evaluation influenced by the adopter's sexual orientation would result from prejudice and from a lack of proper team training. Moreover, this kind of influence has not been seen in practice.

The State Courts in Sao Paulo³⁴ regard the Law of Public Registries as the main legal obstacle to adoption by homosexual couples, because it strictly establishes the way the child registry must be filled out, referring to the names of the "father" and the "mother" instead of "son of... and of....". However, it is clear that the sentences which conceded adoption to homosexual couples simply stated that the registry should be done as just mentioned ("son of... and of....").

³² See Nery Junior, Nelson e Nery, Rosa Maria de Andrade. Código Civil Comentado, 6ª Ed., Revista dos Tribunais: São Paulo, 2008.

³³ www.tjrr.jus.br/page/web/jij/adocao, accessed in March 13th, 2009.

³⁴ According to information provided by Fermino Magnani, former Judge of Children and Juveniles at São Paulo State Court, now judge at São Paulo State Supreme Court.

Ana Luiza Castro, a psychologist in the 1st District Court of Porto Alegre (Rio Grande do Sul), reported to a renowned newspaper from Sao Paulo that "People in a stable homosexual relationship, upon coming to the Court to apply for adoption, deny [they are a couple], for fear of having the adoption refused³⁵". Even so there are two important decisions concerning adoption by homosexual couples given by different Courts. In the District Court of Catanduva, Sao Paulo, in 2005, judge Júlio Cesar Spoladore Domingos approved adoption by two homosexual men. In the District Court of Bagé, Judge Marcos Danilo Edon Franco allowed the adoption of two children to a couple who were both women. This case became more polemic due to the fact that the Attorney General appealed and the State Supreme Court confirmed the first decision.

According to judge José Daltoe Cezar (2nd Children and Juvenile District Court of Porto Alegre), "As long as the same social-economic and psychological requirements applied to heterosexuals are met , the application will be accepted – even when it is made in name of both partners. (...) We reached a consensus in the local jurisprudence, that [discussion] is already past."³⁶ The District Attorney of the same District Court states that she had already presented two favorable Advisory Opinions and will keep doing so "as long as the couple meets the Court's requirements."³⁷

The National Council of Justice expressly states that it has no position on the criteria to be used by the competent Courts in the procedures of adoption, but only on the proceedings

³⁵ See FOLHA DE SÃO PAULO-SP – June 15th , “Justiça gaúcha facilita adoção por casais gays”,available at <http://pfdc.pgr.mpf.gov.br/clipping/junho-2008/justica-gaucha-facilita-adocao-por-cas>, accessed in March, 8th, 2009.

³⁶ Idem.

³⁷ Idem.

concerning the National Registry for Adoption,³⁸ whose system does not forbid the accreditation of homosexual couples.³⁹

As far as the law is concerned, the bill of the Adoption National Law⁴⁰ would allow adoption by homosexual couples. However, "in order to obtain its approval in the House of Representatives, in August 2008, the part of the text containing the permission for adoption of children and adolescents by a couple of the same sex was withdrawn"⁴¹, even if one verifies that "normally, homosexual couples already have the right to adoption acknowledged by the Courts"⁴². That is why ECA's new Art. 42 § 2º still refers to a married people or "de facto" union couples.

5. The argumentative discourse on adoption by homosexuals

Since one of the goals of this paper is to analyze the legal discourse on adoption by homosexual couples, the items below examine the arguments usually presented.

5.1 THE ARGUMENTATION AGAINST ADOPTION BY HOMOSEXUALS

It has been already stated that the bias related to adoption by homosexuals is not fully reflected in the discussions before the Courts, especially due to the decision of most

³⁸ Information obtained through the electronic channel of National Council of Justice- CNJ.

³⁹ Statement of Cristiana Cordeiro, judge of Children and Juveniles in Rio de Janeiro State Court and member of Adoption National Registry Council, to FOLHA DE SÃO PAULO-SP newspaper- June 15 th. "Justiça gaúcha facilita adoção por casais gays, available at <http://pfdc.pgr.mpf.gov.br/clipping/junho-2008/justica-gaucha-facilita-adoacao-por-cas>, accessed in 08.03.2009.

⁴⁰ Bill n. 6.222/05.

⁴¹ See <http://pfdc.pgr.mpf.gov.br/clipping/novembro-2008/nova-lei-pode-agilizar-adocoes/>, accessed March 15th, 2009.

⁴² idem.

homosexually-oriented people to adopt a child on their own and hide this condition out of a fear of being denied.

There is also a trend for authors to make general statements about the existence of prejudice and stigma in the technicians and law operator concepts concerning homosexual parenting.⁴³ Roger Raupp Rios, accordingly, describes this contrary approach to adoption as based on the fact that the adopters' homosexuality in itself "neglects the best conditions for the development of the child, which would guide the solution of the collision of principles for banning the adoption of children by homosexuals,"⁴⁴ but the statements against this type of adoption are not identified, making the analysis of their foundations difficult.

Therefore, there were two difficulties in the analysis of these arguments: (1) locating the social actors against homosexual adoption that have expressed with a minimum of coherency their position, and (2) effectively distinguishing positions in opposition to some notion of "common sense" regarding the social restrictions erected against any institutionalization of homosexual relationships, including the parental one. As the matter is subject to prejudice, the positions against it are disguised in an effort to hide the conservatism of its roots. On the other hand the positions for adoption assume the existence of prejudice and discrimination without providing the basis for this judgment. This makes the analysis of arguments against adoption by homosexuals difficult, as a clear reference for contraposition is missing.

Similarly, it is possible to assume that the acting operators in legal cases of adoption – judges, lawyers, attorney general office assistants, social workers and psychologists – will

⁴³ Uziel, Ana Paula. Homossexualidade e parentalidade: ecos de uma conjugação. In HEILBORN, Maria Luiza (org.). *Família e Sexualidade*, FGV: Rio de Janeiro, 2004, p. 111.

⁴⁴ RIOS, *op. cit.*, p.133 (referring to a principle collision between *full child protection* with *prohibition of sexual orientation discrimination*).

ultimately justify a negative decision on homosexual adoption on the basis of arguments that do not clearly explain the sexual issue of adopters.

Note, for example, how the debate so easily takes a detour to a consideration of the difficulties that children would face in social life:

"(...) promoting the idea of homosexual adoption is a vehicle for promoting homosexual marriage, in the sense that, as an old saying goes, if it acts like a duck, and quacks like a duck, it's probably a duck. What begins by imitating nature, often ends up replacing it. If what is required for the proper development of children, it could be argued, is grounding it in an environment of stable companionship, why not accept that this can be provided by the proposed union for life of two persons of the same sex? What effects would it have, however, on the child in a homosexual home environment, when it is true that the wider social relations in which the child must operate are marked predominantly by heterosexual love? An education for the full exercise of freedom, if it was somehow possible, would ensure autonomous choices in the area of sexuality in a way that the definition of each person would not result from pressure or conditioning, including the environment. This consideration in itself speaks both against and for homosexual marriage. In my point of view it should be taken into account in a consistent assessment of the problem."⁴⁵

Discussions of homosexuality and family in the European Court of Human Rights provide a glimpse of less guarded speech against homosexual parenting in the review of the decisions of the national courts of Europe.

In the case *Salgueiro da Silva Mouta v. Portugal* (1999)⁴⁶ the Portuguese Court of Appeals granted custody of a child to its mother on the grounds that the father was homosexual and lived with another man. It was expressly stated that "the child shall live (...) in a traditional Portuguese family, and that it was unnecessary to consider whether homosexuality is a disease or a sexual orientation. (...) In any case it would be an abnormality and children should not grow under the influence of abnormality."

⁴⁵ VILLELA, João Baptista. *As novas relações de família*. Anais da XV Conferência Nacional da OAB. Foz do Iguaçu, set. 1994.

⁴⁶ 33290/96.

Faced with this decision, the father complained before the European Court of Human Rights of an unjustified interference with his right to respect for his private and family life, as guaranteed by Article 8 of the European Convention on Human Rights and discrimination, contrary to Article 14 of the Convention.⁴⁷ The European Court stated that, although the Portuguese Court aimed for the protection of the child, the different treatment given to the father in this Court's consideration was discriminatory, since in this case "there was not a reasonable relationship of proportionality between the means employed and the aim sought to be reached,"⁴⁸ thus, there was no objective or reasonable justification. In assessing this relationship, the European Court noted that the sexual orientation of the applicant was "a decisive factor" in the final decision of the Portuguese Court.

In the Case of *Fretté v. France*, the national authority, the *Conseil d'Etat*, stated that Mr. Fretté, despite his personal qualities, did not provide the requisite guarantees necessary for adopting a child, from an educational, psychological and family perspective, by reason of his lifestyle.⁴⁹

The European Court held that the national Court had pursued a legitimate aim and affirmed that "the Contracting States enjoy a certain margin of appreciation in assessing when and to what extent differences in otherwise similar situations justify a different treatment in law. In a case like the present one where the difficult questions raised concerned areas in which there was very little common ground between the member States of the Council of Europe and where, in general, the law seemed to be going through a transitional phase, a broad margin of appreciation had to be left to the authorities of each State (...). In the present case, concerning the

⁴⁷ European Court of Human Rights Press Release issued by the Registrar, n° **741, 21.12.1999**.

⁴⁸ *Idem*.

⁴⁹ European Court of Human Rights Press Release issued by the Registrar, n° **105, 26.2.2002**.

competing interests of the applicant and adoptable children, the Court would only be able to note that the scientific community – especially child-care specialists, psychiatrists and psychologists – was divided over the possible consequences of children being brought up by one or more homosexual parents, regard being had in particular to the limited number of scientific studies on the subject published to date." Following this path, the Court concluded that was no violation of the articles 8 and 14 of the Convention.

5.2. THE ARGUMENTATION FOR ADOPTION BY HOMOSEXUALS

Some Brazilian authors⁵⁰ consider that discrimination against homosexuals concerning adoption opposes constitutional precepts, including the right to equality provided for in Article 5, the non-discrimination principle contained in Articles 3, 4, and the principle of human dignity contained in Art. 1, sec. III of Federal Constitution. Silvio de Salvo Venosa states that “if homosexual mates are not yet recognized as a family entity, they cannot act jointly. However, depending on the judge’s evaluation, a homosexual individual can adopt, because discrimination is not allowed in such case.”⁵¹

The European Court of Human Rights analyzed the Case of *E.B. v. France*, in which French authorities had also refused the E.B.'s application for authorization to adopt, basing their decision "on the lack of a paternal referent in the applicant’s household, and the attitude of the applicant’s declared partner.”⁵² Claiming that the authorities had refused the grant for adoption

⁵⁰ VENOSA, Silvio. *Direito Civil*, 6ª Ed. São Paulo: Atlas, 2006, p. 299 – 300. DINIZ, Maria Aparecida Silva Matias. *Adoção por pares homoafetivos. Uma tendência da nova família brasileira*. Jus Navigandi, Teresina, ano 13, n. 1985, 7 dez. 2008. Available at <<http://jus2.uol.com.br/doutrina/texto.asp?id=12059>>. Accessed on March 8th, 2009.

⁵¹ VENOSA, *op. cit.*, p. 299/300.

⁵² European Court of Human Rights Press Release issued by the Registrar, n° 038 22.1.2008.

regarding her sexual orientation, E.B. alleged before the European Court that Article 14 had been violated in conjunction with Article 8 of the Convention, already mentioned above.

In this case, the Court considered that, although the reference to the applicant's homosexuality had been, if not explicit, at least implicit, the influence of her homosexuality on the assessment of her application had been a decisive factor leading to the decision to refuse her authorization to adopt.⁵³ It was stated that “the applicant had suffered a difference in treatment” and that there was “no convincing and weighty reasons (...) in order to justify such a difference (...) because French law allowed single persons to adopt a child, thereby opening the possibility of adoption by a single homosexual.”⁵⁴ In this sense, the European Court concluded that the decision was incompatible with the Articles 8 and 14 of the Convention.⁵⁵

An important argument in favor of adoption by homosexuals indicates, precisely, the necessity of considering the current changes in the concept of family.⁵⁶ From this perspective, the concept of family embraces not only its traditional design, based on the union between a man and a woman for the purpose of reproduction and transmission of property.⁵⁷ There are a large number of children who grow up in single parent families⁵⁸, or that are even raised by relatives

⁵³ Idem.

⁵⁴ Idem.

⁵⁵ Idem.

⁵⁶ DINIZ, Maria Aparecida Silva Matias. *Adoção por pares homoafetivos. Uma tendência da nova família brasileira*. Jus Navigandi, Teresina, ano 13, n. 1985, 7 dez. 2008. Available at: <<http://jus2.uol.com.br/doutrina/texto.asp?id=12059>>. Accessed in March 8th., 2009. PINHEIRO, Fabíola Christina de Souza. *União homoafetiva. Do preconceito ao reconhecimento como núcleo de família*. Jus Navigandi, Teresina, ano 9, n. 625, 25 mar. 2005. Available at: <<http://jus2.uol.com.br/doutrina/texto.asp?id=6495>>. Accessed in March 11th., 2009. For the transformations in the love relationships and sexuality in the contemporary society, see. GIDDENS, *op. cit.*, p. 14/26

⁵⁷ ARAÚJO, Ludgleydson Fernandes de; OLIVEIRA, Josevânia da Silva Cruz de; SOUSA Valdiléia Carvalho de; e CASTANHA, Alessandra Ramos. Adoção de crianças por casais homoafetivos: Um estudo comparativo entre universitários de Direito e de Psicologia. *Psicologia & Sociedade*, 19 (2), 2007, p. 95/102.

⁵⁸ According to information from the Brazilian Institute of Geography and Statistics, the female head of the family is strongly represented in the families where there is no spouse, especially in the kind of family arrangement where all children are 14 years or older. In this case, you can find divorced or single mothers with children already aged, or even widows, whose children remain at home by choice or necessity. From 1995 to 2005, the percentage of families

of different degrees, such as grandparents, uncles, and aunts. It is noteworthy, too, how in past decades there was a significant bias against single parent households formed as a result of divorce. This bias led to ostracism and legal rules about divorce was late in coming in many Latin American countries. Therefore, it would not just be possible but also necessary to include the family nucleus formed by homosexual couples, leaving behind the exclusion and discriminatory behavior.⁵⁹

Another significant argument in this debate is that which concerns the absolute prevalence of the welfare of the child in adoption, and, in this regard, the sexual orientation of the adopter should not be considered.⁶⁰

In a Brazilian case in Rio de Janeiro, in which the sexual orientation of the adopter was raised during the adoption process, the decision was that the real advantages to the adopted, predicted in the Statute of Children and Adolescents (*Estatuto da Criança e do Adolescente*), was the most relevant point. The supporting opinions (psychological and social studies) found that the adopted, aged ten, was proud to have a father and a family, after having been abandoned by his birth parents when he was one year old. The adopter was a science teacher in religious schools where standards of conduct are strictly observed. The decision thus recognized that there was no obstacle to adoption once satisfied the conditions regarding the factors of the moral, cultural and spiritual formation of the adopted, and that "the adoption meets the targets

headed by women with children and no spouse rose from 17.4% to 20.1% in the Northeast and the Southeast, from 15.9% to 18.3%. Cf. www.ibge.gov.br/home/presidencia/noticias/, accessed in April 13th, 2009.

⁵⁹ MELLO, L. (2005). Outras famílias: A construção social da conjugalidade homossexual no Brasil. *Cadernos Pagu*, 24(1), 197/225.

⁶⁰ "As related to the legal possibility of adoption by homosexuals, many questions arise in respect to the preservation of the best interest of the child. However, researches done in another countries, as well as the fact that there are families of homosexual parents and biological children, can leads to the conclusion that the denial of the adoption in such cases, are due more to the prejudice in relation to homosexuality than to effective harms to the adopted children. GIRARDI, Viviane. O direito fundamental da criança e do adolescente à convivência familiar, o cuidado como valor jurídico e a adoção por homossexuais. *Revista do Advogado*, n. 101 (Dezembro de 2008), p. 121.

advocated by the Children and Juvenile Act (ECA) and desired by all the society.” As for the homosexuality of the adopter, it was considered "an individual preference constitutionally guaranteed that can not be a barrier to adoption of underage, if not proven or demonstrated any offensive expression to decorum that is able to deform the character of the adopted."⁶¹

6. CONCLUSIONS

The law's treatment of homosexuality remains a frontier that needs taming. From the analysis of various discourses on the possibility of adoption by homosexuals, there appears to be more concealment than recognition of rights. The formal equality appears as a shield to prejudices and hegemonic visions of family and sexual normality. The discourse that the evaluation is equal for all and the parameter is uniform, that is, the welfare of the child, is not convincing as regards the capacity of judicial institutions to deal equally with patterns and situations outside tradition. Without doubt it is for this reason that homosexuality is omitted in many adoption applications, as noted above.

Thus, while Brazilian law has taken important steps to overcome discriminatory barriers based on sexual orientation, such as the recognition of the legal relationship for same sex couples – similar to the family for property and pension matters – it is far from overcoming the barrier of a general and abstract equality, from recognizing the differences in order to allow an equal treatment in specific and concrete matters. Hence the importance of the *right to recognition* is the first step to make appropriate institutional approaches to issues such as adoption.

⁶¹ TJRJ.Apel number 1998.001.14332 – Judged at 23/03/1999. In Revista Forense, v. 349, p. 315.

Regarding adoption, the major barrier appears to be the strength of the resistance to giving a family status to homosexual unions. Accordingly, homosexuality is left out of an area that is essential to the organization of society – the family – in ways that are often oblique. There is a strong hegemony of the conception of the heterosexual family, which leaves no room for other forms of affection, solidarity and uniting destinies, which are placed outside the legal discipline.

In the sphere of discourse, as far as adoption is concerned, we can observe the occurrence of a dangerous omission in the contrary positions that do not come to light and do not allow debate to take place. The favorable position, thus, has no direct opposition and so can only take on common sense attitudes regarding preconceptions and discrimination. Perhaps here, as in other situations in Brazil, like for example the racial issue, discrimination is exercised subtly, rooted in a simply formal legal equality exposed by strong discriminatory majoritarian social arrangements.

7. BIBLIOGRAPHY

AGÊNCIA BRASIL, 02.09.2008, *Reconhecimento judicial de união homoafetiva vai exigir mudança na lei, diz advogado* (<http://www.agenciabrasil.gov.br/noticias/2008/09/02/materia.2008-09-02.8987080611>), acessado em 08.03.2009.

ARAÚJO, Ludgleydson Fernandes de; OLIVEIRA, Josevânia da Silva Cruz de; SOUSA Valdiléia Carvalho de; e CASTANHA, Alessandra Ramos. Adoção de crianças por casais homoafetivos: Um estudo comparativo entre universitários de Direito e de Psicologia. *Psicologia & Sociedade*, 19 (2), 2007, p. 95/102.

AZEVEDO, Álvaro Villaça. *União entre pessoas do mesmo sexo*. Revista Jurídica. São Paulo: Consulex, n. 28, abril de 1999, p. 53.

- BASTOS, Celso Ribeiro e MARTINS, Ives Gandra. *Comentários à Constituição do Brasil*. São Paulo: Saraiva, 1998, vol. 8.
- BRITO, Fernanda de Almeida. *União afetiva entre homossexuais e seus aspectos jurídicos*. São Paulo: Ltr, 2000.
- DIAS, Maria Berenice. *União Homossexual: Preconceito e a Justiça*. 2ª Ed. Porto Alegre: Livraria do Advogado, 2001.
- _____. A família homoafetiva e seus direitos. *Revista do Advogado*, n. 91 (Maio de 2007), p. 103/111.
- DINIZ, Maria Aparecida Silva Matias. *Adoção por pares homoafetivos. Uma tendência da nova família brasileira*. Jus Navigandi, Teresina, ano 13, n. 1985, 7 dez. 2008. Disponível em: <<http://jus2.uol.com.br/doutrina/texto.asp?id=12059>>. Acesso em: 08 mar. 2009.
- ENGELS, Friedrich. *A origem da família e da propriedade privada*. São Paulo: Centauro, 2006.
- FOLHA DE SÃO PAULO-SP - 15 de junho de 2008. Justiça gaúcha facilita adoção por casais gays, disponível em <http://pfdc.pgr.mpf.gov.br/clipping/junho-2008/justica-gaucha-facilita-adocao-por-cas>, acessado em 08.03.2009.
- FOLHA DE SÃO PAULO-SP - 15 de junho de 2008. Justiça gaúcha facilita adoção por casais gays, disponível em <http://pfdc.pgr.mpf.gov.br/clipping/junho-2008/justica-gaucha-facilita-adocao-por-cas>, acessado em 08.03.2009.
- FOLHA DE SÃO PAULO-SP - 15 de junho de 2008. Justiça gaúcha facilita adoção por casais gays, disponível em <http://pfdc.pgr.mpf.gov.br/clipping/junho-2008/justica-gaucha-facilita-adocao-por-cas>, acessado em 08.03.2009.
- FRASER, Nancy. From Redistribution to Recognition? Dilemmas of Justice in a “Postsocialist” Age. Disponível em www.ethicalpolitics.org/blackwood/fraser.htm, pesquisado em 13.04.2009.
- GAMA, Guilherme Calmon Nogueira da. *O Companheirismo: uma espécie de família*. São Paulo: RT, 1988.
- GIDDENS, Anthony. *A transformação da intimidade: sexualidade, amor e erotismo nas sociedades modernas*. São Paulo: Unesp, 1993.
- GIRARDI, Viviane. O direito fundamental da criança e do adolescente à convivência familiar, o cuidado como valor jurídico e a adoção por homossexuais. *Revista do Advogado*, n. 101 (Dezembro de 2008), p. 116/123.
- LOPES, José Reinaldo de Lima. Prefácio. In RIOS, Roger Raupp. *A homossexualidade no direito brasileiro*. Porto Alegre: Livraria do Advogado, 2001.
- LOPES, José Reinaldo de Lima. Liberdade e direitos sexuais – o problema a partir da moral moderna. In RIOS, Roger Raupp. *Em defesa dos direitos sexuais*. Porto Alegre: Livraria do Advogado, 2007.

- MELLO, L. Outras famílias: A construção social da conjugalidade homossexual no Brasil. *Cadernos Pagu*, 24(1) (2005), 197/225.
- MINDA, Gary. *Postmodern legal movements: law and jurisprudence at century's end*. New York: New York University, 1995.
- MINOW, Martha. The Supreme Court 1986 Term – Foreword: justice engendered. *Harvard Law Review*, n. 101, 1987/1988, p. 10/95.
- NERY JUNIOR, Nelson e NERY, Rosa Maria de Andrade. *Código Civil Comentado*. 6ª Ed. São Paulo: Revista dos Tribunais: São Paulo, 2008.
- OLIVEIRA, Basílio. *Concubinato: novos rumos*. Rio de Janeiro: Freitas Bastos, 1997.
- PINHEIRO, Fabíola Christina de Souza. *Uniões homoafetivas. Do preconceito ao reconhecimento como núcleo de família*. Jus Navigandi, Teresina, ano 9, n. 625, 25 mar. 2005. Disponível em: <<http://jus2.uol.com.br/doutrina/texto.asp?id=6495>>. Acesso em: 11 mar. 2009.
- RIOS, Roger Raupp. *A homossexualidade no direito brasileiro*. Porto Alegre: Livraria do Advogado, 2001.
- SILVA, José Afonso da. *Comentário Contextual à Constituição*. 5ª ed. Malheiros: São Paulo, 2008.
- _____. *Curso de Direito Constitucional Positivo*. São Paulo: Malheiros, 2005.
- TRIBE, Lawrence. Lawrence v. Texas: the "fundamental right" that dare not speak its name. *Harvard Law Review*, n. 117, 2003-2004, p. 1.895/1.955.
- UZIEL, Ana Paula. Homossexualidade e parentalidade: ecos de uma conjugação. In HEILBORN, Maria Luiza (org.). *Família e Sexualidade*, FGV: Rio de Janeiro, 2004.
- VENOSA, Silvio de Salvo. *Direito Civil*. 6ª Ed. São Paulo: Atlas, 2006.
- VILLELA, João Baptista. *As novas relações de família*. Anais da XV Conferência Nacional da OAB. Foz do Iguaçu, set. 1994.