

# CONYUGAL AND FILIAL RIGHTS OF LGBTIQ<sup>+</sup> PERSONS THE CHILEAN CASE

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## ABSTRACT

*Judeo-Christian-based religions based on what they recognize as sacred scriptures reproduce sexual diversity, considering it and natural. They confused parenthood with fecundity, assimilating sexual and gender diversity with sterility, stating that a same-sex couple cannot reproduce “naturally” and could not exercise maternity/parenthood. The heterocisnormative Judeo-Christian model generates repercussions at the sociocultural and political levels through the existing obstacles to passing laws related to the Rights of LGBTIQ<sup>+</sup> people, especially regarding their access to establishing marital contracts or to the exercise of parenthood. In this article, we will present as an example the Chilean case study, in comparison with Latin American countries, analyzing the legislative situation from the factors associated with religious groups.*

**Keywords:** Diversity, Motherhood, Fatherhood, Conjuality, Catholicism, Evangelical Movements.

## INTRODUCTION

At the end of the 20<sup>th</sup> century, in Latin America, left-wing political forces and social movements of LGBTIQ<sup>+</sup> people began to advocate for legislative changes associated with rights-related claims (Diez, 2015 & 2016; Garrido, 2016). However, Chile does not make legislative changes on par with other Latin American countries. Since the coup d'état, two political coalitions were generated - one center-left and one center-right, which count among their ranks confessional parties (Mayol, 2016). Given this, the conservative social forces of the left and right, associated with Catholic and Evangelical religious movements, have high veto power in legislative instances (Alday-Mondaca & Lay-Lisboa, 2021; Diez, 2015 & 2016; Mayol, 2016).

In this context where the Catholic and Evangelical churches permeate political coalitions (Mayol, 2016), the possibility of establishing legal and social structures that allow LGBTIQ<sup>+</sup> people to experience parenthood is hindered, so symbolic violence is exercised through the normalization and validation of the dominant heterosexual position (Bourdieu, 2007).

In 2016, the Chilean State, following the Inter-American Court of Human Rights (IACHR) judgment concerning Atala and girls vs. the State of Chile<sup>1</sup>, assumed the Agreement for Equality. This agreement recognizes that the human rights of LGBTIQ<sup>+</sup> people are violated by prohibiting equal marriage and commits to the approval of this legal regulation is a binding agreement (Zuniga, 2012; Farias, 2016).

Since the Atala case, progress has also been made concerning the National Service for Minors (Sename), which committed favorable reports for "*same-sex adoption and filiation*". For the first time in Chile, a same-sex couple has been declared eligible to adopt. Despite these indications, adoption by same-sex couples is still not legal, and there are still problems associated with the discrimination<sup>2</sup> of these families (Alday-Mondaca & Lay-Lisboa, 2021a; Movilh, 2016).

Religious groups dispute these advances through the intensification of actions aimed at slowing down the processing of laws vindicating the rights of LGBTIQ+ people (Movilh, 2018). Rights-related claims become especially serious in a society such as the Chilean one. Social rights have become consumer goods, from the high commodification caused by the imposition of the subsidiary State in the Chilean Constitution proclaimed during the military dictatorship.

For example, the role of the subsidiary State means that public health services are not guaranteed, and health services are charged. LGBTIQ+ people mostly have difficulties entering and remain in formal education and, therefore, often have access to precarious jobs with low wages and without the possibility of paying the high costs of private health care (Alday-Mondaca & Lay-Lisboa, 2021). Paid health services are a violation of LGBTIQ+ people's rights.

In the following sections, we will present a study of the Chilean case, compared with Latin American countries, analyzing the legislative situation based on the factors associated with the religious groups that sustain the status quo. For this purpose, we will develop the sections: Religious mobilization associated with conjugal rights and religious mobilization associated with filiation rights; then, we will present the conclusions.

### **Religious Mobilization Associated with Conjugal Rights**

From 2000 onwards, the demands of sexual and gender diversity groups and organizations against discrimination led to the revision of the legal systems of several countries to implement what was called "*equal marriage*", "*homosexual marriage*," or "*gay marriage*" (Quintana, 2015).

Various studies show that the Chilean population has positive attitudes towards the equal marriage law, which has support ranging from 48 to 68.5% among the Chilean population (Cadem, 2017; VIII Survey of the National Youth Institute. Internationally, it has been shown that there is a link between a country's economic development and the approval of equal marriage laws. However, within the group of countries with the highest development in Latin America, Chile is the only one that has not yet passed an equal marriage law, which is an exceptional case (Diez, 2016).

We can comprehend this difference by analyzing the articulation of the Judeo-Christian heterocisnormative model with the current Chilean sociopolitical system. The Chilean State, based on naturalized religious discourses, has patterned practices through laws that regulate the configuration of the family and the recognition of couple and filial relationships since the nineteenth century (Alday-Mondaca & Lay-Lisboa, 2021a; Garrido, 2016; Laguna, 2016; Olavarria, 2014).

The Civil Marriage Law 19.947 establishes that the right to marry is an inherent right of individuals. There is no explicit impediment for two individuals of the same sex to get married in its wording. However, Article 102 of the Civil Code states that:

*"Marriage is a solemn contract by which a man and a woman are united presently and indissolubly, and for life, to live together, procreate, and help each other."*

This article is considered discriminatory (Garrido, 2016; Movilh, 2016) and unconstitutional (Buendía & Douglas, 2012) for contradicting the principles of equality and non-discrimination in force and declared in the first article of the Chilean Constitution:

*"Persons are born free and equal in dignity and rights. The family is the fundamental nucleus of society. The State must safeguard national security, protect the population and the family, promote the strengthening of the family, promote the harmonious integration of all sectors of the Nation, and ensure the right of persons to participate with equal opportunities in national life."*

Article 102 of the Civil Code limits equal access to the right to marry and violates the legal protection of the family established in Article 16.3 of the Universal Declaration of Human Rights; Article 17 of the American Convention on Human Rights; Article 23 of the International Covenant on Civil and Political Rights; and Article 10.1 of the International Covenant on Economic, Social and Cultural Rights, all ratified by Chile.

In Chile in 2015, the Civil Union Agreement was enacted, which regulates the property relations of natural persons. However, it leaves out the possibility of filiation and does not protect children of LGBTIQ+ persons (Quintana, 2015).

President Michelle Bachelet signed an Equal Marriage Bill, which extended to couples formed by LGBTIQ+ people the rights of filiation, parenting, adoption, and assisted fertilization and recognized the existence of parental blocks formed by two mothers/fathers (Bachelet, 2017). This Law includes the modification of Article 102 of the Civil Code, by the text: *"marriage is a solemn contract by which two natural persons unite to live together and form a family"*; eliminating the differences by sex and the mandate of marriage for reproductive purposes.

This bill also includes a modification of the Civil Code, where it would establish that *"parents, fathers, and mothers are those concerning whom the filiation relationship has been determined"*, which implies that any couple could have custody of their children. In addition, it opens the option of accessing assisted reproduction techniques (Alberdi & Mardones, 2016).

Various groups formed by LGBTIQ+ people consider the approach of this bill as an advance in equal rights, which could have a performative effect by generating a profound change in one of the most traditional institutions of the heterocisnormative Judeo-Christian model (Castelar, 2010). Above all, because it would allow couples formed by LGBTIQ+ people to access rights and social benefits whose recipients are couples legally recognized by the State -for example, the right to inheritance- (Alday-Mondaca & Lay-Lisboa, 2021a). However, after the inauguration of President Sebastián Piñera, who assumed power supported by a political coalition that contains Catholic groups and a robust Evangelical bench, government representatives publicly expressed their opposition to the processing of this Law (El Dínamo, 2018; Movilh, 2021).

During the last public account of his mandate -unexpectedly and without the support of his political coalition-, President Sebastián Piñera expressed his intention to put legislative urgency to the equal marriage bill. This statement generated rejection comments from representatives of the two largest parties of his coalition - Renovación Nacional and Unión

Demócrata Independiente (Movilh, 2021). Currently, the Law is being processed in the Senate (Senado, 2021).

### Religious Mobilization Associated with Filiation Rights

There are different ways in which LGBTIQ<sup>+</sup> people can be mothers or fathers. However, the lack of legal guidelines that regulate maternal/paternal-filial relationships generates invisibilization, social and legal lack of protection and may result in LGBTIQ<sup>+</sup> people deciding not to have children under these circumstances (Alberdi & Mardones, 2016; Alday-Mondaca & Lay-Lisboa, 2021a; Diez, 2015 & 2016; Herrera, 2009; Movilh, 2018; Rodriguez, 2015; Spauldo, 2017).

Regarding legal aspects, in the case of parenthood, in the Civil Union Agreement (AUC, by its Spanish acronym), the filiation of a couple formed by persons of the same sex is not regulated, so the adoption, guardianship, and custody of children are left without legal coverage, and neither does it regulate the right to nationality, the surname regime, inheritance rights, alimony, among others (Alberdi & Mardones, 2016; Diez, 2015 & 2016; Laguna, 2016; Law No. 20.830. Civil Union Agreement; Rodríguez, 2011).

This arbitrariness tries to justify the supposed impossibility for LGBTIQ<sup>+</sup> persons to procreate in a "*natural*" way; legally, the same criterion is not applied when heterosexual, cisgender couples carry out adoption procedures and assisted reproduction techniques (Alday-Mondaca & Lay-Lisboa, 2021b). Then discrimination is not based on the (in) existence of a blood relationship between the children and the parents, but the sexual and affective orientation of the couple. This situation is contrary to the recognition of human rights (Alberdi & Mardones, 2016). In this sense, vulnerabilities that go through the diverse identities of LGBTIQ<sup>+</sup> people are reinforced and perpetuated through government policies, laws, and programs (Alday-Mondaca & Lay-Lisboa, 2021; Esguerra & Bello, 2014).

For example, the public health policy on assisted fertilization considers male-female couples its beneficiaries, which constitutes legalizing discrimination based on sex-affective orientation (Alday-Mondaca & Lay-Lisboa, 2021).

The current Adoption Law (Law No. 19, 620) dates to 1999. During 2013, 2014, and 2015, amendment proposals have been presented that have not been able to advance in the legislative process. In June 2018, the Government of President Sebastian Pinera introduced a substitute indication to the draft Adoption Law, which indicates that the child must be ensured a family environment where the roles of mother and father can be adequately exercised (Ministry of Justice and Human Rights, 2018). Due to the wording of this paragraph, it is questioned whether the proposed modifications to this Law, will be applied as arguments against the exercise of maternity/parenthood of couples formed by LGBTIQ<sup>+</sup> people (Movilh, 2018).

In contrast, in the social sphere, support for adoption by same-sex couples is 60.7%, and a high percentage of people agree that Trans people should be allowed to conceive a daughter/son (78%) or adopt (60%) (Ipsos, 2018). "*PDSA parenting experiences can be highly enriching for both mothers/fathers and children, as long as there are a series of structural/institutional, social and personal conditions that allow for a protected and accompanied experience*" (Alday-Mondaca & Lay-Lisboa, 2021). Civil society is advancing towards recognizing the rights of LGBTIQ<sup>+</sup> persons at a faster pace than political actors.

Judeo-Christian-based religions, relying on what they recognize as sacred scriptures, reprove sexual diversity considering it unnatural (Diez, 2016; Garrido, 2016). Through reification<sup>3</sup>, it is assumed that marriage is a socio-sexual contract (Pateman, 1995) whose purpose is reproductive and comes from a divine mandate (Díez, 2016; Garrido, 2016; Robaldo, 2011; Grove, 2014).

Parenthood is confused with fecundity, assimilating sexual and gender diversity with sterility, meaning that a same-sex couple cannot reproduce "*naturally*" and, therefore, could not exercise maternity/parenthood (Alday-Mondaca & Lay-Lisboa, 2021; Diez, 2016; Garrido, 2016; Leyton & Trabucco, 2014).

In the Chilean social field, those who occupy the dominant position from heterosexuality have overseen judicializing a frontier between them and LGBTIQ<sup>+</sup> people. The Judeo-Christian heterocisnormative model generates repercussions at the sociocultural level, as well as at the legislative, political level, through the existing obstacles for the processing of laws related to the rights of LGBTIQ<sup>+</sup> persons, and the legal unprotection that LGBTIQ<sup>+</sup> persons face at all levels and, especially, regarding their access to establish conjugal contracts or to the exercise of parenthood and filial rights (Alday-Mondaca & Lay-Lisboa, 2021; Diez, 2015 & 2016; Herrera, 2007, 2009; Laguna, 2016). The Judeo-Christian heterocisnormative model turns Law and laws regarding marriage/affiliation into guardians of hierarchy among people of diverse genders and sexual orientations (Alberdi & Mardones, 2016; Alday-Mondaca & Lay-Lisboa, 2021; Laguna, 2016; Olavarría, 2014; Robado, 2011).

Since the return to democracy, Chile has experienced significant changes in its economy, the expansion of cultural freedoms, and the expansion of democracy. Those changes have led to people's empowerment and less tolerance of inequality and its daily manifestations (Larranaga & Rodriguez, 2013).

In empirical research, we have found that LGBTIQ<sup>+</sup> people apply resistance tactics to confront this adverse legal framework (Alday-Mondaca & Lay-Lisboa, 2021). For instance, at the structural/institutional level, the drafting of a new constitution - an effect of the 2019 social revolt (Mayol, 2019) - is perceived by LGBTIQ<sup>+</sup> collectives as an instance where the human rights agreements that Chile has signed, but which remain unfulfilled, can be embodied (Alday-Mondaca & Lay-Lisboa, 2021). Drafting the new constitution that emphasizes equal rights for all people could lead to laws and the implementation of public policies that allow LGBTIQ<sup>+</sup> people to develop marital and parental-filial relationships under a framework of legal protection (Fraser et al., 2011; Camila & Alanis, 2014).

Access to institutional political power is crucial to achieving legal modifications that give protection to social practices. This protection can be activated through the election of LGBTIQ<sup>+</sup> people to positions of public relevance and through the advisory services that LGBTIQ<sup>+</sup> organizations can provide in spaces of institutional political power such as the Senate or the Chamber of Deputies (Alday-Mondaca & Lay-Lisboa, 2021). For this to happen, LGBTIQ<sup>+</sup> people must manage to constitute and maintain self-managed groups over time, capable of influencing the institutional political sphere and public opinion, promoting social changes in favor of their rights (Alday-Mondaca & Lay-Lisboa, 2021).

## CONCLUSION

We have not yet been able to build a legal framework that recognizes the existence of diverse families and gives them the protection and sense of equality before the Law that they need and deserve. The defense of human rights is confronted with unequal social relations, economic conditions, and political structures. In this sense, the task of making social justice a reality for all remains a pending task.

## ENDNOTES

1. In 2004, the Chilean Supreme Court ruled that the three daughters of Judge Karen Atala should live under the full custody of the girls' father. The argument presented was that the mother, living with her female partner, could not provide a suitable environment for her daughters' development. Due to this determination, the Judge sued the State of Chile before the IACHR, which ruled in favor of the Judge and forced the State of Chile to reverse the ruling (Zúñiga, 2012).
2. Negative attitudes towards a social group or a person perceived as a member of that group (Cárdenas, Gómez, Méndez & Yáñez, 2011).
3. Apprehension of human phenomena as facts of nature or divine will (Berger & Luckmann, 1968).

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