

[This document -- **tmp7.13pereiraart11** – is the same as tmp7.13pereiraart11 except that the Word” accept all changes” feature has been applied (1/3/15).]

The Co-Regulation of the Family by Civil Society and the State: A Dialogue with the Federal Constitution of Brazil ¹

By Antonio Jorge Pereira Júnior ².

Abstract. The State is currently the best equipped institution of civil society to organize social life and to protect humans. The family is the basic unit of society (*celula mater*) and is therefore worthy of the best political and legal treatment. The State has a duty towards civil society to regulate the family in order to ensure it special protection. This duty is necessarily performed both by adopting laws and by implementing public policies. In these activities, the State might eventually abuse its position, by using its power in a way contrary to the best interest of the family. So, to avoid negative effects of State intervention, it is convenient to define the competence of each of these two “circles” around the family (civil society and State), and establish the criteria to guide their harmonious action for the sake of the family. This paper will propose (1) the division of competencies between these circles, supported by the science of

1 This article is a development of a paper presented at a conference held on June 11, 2013, sponsored by the International Academy for the Study of the Jurisprudence of the Family, entitled "Symposium on the Jurisprudence of Family Relations: Privacy, Autonomy, and States Should Regulate Family Relations?" hosted by Cardozo Law School of Yeshiva University in New York City, New York.

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Constitutional Law, and (2) the observance of principles that regulate the relation between them. The combination of the binomial competence and principles of social order will eventually lead to the best result in joint action by all for the family.

Introduction

This article, although in an incipient manner, deals with the regulation of the family by civil society and by the State, from two perspectives. First from an external perspective, this article asks who should determine what should be viewed as a family worthy of special protection by the State. Secondly, from an internal perspective, this article inquires as to what criteria to apply in setting the bounds for State interference in managing internal family affairs.

On one hand, this work is a critique, as it analyzes the current definition of family in Brazil and by State authorities; and on the other hand, it introduces concepts that should be further developed.

I – External perspective of family: the concept of family for the State

The eighth title of the Constitution of the Federative Republic of Brazil (hereinafter, the “Constitution of Brazil” or the “Constitution”) is dedicated to “Social Order”.³ Its art. 226 is of particular interest for the present analysis, because it deals with “family”:

*Article 226. The family, which is the foundation of society, shall enjoy special protection from the State.*⁴

³ A full citation to the Constitution, and to the other authorities referred to in this Article, is set forth in the section entitled “References” below. Here and elsewhere the English translation of the Constitution is that contained on an official Brazilian governmental site: <http://www.v-brazil.com/government/laws/constitution.html>. However, this version does not reflect amendments since March of 2006 and quotations from it are, in this Article, updated where necessary.

⁴ Compare Article 16(3) of the Universal Declaration of Human Rights, which states that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). (<http://www.un.org/en/documents/udhr/index.shtml>). Article 23(1) of the International Covenant on Civil and Political Rights uses the same words. 999 U.N.T.S. 171, entered into force Mar. 23, 1976., (<http://www1.umn.edu/humanrts/instree/b3ccpr.htm>). Article 16 of the European Social Charter (revised), similarly, recognizes the family as “a fundamental unit of society” and aims at its “appropriate social, legal and economic protection”. C.E.T.S. No. 163, entered into force Jan. 7, 1999. (<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=163>).

Comment [SF1]: NEW STF COMMENT:

See mycover letter of 1/3/15, forwarding this document, and repeating a suggestion in an earlier letter that this Section One be greatly reorganized.

Paragraph 1. Marriage is civil and the marriage ceremony is free of charge.

Paragraph 2. Religious marriage has civil effects, in accordance with the law.

Paragraph 3. For purposes of protection by the State, the stable union [união estável] between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.

Paragraph 4. The community formed by either parent and their descendants is also considered as a family entity.

Paragraph 5. The rights and the duties of marital society shall be exercised equally by the man and the woman.

Paragraph 6. Civil marriage may be dissolved by divorce⁵. (New text given by constitutional amendment number 66 of 2010.

Paragraph 7. Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide educational and scientific resources for the exercise of this right, any coercion by official or private agencies being forbidden.

Paragraph 8. The State shall ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family.

Some questions arise from this text. Who can define what should be understood as “family” deserving of special State protection? Which categories constitute the base of civil society? What parameters should guide the Legislative, Executive and Judicial powers in defining and organizing the “family”? Are there limits to the law and judicial activity in this area? Where would these limits come from?

The American Declaration of the Rights and Duties of Man (the “Bogota Declaration”), similarly, provides in Article VI that “Every person has the right to establish a family, the basic element of society, and to receive protection therefore.” O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), *also reprinted in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS*. (Published by Office of the United Nations High Commissioner for Human Rights, Geneva) Vol. II: REGIONAL INSTRUMENTS 5 (1997). The Declaration is available on line at <http://cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm> .

⁵ Prior to constitutional amendment number 66 of 2010 this provision contained, after the word “divorce,” the phrase: “after prior legal separation for more than one year in the cases set forth by law, or after two years of proven “de facto” separation”.

Brazilian politicians and judges do not always understand the limitations of their roles in the creation and interpretation of family laws and rights. The authors of books that have guided lawyers, judges and legislators lack in-depth comprehension of anthropology and social philosophy. Thus, many have reduced the family to an expression of affection, removing its objective content. To these, affection is enough to justify the same State protection for any amorous combinations. This is one of the reasons for the current confusion and incongruity of family law in Brazil.

Some law professors and judges advocate, for example, the end of monogamy and of legal impediments to marriage, saying that they are remnants of moralism. For example, Marcos Alves da Silva presented, as his thesis for the doctorate in law at University of Rio de Janeiro, in 2012, “The overcoming of monogamy as a structuring principle of the legal status of the family” (published in 2013). Reading his text, one can see that he confuses social ethics with morality, morality with law and limits with prejudice. Asked about why he proposed the elimination of monogamy as a structuring principle of the legal status of the family, he answered:

“This question can be answered from two perspectives. One concerns the motivation or hypothesis that formed the basis or the impetus for research. The other refers to the core of the thesis, that is, the reasons that allow me to say that monogamy is not, today, a structuring principle of the legal status of the family. I suspect that the principle of monogamy served as an instrument of exclusion, with the purpose of making certain people and subjective situations invisible to the legal system. There are polygynous families sociologically, but their legal existence is denied, generating serious injustices in attention to the alleged principle of monogamy. Examples of the use of monogamy as an instrument of exclusion are abundantly present in the case-law of the Superior Court of Justice (STJ) and the Supreme Court (STF).⁶

Maria Berenice Dias has been the most widely read exponent of such theories. She was judge in the State of Rio Grande do Sul. She is one of the most famous advocates of the gay lobby. As a Tribunal judge, several times she decided to apply to gay unions what the law allowed only to unions of persons of different sex. She also worked to change the law of divorce in Brazil, proposing that divorce should be readily available. Such a change was accomplished by Constitutional amendment number 66 of 2010, which expressly allowed for divorce. Today it is possible obtain divorce the day after marriage. Currently, she advocates the end of monogamy in family law, and the recognition of civil unions between three or more people, that is not allowed in Brazil. (At present, marriage

⁶ An announcement relating to this thesis is posted at <http://www.ibdfam.org.br/noticias/5312/Entrevista%3A+Marcos+Alves+da+Silva+fala+sobre+uniões+simultâneas>.

Comment [SF2]: NEW STF COMMENT:

Is da Silva a professor or a judge? If not his thesis is not exactly an “example” and some rephrasing is needed.

Comment [SF3]: NEW STF COMMENT:

*** Is this really the title of his thesis? Would it not have a Portuguese title instead?

Comment [SF4]: NEW STF COMMENT:

*** Please cite this thesis – as it was published, it might be cited in the form in which you would cite a book.

I suggest that the footnote citing his thesis be placed here, and that the contents of the next footnote be added to it.

Comment [SF5]: NEW STF COMMENT:

I myself prefer the “serial coma,” but as you do not use it elsewhere I suggest its elimination here.

Comment [SF6]: NEW STF COMMENT:

The suggested changes I make in this sentence and the next one are advanced on the supposition that you are the translator, and so at liberty to make such alterations. If this is not a translation, or is translated by someone other than yourself, then of course my suggestions here must be disregarded, but the term *sic* should be introduced, in parentheses, here and after the word “is” in the next sentence.

Comment [SF7]: NEW STF COMMENT:

*** Can you cited to a published source for this quotation?

Did he make this statement in English? If not, please identify the translator.

Comment [SF8]: NEW STF COMMENT: ***
Please cite this amendment to an official source.

Comment [SF9]: NEW STF COMMENT

*** I suggest a footnote here, quoting the relevant provision.

Comment [SF10]: **Please cite and quote some of the works in which she advocates these things.

and stable unions are recognized only as between two people (a man and a woman or two same-sex persons). She has written:

"In this panorama it is no longer fit to deny legal consequences to a fact which exists, has always existed, but that justice refuses to recognize: affective bonds held in concurrent manners. The social reality throughout history insists on countering the legal determination, so that parallel relations, durable ones, have always occurred and still exist. This is the situation historically assumed by men who have the tendency to infidelity and are proud to maintain affective relationships with more than one woman. On the grounds that the monogamous system is the form chosen by the State for the structuring of the family [and that bigamy is a crime in Brazil] . . ., judges tend not to accept that more than one relationship per person may receive legal recognition. At least there's enormous resistance to the recognition of multiple relationships in the context of family law and to extending to them the benefits that this branch of the law grants"⁷.

Alongside other jurists of similar opinions, Judge Dias has used and continues to use the Brazilian Institute of Family Law (IBDFAM) to promote her beliefs. Today, retired from the Court, she acts as a lawyer in this area, promotes the sale of books and participates in conferences throughout Brazil. The most curious thing is that she became famous as an authority in this area without having published any academic research, and without a thorough knowledge of anthropology, philosophy and sociology. She is a very good speaker, whose rise to prominence was backed by the media and by the gay lobby. For her, Family must be understood as a form without content, and must serve exclusively to express the affections of each participant⁸. She has been married and divorced several times. She defends an individualist conception of Family, against a transcendent conception, in terms developed by Gustav Radbruch in his book *The Philosophy of Law [Rechtsphilosophie]*.

People like Maria Berenice Dias lack in-depth knowledge about the family and the human condition. They do not measure the consequences of their ideas over time, in the legal and social sphere. They advocate that the family cease to be an objective reality, and that we should abandon the concept of family as the foundation of society inexorably linked to the idea of procreation. They forget that the union of a man and a woman is the only means by which human society is renewed and preserved. That is not a question of moralism. That is objectivity.

⁷ Dias, Maria Berenice: on line: http://www.mariaberenice.com.br/uploads/4_-_adult%2C_bigamia_e_uni%3o_est%E1vel_-_realidade_e_responsabilidade.pdf.

⁸ See, e.g., Dias, Maria Berenice: 'Adultery, bigamy and stable Union: reality and responsibility'. On line http://www.mariaberenice.com.br/uploads/4_-_adult%2C_bigamia_e_uni%3o_est%E1vel_-_realidade_e_responsabilidade.pdf; *Family Law Manual* (Sao Paulo: RT);

Comment [SF11]: NEW STF COMMENT

The suggested changes I make in this indented passage are advanced on the supposition that you are the translator, and so at liberty to make such alterations. Please carefully check my suggestions to see whether they are consistent with the Portuguese original.

If this is not a translation, or is translated by someone other than yourself, then of course my suggestions here must be disregarded, but the term *sic* should be introduced where appropriate.

Comment [SF12]: NEW STF COMMENT:

*** Query the phrase "in this panorama." What is the Portuguese? (My computer will not open the cited on-line source).

Comment [SF13]: NEW STF COMMENT:

*** In this footnote: please cite her hard-copy publication in the usual form for a book or article, as well as the on-line source.

Comment [SF14]: NEW STF COMMENT:

*** In this footnote: please cite her hard-copy publication in the usual form for a book or article, as well as the on-line source. (My computer will not open the web citation).

Comment [SF15]: Please identify and quote the opinions about the **family which Radbruch articulated and Dias endorsed.**

One must observe that the family appears in the Constitution under Title VIII, named “The Social Order.” Not in the chapter regarding “Individual and Collective Rights and Duties”. However, as the subjectivist and individualistic conception of family progresses, the connection between family and “social order” is lost, as well as the understanding that protection of the family ensures the maintenance of civil society. In an individualistic context, the State should treat the family as a simple provider of individual interests, with no connection to the perpetuation of society. We could call it “Family as (part of) Consumer Law”. From this perspective, the State should offer various legal living arrangements, as products to supply the market demand for affectionate relationships. But it seems that this role is not pertinent to the State in its relation to the family.

The *Universal Declaration of Human Rights* (1948), recognizes the natural and fundamental characteristic of family by stating that “family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (art. 16). Accordingly, the Constitution of Brazil states in art. 226: “the family, the basis (foundation) of civil society, shall have special protection by the State.”

Here one can recognize the criteria for identifying a category of relationship as entitled to the “special protection by the State”. By indentifying the family as the “basis of society”, this provision indicates that it is a fundamental support for the existence of society. The relationship between man and woman through marriage or civil union, and the parent-child relationship, are the elements that guarantee the natural perpetuation of society, and are therefore entitled to special protection. The same way water sources are “especially” protected for environmental sustainability, the family “base-of-society” should be especially protected as the foundation of “social sustainability”. However, this is no longer the consensus in Brazil.

On May 5th, 2011, the Federal Supreme Court (STF) decided that art. 1.723 of the Civil Code, which deals specifically with the union between man and woman⁹, should be applied to unions between persons of the same sex, according to its interpretation of the Constitution¹⁰. With this decision the Supreme Court gave new meaning to Article 226 § 3 of the Federal Constitution, which provides that the State should give special protection to the union between a man and a woman. The documents recording the discussions of those who drafted and adopted this provision during 1987 and 1988 confirm that the

9 “Art. 1.723 provides: “É reconhecida como entidade familiar a união estável entre o homem e a mulher, configurada na convivência pública, contínua e duradoura e estabelecida **com o objetivo de constituição de família**“. **This may be translated: “A family entity is recognized** as the stable union between man and woman, consisting in public common life, continuous and lasting and established with the objective of constituting family”.

10 STF, ADPF n. 132-RJ, Relator: Min. Ayres Britto, 05.05.2011. (<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633>).

Comment [SF16]: This is a somewhat different translation from the one which you quote supra.

*** I suggest that you drop a footnote here, quoting the Portuguese and explaining your translation.

Comment [SF17]: ** In this footnote:

If this translation is by some official source, please cite to it (here and in the “References” section of this Article.) See my marginal note to the Rferences section below, for a citation to a recent English version.

If this translation is by you, please so indicate.

I make suggestions for the English translation on the supposition that you are free to vary it because it is not a quotation from an other source. Please check my suggestions carefully as, not reading Portuguese, I may have made some mistakes.

intention was to avoid interpretations such as the one from the Supreme Court. The drafters took care to retain the definite articles “o” and “a” in identifying the parties who were to be recognized as grounding a family entity, because those definite articles (unlike “the” in English) are gender specific and make it clear in context that only a union between a man and a woman is intended.

Comment [SF18]: NEW STF COMMENT:

Please place a footnote here citing this extract, and also referencing and quoting other portions of the discussions.

Against the statements of the Supreme Court can be set the observations of Ives Gandra da Silva Martins, as well as Lênio Streck. Ives Gandra stated, “[N]umerous jurists have developed legal and constitutional considerations disagreeing with [those of the Supreme Court] . . . , among them most notably the eminent professor of constitutional law, Lênio Streck who, in an interview with the newspaper ‘O Estado de São Paulo,’ published on May 6, 2011, declared: “this is a matter for discussion by the legislature as . . . in Spain and in Portugal. There, this matter was discussed by Parliament. The judiciary, at this point, cannot replace the legislator” (MARTINS, 2011).

Comment [SF19]:

*** I request that you drop a footnote giving some brief citation information for the Martins item, although of course it is cited in full in the list of References at the end of this article.

Comment [SF20]: Where does this quotation end: where should the “close quotation” mark be placed?

Lênio Streck is Prosecutor of Justice of Rio Grande do Sul, holds a Ph.D. from the University of Santa Catarina, and is a professor at Unisinos University. He answered some questions about this:

Comment [SF21]:

NEW STF COMMENT:

As to all the quoted material in this paragraph:

If the translations are by some official source, please cite to it (here and in the “References” section of this Article.)

If the translations are by you, please so indicate.

I make suggestions for the English translations on the supposition that you are free to vary them because they are not quotations from other sources. Please check my suggestions carefully as, not reading Portuguese, I may have made some mistakes.

Question: “STF’s decision generated controversy because the judges would be legislating. What do you think of that?”

Answer: “The Supreme Court had an activist stance and put itself in the place of the legislator, violating the separation of powers clause. It is not on the agenda in my discussion, to be against or in favour of same sex unions. Personally, I think it is a legitimate cause. But the Federal Constitution would have to be modified or new legislation created, because the legal text speaks of man and woman”.

Question: “The main argument of the proponents is that Ministers were consulted and should rule. Is that correct?”

Answer: “They have to decide, but they could judge the action as unfounded and say that this is a matter for the legislature. This should occur through the legislature, as in Spain and in Portugal. Why, in Brazil, must the judiciary?”

Question: “The Supreme Court has already decided other major questions, such as stem cell research. Has not activism been going on for a long time?”

Answer: “Yes, but there are two kinds of activism. One situation is that in which the Court is activist on issues where there is room in the Constitution for that, but another is one that goes beyond the Constitution”.

Question: “Some argue that this kind of decision would not occur in Congress. What’s the alternative?”

Answer: “This is the risk. This is the burden of democracy. Not everything that people want Parliament approves. Democracy doesn’t always attend to everything. It does its part. Europe coexists nicely with it. Brazil apparently prefers to shorten paths. It’s much easier to convince 11 than 513”¹¹.

Flexibility in interpretation of the Constitution is limited by the text of the norm. The Brazilian constitutional system does not allow any form of interpretation which goes beyond what has been prescribed, be it in the original or revised text. Not even the Supreme Court can evade this restriction. In order to change the text, it is necessary to reform the constitution, a power which is reposed in the National Congress. Thus, the Ministers who decided to make same-sex unions equal to the unions between a man and a woman used the judiciary power for political purposes, in conflict with the democratic system described in the Constitution. They took upon themselves the Legislative power to amend the Constitution.

The Ministers were driven by the ideological and psychological aspiration to legally affirm homosexual couples, by the desire to mitigate social prejudice and by the intention to grant specific benefits to this group. They were eager, for political reasons, to equalize gay unions to models described in the Constitution. With this behavior they created a dangerous precedent. They perverted the Brazilian democratic system, since that political role belongs to Congress, which must debate with society before changing the Constitution. And, finally, they did not display the best juridical knowledge, when they tried to justify what they did by maintaining that it was according to the law.

Along the same lines, in May, 2013, the National Council of Justice (CNJ, according to the name in Portuguese), an entity with the power to oversee and establish rules for the Judiciary, determined that all notaries must convert same-sex unions into marriage, whenever requested by the couple,¹² based on an article in the Constitution which says that “for purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage”.¹³ So gay marriage has been established in Brazil by the Judicial power for the whole country. Since in Brazil only National Congress has the

¹¹ STRECK, Lênio. Entrevista. O limite entre o Judiciário e a Lei [Interview. The boundary between the judiciary and the law]. Publicada em gazeta do Povo, 5 de maio de 2011, <http://www.gazetadopovo.com.br/vidaecidadania/conteudo.phtml?id=1123555>. [These passages are translated by the author of the present Article.](#)

¹² CNJ, Resolução n. 175, de 14 de maio de 2013, D.O.U de 15.05.2013.

¹³ Article 226(3), quoted above.

competence to legislate in this area. In the Constitution, article 68 says that the National Congress is not allowed to delegate competence, as to matters reserved for supplementary laws and as to legislation about: “(...) II – nationality, citizenship, individual, political and electoral rights”. It is important to highlight that, for the most part the Brazilian people are opposed to gay marriage, and did not participate in the discussions on the topic, nor did the National Congress, which has the mandate to amend the constitution.

Comment [SF22]: **

NEW STF COMMENT:

Can you cite the provision which confers competence in this area?

Since Thursday, May 16, 2013, resolution number 175 of May 14th, 2013, of the National Justice Council (CNJ) has been in effect. The resolution stipulates that the Civil Registry Offices across the country should celebrate the civil marriage between persons of the same sex and convert the stable homosexual unions into marriages, without the requirement that application be made to the judiciary. According to the CNJ, the competent authorities are prohibited from refusing to provide the service. In the first year 1000 civil marriages were contracted between persons of the same sex. The highest number of such marriages took place in São Paulo, where there were 701.¹⁴

Comment [SF23]: NEW STF COMMENT:

I have normalized the margins of this and the next paragraph in the belief – correct? – that they are not a quotation from some other source.

Comment [SF24]: NEW STF COMMENT:

Is this suggestion correct?

Comment [SF25]: NEW STF COMMENT:

I have revised this paragraph and, with the suggested revisions, placed it in the previous footnote. Please check.

** Please provide fuller citation information for the document cited in the on-line cite.

It is important to make it clear that all citizens have rights and deserve protection. Civil society can create, through the democratic process, different institutions for protection in different situations. The issue analyzed in this paper is not same-sex unions and their protection by the State. The issue is the definition of what constitutes the “foundation of society”, and of what entity deserves the “special protection” promised to the family as “base of society”? Who can define what is the family as a base of society: the Supreme Court judges, the Legislative body or civil society? What are the criteria? Currently there is great influence from lobby groups in this area.

Lobbying in Brazil is not regulated, though it is highly influential. Thus, the pressures of lobbies occur outside the law and without transparency. As a result, many laws are created on behalf of the Brazilian people, but not in the real interest of the people.

¹⁴ Association of Registrars of Individuals (Arpen-Brazil).

As with marriages between heterosexuals, for conversion of stable unions or for enabling homosexual civil marriage, those interested are required to proceed through the Civil Registry Office of the Division of the domicile of one of them. They are required to present their birth certificates, their identity documents and proof of residence, and also two witnesses. Before the decision of the CNJ some States already had been performing such marriages and conversions based on regulations promulgated by certain courts. Cf. <http://www.anoregms.org.br/noticias-anoreg/um-ano-apos-norma-sobre-o-casamento-gay-chega-a-1-000-as-unioes-entre-o-mesmo-sexo/>

It is a distortion very common nowadays. Democracy is especially violated when State agents use State power to promote the “ideological interests” of minorities, disguised as “rights” - interests with which they are identified politically – to the detriment of the true values and real human rights of the majority. This is unfair. And it happens when the judges want to be like social engineers and try to act as political agents instead of acting as guarantors of real justice.

To be supported by a lobby is not always wrong. There are lobbies that arise from the political base that supports the politician. But sometimes there are politicians who advocate ideas contrary to the well being of their electors, and for interests different from the common good. In such cases, politicians sell themselves to lobbyists who promise them financial support or some other kind of support. The same phenomenon also occurs with judges. They work under the pressure of lobbies. The Congress has about 650 representatives of the people, making it harder for lobbyists to control the process. Sometimes is easier and more efficient to lobby at the Supreme Court or the High Courts in Brasília. There are influential lobbies acting on the Judiciary.

Lobbyists represent interest groups. They are important actors in democracy. The problem that arises in countries like Brazil, besides the circumstance that there is no regulation of lobbying, the majority of people have not learned yet how to organize themselves in defense of their own interests. In this situation, the well organized lobbies for minority interests, when in conflict with the poorly organized representatives of majority interests, prevail over the majority in debatable matters that go far beyond the basic rights of the minority. That creates a distortion in democracy.

The GLBT (gays, lesbians, bisexual and transgender people) lobby is one of the most organized and efficient. They operate in the Legislative branch, and also in the Judiciary, where they have achieved better results. They have had much support from State officials sympathetic to their causes.

After all of this, one must ask: who is acting on behalf of civil society? Who is dictating what is the family on behalf of the State? In furtherance of what interests? How can we prevent civil authorities from using State power to pursue agenda contrary to the wellbeing of civil society? It seems that Brazil is not alone in these concerns: in France, for example, there has been a large public uproar against a law that its legislature approved, apparently on behalf of the population, but without taking the population into consideration.

II – Internal perspective of family: competencies related to family duties

Comment [SF26]: I suggest the reintroduction of this phrase just below. (ok! – aj)

We will direct our study to two principles that would contribute to preventing State abuse by usurpation of activities related to the family. *When and in what areas* may the state interfere in family life? State, civil society and family are social circles that divide competencies and occupy different spaces, in relation to protection of the human and the pursuit of the common good (PEREIRA JUNIOR, 2002, p. 50s). There are no rules regulating precisely the space belonging to each. But it is appropriate to identify competencies and establish principles that can guide them.

The word “competence” comes from the Latin *competere*, which can mean “to be qualified, competent, appropriate, fit, or suitable” (LEWIS & SHORT, 1969, p. 389). For purposes of constitutional law, *competence* can be defined as “the power assigned by law to an entity or Government body or agent which issues decisions”¹⁵ (Silva, 2000, pp. 479-485). In general, the concept of *competence* has a delimiting function to the range of action of an entity. The science of constitutional law developed typologies of competencies of the State. Let us call to mind this conceptual framework in order to make use of it.

According to the *extent* of appropriate power afforded to a given entity regarding certain subjects, four types of *competencies* can be identified: *exclusive*, *private*, *concurrent* and *supplementary*. *Exclusive competence* does not allow delegation. *Private competence*, on the other hand, allows it. *Concurrent* or *common competence* is one that is afforded to more than one entity. It may be shared, establishing *preference* to one entity over another. In this case, the entity with the lower preference is said to possess *supplementary competence*.

Another interesting classification relates to the source of competence. Competence assigned directly is called *originary*. Competence conferred by a higher competent person or entity is called *delegated*.

The competencies of family are independent of State legal provision. There is family before State. So, the family roles do not depend on the State to exist. It is true, however, that a measure of “positivization” about the family roles can be helpful in supporting the political and legal orders in this important area.

The principles of subsidiarity and cooperation

In order to establish criteria for the interaction between family, civil society and State we can avail ourselves of the principles of social order. In particular, we can highlight two of them: subsidiarity and cooperation.

The word subsidiarity comes from the Latin word *subsidium*, which referred to “a body of troops with held from action as a reinforcement for the front line” and to

¹⁵ Translated by the author of this Article.

“additional manpower available as a replacement, reserves” (II OXFORD LATIN DICTIONARY, 2d ed., 2012, pp. 2038-39). In Rome, the *subsidiarii cohorts* were the troops in the rear, ready to help the troops in the front line (*prima acies*) when they were in trouble and unable to get out of the situation themselves (Martinell GIFRÈ, 1991, p. 707). *Subsidium* is that which furnishes support, help, aid, support, relief, assistance or provision¹⁶. Thus, the term refers to the assistance provided by *higher* persons or entities to *lower* ones, in instances in which the lower ones are not able to meet their needs alone. The term is usually applied to the relationship between the State and institutions of civil society, including intermediate entities. The principle of subsidiarity serves as a guide to social life and reflects basic human experience.¹⁷

Bearing in mind the competencies of social units, and also the good of social order, one can say that subsidiarity requires that the State respect the *exclusive* and *private* competencies of smaller entities. The State should act (provide subsidy) when the entity is not fulfilling its duties (competencies), in the defense and protection of persons who may be affected negatively by their insufficient action. This principle protects the *autonomy* of smaller social groups, in the face of abusive invasion of the State.

It is, accordingly, the State’s responsibility to intervene when circumstances warrant such intervention, but always in ways which allow the full development of intermediary entities such as the family. All such entities must be respected because they respond to a need -- and therefore have rights and their own purposes, as is the case with family -- or because, in the least, they are a product of the human freedom of association.

The principle of subsidiarity protects the individual family (HÖFFNER, 1986), in a special way since – as we emphasize for the purposes of this study -- its purposes and competencies are inherent, and are not transmitted or delegated to it by the State (MESSNER, [undated]). Violations of such competencies imply a totalitarian State, since the State would be meddling in the sphere of other entities.

It is easy to see the principle of subsidiarity informing provisions of the Constitution of Brazil. This is especially evident in those provisions which recognize the powers and responsibilities of parents. They are the first ones responsible for raising their children. Should the State look after minors, it must respect the precedence of the family. Examples of the acknowledgment of the parental role can be found in articles 227¹⁸ and

¹⁶ Cf. STELTEN, Leo F. , *Dictionary of Ecclesiastical Latin*, Columbus: Pontifical College Josephinum. Columbus, 1994, p. 540.

¹⁷ For a learned and insightful discussion of the principle of subsidiarity, and extensive references to the literature, see CAHILL, Maria, *The Origin of Anti-Subsidiarity Trends in the Regulation of the Family*, 4 INT’L. J. JUR. FAM. 85 (2013).

¹⁸ Article 227 is set forth as an appendix to this Article.

Comment [SF27]: NEW STF COMMENT:

If this is a direct quote, please add quotation marks and delete the “cf.” From the footnote.

229¹⁹ of the Constitution, article 1634 of the Civil Code²⁰ and article 22 of the Statute of the Child and Adolescents²¹.

The principle of subsidiarity is invoked when there is no equal competence among social organizations (in the case of the *exclusive competence* of the family, for example), and one of them needs to intervene to rescue a person who is not conveniently served by the *originally competent* organization (MESSNER [undated]). You can apply the above reasoning to the duty to educate a child.

First, one should differentiate between types of education: moral-religious and scholastic-professional. Scholastic education of the minor is within the *concurrent competencies* of the family and the State. The family has *preference* over the State. (One implication of the principle of subsidiarity, therefore, is the legal recognition of homeschooling, which is not allowed in Brazil). Moral and religious education, on the other hand, is within the private competence but not the exclusive competence of the parents. Therefore, the State must respect the precedence of the parents and help them in this function when needed. But the State cannot arrogate to itself the right to educate moral or religiously, in concurrence with parents who respect the fundamental rights of the child. An implication of this principle is that it is the duty of the State not to override parents when organizing campaigns aimed at combatting sexually transmitted diseases and AIDS among the young. In Brazil, the campaign “have sex with a condom: nothing gets passed by it”, is objectionable on this ground. Quite apart from the fact that it communicated false beliefs about the reliability of condoms, it was deplorable as

¹⁹ Article 229 provides: “It is the duty of parents to assist, raise and educate their under-age children and it is the duty of children of age to help and assist their parents in old-age, need or sickness.”

²⁰ Article 1.634 provides: “With respect to the person of the minor children, the parents have the right:

- I. To direct their raising and education;
- II. To have them in their company and custody;
- III. To grant or deny consent to their marriage;
- IV. To appoint a guardian for them, by testament or authentic document, if the other parent does not survive, or the survivor cannot exercise the parental power;
- V. To represent them until 16 years of age, in the acts of civil life, and assist them, after that age, in the acts to which they are parties, by supplying their consent;
- VI. To reclaim them from whoever illegally detains them;
- VII. To demand their obedience, respect, and services appropriate to their age and condition.”

²¹ Article 22 provides: “It is the duty of parents to provide support, custody and education to underage children and, in the interest of such children, it is also their obligation to comply and see to compliance with judicial decisions.”

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If this translation is written by you, please so indicate.

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If this translation is by some official source, please cite to it (here and in the “References” section of this Article.) If this translation is written by you, please so indicate.

stimulating sexual practices at an early age. Nowhere in the campaign materials were the parents mentioned nor were parents consulted so that the general values of Brazilian society could be harmonized.

There is also a *principle of cooperation*, which serves as a guide to joint action of more than one entity to common tasks. Cooperation refers to a common responsibility. The principle of cooperation is a standard that guides joint activities among subjects with shared *competence*, thus allowing for associations and entities to supplement one another, without infringing one another's private or exclusive competencies.

The principle of cooperation is reflected in art. 227 of the Constitution of Brazil, which provides that it is the “duty of the family, society and the State to ensure [certain rights of] children and adolescents, with absolute priority . . .”²² This provision summons all forces of social mobilization to ensure the rights of children and adolescents.

As regards training, for example -- technical, intellectual and professional training -- the Constitution provides that it is the duty of the State and the family (art. 205²³), and “with the cooperation of society [...]” The State ensures free and compulsory basic education (art. 208, §1²⁴), and access to such education is recognized as “public subjective right” (art. 208, §1²⁵). However, education goes beyond technical instruction: here is a moral dimension which is the primary task of parents, their *private competence*.

The principle of cooperation, according to how it is now perceived, should be used to guide the common actions of associations when they have *competencies* in common, and in ways which respect the order of precedence among them,

Conclusion

This text has offered a brief warning regarding the exclusion of great part of civil society from the definition of family in Brazil. Secondly, it has very briefly presented the typology of *competencies*, and applied them to issues involving State and family, with the intent of protecting the family from abusive State interference. The two perspectives presented -- the reach of the principle that family should receive special State protection

²² Article 227 is quoted in full in an appendix to this Article,

²³ Article 205 provides: “ Education, which is the right of all and the duty of the state and of the family, shall be promoted and fostered with the cooperation of society, with a view to the full development of the person, his preparation for the exercise of citizenship and his qualification for work.”

²⁴ Article 208 provides: “ The duty of the State towards education shall be fulfilled by ensuring the following: i – mandatory basic education, free of charge, for every individual from the age of 4 (four) through the age of 17 (seventeen), including the assurance of its free offer to all those who did not have access to it at the proper age”

²⁵ Article 208. Paragraph 1 provides: “ The access to compulsory and free education is a subjective public right”.

Comment [SF30]: ** In this footnote and the next two: please identify the translator.

The term “state” is not capitalized in this footnote but it is capitalized in the next and in the text of this paragraph above. Which is correct?

Comment [SF31]: Query “I.” Should it be section one?

and the principle limiting the degree of State intervention in the internal tasks of family -- call for further study. This is the subject line of research that will begin in the University of Fortaleza (Ceará, Brazil) in the beginning of 2014.

Comment [SF32]: Kindly cite the particulars of the research project..

Comment [SF33]: NEW NOTE TO MYSELF: DTH FOR MARGINAL COMMENTS AND NEW AUTHOR MATERIALS N

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Comment [SF34]: Should this not also be cited to the OFFICIAL GAZETTE: DIÁRIO OFICIAL DA UNIÃO (Imprensa Nacional, 1990-), http://portal.in.gov.br/page_leitura_jornais, LOC Call No. J6 .B8 GAZETTES.

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APPENDIX

Article 227 of the Constitution of Brazil

It is the duty of the family, the society and the state to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.

Paragraph 1. The State shall promote full health assistance programmes for children and adolescents, the participation of non-governmental entities being allowed, and with due regard to the following precepts:

Comment [SF35]: Please identify the translator .

I – Allocation of a percentage of public health care funds to mother and child assistance;

II – Creation of preventive and specialized care programmes for the physically, sensorially or mentally handicapped, as well as programmes for the social integration of handicapped adolescents, by means of training for a profession and for community life, and by means of facilitating the access to communal facilities and services, by eliminating prejudices and architectonic obstacles.

Paragraph 2. the law shall regulate construction standards for public sites and buildings and for the manufacturing of public transportation vehicles, in order to ensure adequate access to the handicapped.

Paragraph 3. The right to special protection shall include the following aspects:

I – minimum age of fourteen years for admission to work, with due regard to the provisions of article 7, XXXIII;

II – guarantee of social security and labour rights;

III – guarantee of access to school for the adolescent worker;

IV – guarantee of full and formal knowledge of the determination of an offense, equal rights in the procedural relationships and technical defense by a qualified professional, in accordance with the provisions of the specific protection legislation;

V– compliance with the principles of brevity, exceptionality and respect to the peculiar conditions of the developing person, when applying any measures that restrain freedom;

VI – Government fostering, by means of legal assistance, tax incentives and subsidies, as provided by law, of the protection, through guardianship, of orphaned or abandoned children or adolescents;

VII – prevention and specialized assistance programmes for children and adolescents addicted to narcotics or related drugs.

Paragraph 4. the law shall severely punish abuse, violence and sexual exploitation of children and adolescents.

Paragraph 5. adoption shall be assisted by the Government, as provided by law, which shall establish cases and conditions for adoption by foreigners.

Paragraph 6. Children born inside or outside wedlock or adopted shall have the same rights and qualifications, any discriminatory designation of their filiation being forbidden.

Paragraph 7. In attending to the rights of children and adolescents, the provisions of article 204 shall be taken into consideration.