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Succession Rights And Stable Unions: Understanding The Evolution Of The Brazilian Legal System From The 1916 Civil Code To The General Repercussion Of Extraordinary Appeal 646.721

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Abstract:
The legal recognition of stable unions in Brazil did not occur with the 1916 Code, but only with the promulgation of the 1988 Federal Constitution was it equated with marriage, and the State should guarantee its protection, with no gender distinction. However, it was only in 2011 that the Federal Supreme Court (STF) judged the Direct Action of Unconstitutionality (ADI) 4277 and the Argument for Non-compliance with a Fundamental Precept (ADPF), recognizing stable unions between people of the same sex and guaranteeing these couples all the rights and duties assured to heterosexual couples. In addition, the STF analyzed the constitutionality of article 1.790 of the Civil Code of 2002 (CC/2022), although it supported stable unions between same-sex couples, there was a divergence in treatment, so the STF upheld Extraordinary Appeal 646721, declaring the unconstitutionality of the distinction between inheritance regimes between spouses and partners, and the regime established in article 1.829 of the CC/2002 should be applied in both cases. As a result, stable unions between people of the same sex in Brazil are recognized and protected by the law, with rights to inheritance, alimony, among other aspects that regulate the cohabitation and dissolution of these unions.

Key Word*: marriage; equalization; evolution; unconstitutionality; repercussions.*

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I. Introduction

Over the years, society has evolved and adapted to the changes that have taken place, adapting its legislation to guarantee citizens their rights. In this sense, family models and the way they are composed have diversified, promoting rights. The evolution of the concept of stable union has embraced social and cultural changes, guaranteeing couples rights and duties through Brazilian legislation. From the Civil Code of 1916 to the effects of Extraordinary Appeal 646.721, it is possible to observe significant transformations in the laws governing stable unions, between heterosexual and homosexual couples, and inheritance rights in Brazil.

The constitutional recognition of stable unions as family entities in the 1988 Federal Constitution represented an important milestone, equating this form of cohabitation with marriage. For this reason, the aim of this work is to explore the evolution of succession applicable to stable unions and to analyze the succession rights of the surviving cohabitant in the Brazilian legal system. For a better understanding of the facts, not only will the legal aspect be analyzed, but the social philosophical merit will also be explored so that it is understood that society is the one that guides the legal system.

Thus, the discussion and theoretical foundation was based on reflection on the subject, through analysis of the law, doctrine, case law and articles, enabling theoretical dialogues, arguments and questions about how stable unions were treated in the Civil Code of 1916, how they are interpreted by the Federal Constitution of 1988 and in the Civil Code of 2002. As a result, it was possible to identify that there have been developments in the judicial decisions handed down by the Federal Supreme Court on the subject, making a parameter with what applies to marriage and its legal repercussions.

In addition, it will also be addressed whether there has been unequal treatment between succession in stable unions and in marriages, and if so, it will be established in what parameters the discrepancy occurred or occurs, as well as whether there is any legal, doctrinal or jurisprudential instrument that has helped the segregative treatment.

This research paper will end with the final considerations, setting out the points highlighted throughout the text, encouraging further study, analysis and reflection on succession in stable unions, addressing the treatment of succession analyzed here between the two civil legal systems - the Civil Code of 1916 and the Civil Code of 2022 - laws that belong to different centuries and are approximately 96 (ninety-six) years apart.

II. Development

Before delving into the subject of this academic article, it is worth clarifying a few points about marriage and stable unions, bearing in mind that in order to recognize the multiple ways in which these institutions are constituted in contemporary society, there was a need for judicial recognition to guarantee the rights of those involved in these relationships.

The free union of people undoubtedly predates marriage, since the feeling of union is human and the emergence of the family is a natural fact. The term "concubinage" was once used as a synonym for stable union and had an important meaning in the old qualifications of children, who were called natural if they originated in a free union, or legitimate if they originated in marriage. The paternity relationship was presumed due to marriage, but the same presumption of paternity did not apply to children born in a stable union, thus legitimizing the imbalance and unequal treatment of parental status (FIGUEIREDO, 2022).

A stable union is a family entity formed without the legal formalities of civil marriage, where the bond between a man and a woman is one of affection (BRANDÃO, 2007). Marriage can be understood as the union of two people, recognized and regulated by the State, formed with the aim of establishing a family and based on a bond of affection (TARTUCE, 2018).

According to the Magna Carta of 1988, it is clear that homosexual relationships were left out of what was understood by our constituents to be a family, since the text in Article 226 recognizes the family as the basis of society, and is endowed with special protection by the State. It recognizes civil marriage and states that for the purposes of state protection, stable unions between men and women are recognized as family entities, and the law should facilitate their conversion into marriage (BRASIL, 1988). It should be noted that when the possibility of conversion into marriage is mentioned, it is clear that this is a mere option, so cohabitants can spend their entire lives with just the bond of union without the need for conversion into marriage, since the stable union of individuals in a lasting way, with publicity of the relationship and the objective of starting a family is enough to characterize a family entity that will be fully protected by the State (GIMENEZ, 2016). However, there remains a gap regarding same-sex relationships, as if they could not constitute a family nucleus.

The stable union is a Constitutional norm referred to man and woman, only for the special protection of the latter, which focuses on the purpose of establishing horizontal legal relations or without hierarchy between the two genders, it is worth mentioning that the Constitution did not prohibit the formation of a family by people of the same sex (ANDRADE, 2018). However, the current Magna Carta did not establish rules for stable same-sex unions, and this factor may have contributed to society's lack of recognition in accepting family models that are not traditional.

Based on this, the Civil Code of 1916 did not mention the protection of stable unions, considering that at that time society was not yet ready to accept this type of family, as even today there are people who think against this type of union, due to personal convictions and pressure from the church (CAVALCANTI et al., 2022). Because of the strong influence of the church, the legal concept of family was strongly linked to marriage. There was a call for the protection of property and domestic peace, so it was intended that external agents would not interfere in intra-marital relations, as well as in relations between parents and children, which was evident in art. 229, Civil Code of 1916, which considered the legitimate family to be that established by marriage (PINHEIRO; CADELATO, 2017).

In the previous system there was no competition for succession involving the spouse or partner, so the order of succession was simple and easy to understand. The provision for legitimate succession in the repealed Civil Code was set out in article 1.603, CC:

Art. 1.603. Legitimate succession is granted in the following order: (Edited by Law no. 8,049 of 1990)
I - Descendants.
II - To ascendants.
III - To the surviving spouse.
IV - To collaterals.
V- To the States, the Federal District or the Union (BRASIL, 2002).

It can be seen that the order of succession in the article above worked hierarchically: in the absence of one class, the other was promoted and the next class succeeded without competition. If the spouse was third in the order of succession, the partner was excluded from the succession, which shows that the legislator at the time had not yet shaken off the influence of the morals strongly defended by the church and the patriarchal regime that had for a long time underpinned the precepts of the previous Code.

It should be noted that Law No. 8971/1994, which regulated the right of partners to alimony and succession, and Law No. 9.278/1996, which regulated § 3, of art. 226, CF/1988, did not include homosexual stable unions (FACHARDO, 2014). Even after more than 20 years, the Civil Code of 2002 failed to alleviate this marginalization of same-sex relationships, including in its text the recognition as a family entity of a stable union between a man and a woman. In addition, the legal text made a distinction between spouses and partners in terms of succession.

Legitimate succession is the succession granted by law and will be applied to the entire inheritance when the deceased dies without a will or when the will is null or void; and partial succession is restricted to the part not included in the dispositive freedom, when the testator does not dispose of the entire inheritance in the last will and testament or when there are necessary heirs, forcing the reduction of the will if it does not respect the hereditary quota (FERNANDES, 2008).

The word succession, in a broad sense, indicates the act by which one person takes the place of another, replacing them in the ownership of certain assets. The idea of succession is realized in the preservation of a legal relationship that lasts and subsists despite changes in the respective owners, and does not only occur in the law of obligations (GONÇALVES, 2012). In this way, the term succession is used to incorporate causa mortis succession, as opposed to between the living succession, which can be present in various situations, such as a company succeeding another due to contractual issues (TARTUCE, 2018).

What is being defined in these cases are two people of the same sex who wish to maintain a stable affective and sexual relationship; and, on the other hand, a traditional conception of society that only admits relationships of this nature between people of different sexes (BARROSO, 2010). Each and every human being is part of a social context and cannot be understood as an individual being. However, the principle of human dignity, enshrined in the constitution, requires the state to protect human dignity through rules and public policies that guarantee the minimum existence necessary to ensure a dignified life (DA SILVA, 2021).

Initially, the Judiciary was assigned to deal with discriminatory cases regarding the recognition of marriage and stable unions between people of the same sex, when the Justices of the Federal Supreme Court heard the Argument for Failure to Comply with Fundamental Precept 132 as a Direct Action of Unconstitutionality (ADI), and judged it together with ADI 4.277, by unanimous vote. As a result, homosexual stable unions were legally recognized, guaranteeing them the same rights as stable unions between men and women (CNJ, 2022).

During the trial, it was possible to recognize the decision taken by the Federal Supreme Court (STF) recognizing the "lack of hierarchy or difference in legal quality between the two forms of constitution of a new and autonomous domestic nucleus", with the same rules and consequences applying to same-sex stable unions as heteroaffective stable unions (ADI 4277 and ADPF 132, Rel. Min. Ayres Britto, j. 05.05.2011). It was also stated that it is illegitimate to unequaled, for inheritance purposes, spouses and partners, that is, the family formed by marriage and that formed by a stable union, and that such a hierarchy is incompatible with the 1988 Constitution. Therefore, the current Civil Code, by repealing Laws 8.971/1994 and 9.278/1996 and discriminating against the partner, giving him succession rights far inferior to those granted to the spouse, conflicted with the principles of equality, human dignity, proportionality as a prohibition of deficient protection and the prohibition of retrogression (FACHARDO, 2014).

There was therefore a move away from the previous system, which only recognized two-parent families, based on the outdated patriarchal and hierarchical model of the 1973 Civil Code, where the family was made up of the children of a father and a mother, which led to discrimination against the children of single mothers. This break gave way to the recognition of the single-parent family, which consists of the children of one father or one mother (LACERDA, 2006).

As a result of this recognition of same-sex relationships as a family entity, cohabitants in stable unions began to seek their rights, and some controversies arose in the legal world. One of these is the unequal treatment that the Civil Code of 2002 fostered with regard to inheritance rights for the surviving spouse and partner (FREITAS, 2014).

Extraordinary Appeal No. 646.721, which was heard by Justice Marco Aurélio, was an appeal seeking a declaration that Article 1.790 of the Civil Code was unconstitutional, because it was applied to the specific case of succession of property to the surviving partner of a stable homosexual union that had lasted for 40 (forty) years. This was due to the different treatment given to spouses and partners by the Civil Code when dealing with succession:

Art. 1.829. Legitimate succession is granted in the following order:

I - to the descendants, in competition with the surviving spouse, unless the latter was married to the deceased under the universal communion regime, or under the compulsory separation of property regime (art. 1.640, sole paragraph); or if, under the partial communion regime, the author of the inheritance has left no private property;
II - to ascendants, in competition with the spouse;
III - the surviving spouse;
IV - to the collaterals (BRASIL, 2002).

The 2002 Civil Code honors the spouse in such a way that, in addition to being a sharecropper, they also become heirs, depending on the type of property regime adopted in the marriage. The treatment of cohabitants is quite different, as regulated by art. 1.790:

Art. 1.790. The partner will participate in the succession of the other, with regard to assets acquired onerously during the stable union, under the following conditions:
I - if they compete with common children, they shall be entitled to a share equivalent to that attributed to the child by law;
II - if they compete with descendants of the author of the inheritance alone, they will be entitled to half of what falls to each of them;
III - if he competes with other succession relatives, he will be entitled to one third of the inheritance;
IV - if there are no succession relatives, he/she will be entitled to the entire inheritance (BRASIL, 2002).

Therefore, under the Civil Code in force, the surviving partner would have to prove the acquisition of assets acquired during the stable union. If the assets were acquired before the stable union or free of charge, the residual partner will not participate in this share, being totally excluded from the inheritance (FIGUEIREDO; FIQUEIREDO, 2014). In addition, the partner would be entitled to a share equivalent to that attributed to the child when competing with the latter; being entitled to a third of the inheritance if competing with other succession relatives; and would inherit the whole only if there were no succession relatives, which would be unfair, given the extremely unequal treatment when it comes to succession arising from marriage (CARUZO, 2021). It is possible to observe that the provision in question does not benefit the partner when competing with the other heirs, if we compare it with the provisions alluding to the rights of the surviving spouse.

As a result, the partner is at a disadvantage in relation to the spouse, as it only deals with assets acquired in a costly manner and during the union, and the partner was not equated as a necessary heir, like the spouse, having to compete with the ascendants and descendants and being in third place in the order of hereditary vocation (NUNES, 2021).

It is clear that the stance of the 2002 civil code deprives the family formed through a stable union of its greatest asset, which is dignity, by giving it a hierarchically inferior position to marriage. This justifies the urgency for legislative changes to take place, and to bring to light the rights protected by the 1988 Federal Constitution for those who decide to unite through stable unions (DE ALMEIDA, 2020).

Article. 1, III, of the Major Law establishes the dignity of the human person as one of the foundations of the Republic, which aims to build a free, just and solidary society, and to promote the good of all, without prejudice to origin, race, sex, color, age and any other forms of discrimination (art. 3, I and IV), and it is equally true that when dealing with fundamental rights and guarantees, art. 5, VI, establishes that:

[...] freedom of conscience and belief are inviolable, the free exercise of religious cults is guaranteed and the protection of places of worship and their liturgies is guaranteed in the form of the law", with item VIII also stating that "no one shall be deprived of their rights on grounds of religious belief or philosophical or political conviction, unless they invoke them to exempt themselves from a legal obligation imposed on all and refuse to comply with an alternative provision established by law (BRASIL, 1988).

This apparent conflict arises between the principles listed above, highlighting the need for action by the public authorities as a way of guaranteeing and promoting the full and isonomic enjoyment of the rights proclaimed and guaranteed by the Magna Carta (DO BONFIM, 2011).

Art. 1.790, CC/2002 was thus challenged in court, through Extraordinary Appeal 646.721, and the Full Court of the Federal Supreme Court upheld the appeal and declared the unconstitutionality of this provision, on the grounds that it doesn't matter whether the family is made up of marriage or a stable family or union, whether they are made up of homosexual or heterosexual couples. The grounds for this decision were based on the concept of the family, making considerations in the light of the principle of the dignity of the human person. It used semantic, historical, teleological and systematic interpretation of equality between spouses and partners, as well as questioning and explaining the state's limits on family relations (CAROSSI, 2010).

In order to provide a basis for the judgment, which equated the inheritance regimes between spouses and partners in stable homosexual unions, the Federal Supreme Court demonstrated that the unequal treatment expressed in the current civil legislation violates the principles of human dignity and non-hierarchization between family entities; proportionality in its aspect of prohibition of deficient protection and prohibition of retrogression (BRASIL, 2017). In this sense, it was established that the regime of art. 1.829 of the CC/2002 should be applied in both cases of marriage and stable unions. However, taking into account the lawsuits and proceedings on this matter in progress in the country at the time of the judgment, with the aim of preserving legal certainty, the plenary of the Federal Supreme Court modulated the decision so that the established understanding was applied only to judicial inventories in which the final judgment of partition has not been passed and to extrajudicial partitions in which there has not yet been a public deed (BRASIL, 2017).

The purpose of this judgment was to equalize the rights recognized in marriage and stable unions, protecting the family in its various forms of constitution, according to art. 226 of the 1988 Constitution. With this, the following thesis was affirmed in general repercussion: "In the current constitutional system, it is unconstitutional to distinguish succession regimes between spouses and partners, and the regime established in art. 1,829 of the CC/2002 must be applied in both cases" (BRASIL, 2017). Thus, for all cases involving succession and involving a spouse or partner in succession, art. 1.829, CC/2002 must be applied.

However, even after the Federal Supreme Court defined that in the succession arising from a stable union, the surviving partner has the same rights as the surviving spouse, there have still been legal challenges in similar situations. This is the case of Special Appeal No. 1.904.374-DF (2020/0143768-8), which was heard by the judge of the Superior Court of Justice, Justice Nancy Andrighi. In the case of this Special Appeal, the appellants, children of the deceased, used all possible arguments to dismiss the claim of the surviving partner, including the argument that the judgment under appeal had relevant omissions regarding the existence of formal res judicata and the impossibility of the decision of the Federal Supreme Court having binding effects.

However, the report and the votes of the Justices of the Superior Court of Justice are based on the view that the law that is incompatible with the constitutional text suffers from the vice of nullity and that the consequence of this is that, as a rule, the declaration of unconstitutionality of a law has ex tunic effect (BRASIL, 2009). In addition, the Federal Supreme Court's aim is to protect trust and give predictability to relationships finalized under the old rules (i.e. in inventory actions concluded in which art. 1.790 of the CC/2002 was applied), which is why the thesis has been established that the declaration of unconstitutionality should only affect legal proceedings in which there has been no final and unappeasable partition judgment (ANDRIGHI, 2021).

For this reason, the report by the Superior Court of Justice judge and the vote by the other judges on that panel followed the reasoning of the Supreme Court, which ruled that judicial decisions can be modified according to the convictions of the judge in the specific case, which may be the case in Extraordinary Appeal 646.721.

Therefore, the absence of a specific law aimed at equalizing succession between spouses and surviving partners will still cause discrepancies and damage to families formed through stable unions.

III. Final considerations

The central theme of this article was succession rights in stable unions, covering the evolution of the Brazilian legal system from the Civil Code of 1916 to the general repercussion of Extraordinary Appeal 646.721. Thus, in order to achieve the objectives proposed for the research, it was necessary to make a chronological study of the Civil Code of 1916; Law no. 8971/94, which regulated the right of partners to maintenance and succession; Law no. 9.278/96, which regulated § 3, of art. 226, CF/88; the Federal Constitution, the Civil Code of 2002; in addition to the doctrine and jurisprudence of the Federal Supreme Court and the jurisprudence of the Superior Court of Justice.

During the research and production of the text, it was necessary to bring in some concepts based on the change and evolution of society's customs. This evolution was recognized through the analysis of legislation, as the legislator's intention changed when dealing with cases of succession. While in the Civil Code of 1916, stable unions were not even recognized, the legislator of the Civil Code of 2002 mistakenly demonstrated the differences between succession rights for spouses and partners.

In its role as guardian of the Federal Constitution, the Federal Supreme Court played a very important role at two moments. The first was when it ruled on ADI 4277 and ADPF 132, when it ruled out the hierarchy or difference in legal quality between marriage and stable unions, as well as applying the same rules and consequences to same-sex unions as heterosexual stable unions. The second moment was when the Supreme Court upheld Extraordinary Appeal 646.721 and equated spouses and partners for inheritance purposes, ruling out the application of art. 1.790 of the current civil legislation on the grounds that it is unconstitutional. As a result, there

was a general repercussion ruling that art. 1.829 of the current Civil Code should be applied to inheritance regimes, regardless of whether it is a marriage or a stable union, with the exception of judicial inventories in which there has been no final and unappealable judgment of partition and extrajudicial partitions in which there has not yet been a public deed.

In concluding this research, it can be seen that there has been progress in gaining equal rights for the partner in relation to the spouse. However, it is important to note that this progress was achieved through the courts. It is assumed that the ordinary legislator has not matured the idea of equality between stable unions and marriage, even though Article 226 of our 1988 Magna Carta so proposes.

This legislative omission, even in the face of the current scenario, demonstrates that stable unions can still be taboo in our society and that the issue must be tackled more thoroughly in order to understand whether society recognizes stable unions, given that the partner's situation with regard to succession is too fragile, as the jurisprudential understanding can be changed at any time.

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