

# THE “SHAKESPEAREAN ROSE” BLOSSOMS DOWN THE EQUATOR: *REFLECTIONS UPON THE IMPACT OF BRAZILIAN SUPREME COURT’S DECISION RECOGNIZING THE CONSTITUTIONALITY OF SAME-SEX CIVIL UNIONS*

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**Abstract:** In May 5th 2011, Brazilian Supreme Court (Supremo Tribunal Federal) decided unanimously that Brazilian Constitution allows civil unions between two people regardless their gender, thus admitting same-sex partnerships as a legitimate type of family entity entitled to special protection provided by article 226 of current Brazilian Political Charter. However, the repercussions of such decision have yet to be fully realized, particularly because of paragraph 3 of the same article, which explicitly determines that the law shall facilitate the conversion of a civil union into marriage. Hence, the discussion about same-sex civil marriage has regained its momentum in Brazilian legal scenario, whether in legislative or judiciary arenas. This article means to demonstrate how the Brazilian Supreme Court has already created a legal substrate towards isonomic treatment for both different-sex and same-sex civil unions, which would make it quite illogical to admit hierarchical rankings between them.

**Keywords:** Legal recognition of same-sex civil unions – Same-sex marriage in Brazil – ADI 4.277.

## 1. INTRODUCTION

In the constitutional history of Brazil, there have been seven political charters prior to the current one<sup>1</sup> promulgated in October

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<sup>1</sup> Brazil’s first Constitution of Brazil dates of 1824 and is the only one of the Imperial age (1822-1889).

5th, 1988. Since the first Republican Constitution of 1891 it has been explicitly established that (indissoluble) marriage was the exclusively legitimate way to start a family (art. 72, paragraph 4), which has been followed by the charters of 1934 (art. 144), 1937 (art. 124), 1946 (art.163), 1967 (art. 167) and 1969 (art.175).

However, as opposed to the provisions mentioned above, the 1988 Constitution determines the State obligation to protect the family entities and its members, thus ending the period in which marriage was recognized as the sole legitimate foundation of family<sup>2</sup>:

*Article 226. The family, which is the foundation of society, shall enjoy special protection from the state.*

*Paragraph 1. Marriage is civil and the marriage ceremony is free of charge.*

*Paragraph 2. Religious marriage has civil effects, in accordance with the law.*

*Paragraph 3. For purposes of protection by the state, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.*

*Paragraph 4. The community formed by either parent and their descendants is also considered as a family entity.*

*paragraph 5. The rights and the duties of marital society shall be exercised equally by the man and the woman.*

*paragraph 6. Civil marriage may be dissolved by divorce.*

*Paragraph 7. Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide educational and scientific resources for the exercise of this right, any coercion by official or private agencies being forbidden.*

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<sup>2</sup> Official English version provided by Brazilian House of Deputies (Camara dos Deputados), available at: <http://bd.camara.gov.br/bd/handle/bdcamara/1344>.

*Paragraph 8. The state shall ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family.*

Moreover, article 226 has specifically indicated the family as the institutional basis of Brazilian society, meaning to extend State protection to other sociological arrangements not based on traditional wedlock such as the civil union and the single-parent families, which have both become legitimate basis for family entities, along with marriage.

Nonetheless, there were still other household models that remained invisible to the Brazilian constitutional establishment, such as the same-sex partnerships. Thus, in order to understand the reasons indicated in the Brazilian Supreme Court’s decision of May 5th 2011, it is necessary to comprehend the developments of Brazilian infra-constitutional family law.

## **2. A FEW NOTES ON THE CIVIL UNION UNDER BRAZILIAN LAW**

Until recently, following the trend of other countries belonging to the Civil Law tradition, the Brazilian legal standard of family entity –worthy of State protection – was exclusively formalistic and matrimonial centered, relegating to marginality any relationships out of a valid wedlock<sup>3</sup>.

In order to strengthen the laicism of the recently inaugurated Republic<sup>4</sup>, the Decree 181 of January 24th 1890, regulated the institution of civil marriage, thus establishing its exclusivity as the source of legitimate family, as well as its indissolubility (art.93)<sup>5</sup>.

It must be also noted that this Decree has intentionally not recognized legal effects to religious ceremonies which were traditionally the majority of the weddings celebrated in Brazil, especially during the Empire (1822-1889). Consequentially, a great number of couples who have only been united solely by religious authorities were deliberately ignored by legal establishment.

For such reason, couples frequently took part on two different wedding ceremonies (one civil and another religious) in order to obtain

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3 BARBOZA, Heloisa Helena. O direito de família brasileiro no final do século XX. In: BARRETO, Vicente (org.) *A nova família: Problemas e perspectivas*. Rio de Janeiro: Renovar, 1997, p. 87-112.

4 Proclaimed in November 15th, 1889.

5 RINGROSE, Hyacinthe (editor). *Marriage and divorce laws of the world*. Londres: Draper Company, 1911, p.223-226.

the legal protection, and to fulfill the desire of having religious blessings bestowed upon that union, a situation that would only be remedied years later with Law 1.110 of May 23rd 1950, which specifically regulated the recognition of civil effects to religious marriages including those realized prior of such law (arts. 4 and 5)<sup>6</sup>.

Years later, the original wording of the 1916 Civil Code (Law 3.071 of January 1st, 1916) contained several dispositions that imposed serious hindrances to a wider recognition of other kind of family groups besides marriage such as: the legal status of married women, who had their legal capability downgraded, thus needing assistance of their husbands in all legal matters (art. 6, II); the legitimacy of filiation depending on the previous existence of a valid wedlock, which resulted in hierarchical rankings between children of the same parent (arts. 337, 338, etc...), the patriarchal model of decision-making in the family group, electing the father as the “family chief” whose authority should be respected by the wife and their offspring (art. 233), and the indissolubility of the wedlock (art. 315, sole paragraph).

The 1916 Civil Code also contained several regulations that explicitly repressed any kind of extra-matrimonial relationships as the prohibition of the husband of donating any asset from his personal patrimony to his female love affair, also known as his “accomplice” (art. 1.177) or even designating his concubine as a testamentary heiress (art. 1719, III).

These restrictions were reinforced by the prerogative of the wife to reclaim any asset donated or legated by her husband to the concubine (art. 248, IV), and even barred the recognition of out-of-wedlock offspring if the child was conceived during concubinage (art. 363, I).

However, over the next decades there have been profound changes in Brazilian family law even prior to 1988 Constitution, promoting the evolution of once hermetic standards of family legitimacy such as: the possibility of recognition of out-of-wedlock offspring (Law 883 of October 21st, 1949), the Married Woman Act (Law 4.121 of August 27th, 1962) which restated the ruling of several articles in order to put an end to the legal subordination of the wives towards their husbands, and the implementation of divorce (Law 6.515 of December 26th, 1977).

It must also be noted that in reaction to several cases of outrageous unfairness created by previous legislation, doctrine and jurisprudence of Brazilian Family Law have construed different meanings for the term “concubinage”.

An *impure* concubinage consisted of a marital relationship marked by the existence of marriage impediments, which clearly hurt

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6 PEREIRA, Rodrigo da Cunha. *Concubinato e União Estável*. 8th edition. São Paulo: Saraiva, 2012, p. 33.).

the moral principles of society. Thus, in such cases, the circumstantial restrictions of concubinage should be fully enforced. In practice, any relationship described in the list of article 183 would be an impure concubinage such as the cases of sexual affairs between ascendants and descendants, brother and sister, the adopter with the adoptee and their respective offspring, etc....

In contrast, despite the lack of a formal wedding ceremony, if the relationship carried no impediment to marriage, it should be considered a *pure* concubinage, also known as common-law marriage, and should not fall into the legal restrictions previously mentioned<sup>7</sup>.

Hence, if a married man kept a clandestine amorous relationship with another woman while still cohabiting with his wife, such situation was to be recognized as an impure concubinage, and more specifically, an *adulterine concubinage*.

On the other hand, if a single woman commenced a stable, exclusive and publically known relationship with a widower, this situation was to be classified as pure concubinage (common-law marriage).

The last example could have some effects recognized by the legal order, mostly in terms of property rights, because the former Constitutional Charters have chosen marriage as the only legitimate way for a family. In fact, Brazilian Supreme Court had repeatedly ruled that, although these unions did not belong to Family Law, partners have joined economical efforts to create an informal partnership, but only because there weren't legal impediments for marriage between them<sup>8</sup>.

It must be noted that there have always been legal scholars harshly criticizing the indissolubility of marriage under Brazilian law, not only because divorce should be considered a fundamental freedom of the individuals, it also implied in the marginalization of innumerable people, whose relationships were barred from legal recognition and protection because one or both of partners have been married to someone else, even though these people were judicially or *de facto* separated for a reasonable period of time and had already constituted solid meaningful relationships<sup>9</sup>.

Once divorce was allowed in Brazil, authors have also defended

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7 NOGUEIRA DA GAMA, Guilherme. *O companheirismo: uma espécie de família*. São Paulo: Revista dos Tribunais, 2001.

8 Supremo Tribunal Federal. Súmula nº 380, May 5th, 1964. In terms of social security, for instance, since 1945 it became possible for a man to designate his female partner as a beneficiary, granted that they both were not married. In 1960, civil partners could only be beneficiaries in the lack of spouses, but in 1973 legislation has been once again altered, granting the right to the partner to be designated even in addition to spouses.

9 DIAS, Adahyl Lourenço. *A concubina e o direito brasileiro*. Rio de Janeiro: Freitas Bastos, 1962, p. 60.

the recognition of civil unions (pure concubinage) when the married partner was legally separated, or didn't cohabit with his or her former spouse for a certain amount of time, cases in which the conjugal society was legally dissolved, ceasing the mutual obligations between husband and wife.

In the 1988 Constitution civil union was promoted to another venue of family entity, which does not compete, but rather coexists in perfect harmony with marriage, and for such reasons it is worth the same kind of legal protection<sup>10</sup>.

Attending to the rule of paragraph 3 of article 226 of the 1988 Charter, Law 8.971 of December 29th 1994 effectively granted alimony and property rights to civil partners, which was later complimented by Law 9.278 of May 10th 1996, establishing reciprocal rights and duties between partners along with a property regime, and the regulation of the proceedings to perform its conversion into marriage.

Since its entry into force (on January 11th, 2003) the current Brazilian Civil Code (Law 10.406 of January 10th, 2002) also regulates civil union on article 1723 in the following terms:

*It is recognized as family entity the stable union between one man and one woman, based on a publically known, stable and lasting relationship whose goal is the constitution of a family.*

*Paragraph 1. The stable union won't be recognized in the presence of the impediments of art. 1521 with the sole exception of number VI, if the married person is judicially or factually separated.*

*Paragraph 2. The cases described on article 1523 do not impede the recognition of the stable union.*

One should note that the literal wording of the new Civil Code, following the parameters of the art. 226 paragraph 3 of the 1988 Constitution, establishes a strong parallelism between the institutions of marriage and civil union, and excludes from the latter, those relationships between people who, according to Brazilian Civil legislation (article 1521 of the current Code) cannot get married to each other.

This was the way chosen by lawmakers to ensure that stable unions wouldn't be used as "second class" marriages by those legally impeded to marry. However, it must be clarified that married people, whose conjugal society has been dissolved by legal or de facto separation

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10 OLIVEIRA, José Lamartine Correia de; MUNIZ, Francisco José Ferreira. *Curso de direito de família*. Curitiba: Juruá, 2002, p. 78.

are also allowed to constitute a civil union, which can be registered for the comfort of the partners or even directly recognized by a judge.

As a matter of fact, the most controversial aspect of a civil union comes exactly from the second part of article 226 paragraph 3 of the 1988 Constitution (repeated in article 1726 of the 2002 Civil Code). What would be the exact meaning of the clause through which “*the conversion of a civil union into marriage should be facilitated by law*”? Some believe that it should be interpreted in the sense that the Constitution has imposed hierarchical differences between marriage and civil law.

In any case, it must be considered that both of them are family entities, they must receive equal state protection, and for such reasons legal scholars<sup>11</sup> and jurisprudence still debate over the alleged equivalency between marriage and civil union in areas such as property regime, rights to succession and social assistance benefits<sup>12</sup>.

### **3. LEGAL TREATMENT OF SAME-SEX RELATIONSHIPS IN BRAZIL BEFORE 2011**

It must also be noted that even prior to the decision of Supreme Court in 2011, several judicial precedents have recognized certain legal effects to same-sex relationships, especially in property rights<sup>13</sup>, succession<sup>14</sup> and social assistance areas<sup>15</sup>.

However, doctrinal inputs displayed different trends on the admissibility of family entities based on a stable union by two people of the same gender under Brazilian Political Charter of 1988, varying from total disregard to full recognition.

Those who refused the constitutional admissibility of family status to such unions mainly defended that civil unions could not be recognized in those cases where partners were legally prohibited to get married, according to paragraph 1 of art. 1723 of the Brazilian

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11 GAMA, Guilherme Calmon Nogueira da. *Direito Civil: Família*. São Paulo: Atlas, 2008, p. 132-145.

12 STJ, RESP 1117563/SP, leading vote by Judge NANCY ANDRIGHI, ruled on December 17th, 2009, published on April 6th, 2010.

13 GAMA, Guilherme Calmon Nogueira da. *A união civil entre pessoas do mesmo sexo*. Revista Trimestral de Direito Civil, v. 2 (April/June 2000), 2000, p.168-177. See also, DINIZ, Maria Helena. *Curso de Direito Civil Brasileiro: Direito de Família*. São Paulo: Saraiva, 2006, 21 ed., p. 368.

14 In 2003, a decision from Rio Grande do Sul has conferred inheritance rights to the same-sex surviving partner of a man. (TJ/RJ 4ª Câmara Cível, Embargos Infringentes 7000.3967676, Leading vote by: Des. Maria Berenice Dias. Judged in May 9th, 2003)

15 In 2007, the Federal High Court of Second Region has granted mutual social assistance rights to same-sex partners. (TRF 2ª Região, AC 388739, 7ª Turma, Leading vote by: Des. Sérgio Schwaitzer. Judged in September 25th, 2007.).



Civil Code. It must be pointed that gender equality is not listed among the causes of marriage prohibition (art. 1521). Nonetheless, there are scholars supporting the theory in which the institute of marriage only exists and can only be legally performed between one man and one woman<sup>16</sup>.

Even among those defending that no prohibition of same-sex civil unions could be inferred from the Constitution, there seemed to be a slight divergence on the matter of the necessity of complimentary legislation to regulate article 223 of the 1988 Charter.

One group of scholars supported immediate and full recognition of same-sex relationships as the family entity of stable union, alleging that art. 223 should not be considered isolated, but rather in the context of the constitutional system, which prohibited any kind of discrimination<sup>17</sup>

Meanwhile, there were those understanding that, albeit no prohibition could be implied from art. 223, same-sex relationships could only be recognized as civil unions through legislative or judicial measures<sup>18</sup>.

For such reasons, there was definitely no stability recognized to same-sexual relationships, which meant that protection on the basis of family entities was far from being consensual within Brazilian family law framework:

*Taking all of these articles together, it appears that the Brazilian Constitution establishes an unclear position on this issue: while it does not explicitly recognize same-sex partnerships as either a family or a marriage as it does for heterosexual relationships, it also does not explicitly forbid their recognition. Moreover, it also includes such strong references to equality and non-discrimination that some might argue it is unconstitutional for the state*

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16 GONÇALVES, Carlos Roberto. *Direito Civil Brasileiro: Direito de Família*. São Paulo: Saraiva, 2007, p. 544.

17 DIAS, Maria Berenice. Uniãoes homoafetivas: uma realidade que o Brasil insiste em não ver. Available at [www.mariaberenicedias.com.br](http://www.mariaberenicedias.com.br). See also, FACHIN, Luiz Edson. *Elementos Críticos do Direito de Família*. Rio de Janeiro: Renovar, 1999; FONTANELLA, Patrícia. União homossexual no direito brasileiro: enfoque a partir do garantismo jurídico. Florianópolis: OAB/SC Editora, 2006; FUGIE, Érika Harumi. *A União homossexual e a Constituição Federal: inconstitucionalidade do art. 226, §3º da CF?*. Revista Brasileira de Direito de Família nº 15, mar./may, 2002.

18 MORAES, Maria Celina Bodin de. A união entre pessoas do mesmo sexo: uma análise sob a perspectiva civil-constitucional. *Revista Trimestral de Direito Civil*. v.1, (january/march 2000), 2000, p. 109-112. See also GAMA, Guilherme Calmon Nogueira da. *Direito Civil: Família*. São Paulo: Atlas, 2008, p. 155-162.



*to treat same-sex couples differently. Either way, supporters and opponents of same-sex partnership recognition both have strong constitutional arguments supporting their positions (...) The new Brazilian Civil Code is very progressive in that it grants several rights formerly reserved only to married couples to those who can prove to the state that they are living in a “stable union” with another person. As a result, opposite couples need no longer get married to enjoy many of the benefits that come along with marriage. There is a large debate over whether same-sex couples can declare themselves as a stable union and receive the same rights and privileges. (...) Like the constitution, both of these articles discuss unions and marriage with allusions to one man and woman, but it does not say this is the only possible configuration, nor does it specifically exclude same-sex couples. Because this exclusionary statement is missing in all of these places, it is possible to make the argument that the constitutional principles of equality articulated in Articles 3 and 5 might take precedence. Either way, there is a large gap in federal law on this issue<sup>19</sup>*

In such context of uncertainty, two original suits (ADPF 178 and ADPF 132) had been presented to the Supreme Court and were received by the Court as a single one, in which it should be addressed the admissibility of same-sex civil unions under article 223 of the 1988 Constitution as well as the correct interpretation of article 1723 of the Civil Code.

#### **4. THE DECISION ON ADI 4.277**

On May 5th, 2011, the Supreme Court of Brazil – Supremo Tribunal Federal – rendered its unanimous decision on the matter of the constitutional admissibility of the recognition of same-sex partnerships as the family entity of civil (or stable) unions<sup>20</sup>.

The leading vote, conducted by Justice Carlos Ayres Britto has considered that, despite the wording of article 226, paragraph 3 of the

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19 SCHULENBERG, Shawn. *Policy stability without policy: the battle over same-sex partnership recognition in Brazil*, p.7-9. <http://ssrn.com/abstract=1451907>.

20 STF, ADI 4277. Leading vote by Justice Carlos AYRES BRITTO (p. 625-656), Full Court, judged in May 5th, 2011, published in October 14th, 2011. Full text in Portuguese available at [www.stf.jus.br/portal/jurisprudencia](http://www.stf.jus.br/portal/jurisprudencia)

Brazilian Constitution (describing civil union between one man and one woman), its ruling should be considered with regards of fundamental principles such as human dignity (article 1, III), equality in law (article 5, I) and the prohibition of any kind of discrimination on the access of rights (article 5, VIII).

According to the leading opinion, as the basis of Brazilian society, the terms family and family entity cannot be dissociated, and their legal meaning has been opened to several institutions other than marriage, and it should be noticed that such entities are not solely the ones described in the paragraphs of article 226.

Hence, in order to give full effect to the constitutional principles of equality before the law, and the dignity of the individuals, same-sex relationships have to be immediately recognized as stable unions if the other elements (mutual commitment, public acknowledgement and *affectio maritalis*) are fulfilled.

The leading vote of Supreme Court has ruled that the interpretation of article 1723 of the Civil Code which best attends the principles of the current Brazilian Constitution is the one allowing the recognition and registration of same-sex partnerships as civil unions, worthy of the exact same legal protection under Brazilian legal order<sup>21</sup>.

Five other Justices of the Brazilian Supreme Court have joined the leading vote, which construed the major opinion under which civil unions between two partners of the same gender cannot be legally discriminated from those formed by one man and one woman.

Justice Fux fully agreed with the vote of Justice Ayres Britto, and also highlighted in his own vote that for decades the rule of law has followed straight standards (heteronormativity) which kept homosexuality in marginality for far too long and should no longer remain invisible to the legal establishment<sup>22</sup>.

Justice Carmen Lucia's vote emphasized that same-sex partnerships cannot be treated as second class unions by the legal order, which would violate the most fundamental principles of the Brazilian juridical system<sup>23</sup>.

According to Justice Joaquim Barbosa's vote although there have been same-sex partnerships in Brazil during previous systems, the current Constitution invited all individuals to join civil and fundamental rights. Following Aaron Barak's teachings, Justice Barbosa understands that it is time to bind the gap between law and society with effective means to promote full enjoyment of legal protection for same-sex civil unions<sup>24</sup>.

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21 STF, ADI 4.277, October 14th, 2011. See Justice Ayres Britto's vote especially at page 656.

22 STF, ADI 4.277, October 14th, 2011. See Justice Fux' vote at page 690-692.

23 STF, ADI 4.277, October 14th, 2011. See Justice Carmen Lucia's vote at page 703-704.

24 STF, ADI 4.277, October 14th, 2011. See Justice Barbosa's vote at page 726-728.

Justice Marco Aurélio Mello’s vote establishes the necessity of protection of homosexuals from discrimination along the lines of human dignity and equality before the Law, and he defends that a literal interpretation of article 1723 does not attend such Constitutional purposes. Hence, those stable, committed, publically known same-sex partnerships are to be fully recognized as civil unions for all legal purposes<sup>25</sup>.

In fact, Justice Celso de Mello emphatically invoked the Principles of Yogyakarta in his vote to enforce the obligation of a democratic State to provide for non-discriminatory access to the right of founding and enjoying family and familiar relationships, and restated that it is only through judicial proactivity that the legal protection from minorities is achievable<sup>26</sup>.

However, Justices Cesar Peluzzo, Gilmar Mendes and Ricardo Lewandowsky have dissented of the leading vote on the matter of full equality of civil unions between men and women and those between same-sex partners.

According to Justice Mendes, a same-sex civil union is another kind of family entity, which can be immediately recognized and protected, but not with basis on article 226 (3) of the Constitution (neither article 1723 of Civil Code). He establishes that full extension of different-sex civil union to same-sex civil unions should be properly enforced only by legislative measures<sup>27</sup>.

Justice Lewandowsky considered that although constitutional provision for civil unions between one man and one woman does not eliminate the possibility of recognizing same-sex stable unions – which derives from principles such as protection of human dignity, the prohibition of any ground of legal discrimination and the obligation for protection of family entity – the rules on different-sex civil unions are not immediately applicable to same-sex partnerships<sup>28</sup>.

Finally, Justice Peluzzo, who functioned as Chief Justice at the time of the judgment, followed the same arguments, admitting that same-sex partnerships could be recognized and registered as civil unions with means to legal protection, but not automatically with the same effects already established for different-sex civil unions<sup>29</sup>.

As seen above, dissenting opinions agreed that the rules

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25 STF, ADI 4.277, October 14th, 2011. See Justice Marco Aurélio Mello’s vote at page 820-822.

26 STF, ADI 4.277, October 14th, 2011. See Justice Celso de Mello’s vote and especially at page 866-872.

27 STF, ADI 4.277, October 14th, 2011. See Justice Mendes’ vote especially pages 763 to 765.

28 STF, ADI 4.277, October 14th, 2011. See Justice Lewandowski’s vote especially pages 713-714.

29 STF, ADI 4.277, October 14th, 2011. See (Chief) Justice Peluzzo’s vote especially page 874.

pertinent to different sex civil unions cannot be automatically invoked without necessary legal instruments determining such equalization. According to such minority, same-sex civil unions are not yet possible to be converted in marriage upon initiative of the partners such as stated in the case of different-sex couples, according to the second part of article 226, paragraph 3.

## **5. DIFFERENT INTERPRETATIONS AND REPERCUSSIONS**

As a matter of fact, the decision of Brazilian Supreme Court has been unanimous about the immediate admissibility of same-sex civil unions according to Brazilian Constitutional Law. However, the afore mentioned dissention about the applicability of the second part of article 226, paragraph 3 of the Constitution to same-sex stable unions has also opened a new chapter on the debate of same-sex civil marriage under Brazilian law.

Firstly, it must also be noted that article 22, I of Brazilian Constitution determines that legislation about substantial and procedural civil law is exclusively federal. However, given the current procedural rules, judges and courts of Member States hold the competence to decide on family matters, including the issuing of marriage licenses and the registration of civil unions.

Thus, a few days after the public announcement of the decision on ADI 4.277, the State Court of Justice of Rio de Janeiro has promoted a public collective ceremony to join hundreds of same-sex couples in civil unions<sup>30</sup>. On the other hand, on June 27th, 2011, a state judge of São Paulo ruled in favor of the conversion of an existing civil union between two men in marriage<sup>31</sup>.

Nonetheless, a state judge from Rio Grande do Sul has denied the issuing of a marriage license for two women, under the argument that decision of the Supreme Court did not establish same-sex civil marriage in Brazilian legal system, a decision which has been confirmed by the Court of Appeals on that state, but the High Court of Justice (Superior Tribunal de Justiça) – which is a federal court responsible for harmonization of the enforcement of federal legislation within the member states – has reverted the ruling by majority, considering that upon ADI 4.277, the interpretation of the Civil Code which best suited the Constitution could not exclude the possibility of same-sex marriages in Brazilian system without legislative determination<sup>32</sup>.

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30 <http://veja.abril.com.br/noticia/brasil/casamento-gay-reune-600-pessoas-no-rio>.

31 <http://noticias.uol.com.br/cotidiano/2011/06/28/primeiro-casamento-civil-gay-do-brasil-acontece-hoje-em-jacarei-sp.jhtm>. Acesso em 18/01/2012.

32 STJ, Recurso Especial nº 1.187.738/RS, judged on October 25th, 2011. Available at [www.stj.jus.br](http://www.stj.jus.br)

The admissibility of same-sex marriage in Brazil, through conversion of preexisting civil unions or directly (through the issuing of licenses to same-sex couples) has once again risen in the juridical and political arena, especially because the different scenarios verified in member states throughout Brazilian territory.

The Judiciary Power of Alagoas was the first to address the matter, issuing a regulation which allowed same-sex couples to obtain marriage licenses, although the proceedings in those cases should necessarily be confirmed by a judge. In comparison, when dealing with different-sex couples, such confirmation is only necessary if any objection has been made by Public Prosecutor or a third party<sup>33</sup>.

Meanwhile, some other member-states have enacted their own provisions about the same matter, but decided to take a further step towards full equality. Recent reforms on the states of Sergipe<sup>34</sup>, Espírito Santo<sup>35</sup>, Bahia<sup>36</sup>, Distrito Federal<sup>37</sup>, Piauí<sup>38</sup>, São Paulo<sup>39</sup>, Ceará<sup>40</sup>, Paraná<sup>41</sup>, Mato Grosso do Sul<sup>42</sup> and Rio de Janeiro<sup>43</sup> have not only admitted the conversion of preexisting same-sex civil unions into marriages, but also determined that same-sex couples can be granted marriage licenses, provided they don't fall under the cases of legal impediments (articles 1.521 and 1523 of the Civil Code).

Despite such recent advances, the majority of Brazilian member-states still haven't adopted uniform rules on this matter. In fact, even after the decision of the High Court of Justice which allowed the issuing of marriage licenses for same-sex couples, one state judge of Rio de Janeiro has ruled against the conversion of a preexisting civil union into marriage because the partners had the same gender.

According to this magistrate, there would be two different systems of civil unions in Brazilian law: one for different-sex couples

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33 <http://www.tjal.jus.br/corregedoria/provimentos/fdecf43ea5a3804e37b479be1b6a01e5.pdf>.

34 Regulation nº 06/2012, articles 1st. (registration of same-sex civil unions and its conversion into marriage) and 3rd(marriage license proceedings for same-sex couples). <http://www.tjse.jus.br/corregedoria/documentos/publicacoes/provimentos/2012/provimento-062012.pdf>.

35 [http://www.cgj.es.gov.br/arquivos/normasinternas/oficioscirculares/2012/Oficio\\_Circular\\_59-2012.pdf](http://www.cgj.es.gov.br/arquivos/normasinternas/oficioscirculares/2012/Oficio_Circular_59-2012.pdf).

36 Regulation CGJ/CCI nº 12/2012. Available at [http://www5.tjba.jus.br/corregedoria/images/pdf/provimento\\_conjunto\\_12\\_2012.pdf](http://www5.tjba.jus.br/corregedoria/images/pdf/provimento_conjunto_12_2012.pdf)

37 Updated on February, 19th, 2013.

38 Regulation 24/2012 from Corregedoria Geral de Justiça do Estado do Piauí, published on December 14th, 2012. Available at <http://www.tjpi.jus.br/corregedoria/uploads/atos/448.pdf>.

39 Regulation CGJ Article 88. “The rules of this section shall be applied to the issuing of marriage license or the conversion into marriage of same-sex couples.”

40 Regulation CGJ nº 02/2013.

41 Resolution 2/2013, March 26th, 2013.

42 Regulation 80/2013, April 2nd, 2013.

43 Regulation CGJ 25/2013, April 18th, 2013.

(which is convertible into marriage), and another for same-sex couples (which is NOT convertible into marriage)<sup>44</sup>.

However, on April 18th 2013, the Court of Justice of Rio de Janeiro enforced a new system of notarial service rules for the issuing of marriage licenses, through which same-sex couples can be directly authorized for marriage, once the judge confirms that such individuals do not fall under legal impediments. This new provision could be interpreted towards the end of controversy over the conversion of same-sex civil unions into marriage on that Member State of Brazil.

Notwithstanding with more conservative orientations that want to legally prevent same-sex civil marriages, there are still important legal activists and scholars defending the possibility of marriage for same-sex couples like the Council of Federal Judges. This entity has approved on its 5th Civil Law Journey (2011) the Statement # 526, consolidating the interpretation of article 1.726 of the Civil Code which allows the conversion of same-sex civil unions into marriages, as long as they meet the legal requirements to be granted marriage licenses<sup>45</sup>.

On May 14th, 2013, Chief Justice Joaquim Barbosa, who also holds the constitutional role of President of the National Council of Justice (*Conselho Nacional de Justiça*) adopted Regulation nº 175 which thoroughly recognizes the right to civil marriage to same-sex couples by prohibiting competent authorities to refuse the issuing of marriage licenses neither the conversion of preexisting civil unions into marriage<sup>46</sup>.

Chief Justice Barbosa fundamentals such Regulation on the grounds of the decision of Supreme Court on ADI 4.277, as well as the decision of the High Court of Justice (STJ) on RESP 1183378/RS (which admitted the issuing of marriage license to same-sex couples) and the attribution of National Council of Justice which functions as an organ with to regulate administrative and financial matters of the Judiciary Branch, according to Article 103- B, paragraph 4 of the current Constitution<sup>47</sup>.

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44<http://veja.abril.com.br/noticia/brasil/juiz-do-rio-nega-a-casal-gay-a-conversao-da-uniao-em-casamento-civil>.

45 Statement CJP # 526 “Art. 1.726: The conversion of a same-sex civil union into marriage is possible, provided the requirements for the issuing of marriage license”

46 <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/resolucoespresidencia/24675-resolucao-n-175-de-14-de-maio-de-2013>

47 It is incumbent upon the council to control the administrative and financial operation of the Judicial Branch and the proper discharge of official duties by judges, and it shall, in addition to other duties that the Statute of the Judicature may confer upon it: I – ensure that the Judicial branch is autonomous and that the statute of the Judicature is complied with, and it may issue regulatory acts within its jurisdiction, or recommend measures; II – ensure that article 37 is complied with, and examine, ex-officio or upon request, the legality of administrative acts



On May 21st, the Social Christian Party (*Partido Social Cristão*) has filed for an injunction (*Mandado de Segurança*) to suspend the effects of Regulation nº 175, stating that such prohibition extrapolates the constitutional competence of CNJ, bypassing the necessary legislative process and for such reasons it should be considered unconstitutional.

However, on May 28th, Justice Luiz Fux has denied the requested order and dismissed the case, on the grounds that not only has the petitioner clearly not chosen the proper way to address its claim, the Supreme Court has already recognized regulatory attribution of CNJ, which is not the same of usurping the competence of Legislative Branch<sup>48</sup>.

Other legal activism groups militate in favor of profound implications of the Supreme Court’s decision in Brazilian legal order, and for such reason it would be actually necessary to address not just the idea of civil marriage for same-sex couples, but most important is to guarantee that all kinds of legal discrimination on the grounds of sexual orientation are eliminated.

In fact, the Brazilian Bar Association (*Ordem dos Advogados do Brasil*) has developed the “*Foreproject of The Brazilian Sexual*

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carried out by members or bodies of the Judicial Branch, and it may revoke or review them, or stipulate a deadline for the adoption of the necessary measures to achieve due execution of the law, without prejudice to the powers of the Federal Audit Court; Republic of Brazil III – receive and examine complaints against members or bodies of the Judicial Branch, including against its ancillary services, clerical offices, and bodies in charge of notary and registration services which operate by virtue of Government delegation or have been made official, without prejudice to the courts’ disciplinary competence and their power to correct administrative acts, and it may order that pending disciplinary proceedings be forwarded to the national council of Justice, determine the removal, placement on paid availability, or retirement with compensation or pension in proportion to the length of service, and enforce other administrative sanctions, full defense being ensured; IV – present a formal charge to the public prosecution, in the case of crime against public administration or abuse of authority; V – review, ex-officio or upon request, disciplinary proceedings against judges and members of courts tried in the preceding twelve months; VI – prepare a twice-a-year statistical report on proceedings and judgements rendered per unit of the Federation in the various bodies of the Judicial Branch; VII– prepare a yearly report, including the measures it deems necessary, on the state of the Judicial Branch in the Country and on the Council’s activities, which report must be an integral part of a message to be forwarded by the chief Justice of the Supreme Federal Court to the national congress upon the opening of the legislative session.

48 “[...] Ex positis , indefiro a inicial, extinguindo o processo sem resolução de mérito, haja vista inadequação da via eleita. Ad argumentandum tantum , não fosse a preliminar ora acolhida, também não vislumbro qualquer ofensa a direito líquido e certo dos membros ou filiados do Impetrante, ante o reconhecimento do poder normativo do Conselho Nacional de Justiça, nos autos da ADC nº 12. Julgo predicado o pedido de ingresso no feito, na qualidade de amici curiae , formulado pelo Partido Socialismo e Liberdade (PSOL) e pela Associação dos Registradores de Pessoas Naturais do Estado do Rio de Janeiro (ARPEN/RJ).” STF, Mandado de Segurança nº 32077. Judged on May 28th, 2013, decision of Justice Luiz Fux. Available at [www.stf.jus.br](http://www.stf.jus.br)



*Diversity Act*”, a highly detailed bill which investigates several areas of Brazilian law (such as civil, criminal, employment, administrative, social assistance areas) proposing punctual changes that will enforce full equality before law to all individuals, regardless their sexual orientation, including a proposal for Constitution Amendment to introduce gender neutrality rules for marriages and civil unions<sup>49</sup>.

## **6. THE SUPREME COURT AND THE SHAKESPEAREAN ROSE**

In the second scene of the Second Act of William Shakespeare’s most famous tragedy, Juliet challenges her beloved Romeo to ponder about the meaning of customs and traditions by asking “*What’s in a name? That which we call a rose by any other name would smell as sweet.*”<sup>50</sup>

The young Capulet damsel’s quick-witted question invited her lover to realize that, ultimately, the meaning of names is irrelevant, they should just be together. However, names can be essentially important to the Law, since the legal treatment of a certain situation many times depends on its juridical designation.

When Brazilian Supreme Court was summoned to decide on the matter of the Constitutional admissibility of same-sex civil unions, the relevance of names was indeed extensively debated. Terms like “family”, “family entity”, “man” and “woman” had their true meanings considered by Justices.

In the end, the Supreme Court was unanimous about certain aspects: families and family entities mean the same in terms of State protection; the principles of human dignity and the equality before Law indicated that, albeit the literality of article 226 paragraph 3 of the 1988 Constitution (and article 1723 of the Civil Code), same-sex couples should be recognized as civil partners if they met the other requirements for such.

However, Justices did not reach consensus about the implications of this necessary equalization.

Although the majority has ruled in favor of extending the exact same rights and duties of different-sex civil unions to couples of the same gender, some of them have stopped short of the idea of recognizing such trait, especially because of the potential marriage conversion

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49 The Foreproject of Sexual Diversity Act was developed by OAB’s Special Committee on Sexual Diversity, created in April 15th 2011, and composed by Maria Berenice Dias (President), Adriana Galvão Moura Abílio, Jorge Marcos Freitas, Marcos Vinícius Torres Pereira and Paulo Tavares Mariante. Special Consultants for this Committee are Luís Roberto Barroso, Daniel Sarmento and Teresa Rodrigues Vieira. English and Spanish versions of the document can be found at <http://www.direitohomoafetivo.com.br/ver-noticia.php?noticia=246#>

50 SHAKESPEARE, William. *Romeo and Juliet*. Act II, Scene II (Juliet).

clause of those civil unions between one man and one woman, which could indirectly establish gender neutral rules for marriage in Brazilian law.

One might consider that one rose would still smell like a rose, even if we changed its name, following the Bard’s quote to regard this decision as a great step towards the legal recognition of homosexual relationships in Brazilian system.

However, although the importance of such fact cannot be denied, in legal terms, the Shakespearean Rose could actually have different smells in Brazil, depending on the name we chose to call it, especially because even in terms of straight couples, the full equalization between marriages and civil unions is yet to be achieved.

The decision on ADI 4.277 held several important arguments in favor of full extension of civil unions’ rights and duties to same-sex couples: human dignity, equality before law, right to personal expression, right to a family life regardless sexual orientation, etc...

If different rules were to be established solely for different-sex or same-sex civil unions, it would essentially break the equality clause that has been decided by the majority on Supreme Court’s decision. Furthermore, such decision would actually establish hierarchical degrees in the access of rights, on the grounds of sexual orientation, something that has been unanimously rejected by the Justices.

In other terms, although this decision of Brazilian Supreme Court’s must be regarded as a milestone in terms of recognition of rights of same-sex couples, the battle for civil rights of homosexual individuals is not over.

In fact, it might be just the beginning, especially because of certain issues that go far beyond the problematic of same-sex marriages (direct or converted), and need to be addressed by ordinary legislation in order to enforce the principles already recognized in this precedent.

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