JURIDICAL INTELLIGIBILITY: THE LIMITS OF ANTI-DISCRIMINATION LAW IN FAMILY RELATIONS

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Abstract: Anti-discrimination law addresses unjustified differential treatment but assumes that the subjects and relationships under review are already legally intelligible. This article argues that the framework cannot fully address forms of inequality produced by the legal conditions that determine which family relationships are recognized in the first place. It distinguishes downstream discrimination from upstream inequality and shows how dominant family norms, binary registration systems, and discretionary decision-making can sustain exclusion within formally non-discriminatory frameworks. In response, it develops a post-comparative model of relational justice grounded in self-determination, relational pluralism, care, and co-responsibility, shifting the focus from unequal treatment to the conditions of legal recognition.

Keywords: Cisnormativity, Differential treatment, Gender identity, Kinship, Relational autonomy, Self-determination.

1. INTRODUCTION

In contemporary international human rights law, the anti-discrimination paradigm is a primary judicial mechanism for remedying unjustified differential treatment between legal subjects. It has helped expand matrimonial and social security protections to previously excluded groups (Corte IDH, *Caso Duque v. Colombia*, 2016, para. 106). Yet this comparative approach has a structural limitation. Because equality analysis operates on terms already recognized within a given legal order, it presupposes the legal intelligibility of the subjects under comparison (Albiston, 2009, p. 1096). When inequality instead prevents non-hegemonic relational configurations from acquiring legal existence, the traditional equality framework reaches an analytical limit.

This limitation reflects the classical distinction between the formal conditions of adjudication and the constitutive foundations of legal subjectivity. In his account of distributive justice, Aristotle argued that proportional comparison requires prior commensurability among terms within a shared framework (Aristotle, 2001, 1131a 1-20; 1134a 30-35). In modern terms, the anti-discrimination paradigm functions mainly as a determinant judgment that subsumes cases under pre-existing categories rather than examining how those categories were constructed (Kant, 1914, p. 18). By treating established legal classifications as neutral baselines, contemporary jurisprudence may reproduce the conflation of sex, gender, and sexual orientation (Valdes, 1995, p. 16).

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Despite substantial literature on comparative equality and intersectionality, human rights scholarship has paid limited attention to the pre-comparative constitution of family relations. Legal analysis often frames relational injustice as a problem of evidentiary barriers or narrow statutory interpretation, assuming that existing categories can expand to accommodate new social claims (Sperino, 2011, p. 71). This assumption overlooks how the demand for a mirror comparator may impose an assimilationist burden by measuring claimants against a dominant archetype and obscuring multi-axial vulnerabilities (Atrey, 2018, p. 384). Less attention has therefore been given to the epistemological boundary created when law not only regulates family life but also defines what can be legally recognized as family (Hegel, 2010, § 158).

This structural limitation has consequences across institutional, administrative, and discretionary settings. Civil registration systems often retain binary and biparental baselines that place multiparental arrangements, social caregiving networks, and trans parenthood in conditions of legal vulnerability or non-recognition (Teschlade et al., 2023, p. 93; Winter Pereira, 2024, p. 111). Similarly, indeterminate standards such as the best interests of the child may facilitate affective governance. Social anxieties and biopolitical rationalities can then associate non-hegemonic family forms with presumptions of pathology or risk through ostensibly neutral welfare assessments (Ahmed, 2004, p. 119; Foucault, 2005). Institutional gatekeepers may thus uphold formal non-discrimination standards while retaining exclusionary baselines that reduce legal personality to an abstract form and obscure material disenfranchisement (Hegel, 2009, p. 579).

Against this background, this paper analyzes the structural limits of the anti-discrimination paradigm when inequality operates through juridical conditions of intelligibility that precede comparison between family relations. It develops a theoretical corrective to prevailing equality doctrines by showing why adjustments at the level of differential treatment may not remedy prior forms of exclusion.

2. JURIDICAL PRECONDITIONS OF COMPARISON

The anti-discrimination paradigm rests on a logical operation that can be stated with precision: given two terms, A and B, both of which are juridically intelligible as instances of a common category, the paradigm asks whether the differential treatment of A relative to B is supported by an objective and reasonable justification. The Inter-American Court of Human Rights has articulated this structure as requiring the identification of a difference in treatment, the examination of whether that difference pursues a legitimate aim, and the assessment of the proportionality between the means employed and the end pursued (Corte IDH, *Caso Duque v. Colombia*, 2016, para. 106). This tripartite structure is, in its formal aspects, characteristic of anti-discrimination adjudication across legal systems and levels of governance.

Underlying this tripartite operation is the presupposition that both A and B are already constituted as intelligible instances of the relevant legal category. The comparison can only proceed if the comparator, the *tertium comparationis*, is available. The terms must be cognizable within the same juridical framework. This requirement is not incidental to the paradigm; it is constitutive of its logical possibility. Without prior intelligibility, comparison cannot begin, and the anti-discrimination inquiry is structurally

foreclosed (Atrey, 2018, p. 380). The paradigm is thus dependent on a condition that it does not itself produce and cannot interrogate from within its own conceptual resources.

Classical philosophical frameworks illuminate the structural nature of this dependence. In the *Nicomachean Ethics*, distributive justice is shown to operate through a geometric proportion requiring four terms: two persons among whom distribution occurs and two shares distributed (Aristotle, 2001, 1131a 1-20). The injustice arises when equals receive unequal shares, or when unequals receive equal shares, according to a pre-established criterion of merit. The crucial implication is that the logic of proportional comparison presupposes the prior commensurability and intelligibility of the terms within the same ontological plane (Aristotle, 2001, 1131a 10-20). When certain relational configurations are not recognized as terms within the equation, the distributive calculus simply does not apply to them.

Beyond the requirement of prior commensurability, the Aristotelian tradition articulates a critical warning regarding the scope of formal equality. Political justice, in its strict sense, obtains only among subjects who are previously free and equal, sharing a life in common under law with a view to self-sufficiency. Where these conditions of intelligibility are not satisfied, what results is not justice but a mere simulacrum of justice (Aristotle, 2001, 1134a 30-35). This notion of the simulacrum is decisive for the present analysis. It suggests that extending the formal apparatus of equality to relations that have not been constituted as intelligible within the juridical order does not produce justice but rather its appearance.

A complementary diagnostic lens emerges from the Kantian distinction between determinant and reflective judgment. A determinant judgment subsumes the particular under a universal that is given in advance. A reflective judgment, by contrast, must ascend from the particular to the universal, furnishing its own principle of systematization (Kant, 1914, p. 18). The anti-discrimination paradigm operates as a determinant judgment: it subsumes particular relations under pre-established legal categories and examines whether the treatment they receive satisfies the requirements of equality. It does not operate as a reflective judgment, which would interrogate the categories themselves and the conditions under which they were produced (Kant, 1914, p. 26). This structural feature renders the paradigm blind to inequalities that operate at the level of category formation rather than at the level of treatment within categories.

This structural blindness generates a systematic gap between what is cognizable under the anti-discrimination framework and what is arguably cognizable under the operative provisions of human rights instruments. This gap has been identified in the context of employment discrimination law, where judicial frameworks function as gatekeepers that reduce adjudication to a mechanical sorting process, creating a disjunction between the cases that fit within recognized rubrics and the broader universe of discrimination prohibited by statute (Sperino, 2011, p. 71). The same structural problem afflicts anti-discrimination adjudication in the family law context. When the controversy concerns not the differential treatment of two recognized family forms but the intelligibility of a relational configuration as family in the first place, the paradigm lacks the conceptual resources to intervene.

To conceptualize this institutional blind spot, inequality may be understood as operating across two distinct levels. The first level, which may be termed downstream discrimination, concerns differential treatment among juridically recognizable figures. At this level, the anti-discrimination paradigm functions effectively. It can identify, for instance, that denying pension benefits to same-sex partners while granting them to different-sex partners constitutes unjustified differential treatment (Corte IDH, *Caso Duque v. Colombia*, 2016, para. 124). The second level, which may be termed upstream inequality, concerns the ontological-juridical foreclosure that prevents certain relations from accessing the condition of cognizable and comparable units within equality frameworks. At this level, the paradigm is structurally insufficient.

Underpinning the divide between downstream treatment and upstream foreclosure is a deeper epistemological problem concerning the production of legal intelligibility. Legal intelligibility is not a natural attribute of social relations. It is produced through normative processes that determine which configurations are recognizable as instances of legally relevant categories. The inscription of a child in civil registries, for instance, is not merely an administrative act; it is the act through which the child becomes a juridically intelligible subject. The Convention on the Rights of the Child (CRC), Article 7(1), requires that the child be registered immediately after birth and have the right "to know and be cared for by his or her parents." This provision presupposes an administrative apparatus capable of identifying who has been born, under what familial configuration, and to whom filiation is attributed (CRC, Art. 7, para. 1). These are conditions of intelligibility that the norm does not subject to scrutiny.

A concrete manifestation of this normative gatekeeping occurred when the Peruvian Constitutional Tribunal examined the case of a father who sought to register his child without revealing the identity of the mother. The Tribunal drew a fundamental distinction between the act of registering a child, which relates to the protection of the right to a name and nationality, and the act of recognizing a child, which relates to filiation (Tribunal Constitucional del Perú, *Sentencia 423/2023*, para. 17). The Tribunal noted that the confusion between these two acts has left millions of children worldwide without identity documents, and that "in practice, a child without registration is a child without rights" (Tribunal Constitucional del Perú, *Sentencia 423/2023*, para. 17). This observation reveals that while the anti-discrimination paradigm compares the treatment of already recognizable subjects, millions of subjects are not yet intelligible as bearers of rights. Inequality antecedes the space of comparison within which the paradigm operates.

Faced with this antecedent void, the Tribunal resolved the case through normative integration (*in via integrandi*), extending the rule applicable to mothers under Article 21 of the Civil Code to the father's situation under Article 20. This technique is revealing. The Tribunal recognized that no rule existed for the father's situation, that the comparison could not proceed directly, and that the rule for the mother had to be extended to create the conditions for comparison (Tribunal Constitucional del Perú, *Sentencia 423/2023*, para. 55). Normative integration thus functions as the mechanism through which the judge creates the conditions of intelligibility that the anti-discrimination paradigm presupposes. This demonstrates that the paradigm depends on conditions that must sometimes be constructed by judicial intervention before the equality inquiry can begin.

Such constitutive dependencies are further obscured by the assumption of completeness that characterizes anti-discrimination adjudication. Courts tend to apply existing frameworks as if they represented a complete lens through which to view discrimination claims. If a set of facts does not fit within a recognized framework, it is not considered to violate the relevant legal standard, and the claim is therefore not cognizable (Sperino, 2011, p. 98). This assumption forecloses the possibility of recognizing forms of inequality that do not correspond to the morphology of the standard model. The presumption of separateness between categories further exacerbates the problem, as courts treat distinct manifestations of discrimination as ontologically separate and mutually exclusive, impeding intersectional or hybrid claims (Sperino, 2011, p. 101).

Exemplifying the breakdown of these discrete categories is the challenge of intersectional discrimination. The comparator test, designed for single-ground claims, collapses when applied to multi-ground intersectional claims. The demand for a mirror comparator forces the claimant to measure herself against a universal dominant archetype, imposing assimilationist pressure and rendering invisible the co-constitution of disadvantages across multiple axes (Atrey, 2018, p. 384). The result is that "claimants are not treated as whole people and the interactive nature of the sites of oppression is rendered invisible, even negated" (Atrey, 2018, p. 387). This failure is not a matter of application but of logical structure: the comparison presupposes commensurability, and commensurability itself is a product of juridical construction.

Compounding this structural incommensurability is the profound normative indeterminacy of anti-discrimination doctrines. The content of indirect discrimination norms, such as the disparate impact standard, is compatible with multiple, mutually incompatible normative principles. Equality of opportunity, merit-based distribution, prioritarianism, and need-based allocation can all underpin the same legal rule (Dinur, 2022, p. 144). This normative indeterminacy means that the formal structure of anti-discrimination law does not specify the substantive moral principle that grounds the prohibition. The norms function primarily as evidentiary tools designed to facilitate fact-finding in adversarial proceedings, not as ontological definitions of injustice (Dinur, 2022, p. 145). Using their content to guide ethical discussions about the nature of wrongful discrimination is therefore likely to mislead.

Examined across time, upstream inequality reveals a distinct temporal lag that standard doctrine fails to capture. While new conditions of intelligibility have not yet been legally constructed, the relations that socially exist remain in an ambiguous juridical status that the anti-discrimination paradigm does not adequately describe. A same-sex couple that existed socially in 1990, when Colombian law did not recognize such couples, could not access survivor's pensions. The subsequent transformation of the law did not retroactively resolve the inequality experienced during the period of non-recognition. The traditional legal analysis would characterize this as discrimination, since a right available to different-sex couples was denied. The analysis of conditions of intelligibility would characterize it differently: the couple was never juridically intelligible as a valid relationship, rendering the comparison partially artificial.

Within contemporary human rights doctrine, the concept of structural discrimination introduces an analogous layer of complexity. The Court has acknowledged

that LGBTI persons have been "historically victims of structural discrimination, stigmatization, diverse forms of violence, and violations of their fundamental rights" (Corte IDH, *Caso Azul Rojas Marín v. Perú*, 2020, para. 90). This recognition, however, operates within the comparative framework: it examines whether a particular LGBTI person was discriminated against relative to others. Structural discrimination also operates at the level of the constitution of intelligibility, determining which identities are recognizable as such in the first place. The law does not only create unequal differentiations in the treatment of what is already intelligible; it also creates the terms of what is intelligible (Foucault, 2005, p. 174).

The Hegelian critique of the person as an "empty One" in the state of right anchors this constitutive critique. When the living ethical community disintegrates into a multiplicity of abstract atoms, juridical persons, the universality that results is an equality of the "empty One" that conceals the loss of ethical substance and subjects individuals to external domination (Hegel, 2009, p. 579). The formalism of legal equality, by reducing subjects to abstract units of comparison, strips them of the substantive density that would make the comparison meaningful. The anti-discrimination paradigm, insofar as it operates within this formalism, reproduces the emptiness that Hegel diagnosed in the transition from ethical community to the state of right.

The fundamental limits of anti-discrimination adjudication arise, then, not merely from the mechanics of comparison, but from the prior constitution of its terms. If juridical intelligibility determines what can enter the field of comparison, the analysis must shift from differential treatment to the legal processes that produce comparability itself. The next section turns to this constitutive dimension by examining how the normative matrix of family law renders some relational forms legally intelligible while leaving others outside established categories of recognition.

3. Normative Production of Family Intelligibility

The anti-discrimination paradigm's dependence on pre-constituted categories of intelligibility is not a contingent feature of particular legal systems. It is an effect of the positive normative matrix of family law, civil status, and filiation, which produces the conditions under which certain relational configurations are recognized as family and others are not. This section deconstructs that matrix from the perspective of *Queer Legal Theory*, identifying the normative techniques through which heteronormativity, cisnormativity, homonormativity, and transnormativity operate to structure the field of juridical intelligibility.

Underpinning this matrix is the foundational architecture of modern family law, which rests on what has been termed a conflation of sex, gender, and sexual orientation. Euro-American law conceives sex as the intransitive determinant of gender and treats sexual orientation as the sexual dimension of gender, producing a tripartite collapsed matrix in which discrimination along any one axis necessarily implicates the other two (Valdes, 1995, p. 16). The critical consequence of this conflation is that anti-discrimination law formally prohibits sex and gender discrimination while permitting, or at least failing to address, sexual orientation discrimination. Judicial institutions strategically recharacterize gender-atypicality claims as sexual orientation claims,

shifting them from the protected to the unprotected domain (Valdes, 1995, p. 24). This creates a "sexual orientation loophole" through which sex and gender biases are licensed and perpetuated.

Beyond domestic jurisprudence, the heteronormative structure of international family law instruments confirms this conflationary logic. The International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 10(1), proclaims that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society." The American Convention on Human Rights (ACHR), Article 17(1), replicates this formulation. Both instruments presuppose the family as a naturally existing entity whose character as "fundamental" is anterior to and external to law. The use of the term "natural" is significant: it naturalizes the family, implying that forms of organization that do not conform to this model fall outside the scope of intelligibility before the principle of non-discrimination can even be applied (ICESCR, Art. 10, para. 1).

Within these international and domestic frameworks, the institution of marriage operates as the primary juridical mechanism through which family intelligibility is produced. The ACHR, Article 17(2), recognizes "the right of men and women to marry and to raise a family if they meet the conditions required by domestic laws." The International Covenant on Civil and Political Rights (ICCPR), Article 23(2), employs identical language. The "man-woman" formulation is not neutral. It presupposes that the relevant subjects of matrimonial law are of opposite sexes. Same-sex couples are not discriminated against in the formal structure of these norms; they are simply not intelligible as candidates for marriage (ACHR, Art. 17, para. 2). This exemplifies the limit of the anti-discrimination paradigm: before the comparative inquiry can ask whether equally intelligible subjects are discriminated against, an exclusion has already operated at the level of intelligibility itself.

The canonical philosophical formulation of this positive matrix appears in Hegel's *Philosophy of Right*, which codified the conceptual framework that modern family law inherited. The family is conceived as the first figure of ethical life (*Sittlichkeit*), the immediate ethical substantiality articulated through love, in which individuals transcend their abstract personality and their egoistic isolation to know themselves not as independent persons but as members of a spiritual unity (Hegel, 2010, § 158). Marriage is emphatically not a contractual relation; its essential foundation consists in departing from the contractual position of autonomous personality (Hegel, 2010, § 163). The rational ethical significance of the sexes is determined by a differentiation in which one sex embodies universality, activity, and the struggle in the state, while the other embodies interiority, passivity, and domestic sentiment (Hegel, 2010, § 166). Marriage is essentially monogamous because the exclusive individuality of personality surrenders itself wholly and indivisibly (Hegel, 2010, § 167).

Exemplifying the conceptual origins of contemporary family law, this Hegelian formulation reveals the philosophical foundations of what *Queer Legal Theory* identifies as the four interlocking normativities that structure family intelligibility. Heteronormativity, understood as a normative regime that produces and reproduces heterosexuality as the default, positions heterosexual persons as "normal" and everyone

else as "abnormal" (Öztürk, 2024, p. 41). Cisnormativity normalizes essentialist assumptions and binary expectations about sex and gender, executing a systemic erasure of trans and gender-diverse existences through binary information systems, corporeal surveillance, and bureaucratic rigidities (Öztürk, 2024, p. 44).

Alongside these foundational imperatives, homonormativity, as theorized by Lisa Duggan, constitutes a politics "that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption" (Öztürk, 2024, p. 42). Transnormativity regulates trans populations by legitimating only those trajectories that transit surgically or hormonally toward a fixed binary pole, marginalizing gender fluidity (Öztürk, 2024, p. 45).

Far from operating in isolation, these four normativities form a mutually reinforcing architecture that produces a specific model of family as the exclusive template of intelligibility. The model can be characterized as a cisgendered, heterosexual, monogamous, biparental dyad instituted through marriage, in which filiation is attributed on the basis of biological complementarity and the man serves as the juridical head of the household (Hegel, 2010, § 171).

The statutory codification of this exclusive template manifests with particular clarity in the German Civil Code (*BGB*). Section 1591 of the *BGB* establishes that the mother of a child is the woman who gave birth to it. Section 1592(1) attributes paternity automatically to the husband of the mother, regardless of genetic relationship. Section 1626 restricts parental authority to a maximum of two progenitors, gendered in strictly binary terms (Teschlade et al., 2023, p. 93). In lesbian marriages, the non-gestational spouse does not acquire automatic parenthood but is degraded to a "second-class mother" who must undergo the invasive judicial procedure of stepchild adoption (*Stiefkindadoption*), including assessments by the Youth Welfare Office (*Jugendamt*) (Teschlade et al., 2023, p. 96).

Central to this statutory machinery is the biparental norm, which operates as a rigid ceiling that forecloses multiparental configurations. In families with three or four caregivers, social parents lack legal status, custody rights, and automatic inheritance standing. As one parent in a qualitative study observed, "death is a gigantic problem for us," because the juridical non-recognition of multiparentality places children in a condition of acute vulnerability when a legal parent dies or becomes incapacitated (Teschlade et al., 2023, p. 99). The *Family Law Act* of British Columbia (2011) offers a contrasting model, permitting the registration of up to four legal parents, demonstrating that the biparental limit is not a logical necessity but a normative choice (Teschlade et al., 2023, p. 107).

The coercive force of this binary architecture manifests with particular intensity in the legal situation of trans parents. Despite the German Federal Constitutional Court's invalidation of mandatory sterilization as a requirement for legal gender recognition, the law continues to link parental designation to strict genital binarism. A trans man who gives birth is registered as "mother," and a trans woman who provides sperm is registered

as “father,” forcing permanent deadnaming that violates self-determination (Teschlade et al., 2023, p. 102). The result is a coercive dilemma: trans persons must choose between biological parenthood and gender affirmation, a choice that produces severe psychosomatic consequences (Teschlade et al., 2023, p. 103).

Underlying these parental designations is the antecedent act of civil sex registration at birth, which decisively consolidates the binary matrix. Civil registration does not inscribe a corporeal materiality but rather a social expectation, a cultural abstraction that assigns roles and anticipates gender performance. This is demonstrated by the fact that rectification of the sex entry in the registry produces constitutive rather than declarative effects: it operates from the moment of rectification forward, not retroactively to birth. If registration inscribed a bodily reality, its effects would logically be declarative (Winter Pereira, 2024, p. 111). The binary architecture of registration rests on what has been called a “naturalistic fallacy”: the confusion of the empirical observation that a majority of persons have XX or XY chromosomes with the normative prescription that all persons must conform to this binary under penalty of pathology (Winter Pereira, 2024, p. 111).

Judicial and legislative attempts to mitigate this binary structure by introducing a third registration category, such as the German Constitutional Court's 2017 decision requiring an affirmative designation beyond male and female, have functioned as *trompe-l'œil* reforms that create the optical illusion of inclusion while preserving hegemonic categories intact (Winter Pereira, 2024, p. 108). The decision's paragraph 51 stipulates that “the civil status of men and women remains unaffected by the opening of an additional registration option,” treating non-binary existence as a deviation or variant rather than an equally valid juridical status (Winter Pereira, 2024, p. 107). This preserves what has been termed the “self-evidence” (*Selbstverständlichkeit*) of binary norms, forcing non-binary persons into a constant justification of their existence that binary-gendered persons are never required to provide (Theilen, 2024, p. 165).

Beyond formal registry structures, the political economy of diversity introduces a further mechanism of containment through the neoliberal co-optation of diversity. The extension of marriage to same-sex couples, while representing an important advance in formal equality, can function as a mechanism of privatization through which the state transfers to the conjugal unit responsibilities for material sustenance and social security that also fall within the state’s positive obligations. The purchasing power of LGBT populations has given rise to “pink money,” which has paved the way to a conditional tolerance structured as a transactional exchange of consumption for recognition (Silva Saraiva & Quental, 2024, p. 277). Gay men of the middle class reproduce heterosexual life patterns, forming monogamous families with children under the “stable union” legislation, disregarding the historical struggles of the LGBT movement for the right to be different (Silva Saraiva & Quental, 2024, p. 279). This mimetic process leads to the reproduction of conservative social positions and the stigmatization of those who fail to conform to homonormative respectability.

This reliance on pre-constituted categories similarly constrains international human rights instruments designed to advance gender equality. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 16(1),

demands equality within marriage, including the same right to enter into marriage (subparagraph a), freely choose a spouse (subparagraph b), and the same rights and responsibilities as parents regardless of marital status (subparagraph d). These provisions presuppose the prior existence of the categories "marriage" and "family relations" in which women participate. CEDAW identifies that discrimination occurs not only in formal law but in "socio-cultural patterns" (Article 5, paragraph a). However, the concept of "discrimination against women" presupposes that the subject "woman" is already juridically intelligible. The norm does not interrogate how the distinction man/woman is juridically constructed across different contexts (CEDAW, Art. 2, para. 1).

Hierarchizing these unexamined categories is the active/passive paradigm, which structures both social and sexual dimensions of gender by dictating that each human being adopt a "correct" gender stance: women as passive and subordinate, men as active and dominant. Because the deductive/intransitive gender model fixes gender permanently according to sex, gender correctness means a permanent positioning that reproduces androsexist hierarchy (Valdes, 1995, p. 332). The irony is that anti-discrimination law purports to protect sex and gender but not sexual orientation. The tragedy is that the conflationary arrangement of the three constructs ensures the practical impotence and conceptual incoherence of the doctrinal status quo (Valdes, 1995, p. 339).

While family exclusion originates within the normative architecture that defines the legally intelligible family, its reproduction does not depend on formal rules alone. Once these categories enter institutional practice, their boundaries are interpreted and enforced through discretionary judgments shaped by stereotypes, affect, and broader processes of normalization. The next section extends this analysis to the sub-normative level, where these mechanisms can reproduce family exclusion even under formally non-discriminatory legal standards.

4. Sub-Normative Production of Family Exclusion

The normative matrix analyzed in the preceding section does not operate solely through the formal architecture of legal codes and constitutional provisions. It is sustained, modulated, and reproduced through affective, discretionary, and biopolitical mechanisms that operate at the institutional level, beneath and alongside the formal rule of law. This section examines how socially circulating affects attach meanings of risk, innocence, or threat to particular family forms, how the juridically indeterminate standard of the "best interests of the child" functions as a channel for moral anxieties, and how the contemporary anti-gender backlash constitutes a biopolitical technology for the preservation of the civil and demographic order of the state.

Theoretically grounding this institutional dimension is the concept of affective economies. Emotions do not reside positively within individual subjects or objects. They circulate between bodies and signs, producing the effect of surfaces that delineate the contours of individual and collective bodies. Their binding force derives precisely from their non-residence and their capacity to accumulate affective value through movement and metonymic displacement (Ahmed, 2004, p. 119). Affect operates as a form of capital: it does not reside in the sign or commodity but is produced as an effect of its circulation. The more certain signs circulate between figures and bodies, the more affective they

become, and the more they appear to "contain" affect in a naturalized manner (Ahmed, 2004, p. 120).

The implications of these circulating affects for the governance of family intelligibility are direct. The standard of the "best interests of the child," as articulated in the CRC, Article 3(1), functions as what the Committee on the Rights of the Child has characterized as simultaneously a substantive right, a fundamental interpretive legal principle, and a rule of procedure (Comité de los Derechos del Niño, *Observación General No. 14*, 2013, para. 6). Its content must be "determined case by case" (Comité de los Derechos del Niño, *Observación General No. 14*, 2013, para. 32). This flexibility, however, "can also leave room for manipulation: the concept of the best interests of the child has been used abusively by governments and other state authorities to justify racist policies" (Comité de los Derechos del Niño, *Observación General No. 14*, 2013, para. 34). The same concept that is meant to protect the child can be instrumentalized for discrimination, precisely because the operations through which it is given content are not formally "discriminatory" but occur at the level of defining what constitutes "best interests."

Exemplifying how affective governance operates within formally non-discriminatory adjudication, the Inter-American Court of Human Rights' jurisprudence on parental fitness provides a critical case in point. In *Caso Atala Riffo y niñas v. Chile*, the Court examined whether a mother's sexual orientation could serve as a valid criterion for denying custody. The Court found that the determination of the best interests of the child "must be made based on the evaluation of specific parental behaviors and their negative impact on the child's welfare and development, on the basis of real and proven, not speculative or imaginary, harms or risks" (Corte IDH, *Caso Atala Riffo y niñas v. Chile*, 2012, para. 59). This holding explicitly prohibits speculation about harms that might result from a parent's sexual orientation. Yet the very structure of the inquiry presupposes a model of family against which the particular configuration is evaluated, and that model is saturated with heteronormative assumptions that operate below the threshold of explicit judicial reasoning.

Sharpening this scrutiny of implicit judicial assumptions, the concept of stereotypes in the Inter-American system provides further analytical precision. The Court has defined stereotypes as "preconceived and generalized ideas about the attributes or characteristics that members of a social group have or should have, or the roles they should perform" (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, para. 137). In *Caso Ramírez Escobar y otros v. Guatemala*, the Court found that the actions of authorities in the abandonment proceedings "were based on gender stereotypes about the distribution of parental responsibilities" (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, para. 139).

In *Fornerón e hija v. Argentina*, the Court held that "a determination based on presumptions and stereotypes about parental capacity and fitness cannot guarantee the best interests of the child" (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, para. 140). These holdings establish that stereotyped presumptions about parental fitness are incompatible with the best interests standard. The problem, however, lies in the difficulty of distinguishing between a legitimate "evaluation of parental capacity" and a "stereotyped presumption," particularly when the stereotypes operate implicitly within concepts such as "family normality" or "adequate environment."

This permeable threshold between legitimate evaluation and implicit bias enables a subtle institutional maneuver: a judge may formally reject sexual orientation as a criterion for differentiation, in compliance with the Inter-American Court's holding that sexual orientation and gender identity are protected categories (Corte IDH, *Opinión Consultiva OC-24/17*, 2017, para. 78). The judge may then apply the best interests standard, evaluating the "family environment" and "normality." Implicitly, "normal family environment" presupposes heteronormativity, in violation of the Court's own holding that "the Convention does not protect a single or determined model of family" (Corte IDH, *Opinión Consultiva OC-24/17*, 2017, para. 179). The decision rejects or limits custody of the LGBTI parent under the justification of "best interests," not sexual orientation. The discrimination does not occur at the formal level but at the sub-normative level where a presumption about what constitutes "family" structurally excludes LGBTI family forms.

Viewed within a broader institutional apparatus, the Foucauldian analysis of biopower provides the theoretical framework for understanding how these sub-normative operations connect to the governance of populations. The transition from the sovereign power to make die or let live to the positive technologies of biopower centered on the administration and optimization of life produces two poles: an anatomopolitics of the human body and a biopolitics of the population (Foucault, 2005, p. 168). Sex functions as the articulating axis of a normalizing society in which the formal empire of juridical law is subordinated to the continuous mechanisms of the norm (Foucault, 2005, p. 174). The law does not disappear, but "functions increasingly as a norm, and the judicial institution is integrated more and more into a continuum of apparatuses (medical, administrative, etc.) whose functions are above all regulatory" (Foucault, 2005, p. 174).

Manifesting this regulatory continuum in contemporary policy, the anti-gender and anti-DEI backlash operates as a biopolitical technology that mobilizes moral panics and invokes "immutable biological truth" to govern populations and impose corporeal disciplining. Executive Order 14168, titled *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, issued in 2025, constructs a rigidly binary system of sex rooted in biological determinism while attempting to invalidate the salience of gender identity. It "openly mobilizes the 'numerous and diverse techniques for achieving the subjugation of bodies and the control of populations'" (Ng et al., 2025, p. 6). The Order attempts to preclude gender identity minorities from operating as "self-determining, agentic subjects" and positions them as "objectifiable bodies to be defined, categorized, and regulated by and through the state" (Ng et al., 2025, p. 6).

At the discursive level, the rhetoric of this backlash operates through what Ahmed identified as the inversion of the victim through the discourse of grievance. The ordinary or normative subject is reproduced as the injured party, the one "hurt" or "damaged" by the "invasion" of others. The bodies of others are transformed into "the hated" through a discourse of pain (Ahmed, 2004, p. 118). In the context of family law, conservative campaigns construct LGBTI parents and non-traditional family forms as threats to children's innocence, to women's safety, and to the natural order. This construction does not require an explicit prohibition. It operates through "metonymic

slides" that link gender dissidence to instability, pathology, or moral danger, generating a unified sensation of threat (Ahmed, 2004, p. 123).

Extending this affective dynamic to institutional spatiality, the concept of "border anxiety" illuminates how normative boundaries are produced and policed. Borders, whether corporeal, familial, or national, do not pre-exist affect. They are produced and actively policed through the emotional sensation of having already been transgressed, through language of "floods," "plagues," or "invasions" (Ahmed, 2004, p. 132). Fear does not involve the defense of borders that already exist; rather, fear makes those borders (Ahmed, 2004, p. 127). In the family law context, the anxiety generated by non-hegemonic family forms produces and reinforces the normative borders that exclude them. The institutional apparatus does not merely respond to pre-existing threats; it constitutes its objects of fear through the very process of policing.

Reinforcing these spatial and affective boundaries, the "chilling effect" identified in the context of the anti-DEI agenda operates analogously in the family sphere. Even where formal legal protections exist, the climate of ideological hostility induces preemptive self-censorship among institutions, organizations, and individuals (Ng et al., 2025, p. 3). Families that deviate from the hegemonic model are subjected to what can be conceptualized as a "work of affective inclusion," an imposed burden of hyper-respectability that demands the over-performance of conjugal bourgeois standards as a condition for recognition. Trans employees in the workplace are forced to "go stealth," burying their gender identity history deep within, in order to avoid punishment (Öztürk & Tatli, 2016, p. 785). Similarly, non-hegemonic families must perform an exhausting labor of demonstrating their normalcy to institutional gatekeepers, a labor that hegemonic families are never required to undertake.

Against this pervasive architecture of surveillance and normalization, the right to care, as articulated by the Inter-American Court in *Opinión Consultiva OC-31/25*, introduces a potentially transformative counter-framework. The Court recognizes care as an autonomous right derived from a joint reading of Articles 4, 5, 7, 11, 17, 19, 24, 26, and 1.1 of the American Convention (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, para. 112). Care is conceptualized as a shared responsibility "between the individual, and the social spaces in which they develop: the family, the community, civil society, business, and the state" (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, para. 119). This principle of co-responsibility suggests that if a family lacks certain resources, such as social support or economic stability, this represents a failure of the co-responsibility system, not an incapacity of the individual parent. Yet custody decisions rarely argue in these terms; they argue in terms of individual parental incapacity, inverting the logic of co-responsibility (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, para. 119).

Crucial to this potential transformation is the tripartite structure of the right to care (being cared for, caring, and self-care), which offers a framework capable of disrupting the individualization of parental fitness assessments (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, paras. 116-118). An evaluation based on this tripartition could not reduce the capacity for care to individual attributes. It would need to include whether the parent can "be cared for" (whether they have emotional, social, and economic support), whether the parent can "care" without discrimination, and whether the parent

can "self-care" (whether they have time, spaces, and resources for their own well-being). An LGBTI family that lacks these elements would be experiencing a violation of the state's obligation under *Opinión Consultiva OC-31/25*, not a deficiency of individual parental capacity. This reconceptualization remains, however, largely implicit in the jurisprudence and has not been applied to concrete decisions about parenthood.

The persistence of exclusion within formally compliant adjudication demonstrates why expanding protected categories or refining comparator tests cannot fully address inequalities produced at the level of relational intelligibility. Addressing these forms of exclusion requires an institutional logic that does not condition recognition on conformity to pre-established family forms and that limits the discretionary reproduction of those forms. Building on this diagnosis, the next section develops a post-comparative model of relational justice centered on self-determination, care, and relational pluralism.

5. Institutionalizing Post-Comparative Relational Justice

The diagnosis developed in the preceding sections establishes that the anti-discrimination paradigm encounters a structural limit when inequality operates at the level of juridical intelligibility. The positive matrix of family law produces the conditions that determine which relations are intelligible as family. Affective governance and biopolitical backlash modulate intelligibility at the institutional level. This section formulates the institutional, procedural, and registral foundations of a post-comparative model of relational justice, grounded in self-determination and direct relational pluralism.

Conceptually, the foundation of this reconstructive model draws on the Aristotelian account of equity (*epieikeia*) and the Lesbian rule of lead. Every law is formulated in abstract and universal terms, which generates inevitable failures when applied to singular situations. Equity intervenes to remedy the gaps and defects caused by the generality of law, adapting itself to reality "as in Lesbos the leaden rule adapts itself in building to the shape of the stone, and is not immutable" (Aristotle, 2001, 1137b 28-32). The positive family law fractures because of its abstract generality in imposing a rigid binary and marital mold. Equity demands that juridical intervention act as the leaden rule, flexibly adapting to the variable geometries, effective care, and material interdependence of human relations without forcing them into pre-established abstract schemes (Aristotle, 2001, 1138a 1-5).

Alongside this classical framework, the Kantian maxim of enlarged thought (*erweiterte Denkungsart*) provides an overarching normative principle for relational justice. This maxim requires "putting ourselves in thought in the place of everyone else, abstracting from the limitations which contingently attach to our own judgment" and reflecting "upon it from a universal standpoint (which he can only determine by placing himself at the standpoint of others)" (Kant, 1914, § 40, p. 172). Applied to the recognition of family forms, this principle demands that the state abandon the standpoint of the hegemonic model and adopt a universal standpoint that encompasses the full plurality of relational configurations. The model does not presuppose a particular family form as the template against which all others are measured. It starts from the equal dignity of diverse forms of interdependence and care.

Translating these normative principles into institutional design, modular filiation constitutes the first core component of the model. The biparental norm, which restricts legal parentage to a maximum of two persons, should be replaced by a modular system that permits the registration of multiple persons as legal parents, reflecting the actual configuration of care and interdependence in the child's life. The *Family Law Act* of British Columbia (2011) provides an operational precedent, permitting the registration of up to four legal parents through pre-conception agreements (Teschlade et al., 2023, p. 107). Finnish and Dutch reforms similarly demonstrate the viability of shared parental arrangements beyond the dyad (Teschlade et al., 2023, p. 108). Modular filiation does not abolish the concept of parentage; it disaggregates its components (gestational, genetic, social, intentional) and permits their recombination according to the actual relational reality of the child.

Anticipating potential conflicts, the operational complexity of multiparentality can be resolved through graduated frameworks. Not all parental figures need hold identical bundles of rights and responsibilities. The system can distinguish between primary caregivers, who hold full parental authority, and secondary caregivers, who hold specific rights such as contact, information, and emergency decision-making. The criterion for distinguishing between these categories is not biological relationship but the effective exercise of care and the intentional assumption of responsibility. The determination of these categories should be made at the time of registration, through a declarative act of the parties, subject to judicial review only in cases of dispute or allegation of coercion.

Extending this logic to administrative infrastructure, the model requires transforming civil registration from a prescriptive to a declarative system. Current civil registration systems inscribe a sex at birth that functions not as the recording of a bodily reality but as the imposition of a social expectation (Winter Pereira, 2024, p. 111). A declarative registration system would record what the registrant declares, subject to the protections against fraud and coercion that apply to all declarative acts. For the registration of sex, this means either postponing the inscription of sex until the person can self-designate, as proposed in the literature on the legal gendering of infants (Theilen, 2024, p. 169), or providing an affirmative designation that empowers the person by breaking with the self-evidence of binary norms. The German Federal Constitutional Court's call for an “affirmative positive designation” (*einheitliche positive Bezeichnung*) provides a juridical foundation for this approach (Theilen, 2024, p. 165).

This declarative principle applies with equal force to the recognition of family relations. Rather than requiring that family configurations conform to pre-established models (marriage, civil union, biological filiation), the registration system should permit the declarative recording of care relationships as they exist. The concept of the *ZiVielPakt*, proposed by Wimbauer (2021), offers a concrete institutional form: a legal construct that does not prescribe how many people can belong to a family, what kinship relation they have, what gender identity they hold, or whether children are part of it (Teschlade et al., 2023, p. 108). Similarly, the concept of *Verantwortungsgemeinschaften* (communities of responsibility) provides a framework for recognizing networks of adults who assume mutual commitments and care interdependencies without numerical limits or requirements of erotic cohabitation.

Crucial to the viability of declarative registration is reconciling relational pluralism with legal certainty. The concern that declarative registration undermines the security of legal transactions and the protection of third parties is legitimate but can be resolved through institutional design. The publicity function of civil registration, which ensures that third parties can rely on the information contained in registries, is preserved through the requirement that all declarative acts be recorded and publicly accessible. The protection of creditors and successors is ensured through clear rules of patrimonialization that specify the property consequences of entry into and exit from registered care relationships. Graduated inheritance frameworks can extend the tax exemptions and inheritance rights currently reserved for nuclear family members to all registered care partners, proportional to the duration and intensity of the care relationship.

Alongside external legal certainty, robust procedural safeguards must govern exit mechanisms and protect against intra-familial power asymmetries. The risk that modular and pluralist family structures might create new forms of exploitation or coercion is real and must be addressed through robust procedural guarantees. Exit from a registered care relationship must be available unilaterally, subject to reasonable notice periods that protect the interests of dependent members, particularly children. The Inter-American Court's recognition that "a third ethical authority" is required to confirm the right of marriage against mere subjective opinion applies, *mutatis mutandis*, to the dissolution of care relationships that involve dependents (Hegel, 2010, § 176). Judicial supervision of exit should focus exclusively on the enforceability of individual fundamental rights, patrimonial guarantees, and protection against violence or material dispossession. It should not extend to the evaluation of the legitimacy, moral quality, or internal configuration of the relational bond.

Beyond procedural and registral guarantees, relational justice fundamentally depends on fulfilling the state's positive obligations. The model of relational justice is incompatible with the privatization and precarization of care. If the state recognizes diverse care configurations, it must also guarantee the material conditions that make care possible. This requires the extension of social protection systems, including parental leave, child benefits, health insurance, and housing assistance, to all registered care partners, regardless of the formal denomination of their relationship. The Inter-American Court's recognition of care as an autonomous right, grounded in the principle of co-responsibility between the individual, the family, the community, and the state, provides the normative foundation for this extension (Corte IDH, *Opinión Consultiva OC-31/25*, 2025, para. 119). The state's obligation is not to assess the adequacy of care configurations but to guarantee the material infrastructure that enables care across all configurations.

To sharpen its structural boundaries, this model of accompaniment must be distinguished from three alternative paradigms that it explicitly rejects. Most prominently, it differs from assimilationist recognition, which extends the benefits of the hegemonic model to non-hegemonic configurations on the condition that they conform to the model's template. Assimilationist recognition, exemplified by the extension of marriage to same-sex couples without modification of the underlying marital structure, reproduces the logic of the "ambivalent gift" that reduces deficits of recognition while producing new exclusions (Teschlade et al., 2023, p. 90).

Equally, the model departs from normalizing tutelage, which conditions recognition on compliance with medical, psychological, or moral standards of adequacy. The requirement that the non-gestational mother undergo stepchild adoption, with its attendant assessments by the Youth Welfare Office, exemplifies normalizing tutelage (Teschlade et al., 2023, p. 96). Nor does the framework align with substitutive welfare intervention, which replaces the autonomous agency of care partners with state-directed arrangements. The accompaniment model preserves the self-determination of relational configurations while guaranteeing the material and procedural conditions that make self-determination effective.

Within judicial adjudication, operationalizing this model requires a fundamental transformation of the evidentiary framework. The comparator test, which structures current anti-discrimination adjudication, should be supplemented by the contextual comparison model developed in South African constitutional jurisprudence. In *Hassam v. Jacobs*, the Constitutional Court evaluated discrimination not through a single mirror comparator but through a comprehensive mapping of all relevant comparison groups within a multi-dimensional Venn diagram, examining patterns of disadvantage across gender, marital status, and religion simultaneously (Atrey, 2018, p. 391). This contextual approach uses comparison not as a formal prerequisite but as a heuristic tool for revealing qualitative and historical patterns of substantive disadvantage and recognition harms. The South African model goes beyond the equal treatment or equal opportunity model and aspires to equality of results (Atrey, 2018, p. 394).

Underlying these procedural and judicial mechanisms, self-determination must be conceptualized in relational rather than libertarian terms. Following the Butlerian insight that self-determination is possible only within a "broader social fabric of existence," the exercise of agency is tied to "social critique and social transformation" (Theilen, 2024, p. 166). Changing the institutions through which humanly viable choice is established and maintained is a prerequisite for the exercise of self-determination (Theilen, 2024, p. 166). This means that the recognition of diverse family forms cannot be conceived as a merely private matter. It requires the transformation of institutional contexts, including registration systems, social protection frameworks, and judicial procedures, to make self-determination materially possible.

At the democratic level, this relational agency anchors itself in the principle of autonormativity: the capacity for self-governance through which subjects define their own frameworks of existence and identity without subjection to hetero-imposed patterns (Rodríguez Ruiz, 2024, p. 81). The values of equality and liberty, under their pretensions of neutrality and inclusivity, have historically provided cover for power relations that crystallize the predominance of those who originally arrogated the capacity to define them (Rodríguez Ruiz, 2024, p. 82). A democratic order that takes autonormativity seriously must abandon the position of the classifier and discipliner and assume the function of accompaniment and guarantee of the material conditions for self-determined care.

Beyond Western constitutional paradigms, the model must confront the colonial-juridical difference: the space in which the local legal-political histories that invent and implement global constitutional designs encounter the local histories that receive them (Winter Pereira, 2024, p. 114). The deconstruction of binarism that is occurring in the

Global North must be understood as a local model of rupture, to avoid the risk that it becomes a global constitutional design that conquers, exterminates, and denies the experiences and voices of the Global South (Winter Pereira, 2024, p. 114). The post-comparative model must therefore be designed with sufficient modularity to accommodate diverse cultural, institutional, and epistemic contexts, drawing on ontologies of interdependence from the Global South, such as the philosophies of *Ubuntu* and *Maat*, which center the communality and reciprocity of human existence (Ng et al., 2025, p. 7).

By dismantling these historical exclusions, post-comparative relational justice reframes the role of law from classifying family relations against predetermined models to securing the conditions under which diverse relations of care can obtain legal recognition and material protection. Its viability depends on combining relational self-determination with legal certainty, protection of vulnerable parties, and context-sensitive institutional design.

6. Conclusions

The conventional framework of anti-discrimination adjudication encounters a structural limit when applied to the relational organization of family life. By assuming that legal subjects and kinship ties enter adjudication already endowed with juridical intelligibility, comparative equality frameworks can address only downstream disparities between pre-constituted categories. Relational inequality, however, may operate upstream through normative conditions that determine which bonds are recognized as legally cognizable family forms and which remain excluded before comparison can occur.

Moving beyond this constraint requires recognizing that the prevailing normative framework, shaped by heteronormativity, cisnormativity, and the biparental model, constitutes social reality rather than merely reflecting it. Administrative registration systems and indeterminate judicial standards, such as the best interests of the child, may also be shaped by social anxieties and biopolitical forms of governance. In these settings, the formal language of equality may reproduce rather than correct existing exclusions. Distinguishing upstream ontological disqualification from downstream differential treatment shows that assimilationist inclusion, while securing formal gains for some groups, may leave broader structural exclusions intact.

Translating these theoretical insights into institutional practice requires a shift toward a post-comparative model of relational justice grounded in pluralism and self-determination. Civil registries should move from prescriptive systems of binary categorization toward declarative frameworks capable of accommodating modular filiation and networks of mutual responsibility without marital or cohabitational requirements. Similarly, judicial adjudication should replace rigid mirror-comparator tests with multidimensional contextual assessments. The state should also assume positive obligations under a broader principle of care co-responsibility, anchoring material security and social protection in lived interdependence rather than conformity to traditional family models.

Further research should examine the bureaucratic and technological mechanisms through which states codify intimacy and how emerging registration systems interact with

non-hegemonic family practices across different socio-legal contexts. Particular attention should be given to the tension between universalizing constitutional frameworks and communal understandings of interdependence rooted in the Global South, avoiding the uncritical transfer of metropolitan models. Research should also examine the implementation of graduated parental frameworks and equitable exit mechanisms that reconcile relational pluralism with legal certainty and the protection of vulnerable parties.

The realization of autonormativity depends on moving beyond the presumption that human flourishing must conform to a fixed legal template. Like the ancient leaden rule that adapted to the irregular contours of stone, a responsive legal order should move from disciplinary classification toward the flexible protection of human relationships. When legal intelligibility no longer depends on conformity to predetermined family forms, equality can move beyond formal symmetry and provide a framework for protecting plural forms of shared life.

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