SAME-SEX UNIONS: LEGAL RECOGNITION OF COMMON LAW UNIONS BETWEEN SAME-SEX PARTNERS

// UNIÕES HOMOAFETIVAS: RECONHECIMENTO JURÍDICO DAS UNIÕES ESTÁVEIS ENTRE PARCEIROS DO MESMO SEXO

Luís Roberto Barroso

>> ABSTRACT // RESUMO

The present paper deals with the State's obligation to provide legal recognition to affectionate relationships between same-sex partners. For that purpose, it will analyze the constitutional principles applicable to this hypothesis – equality, liberty, human dignity and legal certainty –, as well as the current parameter applied in the realm of family law for the recognition of family entities, which is precisely the one of affection. In its final part, the article will present two possible legal solutions that lead to the same result: the extension of the application of the legal regime of civil unions to same-sex unions. // O presente trabalho trata do dever estatal de dar reconhecimento jurídico às relações afetivas entre pessoas do mesmo sexo. Para tanto, será feita uma análise dos princípios constitucionais aplicáveis à hipótese – igualdade, liberdade, dignidade da pessoa humana e segurança jurídica –, bem como do parâmetro vigente no âmbito do Direito de Família que é, precisamente, o da afetividade. Ao final, serão apresentadas duas soluções jurídicas que conduzem ao mesmo resultado: a aplicação do regime da união estável às uniões homoafetivas.

>> KEYWORDS // PALAVRAS-CHAVE

Same-sex civil unions; legal recognition; constitutional principles; civil unions // Uniões homoafetivas; reconhecimento jurídico; princípios constitucionais; união estável

>> ABOUT THE AUTHOR // SOBRE O AUTOR

Full-Professor of Law at the State University of Rio de Janeiro and Justice of the Brazilian Federal Supreme Court. //Professor Titular de Direito Constitucional da Universidade Estadual do Rio de Janeiro (UERJ) e Ministro do Supremo Tribunal Federal.

1. INTRODUCTION

1.1 BACKGROUND

In 2007, while the General-Prosecutor of Brazil was Dr Antonio Fernando de Souza, a group of Federal Prosecutors wanted to urge him to file a constitutional lawsuit seeking the legal recognition of same-sex unions. I was contacted on behalf of this group by Daniel Sarmento, who had been my student during his undergraduate and graduate studies, and who was building a successful academic career with the State University of Rio de Janeiro (UERJ). Their request was that I develop a study that could lay the foundation for filing this lawsuit before the Federal Supreme Court (STF). In essence, the goal was to get same-sex common law unions to be regulated under the same legal regime dedicated to conventional common law unions between opposite-sex couples. At that time, the General-Prosecutor of Brazil chose not to bring the lawsuit. The study I had elaborated was then published as an academic paper in several law review journals[1].

Some time after that, the General-Prosecutor of the State of Rio de Janeiro, Lúcia Léa Guimarães Tavares, contacted me to say that the State Governor Sergio Cabral had learned about the study and, since the General-Prosecutor of Brazil had decided not to file the lawsuit, he would like to do so himself. She then asked me whether I could adapt the text, converting it into a lawsuit to be filed by the State Governor of Rio de Janeiro. I promptly accepted the assignment.

1.2. STRATEGY

Having the Governor bring this lawsuit involved some degree of complexity. The General-Prosecutor of Brazil has what is called "*universal standing*" in presenting direct lawsuits before the STF. That is, he can question any laws or raise any issues independently of the matter or the people affected. The State Governor, on the other hand, although he is also listed by Article 103 of the Constitution – which identifies those who have the right to bring direct lawsuits before the STF –, has what is called "*special standing*". This means that he has to demonstrate that the question under discussion has specific and particular impact within the State in order to meet a STF criterion known as "*thematic pertinence*". In light of that, to justify the filing of the lawsuit by the State Governor, it was necessary to identify a typical state-level issue involved. In that attempt, I have found the State Decree-law 220, of 18.07.1975 – the Statute of Civil Servants of the State of Rio de Janeiro –, which included dispositions that determined the right of leave in case of illness of a family member or to accompany a spouse in a work assignment, apart from other social security benefits to the family members of the civil servants. This was the missing link: the Governor needed to determine whether the definition of spouse or family member should include or not partners in same-sex unions. His interest on the matter was then justified.

1.3. THE LAWSUIT THAT WAS BROUGHT

Once again, the action was filed as a Claim of Non-Compliance with Fundamental Precept – ADPF (*Arguição de Descumprimento de Preceito Fundamental*). The main reason was that the provisions of state legislation relevant to the request for interpretation according to the Constitution dated prior to the Constitution of 1988, which, at least in principle, would make it impracticable to file a direct action of unconstitutionality. In any event, in case the STF were to reject the ADPF – considering STF's requirements still remain somewhat enigmatic –, I also asked that the lawsuit be alternatively received as a direct action of unconstitutionality (ADI), for the purpose of interpreting Article 1723 according to the Constitution, which regulates common law unions, determining that its incidence also comprised same-sex unions. The lawsuit was filed in February 2008 and identified as ADPF 132. Afterwards, while occupying the position of interim General-Prosecutor of Brazil, Dr Deborah Duprat filed herself a new lawsuit with the same request. Her initiative was justified because in the lawsuit filed by the Governor, as previously explained, the thesis of equivalence between common law unions and same-sex unions would only be valid within the State of Rio de Janeiro. Having been brought during a court recess, the lawsuit was later forwarded to then President of the STF, Minister Gilmar Mendes, who accepted it not as an ADPF, but as a direct action of unconstitutionality (ADI 142).

Both lawsuits started to be jointly examined on the 4th of May 2011. During the first semester of 2011, I was abroad, on a sabbatical period as a Visiting Scholar at the University of Harvard in the United States. However, I had guaranteed to the General-Prosecutor of the State of Rio de Janeiro that I would be present for the judgment in case it was scheduled to take place while I was out of the country. And so I did, flying from Boston to Brasilia to take part in this court session, which also extended through the 5th of May.

2. MAIN ARGUMENTS AND ISSUES DISCUSSED

2.1. SUMMARY OF IDEAS ON WHICH THE LAWSUIT WAS BASED

2.1.1. SAME-SEX RELATIONSHIPS AND THE LAW

In recent decades, culminating a process of overcoming prejudice and discrimination, a number of people started to fully express their sexual orientation and, as a result, have publicly manifested their same-sex relationships. In Brazil and around the world, millions of same-sex couples live in long lasting and continuous partnerships, characterized by affection and a shared life project. Social acceptance and legal recognition of this fact are relatively recent and, consequently, there are uncertainties about how the Law should deal with this issue.

In this scenario, it is natural to arise, with urgency, the issue of the legal regime of same-sex unions. As a matter of fact, these partnerships exist and will continue to exist, independently of positive legal recognition from the State. If the Law remains indifferent, from this will emerge an undesirable situation of uncertainty. However, more than that, the indifference from the State is only apparent and reveals, in reality, an opinion of worthlessness. If it emerged – as it did – a state decision to give legal recognition to informal affectionate relationships (i.e. independently of marriage), the non-extension of this regime to same-sex unions translates into a lesser consideration for such individuals. This nonequivalence is unconstitutional for a number of reasons.

2.1.2. PHILOSOPHICAL GROUNDS

The proposed action was grounded on two philosophical arguments. The first one is that homosexuality is a fact of life. Be it considered an innate or acquired condition, derive it from social or genetic causes, the sexual orientation of an individual is not a free choice, an option between different possibilities. Furthermore, it should be noted that homosexuality – and the same-sex affectionate unions originating from it – do not violate any legal norms nor is capable of affecting the lives of others. Except, of course, when these third parties want to impose a "righteous" lifestyle – their own – to other individuals.

The second philosophical argument of the lawsuit filed consisted on the recognition that the role of the State and the Law in a democratic society is to ensure the development of the personality of all individuals, enabling each and every one of them to carry out their own licit personal projects. The State cannot and should not practice or legitimate any prejudice or discrimination, falling to it, on the contrary, the obligation to firmly fight these practices, providing support and security to vulnerable groups. Political and legal institutions have the mission to embrace – and not to reject – those who are victims of prejudice and intolerance.

2.1.3 LEGAL GROUNDS

The lawsuit was developed around two main theses. The first one is that a set of constitutional principles impose the inclusion of same-sex unions into the legal regimen of common law unions, for it consists in a species amid the genre. The second thesis is that, even if were it not an immediate consequence of the constitutional text, the equivalence of legal regimes would arise from a rule of hermeneutics: where the Law is absent, the legal order should be integrated through the use of analogies. As the essential characteristics of common law unions established by the Civil Code are present in same-sex common law unions, the legal treatment should be the same, or else it would create an unconstitutional discrimination.

The principles in question are equality, liberty, human dignity and legal certainty. The analogy principle, in its turn, imposes the extension

to hypotheses not specified by the legal order of the norms applied to an analogous situation. Well then: the situation that better compare to affectionate unions is certainly not the *de facto association*, in which *two or more* people join efforts for a common purpose, in general of financial nature. The more suitable analogy, as can be easily seen, is the common law union, a situation where two people share a common life project, based on affection. This is the key-concept in the analysis of the theme: it is above all the *affection*, and not sexuality or financial interests, which determine same-sex relationships and which deserves the protection of the law.

2.2 STANDING AND FORMAL REQUIREMENTS OF THE ADPF

2.2.1. STANDING AND THEMATIC PERTINENCE

One chapter of the initial petition was dedicated to demonstrating the standing and the thematic pertinence. The ideas elaborated – already briefly anticipated in the presentation of the strategy adopted for the case – were the following. In light of Article 2, I of Law 9882/1999, standing for the ADPF rests on the individuals entitled to bring direct actions of unconstitutionality, listed under Article 103 of the Federal Constitution[2]. This list includes State Governors.

As for the thematic pertinence, I defended that in the State of Rio de Janeiro there is an expressive number of civil servants who are part of same-sex common law unions. Given this fact, both the State Governor and the Public Administration are faced with relevant issues regarding the norms regulating leaves of absence based on illness of a *family member* or to accompany a *spouse*, as well as on social security[3] and social assistance matters. The lack of legal definition on the application of such norms to same-sex union partners subject the Governor, as Head of the Public Administration, to legal consequences before the State Government Accountability Office, the Public Prosecutor's Office and the State Judiciary regardless of the interpretative approach it were to take on the matter. Furthermore, after the Constitution of 1988 and the subsequent legislation, which have significantly expanded the system of judicial review of the constitutionality of laws in the country, it seems inadequate for the Head of the State Executive Branch to adopt a given potentially controversial interpretation without first presenting the question, though the appropriate channels, for the appreciation of the Federal Supreme Court.

Apart from these reasons – which would already be sufficient –, there are thousands of same-sex affectionate partnerships in the State of Rio de Janeiro. It is therefore natural and legitimate that the State Governor, as an elected public official, should also represent the interests of that segment of society. It should be noted that the claims related to the matter herein discussed disembogue before the State Judicial Branch, which has been pronouncing diverging decisions on the matter. The settlement of this issue by the Federal Supreme Court would therefore have – as it did – a positive impact on state institutions and on the residents of the state.

Established the standing and thematic pertinence, it was also important to demonstrate the presence of the formal requirements for the ADPF.

2.2.2. FORMAL REQUIREMENTS OF THE ADPF

Law 9882/1999, which regulates the process and judgment of Claims of Non-Compliance with Fundamental Precept (ADPF)[4], covered two possible modalities for this instrument: autonomous and incidental claim. The claim we filed was of *autonomous* nature, defined by the *caput* of article 1 of the law, which reads:

> *Art. 1°. The claim established by §1° of article 102 of the Federal Constitution will be brought before the Federal Supreme Court, and will have as object to avoid or repair offenses to fundamental precepts, resulting from acts of the State.*

The autonomous ADPF is an action analogous to the direct actions already instituted by the Constitution, through which abstract and concentrated judicial review is brought forth before the Federal Supreme Court. Its singularities include, however, a more limited parameter of control – it is not applicable to all constitutional norms, but only to fundamental precepts – and a broader object of control, comprising the acts of the State in general, and not only those of normative nature. There are three conditions for the suitability of an autonomous claim: (i) threat to or violation of fundamental principle; (ii) acts of the State capable of causing an offense; (iii) the inexistence of any other effective means capable of remedying the offense.

(I) THREAT TO OR VIOLATION OF FUNDAMENTAL PRINCIPLE

Neither the Constitution nor the legislation has determined the sense and reach of the expression "fundamental precept". Nonetheless, there is substantial consensus in legal doctrine that this category encompasses the fundaments and objectives of the Republic, as well as the fundamental political decisions, object of Section I of the Constitution (Articles 1 to 4). The fundamental rights are likewise included in this typification, comprising, in general, the individual, collective, political and social rights (from article 5 onwards). Norms listed as entrenchment clauses (article 60, §4) or directly deriving from them should be equally added to the roll. And, finally, the federalist constitutional principles (Article 34, VII), whose violation would justify a decree of federal intervention.

As it will be analyzed in further detail, in the issue presented in the lawsuit discussed herein, the following fundamental principles were violated: the principle of human dignity (article 1, IV), one of the fundaments of the Republic; the fundamental rights to liberty and equality (article 5, *caput*), reinforced by the statement that one of the fundamental purposes of the Brazilian State is the promotion of a society free and without prejudices (article 3, IV); and the principle of legal certainty

(Article 5, *caput*, also understood as an immediate consequence of the rule of law[5]).

(II) STATE ACT

As a consequence of express reference by article 1 of Law 9882/1999, the acts which may be the object of an autonomous ADPF are those originating from the State, including those of normative, administrative or judicial nature. In the hypothesis explored herein, as already mentioned, the State acts that violate the fundamental principles in question are of normative and judicial nature. The normative acts consist in Article 19, II and V, and article 33 (including its ten items and its sole paragraph), all from Decree-law 220/1975 (Statute of Civil Servants of the State of Rio de Janeiro), which reads:

> *Art. 19 – Leave will be granted:*
> *(...)*
> *II – in case of illness of a family member, with full payment and benefits in the first 12 (twelve) months; and two thirds of those for another 12 (twelve) months maximum;*
> *(...)*
> *V – without payment, to accompany a spouse elected for the National Congress or transferred to serve in another place if a military officer, civil servant, or regular employee of a state or private company; (Text according to Law No. 800/1984).*
>
> *Art. 33 – The Executive Branch will provide social security and assistance to their employees and their families, including:*
> *I – family allowance;*
> *II – sick pay;*
> *III – medical, dental, hospital and pharmaceutical assistance;*
> *IV – real-estate financing;*
> *V – housing allowance;*
> *VI – educational assistance for dependents;*
> *VII – treatment for accident at work, professional illness or compulsory institutionalization for psychiatric treatment;*
> *VIII – funeral-assistance, based on the salary, remuneration or payment;*
> *IX – pension in case of accidental death at work or professional illness;*
> *X – compulsory insurance plan to complement income and pensions.*
> *Sole paragraph – the family of the employee is composed of the dependents who necessarily and provably live at their expenses.*

The provisions transcribed above provide rights to the family members of civil servants – such as medical assistance and funeral assistance – or to civil servants themselves in view of events that could happen to members of their family. In this second scenario, for example, is included the leave of absence offered to civil servants for illness of a family

member. It was uncontroversial that such rights should be extended to civil servants in heterosexual common law unions. However, there is uncertainty whether these can be applied to same-sex unions. The proponent of the lawsuit portrayed herein understands so, but this thesis is not unanimous.

The legal acts that have motivated the filing of the ADPF were represented by the set of decisions rendered by the State Appellate Court of Rio de Janeiro, which have predominantly denied the equivalence between same-sex unions and conventional common law unions. In fact, several decisions have denied the possibility of attributing the status of family entity to such unions. This is confirmed by the following example:

> *RELATIONSHIP BETWEEN HOMOSEXUAL MEN. COMMON LAW UNION. DECEASED PARTNER. REQUEST SEEKING HABILITATION AS PENSIONIST. REGIME OF COMPLEMENTARY SOCIAL SECURITY. ABSENCE OF SUITABLE REGISTER AS DEPENDENT. DENIED. DECISION APPEALED. Although clearly established, for a long time, the homosexual relationship between two men do not fall into the provisions of Law No. 8.971/94 based on an allegation of the existence of a common law union. Especially because, the Constitution, in article 226, establishes that the family, basis of the society, enjoys special protection from the State, specifying under paragraph 3 that in order to enjoy protection from the State, the common law union between man and woman is recognized as a family entity and the law should facilitate its conversion into marriage. This constitutional principle, therefore, is aimed at unions between people of opposite sexes and not people of same sex. On the other hand, in the absence of records showing the plaintiff's register as dependent of the associate before the respondent for the purpose of receiving the requested benefit (post-mortem pension), and being clear, likewise, that this benefit is different from the one contracted on page 29 (peculium proposal), it is clearly evident that the request should be denied*[6].
>
> *Declaratory action. Seeks recognition of common law union between homosexuals. Recognition denied. Neither the Federal Constitution of 1988 nor Law 8.971/94 protects the request under appeal. The concept of family is not extended to same-sex unions. Without demonstration of shared effort, the division of the estate or habilitation to take part in the inventory of one of the partners, now deceased, should not to be considered. Sufficient grounds. Appeal denied*[7].

Although there were occasional decisions to the contrary, the fact is that the majority of the case law violates the fundamental rights of the individuals involved, reason why the proponent has asked the Federal Supreme Court to recognize this fact and reform this orientation.

(III) INEXISTENCE OF ANY OTHER EFFECTIVE MEANS CAPABLE OF REMEDYING THE OFFENSE (SUBSIDIARITY OF ADPF)

The requirement of "inexistence of any other effective means capable of remedying the offense" does not derive from the instrument's constitutional definition, having been imposed by Article 4, §1 of Law 9882/1999. As widely known, the doctrine and the Federal Supreme Court case law have been building the understanding that the verification of subsidiarity in each case depends on the efficacy of the "other means" referred in the law, i.e. the kind of solution that the other possible means would be able to carry out in the hypothesis[8]. The other means should be able to provide similar results to those that could be obtained through an ADPF.

Well then, the decision on the ADPF has binding effects and efficacy towards all, elements which, as a rule, could not be obtained through a subjective action. Furthermore, if the ADPF were to be impeded whenever an appeal or subjective action was applicable, the role of the new action would be entirely marginal and its purpose would not be fulfilled. Based on that, in view of the objective nature of the ADPF, the analysis of its subsidiarity should take into account the other objective actions already consolidated in the constitutional system. This is the understanding that has been prevailing in the STF[9].

In the case presented herein, the impugnation was foremost directed towards a state law prior to the Constitution of 1988. Following the traditional line of the Court's case law, this object is not susceptible to impugnation by any other objective action, being certain that only a mechanism such as the ADPF would be capable of avoiding the offense more generally, putting an end to the state of unconstitutionality deriving from the discrimination of homosexual couples. Likewise, there were no objective actions that could be filed against the case law precedents issued by the State Judiciary in violation to the fundamental principles noted herein.

3. THE FUNDAMENTAL PRECEPT VIOLATED AND THE SOLUTION IMPOSED BY THE LEGAL SYSTEM

3.1. FUNDAMENTAL PRECEPT VIOLATED

As mentioned, the acts of the State – especially judicial decisions – that denied legal recognition of same-sex unions directly violated a significant set of fundamental principles, which included: human dignity, the equality principle, the right to freedom, from which the protection of private autonomy is derived, and the principle of legal certainty. A concise explanation of each of these violations is presented below.

3.1.1.EQUALITY PRINCIPLE

The Federal Constitution of 1988 consecrated the equality principle and expressly condemned all forms of prejudice and discrimination.

These values are mentioned in the preamble of the Constitution, which announces the purpose of building a "pluralist and fraternal society, free from prejudices". Article 3 renews this intention and gives it unquestionable normative power, announcing the "construction of a free, just and solidary society" and the "promotion of the well-being of all, without prejudice based on origin, race, sex, skin color, age or any other forms of discrimination" as the fundamental purposes of the Republic. The caput of Article 5 reaffirms that "all are equal before the law, without distinction of any nature". The constituent has also included explicit text rejecting racism[10] and discrimination against women[11].

This set of norms is explicit and unequivocal: the Constitution forbids all forms of prejudice and discrimination, binomial where the disregard or discrimination based on the sexual orientation of individuals has to be included[12]. Although these considerations are already sufficient to show the clear defect of unconstitutionality arising from the non-recognition of legal effects to same-sex unions, two supplementary observations are noteworthy.

Firstly, it is a fact that the STF case law recognizes without question the possibility of direct application of the principle of equality to rebuke discriminatory practices, even where there is no infra-constitutional legislation on the specific issue. And that even extends so far as to impose to individuals the duty to not discriminate[13], overcoming eventual considerations on the private autonomy of the parties involved. With much more reason, thus, the Court should not hesitate to prevent discrimination practiced by the State itself, which not only recognizes the obligation to abstain from violating fundamental rights but also has a positive duty to act in their protection and promotion[14].

Secondly, it is imperative to conclude that the offense to the principle of equality, in the hypothesis, occurs in a direct manner, affecting its essential core. In fact, although the principle cited involved several nuances and complexities, the contested act violates its most traditional and elemental content, related to formal equality. In simple terms, it deals with the prohibition of the legal system to give different treatment to people and situations which are substantially the same. Such mandate is not merely directed to the legislator, also requiring interpreters to avoid the production of concrete discriminatory effects when establishing the meaning and reach of the law. In certain situations, observed the semantic limits of the normative texts, they should also proceed *correctively*, carrying out the interpretation of laws according to the Constitution, exactly as requested in the present lawsuit.

This does not mean that all and any disequalizing is invalid. On the contrary, to legislate is nothing more than to classify and to distinguish people and facts, based on the most varied criteria. Besides, the Constitution itself establishes distinctions based on multiple factors. What the principle of isonomy imposes is that the fundament of the disequalizing be reasonable and its purpose be legitimate[15]. In this sense, it is worth noting that certain criteria are considered especially suspect by the

constitutional order, such as those based on origin, sex and skin color (art. 3, IV). Within the genre category the sexual orientation is certainly implied. In case of a suspect classification, a heightened argumentative burden is imposed to those who intend to support it.

In any event, however, there shouldn't be a need to enlist reasons to prevent differentiated treatment. The logic is exactly the opposite. Where there is no legitimate reason that requires the distinction, the general rule should be equal treatment. With the caveat that, in a pluralist and democratic State, such reasons should be supported by arguments of public reason and not by particular world views of moral or religious nature. Even when endorsed by a great number of followers or even the majority, it is a fact that such conceptions are not mandatory and therefore cannot be imposed by the State.

In the case under analysis, there is no constitutionally protected principle or value that is promoted by the non-recognition of affectionate unions between same-sex partners. On the contrary, what happens is a direct violation of the constitutional purpose of instituting a pluralist society that is opposed to prejudice. Not by coincidence, the main arguments invoked in an attempt to support the disequalizing fail for their lack of coherence[16], enter the domain of clear intolerance[17] or are based on religious conceptions[18]. While certainly deserving respect, they cannot be coercively imposed by a laic State.

In this sense, the violation of the principle of equality is truly evident, with not a single argument valid in the public domain capable of justifying the legal non-equivalence of affectionate unions based on the sexual orientation of its partners.

3.1.2 RIGHT TO FREEDOM, FROM WHICH PRIVATE AUTONOMY ARISES

The rule of law should not only formally guarantee to individuals the right to choose between different licit projects of life, but should also provide objective conditions for the conduction of these choices[19]. Freedom, in its general facet, is a requirement for the development of personality. However, some manifestations of freedom have even closer connections with the formation and development of personality, deserving heightened protection[20]. This is the case, for example, of religious freedom, freedom of thought and freedom of expression. And, also, the freedom to choose the people with whom a person wants to maintain a relationship of affection and partnership with. In its full, with all the consequences normally attributed this *status*. Not clandestinely.

From the principle of liberty derives the private autonomy of each individual. Denying to an individual the possibility of fully living their own sexual orientation means to deprive them from one of the aspects that give meaning to their existence. As previously underlined, the exclusion of same-sex relationships from the regime of common law unions would not simply create a gap, a space not regulated by the law. This would actually be an active form of hindering the exercise of freedom and the development of personality by an expressive number of people,

depreciating the quality of their projects of life and their affections. That is, making them less free to live their own choices.

There is no doubt that private autonomy can be limited, but not capriciously. The principle of reasonability or proportionality, vastly applied by the STF, requires the imposition of restrictions to be justified by the promotion of other legal values of the same hierarchy, equally protected by the legal order. In this case, since this is related to the existential dimension of private autonomy, only reasons of special relevance – such as the need to reconcile it with the core aspects of another fundamental right – could justify balancing to accommodate conflicting interests.

What happens, however, is that the non-recognition of same-sex common law unions does not promote any legal value that should be safeguarded in a republican environment. On the contrary, it only serves certain particular conceptions, which may even majoritarian, but which should not be imposed as legally binding in a democratic and pluralist society guided by a Constitution that condemns all and any form of prejudice. This would be a form of *perfectionism* or moral authoritarianism[21], typical of totalitarian regimes, which do not restrict themselves to organizing and promoting a peaceful living, but which have the pretention to shape *suitable individuals*[22]. In short, what is lost in terms of freedom is not reverted in any benefit to any other constitutionally protected principle.

3.1.3 PRINCIPLE OF HUMAN DIGNITY

It is impossible not to recognize that the issue discussed herein involves a reflection on human dignity[23]. Among the several possibilities within the meaning of the idea of dignity, two of them are recognized by conventional knowledge: i) no one can be treated as a means to an ends, and each individual should be considered an end unto themselves[24]; and ii) all personal and collective projects of life, when reasonable, are worthy of equal respect and consideration and deserve equal "recognition"[25]. Not recognizing unions between same-sex partners simultaneously violates these two nuclear dimensions of human dignity.

Firstly, this exclusion functionalizes relationships based on affection to a given project of society, which though certainly majoritarian, it is not legally mandated. Affectionate relationships are seen as a means to realize an idealized model, structured in the image and likeness of a particular moral or religious conception. The individual is, therefore, treated as a means to carry out a project of society. They are only recognized when molded to their traditionally attributed social role: the one of a member of a heterosexual family, dedicated to procreation and to child rearing.

Secondly, discrimination against same-sex unions is equivalent to not bestowing equal respect to an individual identity by affirming that a given lifestyle should not be treated with the same dignity and consideration attributed to the others. The idea of *equal respect* and *consideration* is translated in the concept of "recognition", which should be attributed to individual identities, even when they represent a minority. The

non-recognition is translated into discomfort, leading many individuals to deny their own identity at the expense of great personal suffering. The distinction analyzed herein, by not conferring equal respect to same-sex relationships, perpetuates the dramatic exclusion and stigmatization which homosexuals have been subject throughout History, characterizing a real and official policy of discrimination. It therefore characterizes a clear violation of human dignity.

3.1.4 PRINCIPLE OF LEGAL CERTAINTY

The principle of legal certainty involves the protection of values such as the predictability of conduct, the stability of legal relationships and the protection of trust, indispensable to the peace of mind and, by extension, to social peace. The importance of legal certainty is strongly recognized by the Federal Supreme Court case law, even justifying, in certain circumstances, the maintenance of the effects of acts considered to be unconstitutional or the extension of their effects despite the gravity of the defect they sustain. It is not even necessary to approach these extremes in order to conclude that the exclusion of same-sex relationships from the legal regime of common law unions, without a similar specific regime, unequivocally generates legal uncertainty. The demonstration of this argument is simple.

The union of same-sex partners is licit and will continue to exist, even if doubts about their legal framework linger. This scenario of uncertainty – supported by different manifestations of the State, including conflicting judicial decisions – affects the principle of legal certainty, both from the perspective of the relationship between partners and from their relations with others. That is, it creates problems for the people directly involved and for society.

Partners in same-sex relationships are, of course, primarily affected. Developing a shared project of life tends to create existential and patrimonial repercussions. In light of that, it is natural that the parties would want predictability on subjects such as inheritance, community property, obligations of mutual assistance and alimony, among others. All these aspects are balanced into the treatment given by the Civil Code to common law unions[26]. Its extension to same-sex relationships would have the ability to overcome legal uncertainty on the matter.

Likewise, the lack of definition on the applicable regime also affects third parties that establish statutory or business relationships with any of the partners in a same-sex partnership[27]. The first group identifies specifically the relationship between the State and civil servants, which involves a series of rights attributed to civil servants and their family members, such as the right to leave of absence – in case of illness of the spouse or to accompany them when they are transferred –, the right to include the partner in their group health insurance plan, to funeral assistance, sick pay, and many others. These rights are already guaranteed to civil servants in common law heterosexual affectionate unions, in such a way that the only discussion here is on the legitimacy of discriminating against individuals based on their sexual orientation.

In a business environment, it should be noted that, as a rule, people living under common law unions need the authorization of their partners to, for example, alienate property and offer guarantees. There will also be questions on the patrimonial responsibility for individual debts or debts shared by the partners. There are legal uncertainties, therefore, regarding the formalities and aspects of substantive law involving the relationships between same-sex partners and third parties. Even if those relationships are not directly affected by the definition of the legal regime applicable to civil servants, it is certain that this tends to be taken as an indicative element and, in any case, the legal system should safeguard internal coherence.

In this sense, it is necessary to provide a real legal framework to same-sex affectionate unions. It is perfectly possible to interpret the current law in order to achieve this result and there is no other value of constitutional stature to point in the opposite direction. This is another reason why the ADPF had to be accepted. After these considerations on the substance of the fundamental principles violated in the hypothesis, the initial petition deepened the discussion on the possible solutions in light of the constitutional system.

3.2. THE SOLUTION DIRECTLY IMPOSED BY THE APPROPRIATE APPLICATION OF THE AFOREMENTIONED FUNDAMENTAL PRINCIPLES: THE INCLUSION OF SAME-SEX UNIONS INTO THE LEGAL REGIME OF COMMON LAW UNIONS

The fundamental principles described in the aforementioned lawsuit are vested with undeniable normative relevance and should be directly applied to the case in question, determining that same-sex relationships be submitted to the legal regime of common law unions. The direct application of the constitutional principles does not give origin to further controversies, being admitted by the STF case law. Regarding the principle of equality, as previously mentioned, there is even precedent of direct application to private relationships, despite the inexistence of specific infra-constitutional legislation. Much more reasonably, thus, such principle should be imposed to the State itself, preventing it from promoting inequality between individuals on the basis of unreasonable criteria.

In light of this conclusion, it is necessary to provide the provisions indicated in the Statute of Public Civil Servants of the State of Rio de Janeiro with an interpretation according to the Constitution in order to recognize that the rights therein listed should also be applicable to same-sex unions. Likewise, it falls on the STF the responsibility to declare that, in light of the current constitutional and legal order, same-sex unions should receive the same legal treatment given to conventional common law unions by the courts, or else reiterated violations of fundamental principles would then arise.

One last observation should be made: the conclusion reached herein is not affected by article 226, §3º, of the Constitution, which expressly protects common law unions between men and women[28]. As well known, this provision intended to permanently dismiss any form of discrimination against

female partners, consolidating a long line of evolution which has symptomatically began with judicial decisions. It would not make any sense to interpret it in a contrary sense, broadening its meaning and converting it into an exclusionary norm, i.e. the exact opposite of its original purpose. Such interpretation would be clearly incompatible with the already mentioned fundamental principles, and should be completely dismissed.

3.3. AN ALTERNATIVE SOLUTION: RECOGNIZING THE EXISTENCE OF A NORMATIVE GAP, TO BE INTEGRATED BY ANALOGY

The Law has the intention of regulating all relevant social situations, even where no specific norm exists. For that purpose, methods of integration of the legal system are established, such as analogy, resort to custom, and the general principles of Law. This argument is uncontroversial and does not require additional comments.

Based on this, it was sustained that even if the STF understood it to be impossible to directly apply the aforementioned fundamental principles to regulate same-sex relationships, the undeniable fact is that there is an actual situation that requires legal treatment. As mentioned, the existence of a homosexual orientation, which is unarguably licit, produces as unavoidable consequence the emergence of same-sex affectionate unions, which are, therefore, equally licit. Within these unions, or at least throughout their duration, existential and patrimonial relationships are established, with repercussions to the parties involved and to third parties. It would be at least anachronistic to pretend that this situation does not exist, keeping same-sex partners and individuals who establish relationships with them in a real legal limbo.

The application of integration methods to the case is then natural and intuitive. Conventional knowledge shows that analogy consists in the application of a legal norm conceived for a given situation to a similar one, not envisioned by the legislator. For the use of analogy to be appropriate, it is necessary that the two situations present the same essential elements, which would warrant a given legal treatment. It is exactly what the hypothesis under discussion is.

In fact, the essential elements of common law unions are identified by the Civil Code itself, and are present both in heterosexual and homosexual unions: lasting and peaceful cohabitation, moved by the intention to constitute a family entity. As well know, the contemporary doctrine and case law note that the family should serve as a suitable environment for the development of its members, having as characteristic traits the communion of life and mutual assistance between the parties, in both emotional and practical terms.

Well then, it seems impossible to deny the presence of such elements in same-sex unions without incurring in prejudice against homosexual individuals. It would be similar to affirming that such individuals are incapable of establishing bonds of affection and trust. It would be similar to affirming, in short, that they are incapable of feelings of love and partnership. No argument of public reason could endorse statements like these.

For all these reasons, it would be natural to extend the legal regime of common law unions, established by article 1723 of the Civil Code to same-sex unions. It should be noted that this is not only a matter of interpretation of legislation, but of interpretation of the infra-constitutional legislation according to the constitutional principles, an activity the STF has carried out in several opportunities. It should also be registered that such solution has already been adopted in several judicial decisions. As an example, see the following excerpt by the Federal Regional Court (TRF) of the 4th Region:

> *The exclusion from social security benefits based on sexual orientation, besides being discriminatory, withdraws from the state protection individuals who, in light of a constitutional imperative, should be embraced. To debate the possibility of disrespecting or causing damage to someone based on their sexual orientation would be equivalent to give an undignified treatment to a human being. It is simply not possible to ignore the personal condition of the individual, which legitimately composes their personal identity (in which, without question, the sexual orientation is included), as if this aspect had no relation with human dignity. The notions of marriage and love have been changing throughout Western History, assuming plural and multifaceted notions and shapes of manifestation and institutionalization, which in a movement of permanent transformation place men and women before different possibilities of realizing their affectionate and sexual exchanges. The acceptance of same-sex unions is a world phenomenon – in some countries more implicitly – with the broadening of the understanding of the concept of family within the already existing rules; and in others more explicitly, with changes to the legal system in order to legally encompass affectionate unions between same-sex partners. The Judicial Branch cannot ignore the social transformations which, for its own nature, often anticipate legislative changes. Once recognized, based on an interpretation of the guiding principles of the national Constitution, the possibility of accepting same-sex unions within the concept of family entity and rebuking any actuarial constraints, the treatment of the Social Security Office towards same-sex couples should be equivalent to that of heterosexual common law unions, requiring from the former the same conditions required from the latter in order to prove the affectionate links and presumed economic dependence between the couple (art. 16, I, of Law n.º 8.213/91), when processing requests for death insurance and reclusion aid*[29].

4. THE REQUESTS THAT WERE MADE

Based on the arguments previously exposed, the ADPF that was filed presented a precautionary request for an injunction, a main request and a subsidiary one, which are described below.

4.1. PRECAUTIONARY REQUEST

When filing the request for preliminary injunction, it was argued that the presence of the *fumus boni iuris* – i.e., of sound legal basis – was demonstrated throughout the explanation. The *periculum in mora*, on the other hand, it was sustained, was manifested in (i) the risks for the Governor and the Public Administration, who are daily subject to making decisions which could give reason to lawsuits and, more than that, criminal procedures and (ii) the denial of fundamental rights to partners in same-sex legal relationships, who are subject to the *res judicata* of their correspondent lawsuits. For these reasons, the Court was asked to give a preliminary injunction to declare as valid any administrative decisions that provide equal treatment between same-sex unions and common law unions, and to halt the progress of lawsuits and cease the effects of legal decisions denying such rights.

4.2. MAIN REQUEST

The main request asked the Court to declare that the legal regime of the common law unions should also apply to same-sex relationships, either as a direct consequence of the fundamental principles underlined herein – equality, liberty, dignity and legal certainty –, or by analogous application of article 1723 of the Civil Code, interpreted according to the Constitution. As a consequence, the Court was requested: (i) to interpret the above cited state law – article 19, II and V, and article 33 of Decree-law 220/1975 – according to the Constitution, guaranteeing the benefits established in it to partners in common law same-sex unions; (ii) to declare that any legal decisions which deny the mentioned legal equivalence are in violation of the fundamental principles.

4.3. SUBSIDIARY REQUEST

Finally, subsidiarily and as an alternative in case the Court understood that the ADPF could not be accepted in the hypothesis, the proponent requested that the lawsuit be accepted as a direct action of unconstitutionality, considering that its main purpose is the constitutional interpretation of (i) articles 19, II and V, and 33 of Decree-law 220/1975 (Statute of Public Civil Servants of the State of Rio de Janeiro), as well as (ii) article 1273 of the Civil Code, in order to determine that these provisions were not to be interpreted so as to prevent the application of the legal regime of the common law unions to same-sex unions, guarantying its extensive application, otherwise at the risk of unconstitutionality.

With respect to the norms regulating the pre-constitutional state law, it was emphasized that the prevailing logic of the Court, reinforced in ADI 2, is that a law prior to the Constitution that is incompatible with it, was therefore revoked. Consequently, it would not be possible to admit its impugnation through a direct action of unconstitutionality, of which final purpose is the withdrawal of the norm from the system. If the norm

already lacks any effects, it would not make sense to declare its unconstitutionality. This line of thinking, however, is not valid when the request is for interpretation according to the Constitution. What happens is that, in this case, it is not asked that the norm be withdrawn from the legal system and it is not sustained that the law is unconstitutional from an abstract perspective. The norm remains valid, with whichever interpretation is given by the Court.

5. RESULTS[30]

On May 4th and 5th of 2011, ADPF 132 and ADI 142 were jointly judged before a courtroom full of advocates for the cause. To everyone's somewhat surprise an unpredicted unanimity was formed. It is certain that the body language displayed by one vote or another – about three, I would say – were showing some degree of discomfort, if not opposition. Well, but this stays off the minutes. In the entry of judgment, written with the usual care and sensitivity, Minister Carlos Ayres registered:

> *PROHIBITION OF DISCRIMINATION AGAINST INDIVIDUALS ON THE BASIS OF SEX, BE IT IN TERMS OF THE DICOTOMY MAN/WOMAN (GENDER) OR IN TERMS OF THE SEXUAL ORIENTATION OF ANY OF THE TWO. THE PROHIBITION OF PREJUDICE AS A CHAPTER OF FRATERNAL CONSTITUTIONALISM. CELEBRATION OF PLURALISM AS A SOCIAL, POLITICAL AND CULTURAL VALUE. FREEDOM TO EXERCISE ONE'S SEXUALITY UNDER THE CATEGORY OF FUNDAMENTAL RIGHTS OF THE INDIVIDUAL, EXPRESSION THAT MANIFESTS THE AUTONOMY OF THE WILL. RIGHT TO INTIMACY AND PRIVATE LIFE. ENTRENCHMENT CLAUSE. The sex of an individual, unless otherwise determined by implicit or express constitutional provision, is not sufficient as a factor of legal nonequivalence. Prohibition of prejudice, in light of item IV of article 3 of the Federal Constitution, as it directly contradicts the constitutional objective of "promoting the well-being of all". (...) Recognition of the right to sexual preferences as a direct manifestation of the principle of "human dignity": right to self-esteem on the most important aspects of an individual's consciousness. Right to the pursuit of happiness. Normative leap from the prohibition of prejudice to the proclamation of the right to sexual freedom. The concrete exercise of sexuality is part of the autonomy of the will of natural persons. Empirical exercise of sexuality in the domains of intimacy and privacy are constitutionally protected. Autonomy of the will. Entrenchment clause.*

As a consequence of these premises, the vote was concluded in the following terms, granting the request made by the proponent:

> *On the merits, I judge both actions under evaluation to be appropriate. For that reason I provide the interpretation of article 1723 of*

> *the Civil Code according to the Constitution to exclude any meaning that could prevent the recognition of long lasting, public and continuous unions of same-sex partners as a "family entity", understood as a perfect synonym of "family"; recognition which should be made following the same rules and the same consequences of heterosexual common law unions.*

6. WHAT NO ONE CAME TO KNOW

Shortly after the lawsuit was filed, a request to abandon its proceeding was presented. The request did not come from the General-Prosecutor of the State, let alone me. And, most certainly, it was not formulated by someone from the field, since the Federal Supreme Court case law is clear that, at that point, abandonment is not possible in objective actions. Once filed, the proponent cannot decide on its continuity or not, as it is treated as a matter of public interest. The surprising fact is that the request had been made on behalf of the Governor, with undue and unauthorized use of his password for online petitioning! It was never investigated who committed this audacity.

As the Rapporteur, Minister Carlos Ayres Britto, vehemently read his vote, full of images and symbols, Toni Reis, President of the Brazilian Association of Lesbians, Gays, Bisexuals, Transvestites and Transsexuals (ABGLT), who was sitting beside me, commented with excitement: "Wow, this guy really knows this stuff".

>> ENDNOTES

[1] See Barroso, 2007:5-167.

[2] Federal Constitution (CF), art. 103: "The direct action of unconstitutionality may be brought by: I – the President of the Republic; II – the Board of the Federal Senate; III – the Board of the House of Representatives; IV – the Board of the State Legislative Assembly; V – State Governors; VI – the General-Prosecutor of Brazil; VII – the Federal Council of the Brazilian Bar Association; VIII – political parties represented in the National Congress; IV – labor union confederations or class entities of national relevance."

[3] Specifically regarding social security rights, the matter was regulated by state law 5034/2007.

[4] Previous to the promulgation of this law, the understanding of the Federal Supreme Court was against the self applicability of this measure. See STF, Full Court, AgRg in Pet. 1.140/TO, decision on 31/05/1996, DJ 02/05/1996.

[5] In this sense, as an example, see STF, Full Court, MS 22.357/DF, decision on 27/05/2004, DJ 05/11/2004. "The passing of more than ten years from the granting of the injunction. 5. Obligation to observe the principle of legal certainty as a sub-principle of the rule of law. Need of stability of situations originated from administrative decisions. 6. Principle of reliability as an element of the principle of legal certainty. Presence of a legal ethics component and its application to legal relationships of the public law".

[6] TJRJ, 3rd Câmara Cível, 2006.001.5967-7, decision on 28/07/2007 DJERJ 28/09/2007.

[7] TJRJ, 9th Câmara Cível, AC 2005.001.2803-3, decision on 09/03/2006 DJERJ 29/03/2006. In the same lines, see TJRJ, 17ª Câmara Cível, AC 2007.001.44569, decision on 28/11/2007 DJERJ 19/12/2007.

[8] See, e.g., STF, Full Court, ADPF 17, decision on 13/06/2002, DJ 07/03/2003.

[9] STF, Full Court, ADPF 33, decision on 07/12/2005, DJe 16/12/2005.

[10] CF, art. 5º, XLII: "the practice of racism is a crime without the possibility of bail and not subject to statute of limitations, subject to imprisonment according to the terms of the law".

[11] CF, art. 5º, I: "men and women are equal in rights and obligations, according to the terms of this Constitution".

[12] See Silva, 2005:48.

[13] The case law of the STF provides the following example: "(...) I. – The appellant, for not being a French citizen, although working for a French company in Brazil, was not subject to the Company's Personnel Statute, which provides benefits to employees and whose applicability is restricted to employees of French nationality. Offence to the principle of equality: C.F., 1967, art. 153, § 1º; C.F., 1988, art. 5º, caput. II. – The discrimination based on attribute, quality, internal or external characteristic of the individual, such as sex, race, nationality, religious belief, etc. is unconstitutional (...)". (STF, Full Court, RE 161243/DF, decision on 07/10/2009, DJ 17/12/1999). For the legal doctrine on the private efficacy of the fundamental rights, see Sarmento, 2004.

[14] On the so-called duty to protect, see Gonet Branco/Mártires Coelho/Mendes, 2007:257: "Another important consequence of the objective dimension of fundamental rights is impose the duty to protect by the State against breaches of the Public Branches themselves, originating from individuals or other States".

[15] Barroso, 2006:161.

[16] It is the case, for example, of the argument that same-sex unions should not be recognized for the impossibility of procreation. For long time now it has been uncontroversially understood that the central element of common law unions and the concept of family itself are the affection and the purpose of living together with mutual respect and support. Coherently interpreted, the argument based on the impossibility of procreation should also deny recognition to unions formed by sterile couples or even to those who simple do not want to have children.

Strictly speaking, it should even deny the status of family to single-parent families. This goes against the entire theoretical development experienced by family law with the influx of the Constitution of 1988, characterized by the prevalence of affection in detriment of rigid hierarchical structures aimed solely at the reproduction of traditional patterns.

[17] This is the case of traditional stigmas such as the ideas that homosexuals would, by nature, be promiscuous or unworthy of trust.

[18] In this domain, it is relevant to mention the arguments of disrespect to a certain "normal" standard of morality or towards Christian values. The legal order counts on norms and instruments to prevent prejudicial behavior against third parties. Exiting this field, it is necessary to recognize that the establishment of moral standards has already justified, through the course of History, several forms of social and political exclusion, using the discourses of medicine, religion or the direct repression by the power. As for Christian values, this discussion is certainly relevant within the internal domain of religious confessions, which are free to peacefully manifest their beliefs and convictions. It is not, however, an argument capable of justifying discriminatory practices by a laic State.

[19] It should be noted that for an individual of homosexual orientation, the choice is not between establishing relationships with people of the same sex or the opposite sex, but between abstaining from their sexual orientation or living it secretly. People should have individual freedoms that cannot be curtailed by the majority, by the imposition of their own morality. On this subject, see Barroso, 2006:161.

[20] Sarmento, 2004:241: "With respect to existential freedoms, such as privacy, freedom of communication and expression, freedom of religion, freedom of association and freedom of profession, among many others, there is a strengthened constitutional protection, because from the Constitution's prism these rights are indispensable to ahuman life with dignity. These freedoms are not simple instruments of promotion of collective goals, as valuable as they are".

[21] Nino, 2005:205: "The opposite conception of the principle of autonomy, as presented in this section, is usually called 'perfectionism'. This conception supports that what is good for one individual and what satisfies their interests does not depend on their own wishes or choices on how to live their lives, and that the State can, through a number of means, give preference to interests and lifestyles which are objectively better." (non-literal translation)

[22] Nino, 2005:205:"The modern totalitarian State, which intervenes in all aspects of life and which can be exemplified by the Stalinist Russia or the Nazi Germany, claims to realize its political, economical and social ideas even in the private domain (...). In the modern totalitarian State, there is an attempt to subject to the objectives of the State and put at its service not only the economy, the labor market and professional activities, but also the social life, the free time, the family, all beliefs and all culture and customs of the people".

[23] Harmatiuk Matos, 2004:148: "The existing dignity in same-sex unions has to be recognized. The contents encompassed by the value attributed to human beings show that everyone is capable of freely expressing their personality, according to their intimate desires. Sexuality is within the realm of subjectivity, representing a fundamental perspective of the free development of personality; and sharing the daily aspects of life in long lasting and stable partnerships seems to be a primordial aspect of the human experience".

[24] This is, as it is well known, one of the maxims of the Kantian categorical imperative, ethical propositions which go beyond utilitarianism. See Kant, 1951; Honderich, 1995:589; Lobo Torres, 2005; Terra, 2005.

[25] Taylor, 2000; Lima Lopes, 2003.

[26] CC, art. 1725: "In common law unions, except where there is a written contract between the parties affirming otherwise, partial community property regime applies with respect to their estate".

[27] On this subjecte, see Borghi, 2003:60 e Veloso, 1997:86-7. It is worth noting that the authors deal with heterosexual common law unions. However, once same-sex unions are recognized, the same logic would apply.

[28] CF, art. 226, §3°: "For the purpose of the State's protection, the common law union between a man and a woman is recognized as a family entity, and the law should facilitate its conversion into marriage".

[29] TRF4, 6ª T, AC 2000.71.00.009347-0, decision on 27/07/05, DJ 07/10/05.

[30] The oral arguments provided in the occasion are available at: <http://www.youtube.com/watch?v=ECIWP1c9-Vg>.

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