THE RECOGNITION OF STABLE CIVIL UNIONS BETWEEN SAME SEX PARTNERS AS A FUNDAMENTAL RIGHT BY CONSTITUTIONAL JUSTICE

// RECONHECIMENTO DA UNIÃO ESTÁVEL HOMOAFETIVA COMO DIREITO FUNDAMENTAL PELA JUSTIÇA CONSTITUCIONAL

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>> ABSTRACT // RESUMO

In its ruling concerning the interpretation of the institution of family law established by the constituent from 1988 (article 226, § 3 of the Brazilian Constitution) and reiterated practically *ipsis litteris* by the civil legislator from 2002, the Federal Supreme Court (STF) intended to present a political and legal mark in favor of a (fair) political claim. With its strategic attempt to give a systematic interpretation for this specific constitutional provision, aiming to make the special constitutional protection to heterosexual unions go beyond its restrictive meaning to also encompass homosexual unions, the STF did not reach its goal, especially not from the juridical and constitutional point of view and probably also not from the political point of view, as evidenced by the comments developed in this article. Especially embarrassing is the lack of comprehension or the misunderstanding by the Court about the reach of fundamental rights, which must serve as its decision-making parameter and, especially, the distinction between fundamental rights of freedom and equality, on one hand, and institutional guarantees, on the other, as in the case of the institution of stable civil unions. In addition, as it has been happening lately in the STF's jurisprudence, the use of the legal-dogmatic figures with Germanic origin known as "interpretation according to the Constitution" remains skittish. It has also been recurrent some rhetorical excesses, with barely disguised supposed erudition and mastery of German constitutional law. This article reveals the theoretical, legal, dogmatic and methodologically rigorous approach given by the Federal Constitutional Court of Germany to a very similar case, compared to which the dogmatic and political deficiencies and inconveniences in the STF's ruling here in question become clear. It is not about being pro or against the judicial activism of the STF under politically controversial issues, but requiring some accuracy, at least legal-dogmatic and methodologically speaking. The Federal Supreme Court also - and specially - has this burden. // Em sua decisão a respeito da interpretação do instituto de direito de família criado pelo constituinte de 1988 (art. 226, §3°, da Constituição Federal) e reiterado, praticamente *ipsis litteris*, pelo legislador civil de 2002, o Supremo Tribunal Federal (STF) pretendeu apresentar um marco político e jurídico em prol de uma (justa) reivindicação política. Com sua estratégica tentativa de interpretação sistemática do dispositivo constitucional específico, visando a fazer com que a especial proteção constitucional às uniões heterossexuais escapasse do seu teor restritivo para abarcar também as uniões homossexuais, o STF não logrou alcançar seu objetivo; especialmente não do ponto de vista jurídico-constitucional e, provavelmente, também não do ponto de vista político, como demonstram os comentários desenvolvidos no artigo. Sobretudo, causa constrangedor espanto a falta de ou a má compreensão pela Corte do alcance dos direitos fundamentais que devem servir como seu parâmetro decisório, e, principalmente, da distinção entre direitos fundamentais de liberdade e igualdade, de um lado, e garantias institucionais, como é o caso do instituto da união estável, de outro. No mais, como tem ocorrido frequentemente na jurisprudência do

STF, o uso da figura jurídico-dogmática, de origem germânica, da "interpretação conforme a Constituição" continua sendo leviano. Também foram recorrentes alguns exageros retóricos, mal disfarçados com suposta erudição e domínio do direito constitucional alemão. O presente artigo descortina a apreciação teórica, jurídico-dogmática e metodologicamente rigorosa de problema muito semelhante pelo Tribunal Constitucional Federal alemão, com base na qual as deficiências dogmáticas e inconveniências políticas apontadas na decisão em pauta restam claras. Não se trata de ser pró ou contra o ativismo judicial do STF no âmbito de questões politicamente controvertidas, mas de se exigir certo rigor, pelo menos jurídico-dogmático e metodológico. Também e precipuamente o STF tem esse ônus.

>> KEYWORDS // PALAVRAS-CHAVE

Constitutional protection of the stable civil union; stable civil union between same-sex couples; institutional guarantees as a category of fundamental rights; interpretation according to the constitution. // Proteção constitucional da união estável; união de pessoas do mesmo sexo; garantias institucionais como categoria de direito fundamental; interpretação conforme a Constituição.

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1. INTRODUCTION[1]

Wrapped in constant and seemingly endless scandals, the largest political body of the Brazilian state and society, the National Congress with its two houses, is increasingly giving political space to the Brazilian Supreme Federal Court (STF), which, as the guardian of the constitution, also has to apply it as a court of last resort. The STF's decisions have the known binding and *erga omnes* effects when handed down in abstract normative control.

There is not on the political and institutional horizon a reversal of this trend. STF, acting as the newest protagonist of the Brazilian political scene, supplies legislative loopholes and corrects unconstitutional judgments. But, moreover, STF often goes beyond its constitutional powers and even works, in some cases, as a new constituent power - especially when it simply ignores some legal-hermeneutical canons and applies formulas that are momentarily convenient for the court, like the assertion of constitutional mutation[2].

This STF's activism (for the most critical: decisionism) has served to elicit relevant sociopolitical debates, which should have been hatched priorly before the instances of representative democracy and its complementary deliberation. This is the case of the ruling that is going to be briefly discussed here.

In the face of such diagnosis it is the duty of the legal and scientific community to critically check the development of the Brazilian Supreme Federal Court's jurisprudence, especially when dealing with the concretization of fundamental rights. They must do so with all severity, autonomy, and without political concessions, which are, *par excellence*, totally foreign to the social science subsystem. This, of course, with all due respect that the court and its members individually deserve.

2. CASE SYNOPSIS

In an action of abstract constitutional control (Direct Unconstitutionality Action), it was requested that the Article 1.723 of the Brazilian Civil Code was interpreted according to the Constitution, so that the effects of the so-called stable civil union were extended to gay couples[3]. It was sought to establish a broad interpretation of the phrase "between a man and a woman" existent in the article in question, despite its explicit exclusionary character, so that not only heterosexual couples could have their union recognized by the state[4].

In a previously proposed action (ADPF 132[5]) which was judged alongside with the one now being commented (ADI 4277[6]), the extension of pension benefits granted to homosexual partners was sought, through the Statute of Public Servants of the State of Rio de Janeiro (Articles 1 and 2 of the State Law 5.034/2007), for other social spheres and states[7], giving homosexual partners the same legal status as those other public servants who are in heterosexual stable civil unions. Notwithstanding

the questions listed below, concerning the legal legitimacy of creating a civil institution by a court un-backed by legal or constitutional dispositions, is already questionable if, to grant the requests made in the first legal actions over the matter (they in fact represent one of the two reasons given by the Governor of Rio de Janeiro in ADPF 132[8], it would be necessary an abstract extension of the effects foreseen by the constituents for the stable union between man and woman to homosexual couples[9] . This question will be left open for future research [10].

3. THE REASONING BEHIND THE COURT'S OPINION

3.1 PRELIMINARILY: THE LACK OF A COLLEGIATE OPINION

Checking the reasoning behind STF's decisions is not an easy task mainly because of the absence of a collegiate writing[11]. Often, not even the headnotes are instructive, because through them it is not always possible to form a system with all the opinions or legal grounds produced in the votes of the members of the court who participated in the case. Unanimous judgment of the collegiate court that show the operative part of the decision are, with the same uncomfortable frequency, based on varied reasoning that sometimes even are mutually contradictory[12].

Nevertheless, references to the "reasoning behind the ruling" here take into account the arguments produced specifically in the rapporteur's vote. It is possible to assume that this is the member of the court who more intensively analyses the legal and constitutional issues raised by the case. Besides this plausible assumption, this prominence of the rapporteur's vote finds reason in the Internal Rules of the Court (Article 93 of RISTF).

3.2 DECISION, EFFECTS AND SYNOPSIS OF THE RAPPORTEUR'S OPINION

ADPF 132 was received, by unanimous decision, as ADI 4277. On the merits, which has known *erga omnes* and binding effects, also by unanimous decision, it was upheld[13]. In summary, according to the decision, all the effects of stable civil unions between heterosexual couples were extended to homosexual couples, because the last would also configure a "family entity" in the sense of the Article 226, § 3, of the Brazilian Constitution. Among the rights arising, would be the "right of adoption," under the Article 227, § 5, of the Brazilian Constitution.

Regarding the main motives that led him to this conclusion, the rapporteur listed several constitutional provisions that were violated by a literal interpretation of the Article 1723 of the Brazilian Civil Code and of the Article 223, § 3 of the Brazilian Constitution itself, such as human dignity (Article 1, III); political pluralism (Article 1, V) - which he understands as socio-political-cultural - forbidden discrimination based on sexual orientation (Article 3, IV); equality - which he coins as

"civil-moral" (Article 5, heading); legality (Article 5, II); intimacy and privacy (Article 5, X)[14].

4. CRITICAL READING

4.1 APORIA E OMISSIONS

The rapporteur's vote did not face the object of the constitutional evaluation from the specific constitutional parameter applicable to the case, namely Article 226, § 3 of the Brazilian Constitution. Firstly, the argument about non prohibited conduct does not have the power to establish a new interpretation for the exhaustive content of the before mentioned constitutional article and its section. Not being prohibited merely implies that the behavior cannot be sanctioned and not that the state should ensure to that same conduct special protection of institutional nature. At this point, it ignores the function and precise scope of the principle of legality, as a subsidiary negative fundamental right - or a fundamental right of defense as commonly translated by Brazilian doctrine from the Germanic concept of *Abwehrrecht* - against state intervention[15].

Also in relation to converting the stable civil union into marriage as seen in the Article 226, §3, in fine, of the Brazilian Constitution, the legal position is that of recognizing the existence of free discretion in law making including not only the general conversion of stable civil union into marriage but also the legislative possibility to extend the institution in a way to include gay couples. The designers of the Constitution fixed both formal and material parameters necessary to give legitimacy to the exercise of the three classics state functions, beginning with the legislative. Given the supremacy of constitutional norms, the invoked argument of legality becomes strange, since the Constitution is not the locus of the legal prohibition of private conducts[16].

From this legal-dogmatic misconception around the constitutional principle of legality, it has been said that a legal uncertainty may arise and open space to new (and undue) provocations to STF. That is because it was derived from the principle of legality, which refrains state measures potentially harmful to the fundamental rights (*status negativus*), a positive effect (*status positivus*) that it does not have. Having the parameter of constitutional legality been incorrectly used and interpreted, a subsequent legal consequence of a failure to verify legislative measure using this parameter has no way to be upheld. So far, there is no verifiable legislative omission from a constitutional parameter.

There is also no way to verify a mismatch between the object of examination, the article 1723 of the Brazilian Civil Code, and the only applicable constitutional parameter, which is the article 226, §3 of the Brazilian Constitution, since the first virtually reproduces the content of the last[17]. This absence of incompatibility raised the most radical *aporia* of the ruling. However, the constitutional provision under discussion does not prohibit the ordinary legislator from using their democratic legitimacy

and discretion and extend the institution of stable civil union to homosexual couples. Only in the face of the legislator it does makes sense to talk about the absence of prohibition, as will be seen below in the reconstruction proposal under the light of comparative law.

It is also not the case to prohibit *de facto* unions between homosexuals or to sanction any conduct relevant to their sexual autonomy, but it is a matter regarding the legal institutionalization through the creation of a private-legal institute. The civil legislature may at any time change the content of art. 1723 of the Civil Code, removing the expression "between a man and a woman."

Nevertheless, given the purpose of avoiding possible parliamentary revocation or exemptions, it is necessary the expression of constituent power shown through a constitutional amendment in such a way to also remove from the text of art. 226, §3 of the Brazilian Constitution that restrictive expression. Such amendment would change the constitutional parameter and have the effect of raising unconstitutionality by omission in light of the new order of protection aimed at the legislator and unequal treatment in the face of the article 5, *caput* of the Brazilian Constitution[18].

Also, the "interpretation according to the Constitution" - an operative decision-making technique for mitigating the effects of *res judicata* created by the German Constitutional Law and abused repeatedly in the jurisprudence of the Brazilian Supreme Federal Court[19] - requires broad discussion among the various possible interpretations and the court must choose one that is the most compatible with the applicable constitutional parameters.

The debate between the possible interpretations according to the Constitution was not made in this case - it virtually never occurs in other cases in which the necessity of such interpretation is alleged, in the votes of all members of the Court who participated in the trial. There was therefore a misuse of this technique that allows modulating effects of *res judicata*, which in German Constitutional Law, from which it derives, has the function of preserving the law from a declaration of nullity. In Brazilian constitutional jurisprudence, the use of this technique has been serving to the usurpation of legislative powers by the Supreme Federal Court[20].

Other constitutional parameters brought in the rapporteur's vote as well as in the votes of other Ministers are either not relevant nor applicable in the case at hand. They should not have argued, for example, about gender equality violation because female and male gay couples are treated equally by the law[21] or about possible violation of general equality because the configuration of the ordinary family law reflects the sociopolitical evolution of a legal institution, subject to public debate and the relative legislative discretion[22].

There is also no way to bring the fundamental right to special equality against specific kinds of discrimination as a constitutional parameter in this case (art. 5°, *caput* c.c. art. 3°, IV da CF). It is possible to arrive at this conclusion in three steps. First, comes the idea that from this systematic application of the Brazilian Constitution can derive not only the duties of state abstention (non-discrimination), as well as state duties of positive

discrimination. Second, the list of prohibited *discrimina* existent in art. 3, IV, of the Brazilian Constitution which, dialectically, can be used to legitimize positive discrimination ("affirmative action"), does not mention discrimination by "sexual orientation" and is not exhaustive ("[...] and any other forms of discrimination"), thus, the discrimination based on sexual orientation or sexuality as an element of autonomy relevant to the free development of personality is also prohibited. Third: there is no connexion, however, between the configuration of the institute of marriage and stable civil unions perpetrated by the legislature in accordance with its traditional view of marriage and the discrimination on grounds of sexual orientation of individuals or social groups, because logically any homo or bisexual individual can marry, since they meet the conditions laid down for everyone[23]. The sexual orientation is irrelevant to marry. There isn't a *tertium comparationis* on this legal situation under which persons or groups of persons of heterosexual orientation and persons or groups of persons of other different sexual orientations could be subsumed into and therefore suffer from an unequal treatment hardly constitutionally justifiable. Very different is the case of the prohibition of marriage between people of different ethnic groups, social classes or religions[24].

4.2 LEGAL AND DOGMATIC CONTENT OF THE FUNDAMENTAL RIGHTS TO MARRY AND TO ENTER A CIVIL UNION INSERTED IN THE 226 ARTICLE OF BRAZILIAN CONSTITUTION IN THE LIGHT OF GERMAN COMPARATIVE LAW (ART. 6, I GG)

Unlike the German Constitution - whose art. 6, I GG states that "marriage and family are under the special protection of the state law" - the Brazilian one (art. 226, caput) only submitted the family, as "foundation of society", to a "special state protection." Marriage appears only in §1° and 2° of the before mentioned constitutional article in the Brazilian and the constituent has definied it only as civil and guaranteed its gratuity(§1) and the extent of the effects of civil marriages to religious ones in accordance with infra constitutional law (§2).

The difference is significant for two reasons: firstly, to the interpretation of marriage as an axiological decision of the original constituent power that is clearly present in the German Constitution system, but absent in the Brazilian one; secondly, to the recognition of the functional difference between marriage and family with similar effects in both systems and with great relevance to the case under discussion.

In both normative-constitutional systems, however, the similarities have prevalence. As marriage is "at once a social and legal construction"[25] and at the heart of its concept is the image of the civil (bourgeois) mundane marriage entrenched by legal forms, it has, as a fundamental right enforceable against all state agencies (including the holder of the legislative function), at least two of the three functions or dogmatic categories identified in German.

As a negative right (*Abwehrrecht*), it houses several individual capacities beginning with the choice to marry with whom and when, besides

the free configuration of married life without state intervention. As such, it resembles personal rights that act as subsidiary rights in relation to it. However, it is as an institutional guarantee and as an objective order that marriage binds the legislators in order to force them to give it legal form as a civil and family law institution. In order to do so, the legislators have a wide conformation discretion but are forbidden to simply not shape it or to do so in such a far way from the concept of marriage: the legislator must observe the structural principles derived from the constitutional concept of marriage.

The legislator shall, when configuring the institution, observe the structural principles derived from the constitutional concept of marriage. To these structural principles belong undoubtedly those listed by the Federal Constitutional Court of Germany and corroborated by specialized literature in the face of the legal and constitutional order of that country: because marriage is a communion in principle (but not without exceptions) for life, signed under state's participation, that binds a man and a woman with intent and promise of reciprocal solidarity, its conceptual attributes are: a) state participation b) principle of indissolubility intentioned and c) heterosexuality[26].

The third function or dogmatic, category, however, that is relevant to the fundamental right of marriage - assuming here the character of fundamental right of the article 226, §3 of the Brazilian constitution[27] and its axiological decision and derivative duty of special protection of marriage - is not present in the Brazilian constitutional system. This is corroborated by the previously mentioned Brazilian Constitution's article and section, which admits another kind of married life: the stable civil union between man and woman.

The result in a legal-dogmatic view is setting the legislator completely "free" to end the privilege of the life form inherent to the traditional marriage that, in an axiological neutral manner, especially when it comes to sexuality or sexual orientation, was submitted to special protection in the German law system to fulfill the reproductive function, while protecting the family has always fulfilled the function of socialization in order to foster community solidarity (*Einstandsgemeinschaften*), not necessarily intrinsically connected by blood ties.

That is the reason why there is an elementary legal-dogmatic misconception in the appellate decision as well as in the reasoning of the Minister's votes. They do not recognize that marriage or stable civil union are fundamental rights whose content are not, at least solitary, an individual or collective behavior. They are not exercised and exhausted in conducts of the holder of the right ("natural" freedom) all as strictly fundamental as others rights of freedom. It is, rather, a normative fundamental right. More precisely speaking, the area of protection of such fundamental rights (marriage, inheritance, property, etc.) is coined normatively (*normgeprägterSchutzbereich*)[28].

Thus, even if the stable civil union is a social fact, as the tenure inserted in the legal protection of the fundamental right to property, its legal protection is marked by a legal civil institution, i.e., coined by juridical

norms. It is not, therefore - at least as an institutional guarantee - a right to liberty whose purpose is to oblige all State bodies and its traditional functions to refrain from intervening actions not justified by constitutional limits, with the performance of the principles of legality and, in theoretical and constitutional perspective, distributive justice[29].

When the Brazilian Supreme Federal Court's appellate decision brought the parameter of the fundamental right of equality, it did not show its relevance or suitability as an applicable parameter to the juridical-constitutional situation nor held a genuine examination of normative constitutionality. Besides the absence of a essential *tertium comparationis* for applying the fundamental right to general equality as constitutionality test's parameter, there is a general absence of unequal treatment on the basis of gender, the prohibition of discrimination "of any kind" present in the art. 3, IV, of the Brazilian Constitution does not guarantee the desired equivalence. This common genus (*tertiumcomparationis*) under which different forms of life can be compared could only be the marital status that is rightly stated by the standards of the institutions of marriage and stable civil union between man and woman, both backed constitutionally.

As a special rule prohibiting discrimination, it only prohibits discrimination against married and partners in a stable civil union, especially in regard to singles[30], assuming therefore legal situations already institutionalized by the ordinary legislator. So that, materially, the intended equating is solely relevant to the legislators that configure the institution on laws under the constitution in a fashion that is guided by tradition and evolution of this same civil institution which, par excellence, answers the historical transformation of social values bypassing the problem of negative discrimination or even positive discrimination for the purposes of the "area of social life" (area of "regulation") pertinent to the dogmatic of the fundamental right to equality (art. 5, art caput cc. 3, IV of the Brazilian Constitution)[31].With regard to the fundamental rights of personality backed in the article 5, *caput* and the article 5, X of the Brazilian Constitution, especially in the most interesting sense for the present case, which is the one of self-determination that includes arguably sexual orientation and free choice by the composition of a family according to the self-understanding of the holders, attention must be given to the function of such fundamental rights specifically for the State duty they order.

As in German constitutional law (art. 2 I GG), it is also a duty of abstention that may have exceptions and additions given the opportunity to re-subjectification, which is recognized by the dogmatic study of the State's duty of protection in the face of risks to the freedoms of the individuals. The verification that this is a duty of abstention is a consequenceof the content and the systematic interpretation of constitutional devices brought to the agenda. The Brazilian constitutional framers defined the general freedom (article 5, caput) as a subsidiary fundamental right and some of its concretizations stated in the article 5.X as "inviolable", indicating that your recipients, i.e., state organs holding any of the three state functions, should refrain from intervening in the free exercise of these rights without constitutional justification.

A systematic interpretation involving both, the negative right to freedom and the fundamental right to marriage (stated in the article 226 of the Brazilian Constitution) also in its sense of a negative right (*Abwehrrecht*), can bring forward commandments of abstention or at least justified intervention. These commandments have, in practice, though occasionally, the power to produce effects very similar to the ones produced by heterosexual marriage and stable civil union, for example, the freedom to choose the partner, time to start a union, internal configuration (distribution of family roles), etc.

In its role as a negative right, marriage encompasses such capacities, as seen above, and it does not require the presence of intimate relations as a structural element– obviously it also does not matter if this kind of relation happens between persons of same or opposite sexes. This represents an impassable taboo to the state: any action to intervene in this subject would not be constitutional and therefore would represent a violation of the freedom here in comment[32].

Much less agreement deserves the lightly and abused statement around the relevance of a non-legislative setting for a legal institution necessary to the observance of the fundamental principle of Brazilian Federal Republic, the dignity of the human person, as it prescribed by the article 1.III of the Brazilian Constitution.

Besides the lack of legal method observed in this and others relevant macro-policy decisions, the systematic interpretation suggested by some members of the Court - according to which the specific and mandatory rule of the article 226, 3rd section of the Brazilian Constitution should not apply because of the alleged violation of the dignity and other constitutional principles – goes beyond the boundary of compliance with minimal standards of legal rationality.

Indeed, notoriously, it is impossible to solve alleged antinomies between a specific rule and many others generic pointed (as constitutional principles) that are at the same hierarchical level[33] with reference to the generic rule. There was a clear reversal of the doctrine *lex specialis legi generali derrogat*[34]. Moreover, were brought various constitutional provisions that were used as rhetorical figures to defend these political theories.

Therefore, in a legal-dogmatic manner, the Article 226, 3rd section of the Brazilian Constitution contains only one constitutional mandate which is intended, primarily, to the legislators (*Gesetzgebungsauftrag*)[35] obligating them to set, in juridical norms, a special protection to the heterosexual stable civil union, recognizing the historical social fact about the high number of heterosexual couples who constitute a family in absentia of marriage.

Moreover, with this political-constitutional choice, the original constituent power of the Brazilian Constitution, differently to what the original constituent power of the German Constitution did, relativized the constitutional protection of marriage itself. This involves recognizing that a legislative action for the establishment of the institution of stable civil homosexual union could not be questioned as to its constitutionality, much less the performance of the derived constituent that

had the intention of broadening the protective order of art. 226, 3 °, of the Brazilian Constitution extending it also to homosexual couples.

4.3. DE CONSTITUTIONE FERENDA ET DE LEGE FERENDA

The legal-dogmatic conclusions shown above can cause bewilderment. For the advocates of equating the effects of heterosexual stable civil unions to the homosexual ones, it does not matter what state political institution effectively defended their desideratum, if the Brazilian Supreme Federal Court or the Congress. So it is understandable the good repercussions that the ruling in comment has had among the supporters of the cause in question. However, the equalization, which is more than welcome, can only be imposed consistently in the legal point of view with the performance of the ordinary legislator, at least, and perhaps one day with the performance of the derived constituent power. When that happens, such equalization will not risk being handled by the free discretion of the legislative policy of Congress.

Beyond the legal and dogmatic problem, the way in which the equalization was obtained affects the consistency of the political system as revealed by the evolution of the German TCF's who constantly converses with the Federal Camera (Bundestag), despite their competence to repeal unconstitutional laws.

Before the decision here widely reported and whose structure was reproduced in the Annex - in the context of family law some fundamental rights are closely related to their interpretation and definition[36] - the German TCF was gradually judging unconstitutional standards from provocations due mainly to the patriarchal characteristic of the BGB and giving time for the legislature to promulgate rules according to the GG in the context of family law. The focus was on defining the standards of fundamental rights first with lower frequency of the Article 2.I, often also in combination the Article 2.I and the Article 1.I (free development of personality and order of observance and protection of human dignity), the Articles 3.I, 3.II and 3.III GG (general equality and equalities special - seal of discrimination) and finally with the Article 6 GG (protection of marriage, family, children's education etc.). This raised a palpable and consistent evolution of family law in this regard[37].

After a decision which ruled that the legislative creation of an institute know as "registered partnerships" for same-sex couples was compatible with the German Constitution, specially in regard to the parameter of the order of special protection of marriage and family (Article 6, I, GG), the Federal Constitutional Court of Germany remained being provoked to answer similar cases, mainly through the concrete control proposed by judges and courts instances (Art. 100 GG I), in order to assess the compatibility of provisions of the new law that created the institute but now, in the face of other parameters, like the special equality (ban discrimination) stated in the Article 3, III, the GG and the free development of personality plus the duty to respect and protect the dignity of the human person (art. 2 I cc art. 1 I GG).

The Federal Constitutional Court of Germany ruledas unconstitutional, for example, court decisions that interpreted in the context of social security some previdenciary[38]. The court was also mainly provoked through concrete constitutionality control proposed by judges and courts instanciais (art. 100, I GG) to assess the compatibility of specific articles from the law of public records for transsexuals (TSG)[39].

Several devices from TSG, even theoretically, implied in discrimination against transgender people and therefore they have been dismissed by the TCF in a consistent and dogmatically rigorous manner in at least four decisions (the last one was enacted in February 2013)[40]. Finally, on February 19th this year of 2013[41], the TCF judged, from reputable procedural provocations of concrete constitutional control[42] and constitutional complaint[43], articles from the law concerning registered partnerships between persons of the same sex (LPartG), namely section 9, VII, which was inserted in 2004. As a result, this section of the law was ruled as incompatible with the article 3, I of German Constitution (general equality). It was questioned in both procedures jointly examined if the inserted the section 9, VII, LPartG would be compatible with the German Constitution in respect to the extent of the prohibition to the registered partners of the legal possibility of one of the partners adopting the child that the other previously adopted (called "successive adoption" - *Sukzessivadoption*) because the section 1742 of the BGB (German Civil Code) states the possibility of successive adoption while the section 9, VII LPartG only allowed the adoption of the partner's biological child (adopting a stepson - *Stiefkindadoption*). Certainly, TCF judges dispensed, in this case, the label of "progressive" simply because they do not respond politically for their decisions unlike the members of the Congress.

When creating an institute parallel to the stable civil union between opposite-sex couples because of a particular social relevance, namely, the existence of many informal unions without proper marriage, especially among the poor population, the Brazilian original constituent power relativized the very importance of marriage. It is and still should be in the Brazilian Constitution an institute of private law only for the sole purpose of preventing its repeal by the civil legislator[44].

Nevertheless, keeping in mind the Brazilian *Realpolitik*, the assertion that it is up to the federal legislators to conform the institution of marriage, according to their discretion and based on democratic legitimacy, provokes understandable dissatisfaction, because the result is to recognize that the failure to set up a legal institution that meets the demands of a particular political milieu is not, in itself, discrimination, much less a violation of human dignity.

Political claim must be brought, however, to the parliament trough political parties and must be submitted to public and democratic debate. Trying to judicially forge a legal institution that satisfies the desideratum of a minority is not legally ordained, and also little indicated politically. If the legal-constitutional dogmatic does not serve the intended purpose of equalization, it could possibly start a rapidly search for a theoretic mission of the constitutional justice as a mean to uphold decisions

from the constitutional justice that are against the majority. And this, in its turn, could give rise to minority's interests and could guarantee the legitimacy of a Supreme Federal Court's decision, which sometimes sanctifies and sometimes demonizes the constitutional text.[45]

However, legal certainty for gay couples, mentioned in one of the vows, can be at least partially achieved by contracts and wills. Therefore, it is not necessary for those couples to dispense with the law that should regulate many details that are subject to parliamentary deliberation, properly accompanied by the public opinion and by the opinions of experts. Rather, it is the judicial decisionism that causes legal uncertainty.

There is no doubt that the constitution framers and ordinary legislator departed from the traditional concept of marriage with not only a Christian inspiration as a first step to starting a family ("increase and multiply"), but also with a Greek one (*oikos*)[46].

However, regardless the scope of the concepts of marriage or stable civil union, the concept of "family" even in the sense of the Article 226, caput, of the Brazilian Constitution (not only: "family entity" in the sense already given by its apparently weakened the section 3) can be interpreted to encompass all modern and alternative family forms, given its relevance in the perception of the fundamental rights of personality of any single or double or community solidarity (polygamy) especially concerning filiation and adoption.

Not that there is a fundamental right to adopt, not even for heterosexual couples that are married or living in a stable civil union. It is a matter concerning the child's interests (such as a limit to the negatives fundamental rights: freedom and equality in its broad sense). In this case. any prohibition or unequal treatment suffered by homosexual person or couple necessarily imply an unconstitutional violation of freedom and, more often, discrimination based on sexual orientation.

Surely, this is not enough for those appropriately seeking a broader equalization. This equalization can serve as a tool to combat discrimination and homophobia occurring in various social subsystems and expressed in the streets by cowardly attacks and may represent an optimistic prognosis, however, but still lacks a lot of empirical data. Such a prognosis is not relevant to the interpretation of the legal and constitutional parameters of freedom, equality and dignity of the human person so frivolously brought and interpreted by the Brazilian Supreme Federal Court.

In addition to that, extreme cases of homophobia linked to serious crimes consummated or attempted (murder, body injury, among others) do not fade the Brazilian Supreme Federal Court's ruling and perhaps even produce the opposite effect of awakening the "fighting spirit" to use an ideological euphemism dear to the extremist conservative right.

That the state fulfills its duty of protection in the face of attacks from individuals (here: Schutzpflichten) through a legislative policy, particularly criminal legislation-consistent is essential for the protection of the fundamental right of freedom.

As the euphemism "*salonfähig*" (socially acceptable) of "homoaffection" suggests, seems to be important satisfying an understandable

desideratum of the milieu, but not actually fighting violence against expressions of sexuality between persons of the same sex based on deeply rooted social prejudices.

In a tropical country and in times of exacerbated celebration of the sexuality, what is needed is a social environment in which people of the same sex can express *in public* and in the same way as heterosexual couples their sexuality without fear of being assaulted by any hypocritical on call who wants to see such sexuality restricted (because here anyway is a matter of "affect" and "affective") to four walls[47]. If laws alone can foster such an environment is a question that will be left open. But certainly by court decisions supposedly well intentioned it cannot be done.

Proclaiming as the reasoning of a judicial ruling things that look like "encrypted messages", such the unintelligibility of what is meant by them, as the one that states the existence of an "inseparable unity between the genital tract of the human person and herself" does not contribute, therefore, to what really matters to both the milieu and the community as a whole. Nothing makes up for the lack of civilized political debate. The desired consistency cannot be achieved by a court ruling, which seems more concerned to establish a supposed progressive institutional image than to legitimate their legal and constitutional mission.

ANEXX:

COMPARISON BETWEEN THE STRUCTURES OF THE RAPORTEUR'S VOTE IN ADI 4277 AND FEDERAL CONSTITUTIONAL COURT OF GERMANY'S DECISION ON THE CONSTITUTIONALITY OF LPARTG (OR LPARTDISKBG)

A juridical and constitutional decision well grounded on constitutional law in force today cannot do without a good structure, whose first elements are the constitutional parameters stated in specific constitutional provisions. Constitutional control presupposes clarity about the two standards that must be compared based on hierarchical criteria: the object(s) and the parameter(s). They are not mere references to implicit or explicit principles in the constitution, to the infamous "spirit" of the "democratic", "citizen oriented", "solidary" constitution or to any other adjective that would give a decision a rational-legal status and therefore, turn it into a correct decision.

The comparison between the structures of the rapporteur's vote in ADI 4277 and the equivalent Federal Constitutional Court of Germany's decision fully demonstrates the juridical-dogmatic shortcomings commonly found in the Brazilian Federal Supreme Court' decisions. The case decided by the German court was an abstract constitutional control submitted to the conservative minority comprising parliamentary Centre-Right party (CDU) against a law that created the institution of registered partnership for homosexual couples parallel to the institution of marriage for heterosexual couples in order to benefit those people who could not get married since there had been a denial of any constitutional mutation around the traditional scope of matrimonial union. The main parameter was the article 6, I of the German Constitution which states the special protection of marriage by the state that could be theoretically threatened by a rival institution like the novel registered partnership established by the ordinary legislator for homosexual couples.

I. THE STRUCTURE OF THE RAPORTEUR'S VOTE IN ADI 4277

The rapporteur's vote was structured in 37 sections, numbered as it usually is in the instruments used by the parts in juridical actions:

1. Sections 1 to 6 (or 15 to 19 when considering the first 14 sections of the report):
   - Procedural adequacy and thematic relevance: in the case: the procedural interest of acting from the Governor of the State of Rio de Janeiro is present according to the vote of the rapporteur.
   - Juridical possibility of what is being requested in the action? "Interpretation according to the constitution"of the articles being discussed.
   - Knowledge of the ADPF as an ADI after the following text: "In short, we are dealing with a kind of judicial dissent that reflects the

> historical fact that nothing bothers more people than the sexual preference of others when such preference does not correspond to the social norm of heterosexuality. It is the perennial attitude of a conservative reaction to the ones that in the unfathomable domains of affect loosen up the shackles of the ship called heart. "

2. Section 7 (20): "The requests asking that the article (article 1723 of the Brazilian Civil Code) be interpreted according to the Constitution deserve to be upheld. Homoaffective unions characterized by durability, not being hidden, continuity and longing for forming a family are supported by the Constitution.

3. Sections 8 and 9 (21 and 22): Analysis of the term "homoaffective"

4. Section 10 (23): "I now move to the proper constitutional view in the merits of the actions". References to the article 3, IV of the Brazilian Constitution and to others that also mention men and women.

5. Section 11 (24): "It is (...) a normative laboring at the site of most natural differentiation between the two types of the human species (...) although both modalities relate to the same animal kingdom, as opposed to vegetable and mineral kingdoms. "

6. Sections 12 to 16 (25-29): Differences between the sexes and the article 3, IV of the Brazilian Constitution. Interpreting the good of all and prohibition of prejudices. "There are an inseparable unit between the genital tract of the human person and the this same person" (Section 16).

7. Sections 17 to 20 (30-33): Function of law as a social control technique and "intentional silence" existent in the Brazilian Constitution in the face of the use of sex to erotic stimulation, carnal conjuction and biological reproduction corresponding to the general negative kelsenian rule according to which "everything that is not legally prohibited or required is legally permitted ", which corresponds to the article 5, II of the Brazilian Constitution. It is up to each person's free will the use of their sexual organs.

8. Section 21 (34): Sexual preference as "emanation of the principle of human dignity (article 1, III of the Brazilian Constitution)".

9. Sections 22 to 24 (35-37): The use of sexuality corresponds to the exercise of other fundamental freedoms like intimacy and privacy (article 5, x of the Brazilian constitution)

10. Section 25 (38): Summary.

11. Sections 26 to 30 (39-43): "... one wonders if the Brazilian constitution withholds from homoaffective couples (...) the same protective regime that from its text can be seen in favor of heteroaffective ones (...) ". Verbatim reproduction of the articles 226 and 227 of the Brazilian constitution. Interpretation of the article 226 of the Brazilian Constitution. "From all this prescriptive language structure (...), jump to the evidence that the most important part is the head of the article 226, alluding to the institution of family, because only to it (...) was awarded a special clause concerning state's protection". Facticity of the family concept. "Complex social institution in the subjective sense." Follows a kind of ode to the family as a place of realization of fundamental rights.

12. Sections 31 to 34 (44-47): Family as "true continent to all else". That is why "it must work as a guide to the articles into which the chapter VII unfolds, according to the transcription priory made". The "constitution does not make the slightest differentiation between the family formally built and the one that only exists in real world facts". Non-reductionist interpretation of the family concept. Protection of the family made by homosexual couples must be full and not "more or less". It is concluded with a mention to a verse attributed to the medium Chico Xavier: "otherwise we will be on risk of being just more or less like a person".

13. Sections 35 and 36 (48-49):

– From this "normative concept of family as society's base and as creditor of special state protection [let us move to] the interpretation of each one of the emblematic institutions that unfold from the article 226 of the Brazilian Constitution." (p. 42/49).
– The article 226, section 3 from the Brazilian Constitution "refers to the social-cultural-religious tradition of the western world of which the Brazil is part of". But: "civil marriage, in fact, is stated in the Brazilian Constitution without any mention to the nouns 'men' and 'women'.
– The original constituent wanted only to reinforce the fundamental equality between men and women in face of the brazilian patriarchalism.
– Several metaphors appear next and the phrase "do not use the letter of the constitution to kill its spirit."
– Identity between the concepts of "family entity" and "family." There is no "subfamily".
– Heterosexual couples do not have the right to not being legally equated to gay couples, "since their heteroaffection itself does not make them superior in anything."
– Family status is also given to single parents and their children. Adoption of minors should be extended to homoaffective couples, because even singles can adopt (reference to the articles 5 °, II; 3 ° and 5 °, § 1 from the Brazilian Constitution).

14. Section 37 (50): Conclusion: both actions were upheld to give the article 1723 of the Brazilian Civil Code an "interpretation according to the Constitution in order to delete from it *any meaning* that prevents the recognition of continuous, public and lasting union between persons of the same sex as 'family unit'. Recognition is to be done in the same manner and with the same consequences of stable heteroaffective civil union "(emphasis in italics by LM).

II. THE STRUCTURE OF FEDERAL CONSTITUTIONAL COURT OF GERMANY'S DECISION ON THE CONSTITUTIONALITY OF LPARTG(BVERFGE 105, 313)[48]

REASONS
A.
(FEATURE: DESCRIPTION OF THE FACTS AND PROCEDURE)
INTRODUCTION: DEFINITION OF THE PROPOSED ABSTRACT CONSTITUTIONAL CONTROL'S OBJECT: LPARTG (OR LPARTDISBG).[49]

I.

Purpose of the law: End discrimination faced by gay couples and opening the possibility of giving their partnerships legal protection and framework.

1. Presentation of sociological data and statistics (eg in year 2000, 47,000 gay couples were living in BRD) about the desire of having their unions recognized etc., with bibliographical sources from the sociological literature.
2. Description of proposals that were made in order to meet this sociopolitical demand since 1990 as a proposal of the Green Party - BTDrucks. 11/197[50] - and corresponding pressure from the European Parliament. Historical analysis (precedents) and genetics (protocols of parliamentary discussions in the legislative process of the law attacked).
3. Description and analysis of all provisions of the law enacted.

II.

Reproduction (in indirect speech) of the content of the arguments related to the abstract constitutional control proposed by the mentioned states.

1. The law would be unconstitutional even from a formal point of view.
   a) Thanks to the division of the original proposal in two, with the goal of making the law a law that does not require the approval of the Bundesrat, the new law would be fraught with insurmountable procedural defect.
   b) In addition the law supposedly contained extravagant rules pertaining to the derogation of the law that introduces the German Civil Code (BGB or EGBGB) and it should also go through the approval of the Bundesrat.
   c) Finally, other formal issues would make the law as a whole a kind of law that requires the consent of the Bundesrat (Zustimmungsbedürftiges Gesetz)
2. The law would also be unconstitutional from a material point of view:
   a)Incompatibility of the law with the constitutional protection of marriage and family as stated in the article 6, I of the German constitution because the law, when it created a parallel legal institution for homosexual unions, would not be respecting the state's duty of

detachment (Abstandsgebot) from the institutions of marriage and family derived from the institutional guarantee traditionally envisioned in the article 6, I of the German constitution.

b) The Article 6, I of the German constitution would also be violated because homosexual unions, because of the law's silence, do not stop marriage and thereby assuming a parallel union to marriage, although the mandatory obligations of the new law were incompatible with marriage.

c) The law would also be intervening in the family power of the partner without children with relevant patrimonial consequences to the fundamental right of inheritance stated in the article 14, I, GG. The Article 14 I GG would remain violated in the case of testamentary freedom curtailing the surviving partner. Also the article 3, I, GG (fundamental right to equality) would be violated because other civil unions (heterosexual ones) would lack such legal protection.

III.

The following were given the possibility to manifest their opinions in the case ("participants" and amici curiae): the Federal Chamber (Bundestag), the Federal Council (Bundesrat), the Federal Government (Bundesregierung), the (16) state governments (Landesregierungen), the Scientific Association for the Family Law, the Confederation of Lesbians and Gays in Germany, the German Confederation of Family and the Ecumenical Working Group (Collective) Church and Homosexuals.

1. The federal government considers the law compatible with the constitution.
   a) Formal exam: Exame of the division of the law to avoid the need to obtain the consent of the Bundesrat.
   b) Material exam: The law was compatible with the constitution (articles 2, I; 6, I; 3, I and 14, I from the German Constitution)
2.
   a) According to the view of the Federal Chamber, the propositions concerning the abstract constitutional control would lack foundation.
      aa) The arguments over the formal constitutionality are almost identical to the Federal Government's arguments.
      bb) Material exam of constitutionality.
   b) Participation of members of the Federal Chamber at the public audience: Renesse (SPD), Geis (CDU / CSU), Beck (Green Party) and Braun (FDP), but Geis (CDU / CSU) filed a dissenting opinion in relation to the opinion of the Federal Chamber.
3. Position of the Government of the Hamburg City-State: The propositions would lack foundation endorsing the reasoning of the Federal Government with small nuances.
4. Position of the Government of the State-Member Schleswig-Holstein: The propositions would lack foundation, mainly because

of a reproduction of marriage for similar situations could not be derived from the article 6, I of the German Constitution.

5. Position of the Confederation of Lesbians and Gays in Germany: The law would have been enacted, formally and materially speaking, in line with the German Constitution. Homosexual unions would have a constitutionally guaranteed right to legal support because of the Article 2, I and 3, I from the German Constitution. GG. The previous legal situation would be unconstitutional. The new legal institution, in its turn, would not have violated the article 6, I of the German Constitution. On the other hand, the understanding according to which the homosexual union would be dissolved if one partner did get married would be unacceptable.
6. The Ecumenical Working Group (Collective) Church and Homosexuals adhered to the legal reasoning of the Confederation of Lesbians and Gays in Germany, adding some sociological data as the fact that in some evangelical churches were already ministering the blessing of homosexual couples as an official action of the church.

B.
(EXAMS OF CONSTITUTIONALITY)
"THE REQUESTS [OF ABSTRACT CONSTITUTIONAL CONTROL] ARE UNFOUNDED. THE LAW FOR SOLVING DISCRIMINATION AGAINST HOMOSEXUAL UNIONS (LPARTDISBG) IS COMPATIBLE WITH THE GERMAN BASIC LAW."

I.

(Formal exam of constitutionality having in mind the necessity of approval from the Federal Council as stated in the article 84, I of the German Constitution)

"The law was made in accordance with the constitution. It did not need the consent of the Federal Council. "

1. "The law does not have provisions that, in accordance with the article 84, I of the German Constitution, would require such consent.".
   a) Interpretation of the requirement of consent stated in and in accordance with the article 84, I of the German Constitution
   b) Subsumption: "Daran gemessen [...]".
      aa) Exam of the article 1 § 1 I LPartDisBG
      bb) Exam of the article 3 § 25 LPartDisBG
      cc) Exam of the article 3 § 6 LPartDisBG
      dd Exam of the article 3 § 11 LPartDisBG
      ee) Exam of the article 3 § 16 LPartDisBG
2. "A mandatory consent of LPartDisBG cannot be inferred from the fact that the article 1 § 3 III and IV states powers of the person responsible for the official civil registration that have been known prior to the completion and publication of the law. That [present] version of the bill was corrected irreproachably concerning the constitutional point of view."

a) The German Constitution does not establish specific rules regarding corrections of legislative proposals, nevertheless there are other provisions in the internal regulations of the legislative houses and in the consolidated state praxis that would give fundaments to the perpetrated procedure. Presentation and interpretation of applicable provisions and consolidated state praxis.
b) Subsumption: "about the base for such parameters, the correction made in the article 1 §3 III and IV LPartDisBG did not go beyond the constitutional limits."
   aa) Demonstration of the material error in the article 1 § 3 III and IV LPartDisBG form the legislative protocols (among others: BTDrucks. 14/4545)
   bb) "The composition of the text of the article 1 § 3 III and IV LPartDisBG corrected and published corresponds to the intention of the legislator brought to term in the law." Reasons follow.
   cc) "Moreover," Confirmation through opinions on the correction procedure.

3. The division of the proposal, which was brought by the government benches in a material proposal and in a procedural one, does not clash against the constitution. "Mainly the division perpetrateddoes not motivate the requirement of consent [of the Bundesrat] for the LPartDisBG".
   a) "The Federal Chamber is not constitutionally prevented of, in the exercise of its legislative freedom, regulating different proposals". Reasons follow.
      aa) Exam of the article 74 I, N° 2 GG – concurrent legislative power.
      bb) Subsumption
   b) "If the operative power of the Federal Chamber must be concretely limited by constitutional provisions in the face of the division of one legal matters in more than one law as well as determining when such limits would be exceeded are questions that can stay here without examination (cf. BVerfGE 24, 184 [199 s].; 77 84 [103]). The federal legislator's decision [...] was not arbitrary." "
      aa) "The reason attributed to the Federal Chamber to have divided the legal matters in order to exclude the possibility of the Bundesrat to prevent the promulgation of material legal rules through the refusal to consent does not make this procedure an arbitrary one." Follows the reasoning based on the jurisprudence of the own BVerfG (cf. BVerfGE 8, 274 [294], 55, 274 [319]) according to which a law as a whole needs the approval from the Bundesrat if it contains only one device provision that needs such consent. Therefore, the path taken by the Federal Chamber would be legitimate to avoid a change of constitutional powers that Article 84 I GG's function is precisely preventing.
      bb) The juridical material rules of LPartDisBG are clear and accurate enough despite what say the responsible for the present abstract constitutionality control action.

II.

(Exam of material constitutionality)
1. Violation of the article 6 I GG.
a) Possible violation of the freedom to marry ("*Eheschließungsfreiheit*"):
aa) Anyone with legal capacity to marry can still marry after the introduction of gay stable civil union. Same sex couples remain, according to the new law, forbidden to get marry. The law does not influence, direct or indirectly, the freedom to marry of heterosexual couples. As the new law does not contemplate heterosexual stable civil unions, the heterosexual couples would not be forbidden to get married.
bb) The access to marriage is not limited by the LPartDisBG. The person who is part in a registered partnership is not forbidden to marry a person of a different sex. The consequences of the (homosexual) registered partnerships remain open.
b) Possible violation of the juridical institution of marriage: it does not exist because the object of the law is not the marriage.
aa) The *Grundgesetz* does not have the definition of marriage. The power to configure infra constitutionally (form and content) leave for the ordinary legislator, which has wide discretionary capacity, but still must respect certain "institutional and substantial principles". It is part of the content of marriage, independently of social mutation, i) the association between a man and a woman to a durable union of lives (without a determined date for its end), ii) it must be based on the free will of the partners, iii) under the state's actuation, iv) in which man and woman, in an egalitarian partnership, are faithful to each other and v) both can freely decide about the form of the life they have together.
bb) The institution of the registered partnership between same sex couples does not have the same state's protection given to marriage. This kind of partnership is not marriage in the sense of the article 6 I GG, but it gives gay couples [similar] rights. The legislator took in consideration 2 I, 3 I and III GG because it help people to develop their own personalities and combats discriminations.
cc) The marriage as an juridical institution did not go through any change. From the institutional guarantee of marriage does not derive some prohibition towards gay couples being able to enter a registered partnership that has juridical effects that are similar to the ones that are derived from the marriage.
c) Possible violation of the state's duty to protect the axiological decision made in the constitutional provision (axiological theory of the fundamental rights)
aa) No allocation of the institution of marriage. The special protection of marriage, prescribed in the Article 6 I GG,

prohibits its placement in a worse position than other life forms.

(1) No harm to occur when the Marriage Act provides a new institute made in the image and likeness of the rules of marriage. The novel institute is aimed at people who cannot marry.

(2) The rules on social assistance provided in the law do not imply downside to marriage.

bb) No withdrawal of Government support to marriage.

cc) The Article 6 GG I did not prevent the legislator to favor marriage in the face of other forms of family togetherness. However, from the commandment protective Wedding, the Article 6 GG I, it does not derive the commandment of a disadvantage to other forms of family togetherness. "This was ignored by Judge Haas in his dissenting opinion, when she understood the commandment of fostering the Article 6 GG as I commanded to [oppose] disadvantage to other forms of union other than marriage."

(1) Interpretation (including genetic) of "special" protection of marriage and family by the Article 6 I GG. It is a constitutional protection that does not exclude legislative infra constitutional protection from other forms of union. There is no duty of detachment by the legislator (kein Abstandsgebot).

(2) The Section 6 I GG protects marriage as the legislator, in compliance with the structural substantial principles, has set. In the face of social changes, the protection that is due to the institution of marriage cannot be separated from normative recipients for whom marriage was created as a way of life protected.

(3) The duty to protect the marriage has to be based on the purpose of protection ofthe Article 6 I GG. The legislator would have hurt this duty, for example, if he or she had created a parallel institute with identical function, equal rights, but fewer obligations and such that the institutes could be interchanged. This hypothesis is not present with the creation of the Institute of gay marriage. There is no competition between the institutes. Unlike stated in the two dissenting opinions (see below in the structure of the votes from the judges Papier and Haas, n. from author), homosexual union is not a "fake marriage with label" but an "aliud" in the face of marriage.

2. Violation of the Article 3 and the Article III 1 3 I GG GG: "The LPartDisBG does not violate the special prohibition of discrimination in the Article 3 III 1 GG nor the general principle of equality of the Article 3 GG I".

a) Because the law only opens up the possibility of a registered union for gay couples, it does not imply a disadvantage created to heterosexual couples based on gender. The law does not establish rights and obligations differentiated because of gender, but the combination of genders in the union of two people. The same

goes for the non violation of the discrimination prohibition on grounds of gender of homosexuals in the absence of the new law. Men and women are always treated equally because heterosexual couples cannot engage in a registered union such as gay couples cannot marry.

b) The fact that other life unions [stable and of heterosexual couples] or any other form of solidarity union haven't been contemplated with this form of registered union. The Art. 3 I GG forbids the differentiated treatment of normative recipients when there is no relevant different that justifies the unequal treatment. Those differences, however, exist in the case of homosexual couples with respect to other connections.

aa) Although there is also the need of recognition of the heterosexual unions, the road to marriage to heterosexuals are not sealed, unlike what happened historically to gay couples.

bb) Also in relation to other unions based on family ties and affection (union of brothers, for example) there are differences that justify different treatment, starting with the exclusivity of gay marriage (mutatis mutandis "monogamy"). These other types of union based on family ties and blood are also now protected in various fields of law, such as inheritance and taxes.

cc) The legislator is not prohibited to create new possibilities for recognition to heterosexual unions or to those unions guided by family and blood ties, providing he or she avoids the possibility of exchange with the wedding fashion, but a constitutional mandate to that effect [positive, of creation of the law] does not exist.

3. Provisions of the law on the protection and rights of succession of "life partners", as well as pension are not constitutionally questionable.

a)

aa) According to the Article 1 ß 9 LPartDisBG the companion of a parent may be given, by their acquiescence, the power to decide jointly on the child's everyday affairs. It was also created a family emergency power in regard to the child's welfare. With the establishment of this "small family power" for the homosexual partner (kleines Sorgerecht) the legislator did not intervene in the family right of a parent that does not have the family power. Examination of the protection area of the Article 6 II 1 GG. It is up to the legislator, under the field of family law, to create the rules of the family power. If a parent has been excluded from such familiar power by virtue of such devices and their application, the "small family power", the power that derives from one of the homosexual partners, does not intervene in the family right of that who has been excluded anyway.

bb) Subsumption: No violation of the Article 3 I GG. Under the new rule, parents that don't live with the person who has the family power in a juridical stable union do not suffer undue

disadvantages. Other juridicalopportunities would remain open for them.

b) aa) The Article 1 ß 10 VI LPartDisBG dos not infringe the testamentary freedom protected by the Article 14 I GG. It follows the interpretation of testamentary freedom as an element pertinent to the protection area of the Article 14 and as reference to the jurisdiction of infraconstitutional conformation of the ordinarylegislator (also, the right of inheritance has anormative protection nature, not a behavioral one).

bb) The Article 14 GG I would not be violated by the fact that the portion of the inheritance that is due to those entitled is decreased because of the participation of the partner of the person who died. It also would happen like this if the deceased had married.

c) Food Obligations based on the Article 5 ß ß 1, 0:16 LPartDisBG did not violate the Article 3 I GG. Follow fundaments.

C.
(CONCLUSION)

"This decision was taken by majority 5-3, with regard to compliance with the Article 6 LPartDisBG I GG; majority 7-1, with regard to compliance with the Article 3 GG I, other then that, there was unanimity."

Papier	Jaeger	Haas
Hömig	Steiner	Hohmann-Dennhardt
Hoffmann-Riem	Bryde	

Dissenting opinion of Judge Papier
(...)
Discordant opinion of Judge Haas
1. (...)
2. (...)
a) (...)
b) (...)
c) (...)
(1) (...)
(2) (...)

>> ENDNOTES

[1] Cf. for the initial part: Martins, 2013.

[2] A deeper review on the subject can be found at Dimoulis and Lunardi, 2011: 290-296.

[3] As brilliantly pointed out by Dimoulis and Lunardi, 2013: "It is common to describe the unions in question as 'gay' or 'homoaffectives'. However, neither the Brazilian Constitution nor Brazilian ordinary law mention orientation or sexual activity as a relevant criterion for describing Family units. Only biological sex is mentioned. Therefore, it is legally correct to refer to the union of persons of the same sex." This terminological confusion, with legal-dogmatic repercussions as will be seen, between sexual orientation and marriage of same-sex persons permeates the ruling here commented and leads to the foregone conclusion that the configuration of a legal institution by the legislator was an act of discrimination against a supposedly minority group with different sexual orientation. Linguistically, it is interesting to notice the use of the expression "homoaffection" instead of "homosexual" in order to live up to the code of political correctness, in view of the axiological negative content of the term "homosexual" which could, however, be used here in an axiological neutral context. In terms of social life, it is certain that it is not necessarily affection or more precisely familiar affection, but the expression of sexuality as an element of the free development of the personality of each. And this has nothing to do with the relative legislative discretion in setting up institutions of family law as will be demonstrated here. To avoid the very long formula suggested by Dimoulis and Lunardi (ibid.), it was chosen here the use of the expression "homosexual union".

[4] Cf. STF-ADI 4.277/DF, from 05/05/2011, published in 14/10/2011 no DJe 198, headnote 2607-3, p. 611-880 (there will be mentioned the numbers of pages of the official publication), which can be found in the following web link:<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635>Accessed in: 30/03/2013.

[5] Cf. STF-ADPF 132/RJ, from 05/05/2011, published in 14/10/2011 in the DJe 198, headnote 2607-1, p. 1-274, which canbe found in the following web link:<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633>Acesseded in: 30/03/2013.

[6] As pointed out by the rapporteur (cf. STF-ADI 4.277/DF, p. 623), this case originated a prevention because its object and the object of the previously mentioned case coincide (as stated by the Article 77-B of the RISTF). The objects here in question are the interpretation of the Article 1.723 of the Brazilian Civil Code.

[7] The plaintiff's complaint in ADPF 132/RJ to interpret according to the Constitution some pre-constitutional juridical norms, namely the Article 19.II and V and the Article 33 of Decree-Law 220/1975, was impaired by loss of purpose, because they were derogated by Law 5034/2007. Cf. STF-ADI 4.277/DF, p. 625.

[8] In the judgment of admissibility, the rapporteur, if he did examine, ceased to enshrine in his report the result of a necessary examination of the existence of relevant judicial controversy over the application of the fundamental precept that was acclaimed to have being violated as it is prescribed by the Article 3.V of Law 9.882/99. Maybe such examination was not enshrined in his report due to the preliminary trial set of both APDF 132 and ADI and 4,277. Without wanting to enter the constitutional procedural minutiae concerning the delimitation of the judgments of admissibility of the two instruments of normative control abstract (about cf. Dimoulis and Lunardi, 2011: 120-140 and 158-178), presenting the dispute in a systematic way from the original demands at least would be a good preparation for the examination of the merits. The vague information provided by some Courts of Justice (cf. STF-ADPF 132/RJ, p. 13 s.; STF-ADI/DF and DF-4277, p. 620 s.) are not enough.

[9] In the original cases, with their demands between individuals and administrative organs, the requests concerned, probably (as stated in the previous note, these were not presented in the report of the appellate decision, as a common practice in the decisions of the German Constitutional Court - see ref. the annex below - which compromises the precision of this analysis), mostly to provide pension benefits and others that could be accepted despite the aimed equalization, because all indeterminate legal concepts or likely to change according to conceptual mutation, as in the case of the family concept, involve the judicial duty to interpret them in the light of the constitutional system of fundamental rights (cf. Martins, 2012: 100-102).

[10] It is impossible to analyze here each one of the Decree-Law 220/1975's articles that were subject to attack in the ADPF 132 (namely Articles 19.II, 19.V and 33. I-X). Nonetheless, it is necessary to state that all of them (except Article 19.V, which speaks of [refers to]"spouse") should be interpreted in the light of the normative constitutional system that despite similarities should not be confused with the interpretation according to the constitution (cf. Schlaich and Korioth, 2010: 274; Dreier, 2004: 285 s., and Martins, 2013) in order to obtain the desired effect of extending social security benefits to homosexual stable civil unions. The analysis between, for example, the information provided by TJ-BA, according to which "[...] the judiciary, exercising administrative functions (application of the Statute of Public Servants), cannot grant rights that are not provided by law [...]" and the herein claimed generalization of the effects of res judicata brings up a quirk of the Brazilian legal and constitutional culture. In everyday administrative and judicial practice nobody sees the problem in infralegal norms being interpreted in a way that is contrary to the law and the constitution or in the law being interpreted in a way that it should not be according to a dogmatically and methodologically accurate interpretation guided by the constitution. This leads to an administrative discretion to which the judiciary should surrender. On the other hand (and against the rationality that demands respect for normative sources' hierarchy) and on behalf of a very vague " solidary constitutionalism ", the relativization of legal and constitutional objects and parameters is sought in order to make the exercise of the democratically backed legislative function even more irrelevant than it already has become. There is a kind of schizophrenia based on the attachment to the form and to a complex and counter-productive judicial process ????[falta uma palavra?], which is more detrimental to the effective constitutional concretization because it relegates to the background a correct application of the legal and constitutional system that requires strict observance of normative hierarchies.

[11] As a consequence, some authors advocate introduction of a collegiate foundation. See, for example, with references to Brazilian and foreign doctrine: Dimoulis and Lunardi, 2011: 108 and its finding of inconsistency problems derived from the lack of reasoning in the case under discussion, in: Dimoulis and Lunardi, 2013.

[12] Cf. great systematization of the arguments used by the judges in this case presented by Dimoulis and Lunardi, 2013.

[13] In the operative part of the decision (appellate decision in strict sense), the merit was set up as follows: "[...] By unanimous vote, [the Ministers] agree to uphold the actions, with erga omnes and binding effects, with the same rules and consequences of hetero-affective stable civil unions [...]. "(cf. STF-ADI-4277 DF, p. 615).

[14] Cf. STF-ADI 4.277-DF, p. 632-635.

[15] In this regard, cf. Martins, 2012: 30-33, 47-55 and Dimoulis and Martins, 2012: 49-51 and 110 s. The principles of legality and formal equality before the law have no consequences for the bond between the legislator and the constitutional norms, notably fundamental rights.

[16] The poorly received theory of horizontal effect of rights and, lately, also of the horizontal effect of positive state duties contributes to this legal-dogmatic misunderstanding, and

the result is a process of constitutionalization of the entire legal system and the consequent weakening of the normative force of constitution, which is primarily the State's constitution and not society's, in favor of its symbolic character. About the theoretical foundations of the argument, cf. Martins, 2012: 9 and 28-43. On major legal and dogmatic repercussions, cf. Dimoulis and Martins, 2012: 90-108 and Martins, 2012: 89-119. With a different theoretical assumptions than the ones shown here, but perpetrating an analysis of the phenomenon of constitutionalization of law, see generally: Smith, 2005. About Brazilian understanding of the theory of horizontal effect cf.: Sarmento, 2004: 279-289 and for a small and clear synthesis of the debate, cf. Novelino, 2012: 403-405 s.

[17] Cf. same finding in Dimoulis e Lunardi, 2013.

[18] The situation of unconstitutionality would be politically unlikely, given the qualified majority required for constitutional amendments compared to the simple majority needed to all infra constitutional legislation, unless in a scenario of slow legislative action, change of legislature, or political inconsistencies inside parties.

[19] This same review was made several years ago and substantiated by the present author in several publications. See, for example, more recently, Martins, 2011: 100 s., Martins, 2012: 240 s. and 304 and Martins, 2013.

[20] The overuse of this formula in the jurisprudence seems to reflect a conception of judicial activity that is not bound to the current constitutional order, because every time a normative texts does not suit the Brazilian Supreme Federal Court, it uses the before mentioned formula in a purely rhetorical way, since there is no debate among the various possible interpretations of the juridical norm object of the constitutional control and no justification for the chosen interpretation that is said to be more consistent with the constitutional parameter. This situation is exacerbated by the use of the constitutional mutation thesis, ie, becoming mitigated not only the effects of res judicata, but also the judicial norms that are used as object and parameter of such a constitutional test. The most striking example of this was the interpretation given by the Brazilian Supreme Federal Court to a constitutional provision that states grant of jurisdiction (!), namely the Article 52, X, of the Brazilian Constitution. This constitutional article, given its nature, contains no open concept that is likely to mutate in its historical understanding. The case was the Constitutional Complaint 4335 and its key excerpts followed by a precise discussion can be found in Dimoulis and Lunardi, 2011: 281-296.

[21] The Federal Constitutional Court of Germany's decision concerning the constitutionality of a statutory law that created registered homosexual unions, an institution parallel to marriage (cf. BVerfGE 105, 313 et seq. as well the brief presentation and ruling's structure in the annex below) started from the combination of sexes (not) corresponding to the constitutional concept of marriage and not from the marriage candidate's gender, much less from their sexual orientation and finally signed up such understanding that, prima vista, can cause strangeness in the lay public. With some exceptions, the German legal and constitutional dogmatic does not see a problem of correspondence between the free configuration of a legal institution by the legislators and unequal treatment to be constitutionally justified. The parameters of fundamental rights to equality ("everyone" in the Article 3 of the German Constitution) were brought to the agenda because the new institute of registered homosexual unions could not be extended to heterosexuals who could assert, as always, to the traditional marriage institution (cf. BVerfGE 105, 313 [351-353] and, in the Annex, point B II. 2.) See among many: Heuer, 2004: 482; Gröschner, 2004: 774-778; Jarass and Pieroth, 2011: 239-242; Manssen, 2012: 122 and 127; Papier and Krönke, 2012: 145; Schmidt, 2010: 231 s.; Schroeder, 2011: 128, Epping, 2012: 229; Ipsen, 2012: 98; Fisahn and Kutscha, 2011: 89; Degenhart, 2012: 130; Pieper, 2012: 159 s. and Pieroth and Schlink, 2012: 168 s. With a certain critical distance and under the influence of European community

law, yet without dismissing the dogmatic: Michael and Morlok, 2010: 146-147.

[22] The legal-dogmatic next step would be to investigate the extent to which the legislator is bound to the fundamental right as an institutional guarantee, because "that the legislator needs to set up a fundamental right cannot mean that he may [freely] dispose about it" (Pieroth and Schlink, 2012: 56). Cf BVerfGE 105, 313 (344-346), and below, attached B.II.1.b, besides the extensive discussion in the specialized legal literature, as in Gröschner, 2004: 768-772; a succinct but dogmatically very well made analysis that contains many sources in Jarass and Pieroth, 2011: 238-241; cf. as well the references in the previous note. As also alluded to in the previous note, partly defending a little dissenting opinion by reference to European Community law for the specific case of the general equality and claiming "functional proximity" between family and private life: Michael and Morlok, 2010: 146-148. But even such a pair of authors more sympathetic to that less strict, under a dogmatic point of view, European jurisprudence do not abandon the understanding of marriage as a fundamental right with an institutional character with its consequences as herein presented.

[23] Cf. BVerfGE 105, 313 (351 s.) And, below, in the Annex: B.II.2.a. Cf. Martins, 2012: 44-62 about the specific dogmatic concerning the fundamental rights of equality and freedom stated in the Article 5 °, caput, of the Brazilian constitution.

[24] All other conditions established by the civil legislator, however questionable, outdated, conservative etc., are applied equally to all those who want to get married without distinguishing persons, which reveals the peculiarity of institutional fundamental rights in relation to behavioral ones. If sexual orientation was indeed a discrimen, this could be extended ad absurdum, making impossible any legislative configuration of the institution. The prohibition of bigamy and polygamy or of marrying animals and things, the age limits to get married - it all would have to be measured based on the assumption of equal parameter.

[25] Pieroth and Schlink, 2012: 167.

[26] Cf. With broad list of references: Gröschner, 2004: 772-779.

[27] Although not shown in its proper systematic locus, which would be the list of fundamental rights stated in Articles 5-17 of the Brazilian Federal Constitution, the entire article 226 of the Brazilian Federal Constitution, that appears under the chapter dedicated to the family and the title correspondent to the "social order", contains, due to its text, positions arising from fundamental norms, just like other fundamental rights. In German constitutionalism, such fundamental rights that are sparsely shown in the constitutional text are called equal rights to fundamental rights" (Rechte grundrechtsgleiche). See, eg, Pieroth and Schlink, 2012: 18.

[28] Cf. Pieroth and Schlink, 2012: 55 s.: "For them [rights whose protection areas are normatively stated], the individual is still not able to exercise their fundamental rights only by its nature [individual] nor by their sociable nature, but only through the legal system. Examples: living (art. 2, II 1 GG) and settling residence here or there (Art. 11 I GG) are the individual's nature; exchanging opinions (art. 5, I, 1 GG) and making reunions (art. 8, I GG) are part of the individual's sociable nature. Rather, only the law makes any joint life of woman and man marriage (art. 6, I GG) and of any possession a property (Article 14 I GG)." Cf., in the vernacular, the reception of this concept in Dimoulis and Martins, 2012: 145 s.

[29] This principle states that it is the state that must justify its actions when intervening on rights and not the individuals who must justify their actions when exercising them. See Martins, 2012: 29, with reference to the principle mentor, Carl Schmitt.

[30] Cf., by all: Jarass e Pieroth, 2011: 249.

[31] See Martins, 2012: 57-59, and on the legal-dogmatic relevance of the concepts of regulatory area versus. area of protection for the rights of freedom: Dimoulis and Martins, 2012: 127-131.

[32] It is, considering that the Federal Republic of Brazil is a democratic and constitutional state

of law, such an obvious taboo that the state should not interfere, excluding the duty of protection in the face of the problem of domestic violence. The many pages of the votes in the Brazilian Federal Supreme Court's decision were only dedicated to verify the obvious and did only serve the purpose of diverting the focus, or rather, in this case, of revealing a misunderstanding on the part of the Ministers about the object of their decision.

[33] Disclaimer aptly presented by Dimoulis and Lunardi, 2013: "The ministers used the systematic interpretation for introducing constitutional foundations in the reasoning that were different from the Article 226, § 3, of the Brazilian Federal Constitution seeking to justify the decision of using the technique called interpretation according to the Constitution. Note that this method should have led to the declaration of unconstitutionality of the constitution itself, as the logical conclusion of the prevalence of certain principles over exhaustive constitutional norms. But the Brazilian Federal Supreme Court did not do it [...], preferring the inconsistency." This use could have been made in accordance to the implicit and functional societal element existent in the concept of family, as already pointed in here. This would have notorious impact to the legislator in fields such as adoption, for example. Cf. the quite palpable result of this premise in the recent decision of the German TCF, published in 19/02/2013: BVerfG, 1 BvL 1/11 - Sukzessivadoption innerhalb der Lebenspartnerschaft ("successively adoption inside registered partnerships [between people of the same sex] ") and a short presentation in the text below and in the note 41 as well.

[34] According to the reasoning in one of the Minister's vote: "This line of ideas leads to the question of the private individuals' autonomy, conceived in a Kantian perspective as the center of human dignity. Rivers of ink have been written on the subject in Brazil and abroad, making negligible greatest digressions on the subject. It is enough, for now, remembering that its [human dignity] consecration in the article 1, section III of the Brazilian Federal Constitution, translates the prediction that the individual is entitled to be treated by the state and by other individuals as subject and not object of law, respecting her/his autonomy, by her/his very condition [conferir o uso da palavra very antes de um substantivo] of being human"(emphasis in original, cf. STF-ADI-4277 DF, p. 674-675, Min Luiz Fux). Despite the mentioned "line of ideas" has not been well explained, who would dare disagree with this argument around the most important principle that should govern the Federal Republic of Brazil? And what an easy writing and flawless language Machado de Assis would say! It is a pity that it was not written as a piece of literary art and does not belong to any other human science; it is a judicial decision made in the context of normative control of constitutionality with its important consequences. In the same vote (p. 661-663) several successive references without logical and dogmatic concatenation appear. Between them is the dogmatic of states' duties of protection with explicit reference to the original German concept of "(Staatlichen) Schutzpflichten" and to national and international doctrines that welcomed the formerly cited dogmatic. But this concept, as many other imported ones, is decontextualized and is not applicable to the case (see about Dimoulis and Martins, 2012: 114-122 and Sarlet et al, 2012: 297). Moreover, it would lead to a dogmatic consequence characterized by the legislative obligation to act to protect a jusfundamental natural position and not a normative one (life and health especially) in the face of threats from private individuals (at this point, correct is the conceptualization of the fundamental right's spectrum of protection in Mendes et al, 2008: 267). Even assuming, as aimed by Brazilian dominant opinion, an objective dimension of fundamental rights that leads to a direct link between fundamental rights and private individuals (thesis to which the vote of the Minister apparently joins but actually there should have been made a separation between the state's duty to protect and the private individuals bond to fundamental rights but both concepts were treated as the same in the Minister's vote) remains the question about the

precise relation between the bond of private individuals to an alleged right to an equal legal status. And what would be its relation with the reversing of the rule concerning the solution of the specificity antinomy? Such blunders occurred frequently in this and other votes that upheld the judgment. This is what happens when judges do not aim to persuade and decide based on legal parameters. Such speculations are totally off the problem concerning the systematic interpretation of articles 3 and 226, § 3 of the Brazilian Constitution.

[35] On this figure, see for everyone: Dreier, 2004: 81.

[36] The norm stated in the article 2, I, of the German Constitution, more often in combination with the article 1, I (free development of personality combined with the order of observance and protection of human dignity) is sometimes used to interpret and define infra constitutional legislation. But the Federal Constitutional Court of Germany recognized the bigger impact on such interpretation of the article 3, I, II and III of the German Constitution (these articles refer to general equality, special equalities and prohibition of discrimination) and, lastly, also the very article 6of the German Constitution (protection of marriage, family, children's education etc..).

[37] Cf. references and discussions on such decisions in Martins, 2011: 455 et seq..

[38] See BVerfGE 124, 199: "1. Unequal treatment of marriage [regarding] registered [same-sex] partnerships in the field of pension successors for employees of the public service [...] is incompatible with the Art. 3, I, GG. 2. If the privilege of marriage imply a disadvantage of other forms of [marital] life, although they are comparable in view of the matters regulated social life and goals of marriage persecuted by legislative activity [under discussion] such differentiation was not justified with the mere mention of the commandment to protect marriage in the sense of the Art. 6, I GG. "

[39] The Transsexuellengesetz (TSG), synthetic epithet for the "law on the amendment of the first name and the statement of the relevance of gender in special cases", entered into force on September 17, 1980. Based on the scientific stage of the late 1970s, the law provided two solutions to change civil registry for people who do not identify themselves in their respective biological sex of birth: change the first name or, beyond that, also change the definition of genre. With the enactment in 2001 of the most talked here LPartG, the law to registered partnerships of persons with the same sex, many questions were raised, including the possibility of transsexuals to marry or register partnership between persons of the same sex, since there are cases of transgenders having homosexual orientation, that is, after the change of record of the genre, for which surgical intervention and the "permanent sterility" were required, the person developed homosexual behavior (which would be a straight one if the genre had not been previously changed). Among others, the need for sex-change operation was deemed unconstitutional in the face of the article 2, I and the article 1, I of the German Constitution by decision made in January 2011 to be then commented, in such a way that the situation today is about "the felled sex" (expression coined by Heribert Prantl, former judge of law and one of the today's largest German journalists, cf. . <http://www.sueddeutsche.de/politik/verfassungsgericht-kippt-transsexuellengesetz-das-gefuehlte-geschlecht-1.1052344> Accessed in: ??) by the holder of fundamental rights, and the State, based on criteria defined by the legislator, must only check the consistency of such a decision.

[40] Cf. in chronological order: BVerfGE 115, 1- Transsexuelle III (27/05/2008); BVerfGE 116, 243- Transsexuelle IV (27/05/2008); BVerfGE 121, 175- Transsexuelle V (27/05/2008); and BVerfGE 128, 109 – Lebenspartnerschaft von Transsexuellen (11.01.2011). In the first decision, the object was the section §7, I n. 3 TSG, from a concrete constitutional control proposed by Itzehoe State Court. The object of the ruling was considered incompatible with the articles 2, I and 1, I of the German constitution. In the second decision, the object was the section § 1, n. 1 TSG, from two

actions aiming the concrete constitutional control and were proposed by the Superior State Tribunal of Oberbayern and Frankfurt. The object of the ruling was considered incompatible with the articles 3, I; 2, I and 1, I of the German constitution. In the third decision, the object was the section 8, I n. 2 from a from an action aiming the concrete constitutional control by a single judge from Schöneberg (Berlin). The object was considered incompatible with the articles 2, I; 1, I, G and 6, I from the German constitution. In the fourth decision, the object was to the § 8, I, 4 n.3 from a constitutional complaint judged incompatible with articles 2 and 1, I from the German Constitution.

[41] Cf. BVerfG, 1 BvL 1/11, Sukzessivadoption innerhalb der Lebenspartnerschaft, from 19/02/2013, at: <http://www.bverfg.de/entscheidungen /ls20130219_1bvl000111.html>Accessed in 07/03/2013.

[42] Judicial representation of the Hanseatic Superior Court (Hamburg) from December 22, 2010, met the procedural requirements against the decision of the dispute and the conviction of the court concerning the unconstitutionality of the section 9, VII, LPartG in the face of the article 3, I of the German Constitution (on such procedural conditions, v. Martins, 2011: 22-26).

[43] Filed by a woman ("Dr. K.-W.") immediately against three decisions of the ordinary instances and mediately against the section 9, VII, LPartG (cf. on this duplicity of objects: Martins, 2011: 35 s.)

[44] Another consequence of the difference between "natural" freedoms - that is, legally constituted, but of behavioral content - and institutional fundamental rights, since only the former is enforceable against the legislative and others state functions without ordinary legislative intermediation.

[45] To paraphrase the well choosen words of Dimoulis and Lunardi, 2013.

[46] Since the demonstration of (bookish) erudition seems to be so dear to Brazilian judges, a research in the context of the history of ideas would have revealed interesting results: reading the reviews about the history of the concept of marriage of the art. 6, I of the German constitution made by Gröschner (2004: 757-760 and 775) reveals its "historical-institutional core". According to him, "the institutional protection of the possibility of reproduction [and] possibility of marriage is totally independent of circumstances, capacities and orientations. Therefore, it cannot be linked to homosexuality discredit. As well known, this disbelief was strange to Greek antiquity. Nevertheless, the oikos was there subjected to special protection from the polis precisely because of its reproductive role. This historical-institutional tradition which proved to be religious and ideologically neutral is what gives legitimacy to the constitutional article 6, I of the German Constitution"(op. cit. P. 775). That's because despite the Aristotelian vision of oikos as oikonomia, this has not proven itself as the criterion for the protection of family and marriage. With the exception of Sparta, the protection of the community life of the oikos only enjoyed the protection of the polis "because it was responsible for its perpetuation and good condition through fertilization and education of offspring" (op. cit., P. 757 s.). It was, therefore, more a population policy than an economic policy.

[47] Among other reasons and that is why using the right to privacy of the art. 5°, X of the Brazilian Constitution as a parameter is incomprehensible: it is not at all the protection of sexuality, as an exercise of autonomy and self-preservation (right to "intimate sphere") in the face of state interference. Regarding: Martins, 2012: 49 s. and Pieroth and Schlink, 2012: 91-93.

[48] Concerning the structure in general of the Federal Constitutional Court of Germany cf.Martins, 2011: 79-94.

[49] Respectively abbreviations for Lebenspartnerschaftsgesetz (literally: law of vital society) and Lebenspartnerschaftsdiskriminierungsbeendigungsgesetz (literally: law for solving vital society discrimination). These are two nicknames given by the legislature and legislative-political literature to this law. The political perception that the law aims to combat discrimination

does not have, as will be seen in the structure, support in the dogmatic of the fundamental right to general equality (article 3 I) or to gender equality (article 3 II) much less to equality in the face of specific discrimination (Art. 3, III). See below the point B.II.2 (parameter of fundamental rights to equality of the art. 3 GG, divided into: general equity, in the first paragraph; gender and promoting women's in order to achieve equality, in the second paragraph; and the prohibition of discrimination in the third paragraph), after thorough examination in the face of the Article 6, I GG (order of state protection to marriage and family, as a negative right, a legal institution and axiological decision of the constituent).

[50] Abbreviation for Bundestagsdrucksachen, the official collection of legislative protocols and materials produced in the legislative sessions of the Bundestag, the Federal Camera, 11th legislature (since 1949), p. 197. The BTDrucks are found in any law library and are commonly used in juridical-scientific researches and are relevant sources.

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