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Brazil: The Difficult Path Toward Democratization of Civil Law

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BRAZIL: THE DIFFICULT PATH TOWARD DEMOCRATIZATION OF CIVIL LAW

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ABSTRACT

The Federal Constitution of 1988 reinstated the democratic rule of law in Brazil. Based on fundamental rights, the “Citizen’s Constitution” shaped the model of a welfare State, which objectives consist in the construction of a free, just and solidary society, the erad-

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ication of poverty and substandard living conditions and the promotion of the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination. From this context, the constitutional idealization of family democracy emerges, specifically represented in this paper by the recognition of civil union between people of the same sex as family units. The democratization of civil law in matters of family law, beyond the interpretation of the legal norms in force according to the Constitution, demands the understanding of what constitutes each individual (or group) that is recipient of the principles of affection and solidarity. In the historic 2011 ruling, the Federal Supreme Court equated same-sex unions and opposite-sex unions as to rights and duties. However, the Court failed to advance in the unavoidable debate on gender issues.

Keywords: Brazil, same-sex marriage, civil unions, Brazilian Constitution

I. INTRODUCTION

To discourse on Brazilian civil law in such ample dimensions requires a demarcation of the thematic scope of this paper. Based on the “historic performance” of the Federal Supreme Court¹ (STF) in 2011, we intend to highlight the long walk to democratization of the civil law in Brazil. Although the end result of the Direct Action of Unconstitutionality² 4277³ (ADI 4277) ruling was important to

1. Supremo Tribunal Federal, *Institucional*, available at <https://perma.cc/J9A9-XZ36> (last updated Jan. 13, 2011) (“The Supremo Tribunal Federal [Federal Supreme Court] is the apex body of the Brazilian Judiciary, and its primary responsibility is to safeguard the Constitution, as defined in art 102 of the Federal Constitution.”).

2. Supremo Tribunal Federal, *Glossário Jurídico*, available at <https://perma.cc/CR78-X3BW>:

Direct Action of Unconstitutionality (ADI): Action that aims to declare that a law or part of it is unconstitutional, that is, contrary to the Federal Constitution. The ADI is one of the tools of what jurists call ‘concentrated control’ of constitutionality of laws (or abstract control). In other words, it is a direct contestation to the norm itself in theory. Another form of concentrated control is the Declaratory Action of Constitutionality. The opposite of the ‘concentrated control’ is ‘diffuse control’ in which unconstitutional laws are questioned indirectly through the analysis of concrete situations (our translation).

3. ADI 4277, STF, 05.05.2011, <https://perma.cc/FLY5-UFAV>.

broadening the legal concept of family in the country, as to the very substance of the claim, the decision is found wanting.

By this, we intend to say that to grant rights to a particular marginalized group within a society does not immediately mean accepting its members as citizens. In the present case, the ADI 4277 was unanimously upheld by the justices who at the time formed the main Brazilian Court.⁴ There was the recognition of the continuous, public and lasting (stable) union between same-sex partners as a family. However, little headway was made in the treatment of the homosexual individual as a *person*.⁵

Nevertheless, it is relevant to demonstrate that, since the Federal Supreme Court proposed to play a key role in Brazil's democratic process,⁶ the Court has repeatedly been asked to extract renewed meanings of the normative text of the 1988 Constitution in areas of extreme political and social sensitivity. This has renewed efforts to affirm civil rights.

The concept of *person* derives from law's constant search for protection of the human civilizational form (*person*), which is not preconceived, but must be understood historically in the experience of this endeavor.⁷ Hence, to speak of *existential rights*, "prerogatives designed to protect the self-construction power of each existing person."⁸ However, in order for each individual to have access to self-development, it is not enough to grant rights to minorities, as occurred here with the recognition of same-sex civil unions.

4. Justice Dias Toffoli recused himself.

5. BERNARD EDELMAN, *LA PERSONNE EN DANGER* 45-46 (Presses Universitaires de France 1999) "an individual who has internalized law to the point of discovering it in himself" (our translation).

6. This active stance stems from representation flaws in the democratic process, particularly by legislative omission.

7. Lucas Abreu Barroso, *O direito das famílias e a crise da autonomia do direito no horizonte humano e cultural da pós-modernidade*, 49 *REVISTA CRÍTICA DO DIREITO* (2013).

8. RICARDO RABINOVICH-BERKMAN, *¿CÓMO SE HICIERON LOS DERECHOS HUMANOS? UN VIAJE POR LA HISTORIA DE LOS PRINCIPALES DERECHOS DE LAS PERSONAS* 176 (Didot 2013).

Velten, in his imposing doctoral dissertation on the subject, leads the reader to an unsettling conclusion: the Supreme Court did not recognize, in a broad sense, the social identity of those involved in the ADI 4277. The author convincingly argues that it is because “the Court demonstrated attachment to an individual ethics, dependent on personal and intrinsic factors, typically Aristotelian, and also an impregnated disposition (*habitus*) to become the protagonist in the distribution of rights through the manipulation of concepts (*bricolage*).”⁹

The dissertation concludes that counter-hegemonic discourse served as the basis for the decision. Velten also demonstrates that allegations such as prejudice, vulnerability and historical misfortune (from Nietzsche’s work) serve to evidence a nihilistic *devenir*, suggesting that the arguments always lead to the same philosophical *locus*, therefore half way to the acceptance of the complexity that marks contemporary society.¹⁰

II. THE 1998 FEDERAL CONSTITUTION AND THE NEW RIGHTS IN BRAZIL

The promulgation of the current Constitution of the Federative Republic of Brazil, on October 5, 1988, marked both the end of a turbulent time in the recent history of the country and the beginning of the (re)structuring process of the State regarding political, economic and social aspects. One of its main consequences has been ensuring institutional stability and democracy for more than two decades—the first since the proclamation of the Republic in the year 1889.¹¹

9. Paulo O. Velten, *O ser e o Sujeito de Direitos: Uma Análise do Contramajoritarismo no Supremo Tribunal Federal* (2015) (unpublished Ph.D. dissertation, Universidade Estácio de Sá) (on file with author).

10. *Id.* at 123 *et seq.*

11. LUÍS ROBERTO BARROSO, *O NOVO DIREITO CONSTITUCIONAL BRASILEIRO: CONTRIBUIÇÕES PARA A CONSTRUÇÃO TEÓRICA E PRÁTICA DA JURISDIÇÃO CONSTITUCIONAL NO BRASIL* 26 (Forúm 2014).

Politically, the Federal Constitution of 1988 ended a transition, which begun in the late 1970s. It was the transition from an authoritarian, intolerant, violent state¹²—built around the policies of a civil-military dictatorship, established by the 1964 coup d'état—to the rule of law which is democratic, eminently constitutional, and based primarily on fundamental rights.

Thus, the Basic Law of 1988, which came to be known as the “*Citizen’s Constitution*,”¹³ outlined in its text the formatting of a welfare state—its roots were engendered in the political structure of the country by the Constitution of 1946—which survived, despite defeats, the authoritarian Constitutions of 1967 and 1969.

Economically, the 1988 Federal Constitution, by protecting strategic sectors of the Brazilian economy,¹⁴ such as mineral production and telecommunications, emerged against neoliberal policies that were taking shape in the Western world in the late 1980s. These protectionist provisions were the first barriers removed by a Brazilian government that favored economic openness (1994-2002). This happened through the second round of constitutional amendments approved by Congress¹⁵ in order to allow the insertion of the Brazilian economy into the globalized world.

Socially, the Federal Constitution, by providing rights that are typical of a social welfare state, such as access to education, health and housing,¹⁶ brought hope to a country overrun with pockets of

12. *Id.*

13. This expression was popularized by Deputy Ulysses Guimarães, the Chairman of the National Constituent Assembly (1987-1988), to whom this new Political Charter would be the recovery of citizenship for the Brazilian people, who had been deprived of the right to choose their own President, among other rights, for twenty-five years.

14. PAULO BONAVIDES, *CURSO DE DIREITO CONSTITUCIONAL 675* (24th ed., Malheiros 2009).

15. *Id.* at 675-77.

16. art. 6: “Education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution,” *CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL* (3rd ed., Istvan Vajda, Patricia Zimbres, Vanira Tavares de Souza trans., Brasília: Documentation and Information Center, Publishing Coordination, Chamber of Deputies 2010) [hereinafter CF 88] (including

poverty, both in cities and in the countryside. Because the Brazilian population is markedly poor and plagued by a historical unequal income distribution, its members could not identify with the provisions of their fundamental law, which still remains partly the case today.

If on one hand, the Federal Constitution emerges with a prospective character, since its main guideline consists of the construction of a new political, economic and social reality, one should also emphasize the democratic environment in which it was conceived.

First and foremost, the process that culminated in the promulgation of the 1988 Federal Constitution is the result of political will, embodied in a National Constituent Assembly, whose representatives, deputies and senators, were democratically elected in 1986 and gathered sovereignly during the years 1987 and 1988 for its preparation.

Although there is a consensus that the National Constituent Assembly¹⁷ had a conservative profile, this decision-making forum managed to be democratic and progressive at the same time. These characteristics may seem contrary to the ideological lines of most constituent deputies, but together with such ideologies, they portray accurately the striking features of the entire Brazilian society of yesterday and today, with all its uneasiness, worries, instabilities, deficiencies, and political practice.¹⁸

The National Constituent Assembly was marked by the direct participation of citizens who submitted popular proposals on controversial but essential issues for the country's development, such as stability of employment and land reform.¹⁹

constitutional text of October 5, 1988, with the alterations introduced by constitutional amendments no. 1/1992 through 64/2010 and by revision constitutional amendments no. 1/1994 through 6/1994).

17. PAULO BONAVIDES & ANTÔNIO PAES DE ANDRADE, *HISTÓRIA CONSTITUCIONAL DO BRASIL* 474 (3d ed., Paz e Terra 1991).

18. *Id.*

19. *Id.* at 460.

Similarly, the participation of new political parties with progressive views (especially the left and center-left) within the Constituent Assembly, and other social actors, such as unions, business confederations and religious organizations, lent an interesting dynamic to the process of constitutional creation. This involved not only legitimate claims, but also interests of particular groups, market reserves, and personal ambitions.²⁰

The work of almost two years of the National Constituent Assembly resulted in a text of 245 articles and in 70 articles of the Temporary Constitutional Provisions Act. Considered wordy, the Constitution addresses too many issues, is excessively detailed in some respects, and follows casuistry reasoning.²¹ It does not only focus on materially constitutional matters such as state organization and fundamental rights, but also emphasizes on many other issues, such as private relations questions.

This new constitutional structure profoundly impacted Brazilian civil law, to such an extent that many of its institutions, with roots in the obsolete Civil Code of 1916, were reinterpreted and incorporated into the reality of the national community of the late twentieth century.

Accordingly, the legal field of family law received special attention, as the family became the object of express constitutional safeguard, with special protection from the State.²² While in previous constitutional contexts such protection did not exist as a right, now the State began to govern *family relationships* in their various social manifestations and in line with several international treaties on the matter.²³

A major paradigm shift regarding family law occurred. On the one hand, there was the rapid collapse of the patriarchal model that

20. BARROSO, *supra* note 11, at 26.

21. *Id.* at 26-27.

22. CF 88, art. 226: "The family, which is the foundation of society, shall enjoy special protection from the State."

23. PAULO LÔBO, *FAMÍLIAS 1* (Saraiva 2008).

had prevailed in Brazil since colonial times;²⁴ on the other hand, affective bonds became the center of family relationships. Family relations, now also based on affection, began to reflect the principle of solidarity, enshrined in article 3, I, of the 1988 Federal Constitution.²⁵

III. THE GAP BETWEEN THE 2002 CIVIL CODE AND SOCIAL ORGANIZATION

Those who had witnessed the advances in family law with the promulgation of the 1988 Federal Constitution found it difficult to believe the proposals contained in the second Civil Code of Brazil (2002). Its historical and sociological profile reflected the Brazilian family of the 1960s and 1970s. Thus, in this respect, the Civil Code was born significantly old.²⁶

Professor Miguel Reale, the supervisor of the revision and preparation of the Civil Code, revealed in explanatory memorandum that: “[t]he Revision and Drafting Committee of the Civil Code, as it is noticeable, despite its constant efforts to adapt civil law to the demands of our time, always preferred to preserve the structure of the [civil] law now in force, enriching its titles with new institutions and representations.”²⁷

In addition, under a methodological perspective, Book IV (Family Law) of the Special Part of the Civil Code has shown some flaws because of the (wholesome) division of the matter into the *personal and patrimonial* fields of family law: “[i]n fact this is the book of the current code that lacks systematic harmony the most. The chapters do not always follow a strict logical development.”²⁸

24. *Id.*

25. CF 88, art. 3, I: “The fundamental objectives of the Federative Republic of Brazil are: I – to build a free, just and solidary society . . .”

26. LUCAS ABREU BARROSO, CONTEMPORARY LEGAL THEORY IN BRAZILIAN CIVIL LAW 12-13 (Kennedy Matos trans., Editora Juruá 2014).

27. Presidential Statement no. 160 from the President of Republic, Ernesto Geisel (June 6, 1975).

28. *Id.*

Nevertheless, the published text has some recognized innovations. However, such advances did not have the power to keep civil law abreast of the social organization of the family, which was moving quickly towards the twenty-first century. This is because relevant changes—such as (i) equality between men and women in family affairs, (ii) the replacement of paternal power with family authority, (iii) the expansion of the meaning and scope of child support, (iv) the possibility of changing the regime of property between spouses, (v) a renewed regulation for adoption and filiation, and (vi) the protection of homestead—did not manage to overshadow family relationships grounded in heterosexuality, monogamy, and the prevalence of marriage.

The almost thirty years of legislative consideration were quite harmful to the regulatory framework designed for the novel encoding of private life in Brazil: “[i]ts approval was both a political, legal setback and social regression, because during those three decades the new Code disregarded many of the changes occurring in the country.”²⁹

Effectively, a close analysis of the scenario of the presidential approval of the final draft of the Bill 634/1975 (turned into Law 10,406/2002) reveals that the “final text with all the amendments adopted by the two federal legislative houses, and the Revision Committee, only shows the new Civil Code trying to keep pace with the social reality of our time.”³⁰

This is certainly true because several bills aimed at reforming it were soon submitted after its publication on January 11, 2002, some of them dealing with family relationships, a topic so sensitive to reactions between tradition and modernity in a democratic society with a conservative view.

29. JOSELI LIMA MAGALHÃES, *DA RECODIFICAÇÃO DO DIREITO CIVIL BRASILEIRO* 86 (Lumen Juris 2006).

30. JOSÉ SEBASTIÃO DE OLIVEIRA, *FUNDAMENTOS CONSTITUCIONAIS DO DIREITO DE FAMÍLIA* 335 (Revista dos Tribunais 2002).

Among the so-called large projects is the controversial draft Statute of Families³¹ (a bill introduced in 2007 and not yet adopted), which aims to remove from the Civil Code every rule related to family law, forming an autonomous legal set, “concerned not only to ensure rights, but also realize them” by providing substantive rules and by governing procedural aspects and proceedings.³² After that, the idea of a family law micro system eventually gave rise to the proposal of other more comprehensive legislative projects, inspired by radically opposing ideological beliefs, particularly between religiosity and secularization.

Instead of stimulating a second cycle of de-codification in Brazil, several parliamentary initiatives on a smaller scale were introduced before and after such statutes³³ in order to make only specific changes in posited family law. The biggest confrontation, however, remains unresolved: will the codifying legislative technique prevail in Brazilian family law? Alternatively, will family law revive the “era of the statutes”?³⁴

Regardless of the outcome, what is at stake is not only a question of method. It has to do with family characteristics, with the pluralism of family organizations and family environments, with the recognition that “the Brazilian family changed significantly at the end of the twentieth century, not only regarding values, but also in terms of its composition.”³⁵

The Civil Code of 2002 called for a paradigm shift, but it was not quite what was observed through its critical reading.³⁶ From the

31. Bill 2007, Statute of Families, <https://perma.cc/J4WE-JRJE>.

32. MÁRIO LUIZ DELGADO, CODIFICAÇÃO, DESCODIFICAÇÃO E RECODIFICAÇÃO DO DIREITO CIVIL BRASILEIRO 452, 466 (Saraiva 2011).

33. *Id.* at 470-71; Regina Beatriz Tavares da Silva, *Análise do Projeto de Lei do Estatuto das Famílias*, 27 REVISTA DO INSTITUTO DOS ADVOGADOS DE SÃO PAULO 389-409 (2011).

34. Gustavo Tepedino, *O Código Civil, os Chamados Microsistemas e a Constituição: Premissas para uma Reforma Legislativa*, in PROBLEMAS DE DIREITO CIVIL-CONSTITUCIONAL 4 (Gustavo Tepedino ed., Renovar 2000).

35. LÔBO, *supra* note 23, at 10, 56.

36. LUCAS ABREU BARROSO, A REALIZAÇÃO DO DIREITO CIVIL: ENTRE NORMAS JURÍDICAS E PRÁTICAS SOCIAIS 23 (Juruá 2011).

intended change of individualism to social solidarity, what we saw was the continuity of a “strong presence of patrimonial interests over personal ones.”³⁷

Thus, the desire for democratization of the Brazilian civil law remained partially unfulfilled. Within the limits of this comment, such desire refers to the aspiration for a democratic family. On the other hand, the Federal Constitution of 1988 exerted influence on the infra-constitutional legislation and jurisprudence of local and higher courts (nationwide), which brought about a transformation of the model and the role of the Brazilian family in the transition to the third millennium.

A great deal has already changed³⁸ and many other things are changing.³⁹ What is yet to change? It seems fair to say that “to achieve full democracy in family relations there is still much to do, even from a strictly legal point of view.”⁴⁰ Domestic violence, equality and gender diversity, freedom and solidarity within the family, among many other topics, still challenge our jurists.

The difficult path of the Civil Code of 2002 towards family democracy, far from any consensus, leads to its interpretation according to the Federal Constitution of 1988⁴¹ and beyond, to the understanding of what constitutes each Brazilian, individual or group, recipients of the “personal achievement of affectivity, in coexistence and solidarity,”⁴² as basic functions of the present-day family.

IV. THE RECOGNITION OF CIVIL SAME-SEX UNIONS BY THE FEDERAL SUPREME COURT

On May 5, 2011, the Federal Supreme Court recognized same-sex civil unions as family units by deciding both actions in a single

37. LÔBO, *supra* note 23, at 9.

38. See Maria Celina Bodin de Moraes, *A Família Democrática*, in NA MEDIDA DA PESSOA HUMANA: ESTUDOS DE DIREITO-CIVIL CONSTITUCIONAL 217-21 (Maria Celina Bodin de Moraes ed., Renovar 2010).

39. *Id.* at 221-30.

40. *Id.* at 230.

41. *Id.* at 234.

42. LÔBO, *supra* note 23, at 14.

ruling, the ADI 4277 and the ADPF⁴³ 132.⁴⁴ The Federal Supreme Court is the Brazilian Superior Court with the mission of judging the constitutionality or unconstitutionality of infra-constitutional legislation, through the control of diffuse and concentrated constitutionality. The ADI and the ADPF are examples of concentrated constitutional control.

The Supreme Court examined article 1723 of the Civil Code⁴⁵ and articles 19, II and V, and 33 of the Statute for Civil Servants of the State of Rio de Janeiro (Statute for Civil Servants)⁴⁶ in light of the Constitution. The goal was to avoid any outcome that differentiated the legal protection of homo-affective civil servants from that given to heterosexual ones in the state of Rio de Janeiro. In the end, the Supreme Court considered same-sex civil unions constitutional, affirming them as a type of family that is constitutionally protected by Brazilian law.

The following is a summary of the grounds for the decision (headnote can be found in the Appendix). The opinion of the Reporting Justice Ayres Britto, the first to vote, will be analyzed in more detail, but the highlights of all other justices' opinions will also be examined. The Reporting Justice addressed the possibility of interpreting article 1723 of the Civil Code and articles 19, items II and

43. Supremo Tribunal Federal, *Glossário Jurídico*, available at <https://perma.cc/8PWB-BXDN>:

Allegation of Breach of Fundamental Precept (ADPF): It is a kind of action, filed exclusively with the Supreme Court, which has the purpose of preventing or repairing damage to a fundamental precept, resulting from an act of the administration. In this case, it is said that the ADPF is an autonomous action. However, this type of action can also have an equivalent nature to ADIs and could challenge the constitutionality of a provision before the Federal Constitution, but such a norm should be municipal or prior to the 1988 Constitution. The ADPF is regulated by Federal Law 9,882/99. The legitimate parties to file it are the same that may file an ADI. An ADPF is not appropriate where there is another type of action that may be filed (our translation).

44. ADPF 132, STF, 05.05.2011, <https://perma.cc/FLY5-UFAV>.

45. CC art. 1723: "A stable union between a man and a woman, evidenced by public, continuous and lasting cohabitation and established with the objective of constituting a family, is recognized as a family unit."

46. Law 220/75.

V, and 33 of the Statute for Civil Servants, in conformity with the Constitution.

The latest legislation of the State of Rio de Janeiro⁴⁷ granted social security benefits equally to heterosexual and homosexual partners, which prevented the ADI 4277 from being rejected due to lack of grounds. However, other subjective rights were denied to homosexual partners, hence the possibility of trial in this case.

In his opinion, the Reporting Justice points out that the Rio de Janeiro State law should be read in accordance with the Constitution and the Civil Code, for the purpose of recognition of homosexual unions as family units, as well as the rights and duties thereof. Thus, the requests made in the ADI 4277 were upheld.

Justice Ayres Britto began by defining homo-affectivity as “a bond of affection and solidarity between same-sex couples or partners.” He cited legal doctrine and joined the terms love, care, and affection as components of homo-affectivity. He stated that the union must be lasting, without setting a minimum time, socially conspicuous and with the intention of raising a family. He did not clarify, however, what the evaluative words⁴⁸ meant and whether they may be imposed by law.

He also asserted that the word “sex,” used in articles 3, IV, 5, XLVIII, 7, XXX, 201, § 7, II, of the Constitution,⁴⁹ has the sense of “anatomical and physiological non-coincident conformation between a man and a woman.” This rules out any possibility of legal inequality in relation to rights and duties of people of different sex, unless there is a reasoned justification for this. As such, article 3, IV of the Constitution prohibits discrimination against people based on sex. There was no further clarification of the meaning of the evaluative word “inequality.”

47. Law 5,034/2007, art. 1.

48. On the importance of the densification of evaluative words, see Roberto Freitas Filho, *Decisões Jurídicas e Teoria Linguística: o Prescritivismo Universal de Richard Hare*, 178 REVISTA DE INFORMAÇÃO LEGISLATIVA 19 (2008).

49. CF 88.

This idea embodies the “fraternal constitutionalism” advocated by Justice Britto in a book of his authorship and quoted in the decision. It is a constitutionalism “that turns to a community integration of people (not just to ‘social inclusion’), viable through the urgent adoption of public policies which affirm the fundamental civil and moral equality (more than just economic and social equality) of the social strata historically disadvantaged and even vilified.”

Homosexual partners would be in this category and this means “full acceptance and subsequent experimentation of the socio-political and cultural pluralism.”⁵⁰ This respectful “coexistence of opposites” would be the basis of a substantive democracy, reinforcing the notion of lack of gender prejudice. The meaning of the term “substantive democracy” was not clarified.

The Reporting Justice cited Kelsen’s negative norm, according to which “all that is not legally prohibited or required, is legally permitted,” in conjunction with article 5 II of the 1988 Federal Constitution, alluding that “no one shall be obliged to do or refrain from doing something except by virtue of the law.”

Therefore, there is no law forbidding homosexual unions since the Constitution allows each person to behave according to their sexual orientation. Justice Britto did not elaborate on the meaning of the evaluative word “freedom.” He just said it was a personality asset. Britto welcomed Jung’s idea that homosexuality is not a pathological anomaly, but a psychic identity that individualizes the person, ratifying sexual preference as an emanation of the principle of human dignity.⁵¹ He did not explain what he understands as “dignity of the human person.” He deals with human sexuality as a subjective right or an active legal situation and potestative right to intimacy and privacy⁵² without, however, elaborating on the sense of such institutions. To him, there is no constitutional provision prohibiting such

50. CF 88 art. 1, V.

51. CF 88 art. 1, III, & 60, § 4 (constitutional entrenchment clause).

52. CF 88 art. 5, X. The opinion thus defined the terms intimacy and privacy: “I - the right to intimacy may be viewed through the prism of abstention, or of the

freedom, which is a fundamental right and immediately applicable.⁵³

He also held that articles 226 and 227 of the Federal Constitution, dealing with social order and family, outline a constitutional sense of family and give [the family] special protection “in its colloquial or proverbial meaning of domestic nucleus, regardless of whether formally or informally constituted or composed of heterosexual couples or openly homosexual couples.”

The family would be the primary place of realization of fundamental rights. So, to the Federal Constitution, according to the Reporting Justice:

The equality between hetero-affective couples and homosexual ones only gains full meaning if it flows into the same subjective right to the formation of an autonomous family. Such family is understood, in the context of the two legal subject typologies, as an independent domestic core and constituted as a rule of visibility, continuity, and durability.

As such, the decision states that there is no hierarchy between marriages and stable unions and allows civil marriage and adoption of children by homosexual couples. The Reporting Justice concluded with the following remarks:

I interpret art. 1723 of the Civil Code according to the Constitution in order to exclude any meaning that prevents the recognition of a continuous, public and lasting union between persons of the same sex as a ‘family unit,’ which is understood as a perfect synonym of ‘family.’ Such recognition must be according to the same rules and with the same consequences as those of opposite-sex stable unions.

Justice Luiz Fux was the second to speak. Here are the highlights of his opinion: (i) the application of the notion of protective duties—objective dimension of fundamental rights (effectiveness of funda-

solitary enjoyment (onanism); II - the right to privacy may be seen through the angle of intercourse or coupled enjoyment (inter-subjectivity plane, therefore).”

53. CF 88 art. 5, I.

mental rights for the State and individuals). He refers to legal doctrine to explain such protection duties, through which the State acts to prevent violation of fundamental rights, as in the case of sexual orientation of minorities (homo-affective relations), (ii) he states that homosexuality is a fact of life and sexual orientation, that is, an individual's personality characteristic, rejecting the taint that it is a disease, a belief or an ideology. Furthermore, homosexuality allows the formation of continuous, lasting unions of mutual assistance, the sharing of life projects, and Brazil had, in 2011, more than 60,000 publicly declared homo-affective unions. In Brazilian law, there is no prohibition to establish homo-affective unions,⁵⁴ and the regulation given to the hetero-affective unions and marriages should be extended to homosexual unions⁵⁵ for lack of distinction between the institutions (equality according to Dworkin and Alexy); (iii) family is above all love, but Justice Fux did not elaborate on the meaning of love or the requirements for a homosexual union; (iv) [he maintains] besides equality, private autonomy of individuals as the center of human dignity and Nancy Fraser's recognition policy, allowing the achievement of life projects of homosexual persons (substantive equality), to also generate legal certainty to such individuals. Requirements for a homosexual union must be substantiated. However, he did not deepen the understanding of referenced evaluative words, (v) he did not expressly mention adoption by homosexual couples and agreed with the Reporting Justice on this matter.

The third opinion was by Justice Carmen Lúcia. The highlights of her views are as follows: (i) she maintained that, according to Bobbio, we are in the time of realization of rights conquered, such as the exercise of freedom. She equated values to principles, without explaining the meaning of each evaluative word; (ii) she accepted homosexual unions "under the canopy of the Constitution that bases

54. CF 88 art. 5, II.

55. CF 88 art. 226.

its normative pillars on the principle of human dignity, which requires tolerance and harmonious coexistence of all, with full respect to the free choices of individuals.” Again, she did not explain the evaluative words, neither did she explain the meaning assigned to equality, intimacy and social pluralism, which were some of the foundations that she used for the admission of homosexual unions; (iii) she agreed with the solution proposed by the Reporting Justice without expressly dealing with marriage and adoption by homosexual couples.

The major points of Justice Ricardo Lewandowski’s opinion, the fourth to speak, are: (i) the description of family as an entity constituted by marriage in the Brazilian Constitutions of 1937, 1946, 1967 and in Constitutional Amendment 1/1969 was not confirmed by the Constitution of 1988; (ii) according to the Constitution, infra-constitutional texts, and the National Constituent Assembly debates, he asserts that same-sex unions do not fit the molds of marriage, stable unions and one-parent family. However, it is possible to constitute a stable homosexual union, with its own format, by applying the technique of integration of the Portuguese constitutionalist Canotilho; (iii) the roster of article 226 of the Federal Constitution of 1988 is exemplary, giving rise to the upholding of the claims in the action, “so that the legal provisions to heterosexual stable unions be applied to homosexual unions characterized as family entities, excluding those provisions that require the diversity of sex to their exercise until specific rules governing such relations arise;” (iv) he agreed with the solution proposed by the Reporting Justice and did not clarify the evaluative words nor did he confront the foundations of previous opinions.

Justice Joaquim Barbosa was the fifth to speak: (i) he mentioned the role of the Constitutional Courts to bridge the gap between law and society, based on the work of Aaron Barak; (ii) he said that the gap between positive law (lack of legislation favorable to the recognition of same-sex marriage) and reality must be overcome by the Supreme Court, and that there is not in the Constitution of 1988 any

prohibition of the recognition intended, which emanates from the dignity of the human person; (iii) he stated that the Federal Constitution of 1988 dealt with substantive equality and non-discrimination, but he did not elaborate on the evaluative words he used throughout his vote; (iv) he agreed with the solution proposed by the Reporting Justice, although he did not mention marriage and adoption expressly.

From the opinion of Justice Gilmar Mendes, the sixth judge to rule, one can infer: (i) the concern to define the meaning of interpretation according to the Constitution, seeking to avoid any interpretation of article 1723 of the Civil Code that would prohibit recognition of homosexual union; (ii) he stresses the role of the Supreme Court in judging the action due to the legislator's omission regarding the matter, protecting the rights of minorities because each individual has the right to self-development. He supports his arguments by using the Basic Law of Bohn (the Constitution of Germany), the principle of equality and comparative law; (iii) based on the Constitution,⁵⁶ he also accepted stable homosexual unions by using an open interpretation grounded in the theory of Peter Häberle; (iv) he addressed the problems of evaluative gaps and possible thought, citing specific doctrine; (v) he concluded with the following words:

Therefore, at this point, I merely recognize the existence of the union between persons of the same sex, based on legal foundations distinct from those explained by Justice Ayres Britto. And grounded in the theory of possible thought, I determine the application of a similar protection model—in this case, the one which deals with stable unions—where applicable, in accordance with the reasoning presented here without addressing other developments.

(iv) he also accepted the solution proposed by the Rapporteur, but did not give meaning to all the evaluative words used in his opinion, such as freedom and equality.

56. *Id.*

Justice Ellen Gracie, the seventh judge to express her views, fully agreed with the Reporting Justice's opinion and did not submit, therefore, a written opinion.

In the opinion of Justice Marco Aurelio, the eighth judge to give a ruling, one can observe: (i) the confirmation of prejudice experienced by homosexuals as a population of 18 million people, bringing up the English experience on the possibility of homosexual union; (ii) based on Hart he criticizes the idea of collective morality or that of an ordinary person and highlighted, among others, Hart's arguments in the English debate:

First reason: to punish someone is to cause them harm, and if the offender's attitude did not cause harm to anyone, punishment is meaningless. In other words, the private conduct that does not affect the rights of third parties is within the sphere of private autonomy, free from government interference. Second reason: free will is also an important moral value. Third: freedom enables learning resulting from experimentation. Fourth: the laws that affect individual sexuality entail harm to individuals subject to them, with very serious emotional consequences.

(iii) he also highlighted that "morality and the law should have different criteria, but go together. The law is not fully contained in morality, and vice versa, but there are points of contact and approach;" (iv) he emphasized the lack of political will on the part of Congress to discuss the issue in spite of the numerous bills introduced, which did not generate any specific legislation. The solution has to stem from the fundamental rights,⁵⁷ from the reinterpretation of the meaning of family, from the Brazilian historicity and legal doctrine, and from the principle of human dignity, through the counter-majoritarian role of the courts in ensuring fundamental rights; (v) he decided for "the applicability of the regime of stable union to same-sex unions," agreeing with solutions proposed by the Rapporteur, without dealing explicitly with adoption and marriage in these situations and without delving into the meaning of evaluative words in his opinion.

57. CF 88 art. 226, §3.

In the opinion of Justice Celso de Mello, the ninth judge to pronounce, one reads: (i) the importance of the intervention of *amicus curiae* to pluralize discussion of the topic and allow the Supreme Court to “have of all the necessary elements for the resolution of the dispute, enabling it, *with such procedural openness*, to overcome the serious issue relevant to the *democratic legitimacy* of the decisions emanating from this Court;” (ii) he stressed the legislative historicity imposed by Portugal when colonizing Brazil until the Military Penal Code, which was always discriminatory toward homosexuals; (iii) that this treatment before the 1988 Federal Constitution cannot exist, which allows for “the recognition *by constitutional imperative*, of a stable homosexual union as a legitimate family unit,” which prevents discrimination and realizes the values of liberty, equality, legal certainty and non-discrimination based on legal doctrine and judgments of the Supreme court and other Brazilian courts. There was no explanation of the evaluative words used; (iv) about the counter-majoritarian role of the judiciary in the defense of fundamental rights and protection of minorities through a substantive perspective of a constitutional democracy. There was no explaining of the evaluative words used, except for the meaning of substantive democracy (based on the works of Geraldo Ataliba and Ferreira Pinto); (v) he emphasized the right to the pursuit of happiness as derived from constitutional principles such as the dignity of the human person, without showing it, but citing the Supreme Court rulings on the matter and rulings from the United States and foreign constitutions; (vi) [he regarded] affection as value / constitutional principle and family shaper, and [he also mentioned] the “Yogyakarta Principles: the right to constitute a family, regardless of sexual orientation or gender identity” in order to address the legislative omissions (unconstitutional) so as to equate stable unions with homosexual unions; (vii) he accepted the solutions proposed by the Rapporteur without explicitly dealing with marriage and adoption.

From the opinion of the tenth and last judge, Justice Cezar Peluso, who was the Chairman of the Supreme Court at the time of

this judgment, one gathers: (i) the wording of art. 1723 of the Civil Code and article 226, § 3 of the Federal Constitution of 1988 authorizes the interpretation according to the Constitution, removing the exclusion of homosexual union as a kind of family, but with its own configuration, which differs from stable unions. Stable union rules may be applied to same-sex unions but only similarly; (ii) after the present judgment, action on the part of the legislative branch is required; (iii) he agrees with the proposed solution by the Rapporteur [as to marriage and adoption], and did not explain the evaluative words in his opinion.

V. JUDICIAL AND ADMINISTRATIVE REPERCUSSIONS OF THE ADI 4277 RULING

After the Supreme Court decision was published, the normative hypothesis of article 1723 of the Civil Code gained amplitude because stable same-sex and opposite-sex unions were equated, and it is now unconstitutional to make any distinction between such types of family formation.

It is important to remember the *erga omnes* effectiveness given to the decision by article 102, § 2, of the Constitution, as well as its binding effect on the State, judicial or administrative structure⁵⁸ that have to be fully committed to the content of the ruling.

As direct repercussions of the judgment of ADI 4277, two major controversies took the legal stage, both related to civil marriage: (a) the refusal by clerks and judges to perform the conversion of stable same-sex union into full marriage; (b) the denial of marriage licenses to people in same-sex relationships.

58. CF 88 art. 102:

The Federal Supreme Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: [...] Paragraph 2 Final decisions on merits, pronounced by the Supreme Federal Court in direct actions of unconstitutionality and declaratory actions of constitutionality shall have force against all, as well as a binding effect, as regards the other bodies of the Judicial Power and the governmental entities and entities owned by the Federal Government, in the federal, state, and local levels.

It is obvious that homosexual partners with legal status duly recognized would see themselves fully entitled to request the *conversion* of their stable union into civil marriage, as provided in article 226, § 3 of the Federal Constitution⁵⁹ and article 1726 of the Civil Code.⁶⁰

However, bureaucratic and often ideological obstacles in the process of conversion of a stable union into civil marriage eventually made the latter be the preferred route for the consolidation of love life, even among people of the same sex. The constitutional provision of article 226, § 3, ordering the facilitation of this *conversion* was not observed by many courts of the federal states. Thus, such conversion became less expeditious than direct marriage.

Nevertheless, given the countless denials of marriage licenses to homosexual partners, there arose the need to confirm the extent of the judgment handed down by the Supreme Court. The debate reached the Superior Court of Justice⁶¹ through the Special Appeal 1183378,⁶² which was upheld. Same-sex partners were then authorized to obtain marriage licenses.

In his opinion, the reporting justice, Luis Felipe Salomão, states that the Brazilian Civil Code provisions do not textually ban same-sex marriage, and, therefore, one cannot in any way envision any implied prohibition to the solemnization of marriage without frontally contradicting the constitutional principles previously invoked in the Federal Supreme Court decision.

59. CF 88 art. 226:

The family, which is the foundation of society, shall enjoy special protection from the State . . . For purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.

60. CC art. 1726: "A stable union may be converted into marriage, upon application to a judge by the companions and registration in the Civil Register." Translation based on LESLIE ROSE, *O CÓDIGO CIVIL BRASILEIRO EM INGLÊS/THE BRAZILIAN CIVIL CODE IN ENGLISH* (2d ed., Renovar 2012).

61. Translator's note: The Superior Court of Justice is the highest appellate court in Brazil for non-constitutional issues concerning both state and federal ordinary courts.

62. REsp 1183378, STJ, 01.02.2012, <https://perma.cc/X9TV-WDFR>.

Although the judgment of the Superior Court of Justice only binds the parties of the legal procedural relationship, as a unifying Court of jurisprudence, its decision had a great impact on the various similar cases being heard across the country, establishing itself as a true paradigm decision.

Nonetheless, the results of the ADI 4277 and the Special Appeal 1183378, in addition to the decisions that eventually were consolidated in the courts of the federal states, remained insufficient to ensure the conversion of stable homosexual union into civil marriage and the granting of licenses to marriage, which continued to be insistently denied to homosexual couples.

It is worth mentioning that, although subject to the supervision of the judiciary, the notaries of the Civil Registry of Natural Persons are not part of the direct or indirect public administration. Still, notaries are regimentally and legally compelled to comply with determinations issued by the Supreme Court and the Superior Court of Justice. Therefore, it is unconstitutional and not prudent to refuse the conversion to marriage and the licenses to direct marriage.

Even within the Judiciary Commissions of State Appellate Courts, there was no uniformity in interpreting the extent of the judgment of ADI 4277, especially regarding the possibility of realization of civil same-sex marriage.

Such resistance against the outcome of ADI 4277 required the issuing of Resolution 175⁶³ by the National Council of Justice⁶⁴ on May 14, 2013, during its 169th Plenary Session.

This normative act was explicitly aimed to prohibit the refusal of the license and civil marriage solemnization to same-sex couples,

63. Resolução 175, 05.14.2013, <https://perma.cc/NHH4-N65R>.

64. The National Council of Justice (CNJ) is a public institution that aims to improve the work of the Brazilian judicial system, especially with regard to the control and administrative procedural transparency. It was created as an external control body, in order to standardize the internal procedures of the Judiciary and provide strategic planning to magistrates, with assignments which are primarily administrative, financial and disciplinary, as set forth in the Constitutional Amendment 45/2004, commonly called the "Judiciary Reform."

as well as the denial of the conversion of stable homosexual union into marriage.

If practiced, these acts will give rise to an immediate report to the Judge-inspector [member of the Judiciary Commission] who will take appropriate action in the face of the concrete case, to ensure the full realization of these rights, even with the possibility of certain penalties.

With the entry into force of Resolution 175 (based on item I of § 4 of article 103-B of the Constitution), which took place two days after its publication, same sex civil marriages were widely licensed around the country, ending any infertile debate on the issue. Likewise, permissions for the conversion of stable homosexual union into civil marriage were broadly granted.

VI. CONCLUSION

It can be said that the Supreme Court in this historic judgment, albeit belated and conservative, defended the national constitutionalism from biased and exclusionary discourses that sought to interpret the Federal Constitution of 1988 as a static text, disconnected from the factual and legal reality.

These discourses, however, failed to prevent the realization of the principles of equality (elimination of discriminatory factors that nullified the recognition of a new family entity) and freedom (positive freedom: free exercise of sexual orientation) as the basis of a stable union (and, later, marriage) between persons of the same sex in the Brazilian constitutional civil law.

Some negative events permeated the lives of homosexuals and homo-affective families before, during, and after the case. Certain social groups, mainly of a religious nature, opposed the rights of same-sex couples.

For instance, in 2011, statements of Congressman Jair Bolsonaro and the well-known Evangelical Pastor Silas Malafaia compared ho-

mosexuality to zoophilia and necrophilia.⁶⁵ In 2011, before the Supreme Court decision, the Speaker of the Chamber of Deputies, Federal Deputy Marco Maia also said it was not yet time for the Brazilian National Congress to discuss issues such as abortion and homosexual unions.⁶⁶ Still in 2011, the newspaper *O Globo* reported that a cohabiting homosexual couple needed to go through four registry offices in Curitiba (Paraná state capital) to be able to register their homosexual union. This was the case after the Supreme Court decision.⁶⁷

Earlier reports show that in Brazil between 37⁶⁸ and 78⁶⁹ rights were denied to cohabitating homosexuals in stable unions. For example, (i) they could not combine incomes to approve financing; (ii) they were unable to register their partners as dependents in the public service; (iii) they did not participate in state programs related to family; (iv) they could not move with the public servant partner transferred to another location; (v) they had no right to inheritance; (vi) they could not file income tax returns jointly; (vii) they had no *usufruct* of the partner's assets; (viii) and they did not enjoy immunity from seizure of the property where the couple resides. The Brazilian legal system by not granting the same rights to homosexuals considerably raised the cost of living for these individuals and their families.⁷⁰ These problems were discussed at the Supreme Court,

65. Bianka Carbonieri, *Silas Malafaia Compara Homossexualidade com Zoofilia e Necrofilia*, SAPATOMICA, <https://perma.cc/B9FN-94N7>; Bianka Carbonieri, *Uma geral pelo "caso Bolsonaro,"* SAPATOMICA, <https://perma.cc/5RMH-L38G>.

66. *O Globo*, *É A Hora de Discutir Temas Como Aborto e União Homossexual*, March 14, 2011, <https://perma.cc/7V7T-GZYH>.

67. *O Globo*, *Casal Homossexual Só Consegue Registrar União Passar por Quatro Cartórios em Curitiba*, May 5, 2011, <https://perma.cc/RTE6-ZVVU>.

68. MARIA BERENICE DIAS, *UNIÃO HOMOSSEXUAL: O PRECONCEITO E A JUSTIÇA* (Livraria do Advogado 2000).

69. Associação Brasileira de Gays, Lésbicas, Bissexuais, Travestis e Transsexuais [Brazilian Association of Gays, Lesbians and Transvestites], *78 direitos negados a casais homoafetivos*, <https://perma.cc/GY8A-5X32> (now offline).

70. Eloi Rodrigues Petechust Barreto & Oksandro Osdival Gonçalves, *Análise Econômica da Homossexualidade: Custos e Benefícios do Comportamento Sexual na Perspectiva do Direito Brasileiro*, 18 *REVISTA JURÍDICA DA PRESIDÊNCIA* 409, 419-20 (2016).

but even after the ruling, these rights continue to spark heated debates.

In addition, many cases of gender violence were recorded. In 2013, the Annual Report on the Murder of Homosexuals in Brazil—LGBT⁷¹ revealed the following: (a) that there were about 312 murders of gays, transvestites and lesbians as a result of homophobia, that is, one murder every 28 hours; (b) when it comes to homicide due to sex discrimination, the murder of gays ranks highest with 186 homicides (59 %), followed by 108 transvestites (35%), 14 lesbians (4%), 2 bisexuals (1%) and 2 heterosexuals (1%); (c) that 10 homosexuals committed suicide due to homophobia, as in the case of a 16-year-old who hanged himself at home because his parents did not accept his homosexual orientation; (d) that Brazil led the world ranking of homo-transphobic crimes registering in 2013 with the killing of 108 transsexuals, while in the United States, a country with a population one hundred million more than that of Brazil, experienced 16 murders of transgender people in the same year. Brazil has a homicide risk of transvestites 1,280 times higher than in the United States.

It stands out, finally, that there is no federal law regulating homosexual union in Brazil, although there is no shortage of bills under consideration in Congress on the matter, some of them proposing setbacks.⁷²

71. Grupo Gay Da Bahia—GGB, *Relatório Anual de Assassinato de Homossexuais no Brasil—LGBT*, 2013, <https://perma.cc/SG4Y-QF4J>.

72. Bill 470/13, which provides for the Statute of Families, recognizing the stable union as “a family unit . . . between two people, characterized by the public, continuous, lasting cohabitation and established with the purpose of starting a family;” Bill 5.120/13 to recognize civil marriage and stable union between people of the same sex; Bill 6.583/13 (Statute of the Family) intended to establish by law the recognition of the family as “family entity formed from the union between a man and a woman through marriage or stable union, and the community formed by either parent and their children.”

APPENDIX

The following is the headnote of the Supreme Court ruling, which decided the actions ADI 4277 and ADPF 132⁷³:

1. Allegation of Breach of Fundamental Precept (ADPF). Partial loss of object. The remaining part accepted as Direct Action of Unconstitutionality. Homosexual Union and its recognition as legal institution. Convergence of objects between actions of abstract nature. Joint decision. Adoption of the foundations of ADPF No. 132-RJ for ADI No. 4277-DF, in order to give an interpretation according to the Constitution to article 1723 of the Civil Code. Requirements for the action met.
2. Prohibition of discrimination against persons based on sex, be it in the dichotomy man/women (gender), or based on sexual orientation of either of them. Prohibition of prejudice as part of fraternal constitutionalism. Tribute to pluralism as a socio-political and cultural value. Freedom of sexual expression, within the category of fundamental rights on individual, which is an expression of the autonomy of the will. Right to intimacy and private life. Eternity clause. The gender of individuals, unless there is a constitutional provision expressed or implied to the contrary, is not a factor of legal difference. Prohibition of prejudice in the light of item IV of art. 3 of the Federal Constitution. Prejudice frontally collides with the constitutional purpose of promoting the good of all. Normative silence of the Constitution regarding the actual sexual expression of individuals based on Kelsen's negative norm: that which is not legally prohibited or required, is legally allowed. Recognition of the right to sexual preference as a direct emanation of the principle of human dignity: the right to self-esteem in the highest point of the individual's consciousness. Right to the pursuit of happiness. Normative leap from the

73. The language of Brazilian court decisions headnote is rather telegraphic. The translator tried his best to make it understandable in English. See ADI 4277, *supra* note 3; APDF 132, *supra* note 44.

prohibition of prejudice to the proclamation of the right to sexual freedom. The concrete sexual expression is part of the natural persons' freedom of choice. Empiric expression of sexuality on the planes of constitutionally protected intimacy and privacy. Freedom of will. Eternity clause.

3. Constitutional provision for the family institution. Recognition that the federal constitution does not lend to the noun 'family' any orthodox meaning or that of the legal technique. Family as a socio-cultural category and spiritual principle. Subjective right of family formation. Non-reductionist interpretation. The *caput* of art. 226 gives the family, the foundation of society, special state protection. Constitutional emphasis on the family institution. Family in its colloquial or proverbial meaning as a household core, regardless of whether formally or informally constituted or formed by hetero affective couples or homosexual ones. The 1988 Constitution when using the term 'family' does not limit its formation to opposite-sex couples, nor to a notary formality, a civil solemnization or a religious liturgy. Family as a private institution that is voluntarily constituted between adults and maintains a necessary trichotomous relationship with the State and civil society. The family unit is the main institutional locus of realization of fundamental rights, which the Constitution denotes as intimacy and privacy (item X of art. 5). The isonomy between heterosexual couples and homosexual ones only gains full meaning if it flows into the same subjective right to form an autonomous family. Family as the central figure or receptacle, of which everything else is content. Imperious need of non-reductionist interpretation of the concept of family as an institution that is also formed through different routes rather than civil marriage. Progress of the 1988 Federal Constitution in terms of customs. Advance towards pluralism as a social-political-cultural category. Jurisdiction of the Supreme Court to main-

tain interpretatively the constitutional text fundamentally coherent, which involves the elimination of prejudice against sexual orientation.

4. Stable union. Constitutional norms that refer to men and women, but only to give special protection to give special protection to the latter. The constitutional aim is to establish legal relations that are horizontal and without hierarchy between the two human genres. The constitutional definition of the concepts of family unit and family. The constitutional reference to the basic duality man and woman in § 3 of its art. 226 is due to the primary purpose of not missing the slightest opportunity to promote legal horizontal relationships without hierarchy within domestic societies. Normative reinforcement to a more efficient fight against the patriarchal reluctance of Brazilian customs. Impossibility of the use of the Constitution text to revive article 175 of the Charter of 1967/1969. It is impossible to roll the head of the art. 226 on the gallows of its third paragraph. Provision using the terminology 'family unit' did not intend to differentiate it from 'family.' There is no hierarchy or legal quality difference between the two forms of constitution of a new autonomized and domestic core. The use of the term "family unit" as a perfect synonym for "family." The Constitution does not forbid family formation by persons of the same sex. Affirmation of the judgment that a person is not prohibited of anything, only in light of a right or a legitimate protection of the interest of others, or of the whole society, which is not the case *sub judice*. Inexistence of the right of heterosexual individuals to its legal non-equivalence with homosexual individuals. Applicability of § 2 of art. 5 of the Federal Constitution, to show that other rights and guarantees not expressly listed in the Constitution, emerge from the system and the principles adopted by it, *verbatim*: The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from

the international treaties to which the Federative Republic of Brazil is a party.

5. Lateral differences for the grounds of the decision. Note that Justices Ricardo Lewandowski, Gilmar Mendes and Cezar Peluso agree on the impossibility of an orthodox fitting of homosexual union into the constitutionally established family types. Nevertheless, they recognized the union between same-sex partners as a new form of family unit. The matter is open to legislative confirmation, without prejudice to the recognition of immediate applicability of the Constitution.
6. Interpretation of art. 1723 of the Civil Code in accordance with the Federal Constitution (technique: interpretation according to the constitution). Recognition of homosexual union as family. Actions upheld. Due to the possibility of a prejudiced or discriminatory interpretation of article 1723 of the Civil Code, not resolvable in the light of its own, it is necessary to use the technique of interpretation according to the Constitution. This is to delete from the provision any meaning that prevents the recognition of a continuous, public and lasting union between persons of the same sex as a family. Recognition according to the same rules and with the same consequences as those of the opposite-sex stable unions.