Among Brothers or How the Battle for the Redefinition of Marriage did Affect Family Law in Argentina

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“There are six things the Lord hates, seven that are detestable to him:: (…) a false witness who pours out lies and a man who stirs up dissension among brothers.”

1. Law in context: antecedents of the approval

Argentina was the penultimate country in Latin America to pass a divorce law. As a matter of fact, it was one of the last in the world to do so. It ended up being the first Latin-American country to pass same sex marriage and the tenth country in the world to enact it. Before we passed same sex marriage law we did not even have legal recognition of civil unions or partnerships. How came this substantive change to happen all of a sudden?

By 2002, the city of Buenos Aires passed a law legalizing civil unions only within the perimeters of the city. The draft did not contain the duty of fidelity. Only two years of cohabitation were needed, but they could be skipped by mutual agreement of the parties. It had been expressly asked by the leaders of the Homosexual Community in Argentina (CHA): (a) to exclude the duty of fidelity; (b) to facilitate as much as possible the dissolution of those unions; and (c) to provide ample faculties to make agreements concerning property rights, alimony or other issues. The partners had been granted no succession rights, nonetheless social security rights –including pension rights- were extended to them.

This local regulation was received with criticism. Not so much because it granted rights to same sex couples, but mostly because civil law is a federal matter in Argentina. Local legislatures cannot pass civil law. Despite that, the bill was successfully enacted.

After that, same sex unions were very rare. They occurred at a rate of 5-15 per month.

Several years passed without much ado.

By 2005, Spain legalized same sex marriage. This reignited the spark, but only timidly. Some voices rose suggesting passing a national civil union’s law. The peronist party

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(currently ruling in Argentina) had never been very fond of minorities’ claims. Peron had flourished during nationalist political movements, and his followers were reluctant to discuss same sex marriage or even civil unions. By then, the LGTB’s association had managed to form a national front uniting the main LGTB’s associations. The leader of the strategy was Maria Rachid. She was a confessed trotskist and had followed some queer studies in the States. In an interview (and I heard her personally speaking about this), she said that she never even dreamt of marriage. The most she hoped was for a national civil union law. At this point, it is convenient to quote from a transcendent interview in which she narrates the chain of events that lead to the legalization: ““In a debate, a priest said to me: We do not object your being together and having some rights and duties and calling it as you wish to. However, do not mess with marriage, because marriage is a sacred institution. Having heard these words, I thought: If this people do not want us to mess with marriage, it has to be because marriage touches a nerve central to society””.

This is a historic document, and it shows how sometimes simple events trigger great changes.

She goes on to explain how the left parties engaged with LGTB’s rights, though they were always a minority in the Parliament. They also struggled with the CHA (Argentine homosexual Community), because the CHA did not support marriage. They held the historical position, meaning that marriage was not suited to homosexual relationships (see above, same sex unions in Buenos Aires). Finally, she managed to convince them: it was made clear to them that it was not so much about marriage, in which neither of them did believe; but about social recognition of the equal dignity of homosexuality.

By 2009 the leading peronist party had had a bad ballot. They lost many seats in the Parliament, though they managed to retain the majority. Statistics showed that the only way they could regain lost votes was by moving to the left wing. Since then, Nestor Kirchner – by then representative meanwhile his wife had been elected President- decided he would back same sex marriage as a part of his new political strategy. Actually, the only time he voted for the year and a half since he occupied the seat was precisely when the vote for same sex marriage took place.

In the Senate, things were not so easy. The vast majority of members represented conservative provinces. I was then asked to sketch a single draft out of many I regulating a national civil union for heterosexual and homosexual couples. This bill out of that draft was approved by two thirds of the Commission of Legal Matters in the Senate, and it had been anticipated that the government’s same sex marriage bill would fail to pass.

Hence, three measures were taken: first, to turn down the civil union bill without explanations and postponing the right to appeal this measure after the vote for same sex marriage took place. Secondly, some opponents of same sex marriage suffered pressures and some of them were offered favors in return for their vote (this was stated publicly by some of the concerned senators). Thirdly, some of the Senators opposing the bill were

4 VALLEJOS, Soledad, “La presidenta de la FALGBT, María Rachid, narra el camino que llevó al matrimonio igualitario”, Página 12, 18/7/2010.

5 VALLEJOS, “La presidenta…”, cit.
offered to accompany the President to a business trip to China. Despite that, the bill passed narrowly: for only three votes and three absentees. The following events are more or less known to everybody. Those scholars who backed the bill called it not just “reform to the marriage law” (as the previous divorce law was called), but “egalitarian marriage”.

A law that meant so much for the LGTB movement would have gained legitimacy if it would have been played by the rules. Besides, wording was very deficient and it triggered countless loopholes. However, the proponents always held that no matter what, the approval of the law would set ground for long lasting changes. And I think they were right.

2. **What this law meant to Argentina**

Only a month after the law was enacted, the main leftist newspaper in Argentina (quite close to the Government\(^6\)) published an interesting interview to the lawyers of the LGTB front. Among other questions, they were asked about the duty of fidelity. They answered:

- “The essence of civil marriage is based on nineteenth-century criteria inspired by the doctrine of the Catholic Church. There are duties that make the institution obsolete. That is why the CHA has presented a draft bill in order to modify marriage, so that it liberates the couples instead of oppressing them. The same sex marriage law has set the minimum standard of equality in order to bargain in the future”.
- It was also said that “society expects a romantic relationship in order to enter marriage. It could as well happen that it is just two friends who marry to grant each other social right. These cases are not yet installed in the social imaginary. These debates are just beginning”.
- Finally, in Argentina adultery is a divorce ground. Concerning this, another lawyer stated that: “We do not know if a judge would apply the same criteria to divorce a heterosexual couple than those applied to divorce a homosexual one. The proof provided by the parties might be determinant: for instance, if adultery was a practice previous to marriage or not…”

As you can see, these eloquent assertions reveal the complexities of the aftermath.

3. **The aftermath: the expansive force of gender neutrality**

The “egalitarian marriage” law was widely criticized. The criticism was of three kinds:

a) Those who criticized the redefinition of marriage because it was unconstitutional\(^7\) or simply because it altered the nature of marriage\(^8\).

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\(^6\)The 10/27/2012 a press statement was released stating that pagina 12 had been benefitted over many newspapers with nearly 10 million dollars of publicity by the Government. (Diario La Nacion, 10/27/2012)

\(^7\)In the important XXIII Jornadas Nacionales de Derecho Civil the majority of professors voted that same sex marriage law was unconstitutional, following a paper by Prof. ARIAS de RONCHIETTO, Catalina E., “Efectos de la ley 26.618 en el Derecho de Familia”, later published in La Ley, Sup. Act. 27/12/2011, p. 1. The complete vote is described in MILLÁN, Fernando, “Incidencia de la ley 26.618 en el Derecho de Familia. Conclusiones de las XXIII Jornadas Nacionales de Derecho Civil”, La Ley, Sup. Act. 13/12/2011, 1
b) Those who criticized the text, because of the incoherence derived from the regulation.

c) Those who pointed out that the new marriage law was not egalitarian, but the opposite. Some rights of women, children and heterosexual couples were treated disregarding the principle of equality.

Same sex marriage was introduced in Argentina as a modification to our current Civil Code. As many other gender neutral legislations, our law meant suppressing every mention of men and women from the Civil Code. No place for grandmothers, grandfathers, mothers, wives or husbands. Only “spouses” and “parents” formed part of the new thesaurus of our Civil Code. However, the structure of the institution of marriage and legal presumptions to establish parenthood were left untouched. This caused a myriad of troubles. Not a month had passed when several other bills were proposed to adequate the system to the new gender neutral paradigm.

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8 GARCÍA BELSUNCE, Horacio A., “Las mutaciones conceptuales del matrimonio”, Sup. Academia Nacional de Derecho y Ciencias Sociales de Bs. As. 20/12/2011, 4, LA LEY 2011-F, 1330. MAZZINGHI, Jorge Adolfo, “Ley de matrimonio entre personas del mismo sexo. A la sombra de Lucrecio.”, Sup. Act. 12/08/2010, 1. FAMÁ, María V. “Hacia una revisión de la teoría sobre la inexistencia del matrimonio entre las personas del mismo sexo”, Revista Abeledo Perrot, 15/12/2010, in which she even explains that the general theory concerning the inexistence of juridical acts of general civil law should be revised in order to comply with the existence of same sex marriage. (That article was written in reply to Prof. MAZZINGHI’s and mine: BASSET, Ursula C. “Estudio sobre algunos aspectos relativos al reclamo de reforma en torno al matrimonio.” SJA 4/8/2010, in which I held that marriage is a suit that does not fit both -homosexual and heterosexual relationships- at the same time. As the Argentinian law had preserved the definition of marriage intact, even if it had introduced a gender neutrality clause, those marriages would be unfit for homosexual couples. My assertion proofed right only some days later in the interview I referred in the section 2 of this paper).


10 ZANNONI, Eduardo A., “Matrimonio entre personas del mismo sexo. Ideología de género y derecho de familia”, LA LEY 14/03/2011, 1 • LA LEY 2011-B, 742 • DJ 23/03/2011, 1. He said: “Sin embargo, esta técnica legislativa responde a una suerte de voluntarismo con muy claras connotaciones políticas. (…) No debe olvidarse, sin embargo, que el voluntarismo jurídico es una ilusión, un espejismo que genera la creencia —que desde cierto punto de vista puede parecer ingenua, pero que, utilizada desde la perspectiva política, puede llegar a ser perversa— de que los principios o declaraciones que la Constitución, los Tratados o las leyes hacen, tienen la mágica virtualidad de modificar la realidad. (15) En la medida que se instala en la sociedad la creencia de que las leyes por sí solas tienen el poder de transformar la realidad atribuyendo a sus enunciados una virtualidad transformadora, se admite de modo irreflexivo que el poder político posee y utiliza la varita mágica del cambio.”

11 MEDINA, Graciela, "La ley de matrimonio homosexual proyectada. Evidente retroceso de los derechos de las mujeres" La Ley lunes 17/5/2010. GOGGI, Carlos, "Matrimonio igualitario y el apellido de las personas (Las desigualdades subsisten, entre otras cuestiones)" , Sup. Esp. Matrimonio Civil 2010 (agosto) , 37

12 Most of all, the law called “gender identity” that allowed to adequate the name and the secondary sexual characteristics in order to conform them to the “autoperceived” gender identity.
A quick search within the local legal literature showed an overwhelming list of collateral issues that had to be adjusted because of the marriage reform. We quickly knew that legislating same sex marriage virtually implied a revolution to our internal law. Most institutes concerning the law regulating public order, identity, gender, rules of kinship, filiation, marriage, name, marital property arrangements, alimony, parental rights, law of succession, domestic violence, adoption, artificial...

13 OTAEGUI, Julio C., “La moral pública y el matrimonio homosexual”, Sup. Act. 22/07/2010, p. 1. (His argument is that redefining marriage is against public order and morality, and therefore unconstitutional).

14 VON OPIELA, Carolina, “Reflexiones sobre la identidad autopercebida”, Sup. Esp. Identidad de género - Muerte digna 2012 (mayo), 67, LA LEY 2012-C, 1066


18 GOGGI, Carlos, “Matrimonio igualitario y el apellido de las personas (Las desigualdades subsisten, entre otras cuestiones)”, Sup. Esp. Matrimonio Civil 2010 (agosto), 37. SAUX, Edgardo Ignacio. “La ley 26.618 de matrimonio de personas del mismo sexo y su incidencia sobre el apellido marital y familiar”, in Nuevo Régimen..., p. 175


reproductive techniques\textsuperscript{25}, surrogate motherhood\textsuperscript{26}, liberty of conscience\textsuperscript{27}, criminal law\textsuperscript{28}, tax law\textsuperscript{29}, laboral law\textsuperscript{30}, among other topics. All of these subjects needed to be attuned to the gender neutrality paradigm.

Only half a year after the enactment of the “egalitarian marriage” the President of the Supreme Court of Argentina proposed drafting a new Civil Code. “Egalitarian marriage” would be an undisputed starting point for the drafters: in the area of family law, they decided to adjust all the current institutions in order “to equalize heterosexual to homosexual or lesbian relationships”\textsuperscript{31}. To be more precise, as a leader of the reform process put it, any “heteronormativity” in family law had to be erased so as to attain equality\textsuperscript{32}. This draft for the Civil Code has now the status of a bill, and a special


\textsuperscript{25} MIZRAHI, Mauricio Luis, “El niño y la reproducción humana asistida”,

\textsuperscript{26} FAMÁ, María Victoria, “Maternidad subrogada. Exégesis del derecho vigente y aportes para una futura regulación”, LA LEY 2011-C , 1204: “… aunque la reforma de la ley 26.618 ha sido seguramente el disparador más poderoso de un debate que había sido algo rezagado en los últimos tiempos.”

\textsuperscript{27} NAVARRO FLORIA, Juan G. “Matrimonio de personas homosexuales y libertad de conciencia.” DFyP. Octubre de 2010, Nº 9.

\textsuperscript{28} RÍOS, Carlos Ignacio. “El nuevo matrimonio civil en la ley penal.”, L.L. Sup. Esp. Matrimonio Civil entre personas del mismo sexo 2010 (agosto), 47

\textsuperscript{29} KALEMKERIAN, Fernando Carlos. El impuesto a la renta y sobre los bienes personales y la reciente modificación del régimen matrimonial. L.L. Sup. Esp. Matrimonio Civil entre personas del mismo sexo 2010 (agosto), 55. RAJMILOVICH, Darío M. “Nueva ley de matrimonio y sus implicancias en el sistema de imposición de las personas físicas.” L.L. PET 2010 (agosto-448), 1-Sup. Esp. Matrimonio Civil 2010 (agosto), 59

\textsuperscript{30} CARCAVALLO, Esteban. “El nuevo régimen de matrimonio civil en el ámbito de las relaciones laborales.” L.L. Sup. Esp. Matrimonio Civil entre personas del mismo. LÓPEZ, María E. El matrimonio entre personas de igual sexo y sus efectos en las relaciones laborales y en materia de seguridad social. RDLSS (Revista de Derecho Laboral y Seguridad Social) 2010-19-1709.


\textsuperscript{32} See above.
Committee is now discussing its approval. The main traits of the projected Civil Code include:

— The only two principles presiding over the entire regulation are: a) autonomy; and, b) equality of same sex couples to heterosexual couples. Principles such as the protection of the child within marriage or the protection of the family, to which we are constitutionally bound, were omitted.

— Marriage is defined as neutrally gendered, therefore some of the special protections the law for women have vanished, other are blotted out. [Examples...]

— Neither duty of fidelity nor duty cohabitation are required. However, most heterosexual couples still promise each other fidelity or have promised it by the time they married. This tailoring of marriage in order to fit to the expectations of some, makes the institution unsatisfactory or even unfit to many.

— Easy divorce: no reflection period, unilateral (a sort of “Vegas marriage”). As marriage has come to be regarded as an eventually uncommitted relationship; it is coherent to open an ample exit door to spouses. However, this does ease the burden from the State, whose obligation is to protect the family in order to provide children—when possible— with a stable environment in which they can be raised.

— In order to grant the right of a child to homosexual couples, surrogate motherhood is to be incorporated. Once again, the perspective of the law is adult-centered. It is focused centrally in the right of some adults to achieve their goals in life,. In any legislation there is a hierarchy of values. In our legislation, the most highly esteemed is adult autonomy to choose its own lifestyles and the duty of the state in a democratic and participative society to grant the feasibility of those ideals. Once this hierarchy is set, it follows that if heterosexual couples yearn for having children, law must pave the way for it. Therefore, surrogate agreements and heteronomous fertilization, anonymity of the donor must be a consistent part of the scheme. At least, such was the explicit reasoning of the Argentinian drafters.

— For the same reasons, legal presumptions should be extended to same sex couples, without any difference of treatment between marriages or de facto cohabitation. The equalization of marriage to de facto unions is also consistent with the line of reasoning we are following. Since marriage is fragile and does not imply commitment, it is quite reasonable to put it at the same level than de facto unions.

— Same sex adoption is expressly granted.

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33 Cita de LLOVERAS, Nora, SALOMÓN, Marcelo,...
34 It is astonishing to discover that in the Argentinian Civil Code bill de facto unions imply a higher level of commitment than marriage. In order two enter them cohabitants have to have an enduring, exclusive and affectionate and cohabiting relationship that last at least two years. None of those requirements are to be found in the projected institution of marriage (no need to cohabitate, no need to be faithful, no enduring relationship needed).
Occasional cohabiting partners will have parental rights over the children of previous couples.

4. A legal upside down
The former paragraphs are not to be understood as a variant of the slippery slope argument. This paper is not about dim prophecies that will fall upon humanity if and when same sex marriage is legalized. Over a year after it was legalized in Argentina, no tragedy occurred. Of course it might be said that we are not yet in a position to assess long term consequences and to honor the truth we have to concede we still do not know. And, as we do not know, others might argue if it is fair to submit children to an uncertain social bet. To that assertion others respond that how any change would succeed if we do not try. In an endless and probably untreated dispute the first group would ask: “How much are you willing to risk?” No risk at all, would be the answer. And then, it would start all over from the beginning.

In any case, and this we can tell you, same sex marriage meant a legal upside down. No stone remained unturned. As it happens, this was a quite unavoidable exigency of reason and logic, once same sex marriage was approved. Once gender neutrality is infused into marriage, every institution in family law has to be rearranged in order to adequate to the “new order”. Most of all: to pull the coherence of the system to its maximum, even the best interests of children and the special protection due to women in heterosexual relationships has to be revisited in order to comply with gender neutral equality standards. Gender neutrality is rather a formal than a substantial concept, based in real life differences. It has more the makings of an abstract theory than a verifiable suspect category: it is based on freedom of choice concerning human acts of behavior, and not in acquired characteristics of human beings. Any restriction might imply an unjustified discrimination between heterosexuality and homosexuality. Gender neutrality calls for a transversal totality. Every institution has to be coherently scrutinized in order to colonize the fields of previous “heteronormativity”. Maybe gender neutrality like some other quests for equality, has to be blind to some real life differences in order to rebalance former inequalities.

5. The peculiarities of marriage
Let us go a step back. The most remote memories of mankind have conceived marriage as the optimal ground for the family. Other forms of building up a family were construed looking up to the paradigm of marriage. Marriage has undoubtedly changed as time went by. The variations usually invoked in order to justify the essentially changing nature of marriage are: (a) divorce or dissolubility of marriage, (b) the religious nature of marriage, (c) the overcoming of prohibitions concerning interracial or interreligious marriage; or (d) forced or arranged marriage.

--- Divorce does not count. The Romans thought of marriage as dissoluble (even if it was thought as an enduring institution). Divorce is actually one of those features that come and go as time goes by. Marriage has known fragility before the 21st Century.
— *Religious celebration of marriage* is another of those features that was once determinant and then faded away. Romans did not have any religious ceremony even if their vows had a certain kind of sacredness (as all the law had).

— *Interracial marriage or interreligious marriage* has been a notable change. However, this feature did not alter the grounds of the institution nor its consequences radically.

— Not even *forced marriage or the age* in which marriage is entered has altered its consequences. Humanity has sought to grant freedom to marry.

Some of those variants were occurrences and recurrences so often found in history of human kind. Other changes implied an ameliorated comprehension of marriage. Yet, none of those changes meant an alteration to what has been historically understood as marriage. There was a core definition of marriage remained unaltered.

Contrary to this, gender neutrality implies a great alteration of the core definitions and effects of marriage. A closer look will show why this disarray was caused: The object and the ends of marriage, and therefore the ability to contract it depend theoretically upon heterosexuality. Hence, the duties emerging from marriage, property arrangements, divorce grounds, legal presumptions of paternity, the whole of it crashes down when heterosexuality is subtracted from it. A new rationale must be build up to justify the existence and meaning of marriage.

The ends of marriage have been ever since included the mutual assistance of their members, the foundation of a family and offspring. Its object was what the Romans called “consortium omnis vitae”\(^\text{35}\). This “consortium” implied a “coniunctio maris et feminae” (a union between husband and wife) constitutively open to offspring\(^\text{36}\). Marriage encloses (has enclosed up to now) a constitutive openness to offspring. This feature has marked indelibly all institutions built upon it. The duty of fidelity, the duty of cohabitation, the aspiration to endure, the State’s interest in marriage: all of it was built upon that pristine idea.

The capacity to contract marriage was proportional to this object and these ends. Therefore, same sex couples were not allowed to, simply because they inherently could not comply with the object and ends of the institution.

The only same sex marriage could comply, was by redefining marriage, by adapting it to another concept: that of a committed relationship. However, by doing so, they had to expatriate the very idea of offspring from marriage. This was a necessary condition, well received by heterosexual adults. Marriage then became a malleable notion, depending on the lifestyle of spouses and no longer constraint by the benefit of children and society.


\(^{36}\) Dig. 1.1.1.3. “The natural law is that which nature has taught to all animals. For this law is proper to all animals and not only to mankind… form this comes the union of a man and a woman that we call matrimony, and the procreation and rearing (education) of children.”
Later on, children were reintroduced in marriage\(^{37}\). However, this time children became a voluntary supplement to marriage if the couple agreed in a desire for offspring, and no longer a constitutive feature emerging from a relationship potentially and inherently open to procreation. None of these substantial adjustments were ever needed in any other previous evolution of marriage. And, as these changes involve the very making of the institution, it would be legitimate to affirm that we are facing more a replacement of the idea marriage than an evolution of it.

6. Among Brothers or the theory of violence in society

It is still unclear why we reached this point. Marriage—in its traditional definition—is not at all an object of desire for some. Most people prefer to cohabit than to marry. In any case, for or against same sex marriage, all parties have a sole object of desire: marriage. Both parties wish to achieve the prize. That begs the question of what is the prize they long for.

The 2005 Californian case \textit{In re marriage} set an interesting scenario. It called the rivalry for the definition of marriage “the label issue”. The Supreme Court held then that the dispute about marriage was not so much about marriage itself, but about the name.

On the one hand, if the conservatives win, they will get a name plus maintain the historical definition of marriage. On the other hand, should the progressive theorists succeed; they would acquire a label plus a redefinition of the institution. Both of them would have a universal claim: their definition of marriage would have to be respected by the other party. Both want the same name; even though, at a closer look they desire different objects which they are willing to call by the same name.

At this point it seems appropriate to recall the theories of mimesis proposed by the French anthropologist and American Professor (he retired in Stanford) René Girard. Girard held that humanity is grabbed by an imitative desire. In his book \textit{Things hidden since the Foundation of the World} he offers the following example:

\begin{quote}
“Place a certain number of identical toys in a room with the same number of children; there is every chance that the toys will not be distributed without quarrel. An equivalent situation rarely occurs among adults. That does not mean that mimetic rivalry no longer exists among them; perhaps it exists more than ever, but adults, like the apes, have learned to fear and repress rivalry, at least in its crudest, most obvious and most immediate recognized forms”\(^{38}\).
\end{quote}

The fact remains that one party feels they are being deprived by the content of marriage by the other party. The other party does not long for that content, but for the word. They usually claim that the gender neutral definition should satisfy both parties, and that only a heteronormative prejudice prevents society from accepting this new evolution of marriage.

\(^{37}\) As Cicero put it, it is in the nature of things that men bind their union with offspring. Cicero in \textit{De Officiis}, 1.4.1.1

\(^{38}\) GIRARD, René , \textit{Things hidden since the foundation of the World}, p. 30.
Rene Girard also wrote that: “We instinctively tend to regard the fraternal relationship as an affectionate one; yet the mythological, historical and literary examples that spring to mind tell a different story: Cain and Abel, Jacob and Esau, Romulus and Remus…”. In this context, the difference between brothers is the source of the mimetic crises. Both are different, but they both want the same.

There is still a chance that, instead of talking of rivalry and defeat, we might take a lesson from our atavisms. In a democratic and participative society there is a place for everybody. Learning to live as brothers might take both parties to learn that there is a place for all. Diversity is welcome, while uniformity usually leads to annihilation of those who think or believe differently. Since both brothers strive for different kinds of institutions, maybe there stands a possibility that each of them gets what they hope for, even beyond the label issue. If marriage is redefined, not only would society have lost an institution that cannot be replaced by a similar one by the same name, but it might be an involuntary pace towards a new form of uniformity: this time a homonormative one.

A short tale to conclude this paper. Argentina is moving towards uniformity. Previously, we had two brothers: Homonormativity and Heteronormativity. They both desired the “marriage word”. Homonormativity won, and redefined marriage to adapt it to them. The new definition and its consequences was imposed on the whole society. Let us hope others can do better than that.