

Rio de Janeiro, October 28, 2015

This is Brazilian civil society contribution to the UN High Commissioner for Human Rights' Report on the impact of the implementation by States of their obligations under relevant provisions of international human rights law with regard to the protection of the family, as requested by Resolution 29/22 of the UN Human Rights Council on July 3, 2015.

Subscribed by:

**ABA** - Associação Brasileira de Antropologia <<http://www.portal.abant.org.br/>>

**ABIA** - Associação Brasileira Interdisciplinar de AIDS <<http://abiaids.org.br/>>

**ABEP** - Associação Brasileira de Estudos Populacionais < <http://www.abep.org.br/>>

**Cfemea** - Centro Brasileiro de Estudos e Assessoria < <http://www.cfemea.org.br/>>

**CLAM/UERJ** - Centro Latino-Americano em Sexualidade e Direitos Humanos < <http://clam.org.br/>>

**IPAS/Brazil** – Ações Afirmativas em Direitos e Saúde <<http://www.aads.org.br/wp/>>

**SPW** - Sexuality Policy Watch < <http://sxpolitics.org/>>

### **The Family as Cultural-Historical Construct**

Kinship systems are an inseparable component in the political organization of any society, and the family is understood as a basic site of social reproduction. The principles that regulate kinship, however, have varied historically, and vary from one society to another, as well as between groups within a given society. Likewise, in different socio-cultural contexts, families come in different shapes, and perform different functions. The very definition of family has varied substantively across human history. Moreover, the dominant models of family organization, as well as the variety of existing or possible family arrangements within any given society and historical period, embody tensions between alternative sets of values of that society or period.

The modern model of the conjugal family as intimate realm of mutual care, and children's socialization consolidated as norm in Western societies only in the 19<sup>th</sup> Century and the turn of the 20<sup>th</sup> Century. The social function of its immediate predecessor, aristocratic and bourgeois marriage, based on an agreement between families, was the maintenance of a state or fortune, and the perpetuation of a lineage. The value of conjugal intimacy, allied to the ideal of romantic love, and to the intensive nurturing of filial bonds, becomes fully realized only in the 19th Century. During that period, emerging nation-states consolidate their political projects, whereby parents also become responsible for the transmission of cultural traditions to the new generations. In its original definition, love of family is also love of country.

It is in the path of this singular processes that the notion of a "traditional family"—as the "basis of society", i.e., both society's and the species' "natural" unit of reproduction— is modeled. But that concept of "nuclear family" is also a result of a process of privatization, individuation, and emancipation from broader hierarchical structures, which creates a tension with other modern ideals. Mutual choice in partner selection and the couple's independence with regard to their respective family lineages become privileged. Later, along with feminist struggles, the access of women to wage labor and to political representation, as well as their civil emancipation, would give particular meanings to that freedom of choice.

Modern egalitarianism is manifest in civil reforms recognizing inalienable rights of the individual within and vis-à-vis the family unit; in particular for the wife, and for female, non-first born male, and extra-marital children. The process of secularization also brings the end to the indissolubility of wedlock, instituted by Canon Law. Concomitantly, the progress of medical technology increases the dissociation of sexuality and

reproduction, strengthening the value of marriage and raising children (either biological or adopted) as individual free choice, and the result of mutual feelings of love.

The very notion of one “traditional family” is, therefore, an ideal formed by processes and values singular to Modernity. Different family models and various viable and socially accepted types of family arrangements have existed in history, and currently exist in different societies, fruit of infinite human creativity. In contemporary societies, families exist in many forms, either legally recognized or not: single-parent; non-parental (made of minors and their grand-parents, aunts, uncles or others); re-made/composite (couples with children from previous unions); same-sex couples (with or without, either biological or adopted, children).<sup>1</sup> Likewise, if different forms of adoption are an integral part of family diversity, reproductive technologies such as in-vitro insemination and gestation substitution have contributed to expand the possibilities of biological reproduction, challenging the notion of a necessary association between fecundation, gestation, and parenthood. Besides the diversity of values involved in these processes, there is a variety of legitimate ways to translate the family ideals present in a given society and historical period.

### **Brazilian Families: Socio-Demographic Aspects**

In terms of population dynamics, the great economic and social transformations brought by industrialization and urbanization led, over the past decades, to an important increase in occupational, especial, and social mobility. In countries where it took place, demographic transition contributed to reduce infant mortality rates, reduce fecundity rates, and increase life expectancy, therefore increasing the elderly population. There have also been changes in gender relations, in a slow but continuous process of ‘depatriarchalization’ of society. These transformations had a great impact on family models, and on the relations of affect and care that structure household arrangements. Families are becoming smaller but, mainly, they are becoming more plural and diversified.

Gender and generation differentials are essential to understand the complexity and diversity of family relations in contemporary Brazil. National censuses indicate a downward tendency in the relative participation of couples with children (from 65% in 1980 to 52.5% in 2010) in the total of household arrangements, due to falling fecundity rates, to the number of separations, and to greater life expectancy, especially among women. The proportion of couples without children rose from 12.1% in 1980 to 15.1% in 2010, as did single-parent arrangements, particularly of mothers (either single, separated or widowed) with children, which went from 11.5% in 1980 to 15.3% in 2010.

To live as a couple is practically a universal event in Brazil, but only if we consider all types of unions. Between 1970 and 2010, civil/religious marriages fell from 65% to 43%, and religious-only marriages did so more steeply, from 14% to 3%, while civil-only marriages rose from 14% to 17%, and consensual unions went from 7% to 37%. Marriages, however, have become more unstable. The rise in separations and divorce generates composite, remade families, whose members bring children from previous marriages to the new union, more and more frequent in the national landscape. That “mosaic-family” is but one type of family arrangement among the gamut of possible arrangements in a society characterized by its plurality and social innovation, regardless any mainstream pattern. Expressive of such plurality are also “homo-affective” (same-sex) families, and “poly-affective” families (whose core is not a monogamous couple). The number of children born out of wedlock has also risen, including those that result from teenage pregnancy; as has shared guardianship and the number of children who live in two homes.

The Brazilian Census Bureau (IBGE, by its Portuguese initials) census of 2010 considered, for the first time, same-sex couples sharing a household as a family unit. Results indicated the presence of about sixty-thousand same-sex couples (not counting those who live in separate homes or cases where neither member of the couple identified as head of the household). Women are a majority of declared ‘homo-affective’

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<sup>1</sup> For Brazil, see Mello, L. *Novas Famílias: Conjugalidade homossexual no Brasil contemporâneo*. Rio de Janeiro, Garamond Universitária, 2005.

arrangements, as they are too among homo-parental arrangements. There are children who have been registered with double-maternity or double-paternity.<sup>2</sup>

### **Brazilian Legal Standards**

In response to the economic and cultural transformations described above, since the 1960's Brazilian Family Law underwent gradual reform to adjust to premises of respect to individual, privacy, and plurality rights. In order to evaluate the meaning of contemporary legal reforms, it is beneficial, to situate them in relation to a longer historical cycle.

Since colonial times, a central theme in moral and normative debates on the formation of Brazilian society was common-law marriage, or "*concubinato*". The Portuguese Philippine Ordinations (1603), which regulated life in the colonies, recognized the common-law union of persons living as husband and wife, 'as long as they are recognized as such in the eyes of the community;' while they rigorously punished adultery (women's in particular), bigamy and polygamy. Marriage, on the other hand, was a religious act, regulated by Canon Law.

After Independence, it is worth mentioning mainly the convergences, but also the distinctions between the Imperial and Republican legal frameworks with regards to Family Law. The penal codes of both regimes punished practices which were deemed to destabilize the 'family order', especially adultery, but also teenage sexuality and o abortion. However, during the Empire, regardless lawmakers' strong support for liberal principles, marriage remained under the orbit of Canon Law, in the same manner that slavery, and the definition of the new nation as a Catholic state were preserved. Na Act of 1861 legalized inter-religious marriage, but civil marriage as a universal norm would only be passed after the proclamation of the Republic (1890).

The first Brazilian Civil Code, finally drawn up in 1916, while keeping that definition, was not ruled, however, by individual rights, or by equality, with regard to family regulation. The new instrument established flagrant hierarchy between man (husband and father) and other members of the family. It condemned adultery and maintained archaic norms such as the husband's prerogative to return a bride who did not preserved her virginity until marriage. The 1916 Code recognized common-law unions, but in order to impose on it the same legal restrictions as before, e.g., to ban access to inheritance and pensions.

Between 1916 and 1988, in particular during the 1960's, news norms were adopted, seeking to correct such disparities between legal and 'illegal' families: the Married Woman Statute (1962); Social Security rules regarding common-law wives' right to pension; Ruling 380 (1964) of the Federal Supreme Court, by which, "*founded on fact of common-law society among concubines, its judicial dissolution is legally reasonable, with division of assets acquired by shared efforts*"; and, most importantly, the Divorce Act of 1977.

The Married Woman Statute altered the 1916 Code, restricting the absolute Power of the husband of male chief of the household, and modifying other definitions, including article 6, which certified female incapacity for various legal functions. The Divorce Act passed in 1977 by constitutional amendment, closing a prolonged legal and political struggle for the right to the dissolution of wedlock, initiated in 1900. The difficult trajectory of the divorce debate can be explained mostly by the strong influence of the Catholic Church upon legislators. But it also illustrates the strong links between political authoritarianism and the premise of matrimonial indissolubility, since norms to preserve that principle were carved into the *Estado Novo* Constitution of 1937, and in the one of 1967, which set the general juridical framework for the military dictatorship (1964-1985).

The great leap in Family Law would come with the Federal Constitution of 1988, which expressly recognized the 'stable union' between man and woman as a family form, finally eliminating the term '*concubinato*' from

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<sup>2</sup> ALVES, J.E.D. & CAVENAGHI, S. Transições urbanas e da fecundidade e mudanças dos arranjos familiares no Brasil. Cadernos de Estudos Sociais, Recife, v.27, n. 2, p. 91-114, jul/ago, 2012. Available at: <<http://periodicos.fundaj.gov.br/index.php/CAD>>

the law. After the Constitution, the matter would be addressed in many other pieces of legislation. For example, in 1989, The 7,841 Act revoked art. 38 of the Divorce Act (1977), eliminating the restriction against successive divorces. In 1994, the 8,971 Act regulated stable union as the union of persons either single, judicially separated, divorced or widowed, who have cohabited for more than 5 years, or who have children in common. Later on, Act 9,278 of 1996 stroke the stipulation on the duration of the relationship, as well as the previous marital status of the convening parts, and indicated as requisites for the union: the durability and publicity of the relationship, and the intention to constitute family. The new Civil Code, finally passed in 2002, practically reproduces what is stated in the 1996 Act, adding, however, the requisite of inexistence of matrimonial impediment, except in the case of persons separated *de facto* or judicially (art. 1,723). In 2007, Act 11,441 determined that both a divorce and a consensual separation may be requested via administrative procedure, sparing the necessity of court file.

One yet more substantive step toward the legal recognition of Brazilian family diversity was the Federal Supreme Court decision of May 5, 2011, ruling that the Brazilian Constitution does not impede the recognition of unions by people of the same sex as a family unit. According to the case's Rapporteur, Justice Alves Brito, article 3º, paragraph IV of the Federal Constitution of 1988 bans any discrimination by virtue of sex, race, or color; and, in that sense, no one shall be diminished or discriminated with regard to their sexual preference. In Justice Brito's words, "The sex of a person, unless ruled otherwise, does not lend itself to juridical inequality."<sup>3</sup>

Two years later, on May 14, 2013, the National Justice Council, which regulates the Brazilian Judiciary, passed a resolution mandating all civil registry offices in the country to celebrate marriages between sex couple.<sup>4</sup> In that opportunity, the president of that Council stated that the Resolution removes any "administrative obstacles to the effect" of the Supreme Court ruling of 2011. Since then, more than 3,000 same-sex civil marriages have been registered in Brazil. Lastly, but of no less importance, those legal transformations have permitted notarization of civil union contracts between more than two persons.<sup>5</sup>

### International Normative Frameworks

The transformation of Brazilian legal norms with regard to family formations, as described above, is in consonance with international definitions elaborated over the past few decades. Those recognize that different forms of family do exist and this is a reality in many countries of the world. In consistence with this understanding, international legal instruments have also established that **no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.**<sup>6</sup> As mentioned above, family types include, but are not limited to single parenthood; female-headed households; same sex couples; "traditional"; temporarily separated; displaced; child-headed; divorced; cohabitating; fostered; grandparents raising children; couples without children; migrants; extended; and LGBTQI).<sup>7</sup>

The imposition of one single type of family to all individuals is a clear violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice. In many cases, differential treatment because of family status will clearly be discriminatory. There are several ways of defining and identifying discrimination based on family status. Discrimination because of family status includes any distinction, including exclusion, restriction or preference based on family status, expressed in laws and policies that result in the impairment of the recognition of human rights and fundamental freedoms.

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<sup>3</sup> See <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=11872>

<sup>4</sup> See [http://www.cnj.jus.br/images/imprensa/resolu%C3%A7%C3%A3o\\_n\\_175.pdf](http://www.cnj.jus.br/images/imprensa/resolu%C3%A7%C3%A3o_n_175.pdf)

<sup>5</sup> See <http://brasil.estadao.com.br/noticias/rio-de-janeiro,rio-registra-primeira-uniao-estavel-entre-3-mulheres,1781538> (in Portuguese)

<sup>6</sup> [http://www.yogyakartaprinciples.org/principles\\_en\\_principles.htm#\\_Toc161634716](http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634716)

<sup>7</sup> Bali Global Youth Forum (2012) UNFPA/WP.GTM.1, ¶ 3.12.

Families should be recognized in all of their diversity as they often take diverse forms both within and across nations, due to individual choice, as well as culture and circumstance, including various heads of household and/or extended family members. Families can be headed by different family members such as aunts, uncles, grandparents, men, and women and can change over time and according to social context. In limiting the definition of “the family” to one form (husband, wife and children), we are ignoring the vast diversity of familial forms that take place both within and across nations, due to individual’s choice, life circumstances and prevalent social norms.

The international community has already addressed and recognized that multiple and diverse forms of the family do exist and must be respected.<sup>8</sup> The ICPD Program of Action Principle 9 recognizes the existence of various forms of the family and the Beijing Platform for Action not only builds upon this broad definition but also gives additional attention to female-headed and single-parent households which represents the majority of families in many countries, whereas CEDAW recognizes that families can take different forms.

Therefore, legislation and public policy aimed at protection the family should encompass and address the needs of all families. They should seek to promote the basic human rights and fundamental freedoms accorded to all individuals by the set of internationally agreed instruments formulated under the aegis of the United Nations, whatever the status of each individual within the family, and whatever the form and condition of that family. Policies should aim at fostering equality between women and men within families, to bring about a fuller sharing of domestic responsibilities and employment opportunities by:

- Acknowledging that families perpetuate patriarchal oppression, traditions and harmful practices, and that human rights abuses do occur within families;
- Recognizing that various family forms exist;
- Addressing the needs of all family members in diverse families;
- Contesting interpretations of religion/tradition/morals that limit the human rights of women, children and LGBTI persons;
- Avoiding stress on the rights of the family bound to negatively impact those who, while members of families, may suffer abuse at the hands of other family members.

We therefore recommend that:

- Strategies and policies are developed, based on the data available and guided by facts and responsive to the realities and diverse needs and challenges families face, to respect, protect and realize the rights of all members of households and families, as it does in the ICPD Programme of Action, with particular attention to families and households in especially vulnerable situations and the lowest-income levels who need special support;
- Policies are enacted to guarantee social protections such as parental leave, access to affordable child care, integration of family-friendly policies in the workplace and at all levels, leave-to-work transition programs, which are developed in consultation with families, are essential to realizing the human rights of women and girls;
- A plural concept of the family is adopted by governments, to recognize its constantly evolving form and social functions, and adapting their legal, policy and programmatic frameworks in order to embrace every form of family and ensure the right of everyone to form a family, regardless of sexual orientation and gender identity;
- The human rights and development of individuals are advanced and protected, emphasizing the protection of the rights of individual members of the family against domestic violence, marital rape, the sexual abuse of children, corporal punishment, neglect of girls, female genital mutilation, female infanticide, early and forced marriage, neglect and abuse of the elderly.

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<sup>8</sup> ICPD POA (1994) ¶ 5.1; Beijing PFA (1995) ¶ 29; CEDAW/C/GC/21, 23, 24, 28, 29.