THE REACH OF THE PARTER'S SUCESSION RIGHTS WITH STF'S JUGDMENT OF THE EXTRAORDINARY RECOURSE nº 878.694/MG

O ALCANCE DOS DIREITOS SUCESSÓRIOS DO(A) COMPANHEIRO(A) COM O JULGAMENTO PELO STF DO RECURSO EXTRAORDINÁRIO nº 878.694/MG

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ABSTRACT

The purpose of this article was to analyze the current situation of the partner in succession in the Civil Code of 2002, as a result of the judgment of Extraordinary Appeal No. 878.694 / MG, in which the Supreme Court (STF) recognized and declared the unconstitutionality of art. 1,790, of the mentioned normative. The Supreme Court equated the stable union with the marriage, for succession purposes, and determined the application, in both cases, of the regime established in article 1.829 of the Civil Code of 2002. The methodological procedure consisted of a descriptive research, presenting the current situation of the partners in Brazilian and qualitative inheritance law, analyzing the understanding of the judgment of Extraordinary Appeal 878,694 / MG by the STF. It was concluded that the STF left several omissions in its decision, such as not having declared the inclusion of a partner in the list of necessary heirs, provided for in art. 1,845 of CC / 2002, as well as saying whether the cohabiting person will have real right to housing rights, according to the rule of art. 1,831 of the same regulation. The STF also failed to take into account the scope of the legal certainty of its decision, since in determining that the understanding of the decision should be applied only to open and unfinished inventories, it ended up facing Articles 1,784 and 1,787 of CC / 2002.

KEY WORDS: Supremo Tribunal Federal. Stable Union. Succession of the Partner.

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RESUMO

O presente artigo teve como objetivo analisar a situação atual do(a) companheiro(a) no direito sucessório, no Código Civil de 2002, em decorrência do julgamento do Recurso Extraordinário nº 878.694/MG, em que o Supremo Tribunal Federal(STF) reconheceu e declarou a inconstitucionalidade do art. 1.790, do mencionado normativo. O STF equiparou a união estável ao casamento, para fins sucessórios, e determinou a aplicação, a ambos os casos, do regime estabelecido no artigo 1.829 do Código Civil de 2002. O procedimento metodológico consistiu numa pesquisa descritiva, apresentando a situação atual dos companheiros no direito sucessório brasileiro e qualitativa, analisando o entendimento do julgamento do Recurso Extraordinário 878.694/MG pelo STF. Concluiu-se que o STF deixou várias omissões em sua decisão, como não ter declarado a inclusão do companheiro ou companheira no rol de herdeiros necessários, previsto no art. 1.845 do CC/2002, bem como dizer se o convivente terá direito real de habitação, conforme regra do art. 1.831 do mesmo normativo. O STF também se omitiu quanto ao alcance da segurança jurídica de sua decisão, posto que, ao determinar que o entendimento do decisum fosse aplicado apenas aos inventários abertos e não findos, acabou por afrontar os artigos 1.784 e 1.787 do CC/2002.

PALAVRAS-CHAVE: *Supremo Tribunal Federal. União Estável. Sucessão do (a) Companheiro(a).*

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1. INTRODUCTION

A stable union is a de facto relationship between a man and a woman, in a prolonged way, without being formalized, as is marriage, but with the goal of family formation. This stable union regime is fully practiced in Brazilian society and supported in its legal system. In this sense, the Federal Constitution of 1988, in its article 226, §3º, recognized the stable union as a family entity and ensured the facilitation of its conversion into marriage, taking the first steps towards equating the rights of partners with those of spouses, family law and inheritance rights.

Later the promulgation of the Magna Carta, as a complement and application of the aforementioned device, were edited Laws 8,971/1994 and 9,278/1996, granting rights to the companions, mainly with regard to the succession.

With the validity of the Civil Code of 2002, there was in its article 1.723 the recognition of the stable union as a family entity, configuring the said union with the publicity, continuity, durability and will of family constitution, consolidating the constitutional desire. However, it also did not occur when the law of succession dealt with the succession of companions, which was regulated in Article 1.790, making clear distinction in relation to the law of succession of the spouses, this regulated in its Article 1.829 and other devices, generating many questions in the doctrinal and jurisprudential context.

Through the Extraordinary Appeal nº 878.694/MG, judged by the Supreme Court (STF) in May 2017 and with Judgment published in February 2018, with effect of general repercussion, the unconstitutionality of Article 1,790 of the Civil Code and the distinction it made as regards inheritance schemes between spouses and partners has been recognised and declared, and in both cases the arrangements laid down in Article 1,829 of the Code of Conduct shall apply.

Despite the recognition of the equivalence of the succession regime between spouses and partners, it is hypothesized that the Supreme Court did not face, in decisum, the issue in its entirety, omitting in relation to various devices that permeate this legal regime. In this

sense, questions will be analyzed that have not been clear or omitted regarding the assimilation, such as: whether or not the companions are in the list of necessary heirs, as provided in art. 1.845 of CC/2002 in relation to spouses, and focus on them the rules laid down in Articles 1.789 and 1.846 to 1.849, which deal with the protection of the legitimate party, which generates for the coexisting restrictions on donation and will.

It will also be analyzed what was the scope given by the Supreme Court in relation to the partners on the real right of housing assured to spouses in art.1.831 of the CC/2002, as well as the application by the Supreme Court of its decision, open and unfinished judicial and extrajudicial inventories.

In order to analyze the scope of the decision of the Supreme Court in the trial of Extraordinary Appeal nº 878.694/MG, about the succession of comrades, the present article was divided into three topics, and initially will be presented an overview of the current situation of(a) companion(a) in the law of succession according to the Civil Code, also addressing the concept and requirements of stable union. The second topic will bring an approach on RE 878.694/MG, in which the STF recognized and declared the unconstitutionality of Article 1.790 of the CC/2002 and equated inheritance schemes between spouses and partners. The third and final will expose the succession rights of the (a) companion(a) in the trial of Extraordinary Appeal nº 878.694/MG, addressing the reach of the Supreme Court on necessary heir, the right in rem to housing and the application of the decision to judicial and extrajudicial inventories opened and not yet completed.

Thus, this study aims to demonstrate the new rule of succession for those living in a stable union, after the recognition of the unconstitutionality of Article 1.790 by the Supreme Court, highlighting, specifically, the scope of the decision before the Supreme Court, relating to several other provisions of the Civil Code which form part of that legal regime.

2. CURRENT STATUS OF COMPANION(A) IN THE LAW OF SUCCESSION IN THE CIVIL CODE

In Brazil, for a long historical period, the prolonged union between man and woman, without the formalization of marriage, living or not under the same roof, was considered as concubinage (PENA JÚNIOR, 2017). The concubinage consists in the relationship between man and woman, among whom one or the other is not free to marry, so that the concubinage is not recognized by the legislation. Differently, in the stable union the participants are free to constitute marriage.

In a stable union, the relationship between a man and a woman is prolonged, continuous and lasting, with the aim of forming family ties, which can be converted into marriage. In the concubinage, the relationship between the man and the woman, although not occasional, does not have the objective of having a family and, as has been exposed, at least one of the companions is legally prevented from marrying.

With the promulgation of the Federal Constitution of 1988 and the recognition of the stable union as a family entity, the advancement and legal protection of this de facto situation in Family Law was significant. In this sense, state Farias and Rosenvald (2015, p. 446),

> From the art §3º. 226 of the Citizen Charter of 1988 it is possible to visualize the stable union, also called companionship, as a situation of absence existing between two people, of different sexes and free to marry, who live together, as if married were (living more uxorious)characterizing a family entity.

Farias and Rosenvald (2015) further add that the stable union is, in fact, a marriage of fact, arising from social and natural relations of affection, from the will of the parties involved, who by reason of the freedom they experience, simply do not wish to bow to the formalities of marriage. Therefore, the protection granted by the Magna Carta is legitimate.

Later, on 29 December 1994, Law 8,971 was enacted, which regulated the rights of companions to food and succession. As far as inheritance rights are concerned, he assured(o) the surviving companion(o) the enjoyment of a fourth part of the property, having children, or half if there are no children, but surviving ascendants and still the right to the entirety of the inheritance in the absence of descending and ascending. In the first two situations, the (a) companion (a) will only be entitled to the enjoyment of the goods of the deceased until it constitutes a new union.

On May 10, 1996, a new law was enacted, Law 9,278/1996, which regulated art. 226, §3º, of the Federal Constitution (BRAZIL, 1988), recognizing the stable union between man and woman as a family entity, assuring the partners the right to inherit and the right of real housing, among others.

Laws 8,971/1994 and 9,278/1996 were tacitly repealed because the subjects dealt with in them were included in the Civil Code of 2002, which incorporated in Articles 1,723 to 1,727 the basic principles of the said Laws (BRAZIL, 2002). In this sense, says Gonçalves (2012, p. 608),

> The aforementioned Laws n. 8,971/94 and 9,278/96 have been repealed in view of the inclusion of the matter in the scope of the Civil Code of 2002, which made a significant change, inserting the title concerning the stable union in the Family Book and incorporating, in five articles (1,723 to 1,727), the basic principles of the aforementioned laws, as well as introducing sparse provisions in other chapters as to certain effects, as in cases of maintenance obligation (art. 1.694)

Gonçalves (2012) also points out that the 2002 Civil Code dealt, in the above mentioned provisions, with procedural and property aspects, leaving for the law of succession the inheritance effect, as provided in art. 1.790 of CC/2002 (BRASIL, 2002).

The Civil Code of 2002 made express mention of the spouse's right in rem to housing, omitting itself in relation to (the) companion (the), which although without provision in the said Code, still proclaims the subsistence of Article 7, sole paragraph, of Law 9.278/1996, which ensured that the surviving companions had a right of residence in respect of the property intended for the residence of the family.

The doctrine differs as to the applicability of the aforementioned article, Pereira (2016) states that there was a tacit repeal of everything that was not incorporated by the Civil Code,

Gonçalves (2012) argues that there was no express repeal of the aforementioned law as to the real right of housing of the (a) companion(a), as well as no incompatibility of the benefit provided in it with any device of the Civil Code (BRAZIL, 2002). It is still invoked, through analogical interpretation, that the real right of housing ensured to the spouse in art. 1,831, Civil Code 2002, should be extended to comrades.

> Even in the absence of prediction in the Code, supports a doctrinal current been the subsistence of art. 7th, sole paragraph, of Law 9.278/96, which defers to the surviving companion the right in rem of dwelling in relation to the property intended for the residence of the family. It is argued, in defense of the companion, that there was no explicit repeal of the said law, as well as no incompatibility of the benefit provided in it with any device of the new Code. Furthermore, the analogical extension of the same right granted to the surviving spouse in art. 1.831 of the same diploma is invoked.
>
> In this line, Statement 117 of the Federal Court Council, approved at the 1st Civil Law Conference, held in Brasilia in September 2002: "The real right of housing should be extended to the partner, either because the provision of Law 9.278/96 has not been revoked, or because of the analogical interpretation of art. 1,831, informed by art. 6º, caput, of CF/88", (GONÇALVES, 2012, p.189-190)

For the Supreme Court the Laws 8.971/94 and 9.278/96 had their devices revoked, as can be seen in the Menu of the Judgment of the judgment of RE 878.694-MG, of 10.05.2017, in which was recognized the unconstitutionality of art. 1.790 of the Civil Code 2002 [...]

> So, the art. 1,790 of the Civil Code, by repealing Laws Nos 8,971/94 and 9,278/96 and discriminating against the companion (or companion), giving her succession rights much lower than those conferred on the wife (or husband), is in contrast to the principles of equality, of human dignity, of proportionality as a barrier to poor protection, and of the barrier of retreat[...].

Thus, it can be stated that part of the doctrine and the Supreme Court agree the validity of the Civil Code 2002 established the succession law of the (a) companion(a), tacitly repealing all previous provisions.

It was in Article 1,790 that the Civil Code (BRASIL, 2002) regulated the succession law of the people living with each other in a stable union, in general terms, that the companion(a) (a) participates in the succession only in respect of the property acquired for consideration during the marriage, in accordance with the following provisions: a) if you compete with common children, you will be entitled to a share equivalent to that of the latter; b) if you compete only with descendants of the author of the inheritance you will be entitled to half of what you touch each of them; c) if you compete with any other next of kin, the (a) companion(a) survivor shall be entitled only to one-third of the inheritance and d) only when there are no successable relatives shall he be entitled to the entirety of the inheritance.

The succession of the spouse does not refer only to onerous assets acquired in the constancy of coexistence, nor does the spouse compete with any successable relative who is not descended or ascending.

The succession rights of the (a) companion(a) are far from the property succession of the spouse, as can be observed in Article 1,829 of the Civil Code. In a brief analysis of the two devices, Articles 1,790 and 1,829 of the CC/2002, we see clearly the difference in the regime of succession of the spouse and the companion or companion, which generated many ques-

tions about the unconstitutionality of art. 1.790, of the aforementioned diploma, in the field of the judiciary (BRASIL, 2002).

It fell to the Supreme Court, when assessing the Theme 809, concerning RE 878.694/MG, to recognize as unconstitutional the distinction of inheritance regimes between spouses and partners provided for in art. 1.790 of CC/2002, determining that the regime of art be applied, both in the cases of marriage and stable union. 1,829 of CC/2002, where the spouse is included in the order of the hereditary vocation and nothing was mentioned about the companion(a) (a). Note that the Supreme Court did not repeal Article 1,790, because only the Legislative Branch is possible to do so, (ANDRADE, 2018).

With this decision, the same succession regime provided for spouses under Article 1,829 of the 2002 Civil Code also currently applies to partners.

However, in its decision (RE 878.694/MG), the Supreme Court did not clarify some emblematic issues: whether the partner has real right to housing, provided in art. 1.831 of the CC/2002 to the spouse; whether or not to be included in the list of necessary heirs of the art. 1.845 of CC/2002, because the necessary heirs, among them the descendant, ascendant and spouse, are entitled not to be deprived of the legitimate part, ie fifty percent of the inheritance.

Similarly, the Supreme Court, in determining that the decision establishing the unconstitutionality of Article 1.790 of the CC/2020 was applied to judicial and extrajudicial inventories already opened and not yet completed, nothing explained about the affront of this understanding to the provisions of Articles 1,784 and 1,787 of the CC/2002, which determine that the succession and the legitimation to succeed are regulated by the law in force on the date of its opening.

Thus, the Supreme Court was omitted by not clarifying whether the rules of various provisions of the CC/2002 are applied to the partners, which are in accordance with the legal regime of the spouses. There is therefore a need for the Court to present the scope of the judgment thesis and the rules and provisions of the succession regime of the spouse that should be applied to the companions, as well as to clarify which law should be applied to the succession of the companions.

3. THE DECLARATION OF UNCONSTITUTIONALITY OF ARTICLE 1.790 OF THE CC/2002 WITH THE JUDGMENT OF THE SPECIAL APPEAL No 878.694/MG BY THE SWISS COURT

On May 10, 2017, the Supreme Court concluded the trial regarding the unconstitutionality of Article 1,790 of the CC/2002, which treated differently from the spouse the (a) surviving partner(a) regarding inheritance rights. The final decision was driven by the Extraordinary Appeal nº 878.694/MG, which had as Rapporteur, Minister Luís Roberto Barroso.

The conflict that generated the process mentioned above was due to the conflict that came to exist after the death of the author of the inheritance, between his brothers and the appellant, with whom he lived in a stable union. The deceased left no will and came to exist

pretension regarding his patrimony by both parties: brothers and companion. The deceased possessed property and had no descendants, nor ascendants, having as his closest relatives only three brothers, who were in the passive pole of the resource.

The decision of the judge of first degree recognized the right of the surviving companion to the whole of the inheritance left by the deceased companion, excluding from the succession the siblings of the cujus, still granting him the royal right of habitation. Therefore, the court of first instance applied to the case the clause III of article 1,829 of the CC/2002, giving equal treatment to the institute of stable union in relation to marriage.

In the present case, in being applied the rule established in Article 1,790, Section III, of the CC/2002, the living siblings, who are collateral of 2nd degree, would contribute to the inheritance with the companion, being the latter only one third of the property left by the deceased companion.

Unconvinced, the brothers of the deceased appealed the decision to the Court of Justice of Minas Gerais (TJ-MG) which, starting from the premise of the constitutionality of art. 1.790 of CC/2002, approved the appeal, pursuant to Article III. 1,790, limiting the companion's right to one-third of the goods acquired onerously during the existence of the stable union, excluding the companion's private goods.

Unhappy with the decision of the court of 2nd degree, the companion of the plaintiff brought Extraordinary Appeal before the Supreme Court, as a last opportunity of appeal, arguing that the succession regime laid down in Article 1,790 of the CC/2002 is incompatible with the Magna Carta, with the State obligation guaranteed by it to protect the family in accordance with the provisions of the Art. 226, §3º, da CF/88. Announcing that the succession regime to be applied to your case should be the one identical to the succession of the spouse. In support of this claim, the applicant put forward the principle of equality enshrined in Art. 5 of the Charter of the Republic and the recognition of the stable union promoted in Article 226 above.

In opposition to the Extraordinary Appeal, one of the judges defended the constitutionality of art. 1.790 of CC/2002, claiming that CF/88 recognised the stable union as a family entity, but did not equate it with the marriage institute.

The Supreme Court concluded the trial, deciding, by majority vote, to grant the Extraordinary Appeal nº 878.694/MG, to recognize the unconstitutionality of art. 1.790 of CC/2002, declaring the right of the applicant to participate in the whole of the inheritance left by her companion, equating the succession regime of the partners to that of the spouse, in the form in art. CC/2002 1.829.

The summary of the decision of Extraordinary Appeal 878.694/MG, published in February 2018, was submitted as follows:

> CONSTITUTIONAL AND CIVIL LAW. EXTRAORDINARY APPEAL. GENERAL REPERCUSSION. UNCONSTITUTIONALITY OF THE DISTINCTION BETWEEN SUCCESSION ARRANGEMENTS BETWEEN SPOUSES AND PARTNERS.
>
> 1. The Brazilian Constitution includes different forms of legitimate family, in addition to that resulting from marriage. This list includes families formed through a stable union.

> 2. Spouses and partners, that is to say the family formed by marriage and the family formed by a stable union, shall not be entitled to desequip for inheritance purposes. Such hierarchization between family entities is incompatible with the 1988 Constitution.
>
> 3. Thus, the art. 1790 of the Civil Code, by repealing Laws Nos 8.971/94 and 9.278/96 and discriminating against the companion (or the companion), giving her succession rights much lower than those conferred on the wife (or the husband), is in contrast to the principles of equality, of human dignity, of proportionality as a barrier to poor protection, and of the fence of retrogression.
>
> 4. For the purpose of preserving legal certainty, the understanding concluded herein shall apply only to judicial inventories in which there has been no final decision on the sharing order, and to out-of-court shares in which there is no public deed.
>
> 5. Appeal is well founded. Affirmation, in general repercussion, of the following thesis: "In the current constitutional system, it is unconstitutional the distinction of inheritance regimes between spouses and partners, and in both cases the regime established in art. 1.829 of CC/2002".

Thus, according to the decision of the Supreme Court exposed, in the understanding of the majority of the Supreme Court ministers, won only the Ministers Dias Toffoli, Marco Aurelio and Ricardo Lewandowski, the rules of the Federal Constitution contemplate different forms of families, beyond what results from marriage, and this list includes families formed through a stable union. The decision is not legitimate to desequip, for inheritance purposes, the family formed by marriage and the stable union.

Therefore, with the above-mentioned decision, art. 1.790 of the CC/2002 has lost its practical applicability and the partner becomes, next to the spouse, in the order of legitimate succession provided for in art. 1,829 of CC/2002 (BRASIL, 2002).

However, it should be noted that the succession regime of the spouse is not restricted to the provisions of Article 1.829 of the Central Committee/2002, and that several others of the Law deal with the succession of the spouse and remain open to the partners, as already dealt with, the real right of housing and configuration of the necessary heir condition, as for example.

This was the line of understanding of the Brazilian Institute of Family Law, when hindering the decision of the Supreme Court in Extraordinary Appeal number 878.694/MG, arguing, in summary, that in the succession regime of the spouse, beyond the rules laid down in art. 1.829 of the CC/2002, there are several other provisions of the said Act that conform this legal regime, in particular the art. 1,845. He requested that the Supreme Court clarify the scope of the thesis of general repercussion, in order to mention the rules and legal provisions of the succession regime of the spouse that should apply to the partners.

The Court, however, rejected the embargoes, as stated in the decision, which stands out below:

> CONSTITUTIONAL AND CIVIL LAW. EMBARGOS DE DECLARAÇÃO EM RECURSO EXTRAORDINÁRIO. REPERCUSSION GENERAL. APPLICABILITY OF ART. 1.845 AND OTHER DEVICES OF THE CIVIL CODE FOR STABLE UNIONS. ABSENCE OF OMISSION OR CONTRADICTION.

> 1. Disclaimers questioning the applicability of Art to stable unions. 1.845 and other provisions of the Civil Code constituting the inheritance regime of the spouses.
>
> 2. The generally recognised impact relates only to the applicability of Art. 1.829 of the Civil Code to stable unions. There is no omission as to the applicability of other devices to such cases.
>
> 3. Disclaimers rejected. (STF, Emb. Decl. no RE 878.694/MG, Rel. Min. Luis Roberto Barroso)

Despite the arguments of the Supreme Court in the decision that rejected the embargoes, analyzing the decision relating to the trial of Extraordinary Appeal number 878.694/MG, it can be noticed that the Court equaled the succession regime between spouses and partners, imposing the application of the rules of art. CC/2002 1.829. However, it is undeniable that the Court omitted the applicability, to stable unions, of several other devices of the CC/2002 that conform the succession regime of the spouse, citing, as a highlight, the art. 1,845, which deals with the list of necessary heirs.

4. OMISSIONS IN THE TRIAL OF EXTRAORDINARY APPEAL No 878.694/MG CONCERNING THE LAW OF SUCCESSION OF(A) COMPANION(A).

As already widely handled, the Federal Supreme Court has concluded the trial of Extraordinary Appeal No 878.694/MG, with general repercussion, unifying its decision for other similar cases, and has established the thesis that, in accordance with the principles and constitutional guarantees in force, it no longer includes the distinction between spouses and partners in succession, and the provisions of Article 1,829 of the 2002 Civil Code should apply to both.

The Federal Supreme Court has therefore equated, for succession purposes, spouses and partners, that is to say, the family formed by marriage and formed by a stable union, on the ground that it thus safeguarded and fulfilled the constitutional precepts in force, was silent on other rights that, also, deal with the succession of the spouse, but that were not described in the art. 1.829 of CC/2002, as the inclusion of the companion(a) in the list of necessary heirs, the real right of housing of the companion(a) and, as well as on the succession rules laid down in the Civil Code as to the moment of the opening of the succession and the law regulates it.

4.1 O(A) COMPANHEIRO(A) COMO HERDEIRO NECESSÁRIO NO ART. 1.845

Although the Federal Supreme Court, in its decision in the trial of Extraordinary Appeal nº 878.694/MG, has equated spouses and companions for inheritance purposes, applying, both for the stable union and for marriage, the rules of art. 1,829 of CC/2002, it was not stated whether to apply to the companions also the rules of Article 1,845, which establishes the list

of necessary heirs: descendants, ascendants and spouse, without making any mention of the companion or companion.

According to Gonçalves (2012, p.205) " is the descendant (son, grandson, great-grandson etc.) or ascendant (father, grandfather, great-grandfather etc.), successor, that is, is every relative in a straight line not excluded from the succession by inhuman or disinherited, as well as the spouse (CC, ART. 1845)", and who appears in this list has succession protection, limiting the author of the inheritance to freely dispose of his estate, since the necessary heirs are entitled to half of the inheritance's assets, constituting it legitimate, as rule of art. 1,846 of CC/2002, which can only be removed in cases of indignity and disinheritance.

The omission left by the Supreme Court generates many questions concerning the Law of Succession and many consequences, such as doubts about the effectiveness or not of this right. In this regard, TARTUCE (2019) highlights that the inclusion of the companion in the list of heirs needed would have three effects, as described below.

The first effect that is pointed out, if considered the companion as necessary, would be the protection of its legitimate, generating restrictions on donation and will, due to the incidence of the rules provided in the arts. 1.789 (availability by the testator of only half of the estate), 1.846 (constitution of legitimate) and 1.849 of the CC/2002 (possibility of being heir testamentary and legal).

As a second effect, arising from the inclusion of companions in the list of heirs needed, would be the understanding of the rupture of the will in the ignorance of the existence of living companion, according to the intelligence of art. 1,974 of the 2002 Civil Code.

And as a last effect, the co-existent, as necessary heir, has the duty to collate the goods received in anticipation, as provided in the arts. 2.002 to 2.012 of the 2002 Central Committee, under penalty of being considered as evaded, in accordance with Articles 1.992 to 1.996, when it is also recognised to the spouse.

Although the Brazilian Institute of Family Law (IBDFAM) has joined with embargoes, claiming that the judgment of RE number 878.694/MG would have omitted in relation to the inclusion or not of the companion as necessary heir, as rule of art. 1.845 of CC/2002, the Court rejected them unanimously, pointing out to the rapporteur that there was no omission to be remedied:

> There is no need to mention the omission of the judgment embargoed for absence of manifestation in relation to art. 1.845 or any other provision of the Civil Code, as the object of the generally recognised pass-on did not cover them. There was no discussion about the integration of the partner to the list of heirs needed, so there is no omission to be remedied, (STF, Emb. Decl. no RE 878.694/MG, Rel. Min. Luis Roberto Barroso).

The rejection of the declaration embargoes proposed by the IBDFAN to the Supreme Court did not resolve the question about the inclusion or not of the companion as necessary heir. In this sense, the words of TARTUCE (2019, p. 244):

The position of the present author is in the sense that this rejection of these embargoes, which occurred in October 2018, did not solve the dilemma, and the doctrine and jurisprudence - notably the Supreme Court - should respond, in interpretation of the previous decision of the Supreme Court, whether or not the companion is the necessary heir.

Thus, faced with the omission of the Supreme Court, the just question about the need to clarify the inclusion or not of the (a) companion(a) as necessary heir in the provision of art. 1,845/2002, since this article establishes the list of necessary heirs, including the spouse, mentioning nothing about the partner or companion.

4.2 THE REAL RIGHT OF RESIDENCE OF(A) COMPANION(A)

In the same trial of the Extraordinary Appeal nº 878.694/MG, to equate the spouse and companion, for succession purposes, that is, the family formed by marriage and formed by the stable union, the Supreme Court also mentioned nothing as the right to real housing companion.

It is certain that in this regard nothing had been argued in the original judgment and that the real right of habitation of the companions was already being debated and recognized by the doctrine and jurisprudence. However, the change caused by the decision in the law of succession in relation to the spouse and companion or companion, demanded the manifestation of the Court on the right of real housing of the (a) companion(a), mainly with regard to the extension of this right, understanding not yet pacified.

Although the Supreme Court mentioned that the validity of the Civil Code 2002 tacitly revoked all previous infraconstitutional laws that dealt with the law of succession of comrades, the doctrine is not unanimous in this regard, and as the Supreme Court was silent, it must be asked whether the real right of habitation of the (a) companion(a) is assured by reason of the subsistence of art. 7th, sole paragraph, of Law 9.278/1996, or is granted this right in the same way as the spouse, in the form prescribed in art. 1.831 of the CC/2002. In this regard, it is emphasized that the two devices have different contents.

It is understandable that the real right of housing is based on the rule laid down in art. 1.831 of CC/2002, although only the name of the spouse is mentioned, it is to be interpreted that the rationale of the decision of the Supreme Court on the unconstitutionality of the art. 1,790 was that the inheritance rights between the spouse and companion(a) could not be divergent, nor could it be the real right of housing (BRASIL, 2002). In addition, this was the understanding of the Statement of the Federal Court, on account of the I Civil Law Day.

The Statement No 117 of the CJF/ STJ established two criteria for the real right of housing of companions to be maintained: a) that there was no express repeal of Law 9.278/1996 and b) that there is a permanent and constitutional right of housing. And after, the decision of the Extraordinary Appeal of the Supreme Court is possible that the aforementioned Enunciation had another criterion: the equality between the inheritance rights of spouses and partners.

4.3 THE STF DECISION NO 878.694/MG ON PENDING CASES.

It is unquestionable that the decision taken by the Supreme Court in the trial of RE 878.694/MG caused significant changes in the law of succession by equating, for these purposes, spouses to partners. At the time of the decision, many inventory processes were still

underway, referring to the inheritance of those who had died before the publication of the decisum.

With the argument of preservation of legal certainty, the Supreme Court ruled that the decision should be applied only to unfinished inventory processes, according to the following excerpt from the menu:

> [...] In order to preserve legal certainty, the agreement now signed is applicable only to judicial inventories in which there has been no final decision on the partition, and to extrajudicial shares in which there is still no public deed [...].

With the understanding signed at the trial, the Supreme Court intended to define the scope of the decision taken, with the purpose of granting security to the succession legal relations involving the interests of spouses and partners, printing, inclusive, the rules laid down in the Code of Civil Procedure dealing with procedural law in time, including the system of the isolation of procedural documents, in which the new law is applied to pending proceedings, (MEDINA, 2019).

It is undeniable that the effects of the decision of RE 878.694/MG reached other provisions of the Civil Code, besides the rules of art. 1,829, which remained open, since the Supreme Court did not face this issue, as already discussed. As for the modulation of the effects of the decisum, stated herein, the Court determined its application to inventories that had not yet had final judgment and extrajudicial shares that did not yet have public deed, at the time of publication of the decision, that is, those who refer to the successions opened before the publication of the decision of the Supreme Court, which hurts provisions of the Civil Code as to the rules of succession, especially its article 1.787, which provides on the law governing the succession, as the law in force at the time of its opening.

At this point, the decision of the Supreme Court, with the limitation imposed by the Court, not appreciating its effects on the other provisions of the Civil Code, It ended up not bringing the desired legal certainty, since the succession and the legitimation to succeed are regulated by the law in force at the time of the opening of the succession, as provided for in Article 1,787 of the CC/2002, plus an omission, for not having considered the STF, the possibilities of opening the succession of the (a) companion(a) prior to the 2002 Civil Code, since Article 1,790 was considered unconstitutional.

It remains evident that the aforementioned Court, by modulating the application of its decision, determining the application to the judicial inventories and to the open and unfinished extrajudicial shares, faced not only the rules of Articles1787, but also, of the 1.784, which provides that the time of the transfer of the inheritance is the time of death, both of which are contained in the 2002 Civil Code.

The Supreme Court, although questioned about the scope of the decision through the aforementioned embargoes, rejected them and did not face the issue, leaving the doubt open and the question about the real legal certainty of decisum.

The present question could have been promptly eliminated, preserving the legal certainty of the open and unfinished successions, if the Court had determined that the effects of the decision would apply, in accordance with the provisions of the arts. 1.784 e 1.787 do diploma

civil, to the successions opened from the term of the Civil Code of 2002, or from the publication of the decision.

5. FINAL CONSIDERATIONS

The Federal Constitution of 1988 recognized the stable union between man and woman as a family entity, which could be converted into marriage if the partners wished.

In accordance with constitutional precepts, on December 29, 1994, Law 8,971 was enacted, which regulated the rights of companions to maintenance and succession, in the latter part, he assured the surviving companion the enjoyment of part of the goods in competition with descending and ascending, and also the right to the whole of the inheritance in their absence.

In the process of monitoring the succession rights of the companion protected by the Magna Carta, on 10 May 1996, Law 9.278 was published, recognizing the stable union between man and woman as a family entity, ensuring the right of inheritance and the right of residence.

With the Civil Code of 2002, the succession regime between comrades was annihilated by the rules laid down in art. 1,790, establishing a clear distinction in inheritance rights between partners and spouses, demonstrating clear prejudice to coexistence relations not formalized by marriage.

As a result of non-conformism of the infraconstitutional law, the appeal of a concrete case reached the Supreme Court in a general repercussion, in the trial of Extraordinary Appeal no 878.694/MG, when the Court of First Instance recognised and declared the unconstitutionality of Art. 1.790 of CC/2002, which governed the succession effect between companions, determining the immediate application, as to those effects, the rules of art. 1.829 of CC/2002, which deals with the inheritance regime between spouses. With this decision, the Supreme Court equated spouses and partners for succession purposes, having art.1.790 of the CC/2002 lost its applicability and found unconstitutional.

The above decision, by equalizing the inheritance regimes of spouses and partners, prescribing for both rules of art. 1,829 of the CC/2002, provoked several questions about its scope, especially in relation to inheritance rights of the spouse who were not disposed in the said article, as the right of real housing, the inclusion of the (a) companion(a) as the necessary heir and scope of the decision. Although the Supreme Court has been questioned about such rights to be achieved, also, by the companion, through declaration embargoes, these were rejected.

Thus, the Supreme Court clarified nothing in the decision of the Extraordinary Refusal n. 878.694/MG as to the real right of housing of the partner, since rule provided in art.1.831 of the CC/2002, figure the spouse.

Likewise, the Supreme Court was silent when the inclusion or not of the partner in the list of required heirs, as provided in art. 1.845 of CC/2002, where the spouse was raised to this level.

The above two omissions are reflected in other provisions of the civil law, concerning the succession law of the companion(a), such as protection of legitimate property, collection of property, right to housing, finally, there are doubts about the applicable rules, which could have been, quickly and easily, answered by the Supreme Court when declaratory embargoes were filed.

Similarly, doubts and questions regarding the legal certainty of that Decision have been raised, whereas, when its application is determined to the successions of the comrades in inventories whose decision did not have the final judgment and extrajudicial inventories still without deed of share on the date of the publication of the judgment, the Supreme Court ends up violating the rules of the arts. 1,784 and 1,787 of the CC/2002, which ensure that the succession and the legitimate are governed by the law in force at the time of its opening, it would be sufficient if he, in his own decision, had safeguarded the provisions of those articles.

It is possible that judicial decisions may be inclined to equate all succession rights guaranteed to the spouse, also to the companion, However, three years after the decision of the Supreme Court considering unconstitutional the order of hereditary vocation granted to comrades by the Civil Code 2020, the discussion still generates disagreements and controversies.

Finally, we regret the fact that the Supreme Court has not faced all these issues as it could and should, now what is expected is that there is as soon as possible a reasonable solution, on the part of the legislator, to correct obvious omissions left by the Supreme Court in the trial of Extraordinary Appeal nº 878.694/ MG, pacifying the absolute equality between spouses and partners, for inheritance purposes.

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