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ABSTRACT

Taking the statements of two Brazilian jurists as a starting point, this article reveals what makes even educated people qualified in law reject granting of equal rights to homosexuals. It also reflects on the absence of moral and legal discussion on this social stigma in Brazil, both generally and, more specifically, among jurists, who tend to develop an irrational or traditionalist (another form of irrationalism) understanding of the fundamentals of moral life and who present arguments that are misinformed and erroneous from a contemporary philosophical and scientific point of view. By adopting this stand, they hinder physical and psychological damage inflicted on homosexual children and youngsters from being considered a form of violence, encouraged by a legal framework that harbors specific religious prejudice. From these two pivotal points, the article attempts to show how the law can be applied so as to end social discrimination of gays and lesbians. [Original article in Portuguese.]

THE RIGHT TO RECOGNITION FOR GAYS AND LESBIANS

José Reinaldo de Lima Lopes

Homosexuals are a race accursed, persecuted like Israel.
And finally, like Israel, under the ignominy of an undeserved
hatred by the masses, they have acquired
mass characteristics, the physiognomy of a nation
... They are in each country a foreign colony.
Marcel Proust

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"Brazil is not prepared for adopting the civil union concept. It is unnecessary and goes against the cultural and religious foundations of the country." This is what judge Marcos Augusto Barbosa dos Reis had to say, in an interview with *Trip* magazine (n. 95, Nov. 2001), about the union between people of the same sex. "Neither natural law, nor Brazil's constitutional or infraconstitutional legislation provides for homosexual union. ... These isolated decisions will never mean that two men, or two women, can find happiness and the protection of law for a behavior that is a deviation from the nature of things." This is the essence of a statement made by the lawyer Jaques de Camargo Penteado, in the *Tribuna do Direito* (n. 82, Feb. 2002). Such contemporary statements illustrate to what degree Brazilian legal discussion is contaminated by inaccuracies and misunderstandings about what law, democracy and morality are. Both these statements confuse dimensions that in liberal, democratic and modern (or at least post-traditional) societies ought never to be confused.

Firstly, they confuse the legal order with the order acceptable by the majority, overlooking the fundamental aspect of democracy: the protection of the rights of minorities.

The references of the sources quoted in this text are found on page 90.

Secondly, they confuse law with a traditional moral order: to say that something is unacceptable because it goes against the traditional fabric of a group is to ignore the prescriptive and counterfactual character of any normative order. Thirdly, they confuse religion and the state: the legal order of a democratic state is not founded on the religious grounds of any of the groups that make up its citizenry. Fourthly, they draw on concepts of natural law and nature that, at best, are inaccurate. As jurists should well know, natural law is not a series of commands or orders, but, rather, a condition enabling the social organization of life. And what, for that matter, is nature? A collection of cosmic necessities and regularities? Indeed, if that were the case, traveling by air and having blood transfusions also go against nature. Is it a set group of functions and purposes? If so, we are lead to "subjectivizing" nature, as when we state that it "wants" something, which, strictly speaking, nobody would admit, except in a metaphorical sense. But the metaphoric use of words rarely produces convincing arguments.

Yet the fact that jurists should express themselves so spontaneously and publicly, indicates how much there still is to be discussed and how statements, in all seriousness, are made that simply reproduce generalizations and uncritical morality. It comes as a disappointing surprise to hear a jurist shield himself behind the claim that "society is not prepared". There are many things society is not prepared for: it is not prepared to abolish torture or share wealth. But we do at least expect it to be prepared to condemn torture and create taxes and social contributions. It is also disappointing to hear people say that nature is prescriptive: surgical operations, marriages between people who cannot reproduce and other similar events would enable us to say that they are things proscribed by "natural law".

Two arguments in favor of a critical morality in law

In the early 60s, when the United Kingdom was discussing an end to the criminalization of homosexual intercourse between consenting adults, an important debate erupted that should be a model for all law students. The debate was waged between Lord Devlin, a member of the United Kingdom's highest judicature (the House of Lords– the *Law Lords*) and one of

the eminent jurists of the last century, Herbert L. Hart. Later, the same topic was addressed by Ronald Dworkin, another first rate jurist, still living. The debate illustrates the need, given that it deals with human dignity and fundamental rights, for a minimum moral grounding. The need, in short, to move away from relativist skepticism, which considers moral questions as if they were questions of taste; and to move away from pure and simple traditionalism, which addresses moral questions merely as a problem of customs that ought to be recognized and preserved.

At the time, the Wolfenden Commission, created in the United Kingdom, concluded that homosexual intercourse between consenting adults should be decriminalized. Part of British public opinion felt outraged, as this meant making a choice of moral character, removing from such acts the character of something subject to punishment, detaching them from the idea of sin. Lord Devlin joined the debate, saying that it is indeed the function of law, particularly the criminal law of a country, to determine what is moral, and that this is or should be the morality of the majority. He said (Devlin, 1991, p. 74): "For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart."

Lord Devlin went on to say that religion and morality cannot be separated completely, and that the moral standards generally accepted in Western civilization are those belonging to Christianity (p. 69). Therefore, while someone living in a Christian society cannot be forced to convert to Christianity, he or she is obliged to adhere to Christian morals, which are the prevailing morals in his or her environment. And a common morality is as necessary as a government: accordingly, if it is legitimate for the government to punish subversive acts – such as forms of treason – then it is also legitimate for the state to punish immorality (sic, p. 77). He recognizes that it is natural for legal penalties not to be merely an extension of religious or moral punishment: therefore, the state may punish given behaviors not because they are sins, in themselves, but because they go against the order – the generally accepted morality. Finally, Lord Devlin adds that this is not a case of shaping the standard of moral judgment only from the opinion of the

majority. After all, he comes from the land of John Stuart Mill, a land that witnessed an intense debate on individual liberty.

J.S. Mill, nearly 200 years ago, drew attention to the danger of democracy dissolving individual liberties (the moral liberty of individuals) in the name of the process of representing the majority. He said: "the tyranny of the majority is now generally included among the evils against which society requires to be on its guard". And he continues: "the majority may desire to oppress a part of their number". This is why, Mill concluded, the only liberty that deserves the name of liberty is the liberty to pursue our own happiness, in our own way, provided it does not prevent others from doing the same (Mill, 1974, p. 138). Devlin, on the contrary, argues for the criteria of the man on the street, or what he calls the "right-minded" person: immorality then, is what every right-minded person considers immoral. Accordingly, it is not the morality of the majority, but the morality of the man on the street that should inspire legislators. In the case of homosexuals, the matter is resolved with simplicity: both the majority and the supposed "man on the street" condemn homosexual persons and practices.

As we can see, Devlin's argument is based on the idea that society is fragile and that individuals are not capable of developing themselves autonomously. Autonomous development creates a risk of social corruption. On the other hand, Devlin does not believe in a critical or rational morality. Like many of our contemporaries, he thinks that morality is a matter of tradition, custom, regularity and convenience. Therefore, one may not, in a moral debate, take a critical perspective – which is always universal – but only a convenient and practical perspective, the perspective of the man on the street.

One of the first to counter these arguments was Herbert Hart. Under the title "Immorality and Treason", a first and brief controversial text, he argues that Devlin tries to show immorality as the result of an intellectual activity that combines disgust, intolerance and indignation: if certain acts or attitudes awaken these feelings in the man on the street, then we are certainly facing something immoral, which should be punished by law. In these terms, concludes Hart, the morality proposed by Devlin is uncritical, is not based

on any rational discussion of the fundamentals of moral choice, but on impressions and feelings. He also emphasizes the erroneous comparison made by Devlin with the case of treason: not all actions against the government are treason, as they may not be attempting to destroy it, but merely modify it. The risk of wrong decisions being taken by majorities – and their representatives –, says Hart, is a risk inherent in representative democratic government. But it should not be broadened, elevating the "man on the street" to such a position that all he needs do is to express repulsion or disgust for us to accommodate our laws to his feeling, without making a critical assessment of his demands.

In a more comprehensive essay (1963), Hart developed his response concluding that the central (critical) principle of the moral discussion is that misery, human suffering and the restriction of liberty are evils. As such, the law of a free and democratic society is founded on the reduction of misery, of suffering and of restrictions against liberty. The preservation of order and of society, in addition to the maintenance of a common morality, cannot be evaluated in themselves, but only when submitted to the principle of a critical morality.

Following the same line of reasoning is an essay by Ronald Dworkin (1977, pp. 240-258). For him too, what is at play in this debate is a controversy between a conventional morality (according to which moral rules are grounded in conventions) and a critical morality (in which the moral rules should be submitted to a kind of rational screening). Of course, Dworkin does not deny that historical moralities can result in the *de facto* acceptance of certain practices. But what he does deny is that this *de facto* existence is grounds for its justification or validation. We do many things without asking why, although if the question is posed, the moral response cannot be "because it's always been done like this" or "because everyone does it like this". Dworkin therefore proposes a screening system for moral opinions:

- prejudice is not a valid reason (a belief that homosexuals are inferior because they do not hold heterosexual intercourse is not justified as a moral judgment of superiority or inferiority);
- personal feelings of disgust or repulsion do not provide sufficient grounds for a moral judgment;

- moral judgment based on *de facto* reasons that are either false or implausible are not acceptable (for example, it is factually incorrect to say that homosexual acts are debilitating, or that no homosexual practices occur in nature – that is, in other species of sexual animals);
- moral judgment based on other people's beliefs ("everybody knows that homosexuality is a sin") is also not sufficiently justified.

In short, the law of a democratic society, contrary to what those less prepared imagine, is not a law without morality, but a law that is founded on a morality of a critical character. The constitutional system – that establishes equal treatment, respect for people's dignity and the moral liberty of citizens – is a legal system with an agenda of critical morality. This distinguishes it from the tragic authoritarian regimes of the last two centuries. Social practices may be authoritarian, but the law is – or should be – an antidote to such practices.

There are two errors in contemporary discussions on the topic of the rights of homosexuals when the issue is dealt with in moral terms, as some would have it. The first consists of identifying the morality of a democratic society with a morality that is traditional, or of the majority. The second lies in the claim that modern law does not include a certain morality. The arguments summarized above help to correct these two errors. The morality of a democratic society is critical, not simply traditional, or backed by the majority. A parliamentary majority cannot do everything, and should it maintain discriminatory forms of treatment, it would perpetrate an unconstitutional act, as defined under Article 5 of the Brazilian Constitution, which expressly prevents discriminatory treatment from being perpetuated. If the question is shifted to the Judiciary, we will find ourselves under the venue of an institution which, by definition, is "antimajoritorial", i.e., is the guardian of the interests of the minority.

But democratic society does have a morality, one that consists of establishing the equal and universal dignity of all persons as its principle, and this principle includes the freedom to do anything that causes no harm to others. As Dworkin notes, the "harm" that is caused to others cannot

be an uneasiness or an indisposition based only on tradition and prejudice. Therefore, the morality of a democratic society must be critical, although there obviously are fundamental moral principles underlying the legal order.

The claim for recognition and the stigma as a legal offense

The gay movement presented the public – in new terms and new circumstances – with the old issue of justice. Just like many other social groups, gays also started to demand, in the name of the law, respect for their identity and their liberty, as well as a nondiscriminatory treatment. This struggle has had a unique history, just like any other movements, but it is also part of a broader process that one might describe as the expansion of democracy and the assertion of universal rights.

This expansion of democracy includes the right to civil and political freedoms, whose most salient features are freedom of expression (the end of crimes of opinion), freedom of association (the end of crimes of sedition) and the extension of suffrage (to all adult individuals). It also includes social rights – labor, welfare and social protection – whose extension is due exclusively to the bitter and often bloody struggles of the working class. For the universal assertion of rights, we need to be able to count on the nature of a universal human subject, in whom is embodied a value that cannot be exchanged, and so by definition has no price, which is dignity. These two currents – democratic expansion from an institutional point of view and the assertion of the subjects from a moral point of view – converge in the gay movement in an exemplary way. And they become more important the less universalistic the social context is in which they are asserted.

The assertion of the rights of homosexuals is not a straightforward process, but, rather, occurs in a manner marked by problems and, at times, contradictions. These rights are not always or necessarily acknowledged or supported by those who consider themselves convinced of moral goodness, whether of democracy as such or of the universal human rights. In fact, it is not only against traditionalist visions of the world that homosexuals have had to struggle. Often they have had to fight groups apparently inclined towards liberty. This is

particularly evident in Brazil, where neo-liberalism often means nothing more than the defense of free trade or free business initiative. Not all liberals extend their liberalism to individual liberties, or to the defense of self-determination of human subjects. The left, largely responsible in the last century for the democratization of Brazil and the extension of rights to all people regardless of their social class, often opposed recognition for homosexuals, when it wasn't ostensibly persecuting homosexuals living under the so-called "real socialism".

In the field of Law proper, in what concerns the legal framework and the kaleidoscope of duties and rights that are distributed among the people, the assertion of the right to recognition also faces difficulties. To clarify the status of homosexuals in law, I shall take as a starting point a key distinction made by Nancy Fraser (1997) between **rights of distribution** and **rights of recognition**. Gays and lesbians, just like national and cultural minorities, claim their right to recognition.

Rights of distribution are traditionally called social rights and they have a special function: their purpose is to redress the structural and inevitable injustices of the class system inherent in capitalism. For social rights or rights of redistribution to exist, we need to accept certain things: (a) that social classes exist; (b) that social classes are not a cosmic phenomenon, but instead the product of institutional frameworks and historical processes; (c) that social classes generate situations of injustice; (d) that the social production of wealth is a common social undertaking; (e) that the injustice of classes consists in the unequal appropriation of the social results of the production of wealth; (f) that even those less capable and less productive, if they are nonetheless recognized as members of society, have the right to be provided for within that society by mechanisms of wealth distribution.

The **rights of recognition**, likewise, also need a starting point, and we can say they emanate from the following: (a) that there are in society groups that are stigmatized;[1] (b) that stigmas are institutional and historical products, not cosmic; (c) that stigmas do not necessarily have any scientific, rational or functional grounding for society; (d) that people belonging to stigmatized groups suffer from the "usurpation" or denial of an asset that is immaterial (non-

1. This topic was addressed extensively in the work of Erving Goffman (1975). For him, a stigma is a social phenomenon, a demeaning attribute that enables the pre-establishment of certain relations. The stigmatized may be divided initially into two groups: those whose stigma is evident, who are known as the discredited people, and those whose stigma is not immediately noticeable, who are the discreditable people.

commercial, non-marketable) and basic: respect and self-respect; (e) that the social perpetuation of stigmas is, therefore, an injustice, causing unnecessary pain, suffering, violence and disrespect; (f) that members of a society, in order to remain members, have the right to have their demeaning stigmas removed.

Nevertheless, if the stigmas are produced socially, one could claim that the law is impotent against such "prejudices" of a social and cultural nature. And, often, the most one can do is to punish the behaviors that generate violence against people belonging to a stigmatized group. But this is a claim that finds not backing either in legal or historical terms.

Let us begin with historical examples. Various forms of stigmatism have already been effectively tackled by law. To cite some examples, one could say that identity groups that have emerged over the past centuries and managed to overcome the social stigmas by legal means are women and, to some degree, blacks, foreigners and the physically handicapped. From the point of view of the cultural majority, the means used to degrade these groups were sanctioned by law. Women could not vote, they could only receive salaries lower than those of men, they did not act on their own judgment without the authorization of their husbands, and so on and so forth. It was the emancipationist and feminist movements that gradually projected a more positive and assertive image of women that "denaturalized" the discriminatory legal treatment, and introduced into law the equality of men and women, which previously would have been considered impossible, given the gender difference. Difference is, therefore, a historical barrier; and the law does not play a neutral role in its construction: on the contrary, the law – the rules in place – helps naturalize the differences and the inequalities common in the culture. A change in the law not only follows cultural changes, it helps to promote them.

Therefore, the law can promote changes and remove historically consolidated injustices, requiring only that certain legal institutions be mobilized. The first of them is the class action, or "civil public action", which offers an effective means for some members of a group to achieve recognition of the rights that will be extended to all members. Accordingly, isolated members or groups of stigmatized people with greater

resources – particularly psychological – can play the indispensable role of hero or trailblazer, without each individual member having to bear the extremely high costs of exposure and combat.

A second important element is the unmasking of the prevailing generalizations. The statements cited at the opening of this paper demonstrate that offensive and injurious words can be used against a given group of citizens without fear of serious consequences. However, if these types of public statements resulted in charges for their discriminatory and unconstitutional nature, there is little doubt that the law would contribute to reducing the stigma in its own arena, in public life. In strictly private life, nobody is obliged to have social contact with gays: flee from them, if you can, as they are everywhere, even in heterosexual families. They are even born into and live with families, although all too often they are submitted to physical and psychological tortures. One of the slogans of the international gay movement is: "we're queer, we're here, get used to it".

Third, the law can unveil discriminatory treatment in the most varied ways: pseudoscientific criteria infiltrate into evaluations for adoption, the custody for children, the distribution of health benefits (social rights, incidentally) and the holding of posts in the public service. To expose this discriminatory treatment helps to break the mold, to lay publicly bare the many forms of violence that a group of citizens has suffered, still suffers and will continue to suffer for some time.[2]

Let us consider but a few examples of the suffering imposed on a particular group of citizens to have an idea of the how much the law contributes to cloack violent and blatantly unconstitutional practices.

Herrero Brasas (2001, p. 323) paints a portrait of the violence that many homosexuals, both male and female, are submitted to from a very early age, in both their childhood and adolescence. He says there is an active violence, which we all see, and a passive violence, which I would call disguised or psychological. This violence is comprised of "public insults, mocking and ridiculing gestures, such as manifestations to torment a social group". Closely associated, and also a form of social and silent violence, is "the lack of legal protection against these symbolic acts", which generally exist in the rhetoric, the

2. It is worth recalling the typology of discriminatory treatment elaborated by Kenji Yoshino (1999). Discrimination disrespects identities, forcing different groups to convert or hide. "Converting" is an explicitly antidemocratic requirement in various circumstances and affects those underlying identities that are changed when freely accepting affiliation to a group (religious, for example). "Passing" is another requirement that presumes to be compatible with a degree of tolerance: the individual may continue with his or her own underlying identity, but not expose it publicly (the freedom of conscience, but without the freedom to hold public services, for example). Therefore, by "passing", the individual may continue to be who he or she is, although publicly he or she must be who he or she is not (the identity trait is not visible). Finally, "covering" occurs when the individual is not required to disguise his or her underlying identity, but to cover it: this permits the individual to retain his or her identity and even make it public, but not take pride in it, exhibit it or flaunt it. According to Yoshino, this is the case with blacks forced to have a conventional haircut among white people, and not flaunt a black power style.

symbols and in the culture as a whole. The lack of legal action is akin to a warrant, a complicity in this daylight violence – evidence of the "denial of absolute equality". We also need to take a look at what Herrero Brasas (p. 324) calls

> *... abandonment and terror that adolescents suffer when they discover their gay or lesbian orientation, which submits them without any alternative to the degrading emotional blackmail of their family ... The younger and more vulnerable person is condemned to silence and to psychological and emotional torture while the authorities conduct no awareness-raising campaigns about the reality of being gay or lesbian, nor do they develop any informative programs for their families. All this causes real suffering ... experienced as an expression of hatred against them.*

Such passivity on the part of governments and of the Law illustrates just how much violence against this particular group of citizens has been naturalized: we talk in defense of children and adolescents, but how much has been done for a group of people who suffer the most violence and degradation when they are children and adolescents? Is there not a role here for the law?

Following the same trend of these observations, one may add the typology developed by Axel Honneth (1996, pp. 129-134), according to which the denial of recognition generates physical violence (physical abuse), which is the prevention of someone being physically secure in the world, and also a non-physical violence. The non-physical violence, in turn, unfolds into two typical forms. The first is a person's exclusion from the possession of certain rights, denying the person social autonomy and the possibility of interaction. Honneth calls this social ostracism. "The kind of recognition that this type of disrespect deprives one of is the cognitive regard for the status of moral responsibility that had to be so painstakingly acquired in the interactive process of socialization" (p. 134).

The second form of non-physical violence is the denial of the value of a way of being or living, and it is this form of violence that underlies the degrading and insulting treatment of certain people and groups, as it promotes disrespect for individual or collective forms of living. Honneth goes on to say (p. 134):

> *For individuals, therefore, the experience of this social devaluation typically brings with it a loss of personal self-esteem, of the opportunity to regard themselves as beings whose traits and abilities are esteemed. Thus, the kind of recognition that this type of disrespect deprives a person of is the social approval of a form of self-realization that he or she had to discover, despite all hindrances, with the encouragement of group solidarity. Of course, one can only relate these kinds of cultural degradation to oneself as an individual person once the institutionally anchored patterns of social esteem have been historically individualized, that is, once these patterns refer evaluatively to individual abilities instead of collective traits. Hence, this experience of disrespect, like that of the denial of rights, is bound up with a process of historical change.*

This is the same form of violence denounced by Didier Eribon (2000):

> *What the insult tells me is that I am an abnormal or inferior person, over whom someone else has power and, above all, the power to offend me. The insult is, therefore, the means by which the asymmetry between individuals is expressed. ... The insult also has the force of a constituent power. Because personality, personal identity, the most intimate awareness, are manufactured from the very existence of this hierarchy and by the place we occupy in it, and, therefore, by the glance of the other, the "dominant one", and the capacity he has to degrade me by insulting me, letting me know that he can insult me, that I am an insultable person and insultable ad infinitum. (p. 57)*

> *The homophobic insult is part of a continuum ranging from the word spoken on the street that every gay and lesbian can hear (bloody queer, bloody dyke) to the words that are implicitly written on marriage registry office doors: "no homosexuals allowed" and, consequently, also the professional practices of jurists who include this ban in the law, and also the rhetoric of all those men and women that justify these discriminations in articles that they present as intellectual elaborations (philosophical, sociological, anthropological, psychoanalytical, etc.) and that are no more than pseudoscientific lectures designed to perpetuate the unequal*

> *order, to reinstitute it, either by invoking nature or culture, divine law or the laws of a symbolic order immemorial. All these lectures are acts, and acts of violence. (p. 62)*

Nevertheless, it is this very insult and violence that certain provisions of the legal framework silence on or, depending on the rhetoric of some jurists, actually permit. And it is this silence or omission that the demand for rights of recognition aims to abolish. In fact, there is an unquestionable contradiction between preaching tolerance and being shocked by the cruel and gratuitous violence of which homosexuals are victims, and, at the same time, upholding as an official and well-controlled rhetoric the generalized violence of offense and, within families, the "blackmail" referred to by Herrero Brasas. To talk about the right to recognition is to talk about abolishing such social practices, or at least removing them from the silence that may serve to keep them alive.

Eribon and Honneth say that insults are forms of offense and violence. One could even say that insults consistent with the denial of rights can propagate the negative image of homosexuals. The denial of rights, the rhetoric that publicly affirms that homosexuals should not be condemned, but neither should they be encouraged, has precisely the opposite effect, that is, to encourage physical and moral violence against them. Since they cannot have equal rights, the message sent by the jurists who deliver them is to reinforce the prejudice and pseudoscientific ideas that are endorsed here and there. It is a message of inequality.

The description of the insults and violence of which homosexuals are victims reveals a violation of their fundamental rights. It is not hard to see that the social treatment given to homosexuals – at times by the state services themselves or by public service agencies, such as hospitals and schools – constitutes a degrading treatment, which is prohibited by Article 5 (III) of the Brazilian Constitution. Many other pretensions of social groups would also consist of violations of the rights of conscience and belief of this portion of the citizenry (same Article, item VI). In addition, the honor and privacy of the individual is treated constitutionally as an inviolable right (item X), so the various forms of public communication and social expression of contempt directed at

gays and lesbians must surely be violations of their honor and their privacy. Not to mention that fact that the Constitution itself requires legislators (and also all public bodies with semi-legislative powers) to punish "all acts of discrimination against fundamental rights and liberties" (item XLI). These individual rights, deemed the fundamental rights of any member of Brazilian society, are enough to reveal to what degree the institutionalized continuity of antigay stigmas is illicit.

But it is unquestionably on the principle of dignity of the person that the vindications against unequal and discriminatory treatment and the reaction to public statements are grounded. The Brazilian state – the institution of the public and common life of Brazilian society – is founded on the "dignity of the human person" and on "political pluralism" (Brazilian Constitution, Article 1, items III and V). A person's dignity can be best expressed by the Kantian formula: the worth of each human being, which is exchangeable for nothing, may be bought for nothing and may be the instrument of nothing. No human being may be used by another or by the collectivity and may not be used even as an example, or as a scapegoat. Pluralism, meanwhile, states that the cornerstone of political coexistence in Brazil is reciprocal tolerance. These are the basic, not to say elementary indications that Brazilian democracy, or rather, the public legal system of Brazil, adopts the necessary precautions not to permit intolerance and social oppression among social groups. Brazil's legal system guarantees and values the plurality of forms of life and thought, and does not license the state to sponsor uniformity, conformism and submission.

The denial of rights, coupled with the traditionalism of the *statu quo*, is what maintains and fuels the most evident forms of physical violence, and that in itself is an offense against the democratic regime of equal liberties. There is no pride to be taken in the fact that intolerance is cultivated under the silence of the legal system – as it could be understood by its most common non-democratic forms of expression. In a democracy, this kind of sexual discrimination is a legal offense. In a democratic state, the defense of the social order is restricted to the defense of institutions that can pass the test of universalization and criticism; this would sustain the different treatments that are justified by the need to maintain the conditions of social harmony with equal

liberty for all. However, today's preconceived ideas about the emotional and erotic relations between people of the same sex would not pass this test.

To claim that such relations should not be recognized, on the grounds that they go against the religious fabric and universal morality, comes up against the constitutional ban on the state compelling all citizens to have a determined set of religious convictions. Arguments about religious conviction cannot be legitimately used in a democracy when they are purely religion-based, as no religion determines precepts, duties and rights for all citizens, since not all are followers of the religion that claims to be or is, in fact, dominant. Freedom of belief, one of the cornerstones of democracy, prevents the obligations required of all followers of a given belief from being imposed on all citizens. Drawing on Christian, Jewish or Islamic ideologies is not sufficient – I purposefully cite these denominations as homosexual relations are not the object of the same taboo in many other religions and cultures.[3]

Freedom of religious belief is, therefore, a democratic and constitutional barrier to arguments of this type, when talking about state legislation. Article 5 (VI) of the Brazilian Constitution is explicit: "Freedom of conscience and of belief is inviolable, the free exercise of religious worship being ensured and, under the terms of the law, the protection of places of worship and their rites is guaranteed". Nevertheless, if freedom of conscience is inviolable, those who do not share the same religious convictions of others (even though the others may be the majority) cannot yield to laws whose *raison d'être* is justified purely on religious belief.

The Brazilian Constitution also adds another extremely important ingredient to the debate: "No one shall be deprived of any rights by reason of religious belief or philosophical or political conviction, unless he invokes it to exempt himself from a legal obligation required of all and refuses to perform an alternative obligation established by law" (Article 5, item VIII).

The religious conviction of others, therefore, may not deprive of rights a social group that does not refuse to observe the general obligations of citizenship. Besides being free to believe, Brazilian citizens are free not to be deprived of rights by religious groups that have enacted laws founded on their

3. This is not the proper place to cast doubt on the very religious grounding of taboo. As many a theologian has said, it is a clear sign of bad faith that religions selectively choose which of their traditions survive and impose this selection on everyone. As such, the groups are not few that, inspired in Judaism or Christianity, ignore the obligations of animal sacrifice, rituals of cleaning and segregating the sick and women, alimentary taboos, and so on. For what reason do they continue to consider an abomination relations between two people of the same sex, but not alimentary taboos?

religious convictions. To say, therefore, that the rights of others due to the "religious fabric" of the majority or the "natural law" of a manifest or pseudoscientific character (and if it is not scientific, it is therefore a belief, a question of conscience) does not extend to certain groups (such as gays and lesbians) is in stark contrast to constitutional law.

The same goes for a claim such as "nobody could be happy like that". It so happens that modern and democratic law does not presume to make people happy. People can be happy the way they like, provided they do not cause any harm or prevent others from also searching for happiness. This is the meaning of civil liberty and tolerance between citizens of a democratic state. It is not the responsibility of the state to make its citizens happy in their private lives, and the happiness of others should be the problem of others. In a particularly pertinent passage, J.R. Lucas (1989, p. 262) says that the expression "take care of your life" is a good summary of the principle of justice and tolerance. "'Take care of your life'. Although this is an inadequate definition of justice, even so, it is an important remedy for an exaggerated solicitude to others. There is ... a conceptual bond between justice and freedom, to the degree that it is part of the requirements of justice that each individual must be able to conduct his/her own life".

Social solidarity in mass societies that are bureaucratic, democratic, tolerant and, in a word, just, is not the same as public control of individual happiness. Nor is it the same as social control: freedom from the interference of others is one of the key benefits of democracy, and is an element that makes it desirable.

Another line of argument for the legal system to ignore the rights of homosexuals and not to "encourage" them attempts to base itself on scientific grounds in two ways. The first claims that natural is what exists empirically, and unnatural is what is not found in other species of animals. The second combines the functions and regularities of nature with the purpose of human action and transforms natural functions into moral maxims (deriving the **ought** from the **is**, as Hume puts it).

The first claim argues that cohabitation of two people of the same sex is unnatural and that such relationships do not exist in nature. In this sense, the alleged grounding for

legislation is simply incorrect: to say that erotic-affective unions between human beings of the same sex is "unnatural" because it does not occur in nature demonstrates plain ignorance of the facts. And cases do exist in "nature", rendering the argument groundless, as proven by empirical evidence: the establishment of relations between individuals of the same sex has been discovered in several mammals.

According to the second line of reasoning, unnatural means against the purposes of nature, and, as such, the argument contains two flaws. The first concerns the purpose of nature, which cannot be determined by science. To do so would be to presuppose the existence of a subject, or a conscience, behind the regularities of nature; this is equivalent to personifying nature. This is why, in modern science the functionality of events should not be confused with their purpose. Transforming natural functions into purposes is an error in the order of categories and precludes logic. Although sexual contact may be functional for the reproduction of the species, one cannot derive from this that the purpose of this contact between human beings is, or ought to be, the reproduction of the species.

Morality and ethics are the fields in which we shape and interpret human behaviors that are independent of natural determinisms. Human beings are valued as people precisely because they are capable of undertaking purposes (this we call autonomy), as opposed to the determining regularities of nature. We are people because we are subjects and not objects. Purpose is not compliance with a natural determination. Nobody has the purpose of dying: the fact that we all die eventually is a determining regularity of nature. In moral arguments, it is not simple to invoke nature as a determiner of prescriptions: nature is not prescriptive, it is determining, altogether a very different thing.

In the last century, even Christian theology rejected such a simplistic assertion. Dealing specifically with Roman Catholic tradition, the constitution *Gaudium et Spes*, of 1965, states: "Marriage to be sure is not instituted solely for procreation" (*GS*, 50). It emphasizes that marriage consists of the expression of love: "This love is uniquely expressed and perfected through the appropriate enterprise of matrimony. The actions within marriage by which the couple are united intimately and chastely

are notable and worthy ones" (*GS*, 49). Along the same lines, now that the years of the great debate of the mid 20th century have passed, the official *Catechism* (of 1992) stipulates that, in addition to the transmission of life, an equally important purpose of marriage is the "good of the spouses" (Part III, Section II, Chapter II, Article 6).

If this were not the case, all infertile humans, for example, would have to be banned from having sexual (and affective) relations and from marrying. But simple infertility, or *impotentia generandi*, has never been cause for annulling marriage. The *Code of Canon Law*, in force since 1983 for the Roman Catholic Church, consolidates the long tradition on this subject: canon 1084, paragraph 1, states that impotence, or *impotentia coeundi*, can invalidate marriage, but it is explicitly stated in paragraph 3: "... sterility neither forbids nor invalidates a marriage".[4]

4. In the *Code of Canon Law* from 1917, the same rules were contained in canon 1068, paragraphs 1 and 3.

Grounded on this valuation of the reciprocal good of the spouses, Michael Sandel (1996, p. 104) criticizes the defense of the rights of homoerotic individuals based only in the negative liberty (negative tolerance). As far as he is concerned, a positive argument is also available, stating that loving relationships between individuals of the same sex are good, just like all loving relationships are good. Therefore, in respect not only of the issue of freedom, but all the idea of goodness, it should not be difficult for courts to positively value these relationships.

Finally, the alleged scientific argument against the "impulse" of erotic and affective relations between people of the same sex appears to be caught up in a strong contradiction. While it is asserted that homoerotic orientation goes against nature because there is no homoerotism in nature (a claim that has already been proven wrong), the argument also suggests that the choice is influenced by cohabitation and education. It also presumes that "nature" determines things for all beings except humans (for whom sexual orientation depends on impulses rather than natural determinisms); and that the law should, if nature fails, step in to substitute it. The problem is considered a behavioral "disease" and, worst of all, a contagious disease.

The coherence of the assertion is at best doubtful. As we well know, the vast majority of gays and lesbians are born into

heterosexual families and they spend most of their lives with heterosexuals (the majority of the population) – environments, incidentally, in which they are submitted to all kinds of moral and physical violence. How, why and because of who do they feel the impulse to belong to this vulnerable group that has been subject to so many limitations, to so much violence and humiliation throughout history? The argument appears to suppose that public recognition of such relations would encourage heterosexuals to convert and become gays and lesbians. What kind of contagion is this that can transform somebody in a gay person but cannot transform a gay into a hetero? So it concludes, as such, that sexual orientation is cultural and social – it is, therefore, not natural. If it were determined by nature, it could not be changed. But if it is not natural, the argument that draws on nature to ban a behavior is impaired.

Therefore, the ban on equal rights for gays and lesbians needs to be based exclusively on moral grounds and, as the intention is to maintain a free and democratic society, arguments of a critical morality, and not a traditional morality, need to be employed. Of course, none of this has any value if the conception of public space, law and politics is intolerant, traditionalist and assimilationist. If what is at play is genuinely the imposition of homogeneity (ethnic, religious, political or sexual), then a difference in sexual orientation is just as malignant as any other, and it is no coincidence that during the Nazi regime homosexuals were also sent to the concentration camps.

Secular and critical arguments, therefore, should be fundamental. And among these secular and critical arguments there are none that invalidate the principle that, among free adults, certain interferences by the state are unacceptable.

The right to recognition: how will it come about?

Recognition consists of an assertion and a positive valuation of a given identity. The right to recognition, therefore, must be asserted as a right first and foremost, and it will need to be translated into public efforts – state and non-state – to remove from a stigmatized group the legal consequences of a social stigma.

How would it be possible to convert this right to recognition into duties, and who should it benefit? I shall turn briefly to the topic of subjective rights. Since the 16th century, the most evident example of subjective rights has been that of *dominium*, which over time was broken down to property – as we imagine it today – but previously involved a series of other powers, such as jurisdiction itself. Princes and male parents had not only commercial and economic *dominium* over things, but also powers of lordship over their subjects and kindred.

In any case, the important thing is that subjective rights ended up being handled in an exemplary manner in the field of property, on two fronts. Firstly, and concerning its concept: property owners were those who could use, enjoy and dispose it. Second, the forms of transfer of power came to constitute the chief field of duties. Therefore, defining powers and determining how they circulate among the people appropriately summarizes the reflection on subjective rights. However, the discussion of subjective rights takes place within the framework of the rules of commutation or exchange. It presupposes that the important thing is to define how things change hands and how they end up in the hands of their owners.

A different sphere is the reflection on distribution. In this field, the problem does not consist of defending existing rights, but in assigning rights out from the assumption that they have not yet been distributed. This is not a historical reflection, but a critical reflection on who should have what. There is a specific difficulty with the rules of distribution: they do not presume that there are already owners of subjective rights, they only presume that everyone should have access to a certain item. Rules of distribution differ from rules of commutation because they do not assign rights to some against others (to the other, as a personal right; to all the others, as a real right), but rights to all against all. The most evident examples of distribution are company laws. There are rights belonging to all partners before being rights of one partner against another partner, or against the company.[5]

To begin with, it is my understanding that rights to recognition need to be placed within this sphere. The struggle for rights to recognition is a struggle for distribution, the distribution of an item that only exists and is only produced socially: respect. We are not dealing here with a commutative

5. Iris M. Young (1996) would disagree with this analysis. As far as she is concerned, distribution occurs with items that can be individualized (income, opportunities, etc.), which is not the case with respect, and the politics of identities does not imply the distribution of anything, only the dismantling of systems of oppression (could distribution dismantle exploitation?). Even so, I believe that we can talk about distribution if we imagine that the image of social groups constitutes a social product, something common (indivisible) and that can be changed. In the *Nicomachean Ethic*, Aristotle presents honor as an example of an object that is distributed proportionally. Obviously, honor in a non-egalitarian society is different from respect in a democratic society; but the respect exists precisely to the degree that it is universally and equally distributed. To address the topic as distributive justice also seems to me to be important, as it is legally relevant: the commutative relations enable legal solutions of simple and bilateral adjudication, while distributive relations call for solutions of plurilateral or administrative adjudication.

respect, but a distributive respect that is, consequently, universal. When a society organizes itself in a hierarchical and unequal manner, respect cannot be distributed equally and universally. In the political language of old, honor consisted precisely of unequal respect: some had it, others did not; some had more (greater honor) and others less (lesser honor); in these terms, it was treated as a scarce item, which could not be distributed equally to all citizens. Respect, for its part, is the counterpart of universal dignity.

Respect itself, the equal valuation or esteem of all human beings, is conditioned to the social production of a positive or negative image, of a trait that identifies a group – skin color, education level, ethnic background, gender or sexual orientation. And the production of this respect sometimes depends on the social perception of the characteristic responsible for the socially created image: is it visible or invisible, mutable or immutable? I am also referring to distributive respect, taking into account that "respect" is an indivisible and socially produced item.. Therefore, if the image of a given group is negative, this distinction is a social production.

The new legal problem is the dispute over public image. Reparation of injustice, in this case, is not of a purely individual character, but social. The struggle for recognition is a dispute for two different things: for recognition of the dignity of the person demeaned or offended by the majority; and also a struggle against the injustice that consists of demeaning an entire group. Accordingly, it is not a struggle to convince the majority of the value of a minority, but a struggle for pluralism.

Naturally, pluralism and tolerance have limits: the intolerant, for example, can at times be restrained. For gays and lesbians to be recognized and tolerated on these terms, they must not be confused as being intolerant themselves, or as being a group that wants to dominate the social landscape. This is one of the underlying themes of various arguments against recognition for gays and lesbians (who are perceived as being "corruptors", traitors to social life). It is not about giving each human being belonging to that stigmatized group the opportunity to simply shake off the stigma. It is about destigmatizing the entire group, demonstrating that the stigma is founded on prejudice and discrimination, which are unacceptable in a democratic society.

Traditional subjective rights were assimilated to property: the property of oneself and one's possessions made up the core of the idea of subjective rights. Having rights meant being the master of oneself and of one's possessions. Consequently, having rights meant having legal protection against acts that violated one's person or property. Generally, this was done by the criminalization or civil penalization of behaviors, giving the victims the possibility to claim the item, or its equivalent in money, by way of compensation. The guarantee of a subjective right was given by the instruments of commutative justice (corrective or retributive): return to someone what belongs to them, repair the damage caused, apply a punishment proportional to the injury caused the other person.

It is natural that the legal defense of the right of property or freedom takes place when someone is either a proprietor or free. The non-proprietor and the slave have nothing to defend. For them to have something, they need to assert a right to distribution of things and to freedom. Under these terms, distribution is a logical precursor of all rights.

This distribution was the object of the struggle for social rights in the 19th and 20th centuries. Social rights were, therefore, conceived as rights of distribution or redistribution. In distribution, one does not conceive of each person as having the right to something; rather, each person has the right to a part of something, which is common. The rights of shareholders to dividends operate exactly in this manner. Nobody would assert, before dividends are distributed, that shareholders do not have a right to such dividends. Until the division is made, they do not have the right to a specified part of the dividends, but they do retain the right to the dividends. This is why there are certain things a Board of Directors cannot do, under pain of infringing on the shareholder rights (of a yet undetermined content). Shareholders, therefore, enjoy remedies that could be described as "collective" or "diffuse", since they have the right to something that remains undivided: while the profit is not "distributed", each shareholder has a right to a part of the common fund (the profits of the business activity).

When speaking of the right to recognition, we speak of something which extends beyond the respect due each individual under the universal democratic rules of tolerance and freedom.

There is no doubt that the ultimate grounding of the right to recognition, the right to be different, as some call it, is the universal subjective right of freedom. Sérgio Paulo Rouanet is right when he says that the defense of certain groups is grounded in the defense of the right of the individuals of that group to lead their lives, to be treated as human beings regardless of the fact that they belong to that group. Women want to be respected as human beings just as complete and worthy as men, and this is the ultimate objective in the defense of women's rights. If, in order to grant them full and equal respect, it is necessary to recognize the differences, then so be it.

Along this line of reasoning, one might say that legal difference is purely instrumental for moral equality, and that the specific difference of who is gay or lesbian enables us to distinguish them apart, denying them some right. This is why the right to recognition calls for an identification, from a social and legal point of view, of the historically negative valuations about a given identity. To belong to an identity group is not the same as belonging to a voluntary association. This is because the tolerance shown to identity groups is different from the tolerance shown to opinion groups. Opinion groups are accepted because they do not force anybody to think one way or another, and contact with the opinions can be illuminating and prompt better decisions. But with identity groups, it is not always possible to come and go freely: one does not change one's ethnicity or sexual orientation like one changes one's opinion.

To talk about "dissidents" is one thing; to talk about those who are "different" is another thing altogether: is the tolerance extended to dissidents the same as that shown to those who are different? Essentially, there are many similarities: tolerance of dissidents stems from the understanding that mere difference of opinion does not make someone a traitor or a murderer. Accordingly, mere difference of opinion does not justify the elimination of the dissident, or the denial of their civil or political rights. But certain attitudes indicate that the rhetoric in support of the rejection of the rights of those who are different is the same as the rhetoric that preaches the elimination of those who are different. Foreigners or homosexuals should only be accepted as equals if they renounce their respective identities. So, they have two options: either

assimilate (convert) or hide (disguise or conceal themselves). The right to recognition is a right to maintaining one's identity, provided this does not prevent the simultaneous existence of other identities. It is an outcome or a specialization of tolerance – tolerance of those who are different.

Perhaps this is more problematic than it appears, as the difference may be precisely what one wants to preserve, not abolish. It is in these terms that the discussion occurs on the right to be different, the right to recognition, with two distinct meanings.

In the first place, the right to be different can mean exactly the same as the implications of fundamental rights in a democratic program: that no individual characteristic may be taken into account by legislators or courts to restrict a person's rights, as long as this characteristic is not justified as a sufficient differentiator. Differences of birth, ethnicity, gender and so on are proscribed from the legal framework. To treat someone differently on these terms means not recognizing that person individually for who he or she is. The legal remedy for the lack of individual recognition is the banning of such acts by the rule of isonomy. And it is worth emphasizing that this isonomy is always created socially – as we well know, to equate men and women in all respects is a fairly recent construction. Respect for difference means here only the purposeful irrelevance of the difference, an intentional disregard of empiric difference.

Secondly, recognition can mean the removal of the negative valuation of a given identity, whether to assert it positively or, more importantly, to assert that the identity, when it comes to social and political-legal life, is irrelevant. On these terms, the individual not only has the right to be treated like all others, needing to prove – through valiant efforts – that he or she is exactly the same as others. In this second perspective, it becomes his or her right to see his or her specific difference not disrespected publicly. The right to recognition, at this point, acquires the distributive aspect I mentioned previously, since the identity is not specific to one individual, but belongs to a group. It is this common item (an identity) that deserves public respect, which means neither admiration nor sympathy. Nobody is obliged to convert to Afro-Brazilian cults, to Islam or Christianity in order to be publicly respected. Just as the law does not enforce love, respect for social pluralism is not to

be confused with the right to change the conviction of others.

Kant says that universal love does not mean universal affection, but that it can and does mean universal respect. The right to recognition means, therefore, respect for a given collective identity. Martha Minow chose a very fitting title for her book on the rights of minorities (1997): *Not only for Myself*. The rights, which are claimed under this form of recognition, are not exclusively individual, they are "not only for myself". The recognition that is sought, in the form of a right, is for "anyone", it is universal.

Nevertheless, this positive construction of difference – or the deconstruction of the negative difference – establishes a conflict in two senses: in the sense that the distribution of the value of the identities needs to be questioned, and in the sense that the identity of each group is something that is distributed universally among all its members.

In the first sense, redress for discrimination, past and present, should be embodied in practices intended to alter, for the future, inherited historical conditions: the dissemination of information and the teaching of tolerance become the rights of all and benefit the groups traditionally submitted to physical and moral violence and traditionally treated, as United States constitutional law puts it, as a "suspect class" (Gerstmann, 1999, *passim*). Redress for passed discrimination is not a privilege, or a special right of a group, but instead redress for a special injustice against a group. Without this redress, historical situations of injustice would tend to be perpetuated.

In the second sense, the violence directed at someone for being a member of the group may be considered an act of violence or an offense against all members of group. That is, if the physical or moral integrity of a member of a group is at risk because he/she belongs to that group, the security and respect the person is entitled to is converted into a common (indivisible) item, which belongs to all members. Intolerance, once it is accepted in social life, knows no limits, creating a vicious circle of exclusions. This is why class actions have proven to be important in this case, since by definition they benefit all members of a class or a group. Distribution is achieved in the very outcome of the process: all members of the group benefit from a positive outcome, reducing the risk of exposure of its more vulnerable members.[6]

6. Class actions also face some specific legal and political problems, of which I will point out just two: (1) they may be used in a paternalist manner, as they possess some clearly paternalistic groundings, such as the idea that the groups the class action is defending are weak and defenseless, or "hyposufficient", and need a representative, because they are incapable of defending themselves; and (2) they may be demobilizing, by encouraging the free-rider effect, or predatory behavior, enabling one of the action's beneficiaries to not pay their share of the costs. These two "defects" of a class action should be remembered by those employ them, although distributive problems undeniably need specific legal redress such as class actions.

The Supreme Court of Justice and the recognition of homosexuals

Various rulings handed down by the Supreme Court of Justice (STJ) illustrate what the right to recognition is in the first sense: tolerance, negative freedom and non-discrimination. The decision on Special Appeal 154857/DF, published on 26 October 1998, is perhaps the most exemplary (rapporteur Minister Luiz Vicente Cernicchiaro). The capacity of a homosexual to testify had been opposed, alleging among other things the person's "moral deviation" [sic]. The STJ accepted the appeal to reestablish the witness' capacity. The argument of the STJ is typically one of tolerance and non-discrimination: a person's sexual orientation does not interfere with his/her capacity to testify, and so it cannot be used as a justification not to hear such person. "Thus the principle of equality, enshrined in the Constitution of the Republic [of Brazil] and in the Pact of San José, Costa Rica, is upheld".

What is important about the decision is that discrimination based on sexual orientation is considered incompatible with the Brazilian Constitution (for violating fundamental rights) and with the Inter-American Convention on Human Rights (for violating human rights on an international level). It means that a constitutional norm prevents sexual orientation from being considered as a criteria for differentiating citizens.[7] Note, particularly, the fact that lower-level local court had actually been capable of invoking the sexual orientation of a witness as a "moral deviation", and it was only at a higher court level that this "deviation" was declared irrelevant.

Other cases have addressed the recognition of the right to division or moiety, in short, the recognition of *de facto* partnerships between people of the same sex. In this case, the question is slightly different. We can say that a form of recognition exists for same-sex unions, as it uses the exact same groundings (the existence of a common effort to accumulate possessions) adopted decades ago, when the bond of marriage was considered indissoluble and the law prevented more than one marriage. At that time, marriage-like cohabitation (*more uxorio*) between heterosexuals could not be formally accepted, although courts gave partners reciprocal estate rights. It was a

7. The central argument in the work of Roger R. Rios (2000) follows exactly along these lines: despite not being expressly stated in the Constitution, discrimination based on sexual orientation is unconstitutional and a violation of fundamental rights and of human rights.

half-way acceptance of the conjugal partnership. By resorting to an equivalent argument, the STJ opens up towards a recognition of the union. But there is a limiting factor: it is the recognition limited to matters of estate, and not a positive recognition, as Sandel says (1996), which includes the affective relations established between the partners.

This recognition is implicit, however, in Special Appeal 148897/MG. In its award, the court recognized that the partner has a right to his or her share in an common asset obtained during the cohabitation, although it denies the survivor compensation – claimed against the father of the deceased – for moral damages caused by having shouldered alone all the responsibilities resulting from the deceased's illness. In adopting this approach, the court applied the same logic that it would apply in the case of a heterosexual couple: the husband or the wife that survives, under the Brazilian legal system, is not compensated by the families for having suffered as a result of the illness of the deceased spouse. What's more, this cohabitation, "in sickness and in health", is part of the marriage contract, according to the terms accepted today. This is why, by dividing the possessions but denying compensation, the STJ took yet another step towards narrowing the gap between gay and lesbian cohabitation and the cohabitation of different-sex partners.

Conclusion – what, after all, is due to gays and lesbians as a fundamental right?

Matters of rights need to be resolved in such a way that we can say what "each one's own" is. When one speaks of social rights, for there to be an "each one's own", we need to define, first of all, what is the common part, of which each one shall have their "own". In capitalist societies common property has been dissolved and everything transformed into an object for individual appropriation. Under these circumstances, the need arose to channel everyone's contributions – proportionally – to the formation of common funds: by levying taxes and social contributions. From these funds come, or should come, the provisions for social rights – health, education, pensions, and so on. We are experiencing today a period of criticism of this model of constituting common funds, criticism aimed at both

the inefficiency of their management (in the name of privatization) and the very possibility of their existence (in the name of competition between economic agents).

I feel altogether sure that, for a legal point of view, social rights were met as a result of the following two processes: the creation of funds and the distribution of common funds. These funds have enabled us to "commodify" (reify, convert into a commodity or credit) the expectations for accessing the social results of economic production. Meanwhile, they also allowed us to measure (albeit imperfectly) the accesses permitted to these funds. By "commodifying" the access, the legal system created very specific tensions. It introduced a fund manager – the state – that appears in reality to be the "owner" of the fund. This was decisive in permitting a universalization of the funds, preventing them from being merely sectorial or corporative. At the same time it disassociated, in the eyes of the jurists, the two extremes of the system: contribution and distribution. It appears that these funds can exist without the contribution of anyone, and legal conflicts concerning contribution are debated in one sphere, while the conflicts of distribution are debated in another. Tax jurisdiction regulates only the relations of the state with the taxpayers and adopts, in this sphere, an approach that is clearly restrictive and protective of the contributor.[8] The conflicts over distribution are processed independently, and permit attitudes that are generous towards the beneficiary. In the long run, the accounts tend not to balance.

Claus Offe (1991) observes that there is here evidence of distinctive rules being applied: one is the rule of solidarity, and the other the rule of interest. Concerning social rights, a "commodification" exists, resulting in a separation of solidarity from interest. Interest appears as if it had no counterpart, and is asserted, therefore, as an individual civil right. The individual civil right, rather like Dworkin's absolute rights, is irresponsible, says Offe (p. 84), it can be claimed by a person without any counterpart by such person. The classic social right, however, presupposes that there is solidarity and that the counterpart of a social solidarity fund exists: its concession depends on whether the fund exists and the respective rules of access.

The right to recognition is distinguished from a social

8. The research of Marcus Faro de Castro (1997) reveals that in 75.57% of the conflicts between public authorities and private individuals, the decisions of the Supreme Court (STF) were in favor of the private individuals, which prompts him to say that "the STF, even in its routine activities, has ruled against the prevalence of the initiatives of the state, which includes the implementation of public policies" (p. 153).

right in an important sphere. It can be difficult to "commodify". Recognition, as Fraser says (1997), does not aim to redress an injustice related to material goods, but to an immaterial good (moral, if you like), which is respect, the public image of a person or a group. This right to recognition is unlikely to be established with the creation of a compensation fund, pure and simple.

This is why, as she says in a previous paragraph, the right to recognition refers to a good – reciprocal and universal respect – which is the common (social) product of life in society. The social image of a group, like a common good, cannot be distributed in a commercial manner. It is distributed universally and equally and, therefore, it is similar to the Dworkin's absolute rights and Offe's irresponsible rights.

Whoever claims the right to recognition requests that the distribution of social identity should not establish hierarchies based on a specific identity trait. The claim is made that all identities should be treated legally and politically as equivalents. It is about asserting the right to be different and for this difference to become irrelevant. It is a combination of modern and Illuministic universalism, with pluralism: a simultaneous claim for universalism and social perception of the "queer theory". The dissolution of sexual identities, the assertion of all sexuality, is done in the name of what is universal. Rouanet (2001, p. 89) recalls that universalism is critical precisely because it prevents the parochial forms of thinking and judgment from aspiring to a universality that they cannot have. Therefore, he says, those who defend universalism "condemn sexism, not because they specifically identify with the feminist statute, but because they reject the validity of all specific statutes and because they consider that these statutes are almost always imaginary creations, destined to deprive empiric individuals of their prerogatives as possessors of universal rights".

This pretension can be protected by the law, as, for instance, when it is shown, in specific cases, how gay and lesbian people are degraded in the treatment they receive from the legal system: simply because of the sex of their erotic and affective partners they see themselves deprived of the benefits extended to other citizens, such as the simple right to testify,

the right to contribute to the public pension system, to be eligible for income tax deductions, and so on. In addition, it can be said that homosexuals have the right to be treated with respect in the public demonstrations of all, and since rhetoric from social groups that incite hatred are not tolerated, the law also serves to repress unlawful public demonstrations. This type of crime victimizes the collectivity, since it breaches democratic coexistence.

In short, much can be said and done by the law; but, given the still oppressive nature for individuals who are publicly degraded, it is legally necessary, on many occasions, for actions to be taken by procedural substitutes. And also because the degradation we are referring to is of a "diffuse" (it can affect anyone) and antidemocratic nature.

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