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## ORIGINAL RESEARCH

# Same-sex parenting, assisted reproduction and gender asymmetry: reflecting on the differential effects of legislation on gay and lesbian family formation in Spain

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**Abstract** This article takes an anthropological approach to examine how laws governing family formation in Spain affect same-sex couples seeking to become parents, in particular the cultural causes and implications of such laws. It highlights how the same laws are has a different impact on gay couples and lesbian couples. Legislation combines with other factors to favour and expand the possibilities of accessing motherhood for women in lesbian couples while limiting the possibilities of parenthood for men in gay couples. Moreover, the persistence of certain cultural models of fatherhood and motherhood can be observed, which further constrain parenthood access options and the forming of new family models.

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## Introduction

In the first decade of the twenty-first century Spain saw great progress in the field of lesbian, gay, bisexual and transgender (LGBT) rights, in particular with respect to the legislation that regulates family formation, filiation and marriage. Throughout that period, LGBT families played a major role in enhancing the

visibility of families that did not fit the heterosexual nuclear family structure and in questioning traditional models of parenthood. The process experienced in Spain is similar to that experienced in other European and American countries. However, the diversity in the legislation and the differences in historical, social and cultural situations across countries, as well as the unequal capacity of the gay, lesbian and transsexual

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communities to achieving change in legislation and policies, mean that each case, country or region has its own specific characteristics, thus making case analyses pertinent.

In Spain, one such particularity is the speed with which changes took place and how easily accepted and well-received these social transformations were by the population (Mello, 2007). It should be noted that Spain was the third country in the world to legalize same-sex marriage (in 2005) and the first state that granted same-sex married couples the possibility of adopting. These transformations occurred precisely in a country that until the 1970s was governed by the National Catholicism principles of the Franco dictatorship, persecuted homosexuals and monopolized a univocal definition of family, which they turned into the bastion of the regime's morality (Pichardo, 2009; 91 and ff.). In spite of that, Spain went on to become one of the countries where the climate towards non-heterosexual families is most favourable (Smietana, 2011; 13 and ff.). Surveys have repeatedly shown that public opinion in Spain is more tolerant toward homosexuality, as compared with other countries, and the vast majority of the population accepts same-sex marriage, including the right of gay and lesbian couples to adopt.<sup>1</sup> Some authors defend the interesting hypothesis that while the debate on the right to form a family has acquired much relevance and a significant degree of maturity in the Spanish state, despite being clothed in the language of civil rights and citizenry that is used in other countries, in the case of Spain it ultimately appeals to a deep-seated familism that homosexuals share with the rest of society, whereby family ties are held as the highest of values and something that nobody should be denied (Pichardo, 2009). All of these circumstances combine to make Spain a uniquely interesting case to study.

The social sciences began to focus their interest on the struggles and strategies of homosexual couples to achieve greater equality, the legal changes resulting from such actions and the implications involved, with the issue becoming a major area of academic analysis, along with the study of same-sex parenting. With respect to these new family structures organized around two parents of the same sex, a recurring theme has been seen in discussion surrounding how they depart from the traditional family model and how they remain the same. To what extent are the new forms of parenthood that emerge from these so called 'chosen families' – a term coined by Kath Weston (1991) – alternative to the traditional model? Or do they instead represent the incorporation into the hegemonic family model of groups that had previously been excluded from the family and whose access is now made possible by assisted reproductive technologies, but without altering or questioning the traditional model in any way (see, for example, Cadoret, 2002; Lewin, 1994; Ricard, 2001). This is also an underlying question in recent research conducted in Spain (Donoso, 2012; Pichardo, 2009; Smietana, 2013), where in addition to being a subject of study it has also served to prompt further explorations into what constitutes a family, the meanings ascribed to parenthood, filiation and kinship, and the role played in all these issues by legislation and biomedical sciences (Imaz, 2015).

Without abandoning that dilemma, but focusing more specifically on motherhood and fatherhood as gender roles,

this article examines, on the one hand, the laws that delimit the possibilities of becoming parents that are available in Spain for female and male homosexual couples, to discern the parenthood models behind such laws. The analysis of legal texts on filiation and the use of assisted reproductive technologies from an anthropological perspective allows us to see the cultural models underlying the principles on which these norms are grounded (Salazar, 2007; 60). These laws on procreation, which in their wording seem gender-symmetrical and would appear to guarantee equality for homosexuals on par with heterosexuals, establish, as we will see, radical differences between the possibilities of accessing parenthood available to gay men and those available to lesbians. This inequality, however, goes unnoticed by Spanish society, otherwise so actively in favour of family diversity and family rights for the LGBT community. On the other hand, the choice of some men to access fatherhood via surrogacy (Cadoret, 2009; Gross, 2012; Lewin, 2009) is prompting considerable opposition in Spain, contrasting with the open stance toward the diversification of family models beyond the heterosexual nuclear family that has characterized Spanish public opinion. The article argues that this inequality between men and women with respect to reproduction can be explained by the persistence of cultural models of fatherhood and motherhood that constrain the development of new family models and reveal the limits of the transformation of gender relations.

To that end this paper draws on two essential ideas by Norwegian anthropologist Marit Melhuus. The first is the idea that the notion of assisted reproduction must include not only the new biomedical reproductive methods, such as artificial insemination or IVF, but also the laws that, as instruments of social technology, can 'create' filiation (Melhuus, 2009). This author is referring specifically to adoption laws that operate by generating kinship ties through means that are alternative to biomedical reproductive techniques. However, I argue that this notion of assisted reproduction should not be limited to adoption and should instead be expanded to include other laws that directly enable or establish filiation, such as laws governing marriage, which, as anthropology has long claimed, is an institution whose fundamental role is to establish the paternal filiation of the children borne by the wife (Gough, 1959). This is especially clear in cases such as the Spanish or Canadian marriage laws, in which the principle of presumption of paternal filiation is extended to the non-child-bearing spouse in lesbian married couples, by granting maternal filiation to a woman with respect to the children borne by her wife (Côté, 2009; 30). Thus, a third principle of filiation is established, which is different from the 'natural' or 'adoption' principle as traditionally defined in the Napoleonic civil code tradition (Tahon, 2006; 4).

The second idea drawn from Melhuus is the hypothesis that the context in which reproduction and filiation laws are produced imbues such laws with certain cultural patterns and imaginaries regarding what family, maternity, and paternity are and what they should be. Regulations thus delimit the field of what is possible and what is not possible with respect to reproduction. In that sense the law can become an instrument of change, but at the same time the letter and spirit of the law are shaped by the cultural context in which it emerges (Melhuus, 2010). Taking as an example of this idea Norway's ban on egg donation in contrast to the legal possibility of donating sperm anonymously in that country, Melhuus argues

<sup>1</sup> See, for example: <http://www.pewglobal.org/2014/04/15/global-morality/table/homosexuality/>.

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