

The Recent Supreme Court Ruling on Same-Sex Unions in Brazil: A Historical Perspective

by Sueann Caulfield

On May 5, 2011, the Brazilian Supreme Court, in a unanimous, binding decision, extended to same-sex unions “the same rights and duties as stable unions [between a man and a woman].” Since stable unions are equivalent to marriage as per the 1988 Constitution, this decision grants Brazilian same-sex couples access to the legal rights that accompany marriage. With this decision, Brazil became the sixth Latin American nation to recognize same-sex couples’ right to form civil unions (Uruguay, Ecuador, Colombia) or to marry (Argentina, Mexico).

Although this victory was hailed in Brazil as a landmark, it was not without precedent. Over the decade, both the state and the courts have increasingly supported the

notion that freedom of sexual orientation is a fundamental human right in a variety of ways. Brazilian diplomats submitted resolutions supporting LGBT rights to the United Nations in 2003 (without success) and to the Organization of American States, which adopted the resolution in 2008. Egalitarian laws regarding pensions and immigration have been on the books since 2000 and 2003, respectively, and the federal government has created a national curriculum for educating children on LGBT issues (though implementation is still under debate). Several Brazilian states have passed anti-discrimination laws. Most visibly, state and federal governments provide financial and symbolic support to Brazil’s famous annual gay pride parades, winning Brazil the distinction of holding both the world’s

largest annual parade, in São Paulo (well over 3 million spectators since 2007) and probably the largest number of regional parades (around 175 in 2010).

These LGBT victories, however, present a paradox. Despite many attempts over the past 20 years to pass federal laws that would replace piecemeal measures with broad protection of equal rights for LGBT people, all of these attempts either languished or suffered defeat in congress. Only the unprecedented and controversial 2011 Supreme Court decision was capable of overcoming the political obstacle. Meanwhile, homophobia remains a grave problem, leading not only to continued discrimination, but also to consistently high rates of homicides of LGBT persons.



There is considerable debate within Brazil regarding this paradox. While some applaud the work of LGBT activists in making state support and legal gains possible, others argue that social and political backlashes against recent legal gains are likely because of the strength of the religious right coupled with the failure of LGBT organizations to create a mass movement or develop effective political strategies. Some see the LGBT movement as overly dependent on the state, which uses the rainbow banner in support of its “ideology of diversity,” promoting the image of Brazil as a multi-cultural democracy while failing to guarantee equal rights. Brazil’s egalitarianism, in this view, which might be epitomized in the gay pride parades, is just a show.

A brief look at the history of gay and lesbian rights activism in Brazil, on one hand, and of family law, on the other, presents a different picture, one that provides some perspective on the seemingly sudden Supreme Court decision. First, the scattered organizations that supported LGBT rights since the late 1970s succeeded over ensuing decades in tying their struggle to an array of local and global movements for social justice. An important portion of these organizations focused on celebrating diversity and inclusion as Brazilian traditions and as universal human rights through public health campaigns and promotion of visibility events such as gay pride parades. This strategy was especially successful in garnering the support of the Brazilian state and in creating a social space in which verdicts that favor equality for LGBT families can stand.

The legal doctrine and jurisprudence that supported the recent Supreme Court decision have an even longer history. The decision ultimately rested on the fundamental principles of equality and human dignity, principles which the 1988 Constitution recognizes as foundational to the state. The issue would probably not have reached the Supreme Court, however, without jurisprudential precedents reaching back to the 1920s, which expanded family rights case by case.

LGBT Activism

Same-sex sex was decriminalized well before the emergence of social movements for LGBT rights. The liberals who wrote the first legal codes after Brazil’s independence from Portugal in 1822 were eager to move as far as possible from what they saw as barbaric punishment of moral offenses during the old regime. Sodomy was excluded from the 1830 criminal code without generating much debate. Through the twentieth century, however, police were commonly given broad license to persecute men and women who were perceived to be sexually deviant.

As was true in many other Western societies, urban homosexual sub-cultures developed in the early twentieth century, creating the potential for development of political movements beginning in the 1950s. The development of militant gay political activism was stymied by the military dictatorship that took power in 1964. When the military eased political repression at the end of the 1970s, a multitude of grassroots movements for social justice emerged in a cascade that turned into a broad-based struggle against the military regime. The disparate movements were linked to one another, and to similar movements taking place all over Latin America, by their common discourse stressing universal human rights.

After the dictatorship finally came to an end in 1985, representatives of these social movements set their sights on creating a new legal order. During the convention that produced the 1988 Constitution, they succeeded in expanding the meaning of citizenship to include a broad range of political, social, cultural, and economic rights, all encapsulated under the overriding principles of “human dignity” and “equality.” Some delegates to the constitutional convention attempted to include freedom of sexual orientation among the specific rights protected by the Constitution, but these efforts failed.

The struggles around the drafting of the 1988 Constitution coincided with the AIDS

crisis in Brazil, when gay rights groups gained new visibility and legitimacy—particularly after Brazil’s 2001 victory against U.S. pharmaceutical companies won international acclaim for Brazil’s AIDS policy. It was at about this time, in the mid-late 1990s, that local LGBT cultural initiatives began to gain national attention, represented most visibly by the rapidly growing gay pride parades. Also in the late 1990s, television writers, some of whom are gay, began to cast gay characters in positive roles, particularly in the extremely popular *novelas* (soap operas). In recent years, a few *novelas* broadcast by the powerful TV *Globo* network, such as *Senhora do Destino* (2004–5) and *Páginas da Vida* (2006–7), became platforms for arguments in favor of gay family rights. The *novelas* did not place same-sex couples in the steamy sex scenes that are their standard fare for heterosexual couples on the shows. Instead, gay couples have appeared as upstanding citizens, loyal family members, and responsible and loving parents: precisely the social roles that real-life LGBT individuals struggle to occupy in their appeals to the courts.

De Facto Partnerships and “Rights of the Companion”: Jurisprudence and Doctrine on Unmarried Heterosexual Couples, 1920–1988

Although legal recognition of families headed by same-sex couples is a new, vanguard position among Brazilian jurists, many of the legal instruments and categories used to justify this recognition had been made available by an earlier process of expansion of family rights through the courts. This process began in the 1920s and intensified after the Revolution of 1930 replaced the republican government with a populist corporatist-reformist coalition led by Getúlio Vargas, who cast himself as “the father of the poor.” As the state increasingly privileged the family in its propaganda and new social welfare programs, vigorous campaigning by the Catholic Church ensured that a particular type of family, “constituted by indissoluble marriage,” was guaranteed “the special protection of the state” by

each of four subsequent constitutions beginning in 1934.

While the campaign to protect legitimate marriage was underway, however, women who “lived maritally” (in consensual unions) filed legal petitions for family benefits such as compensation for accidents suffered by their companions. These petitions multiplied in the 1930s and 1940s, when the Vargas state expanded potential benefits for families of workers. Recognizing that consensual partnerships were a common feature of working-class family life, progressive jurists cited their existence as a “social fact” to justify recognizing them as families. In the absence of a legal definition or regulations regarding these families, judges ruled on issues relating to informal partnerships “by analogy” to marriage.

It remained difficult, however, for women to make claims against a former consensual partner or his heirs in family court. Instead, consensual relationships, called “*de facto* partnerships” (*sociedades de fato*, as opposed to *sociedades de direito*, or legal partnership), were treated like commercial partnerships and adjudicated in civil (not family) courts. Since property was commonly registered in the man’s name, women were often reduced to suing for “indemnification,” receiving an amount meant to compensate them for domestic services rendered. The lack of clear legal guidelines in such cases resulted in mountains of litigation, leading the Supreme Court to pass a resolution in 1964 that determined that once a *de facto* partnership was established between “concubines,” as informal partners were termed, the courts could treat them as married couples in civil matters such as legal separation, division of property accumulated through joint effort, child support agreements, and inheritance.

These so-called “rights of the concubine” were enhanced and renamed by the 1988 Constitution. Unmarried couples’ relationships became legal partnerships, with the term “stable union” replacing “concubinage” or “*de facto* partnership.” Stable unions were

... By defining human dignity and citizenship as fundamental principles, and equality as a basic human right, the delegates who wrote the Constitution provided conceptual tools that, in the hands of talented legal scholars, lawyers, and judges, justified extending family rights to same-sex couples. . .

defined as family entities and granted “the special protection of the State,” alongside and equal to legally married couples.

The Constitutional Basis for LGBT Family Rights: Human Dignity, Equality, and Non-Discrimination

The 1988 Constitution and the subsequent legislation that regulated stable unions specified that these were “unions of one man and one woman.” Yet by defining human dignity and citizenship as fundamental principles, and equality as a basic human right, the delegates who wrote the Constitution provided conceptual tools that, in the hands of talented legal scholars, lawyers, and judges, justified extending family rights to same-sex couples as well, while the jurisprudence on “social fact” and concubine’s rights provided the legal instruments.

At the heart of the movement to expand the legal notion of family to include same-sex couples is the concept of the “socio-affective family.” Developing this concept, jurists reason that family law,

like any other branch of law, must reflect fundamental principles. The central purpose of modern family law is to guarantee every citizen a nurturing environment of mutuality and human dignity necessary for the development of each individual’s legal personality and thus his or her capacity to possess and fully exercise rights. The family that receives state protection is therefore not necessarily constituted by a formal legal contract or even biological relationships, but by love and affection.

The 1988 Constitution recognized affective ties by establishing equality between biologically conceived and adopted children and between married couples and those in stable unions. In 2006, a

Gays and supporters take part in the 15th Gay Pride Parade at Paulista Avenue on June 26, 2011 in São Paulo, Brazil. The Gay pride parade in São Paulo is considered the biggest in the world, expecting over 4 million people this year. (Photo by Julien Pereira/LatinContent/Getty Images)



Jurists... began using terms such as “homo-affective union,” emphasizing that what is relevant to family law is a couple’s ties of affection, not their sexuality, and “homo-parentalidade,” recognizing that many LGBT people are, in fact, parents.

law that establishes domestic violence as a specific criminal offense (the Maria da Penha law, passed as a result of a successful suit against Brazil at the Inter-American Commission on Human Rights) placed even greater emphasis on volition and emotional attachment by defining the family as “the community formed by individuals who are or consider themselves to be related [...] regardless of the family members’ sexual orientation.”

Although the Maria da Penha law was the first to reference sexual orientation, judges had already begun to apply the principles that underlie the concept of the “socio-affective family” to same-sex couples. Beginning the 1990s, as the injustices faced by members of same-sex unions were publicized by gay rights groups and the mass media, more and more same-sex couples approached the courts. In response, a vanguard within the judiciary in a few key states, led by Rio Grande do Sul, accepted the argument that the failure to grant equal rights to families formed by same-sex couples violates fundamental principles of equality and human dignity, and this argument became dominant in national legal scholarship by the beginning of the new century. Citing the concept of the affective family, jurists created a more specific nomenclature, “homo-affective family,” and soon began using terms such as “homo-affective union,” emphasizing that what is relevant to family law is a couple’s ties of affection, not their sexuality, and “homo-parentalidade,” recognizing that many LGBT people are, in fact, parents.

National jurisprudence began to follow suit, though unevenly. As was the case regarding “concubinage” prior to 1988, when faced with the absence of legal guidelines, judges ruled according to social customs (arguing that same-sex relationships were customary and broadly recognized in contemporary society) and by analogy, with stable union,

rather than marriage, as the analogous legal relationship. Same-sex couples’ relationships were recognized in civil courts around the country as *de facto* partnerships based on their existence as a “social fact,” and same-sex companions won some of the rights formerly reserved for heterosexual couples, such as inheritance, legal separation, and state and federal social security benefits. Yet, like “concubines” before 1988, same-sex couples found it much more difficult to win recognition in the family and juvenile courts, which decided issues such as adoption or child custody. Moreover, despite the more or less steady accumulation of judicial victories, there were holdouts not only among individual judges, but within the highest courts of appeals of several states. These included Rio de Janeiro, where in 2008 the governor, frustrated by his inability to offer equal benefits to LGBT state employees, filed the suit that resulted in the Supreme Court’s 2011 decision that settled the matter.

In their 2011 decision to grant same-sex couples the right to form state-recognized stable unions, Brazil’s Supreme Court justices thus relied on the arguments regarding equality, human dignity, and family rights that had recently become dominant in national legal scholarship and in the jurisprudence of a few key states. Far from a sudden departure from major social and legal trends, the justices recognized the decades-long process of transformation in social and legal understandings of the family that had been brought about by various factors, including local and international political activism, publicity in the Brazilian media, and national and international legal scholarship and jurisprudence.

The concrete changes, however, are the result of the individual cases that people have brought to the courts. As an appeals

court justice from Bahia remarked, “we can only rule on the cases that reach our courts, on the arguments made by lawyers about the values and situations lived by those individuals who seek justice.” And a family court judge from Rio de Janeiro, who eight years ago refused to accept a case involving a same-sex couple, told me last August that she hopes to have a second chance soon: “I was wrong about that, I see that now and I feel really badly. Although if I had accepted it, I would have been overturned on appeal. But I see things differently now; you can see in the cases that my colleagues have judged, and in doctrine, and in the stories that you see in the media—these are families like any other family and they deserve equal rights.”

About the Author

Sueann Caulfield is Associate Professor of History and the Residential College at U-M. She was awarded a CICS Human Rights Fellowship in 2010. She specializes in the history of modern Brazil, with emphasis on gender and sexuality. Her first book, *In Defense of Honor: Morality, Modernity, and Nation in Early Twentieth-Century Brazil* (Duke University Press, 2000) dealt with the meaning of honor in Brazilian law and popular culture. Professor Caulfield has also published a variety of works in both U.S. and Brazilian journals on the topic of gender and historiography, family, race, and sexuality in Brazil. She is currently working on a social history of the concept of legitimacy in twentieth-century Brazil. She developed a course for the International Studies Program and CICS on *Sexual Rights are Human Rights: International Law and Human Rights Law and its Application to Gender and Sexual Orientation*; and she delivered a public lecture on *Human Rights and Family Rights of Same-Sex Couples in Brazil* as part of the CICS Human Rights Fellowship.