

# The Adoption as a result of recognition of Marriage Homoafetivo in Brazilian Society

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## Summary

This article has on the evolution of the concept of family in the civil society of the world which entered on legal concepts and opened doors for the recognition of new families in the Brazilian civil society. As a result of this historic breakthrough is the growth of adoption on the part of the so-called new families, which are formed by couples homoafetivos. The aim is to demonstrate that every couple has rights and the principle of equality as a guide and basis for coming issues of prejudice are combated and with a touch of the society. Puts into question the positive influences that the adoption process causes the construction of a better society. How methodology using the bibliographical research associated with the analysis of available data on the subject.

**Key Words:** Adoption, Child, Family, Civil Marriage, Civil Homoafetivo.

## INTRODUCTION

In a modern society can no longer admit forms of exclusion. The evolution that occurs around the world, sooner or later, also affects every country, not that it makes it less sovereign, but that's a reflection of globalisation and that access to information is increasingly evolved and agile, making like that society is increasingly changeable and interested in the fight for their rights.

The recognition of civil marriage homoafetivo demonstrates that the principle of equality should serve as a parameter in order to avoid prejudices continue serving molds at the time of building laws or, mostly, grant rights.

One has to stress whenever Brazil is a secular country which has the largest instrument to your Magna Carta, the Constitution of 1988, which is the basis for the construction of any standard that will regulate rights and build bonds. What is not forbidden is allowed to individuals.

You can't ignore that there is still strong opposition to the right on the screen, which daily put insecurity in those directly affected by your enjoyment. However, the aim is that such opposition does not pass this, after all, the reverse cannot be seen as something positive and, above all, we cannot ignore the fact that such an act would constitute a direct offence to Constitution and laws infralegais.

For both further explanaremos the importance of the construction solidified a right won after much

struggle and manifestos, starting with the stable and the recognition of civil marriage the couple homoafetivo, building a new family within the Brazilian civil society.

## 1. CONCEPT OF FAMILY

The family is the basis of any structured society, since from it is citizens who will perform in various areas of a State, as even trainers of laws and judges. Through the family are passed on historical, cultural, traditional values, and, especially, education.

The family is a law ensuring constitutionally according to art. 226 of CF/88 which has "*the family, the basis of society, have special protection of the State*". For many years built the idea that family was that traditional man's choice for the woman and creating together. However as time was evolving new concepts have emerged and there is currently a certain difficulty to delimit the concept of family variables, definitions, as well preleciona Rodrigo da Cunha Pereira in your book of family law and the new Civil Code:

"From the moment the family is no longer the economic core and reproduction to be wont space and love, some new and various social representations to it."

There is also the concept of the family socioafetiva, recognized through various judged the SUPREME COURT over the past years, and, also, of the Supreme Court in RE 898060. Used here as quality to this recognition the bond created between the child and the adult for her created responsibility and took the obligations stipulated to a father or a mother. In your vote, the Minister Edson Fachin clarified:

The socioafetivo kinship is not a priority, or alternatively the biological fatherhood. Nor a kinship. Take care of paternity, maternity, paternity, with the same legal dignity of adoption, legally constituted and who turns away in fixing the legal parentage of the biological link.

This recognition of a plurality in the concept of family is even debated in the Senate through the Senate Bill (PLS) 470/2013 which brings the objective of one of its main goals to unify the concept of family in order to make faster and more effective the proce judicial processes, the text below is part of a transcript taken from the site of the NGO IBDFAM (Brazilian Institute of family law).

The concept of family is increasingly plural. Family arrangements of modern society no longer arise only of marriage. The stable union between persons of the same sex or not, single-parent families, adoption and paternity proof via DNA tests proving that the various forms of family relationship make the most important affective binding in scope and new definitions of the concept of family. (Text taken from the website:

[http://ibdfam.org.br/assets/img/upload/files/Estatuto%20das%20Familias\\_2014\\_para%20divulgacao.pdf](http://ibdfam.org.br/assets/img/upload/files/Estatuto%20das%20Familias_2014_para%20divulgacao.pdf))

In this way, one can see that there is, currently, a uniform concept that defines the term family, but it is understood the fundamental importance of the same in the creation of the human being.

## 2. CIVIL WEDDING

The idea of marriage was built on top of religious doctrines, especially the Catholic, which during the

period of the Middle Ages was the owner of sovereign power in the world and built several foundations that were the basis for the drafting of various laws.

As Catholicism was the official religion of Portugal was brought by the Portuguese Empire and entered in Brazil, Deconstructing several beliefs and even much of the indigenous culture. With that, much of the Brazilian law suffered strong influences of the dogmatic Catholic buildings.

Stresses that many religious marriage requirements were inserted in the context of civil marriage, including for only 40 years by law 6,515/77 was that divorce has become recognized in Brazil. For years the Church was absolute rights holder on marriage and the family.

The marriage comes the cultural concept of creation of the family, therefore, rooted is the idea of the Union of a man and a woman for the purpose of being together a family. The Civil Code of 2002 gave no definition of what is marriage in your concept and material to scholars this task.

Transcribes a definition of marriage given by the renamed Maria Helena Diniz in your book Brazilian Civil law course:

The legal link between the man and the woman who aims to mutual material and spiritual assistance, so that there is a fisiopsíquica integration and the establishment of a family.

According to Paul Wolf, marriage is the Union between a man and a woman, as extracted below your Civil law book-Families:

Marriage is a legal act to negotiate formal and complex public, whereby a man and a woman are family, the free expression of will and the recognition of the State. (Paul Lôbo)

According to milk, marriage is the legal bond between a man and a woman who come together material and spiritually to constitute a family.

Notice that both books cited above are not earlier than the civil code of 2002, but still bring the archaic idea and has already surpassed that marriage necessarily has to be formed by a man and a woman.

In this way, one realizes the difficulty Deconstructing a fixed idea for centuries at the heart of society, since the right to marry is no longer given only to man added the woman, but the sum of any genre a couple with the right to marry.

## **2.1 Stable same-sex Union**

A new view on family and, consequently, marriage was subsequently adopted with the from of the new Civil Code of 2002. When using an interpretation of teleological way, we can conclude that the marriage is a communion lato sensu of life, in which seeks happiness by the spouses.

Now, to raise a family there as pillar no more only a man and a woman and Yes love familiar. Excluding the concept brought by art. 1,723 that treated her like wedding requirements goes on and lasting public coexistence. Stresses that the Brazilian Constitution prohibits any kind of discrimination on grounds of

sex in art. 3rd, transcribed as follows:

Art. 3 Constitute fundamental objectives of the Federative Republic of Brazil:

IV-to promote the right of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

Despite a huge constitutional obstacle, find the same just as maintainable stable Union fit men and women (art. 226, § 3, CF/88), veda the rest of being holders of such right, making an interpretation in opposite sense.

Art. 226, § 3-3 for the purpose of protection of the State, the stable union between man and woman as a family entity and law facilitate your conversion in marriage.

The Minister Marco Aurélio in ADIN 4277 expressed clearly and clear the right to the recognition of same-sex Union in saying:

If the recognition of the family entity depends only on the free and responsible choice of ordinary life to promote the dignity of participants, conducted by the affection that exists between them, so there seems to be no doubt that the Federal Constitution of 1988 allows is the Union Homo admitted as such.

Worth quoting here an important and meaningful paragraph of book of Pablo Stolze in saying "any scientific research that is done in the field of family law, to well fulfill your desideratum should be devoid of moral and religious conceptions previews" (p. 475). In other words, this is not about religious beliefs, analyses what is moral or not, but rather rights belonging to a society which has as a constitutionally secular State said.

We highlight some positions of Ministers of the SUPREME COURT in the trial of ADIN 4277, which cause an important reflection on the way to see the right here tutored:

We give this noble Brazilian segment, more than a life project, a project of happiness.

The above text was taken from the vote of Minister Luiz Fuz and is quite objective, but of a depth without size. After all, recognize that the right to form a family unit is to live with the person you chose to love and spend the rest of your life with her, and that is the right to be happy which belongs to all.

The Supreme Court r[aos homossexuais]estores the respect they deserve, recognizes their rights, restores your dignity, affirms your identity and restores your freedom.

Above was part of the vote given by Minister Ellen Gracie, and takes the principle of human dignity which is assured to every society, since it is the minimum to live – that should be accessible to all.

The Minister Celso Peluso reinforces the idea that there needs to be a part of Legislation in order to meet the aspirations of this minority who reaches millions of Brazilians and has as a consequence nothing in addition to ensure the construction of a better country. Below transcribed part of the Prime Minister's vote:

The decision of the Court off a space for which, I think, you have to step in the Legislature, "said the Minister. He said that the legislature must be exposed and regulate the situations where the application of the Court's decision will be justified also from the constitutional point of view.

The obstacle against the recognition of due right lies in the brazilian legislative gap, as the same was not creating any laws that might regulate and express the right to a couple homoafetivo to have the stable and the rights and obligations arising out of the Union.

## 2.2 Civil wedding Homoafetivo

After the recognition of stable same-sex Union started a new social struggle for the recognition of civil marriage between persons of the same sex. The first country to recognize same-sex marriage, including divorce and adoption law, was the Netherlands in the year 2000, claiming that the "marriage can be contracted by two persons of the same sex or different" information extracted from the site <http://g1.globo.com/mundo/noticia/2015/06/veja-lista-de-paises-que-ja-legalizaram-o-casamento-gay.html>

Before Brazil, 11 countries have already recognized same-sex marriage. And currently the list already includes 23 countries and the United States joined the list most recently in 2015 and to Germany later that year of 2017.

A given curious is that in Africa, homosexuality is criminalized in about 30 countries, however, against the grain, South Africa was the fifth country to recognize same-sex marriage in 2006, long before Brazil. Information extracted from the site <http://justificando.cartacapital.com.br/2017/06/30/alemanha-legaliza-casamento-homoafetivo-veja-quais-paises-no-mundo-ja-legalizaram/>

How well conceptualized Anwary Brauner in your book the Pluralism in family law: Social reality and Reinvention of the family:

As a result, the recognition of the plurality of forms of Constitution of family is a reality which tends to expand the global transformation process, particularly in the form of treatment of interindividual relations. The claim and the recognition of equal rights, freedom and the intimacy of women and men, ensure every person the right to found a family links and maintain emotional relationships, without any discrimination.

Was recognized in Brazil, through the Supreme Court on direct action of Unconstitutionality 4277, judged in the year 2011, and complaint of breach of fundamental precept 132, the right to civil marriage between persons of the same sex.

However, in practice, even after the above-mentioned decision, many States had no trial, including uniforms, the reports of various registries refuse to perform same-sex marriage.

From the CNJ resolution nº 175/2013 forced the Registry to perform the marriage of same-sex couples. This resolution was fundamental to solidify understanding and commonality of the magistrates of the civil marriage between persons of the same sex as being right is an obligation to be fulfilled by any registry, sealing the negative.

However, even with the positioning of the SUPREME COURT and with the resolution of the CNJ offices still exist in regions that refuse to recognize this right to couples homoafetivos. In an attempt to combat this clash and provide access to a right already assured, in 2015 the TJ/SC in conjunction with the non-governmental Civil Associations were able to perform marriage homoafetivos free of charge for spouses, performing a total of 40 marriage, however in the year of 2016 the number dropped to 12 weddings. Information extracted from the site <http://www.cnj.jus.br/noticias/cnj/84740-lei-sobre-casamento-entre-pessoas-do-mesmo-sexo-completa-4-anos>.

However, despite the Brazilian Superior Court, which has as main objective to defend the Constitution and protect the fulfilment of fundamental precepts have been definitively on the recognition of civil marriage between persons of the same sex, such guidance – more than that, it is an obligation – has not been met by other agencies. For this, the CNJ manifested itself clearly and definitively, to also edit the resolution giving greater emphasis to the right of persons of the same sex get married civilly, and their rights derived from the marriage. And yet, there's still a breach, as prelecionou Maria Berenice Dias in your book same-sex Union-prejudice and Justice highlighted below:

The denial of drawing up of the Registry Act had two foundations: the Covenants which are contrary to morals and good customs and the absence of law recognizing the validity of the object of the contract. The justification, in the open, shrouded prejudiced and discriminatory attitude, since there is no unlawful or illegality in the same sex unions.

We see a strong resistance on the part of the population to comply with established rules, harming other citizens, who despite being seen as minority, cannot have their rights removed, forgotten or descumpridos. It is understood the need for state coercion to curb attitudes which might deprive that minority to have their rights guaranteed, not giving room for social exclusion.

### **3. ADOPTION**

Adoption is one of the so-called institutes away as one of the oldest, not only for the person, but also groups and other species (slaves, animals, etc). The Romans created the adoption ad that subrogation was called in open spaces in front of the population with the authorization of the rulers. The Institute has been evolving until the concept today which will later be exploited.

Formerly there was the idea that a family be considered as complete and have your social function, it was necessary to the existence of a minor, a child. Many women, including, were malvistas by the society for not having children and that was cause of separation, accepts up to the Church. With this, many children were adopted informally, because no one could know.

On the homeland law adoption actually emerged as a solution to concubinage, in 1916, as women desquitadas couldn't live with her new husband. It should be noted that adoption stipulated in the Civil Code of 1916 was only intended for over 18 years.

With the emergence of the 1988 Constitution established the principle of equality between children, regardless of the biological link. Therefore, the adopted and biological son shall have the same rights, being expressly prohibited any discrimination between adopted and biological son as preleciona article 227, paragraph 6 of the CF/88.

Art. 226, paragraph 6 – The children, established the relationship of marriage, or by adoption, shall have the same rights and prohibited any discriminatory designations qualifications relating to filiation.

In the years 90, with the emergence of the ECA (law 8,069/90) introduced a regulation for the adoption process to under 18 years (called children and adolescents). And from the year 2009 by the law the adoption of 12,010 aged over 18 years had the subsidiary application of the law of the ECA, leaving aside the Civil Code.

#### **4. Requirements for adoption**

The ECA has defined a more organised form of adoption in Brazil, and in 2008 the CNJ created a national register of adoption – known as ANC – as "digital tool that assists the judges of Childhood and youth courts in the conduct of the procedures of the processes of adoption and m across the country ". (text taken from the site <http://www.cnj.jus.br/programas-e-acoas/cadastro-nacional-de-adocao-cna>)

There is talk that with the advent of ECA in order to avoid distortion of the main goal of the adoption were created some difficulties, for example, the age difference between the adopted and the sponsor which must be at least 16 years , among others established in article 42:

Art. 42. Can adopt the largest of 18 (eighteen) years, regardless of marital status.

- 1 cannot adopt the ancestors and siblings of the embracing.
- 2nd To joint adoption, it is essential that the adopters are married civilly or maintain stable, proven stability of the family.
- 3 the adopter must be at least 16 years older than the adopting.
- 4 The divorced, the judicially separated and the former can adopt jointly, provided they wake up on the guard and the regime of visits and provided the coexistence stage has been initiated in the constancy of coexistence period and if it is proven the existence links of affinity and affectivity with that guard holder, justifying the specialness of the concession.

From this list of requirements for adoption, despite having a functional logic, also provided a certain delay in the adoption process causing in some cases until the withdrawal to start an adoption process. It is estimated that in Brazil there are more than 36000 children living in shelters for adoption and only 6000 are able to be adopted-information taken from the site <https://direitodiario.com.br/adoca-no-brasil-ha-mais-familias/>– this is because the adopters make demands the which the majority of children living in shelters don't meet.

That is, it's not that there is no willingness to adopt, since there is, and a lot of – there are about 35000 parents enrolled in CNA (national register of adoption) – However, due the demands are incompatible with the children to be adopted, and much blame of this incompatibility is judi power cial it takes to make the process of removal of family power and the kids get older, not answering one of the key requirements of the adopters that is the low age.

##### **4.1 the adoption by couples homoafetivos**

The right is nourished of constant developments in society and your fitness for factual reality. Thus, the

Brazilian judiciary realizing the enormous demand of dispute involving homoafetivas relations, understanding that could no longer procrastinate your decision, decided to position itself and innovated the understanding of family, bringing their legal consequences, as the right to the civil registry, right to inheritance, pension law, and one of the most celebrated, the right to adoption in which we saw in the previous topic in your requirements there is nothing that excludes homosexuals to participate in a process of adoption.

The Constitution is a norm in constant fluctuation and your interpretation should always be volatile to suit standard to your time. Otherwise, we will have only a normative text which certainly will fall in disuse due to the innovations of everyday life. Therefore, it was necessary to use the technique of interpretation as to what is an interpretation of a standard infra in accordance with the Constitution, considering also its fundamental principles and rights.

So if everyone is equal regardless of sex, colour, age or religion – as the preleciona 3 of CF/88, could not, even that for most severe form, there is no law that JD, adopting a diverse option of heterosexual orientation It would be the cruelest Act of an interpretation of a law, aimed at only a discriminatory side. The law authorizes specific acts of discrimination related to gender, called positive discrimination – as for example in the case of tenders which in your edict provides for discrimination and exposes your justification.

Art. 3 Constitute fundamental objectives of the Federative Republic of Brazil:

IV – promote the right of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

The SUPREME COURT, in 2010 maintained a decision of the Court of Rio Grande do Sul which allowed the adoption of a child by a couple homoafetivo, via unanimous decision was as follows:

Wedding. PEOPLE. Equality. SEX. In casu, two women claimed that kept stable relationship for three years and require a license for the wedding along the two registries

civil registry, but the request was denied by the respective holders. Subsequently filed claim of suitability to marriage as the stick of public records and of special actions on the grounds that there would be, in the Brazilian legal system, obstacles to the marriage of persons of the same sex. They were denied the request in ordinary instances. (REsp 1,183,378-RS).

The STF, reinforced such understanding through RE 846102. It is worth noting that such matter has come to the knowledge of the Supreme public prosecutors ' Office of the teaser for Parana, which wanted to establish minimum age for a homoafetivo couple could adopt, and age would be 12 years-so the child could express an opinion if I would or not be ado TADA.

In your vote, the Minister Carmen Lúcia CITES excerpt from vote of Minister Carlos Ayres Britto, where is "without any mental gymnastics or interpretative Alchemy, gives to understand that our Magna Carta loaned not noun" family "no meaning or Orthodox own legal technique. Picked him up with the colloquial sense practically that always acted like the world of reality ".

Against the above, denotes clear prejudice still rooted in our corporate bases which are disseminated in various State agencies. After all, the Prosecutor has the duty to monitor compliance with the law, and to enter with a resource in order to block a right already pacified upper bodies demonstrates that it does not seek to monitor the law, but only a minority prevent a constit law ucionalmente assured – which is the right to a family, the right to adoption.

While taking that attitude prosecutors not only undermines a couple homoafetivo but also a child who tirelessly search for a home, with love, respect, caring, education, regardless of gender who promotes such virtues.

## CONCLUSION

In this way, it is understood that the right to have build a family through a civil marriage or stable Union socioafetivo was not something easy and fast to win. Years of struggle and suffering mark this historic galgada of changes of precepts rooted in brazilian society.

Stresses that the achievements up here are just initial milestones narrated a fight that still needs continue, despite already owning recognitions of superior courts, but there's still a lot of reluctance to accept such rights for certain part of society.

Nevertheless, it is worth mentioning the importance of Ngos to support along with the judiciary strong in search to ensure the rights enshrined are respected for all to finally be able to eradicate prejudicial attitudes of society. But it is known that there is still much to do so.

The kickoff for the right to adoption by couples homoafetivos could today be assured it is the recognition of stable Union of couples homoafetivos, since it generates the right to civil marriage and, consequently, the right to family and Therefore, adopting one of the forms of Constitution of a family.

With that, the need for the elaboration of a law that guarantees of the right to civil marriage, stable and adoption to homoafetivos, as well as the rights and obligations of these institutes. In addition to also provide for sanctions for cases of non-compliance with the legal obligations stipulated in the law.

This would be one way to curb attitudes that seek to restrict access to these institutes for couples homoafetivos, investment in a more inclusive education and media campaigns also serve as incentives for the construction of a social empathy and the search for a company more balanced and fair.

Therefore, denotes the importance of not only those benefit directly by changes in laws, but also by an entire society that has empathy for the cause to join this fight and give more power to a movement that benefits apparently a minority, but that can cause significant changes in the construction of a better country.

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