

THE DATING CONTRACT AND THE CONSTITUTIONAL PRINCIPLES OF FAMILY LAW

Viviane Lemes da Rosa¹

Abstract: The dating contract is a new type of contract, in which the contractors express the desire to maintain a loving relationship with each other known as "dating." This work aims to study the validity of the legal business, based on the analysis of the constitutional principles applicable to family law, the social scene and the current doctrinal positions on the topic. After the study of the historical evolution of family law, of the constitutionalization of the civil law, the common-law marriage, and the dating contract based on the constitutional principles governing family law, we concluded that the dating contract can not be considered null plan, that must be ponderation of the magistrate about the validity of the contract on the case, taking into consideration the will of the parties.

Keywords: *dating contract, stable union, constitutional principles.*

O CONTRATO DE NAMORO E OS PRINCÍPIOS CONSTITUCIONAIS DO DIREITO DE FAMÍLIA

Resumo: O contrato de namoro é uma nova modalidade contratual, na qual os contratantes manifestam a vontade de manter entre si um relacionamento amoroso conhecido como "namoro". Este trabalho objetiva o estudo da validade desse negócio jurídico, a partir da análise dos princípios constitucionais aplicáveis ao direito de família, do panorama social atual e dos posicionamentos doutrinários sobre o tema. Após o estudo da evolução histórica do direito de família, da constitucionalização do direito civil, da união estável, e do contrato de namoro a partir dos princípios constitucionais que regem o direito de família, tem-se que o contrato de namoro não pode ser considerado nulo de plano, devendo haver a ponderação do magistrado sobre sua validade diante do caso concreto, tendo por base a vontade das partes.

Palavras-chave: contrato de namoro, união estável, princípios constitucionais.

¹ Lawyer. Attending Master's degree in Civil Procedural law in the Federal University of Paraná. Researcher of the Constitutional Civil Law studies – Overturning of Copernicus, The Axis of Family and Successions, of the Federal University of Paraná. Email: E-mail: viviane.ldr@hotmail.com
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1 INTRODUCTION

Family Law is passing through a reconstruction. The Civil Code of 1916 protected the family model existent in that time: patriarchal and based on the man of the family, who were the responsible for sustaining and taking decisions. Underneath him there was the woman – responsible for taking care of the children and receiving orders from the husband – and the legitimate sons.

The Project of the new Civil Code was created between 1969 and 1975 – which had Miguel Reale as the manager of the commission that led its elaboration – and was approved only in January 10th of 2002 (PINHEIRO, 2013). Although it was approved in 2002, the new Civil Code has some parts written between 1969 and 1975, which contains the behaviorism of that time.

Many critiques were made against this Project, mainly because there were no updates made to it after the promulgation of the 1988 Federal Constitution, which brought innovations regarding fundamental and family rights. In consequence, today the Civil Code in vigor, promulgated in 2002, has a lot of old mindsets that do not reflect the wishes of the constituent power and did not follow the social changes that started after 1975.

Even before the approval of the Civil Code's Project, Tepedino (2001, p. 439) had already started to criticize some of its articles: "it is a fact that the project was written almost 30 years ago (since the commission was created in 1969) and its approval represents a huge political, social and legal regression".

Families of 2002 do not have the same characteristics as families before 1975; a lot of changes were made in family models since then, starting by the simple fact that new modalities of family came to existence. Family is not anymore that traditional patriarchal model, constituted by a husband, a submissive wife and legitimate sons; there are many models of family nowadays, for example, families with only one parent, with homosexual parents, constituted by stable union, etc.

Calderón (2011, p. 265-280) indicates factors that contributed to the outbreak of a new panorama in the family law - besides industrialization, the entrance of women in the job market and the affectivity between parents and its children – such as the feminine conquests,

the sexual freedom, the reduction of patriarchy, the equality between genders, the divorce and the appearing of new family models.

Fachin (1999, p. 303-304) says that “family does not have the same legal overview as it had before, centralized on the patriarch and based on inequality laws, exclusively transpersonal and constituted by marriage”.

Furthermore, the families’ focus becomes the affectivity and the dignity of their members individually. Lôbo (2008, p. 15) emphasizes the affectivity as the central element of the new family model:

In an environment of companionship and solidarity, the individual realization of the affectivity is the main function of the family in our time. Its ancient economical, political, religious and of procreation roles disappeared or have now a secondary importance. Even the procreational function, with the growing secularization of the family law and the primary role of affection, is not anymore an essential objective.

The 1988 Federal Constitution brought a new family Law that considered the different family models and tried to protect all of them, based on the arguments of the dignity of the human person and the affectivity. Therefore, this constitution reinforces the idea of an Social and Democratic Rule of Law, whose purpose is to guarantee and protect all kinds of family, without prejudice and inequality.

The doctrine started to believe that the Civil Code had to be constitutionalized, mainly because it did not embody constitutional principles and because it had to obey the dispositions of the Federal Constitution. The constitutionalization of the Civil Code is a process through which the civil precepts are applied according to constitutional principles, always having in mind the principles of the human person’s dignity and, in what concerns the family law, also the affectivity.

Thus, the current context recognizes a family Law that follows constitutional precepts and principles, specially the dignity of the human person and the affectivity.

2 THE DIFFERENCE BETWEEN STABLE UNION AND DATING

The familial variety was accepted by our legal system in the 1988 Federal Constitution, that proposes a state protection for all existent family models, according to the principles of equality and dignity of the human person.

One of the most common ways to constitute a family nowadays in Brazil is probably the stable union, and this can be explained by the bureaucracy that involves marriage. Since the stable union is an informal bound between people – it does not require a process, documents, property scheme, etc. – that allows them to create a family, some people chose it instead of marriage. After all, the purpose is the same in the two systems: the affectivity and a common family life.

Besides, the constitution of a stable union can happen even without the awareness and will of the couple, because when all the requisites are accomplished, they can start to live in a stable union. This unconscious form of stable union is believed to be very common in Brazil – where there is an effort for the family law to be known by the people – because the requisites to constitute a stable union are very unclear.

The stable union is a recognized family model protected by the Constitution, according to the 226th article of this document². The 8.971 law of 1994 was elaborated to regulate this constitutional precept, and its 1st article³ established a 5 year deadline or the existence of children as alternative preconditions to constitute a stable union. However, this law was revoked by the 9.278 law of 1996, which abolished the requirement of a deadline for this purpose, according to the articles 1st⁴ and 11th.

Considering that this Law is not restricting in what concerns the necessary conditions to characterize a stable union – requiring only a longtime, public and continual companionship to constitute a family – the doctrine is not unanimous about the requisites.

Venosa (2001, pages 43-48) indicates five requisites to constitute a stable union – the stability, continuity of the relationship, the diversity of gender, publicity and the will to create a family – but also says that other elements can be considered by the judge during the

² Article 226. The family, which is the foundation of society, shall enjoy special protection from the State. [...] 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. (BRAZIL, Constitution of the Federative Republic of Brazil, promulgated in October 5, 1988, 1988).

³ Article 1. *The female companion of a single, legally separated, divorced or widower man, that lives with him over 5 years, or has a child with him, has the right to the precepts in the 5.478 law of July 25, 1968, until she does not constitute another stable union and if she proves the necessity.* (BRAZIL, 8.971, December 29, 1994, 1994).

⁴ Article 1: It is recognized as familial entity the longtime, public and continual companionship of a man and a woman, established with the purpose of constitute a family. (BRAZIL, 9.278 law of May 10, 1996, 1996).

evaluation of the case, such as the fidelity, common habitation, oneness of companions and the existence of a religious marriage.

Madaleno (2001, Page 1.080), on the other hand, believes that the will to constitute a family, the appearance of a married couple, emotional dependence, continuity and a continual cohabitation are the requisites to establish a stable union, and they do not need to be concomitant.

Therefore, the constitution of a stable union depends on the understanding of the judge regarding a specific case. Considering the principal of equality and the precedents, the judge will decide whether the stable union can be legally compound.

The development in the society did not change only the traditional family models: it started a movement to accept all kinds of love relationships- or even only relationships. Nowadays, dating and casual relationships, that do not involve any kinds of commitment, are in a spotlight. There is also a mid-term relationship, that do not even last enough to be a date, but also do not have casualness – popularly known as a “hook up” (in Portuguese: “ficar”). About this last modality of relationship, Xavier explains (2011, page 50):

Another modality of relationship, developed in a hedonistic society and resistant to frustration because it consists in getting near someone to obtain pleasure without getting into a commitment, is the “hook up”. According to the sociologist Jaqueline Cavalcanti, a “hook up” has the aim to eliminate an emotional dependence of the person, who is not worried, most of the time, about the expectations of the hook up partner. The “hook up” is treated as a mere object, which can be replaced by another person at any time.

Despite the wide diversity of relationship models, this work will be limited to the study of the dating relationship because it is this affective relation that influences the creation of a dating contract, whose validity is the object of this text.

Although it may seem necessary, the possibility to create a concept of a dating relationship is questionable because there aren't minimum requisites for this model of relation to be constituted. Dating can have all kinds of characteristics: it can be between two or more person⁵ the couple can travel together, share holidays, meet each other's family, have a pet together, donate something to the other partner, sleep in the partner's residence, and others, or simply do not have any of those elements. The duration of the relationship is also instable:

⁵ Without getting too deep in the subject, which is not the object of this study, it is essential to write a brief comment. Even though the moral concept currently majoritarian in Brazil has monogamy as a base, it's important to remember that morality is subjective: what is immoral to someone may not be immoral to others. Considering that law is a norm, not morality, it is necessary to emphasize that there is no legal prohibition to any informal kind of relationship between more than two individuals.

there are people who date for three months, while others for over six years, without necessarily constituting a casual relationship or a stable union.

Furthermore, dating can involve so many personal characteristics for each couple, so many types of affectivity, that is a form of relationship very subjective, different from couple to couple. Consequently, it is difficult to elaborate a concept that embodies all kinds of couples or establish specific conditions.

Thus, it is very difficult to distinguish dating from stable union and create a line where a relationship stops being a date to become a stable union – specially because almost all stable unions start with a date and, as the time goes by and the accomplishment of several conditions, develop into a stable union. Xavier (2011, pages 105-106) explains the difficulty to create a concrete difference between the two concepts:

Dating couples experience today things that anciently only happened after the marriage, like trips, sexual relations and cohabitation, for example. Besides, dating is not seen anymore as an experimental time that leads to marriage. It gained more autonomy, which influenced couples to choose longtime dating relationships.

This kind of relationship, sometimes, can start to get complex enough to be confused with a stable union, which would give to a dating couple the legal consequences that the constitution of that family entity receives.

Madaleno (2011, p. 1.081) distinguishes dating from stable union through the criterions of stability, communion of lives and the will to start a family. On the other hand, Dias (2011, p. 186) makes this difference by measuring the level of commitment of the couple. Gonçalves (2011, p. 615) says that what distinguishes those two concepts is the wish to start a family.

In what concerns the wish to start a family, it is important to have in mind that a dating relationship can also have this element in a long-term, which means that the couple can intend to create a family in a uncertain future, not in the present. This fact makes it even less clear the transition to a stable union that is constituted with the prolongation of the dating relationship, without the couple even knowing that they might be living in a stable union.

It is essential to also mention the relation between interpersonal relationships and the technological development. In early times, the couple saw each other with less frequency, spoke more rarely and shortly. Currently, it has become really easy to get in touch with someone: the cellphones have internet connection continuously; the telephone companies sell cheap networks for anyone who wants to buy it; the cell phone itself have become each day more and more affordable, with a higher quality, and easier to acquire; they now have every kind of function to contact people, like text and image messages, audio and video conferences

and wireless internet; the emerging of social networks and specialized programs, such as Orkut, facebook, instagram, whatsapp, skype, and others; computers and laptops are everyday more present in work, and they also have internet and, sometimes, access to social networks; etc.

It is possible to keep contact using social networks with people not seen in years, schedule an event with distant relatives, meet new people, talk daily with friends and family, and so on. Social networks are directly related to the subject of this work because they have made easier to start and maintain dating relationships and, more importantly, have helped to elaborate the notoriety as a requisite to constitute a stable union.

Those online networks made possible for other people to know who is in a relationship with who and, in some cases, to know exactly what kind of relationship is that; in other cases, it is also possible to identify the characteristics of this specific relationship, if they have a description made by the couple. For example, Facebook, that allows users to add information regarding the relationship status, which can be: “single”, “in an open relationship”, “it’s complicated”, “in a serious relationship”, “engaged”, “married”, “separated”, “divorced” and “widowed”. The network also allows people to know who is the relationship partner via a link to the partner’s facebook page.

The legal aspect of the information available in social networks is questionable in what concerns procedural instructions and the persuasion of the judge. The judge has a free persuasion, which means he has freedom to value the proof given, although he must justify his understanding⁶. In that case, the meaning of the relationship status “it’s complicated” will depend on the life experience of the judge and the ponderation necessary to resolve the case.

The lack of trustable criterions and the possibility of opposite understandings of judges create insecurity. Perhaps it would be valid if the superior courts established concrete precedents⁷ over the minimum time to constitute stable union and other requisites; however,

⁶ The Brazilian Procedure Civil Code has adopted the valuation of the knowledge proof system as Motivated Free Persuasion or Rational Persuasion in its article 131, that says: “The judge will freely analyze the proof, being limited by the facts and the constant circumstances of the files, even if not alleged by the parts; he must indicate, however, in the sentence the motives that has helped him to form this understanding” (BRAZIL, 5.869 law of January 11, 1973, 1973).

⁷ Concrete because it is notorious the huge divergence between understandings in the same court about the same subject, and that makes more difficult for the judges to take a position and harms the possibility to predict sentences in order to guide other people.

looking at all that has been discussed, the plurality of relationship models and the individuality of each couple, it cannot be forgotten the difficulty to create a precedent because it would be impossible to establish precedents to all the concrete cases that involve the constitution of stable union.

Thus, equality and ponderation in the case are essential to verify the presence of the requisites to constitute stable union or the existence of a dating relationship. Judges cannot forget that the formation of families has as a base the principles of the dignity of the human person and affectivity and that all individuals have the guarantee of the right to plan their lives as they will, and the understanding of judges does not matter if they do not respect this right, expressed in the article 226, paragraph 7th of the Federal Constitution⁸ 3

3 THE DATING CONTRACT AND THE CONSTITUTIONAL PRINCIPLES OF THE FAMILY RIGHT

The dating contract⁹ is a legal business created between individuals¹⁰ that manifest their will to keep with each other a relationship named by them as a date. This contract can be established for many reasons, but usually it aims the declaration that the contractor does not have the intention to start a family – at least in a first moment, in the context of the signature of the contract.

Stolze (2013) creates a concept of dating that describes it as “a agreement signed by two people who maintain a Love relationship – dating, in the common usage – and intend, via the signature of a document that will be filed in a register’s office, to avoid the consequences of the stable union”.

⁸ Article 226: *The family, which is the foundation of society, shall enjoy special protection from the State. [...] 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. (BRAZIL, Constitution of the Federative Republic of Brazil, promulgated in October 5, 1988, 1988).*

⁹ Although it may be extremely relevant the legal nature of the contract (if typical or atypical), this analysis will not be object of this work because of the necessity to deepen the study of this subject, that could create alone a whole new article.

¹⁰ With the caution that this subject demands – because there is, without a doubt, a wide diversity of positions about this theme -, we dare to affirm that the minimum number of contractor would be two, having in mind the model of relationship known as polyamorism.

The Brazilian doctrine and jurisprudence's tendency is to resist against the dating contract because they understand that this constitutes fraud, since it would have, supposedly, as an objective the removal of the possibility to establish a stable union. Therefore, usually a dating contract is null, because the law that regulates the stable union cannot be avoid or rearranged. Rolf Madaleno (2011, p. 1082), Pablo Stolze Gagliano (2013) and Maria Berenice Dias (2011, p. 186) have already expressed themselves in agreement to this position.

In the contrary position, opposite to the traditional doctrine, there is the pioneer understanding of Marília Pedroso Xavier (2011, p. 106) that the dating contract should not always be declared null because it expresses the wishes of the parts, otherwise the private autonomy and the dignity of the human person would be disrespected.

The dating contract cannot be conceived null and void by many reasons: the right to not start a family, the principle of freedom, the free family management, the private autonomy, the dignity of the human person, the principle of affectivity, the right to happiness, the presumption of good faith, the social evolution, and others.

The article 104 of the Civil Code¹¹ brings requisites to the validity of a legal business: capable agent, prescribed or non-prohibited form and legal, possible and determined or determinable object. The doubtful nullity of the dating contract would be based on an illegal object, since the norm that determines the requisites of a stable union is logical and valid. However, as it will be seen later, the object is (initially) legal.

The Federal Constitution protects all kinds of new and different models of family, which can be extracted from the principles of equality, dignity of the human person and affectivity. This, so far, is not new, because the civil doctrine already recognizes the plurality of families and the constitutionalization of the civil law phenomenon. However, one of the most important rights is so obvious that it does not need to be discussed by jurists: the right to not start a family. There is too much discussion over the right to constitute and dismantle a family, that the right to not constitute one is ignored.

This right extends through everyone, and its existence is so natural, inevitable and undeniable that the Brazilian doctrine does not even discuss it. This is acceptable because of two reasons: a) most of the debates involve the rights to constitute and deconstitute a family; b) there are not many relevant legal situations involving this right – for example, the family asset of a single person and the dating contract itself.

¹¹ Article 104: The validity of the legal business requires: I – capable agent; II – legal, possible, determined or determinable object; III- prescribed or non-prohibited form. (BRAZIL, 10406 law of January 10, 2002, 2002).

The fact that this right is so essential and basic, and that it generates so few discussions in the doctrine and jurisprudence makes it easily forgettable most of the time. The right to not constitute a family is left behind, as can be compared to what happens to the right to not have a religious belief. The Constitution guarantees the free religious belief to all people, and this necessarily implies in the right to not have a religious belief. The same thing happens to the right to not start a family: all human beings have this right because it is directly connected to the fundamental rights of freedom and the dignity of the human person.

The dating contract consists on the expression of the wish and the exercise of the right to not start a family. Obviously, this right is not absolute and, consequently, has limits expressed in the law, as it happens with the rights to constitute and deconstitute a family. However, those rights can only be exercised within the limits established in the law.

The existence of the private autonomy in the family Law is undeniable. Here, the matter involving the nature of the family law norms will be ignored – if they are public or private law norms-, because it is not the object of this study. Although the norms that characterize the stable union are logical, the decision of what kind of relationship will be settled and with who, is inside private and individual subjects. It is important to point that in the same way that the stable union norm are norms of public order, so are the individual rights related to the freedom to make family decisions.

The impossibility of the State to interfere in the private autonomy is expressed in the articles 1, III¹², 5 caput¹³, and 226, paragraph 7 of the Constitution, and as well in the article 1513 of the Civil Code¹⁴. In the present time we live in a Social State, which must guarantee and protect the family, and not in an interventionist State, that restricts the exercise of the freedom of an individual inside a family. The objective of a family is to reach happiness through affectivity – both are subjective concepts that differ according to the perspectives of each person.

In this context, Pereira (2005, p. 153) says that “this protection cannot be confused with the power to check and control, in a way that it limits the private autonomy, restraining

¹² Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: [...] III - the dignity of the human person; [...]. (BRAZIL, Constitution of the Federative Republic of Brazil, promulgated in October 5, 1988, 1988).

¹³ Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:[...]. (BRAZIL, Constitution of the Federative Republic of Brazil, promulgated in October 5, 1988, 1988).

¹⁴ Article 1513. It is prohibited to any person, of public or private law, to interfere in the communion of life instituted as family. (BRAZIL, 10.406 law of January 10, 2002, 2002).

the free will and the freedom of individuals”. According to the author, the principle of the private autonomy as an instrument of checks and balances of the State’s interventions is based on the rights to intimacy and to freedom that results in the personification of the individual (PEREIRA, 2005, p. 162).

According to Oliveira (2002, p. 281), “the present State, in the models determined by the Constitution, has the structure to guarantee freedom and happiness and could never reach those aims by interfering in family matters”.

After all, there is no way affectivity can be controlled. Nobody is legally obligated to keep certain relationship with someone because it is not of the competence of the State to impede the exercise of the right to not constitute a family or to obligate the exercise of the right to constitute one.

Xavier (2011, p. 106) defends the respect of the wish to start a family as an element of the parts of the contract. The dating contract would translate, therefore, the exercise of the private autonomy of the couple and the principle of the dignity of the human person:

The importance given to the wishes to the parts is coherent to the course from the transpersonal model to the eudemonist model of family. Besides, it finds its bases in the Minimum Family Law doctrine, that also defends an minimum state intervention in this context, only happening as an exception when there are vulnerability situations.

The private autonomy’s exercise of the couple is reflected in the guaranty of the principle of the dignity of the human person.

What matters is not the constitution of a family, but the happiness of the individual. Although it is not so much studied in the Brazilian law, the principle of happiness is implicit in the Federal Constitution and is directly connected with the principle of affectivity in what concerns the family law. After all, the constitution of a family depends on the existence of affectivity between individuals and aims the happiness of the human being. About this topic, Pereira (2005, p. 180-181) questions:

Looking at this context, the consequence is the essential role of affection in any familial core, existent in all kinds of relationship, conjugal or parental. However, is the contrary also valid? In all situations where affectivity is present will it be also present a familial entity?

People have all kinds of interests regarding their love lives. There was once a time when dating had as a purpose a future marriage or even a more serious relationship; today,

however, people date for several reasons¹⁵, that don't necessarily involve a serious relationship or the wish to start a family.

Society changes and develops itself really quickly, even in matter about family and love life. Xavier (2011, p. 48) explains that we live in times of uncertainty and instability in human relations.

The State cannot tutor or control the reasons why an individual maintain his love relationships, or it will be violating the principles of freedom, the dignity of the human person and the free family planning. Consequently, it cannot prohibit the signature of a dating contract – which makes clear the will to not constitute a family.

Carbonera (2008, p. 249) says the it is recognized “the guarantee of a space to spare the intimacy and the family freedom, the relation space that also is of power, authority, growth, equality and autonomy”.

Happiness is subjective, its concept is different for each person. If a individual sees happiness in a certain model of love life or even in not having a love or long relationship, it is not the State's function to obligate him to change his opinion about what is better for his life, or the State will be interfering in the private autonomy of the person.

The dignity of the human person and freedom embodies to power to define its own love life, to choose to start a family or not. The dating contract is nothing but an expression of the person's wish, which cannot be ignored because the individual has the right to manage his own private life, to express his affection in its own way – characteristic of each human being.

The article 226, paragraph 7, of the Constitution conceives the right to a free family planning¹⁶, which involves the right to not constitute a family, of dating, of deconstituting a family, of living in a stable union, getting married, etc. This article applies to the family law the principles of the dignity of the human person, of freedom, affectivity and happiness.

It is important to mention a precedent¹⁷ that expressed the freedom individuals have to manage their own love lives. In this judgment, the Court of Justica of Rio Grande do Sul (RIO GRANDE DO SUL, Court of Justice, Ap. 70006235287, Rapporteur: judge Luiz Felipe Brasil Santos, 2004) decided that:

¹⁵ For example, loneliness, convenience, friendship or sexual desire.

¹⁶ About this principle, most of the doctrine writes only about the matter of children. However, it is believed that the constituent legislator did not develop this principle aiming only the planning of the number of children and their upbringing, but also the couple life. After all, a family does not only begin when children are born, but way before, with the planning of the couple's communion life. Besides, a singular family also has the right to a free family planning – this right starting with the constitution of the family and its exercise when this family decides to be singular.

¹⁷ Already mentioned by XAVIER, 2011, P. 96.

The State-Judge must interfere shyly on the private life of the people and say that, although they did not get married, this couple acquired the hole effect of a marriage. Before and over all, the people's option should be respected, and so should the individual freedom to constitute the model of relationship that better suits them, questioning with prudence, though, the reason why those people opted to not get married when they could do it. Because of that, the stable union should only be declared when the context makes it clear its existence, and never in doubtful and contradictory situations, where the proof is separated, because, if so, the judge would be marrying without motivation who did not made the motu proprio.

The judge understood that, before the analysis of the legislation, it is essential to verify the options of the person, because of the liberty to start any model of relationship most convenient for the individual, and that other judges should give importance to the reasons why the person did not choose to get married. According to the precedent, the stable union must only be declared when there is an evident proof of the accomplishment of the requisites; if there is doubt, the declaration of a stable union should not continue to avoid the marriage without motivation of individuals that did not want that.

Advocating for the opposite side, Tartuce (2013, p.1 1.177) affirms the maximum in dubio pro familie must be applied in doubtful cases. However, it is understood that the 1988 Constitution, when embodying the principles of the free family planning, of freedom and of the dignity of the human person, and thus protecting individually the human being, gets closer to the mentioned precedent than to the application of the *in dubio pro familia*¹⁸.

In the previous precedent there weren't a dating contract to justify the doubt related to the manifestation of the person's wish. Once there is a dating contract in a concrete case like this, it is evident that the practical application of the mentioned constitutional principles demands the interpreter to follow the logic applied by the rapporteur of the previous case, since this kind of contract brings an opposite manifestation to the constitution of a family, at least in the first moment.

There is a discussion whether an individual that lives alone constitutes a singular family or not family at all. If we considerer that it is a singular family, this person does not have as many protection of the State as any other modality of family; if we think on the other

¹⁸ Even because this maxima does not apply in cases of doubt regarding the characterization of the stable union, but in cases of null or cancellable marriage; for example, in a putative marriage or one celebrated without an authority or by an authority materially incompetent.

side, this person is only an individual exercising his right to not start a family, and this does not eliminate his right to the free family planning¹⁹.

The Civil Code still has patrimonial aspects, ignoring the affectivity that the 1988 Constitution brings to the legal system. According to Oliveira (2002, p. 239), “the legislator of the Civil Code, based on a structure where the emotional aspect had less importance within the family, emphasized other elements, especially patrimonial ones.

The supposition that the dating contract is null and void is an influence of the patrimonial expression of the Civil Code: it imposes limits to the private life of the individual, his wishes and his rights to freedom, happiness and to not constitute a family, in order to impede the restriction of patrimonial effects imposed by the escape from a stable union. However, the valorization of the patrimony to the detriment of the affectivity in civil law and the reason why a person avoids stable union is being forgotten (GAGLIANO, 2013).

The constitution and deconstitution of a family can generate unjust enrichment because of the patrimonial aspects of the institutes; it is undeniable that usually a family starts to create patrimonial frames and with the unique purpose of distribution of incomes, confronting the principles idealized in the Federal Constitution. Well, law should develop along society. According to Pereira (2005, p. 166), “life as it is comes before the legal order”.

Currently, the reality is an extreme protection of the presumption of the fragility of the partner economically dependent, and this has made possible a mistaken distribution of incomes and a benefit of a bad-faith. People have started stable unions only to guarantee its own subsistence, objecting the patrimonial effect of this institute²⁰, because it is well known that the stable union, in general, has a partial property ruling, and that there is the possibility of a distribution of the patrimony or pension food when the family is deconstituted – regardless of the affectivity (SILVA, 2013), and this cannot be tolerated.

In this context, Oliveira (2002, p. 244) affirms that “the concession of the property ruling before a certain time when there was no sharing of affection is, according to us, a situation extremely unfair and that violates the values of the social consciousness”.

The rules about aliments and the regime of property did not evolve with the promulgation of the Constitution in 1988 and the affectivity is not a requisite of those institutes (LÔBO, 2013). About that, it is important to mention the relevant precedent of the

¹⁹ It is not difficult to imagine that many people want a dating relationship without having future pretensions – without wanting to start a family; this does not prohibit the person to have the right to a free family planning, on the contrary, this is the exercise of this right.

²⁰ Many times, the requirement to a stable union includes only the objective of the relationship, aiming only the acquirement of the ex-partner’s incomes or the revenge of one of the parts.

rapporteur Minister Nancy Andrighi, when the Superior Court of Justice decided that the aliments given to a partner should not persist forever and require the proved necessity of the beneficiary, who does not have conditions to sustain himself alone (BRAZIL, Superior Court of Justice, Resp 933.355-SP, Rapporteur: Min. Nancy Andrighi, 2008).

As seen before, there is no determined time criterion to characterize the stable union; the ponderation is a necessary procedure for the judge, who decides according to the rules of equality or the judicial precedents. This uncertainty opens the opportunity to create new decisions, and has scared the individuals that only intend to date and not start a family, because the deadline does not necessarily means the wish to constitute one.

There are many understandings in different directions that could constitute the wish to start a family: the division of residence, donation of belongings between individuals, time duration of the relationship, pregnancy, and others. The affectivity rarely is considered among those factors. As it can be seen, the Judiciary is unpredictable in what concerns a decision of stable union declaration.

Thus, the dating contract – in a first moment – avoids possible declarations of stable union by manifesting that there is no wish to start a family; it avoids one of the most essential requisites to a stable union.

In the same way, the dating contract can be used by individuals in bad-faith with the only purpose to avoid the patrimonial effects of the stable union if already characterized. However, this does not mean that the contract necessarily will be celebrated to achieve this illicit objective. Bad-faith cannot be presumed, only proved; in the Brazilian legal system, the presumption of good faith is a general clause, and, since it is relative, the bad-faith can be proved.

The supposition of bad-faith is an exception and depends on legal precept. However, jurists have applied this presumption on dating contracts, imposing it as absolute null and void. This mistaken logic is evident once we question which contracts would persist if all contracts that could create fraud could be declared null only because of this possibility. Besides, dating contracts do not have only the aspect of a possible illegality; on the contrary, it guarantees the mentioned constitutional rights.

It is evident that a dating contract will be null if the bad-faith is proved, the will to violate the law before the presence of the requisites to a stable union²¹. Despite this, while it is

²¹ Before the article 333, I of the Procedure Civil Code, the person who alleges the nullity of the dating contract has the onus of the proof. Article 333. The onus of the proof encharges: I – the author, about the constitutive fact

not proved, the contrary is valid because it consists on the exercise of the mentioned fundamental rights. The simple existence of a dating contract does not impede completely the configuration of stable union, but, in a first moment, it expresses the lack of one of the requisites – the wish to start a family -, admitting the contrary to be proved.

With the confirmation of the fraud or bad-faith, the contract is declared null; with the proof of the accomplishment of the requisites to a stable union, specially the wish to start a family, the stable union must be declared and the contract stops producing effects.

It is fundamental to be aware of the possibility that, with time, the relationship of the dating couple will get more serious, establishing the wish to start a family and, consequently, the stable union. Also, the revocation of the contract can be done because of the marriage or the declaration of stable union between the contractors, since those acts are incompatible with the existence of a dating contract. Even if there isn't a revocation, in those cases the contract stops having effects.

If the contract is considered flawed, its nullity can be declared by the judiciary, it can be cancelled by the parts or it can simply stop producing effects, if the requisites to a stable union are or become present.

The contract that does not have an absolute and immutable declaration of will, it is not permanent. Once subordinate to the judiciary, the judge should ponder in order to declare the contract null if he sees an eventual fraud – when the only purpose is to avoid the effects of an established stable union.

Dating contracts should not generate the absolute nullity or validity; as any other civil contract, it is subordinate to the legality control of the Judiciary.

Also, they should not be considered null and void, but their validity must be declared after the analysis of each case. Not all people have the wish to start a family, not all have the same intentions, and not all act with bad-faith. Each human being sees happiness in different situations and affectivity comes and goes because of different reasons and by different ways. Therefore, the validity of this contract should be judged according to the case that it arranges, after the proposition of a nullity suit or aiming the declaration of stable union, and should not be presumed absolutely null and not absolutely valid.

5 CONCLUSION

The dating contract aims the declaration of a dating relationship between the contractors who do not have a wish to start a family. The major doctrine considers this type of contract null, because it understands that its purpose is only to avoid the stable union and that those norms cannot be avoided by the wish of the parts, since they are public policy norms.

However, dating contracts should not be considered null and void, because of the following reasons: a) it is an exercise of the constitutional rights to not start a family, the dignity of the human person, the free family planning, happiness, affectivity, private autonomy and freedom; b) bad-faith is not presumable, it is only provable, because there is the rule of the presumption of good faith; c) there is an important precedent that says that in case of doubt, the judge should analyze the motivation that lead the individual to not get married, even if he was able to do it, instead of marrying him to someone without motivation; d) the dating contract, at a first moment, avoids the wish to start a family as a requisite, which is indispensable to characterize a stable union; e) it is necessary to prove the existence of the requisites to a stable union and/or the constitution of the dating contract as flawed, the onus of the part who intends to declare the stable union and/or alleges the nullity of the cited contract; f) the dating contract is not eternal neither absolute, can be revoked by the wish of the parts, stop producing effects because of act incompatible with his declaration or be constituted as null by judicial decision; g) we live in a plural and diversified society, in which each person sees happiness in different situations, and the State cannot impose a kind of relationship that this person do not want to participate.

Thus, dating contracts avoid, at a first moment, the requisite of the wish to start a family, because it contains the manifestation of the contractors' will that they just have the intention to date. However, since there is the possibility to violate the law, if the judiciary power gets notified, it is fundamental the judge's ponderation according to the concrete case.

In this ponderation procedure, the judge must base his decisions on the constitutional principles of freedom, affectivity, free family planning, happiness and dignity of the human person; if there is a proof that the contract was celebrated with the purpose to avoid the effects of a stable union, the judge must declare the nullity of the contract and constitute the parts into a stable union; in case of doubt regarding the possible fraud or the lack of requisites to stable union, the dating contract should be considered valid and avoid the declaration of stable union.²²

²² This article was authorized for publication by the authors in 12/12/2014 . Version in Portuguese received 15/04/2014, accepted in 06/05/2014

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