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SAME-SEX PARENTS AND THEIR CHILDREN: BRAZILIAN
CASE LAW AND INSIGHTS FROM PSYCHOANALYSIS

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This Article argues that maternal and paternal functions can be performed by same-sex parents from a psychological point of view. Consequently, the legal recognition of their relationship with their children meets the principle of human dignity pursuant to the Brazilian Federal Constitution.

In *Obergefell v. Hodges*, the U.S. Supreme Court affirmed same-sex marriage as a right under the protection of the Fourteenth Amendment and the fundamental freedoms it upholds.¹

The extension of the right to marry to same-sex couples, an important landmark, was reached a few years before in Brazil.² In 2011, the Brazilian Supreme Court recognized, on the basis of constitutional principles, same-sex common-law marriage as a legitimate “family unit,” with rights and recognition identical to heterosexual common law marriage.³ Later, in 2013, the National Council of Justice passed a resolution which expressly allowed officials to celebrate civil marriage, and to convert same-sex common law unions into marriages.⁴

After these progressive steps, several other related questions started to be brought before courts. Questions regarding the legal possibility and psychological desirability of registering both same-sex parents on their children’s birth certificate were and still are particularly prevalent. It was only recently that, according to a new

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

2. Supremo Tribunal Federal [S.T.F.] Distrito Federal, Ação Direta de Inconstitucionalidade [A.D.I.] 4.277-DF/ Arguição de Descumprimento de Preceito Fundamental [A.D.P.F.] 132-RJ, Relator: Min. Ayres Britto, 05.05.2011, 198, Diário do Judiciário Eletrônico [D.J.e], 14.10.2011, 611, 611 (Braz.).

3. *Id.* at 614.

4. Resolução 175, CONSELHO NACIONAL DE JUSTIÇA [C.N.J.], 14 de Maio de 2013, 1, 2 (2013) (Braz.).

directive, children engendered by assisted reproduction techniques from same-sex parents shall be registered exclusively in such parents' names. For example, the birth certificate shall contain no reference to the biological donor (male or female) and shall make no use of the qualifiers "paternal" and "maternal" when referring to parents or grandparents.⁵ No judicial authorization shall be needed in order to fulfill this registration.⁶ This Article argues that such official recognition of both same-sex parents is both constitutional and psychologically adequate. We hope that some developments recently presented in the Brazilian juridical debate may be of fruitful use for jurisprudence in other countries, especially in the United States. We should highlight that both countries' constitutions strongly affirm individual rights, and both countries' judiciary systems recognized the right of same-sex couples to marry with decisions based on similar principles.⁷

First, a bit of historical context to illustrate a few important differences in legal tradition. The current Brazilian Federal Constitution came into force in 1988, and progressively displaced the Civil Code as the fundamental framework to guide private (as well as public) law.⁸ This displacement happens within the legal-philosophical hegemony of post-positivism, described by a current Supreme Court Justice and leading Brazilian scholar as an intellectual scenario in which "human dignity and fundamental rights occupy the center of gravity, alongside a new hermeneutics of law, the normativity of [constitutional] principles, the openness of the legal system, and the theory of legal argumentation [proposed notably by German scholar Robert Alexy]."⁹ In this context, constitutional rules are seen as very dense normative spaces that offer rich lenses to interpret sub-constitutional rules—in a revolutionary change in Civil Law tradition, the Constitution is seen as being directly effective, changing the interpretation and application of norms in the Code. As a result of this constitutional supremacy, judges must start to derive legal consequences directly from new constitutional principles, especially the principles of human dignity, of freedom, of equality, of

5. Provimento 52, Conselho Nacional de Justiça [C.N.J.], 14 de Março de 2016, 1, 1 (2016) (Braz.).

6. *Id.*

7. See S.T.F., A.D.I. 4.277-DF/A.D.P.F. 132-RJ at 612; see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

8. GUSTAVO TEPEDINO, *TEMAS DE DIREITO CIVIL* (Rio de Janeiro: Renovar, 4th ed. 2008); see also CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37 (Braz.).

9. LUÍS ROBERTO BARROSO, *CURSO DE DIREITO CONSTITUCIONAL CONTEMPORÂNEO: OS CONCEITOS FUNDAMENTAIS E A CONSTRUÇÃO DO NOVO MODELO* 106–07 (2d. ed. 2010) (Braz.).

solidarity, and of pluralism. Private relationships are then ruled by public law principles.

In the aforementioned 2011 decision, the Brazilian Supreme Court affirmed as constitutionally legitimate the recognition of same-sex common law marriage as a “family unit,” a legal category that carries with it access to rights in Brazilian civil and family law.¹⁰ The decision was based in an inclusive interpretation of article 226 of the Constitution,¹¹ and the court justified such an inclusive interpretation by citing the constitutional principles of freedom, equality, human dignity, predictability of the legal order and recognizing an implicit right to the pursuit of happiness.¹² The Court also affirmed that the protection of minorities is a part of the constitutional concept of material democracy, and determined that the same legal regime should be applied to same-sex and different-sex couples, both described as types of family units.¹³ The U.S. Supreme Court similarly highlighted the profound implications of the due process and the equal protection clauses to guaranteeing fundamental rights, and offered the following as bases for recognizing the right to same-sex marriage: (i) deciding whether and who to marry is inherent to human dignity;¹⁴ (ii) the degree of protection granted by marriage to a union is unique;¹⁵ (iii) the recognition and stability brought by marriage protect children from discrimination and social stigma;¹⁶ and (iv) marriage is a pillar of social order.¹⁷

10. See S.T.F., A.D.I. 4.277-DF/A.D.P.F. 132-RJ at 612, 614. Later, Resolution 175/2103 of the National Council of Justice expressly allowed for the celebration of same-sex civil marriages, as well as the conversion from common-law marriage to civil marriage. Resolução 175, Conselho Nacional de Justiça [C.N.J.], 14 de Maio de 2013, 1, 1 (2013) (Braz.).

11. “A família, base da sociedade, tem especial proteção do Estado. . . . Para efeito da proteção do Estado, é reconhecida a união estável entre o homem e a mulher como entidade familiar, devendo a lei facilitar sua conversão em casamento.” [“The family, which is the foundation of society, shall enjoy special protection from the State. . . . For purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.”] C.F. art. 226.

12. S.T.F., A.D.I. 4.277-DF/A.D.P.F. 132-RJ at 612.

13. *Id.* at 614.

14. “A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

15. “A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” *Id.*

16. “A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” *Id.* at 2600.

17. “[F]inally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of [the Nation’s] social order.” *Id.* at 2601.

As seen in item (iii) above, raising and educating children are one of the issues at the heart of *Obergefell*.¹⁸ Having children is a common aspiration of couples, homo or heterosexual, and, in both cases, parent-child connections can have their origins in natural, civil (in the case of adoption), or socio-affective circumstances.¹⁹

In the case of same-sex couples, natural filiation is possible due to the advances in reproductive technologies, notably through artificial insemination.²⁰ The Brazilian Federal Council of Medicine, following technical advances and social change, passed a resolution affirming the possibility of all persons to benefit from assisted reproduction, without any restriction or barrier to homosexual families.²¹ Once such procedure is successfully completed, and a child is born, we are then presented with a legal issue in relation to the civil registry of births: should we accept double maternity or double paternity?

The birth certificate is the beginning of a citizen's civil life, and, when known, the names of mothers and fathers should be registered.²²

The Brazilian Supreme Court, in the aforementioned decisions, outlawed prejudicial treatment of same-sex couples and their families. Besides the constitutional mandate to "promote the well-being of all,"²³ there are other constitutional principles that are directly relevant to homoparentality and the civil registry of children of same-sex couples,²⁴ such as the special protection of children and youth by the state (Federal Constitution art. 227),²⁵ as well as the protection of families (art. 226),²⁶ and of the human dignity (art. 1, III).²⁷ Article 227 of the Federal Constitution concerns the priority of consideration of the rights of those whose personalities are still

18. *Id.* at 2600.

19. The juridical recognition of same-sex parenthood is based on the Brazilian Civil Code and the direct incidence of constitutional principles. Código Civil [C.C.] art. 1.593 (2002) (Braz.).

20. Regulated by C.C. art. 1.597, V.

21. Conselho Federal de Medicina, Resolução 1.957, de 15 de Dezembro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 06.01.2011, 1, 79 (Braz.).

22. *See* Lei No. 8.560, de 29 de Dezembro de 1992, D.O.U. de 30.12.1992, 1, 1 (Braz.).

23. CONSTITUIÇÃO FEDERAL [C.F.] [BRAZILIAN FEDERAL CONSTITUTION] art. 3 (Braz.): ["Constituem objetivos fundamentais da República Federativa do Brasil: . . . promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação."]. ["The fundamental objectives of the Federative Republic of Brazil are: . . . to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination."].

24. A new word created and used in recent court decisions to refer to the relationship between same-sex parents and their children.

25. C.F. art. 227.

26. *Id.* at art. 226.

27. *Id.* at art. 1.

developing—the best interest of the child is and must be recognized with priority via the recognition of these children’s parents on their birth certificate, and the legal recognition of their parents as such.²⁸ Such prioritization is justified by the stream of reciprocal rights and duties, both affective and patrimonial, that emerge from filiation.²⁹

The protection of families comes as a consequence of these units being seen as a main social nucleus, one that allows for the materialization of fundamental rights to intimacy and private life.³⁰ Through familial relationships, the individual develops their personality from birth. Thus, family is seen as the basis of society, and must be protected in its entirety and in its diversity as a nucleus of caring affection.³¹ Legal recognition is the most basic form of state protection, and recognizing homoparentality is a way to protect families in the social context, avoiding disaggregating situations such as unnecessary battles for the legal recognition as father or mother.

Our basic thesis (in favor of full recognition for same-sex parents) is also justified by the principle of human dignity from the parents’ standpoint in the sense that the state should recognize as deserving of respect multiple personal and collective life projects, within reason. Moreover, from the child’s standpoint, the law cannot simply ignore their lives and their factual situation.

We must highlight that the interpretation of constitutional commandments is, within Brazilian jurisprudence, guided by the principle of optimal concretization of the rule, significant to consolidate and preserve the normative system presented by the Federal Constitution.³² If law and the Constitution have their effects conditioned by life’s concrete circumstances, normative interpretation and enforcement must recognize and incorporate such factual circumstances within its scope.³³

Furthermore, the Brazilian Supreme Court has recognized the implicit principle of pursuit of happiness, which is not explicitly part

28. *Id.* at art. 227.

29. *See* Lei No. 8.560, de 29 de Dezembro de 1992, D.O.U. de 30.12.1992, 1, 1 (Braz.) (protecting the child by regulating the public procedures around identifying a supposed father); CÓDIGO PENAL [C.P.] art. 242 (1940) (amended 1981) (Braz.) (criminalizing the false registry of a child as one’s own); Código Civil [C.C.] art. 1.603–1.604 (2002) (Braz.) (establishing the birth certificate as proof of parenthood, except in situations in which the person can prove error in the process of registry).

30. *See* C.F. art. 226.

31. *See id.*

32. *See* S.T.F., Medida Cautelar na A.D.I. 3.300-DF, Relator: Min. Celso de Mello, 03.02.2006, 200, DIÁRIO DA JUSTIÇA, 09/02/2006, 6; S.T.F., Ag.Reg. no Recurso Extraordinário 477.554-MG, 01.07.2011, Relator: Min. Celso de Mello, DIÁRIO DA JUSTIÇA [D.J.], 26.08.2011, 3 (Braz.).

33. *Id.*

of the Brazilian constitutional text, as well as its importance for judicial interpretation of questions related to fundamental rights.³⁴

Thus, same-sex parents and their children must be recognized by the law.³⁵ Their birth certificates must observe the principle of veracity and, in cases of same-sex parents, veracity is observed by loyally describing the familial situation in recognizing that both same-sex partners are, in fact, mothers or fathers of the child.³⁶ The same conclusion was reached by a different court, the Superior Tribunal of Justice, establishing a precedent in terms of adoption by same-sex couples.³⁷ In this decision, the Tribunal highlights that:

[D]iverse and respected studies on the theme, with strong scientific foundations (from the University of Virginia, University of Valencia, and the American Academy of Pediatrics), did not find any inconvenience in cases of same-sex adoption, and affirming that the quality of the connection and care within the family are a more important aspect to be considered.³⁸

This last decision mentioned the fact that even though there was no express legal provision regulating same-sex adoption, it reaffirmed the principle that “legal gaps should not impede protection,” given that there was a right to the protection of family life established in law, which also established the prioritization of children’s interests.³⁹ The decision went further, affirming that:

[I]f the goal of adoption is the child’s well-being, as is established by the Code of Children and Adolescents, we may say that not recognizing same-sex parents and their families, thus making it impossible for both of them to legally adopt a child, would violate legal principles, since it would facilitate discrimination. In this situation, the child would be stigmatized, not by being adopted by same-sex parents, but by the law of her own country for its failure to recognize her family as such.⁴⁰

Since the heterosexual family is preponderant, in quantitative terms, the child must deal with the difference that results from being raised

34. S.T.F., Medida Cautelar na A.D.I. 3.300-DF, 6; S.T.F., Ag.Reg. no Recurso Extraordinário 477.554-MG, 3.

35. S.T.F., Ag.Reg. no Recurso Extraordinário 477.554-MG, 3.

36. *Id.* at 7.

37. Superior Tribunal de Justiça [S.T.J.], Recurso Especial [R.Esp.] 889.852-RS, Relator: Luis Felipe Salomão et al., 27.04.2010, DIÁRIO DA JUSTIÇA [D.J.], 08.10.2010, 1 (Braz.).

38. *Id.*

39. Lei No. 12.010, de 3 de Agosto de 2009, DIÁRIO DA UNIÃO [D.O.U.] de 4.08.2009 (Braz.).

40. S.T.J., R.Esp. 889.852-RS at 14 (citing *Adoção por Homossexuais—A Família Homoparental sob o Olhar da Psicologia Jurídica*, Ed. Juruá, at 217).

by same-sex parents. This difference may be at times challenging, but dealing with it is a part of the child's development. Genetic differences, as well as different attitudes towards child-raising, or socio-economical differences are similarly possibly challenging and may cause discomfort, but are part of an individual's process of growth. In fact, it is legal non-recognition that increases the feeling of inadequacy, and this is one more reason for recognizing these families' factual situation—one that deserves recognition.

We must also cite the Yogyakarta Principles, especially Principle 24.⁴¹ The Yogyakarta Principles are a set of principles relating to human rights, sexual orientation, and gender identity which were drafted and published in 2006 at a meeting of human rights experts.⁴² Principle 24 recommends that states recognize the diversity of family formations and prove them with equal treatment, protecting people's right to form a family, including the access to adoption and assisted reproduction, and preventing discrimination based on sexual orientation and gender identity.⁴³

Courts have affirmed care and affection as the nucleus of the modern conception of family (*eudemonist* family).⁴⁴ Current family law is the law of plural families, which have affection as their common characteristic.⁴⁵

From a psychological point of view, studies on same-sex parenting have demonstrated that homosexual men and women can be good parents—or not—in the same manner that heterosexual parents can be.⁴⁶ The relevant aspects in determining good parenting are, instead, the capacity for caring and the quality of the relationship between parent and child.⁴⁷

It is currently unadvisable to think of families in terms of single, hegemonic models, and the exact same goes for analyzing parenthood.⁴⁸ That is not to say that parental references do not remain important in constituting the subject's psyche. Paternal authority is a universal basis for an individual's insertion into culture and the social world, and maternal care is fundamental for a baby forming its first

41. *The Yogyakarta Principles* 27 (Mar. 2007), http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

42. *Id.* at 7.

43. *Id.* at 27.

44. S.T.F., Ag.Reg. no Recurso Extraordinário 477.554-MG, 01.07.2011, DIÁRIO DA JUSTIÇA [D.J.], 26.08.2011, 1 (Braz.)

45. *Id.*

46. See Elizabeth Zambrano, *Parentalidades "Impensáveis": Pais/mães Homossexuais, Travestis e Transexuais*, 12 HORIZONTES ANTROPOLÓGICOS, 123, 128 (2006), <http://www.scielo.br/pdf/ha/v12n26/a06v1226.pdf>.

47. *Id.*

48. See *id.* at 127.

connections with the other and forming its first bonds.⁴⁹ These are culturally recognized sites assigned to parental functions.⁵⁰ The psychoanalytical tradition claims that the maternal and paternal functions are determined by culture and language, overlapped with biological characteristics.⁵¹ Under this perspective, father, mother, and child are thought of as functions, instead of specific individuals, or types of individuals.

Following the work of Ricardo de Souza Vieira, generally speaking, parents are references to their children, in terms of caring and recognition, and these references are fundamental for psychological development.⁵² This relationship can be derived from genetic or social bonds, being dependent on intra-psyche resources that allow parents to symbolically desire their children, investing their affections in them, in order to raise them as healthy, psychologically desiring subjects.⁵³

Therefore, if a child is wanted, she can be raised by one person (monoparental family), or by a same-sex or a different-sex couple, and receive all the care necessary for maternal and paternal functions.⁵⁴ If she is physically and emotionally cared for, inserted in a family nucleus, if there is triangulation (her relationship with a “mother” is ruptured by a third, different person), and she knows her origins, whichever they might be—then we have all necessary conditions for parenting.⁵⁵ It is common in our days to see children being raised by single mothers or a grandparent, in a great diversity of nuclear families, which are amply capable of raising these children.⁵⁶

It is desire that surrounds the discursive structures of a family structure, and that will establish places and functions for each member in relationship with the others.⁵⁷ Consequently, the differentiation process conducted by the child is not necessarily related to sex, but to the intersubjective relationship of each member in a couple, in which symbolic functions are parsed out.⁵⁸ This process of

49. *See id.* at 125.

50. *Id.*

51. *Id.* at 131.

52. *See* Ricardo de Souza Vieira, *Homoparentalidade: Estudo Psicanalítico Sobre Papéis e Funções Parentais em Casais Homossexuais com Filhos* [Homoparenthood—psychoanalytic Study on Parental Roles and Homosexual Couples with Children] (Sept. 5, 2011) (unpublished M.A. thesis, Universidad de São Paulo) 12–13, <http://www.teses.usp.br/teses/disponiveis/47/47133/tde-19072011-084912> [<https://perma.cc/33YG76HQ>].

53. *Id.* at 156.

54. *See id.* at 193.

55. *See id.* at 164–65.

56. *See id.* at 90.

57. *See* de Souza Vieira, *supra* note 52, at 89–90.

58. *Id.* at 95.

differentiation is more fundamental for defining different roles and their place in the family structure than the existence of different biological structures.⁵⁹

In this sense, homoparentality does not erase a sex difference, since this differentiation continues to exist in culture and social life.⁶⁰ The child develops into a family and also into a social group, searching for models in other individuals such as uncles, grandparents, godparents, etc.⁶¹ We reaffirm the child's plasticity and wisdom in growing up and becoming more mature.⁶²

According to Vieira and in contrast to what some may believe, the exercise of a maternal function does not depend necessarily on the presence of a biological mother.⁶³ We must highlight that such functions can be performed by persons of any sex, gender expression, or sexual orientation, as long as such a desire to relate to the child is present.⁶⁴ If this relationship is present, the child's needs are translated into demands, creating an illusion of completeness, which will then need another function, the paternal function, to intervene and limit the first relationship.⁶⁵ The interaction with this third person, whichever her sex or gender expression, will then allow for the healthy psychological development of the child.⁶⁶ Thus, when we speak of a maternal function, we are referring to a relationship of primary care, allowing the child to feel welcome and recognized, forming a bond that will become the matrix of all other relationships built in the child's life trajectory.⁶⁷ The maternal eye starts, and allows for, the basic conditions for the child to psychologically invest both in another as a partner, and in herself.⁶⁸

The paternal function, on the other hand, must allow for the expansion of the child's affective life, by being a third element—of any sex—that intervenes in the maternal function or relationship.⁶⁹ This intervention interrupts the duality of the primary relationship and establishes the principles of law with which a human being enters the social and symbolic world.⁷⁰

59. *Id.* at 95–96.

60. *Id.* at 161.

61. *See id.*

62. de Souza Vieira, *supra* note 52, at 161.

63. *Id.* at 128.

64. *Id.*

65. *Id.*

66. *See id.*

67. *See* de Souza Vieira, *supra* note 52, at 129.

68. *See id.*

69. *See id.* at 161.

70. *See id.* at 163.

It is then possible to affirm that parental functions depend, from the very beginning, on the history of a desire to have and raise a child, and of how this desire is welcomed and shared with a partner.⁷¹ It is important that this relationship is based on transparency and truth about the family history and the child's origins.⁷² As a consequence, law has an important contribution to make to children's developments when it supports and legitimizes a child's true story and her family's origins. One way to do so is to affirm the child's situation, reflecting her origin story in her birth certificate, by including the name of both mothers or both fathers.

Both from a psychological and a juridical point of view, by not legally recognizing a factual situation of filiation between same-sex couples and their children, the State adopts a position that carries with it a certain meaning: it symbolizes a State for which a homosexual relationship of mutual affection, and its relationship to its own children, has no social value. There is injury, in this way, to the dignity of all involved.⁷³

In a pluralist society, one in which we aspire to a respectful co-existence of differences, unequal treatment is only admissible when there is a valid, rational juridical-constitutional justification.⁷⁴ In its absence, equal treatment is mandatory.

It is an objective of law to construct peace and justice. In order to achieve this goal, law must recognize life's reality, and bring to it security and predictability. Same-sex couples and their children exist, and the recognition of their families is aligned with fundamental constitutional principles of our societies.

71. *Id.*

72. *See de Souza Vieira, supra* note 52, at 162.

73. On yet another point, the U.S. Supreme Court offered a similar justification to its decision: "Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015).

74. *Id.* at 2603.