

Towards a democratic right to sexuality

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Introduction

This essay grew out of a series of activities developed by the CLAM [Centro Latino-Americano de Direitos Humanos e Sexualidade, or Latin American Center for Human Rights and Sexuality] which propose to develop a multidisciplinary perspective on sexuality. In addition to the Center's data base on sexuality, its reports on sexual policy in Brazil and its work on sexuality in the Social Sciences in Brazil, the present article aims to reflect upon sexual rights from the standpoint of the Brazilian legal debate. It does not purport to supply the reader with an exhaustive listing of all the subjects and problems engendered by sexual rights, nor to take inventory of Brazilian authors and considerations on the subject; rather, it presents the principal elements for the development of a serious legal approach towards human rights in the field of sexuality, while considering the current status of this debate on the national scene.

It represents an attempt at systematization that proposes to introduce among us foundations for a broader and more coherent legal debate regarding sexual rights, based on enunciating the fundamental principles of human rights as applied to issues raised by sexual rights. Its purpose is, therefore, to collaborate towards the advance of the legal debate on sexuality from a human rights perspective.

Within this context, sexuality and the sexual rights associated with it will not be approached as objects that require ethical discipline or therapeutic intervention, for which legislation would be one of the privileged instruments of formulation and legitimacy along with other areas of knowledge such as medicine, psychoanalysis and religious philosophy. Nor will they be discussed as elements whose meaning would only make sense in family-related cases, kinship relations and the constitution of individual subjectivity or social reality (Loyola, 1999). Diversely, sexuality and sexual rights will be considered as elements whose influx of fundamental principles, as supplied by human rights, can and should determine the gaze of the various forms of science and knowledge concerned with them in a democratic society.

In effect, to develop the idea of sexual rights from a human rights perspective points to the possibility of the free and responsible exercise of sexuality, creating foundations for legal regulation that surpass the traditional repressive approaches which have characterized legal intervention within these spheres. It implies, so to speak, a positive understanding of sexual rights in which the group of legal norms and their applications would move beyond restrictive regulation in order to forge conditions for a right to sexuality that is emancipationist in spirit.

To this end, it is necessary to seek out principles which might simultaneously include the great guidelines² according to which the current debate on sexual rights has been structured, to wit: questions of identity associated with the expression of sexuality (including the subjects of homosexualities), sexual

² These guidelines were listed by Sérgio Carrara in a talk given at the *Homossexualidades: identidade, política e produção cultural* [Homosexualities: identity, politics and cultural production] seminar held by the ABIA – Associação Brasileira Interdisciplinar de AIDS [Interdisciplinary Brazilian Association on AIDS], in Rio de Janeiro on October 29, 2002.

relations proper and their consequences – a field extending to various topics such as consent, violence and abortion – and the search for a foundation for sexual rights, historically bound to the idea of sexual health...

The construction of this approach demands a consideration of the relationships between democracy, citizenship and sexual rights, foundations for proposing a democratic model for understanding sexual rights which I call the *democratic right to sexuality*.

In fact, democracy and citizenship are central to the agenda of various contemporary social movements. Through their articulation, a varied spectrum of claims has been advanced, encompassing the most varied sectors of individual and collective life. Among the effects of this dynamic is an increasingly widespread comprehension of the multiple dimensions required for the construction of a democratic society that would include demands for social, economic, political and cultural inclusion. Such dimensions likewise signal an expanded concept of citizenship, traditionally associated to a legal status only by virtue of national pertinence.

As understood by national and international legislation, the idea of human rights also reflects this dynamic. The evolution of international instruments for the recognition and protection of human rights – from the universal declaration of 1948 to a declaration of economic, social and cultural rights; and to attention to concrete issues related (for instance) to gender and infancy – allows for this perception. Increasingly, human beings are seen as subjects of rights which extend far beyond mere nationality.

Among aspects implied within these dimensions, sexuality is probably among the most controversial and the one in which progress is made most slowly. Despite the increased visibility of feminist, gay, lesbian trans-gender and sex worker movements, there is still much work to be done before these groups are allowed equal participation in social life; despite occasional approval by protective legislation of certain rights, it would appear there is still a long way to travel before such legislation is ratified. Many factors contribute to depriving certain individuals of their rights and limiting their opportunities, factors which are the object of attention from a variety of perspectives.

From a legal perspective, the concepts of reproductive rights and sexual rights have been translating this effort. Those advances obtained notwithstanding, theoretical and practical reasons recommend further advance. To this end, it would be necessary to develop a “democratic right to sexuality”, an examination, so to speak, from the perspective of human rights and fundamental constitutional rights, of the various legal norms whose scope of protection is alert to the various manifestations of human sexuality.

The importance of this task goes beyond technical-scientific coherence and the cultivation of intellectual knowledge. To build, as far as possible, a more systematized legal approach allows legal professionals and social movements to have a more efficient instrument for intervention, in addition to pushing for an intensification of the debates in a coherent way and allowing the democratization of the discussion and, consequently, of the legal and political system as a whole.

Such is the sense in which this article proposes to make a contribution. To this end, after contextualizing the idea of reproductive rights and their connection with sexual rights (Part 1), I shall present certain elements which I consider essential to the development of a democratic right to sexuality (Part 2), highlighting their scope of protection, basic principles, extension and relationship to the concept of minorities,

and ending this part with a few considerations regarding homosexual unions within this context. The last two sections deal with the most frequent objections to the development of such a perspective (Part 3) and certain sensitive subjects which are a part of this construction (Part 4).

In bringing this introduction to a close, I should like to situate this work within the scope of the great western and contemporary legal traditions. The proposition of a democratic right to sexuality is nourished by the experience and debate existing in the Roman-Germanic system (at the source of the national legal systems of continental Europe and Latin America) and in Common Law (present in England, in the United States and countries of Anglo-Saxon colonization). Not only is this approach compatible, it also derives directly from the responses being constructed in both legal systems. In fact, each in their own way, parliaments and courts have reacted to the demands that the exercise of sexuality currently produces. The analysis of these responses – without depending on the legal tradition from which they spring and the parliamentary (Roman-Germanic) or jurisprudential predominance in the production of the law in each one of them – is at the base of this study; the legal principles proposed and systematized herein are pillars and keys for updating such legal traditions regarding sexuality.

Part I – Sexual citizenship, reproductive rights and sexual rights

In this section, I shall outline a brief history of issues related to sexuality within the scope of international instruments for human rights. The approach is justified insofar as issues of sexuality within a human rights context generally start from the idea of reproductive rights in order to arrive at sexual rights. Thus, I shall begin by noting the principal stages of this development that I may then discuss some of its limitations.

1.1. Reproductive and sexual rights in international human rights law

Within the scope of sexuality, international instruments for human rights have evolved towards recognizing the situation of women's vulnerability, with the idea of reproductive rights as a starting point (Cabal, Roa & Lemaitre, 2001; Vargas, 1996). In effect, after the generic and abstract proclamations regarding the rights to life, health, equality and non-discrimination, to physical integrity and protection against violence, to work and education (as described in the Universal Declaration of Human Rights, in the International Pact for Civil and Political Rights, in the International Pact for Economic, Social and Cultural Rights and in the American Convention for Human Rights), there has been a succession of international documents and conferences specifically concerned with reproduction and, consequently, the condition of women.

In this sense, the First International Conference on Human Rights (Teheran – 1968) recognized the importance of women's human rights and decided on the need for measures to promote them (art. 15). The General Assembly of the United Nations declared 1975 to be the International Women's Year, and established the period extending from 1976 to 1985 as especially dedicated to improving the conditions of women, promoting two world conferences during the period (Copenhagen, 1980, and Nairobi, 1985). Prior to these dates, the important Convention on the Elimination of All Forms of Discrimination against Women was promulgated in 1979.

In 1993, the World Conference on Human Rights took place in Vienna, declaring the human rights of women to be an inalienable, integral and indivisible part of human rights, their participation under equal social conditions and the eradication of all forms of sex-based discrimination being mandatory, in addition to those which refer to violence against women.

In 1994, the Cairo International Conference on Population and Development established a program for action that declared reproductive rights to be a category of human rights previously recognized by international treaties, which included the right to all information, education and necessary means for determining the free, responsible choice of the number of children and the interval between them. Important to the purposes of this study was the declaration that reproductive health enables the ability to enjoy a satisfactory, risk-free sex life. Overall, the document reaffirms the importance of more egalitarian gender relations with greater liberty for women and freedom from discrimination and violence.

It is also relevant to mention the rights of men, women and children to obtain information and access to safe, efficient, acceptable and self-chosen methods of regulating fertility. The Cairo Action Plan was a

result of this conference and, in addition to introducing the concept of reproductive rights, it signaled the recognition of sexual rights, highlighting that of the discrimination-free exercise of sexuality and reproduction, coercion and violence; in the same opportunity, it was also agreed that the States-Parts, in addition to stimulating and promoting the respectful, egalitarian relationship between men and women, should: 1. be alert to the needs of adolescents, enabling them to better decide on the exercise of their sexuality, and 2. devote special attention to those segments of the population which are most vulnerable to human rights violations in the areas of reproduction and sexuality (Ventura, 2003. p. 14).

In 1995, the Fourth World Conference on Women took place in Beijing and confirmed the directives defined in Cairo. It reiterated the need to protect the rights strictly linked to reproductive rights, such as sexual rights, the right to health, to integrity, to protection against violence, to equality and non-discrimination, to matrimony, to education and to protection against sexual exploitation. It is worth emphasizing that the 'Women and Health' chapter of the Beijing Platform dealt with fundamental issues such as the recognition of sexual and reproductive rights, affirming the right to the free exercise of sexuality through, especially, the emphasis of sexual health.³

Regional in scope, and of particular importance to Latin America, was the Convention of Belém do Pará (1994), devoted to the prevention, punishment and eradication of violence against women, emphasizing explicit concern with violence perpetrated within the domestic setting, holding the state responsible not only for acts of violence in this area but also for the tolerance of private acts against women.

In interpreting various normative instruments, the subsumption of domestic violence and high maternal mortality rates to the right to life must be emphasized, along with the safeguarding of physical integrity and the prohibition of inhuman, degrading treatment and torture; gender-free access to reproductive health services and the right to generic health services; the abjuration of sexual violence and torture; of sexual violations during armed conflicts including crimes against humanity and war crimes (in accordance with the *ad hoc* tribunals for Yugoslavia and Rwanda and the Statute of the International Penal Court); obstacles to the control of fertility as violations of reproductive autonomy, as well as involuntary sterilization and the imposition of contraceptive methods; and medical indictment of abortion as a violation of intimacy, a right which also includes decision-making with regard to one's own body and reproduction.

Within the context of these international instruments, the right to equality and non-discrimination has been extensively developed. Beyond its relations to many of the abovementioned rights (and given women's situation of disadvantage), current interpretation of its commandment of equal conditions for the exercise of various rights and the overcoming of discriminatory barriers points to the prevention and repression of discriminatory behaviors, to the adoption of positive measures, protection from sexual harassment, pregnancy

³ Item 30 of the Declaration of the World Conference on Women ensures "equal access to and equal treatment of women and men in education and health care and enhances women's sexual and reproductive health as well as education."; in turn, item 97 of the Platform for Action states that "the ability of women to control their own fertility forms an important basis for the enjoyment of other rights. Shared responsibility between women and men in matters related to sexual and reproductive behavior is also essential to improving women's health."

or the possibility of pregnancy and equal access to an educational system committed to reproductive health education.

Another important feature developed within the context of international human rights law concerns matrimony and the founding of a family. It implies the right to both matrimony and its dissolution according to an age and ability of consent.

Considering the purpose of this article, it should be underlined that 1. Sexuality was approached in the international instruments from the standpoint of a legitimate and necessary concern with the situation of women; 2. From the standpoint of reproductive rights, this concern engendered the concept of sexual rights; 3. Nonetheless, such a perspective must be broadened for the development of a law of sexuality (Miller, 2000). All this without forgetting that, even at the Beijing Conference, in which the idea of sexual rights began to emerge more clearly, it was still very closely linked to that of sexual health.

In light of the phenomenon of disassociation between sexuality and reproduction, it is therefore necessary to undertake in the legal field the movement verified in the Social Sciences, bestowing legitimacy and bringing consistency to a legal knowledge about sexuality, a fundamental sphere of life in the context of contemporary Western society (Heilborn & Brandão, 1999. p. 7).

1.2. From reproductive and sexual rights to the right to sexuality

In the legal approach to sexuality, its contents are generally articulated as a result of demands involving specific situations representative of the struggles and claims of feminist movements, from the social realities of sexist discrimination and violence to matters related to reproductive health, particularly insofar as they concern access to contraceptive techniques and abortion.

This dynamic(s) engenders an understanding of the theme of sexual rights and reproductive rights according to a perspective centered on the situation of violation of rights experienced by women, visualized both as victims of discrimination or violence and as human beings directly and specifically involved with reproduction.

Without ever underestimating such realities, an advanced understanding of sexual rights and of reproductive rights within the larger framework of human rights implies a broadening of perspective. This is because sexual rights and reproductive rights are legal categories inclined to problematizing social phenomena and relationships established not only by women but also by men. Such rights are pre-eminently necessary in discussions of sexual expression, understood here in its broadest form and encompassing homosexual, heterosexual, bisexual, transsexual orientations and transvestitism. Debate regarding the various technical modalities of assisted sexual reproduction cannot be denied them.

In effect, all of the situations which are only listed here concern the pretension of legislation to conform a series of social relationships in which aspects related to sexuality present themselves directly and decisively. To this end, it is necessary to attribute a broader spectrum to the concept of sexual rights and reproductive rights, one that is able to respond to so many distinctly different demands.

Therefore, to append an understanding of these rights exclusively to the abovementioned realities by linking them particularly to certain aspects of the feminine condition would produce lacunae among the

diversity of the issues involved. Furthermore, it might incur the risk of reducing the functionality of these legal categories inasmuch as they concern women's interests, rendering them undesirably and unnecessarily weak.

It must not be forgotten that human rights, particularly when widely and extensively recognized in constitutional terms, in a fundamental legal text open to new historical realities, are inclined to protect the greatest possible range of situations. In this aspect, for example, the Brazilian constitution of 1988 sanctions such versatility, beyond a doubt, whether because of the number of express constitutional norms that define individual and collective rights and guarantees, or because of the explicit clause that renders new human rights possible, according to which "The rights and guarantees expressed in this Constitution do not exclude others resulting from the regime and *principles adopted by it*, or from international treaties to which the Federative Republic of Brazil belongs" (article 5, paragraph 2). The constitutional enumeration of rights in articles 5, 6 and 7 should be added to this explicit clause of constitutional opening up to the recognition of other human rights, as well as the forecasting of another series of individual and collective human rights throughout the text, such as those related to social security and the family community (articles 194 and 226, respectively).

Constitutional mechanisms of this type provide solid foundations and fertile ground for the recognition of sexual rights and reproductive rights, from the perspective defended here. Nonetheless, in order that they become both concrete and effective, these (national and international) fundamental mechanisms must be studied and systematized, for they demand academic theoretical reflection and commitment by legal professionals.

In this context, the idea of a "democratic right to sexuality" will be increasingly established with regard to the term "sexual rights". A legal approach to sexuality, rooted in principles of equality, freedom and respect for dignity, in fact reveals itself more apt to respond to the theoretical and practical challenges than the orientations, expressions, practices and identities associated to sexuality produced within the context of contemporary democratic societies. It is not a matter of dissolving lists of sexual rights nor of invalidating any effort to enumerate them more concretely; rather, the objective is to widen and deepen an understanding of them by means of references that possess more coherent and systematized principles.

Part 2 – Basic elements in developing a right to sexuality

2.1. Introduction

Understood as a set of norms (legal principles and rules), legislation is a process of social regulation. Its raw material are social relations, the various contents of which (economic, social, religious, moral, sexual, and so forth) are considered (or not) in the elaboration of the norm, seeking to obtain a given result, guided by certain values. This result might be an action, an omission, the imposition of a penalty or a reward for certain behaviors. The contents to which I refer have the possibility of being the most diverse in every legalized social relationship: at times, the norm might consider a certain personal condition as a condition for recognition of a benefit (to be a citizen of a given country in order to have access to a public benefit) or of a damage or injury (to have been criminally condemned for the privation of a given right); at other times, it contemplates only certain behaviors, in an attempt to abstract from the agent's personal condition.

Thus structured, legislation is alert to certain spheres of life, generating various branches whose academic construction, ratification and sanction depend upon countless factors related to the historical moments in which each of these branches develops. Thus, the bourgeois revolutions of continental Europe built a legal system which was centered on the Civil Code, conceived as a true "constitution of private life", alert to the regulation of property and inheritance, business and commerce, and the family. The paradigm of the subject of this law was clearly white, male, European, Christian and heterosexual. The dissemination of this paradigm also extends to public law, making it easy to understand why constitutional proclamations of a subject of an abstract universal law operate to the exclusion of women and other social groups.

I mention all these elements in order that a right to sexuality may be conceived according to the development of sexual and reproductive rights the histories of which I have outlined above. In countless international documents, their elaboration is the fruit of the evolution of international public law created after the Second World War. This law – which stems from the necessary declaration of the dignity of all human beings as a reaction to the consequences of totalitarianisms, "scientific" racisms and to the presence of neo-colonialisms – had to conceive the specificities and make room for the recognition of ethnic, linguistic and religious minorities, thus arriving at the particular situation of women's vulnerability, as evinced by the various abovementioned encounters, conferences and instruments.

The landmarks of the historical construction of the concepts of reproductive and sexual rights therefore render it necessary to broaden these ideas, thus allowing for the postulation of a right to sexuality, the scope of which reflects the full extent of the contemporary understanding of human rights and fundamental constitutional rights.

2.2. Scope of protection

In the abovementioned context, the close relationship between the categories of sexual rights and reproductive rights becomes highly comprehensible and positive. Nonetheless, one must move forward. The conceptions of sexual rights – reproductive rights so developed wind up concentrating the legal treatment of sexuality under the personal condition of a given group of human beings (women), gathering norms from

distinct branches of legislation in order to protect said group from discrimination, promote its condition, and allow for the widest enjoyment and exercise of fundamental rights and freedoms.

Within this dynamic, other fundamental dados to the development of a right to sexuality are left unattended – when not in a situation of confrontation.

In effect, a right to sexuality should care not only for the protection of a sexually subaltern group in function of gender and sex. Other identities demand this safeguard, such as gays, lesbians and the transgendered. Beyond this: the right to sexuality cannot be limited to the protection of identity, no matter of what group. Legal protection of sexual preference and conduct, not necessarily linked to identities, points to this, as evinced by sadomasochism and other forms of “unconventional” eroticism (Taylor, 1997. p. 106).

In this sense, the proposition according to which a right to sexuality should not be determined solely in accordance with pre-defined sexual identities and practices, avoiding heteronymous labels and impositions, eventually reinforces the logic that engenders machismo or heterosexism in current law (Calhoun, 1993). Not to mention the role of the legal system in the construction of such identities, generally in the sense of marginalization stemming from the imposition of a given view of this or that group. It is therefore a matter of elaborating a right to sexuality which will attempt to avoid these dangers, one that is informed, as we shall see, by principles of freedom and equality. Its application to each concrete case should promote a reckoning between the identities and practices in question and these principles.

Nor can a right to sexuality fail to consider social activities which are economically related to the exercise of sexuality, as is the case with sex workers. As we shall see in the discussion of prostitution below, it is one of the most sensitive themes in elaborating a democratic right to sexuality.

Thus conceived, a right to sexuality can draw legal attention and promote freedom and diversity without fixing itself on merely tolerated identities or conducts, or limiting itself to situations of female social vulnerability and their sexual manifestations. It is necessary to invoke principles which, by protecting the interests of the greatest possible scope of freedom and equal dignity, will create a space free of labels or disregard for matters related to homosexuality, bisexuality, transgender, and sex workers.

When we speak of the legal regulation of a certain sphere of life, such as sexuality, we must ascertain the extension we wish to achieve (in other words, the object of regulation). In short, the right to sexuality should extend to a wide variety of identities, behaviors, preferences and orientations related to whatever has been established, at various historical moments, as sexual (Weeks, 1986. p. 25). Within a perspective aligned with social constructivism, we must never forget that sexuality is impregnated by cultural conventions that model [our very] physical sensations (Parker, 1994).

Finally, in developing the right to sexuality, one must also emphasize the diversity of perspectives as an essential element to such an elaboration. As in the right to anti-discrimination, where the intersectional quality of discrimination (Grillo, 1995) is not reduced to a mere sum of discriminatory situations (black women suffer a type of discrimination that is qualitatively different from sexism against white women, or racism against black men, irreducible to a “sum of prejudices”), a democratic right to sexuality should go beyond the catalogue of sexual identities and practices. In fact, these do not exist as abstract entities, race-less, class-less, color-less, with no regard to ethnicity, age and so forth...

How can a right to sexuality be structured along these terms?

2.3. Basic principles: freedom, equality and dignity

Once the scope of protection to the right to sexuality has been established, we must make clear its fundamental principles: freedom and equality, basic principles of the declarations of human rights and of classic constitutionalism, whose affirmation implies recognizing the dignity of every human being to find his own way freely, deserving of equal respect in the sphere of his sexuality.

Consequently, the democratic right to sexuality breaks on principle with the subaltern treatment reserved for women, homosexuals, seropositives, children and adolescents, traditionally perceived more as objects for regulation than as subjects of rights (Collier, 1995). In adopting such a perspective and dedicating itself extraordinarily to situations of vulnerability, it is also incompatible with victimization, which is nourished by inferiority and set in motion by the theatricalization of unhappiness (Rosanvallon, 1998, p. 64). Unlike victimization, situations of vulnerability take on a position of equality and dignity, contextualizing them in the settings of injustice, discrimination, oppression, exploitation and violence which overrun countless entities and subaltern sexual practices or other conditions associated to them, such as HIV-AIDS seropositivity (Parker, 2000. p. 103; Diniz, 2001. p. 27).

Corollary to this stance is the establishment of the democratic principle in the sphere of sexuality which, in the area of sexual rights, just as in that of reproductive rights, points to the guaranteed participation of beneficiaries and recipients of public policies to be developed, a participation which encompasses the identification of problems, the election of priorities, decision-making, planning, adoption and evaluation of strategies.

From this perspective, freedom and equality are protections and guarantees to dignity juxtaposed as arguments of “pure freedom”, “discriminatory interference to freedom” and “pure equality” (Wintemute, 1995.. p. 185; Tribe & Dorf, 1990.. p. 1094). I shall give the example of homosexuality: the free development of personality and sexual privacy, as “pure freedom”; the prohibition of public manifestations of affection, restricted only to certain groups, as “discriminatory interference to freedom”; restriction of certain public or private jobs, as “pure equality”.

In this context, freedom and equality are multiplied in countless rights, more concrete manifestations of their contents in the sphere of sexuality which effectively aggregates sufficient legal content to these rights in order that they may confront a series of situations involving individual and social relations[h] in which sexuality and human reproduction are significantly inserted .

An aptitude of this sort is contingent upon legal understanding, particularly that which is disseminated among its professionals – relative to the legal consequences of many classical human rights – and to the level of information regarding the legal currency and efficiency of international instruments of human rights as incorporated to national rights. A good example of the need for this understanding may be seen in current international human rights law, applicable also to the realities of sexuality and reproduction, as exemplified by the right to equality as expressed by the protection of differences in various subjects of the

law, seen in the specific circumstances and particularities and requiring specific and differentiated answers and protections which sanction the principle of diversity.

2.3.1. Freedom and equality as defenses in the right to sexuality

First generation human rights, recognized since the dawn of liberal constitutionalism (identified as negative rights, defenses against abusive intrusions) have recorded individual liberties whose contemporary dimension reaches various spheres that make up sexuality. Legal content pertinent to classical liberties such as the right to privacy or the right to freedom of movement may be efficiently concretized in the face of phenomena such as prostitution or the exercise of reproductive autonomy.

All legal understanding founded on constitutional doctrine and jurisprudence, pertinent to the formal and material dimensions of the principle of equality, in turn provides solid legal directives to sex-based or sexual orientation-based discrimination.

Various issues related to the regulation of trans-sexuality find their fundamental directives in a combination of the right to the free development of personality and the right to equality, the latter conceived as a right to difference. Not to mention an updated interpretation of the general theory of personal rights, initially developed in the civil field of our legal tradition.

It is, therefore, a matter of recognizing and developing the legal content of the basic principles of human rights and the various classical constitutional rights, a task which is likely to constitute diversified and renewed forms of coexistence; in them, the claim to autonomy and freedom within the spheres of sexuality and reproduction may become concrete, for they illustrate legal decisions that deal with the prohibition of discrimination for reasons of sex and sexual orientation, just as recommendations issuing from the Public Ministry in reproductive health programs.

The right to sexual freedom; the right to sexual autonomy; to sexual integrity and to the safety of the sexual body; the right to sexual privacy; the right to sexual pleasure; the right to sexual expression; the right to sexual association; the right to free, responsible reproductive choices; the right to discrimination-free sexual information – these are some of the most important consequences of the fundamental principles of equality and freedom which govern the right to sexuality. In turn, freedom, privacy, autonomy and safety are fundamental principles directly associated to the right to life and the right not to suffer sexual exploitation.

2.3.2. Freedom and equality as positive means for promoting a right to sexuality

In the wake of the contemporary debate on the dimensions of human rights, a right to sexuality advances towards a consideration of social and economic rights, regarded as the second generation of human rights and qualified by constitutional doctrine as positive rights, providential rights dedicated to the achievement of *de facto* freedom and equality. Protection against arbitrary dismissal from employment, the right to social security, to an integral, non-discriminatory access to health systems, to a public or private system of pensions and retirement benefits – all these are examples of the positive concretization of fundamental principles developed by Brazilian law.

In consonance with this, a wide spectrum of services has been enlisted to be included among the international instruments for the protection to human rights, including (1.) access to information and sexual and reproductive education; (2.) safe and accessible sexual health and reproductive health for the entire population which include access to scientific progress through available treatments and medication that guarantee fertility control to both men and women; (3.) social and legal support services for the exercise of these rights; (4.) security measures and policies to repress and eliminate all types of violence; (5.) policies to promote and guarantee equality and equity between the sexes, discouraging submissiveness in women and girls, and eliminating all and any sexual discrimination; (6.) policies to promote and establish the personal and social responsibility of men with regard to their sexual behavior and fertility, for the well-being of their spouses and daughters (Ventura, 2003. p. 51).

In fact, providential rights such as the right to health, social security and welfare, include a series of situations that are pertinent to the exercise of sexuality and reproduction. In their implementation through public policies, the qualification from the perspective of human rights supplies bases to avoid the prevalence of medicalization or the influx of religious discourse.

On this point, it is worth recording the way in which Brazilian law has developed legal protection against the discrimination of sexual orientation based, precisely, on economic and social rights. Contrary to what might be expected, in situations in which negative freedoms are more easily (or less difficultly) recognized as “deviant sexualities” (an example of which is the jurisprudence of the European Court of Human Rights and the Rights Committee of the United Nations, which initially states the prohibition of discrimination against sexual orientation in cases that discuss the criminalization of sodomy), Brazilian law has evolved from cases in which discrimination against sexual orientation implied denial of the right to health treatment and social security benefits. Taking the jurisprudence of 1996 as a starting point (which ruled in favor of the inclusion of same-sex companions in a federal health plan) federal and state courts have increasingly acceded to demands sanctioning discrimination against sexual orientation (in fact, a few months ago, the President of the Supreme Federal Tribunal himself, in an initial ruling, upheld a restraining order obligating public Social Security not to discriminate against homosexuals in its regime of benefits).

2.3.3. Responsibility in the free exercise of sexuality

The exercise of the right to freedom and equality by various subjects in the most diverse situations, manifestations and expressions of sexuality, of equal dignity, begs consideration of the idea of responsibility. As stated in international conventions on reproductive and sexual rights, responsibility means the fundamental duty of care, respect and consideration for the rights of others (whether these others are individuals or the community), in the free exercise and equal conditions of sexuality. According to this standard, it is not a matter of merely imposing an obligation to repair damages or to prevent them in light of individual and collective legal properties. It is, rather, a matter of an attempt to conform the social relations[hips] experienced to the sphere of sexuality in the freest, most egalitarian and most respectful way possible.

In fact, the exercise of sexuality reaches a foreign legal sphere, given that, in most cases, its experience requires the concurrence of third parties. Situations such as sadomasochism and the age of consent for participation in sexual relations, for example, inquire about individual freedom and ability to discern, as well as positions of power and roles played by each one of the participants involved in sexual relations.

Moreover, the exercise of sexuality may have repercussions beyond the individual in the trans-individual sphere with which public health is notably concerned. In this case, it is the care to assay the obligations that stem from the responsible exercise of sexuality in the community, the title-holder of diffuse and collective rights. From, for instance, the traditional penal repression towards behaviors the objective of which is the dissemination of venereal diseases to the promotion of media campaigns for the prevention of sexually transmitted diseases, there can be no doubt as to the responsible attitude required by individuals towards the community.

To affirm the place of responsibility at the heart of a democratic right to sexuality does not signify the adoption of a repressive perspective, based on moralism or on the exclusion of sexualities stigmatized by majority groups. The responsible exercise of sexuality, informed by legal principles of freedom, equality and dignity, reinforces a positive understanding of sexuality and its manifestations in individual and social life, the reality of which demands consideration of personhood in its simultaneously individual and social dimensions. Without this perception, the development of a democratic right to sexuality would suffer from an individuocentric vision incompatible with the reciprocity and nature of the fundamental rights that inform it.

2.4. Recognition and distribution in the right to sexuality

A democratic right to sexuality, rooted in the human rights principles and fundamental constitutional rights, must act simultaneously in the sense of recognizing equal respect to the various manifestations of sexuality and equal access for all, without distinctions, to the necessary bens for social life. In the words of Nancy Fraser, recognition and distribution are fundamental categories for understanding the paradigms of socioeconomic and cultural or symbolic justice (Fraser, 1997), worlds inhabited by various sexual rights.

In the former, injustice is related to the economic structure of society, concerning itself with situations of exploitation (appropriation of someone's work for the benefit of a third party), marginalization (confinement in situations of low pay and the impossibility of improving conditions) and deprivation of materially adequate living conditions – circumstances which are related to sexuality in many ways, such as sexism in the work market, domestic violence, reactions to rape, the denial of social security rights for homosexuals, prostitution, access to the health system by the HIV-positive, and so on.

In the latter, injustice concerns social patterns of representation, interpretation and communication, as exemplified by situations of cultural domination (subjecting one's self to another culture's patterns of interpretation and communication, foreign and hostile to the culture of the dominated group), non-recognition (dominant cultural practices that render a given group invisible and irrelevant) and disrespect (to be insulted or belittled on a daily basis by means of stereotypes present in the dominant culture and in everyday interactions).

The appropriate remedies for such types of injustice are a result of this characterization, whose relationship to matters of the right to sexuality is direct; while economic injustice, in claiming the redistribution of material goods, points to egalitarian and universalist schemes, cultural or symbolic injustice demands the recognition of the stigmatized groups in a dynamic that both differentiates and particularizes. The dilemma and complementarity between recognition and distribution arise from this distinction.

A dilemma, because, while the first demand tends to produce differentiation and particularism, the second is inclined to weaken them; even as redistributive measures propose universalist, egalitarian schemas, policies of recognition condemn them.

Complementarity, because redistributive remedies generally presuppose an underlying conception of recognition (for example, some proponents of egalitarian socio-economic redistribution base their claims on the “equal value of people”; thus, they consider economic redistribution to be an expression of recognition), just as remedies of recognition sometimes presuppose an underlying conception of redistribution (for example, some proponents of multicultural recognition base their claims on imperatives of a just distribution of the ‘primary goods’ of an ‘intact cultural structure’; they, therefore, consider cultural recognition as a sort of redistribution (Fraser, 2003).

This explanatory schema is important to the construction of a right to sexuality, in light of the diversity of situations faced and the need for their systematization. The conjugation between measures of recognition and distribution and the emphasis given to it will depend on each case. Let us look at, for example: for gays and lesbians, the emphasis is on recognition; in sexual education, the need for information and means requires reinforcement in the access to knowledge and contraceptive techniques; in turn, the situation of women would appear to be a fairly well-balanced hypothesis in which recognition and distribution are equivalent to one another. As previously stated, it is not a question of defending exclusive recognition or redistribution, but of perceiving the appropriate dynamic for each situation, without undervaluing any of the necessary dimensions.

2.5. A case study: homosexual unions in the right to sexuality

The case of the legal recognition of same-sex unions enables us to reflect on these two dimensions and their dynamics.

The need for “gay marriage” is defended by some for distributive reasons which contradict the right to recognition. A first version says that it is simply a matter of regulating something that already exists, which would even be inscribed in biology, in spite of belonging to a minority. Another, more radical version, and perhaps because of this more palatable to common sense, comes from a naturalization of the petit bourgeois heterosexual family model, proceeding to a “heterosexist domestication” of all forms of sexuality that depart from this model. As long as they adapt to the general scheme of such rules, alternative sexualities will be tolerated.

Common to both propositions is their interest in socio-economic distribution (men and women as tax-paying consumers are allowed to express their feelings for one another) and reduced emphasis even in the

most intimate sphere of relationships, of everything regarded as “belonging to a minority”. Whence the tremendous difficulty of transvestites, the transgendered, sadomasochists, sex workers, sexual freedom and so forth when it is expressed, in an evaluation, that theirs is a minority sexuality, the fruit not of illness or sin, but of some incomplete development which is therefore deserving of compassion and tolerance as long as the individuals involved make an effort to behave well. Both versions, therefore, emphasize distribution but wind up weakening the demand for recognition. By assuming, whether consciously or unconsciously, statistical normality or behavioral-affective normality, in practice such versions imply capitulation to the demand for equal respect, symbolic and cultural.

Bills or legal formulations of family rights founded upon these versions therefore contradict a democratic right to sexuality based on fundamental human rights and constitutional rights.

On the other hand, there are propositions which render such a tendency compatible or attempt to break with it. In general terms, the legal design of so-called “pacts of solidarity” may be used as an example (the French case and the recent law of Buenos Aires). In effect, it is a matter of legislation which establishes freedom, independent of sexual orientation, so that partners may self-determine the dynamics of their emotional and sexual lives by supplying them with an instrument according to which the value of such a union is legally recognized and respected. In addition to the advantage of assuring the union’s protection and recognition by the state, a pact of solidarity thus delineated avoids the stigmatization that grows out of a “rule of exception”, as occurs with the original proposals for registered civil partnership, of Brazilian origin, or with the inclusion, in a way, of homosexual unions under the category of “stable unions” in Brazilian law, insofar as this category, no matter how commonplace, is regarded as a sort of “second class marriage”, as may easily be inferred in the text of the Brazilian constitution of 1988.

Even when schematically presented in simplified fashion, the debate on homosexual unions allows us to contextualize, from the perspective of the categories of recognition and distribution, the contents and premises present in the right to sexuality – hence the possibility of realizing the relevance of these categories in the development of a democratic right to sexuality, as well as the risk of adopting mistaken alternatives.

2.6. Minorities and special rights in the right to sexuality

This list of sexual rights may be regarded as a consequence of general rights to privacy, freedom, intimacy, the free development of personality, and equality – foundations upon which legal protection of the sexuality of so-called “minorities” has developed.

This is an important point. When regarded from this perspective, problems considered specific, belonging to the minority, seen as nearly intolerable yet admitted exceptions, lose their pejorative connotation. Thus contextualized, the discussions on gay and lesbian rights are concretizations of fundamental principles and of human rights of everyone (just as gender, racial and religious discrimination), and not tolerated exceptions to minorities.

The debate is vividly present in the controversy between “equal rights x special rights”, special rights being all the protective estimates of discrimination, elaborated by common legislation and not expressly predicted in the Constitution. Nonetheless, to the privileged situation of certain groups (white male Christian

heterosexuals, for example), reveals the impossibility of sexual neutrality in applying the Constitution to concrete situations, since in social life there are privileged groups and oppressed groups. This fact points to the conservative nature of certain formulations regarding the concept of minorities for, as we have seen in the debate between “equal rights and special rights”, they lead to a mistakenly pejorative labeling of certain protective rights against discrimination as “special rights”.

In this horizon, the use of the categories “special rights x equal rights”, the former undesirable and the latter desired – reveals a manifestation of privilege by certain groups, which confuse the need to concretized the general principle of equality – according to the historical circumstances of the given reality (for instance, the existence of machismo and its consequences for women in the workplace) – with its subversion.

2.7. The scope of the right to sexuality: the public/private dichotomy

In closing this section dedicated to exposing the structure of the right to sexuality (encompassing civil and political rights as well as economic and social ones), it is necessary to highlight the spheres within which it acts. This fact is fundamental to the effectiveness of any right to sexuality, insofar as, among the various manifestations of sexuality protected by it, many take place within the private sphere. Nevertheless, one must take care to provide the right to sexuality with a range that is generally avoided by traditional human rights doctrines.

In effect, the more traditional formulations restrict the legal efficiency of human rights and constitutional rights to violations committed by state agents, leaving violations perpetrated by private agents on the margins. In these cases, legal intervention is reserved to norms of penal law or civil law, applied only in extreme cases and conceived with great condescendence to traditional family structures and relations between genders. In the extremely grave case of rape, for example, it may be perceived that an exclusively penal approach, de-contextualized from the paradigm of human rights, tends to be more concerned with the punishment of a dysfunctional act which seriously affects social life, than proper or primarily with the victim’s dignity or citizenship (Pimentel, Schriztmeyer & Pandjjarjian, 1988. p. 205).

The right to sexuality cannot be thus restricted, under penalty of becoming innocuous before situations in which sexual oppression is commonplace and violent. This is one of the principal contributions that the feminist movement has made to the elaboration of this right and, for the rest, to a more general constitutional debate regarding the efficiency of fundamental rights to private agents. It is necessary to break with impassable frontiers whose boundaries eventually consent to domestic violence, conjugal rape and disrespect to the development of adolescent sexuality by parents and educators.

From the perspective of a democratic right to sexuality, the private sphere, particularly that of the family, cannot be converted into a refuge for machismo or heterosexism, implicating the cultural and economic devaluation of women, children, adolescents or homosexuals. In fact, such inequalities at the heart of the family act decisively and continually to restrict autonomy and equal opportunity between the sexes and between parents and children.

In fact, in this sense, it points to the literalness of the international instruments of human rights. In the words of the 5th article of the International Convention for the Elimination of All Forms of Discrimination Against Women the States commit to include modification of “the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.

Therefore, the perspective of fundamental human rights and constitutional rights requires breaking the traditional barrier which proscribes its penetration in the private sphere, allowing approaches that merely condescend or concerned with the functionality of social life to be overcome. This fact leads to a consideration of the functions of recognition and distribution to be performed by a democratic right to sexuality.

Part 3 – Objections to a democratic right to sexuality

3.1. Introduction

The claim to a right to sexuality conceived in democratic terms basically faces three great objections. The first concerns the democratic legitimization of judges and legislators to pass decisions and measures that protect “deviant sexuality” contrary to majority public opinion, in other words, which promote the legal protection of socially stigmatized sexual identities and practices, guaranteeing them a space free from discrimination. The second objection calls upon moral reasons to oppose itself to this type of right to sexuality. By advocating a given morality regarding the relationship between the sexes and the exercise of sexuality as promoted by individuals, it qualifies such rights as distortions that violate morality. The third objection adduces medical reasons, according to which certain identities and conducts in sexual life are merely deviant, degenerate or underdeveloped.

3.2. The majority argument

The first objection poses a procedural argument. Since most individuals in a given society reject and stigmatize certain sexual practices and identities, decision to the contrary would usurp the democratic process, disrespect popular will and configure an arbitrary act by the legislative and judicial organ that so decides. From a human rights perspective, this argument does not prosper. It is refuted by one of the basic features of human rights, especially wherever they are inscribed in national constitutions, to wit, their function to protect individuals and groups against violations perpetrated by majorities.

In fact, in the very genesis of constitutionalism and the Universal Declaration of Human Rights, is the affirmation of certain inviolable rights guaranteed against majority deliberations. In the case of sexuality, of stigmatized identities and practices, once they are subsumed to the basic principles of equality and freedom, they are protected from majority deliberations that violate them. In the tradition of constitutionalism and human rights, a condition for democratic life is the preservation of this fundamental nucleus and its affirmation does not subvert democratic life; on the contrary, such protection is demanded by democracy, a regime which is not limited to the will of the majority.

3.3. The moralist argument

The second objection invokes moral reasons. Such rights simply cannot be rights because they are contrary to morality; they would primarily be distortions of values. This argument is not unlike the preceding one insofar as it associates the defense of a moral majority to a majority dynamic of democracies. The response to such an objection, within a perspective that privileges freedom and equality, comes from John Stuart Mill; the only morality that democracy may welcome is a critical morality in which the arguments of taste, tradition, disgust and a sentiment of repulsion of the majority cannot be final, even under penalty of threats to integralism, fundamentalism of traditions and authoritarianism coming from those who considered themselves enlightened.

In effect, the criteria of absence of relevant harm to third parties and of the existence of free and spontaneous consent supply the foundations for the response of democratic thought to moral objection in the light of sexual freedom. Just as a religious person must accept freedom of creed and the possibility of atheism that stems from it as the best way to guarantee their religious experience, a morally conservative person must admit the guarantees of sexual freedom so that the State, by means of its agents, will not possibly interfere in the exercise of his morality. The central idea that informs these criteria is precisely one of respect for human dignity; regulations are incompatible with equal respect owed to all when it interferes in personal choice, so as to consider individuals incapable of deciding for themselves (Nussbaum, 1999. p. 22).

The moralist argument often expresses itself in religious terms. Faced with this, a democratic right to sexuality implies the rebuttal of discourse based on religious premises, once the “juridicizing” of sexual rights and reproductive rights in the tradition of human rights situates the debate within the wider arena of the laic and democratic state of the law, in synchrony with republican ideals. Conceived according to these fundamental markers, sexual rights may be constituted as spaces in which civil society and the state maintain their autonomy towards religious institutions, by preserving pluralism and respecting diversity.

3.4. The biomedical argument

The third and final objection is related to medical discourse, which “pathologizes” socially stigmatized sexual identities and practices. Beyond the inexistence of a consensus and, less still, official scientific recognition regarding the pathological nature of many of the socially stigmatized sexual identities and practices, the development of the right to sexuality along democratic lines, with a concern for human rights, cannot allow itself to be directed by medical or biological postulates whose role as instruments of social and political control have long since been revealed. This dimension, far from being a truism, implies the “de-medicalization” of [the] discourse and practices on sexual rights and reproductive rights, in a movement of genuine democratization of themes related to sexuality, especially those which are dedicated to public policies.

In keeping with this, in a combination which generally adds moralist contents to the medical argument, one should be alert to the danger of exposing minors to environments of sexual freedom and equality. Without entering into the negative valuation implied by this objection, nor the evils caused to young people by this position (Levine, 2002), a concern for the “contamination of youth” brings to surface the benefits and risks of the democratic experiment. Coexistence with Protestants, Jews and Muslims may appear to be risky to traditional Catholic families, insofar as this contact is able to redound in the conversion of their children; nonetheless, to abolish such a possibility would imply in the suppression of individual human dignity, which would not only be prevented from recognizing the value of otherness but also of choosing one’s religious beliefs and practices for one’s self.

Part 4 – Some sensitive topics in the Right to Sexuality

Among various particularly sensitive topics in the right to sexuality I shall highlight three: its relationship to reproductive rights, prostitution and pornography.

4.1. Relationship to reproductive rights

As seen in the first part of this text, the idea of sexual rights is closely linked to the affirmation of sexual rights. It is therefore necessary to strengthen the right to sexuality, conducting it beyond the reproductive sphere without forgetting that sexual rights violations are often associated to reproduction, in which are victimized in situations of vulnerability.

Just as the right to sexuality ought not to be reduced to a reproductive right (effectively excluding it from non-procreative heterosexual practices), it ought not to be restricted to a right to non-reproductive sexuality. This is all the more important in light of the challenge to develop it in its confrontations with the predominant machismo of gender relations, moralism and hegemonic religious ideologies.

4.2. Prostitution

Prostitution is yet another difficult topic. It challenges consideration of the free use of one's own body in economic activities, related to the exercise of sexual autonomy, with a history of undeniable damages (particularly those caused to women) stemming from sexual exploitation, acting in a context in which consent is, in practice, often non-existent, given the employment of threats and violence or situations of dire necessity. In this field, the international human rights legislation clearly emphasizes the intolerability of sexual exploitation and all its preparatory and correlated activities, such as training, transportation, housing, payment and traffic of women which seek to exploit prostitution.

From the perspective of a right to sexuality informed by principles of freedom and equality, prostitution calls out for combat against situations of feminine vulnerability, whether cultural or economic. This presupposes the improvement of social conditions, affording everyone a broader spectrum of opportunities – circumstance in which the designation of “sex worker” takes on its most precise meaning. Among the recurring discussions in this field are whether or not to criminalize prostitution and the legitimacy of compulsory health examinations. These topics, involving the debate between prohibitionists, regulationists and abolitionists (Carrara, 1996), has found a solution in non-criminalization and non-regulation, according to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others⁴ – a directive which incorporates a concern for the improvement of social conditions, particularly those of poor women, a situation which criminalization would appear only to aggravate.

⁴ Article 6: “Each Party to the present Convention agrees to take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification”

From the standpoint of a right to sexuality informed by principles of freedom and equality, prostitution reclaims the struggle against situations of feminine vulnerability, whether cultural or economic. This presupposes the improvement of social conditions, affording everyone a broader spectrum of opportunities – circumstance in which the designation “sex professionals” takes on its most precise meaning.

Another noteworthy aspect to the elaboration of a right to sexuality along the lines proposed herein is that of male prostitution. It once more brings to the fore the need to constrict the right to sexuality based on a broader perspective which takes into consideration the situation of men and women. Treatment of prostitution in Brazilian legal practice is illustrative. In Brazil, prostitution itself is not a crime, only its exploitation (so-called pimping or pandering). Nevertheless, when it comes to male prostitution, unlike what occurs with female prostitution, police and legal operators legally subsume it incorrectly to the misdemeanor of vagrancy. In practice, this redounds in an even greater stigmatization of hustlers and transvestites.

Another noteworthy aspect to elaborating a right to sexuality along the lines now being proposed is that of male prostitution. It once again brings to the surface the need to construct the right to sexuality

4.3. Pornography

Pornography is another sensitive area for the elaboration of a right to sexuality. This activity presents possible damage caused to third parties and to the people involved, such as the objectification of women and the strengthening of machismo, with all the collateral effects of stimulating violence and the disrespect that stems from it. Nonetheless, its generalized prohibition, without more precise criteria with regard to which sort of manifestation should be considered harmful, may cause undesirable restrictions to freedom of expression, particularly artistic.

Like “reification”, “objectification” (accepted as its synonym) is recorded in dictionaries; there is no need for quotation marks.

In effect, from the correct and necessary condemnation of violence and humiliation arising from certain pornographic manifestations, one cannot, in any event, deduce that all pornography operates thusly. Such a reality points to the need for a case-by-case analysis of the context within which each particular pornographic manifestation presents itself, that we may ban only those which effectively bring about harm. In this regard, it is a matter of inserting the debate on pornography within the more general context of content and the limits of freedom of expression which, even if they are not absolute, in certain cases allow for restrictions, and where the effective presence of relevant damage is patent (Nussbaum, 1999, p. 249).

CONCLUSION

Freedom, equality and dignity are the principal structural elements derived from the idea of human rights and fundamental constitutional rights for the construction of a democratic right to sexuality. In this article, under their influence, I have sought to systematize those debates which might prove most important in building up this area of knowledge and its corollary legal practice.

There is still much to be pondered, criticized and added before we have succeeded in our task. As a result of this effort, at least one certainty remains – to wit, that given present and future needs, such development is indeed relevant and the construction of democracy stands to benefit from the sexual diversity present in our societies as well as from the challenges that derive from it.

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