

# ENFORCEMENT OF THE RIGHT TO FAMILY COEXISTENCE: PROCEDURAL AND NORMATIVE INSUFFICIENCY IN THE PROTECTION OF CHILDREN'S RIGHTS

CUMPRIMENTO DE SENTENÇA  
DO DIREITO À CONVIVÊNCIA FAMILIAR:  
A INSUFICIÊNCIA PROCEDIMENTAL E NORMATIVA NA  
TUTELA DO DOS DIREITOS INFANTOJUVENIS

CARLOS ALEXANDRE MORAES<sup>1</sup>  
DIEGO FERNANDES VIEIRA<sup>2</sup>

## ABSTRACT

The purpose of this article is to analyze the procedural means for the fulfillment of the sentence of family coexistence duly regulated. Thus foster discussion about the civil procedural crisis that plagues the processes involving existential and family conflicts. For this purpose, the hypothetical-deductive method was used together with the procedural and comparative methods, and to support this research, the method of bibliographic and documentary investigation was used. It is concluded that the Civil Procedure aimed at the execution of family coexistence remains impaired and insufficient, lacking adequate coercive means for the treatment of existential demands, urgently needing a new jurisdictional stance and, Furthermore, there should be procedural legislation for the treatment and resolution of family conflicts.

**KEY WORDS:** Affectivity. Civil Process Code. Child and Adolescent. Personality Rights. Family.

## RESUMO

*O presente artigo tem por finalidade analisar os meios processuais voltados para o cumprimento de sentença da convivência familiar devidamente regulamentada. Assim fomentar a discussão sobre a crise processual civil que assola os processos envolvendo os conflitos existenciais e familiares. Empregou-se, para*

- 1 Permanent Professor of the Doctoral and Master's Program in Law at Centro Universitário Cesumar (UniCesumar); Post-Doctor in Law from Centro Universitário Cesumar (UniCesumar), Doctor of Law from FADISP; PhD in Educational Sciences from UPAP; Master in Law from Centro Universitário Cesumar (UniCesumar); Researcher - Research Productivity for Doctor PPD - from the Cesumar Institute of Science, Technology and Innovation (ICETI); Lawyer. ORCID iD <https://orcid.org/0000-0002-2230-0368>. Lattes: <http://lattes.cnpq.br/7327808122990666>. E-mail: [camoraes.adv@hotmail.com](mailto:camoraes.adv@hotmail.com).
- 2 Master's student in the Graduate Program in Legal Sciences (PPGCJ) at Centro Universitário de Maringá - Unicesumar - Scholarship holder in the Graduate Support Program for Private Institutions (PROSUP / CAPES); Graduated in Law from Centro Universitário de Cesumar - Unicesumar; Graduating in Business Administration from Centro Universitário Leonardo da Vinci - Uniasselvi. ORCID iD <https://orcid.org/0000-0001-5351-9023>. Lattes <http://lattes.cnpq.br/8603486646565986>. E-mail: [diego.vieira\\_180@hotmail.com](mailto:diego.vieira_180@hotmail.com).

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*tanto, o método hipotético-dedutivo conjuntamente com o método de procedimento funcionalista e o comparativo, e ainda, para sustentar referida pesquisa, utilizou-se do método de investigação bibliográfico e o documental. Concluindo-se que o Processo Civil voltado para a execução da convivência familiar resta prejudicado e insuficiente, inexistindo meios coercitivos adequados para o tratamento de demandas existenciais, necessitando-se urgentemente de uma nova postura jurisdicional e, ainda, de uma legislação processual própria para o tratamento e resolução dos conflitos familiares.*

**PALAVRAS-CHAVE:** Afetividade. Código de Processo Civil. Criança e Adolescente. Direitos da Personalidade. Família.

## INTRODUCTION

The State, at the moment it legislates on existential issues involving the family and human development, places on itself the responsibility to deal and resolve the conflicts arising from this relational nucleus. In this socio-juridical perspective, the current and constitutionalized Family Law has turned to the protection and happiness of its members, especially the vulnerable, the person of the child. Note that the legal system has come to grant children and adolescents special rights and particular principles aimed at the protection of children and youth, one of these is the so-called right to family coexistence.

In this way, the right to family coexistence has become a right not only for parents, but also for children. This right is fundamental and indispensable for the development and protection of the rights of the personality. It is no longer conceived only as a moral duty, but a legal obligation to do, to provide assistance, beyond the material (food), but also emotional and psychological (coexistence).

However, changes in substantive law do not appear to have achieved procedural law, since there is still a resistance of cultural character in talking about forced execution of family coexistence when the guardian parent unjustifiably stops living with the child. Becoming visible the need to discuss and rethink the process of fulfilling the sentence involving the right to family coexistence.

This research was based on the hypothetical deductive method, using a qualitative analysis, as well as bibliographic and documentary research, aiming to demonstrate the civil procedural insufficiency regarding the protection of the right to family coexistence when the guardian parent remains silent in his duty to live together.

The research was organized in three parts, in the first it was given focus on the right to family coexistence and its reflexes for human growth and development. In the second part, the procedural issues regarding the enforced compliance of family life were addressed. And in the third and final part, hermeneutic possibilities for the protection of this right infantojuvênil have been demonstrated, in addition to the need for a proper procedural legislation for the solution of family conflicts.

The present study proposes a reflection on the importance of family coexistence, as well as the procedural need for this right to be effective when it is not done voluntarily. The focus of the article is not the imposition of "love" on the legal rules, but rather on the promotion of a

responsible parenting, of a conscious action and above all, an effective judicial guardianship, and not only declaratory rights.

## 1 THE FUNDAMENTAL RIGHT OF THE CHILD AND ADOLESCENT TO LIVE WITH BOTH PARENTS

The right to family life is provided for in the Federal Constitution of 1988 in art. 227, in the Statute of Children and Adolescents in art. 3, in the Civil Code in art. 1.589 and also in Law n. 12.318/2010 that deals with Parental Alienation. Parents have the duty of respect and enforcement of this right in the face of the person of the child, and this legal obligation arises from the principle of responsible parenting (art. 226, §7º, CF), in cases of loss of physical custody of the child, which generate the duty to have him in their company (art. 1.634, II, CC), as well as in the obligation of both parents to provide integral assistance (physical, psychic, moral and spiritual aspects) of the child (art. 229 CF, 22 ECA and 1.634, I, CC).

There is also talk of the existence of the constitutional principle of family coexistence applied to the Law of Families. "As a consequence of the principle of best interest is the principle of family coexistence, understood in the right of parents and children to live with each other" (ANGELINI NETA, 2016, p. 84). This principle aims precisely to preserve the parental relationship clearly of a useful nature, which imposes not only on the family, but also on the State the promotion and implementation of the right of the child and the adolescent. (AMARILLA, 2014).

The affective rupture between parents will not break the bonds arising from parenting, the latter remains unchanged, what actually occurs is an adaptation of the exercise of parental authority, which has a direct reflection on the form of coexistence between parents and children. Grisard Filho (2016, p. 110) states that: "The rupture, in itself, does not cause changes in the relations between the subjects of the guard, but it inevitably establishes a new way of linking". In this way, it remains clear that the cession of coexistence between parents will not cease their coexistence with their children, even residing in different houses. (LÔBO, 2008).

The law under analysis becomes the words of Madaleno (2007, p. 119) as being "a right conferred to all persons united by ties of affection, to maintain coexistence and spiritual exchange when these paths of interaction have been broken by the physical separation of the characters".

The objective of this right is basically to safeguard family relations, whether they come from consanguinity or socioaffectivity, including beyond the parental figures. The family coexistence also covers the right of correspondence between parents and children (STRANGER, 1991), speaking today even of a virtual coexistence and communion with the physical to encourage and foster the greater interaction of the non-guardian parent with their offspring.

Currently the family is seen as a privileged locus, where the personality development of all members actually occurs (GAMA, 2008). Being exactly in this place of interaction that the family will overcome its eudemonist conception, to become mainly solidarist, since in the family its members are co-responsible for each other. And even if existential freedom is one

of the pillars of the Democratic State of Law, this autonomy focused on the Law of Families, has as its object “conjugated options”, which impose a certain limit on this freedom, to the exact extent that individual choices will reflect directly to other members of this affective and relational core. (TEIXEIRA; TEPEDINO, 2020).

This co-responsibility is based on the right of family coexistence, which in its new and constitutionalized conception presents a legal obligation to parents and a fundamental right for children. In fact it is no longer maintained that the coexistence (visit) is a choice of the parent, nor an exclusive right of the latter, because it is much more related to the well-being of the child than of the parent. “Family life with parents is much more tied to an obligation to do a positive act in the child’s face than to a right [...]” (MORAES; VIEIRA, 2020, p. 738-739).

Hence the importance of the realization of family coexistence, because it will be through this relationship, this exchange of affection, in short this family experience with both parents, that the child and the adolescent can create and develop the idea of belonging and security. Living together will provide a healthy environment for growth and integral development, still in the consolidation of his personality. (TEIXEIRA; TEPEDINO, 2020).

From this perspective, from the fundamentality of the right to family coexistence, it is understood that fundamental rights will, in fact, affect private law, regardless of its branch, and “not only in patrimonial juridical relations, but also in existential relations” (EHRHARDT JÚNIOR; TORRES, 2018, p. 350). At the moment when family coexistence is established as a fundamental right of constitutional order, means must also be established for its protection and effectiveness in order to preserve and protect them through judicial, administrative and legislative actions.

On the family and its essentiality in the formation of the person, Hironaka (2018, p. 326), clarifies that:

It is undeniable that the bosom of the family forms those who participate in it. It is in it that one prepares or is unprepared for gregarious life, depolulating or receiving obstacles on the way between his private space and public space. More than just people, the aim of the family is to form citizens, not only from their cities and their countries, but from the world, so that they respect the dignity of others and have respect for themselves. This is the family’s responsibility: to serve, to provide and to educate.

For this fact is that, it is up to parents to structure and shape the personality of their children, through the sharing of parental duties, and in the effective exercise of their roles in the human development of their offspring (BOSCHI, 2005). At a time when one recognizes the differences and complementarity of parental functions and relations, it is then possible for the family to reach its goal of being time/space in the development of the children’s personality, and also in a reflexive way of adults, and these functions and actions must be supported by affection, responsibility and solidarity. (GROENINGA, 2009).

While the right to free family planning is guaranteed to all persons, they are not exempt from the obligations involved in caring and caring for the child, and it is up to parents regardless of their will to provide moral assistance, material, affective, intellectual and spiritual to the children since its conception (CARDIN; SANTOS; GUERRA, 2015). Thus, the right to family coexistence “is not structured as an object of personal pleasure of parents, predisposing

itself, as a duty, to the protection of needs proper to the proper development of the personality of children [...]” (STRANGER, 1991, p. 58).

In the words of Amarilla (2014, p. 90):

[...] the right to family coexistence should be seen as a means and not as an end in itself, constituting an instrument aimed at the development of the personality of its members and meeting the special demands of those who, Because of their little age, insufficient maturity, they call for more attention and care.

It will be the effective coexistence that will establish the affection necessary for the life worthy of children and adolescents, hence the importance of respecting this right, always in view of the Personality Rights of both children and parents (GROENINGA, 2009). In this line of thinking Moraes and Vieira (2020, p. 752) maintain that: “[...] healthy and long-lasting family life enables the child to exercise his or her right to psychophysical integrity, honor, respect and the free development of his or her personality”. Thus, it will be in the family and in this relationship and interaction that the development of the personality and potentiality of its members will be promoted, thus guaranteeing them respect for the dignity of the human person in this social aspect. (GAMA, 2008).

Moreover, the right to family coexistence is a fundamental right that aims to guarantee the protection of other rights, more specifically those of the personality, rights that are “inherent to the person and his dignity” (TARTUCE, 2017, p. 153). It is through coexistence that the physical and psychic integrity of the child will be established, it is through coexistence that one will have respect and care for their existential rights of the child and the adolescent.

This physical and emotional interaction between the child and both parents is essential to implement the numerous fundamental rights and personality of the child, serving coexistence as an instrument that benefits the full biopsychosocial development of children and adolescents (BOSCHI, 2005). Thus it is not enough to provide only support and education, “but it is necessary to ensure the coexistence of children with parents, understanding this coexistence as fundamental to the formation of personality in the individual” (ANGELINI NETA, 2016, p. 85).

The family environment as already listed, has a great influence on the development of children and children, and parents should guarantee them at least the minimum conditions for the development of the children's personality (TOMASZEWSKI, 2004), because when this does not occur, rights will be violated, damage will be done and dignity will be tainted. When there is a lack of zeal, care and affection in paternal-maternal-filial relations, it can be said that they will trigger “uncontrollable personal and social harm” (JABUR, 2019, p. 1115).

The omission with regard to physical and emotional contact with the child is a direct violation of this fundamental right, but, moreover, it is a reflex violation of the numerous rights of the personality provided for both in the Federal Constitution of 1988, as in the 2002 Civil Code. “By way of illustration, this act violates the rights of the personality in the physical sphere (right to life, physical integrity), psychic (right to freedom, psychic integrity) and moral (right to identity, respect)” (MORAES; VIEIRA, 2020, p. 750).

If there is no family life, the child will be able to carry with him the feeling of abandonment, trauma of rejection, difficulties to relate and many other damages that will vary his

intensity from person to person<sup>3</sup>. When absent the necessary stimuli the developing human person, "a whole capital aspect of the personality of the child, of his humanity", we could say that already more has been constituted" (TOMASZEWSKI, 2004, p. 86).

Soon, when the parent refuses to live with their child, being silent in their duties, comes to cause damage of extrapatrimonial order. Accordingly, Basset (1993, p. 27-28) clarifies that:

*When the parent does not cohabit unjustifiably refuses to contribute to the paternal or maternal figure, in a visible, legitimized and positive manner, his or her conduct violates the child's substantive right, for whose wholesome and integral formation he or she is responsible, incurs an unlawful act or omission which may cause extra-marital and material damage, which an imperative of justice requires reparation.*

In this way, it is possible to say that the realization of the fundamental rights and the personality in the first place is the responsibility of the Judiciary, since often public policies organized by the State, fail to achieve their preventive and promotional end (FERIATO; MARCH, 2019). This fact is understood that regardless of the will of the parent who does not live daily with the offspring, must comply with their legal duties, even if at its core do not want to exercise it, for reasons that the right cannot encompass.

Finally, the right to family coexistence is a fundamental right of the child who has an instrumental function in the realization of other fundamental rights and personality, as well as imposing legal obligations on parents involving living together and caring. When there is a parental omission regarding coexistence, whether total or partial, then there is talk of an existential damage immeasurable by the Law, and then the Judiciary is responsible for implementing it in order to guarantee the best interest of the child and his full protection.

## 2 ENFORCEMENT ORDER AND ENFORCEMENT OF THE RIGHT TO FAMILY LIFE

One experiences in the present day a wave of relationships, and many of these end up causing the birth of another human being. Regardless of the marital status of these people, son will always be a son, and it is up to the parents, whether they are together or not, to provide for all the needs of this offspring<sup>4</sup>. "The separation of spouses (separation of bodies, legal separation or divorce) cannot mean separation between parents and children. In other words, parents are separated, but not from their children under the age of 18" (LÔBO, 2008, p. 168).

Therefore, because there is no undoing of parental duties and responsibilities, these regardless of their marital status, or loving relationship, will have the duty to support their children, especially in their immaterial aspect. And it is through family coexistence that these

3 In this sense, it is stated that: "These parents who fail to visit their child end up causing irreparable moral and psychological order. The coexistence that the father stole from the son, the emotions that were not shared, the affective bond that was not formed or not maintained can not be recovered, by total time-feedback impossibility" (BOSCHI, 2005, p. 213).

4 about such a social fact, Grisard Filho (2010, p. 196) maintains that: "It is a fact known to all that day by day the number of family ruptures increases and the formation of new nuclei, in which live or circulate and socialize children of different unions, constituting a material and emotional support network that is not free of antagonisms and conflicts".

duties will be materialized. Thus, the realization of parental duties in what restricts family coexistence goes beyond being physically together with the child, but is noted in the materialization of a set of actions that are intended in the protection, zeal and care of the child and adolescent, thus composing a bundle of conduits that have as its primacy the best interest of the vulnerable.

The right to family coexistence brings with it a bilateral perspective, where both parents and children are holders of it. And because this right contributes to the satisfaction of the needs of the offspring, it is necessary to have mechanisms that can ensure their satisfaction, which has as the biggest beneficiary the child and adolescent. (TARTUCE, 2019).

The parent who does not habitually reside with their offspring will have special responsibility for the realization of family coexistence. It is up to him to find ways to better accomplish this time of relationship, adapting the times, days, and activities that will be performed, seeking to strengthen this bond and thus ensure the full development of the child's personality. (BOSCHI, 2005).

It is only through the understanding that family coexistence is an infantojuvenil right, linked to the vulnerable person, and no longer simply a moral obligation of the parents, that it will be possible to open spaces for debate and discussion on a legal guardianship aimed at this institute, and ways to rescue and promote a responsible parenting (MORAES; VIEIRA, 2020). "Therefore, the visitor, as long as the visit is fixed, cannot neglect the duty to perform it, failing to fulfill it in the agreed form, under pain of its omission characterize attack on the fundamental right of the visited (art. 5º of the ECA)" (BOSCHI, 2005, p. 209).

The family relations of contemporaneity are often formed without there being a real sense of affection, solidarity and awareness of a responsible parenting and respect for human dignity (CARDIN; SANTOS; GUERRA, 2015). What often ends up causing in the breach of the terms listed in the judicial executive title, in particular the points related to coexistence, since for subjective reasons the guardian parent ends up defaulting on their parental duties.

As explained, it is the right of the child and the adolescent to be able to develop in all its aspects (moral, spiritual, psychic, physical, among others), being the adequate and continuous family coexistence that provides this to develop. In this sense, "it will not be enough for the winner, however, to issue the order. It must be fulfilled in the real world" (ASSIS, 2013, p. 174). Thus, "[...] it is not totally unreasonable to demand of those who share the right of visits, especially parents, compliance in favor of the minor; after all, the latter also holds the right to coexistence" (TARTUCE, 2019, p. 434).

In these terms, Dias (2017, p. 565) understands that: "It is much more a right of the child to live with the parent who does not have custody. Thus, there is an obligation - and not a simple right - of parents to meet visitation fees". Once the form of family coexistence is regulated, the guardian parent, the one who does not reside with the child in the usual way, has a legal duty, which has its genesis an agreement approved in court or even a judicial decision, therefore, family coexistence "becomes a law between the parties of an individual standard" (BOSCHI, 2005, p. 210).

Thus, in the event of a failure to comply with a sentence, or agreement, this parent "may be held liable for the moral and property damage resulting from the visit" (BOSCHI, 2005, p. 210). But beyond these penalties, one must also guarantee means of compliance, even if

forced, to the proper and adequate family coexistence to the child, since, it is a legal duty and not moral.<sup>5</sup>

In these terms, Tartuce (2019, p. 434) maintains that: "Imposing the forced fulfillment of visits does not in itself cause harm to the minor. The parent will be present, and the child will not feel rejected. If there is fear of possible mistreatment, coexistence can be monitored". Children can and should require the proper coexistence and care of their parents or guardians, since when not fulfilled spontaneously, besides the possibility of civil reparation, depending on the case may occur the suppression of family power based on the negligence of its exercise. (JABUR, 2019).

At a time when rights are guaranteed, and one of them being access to justice, it is necessary to think that in addition to this, it is necessary to have an effective judicial benefit. Thus, there is no point in the State saying the law, if it is not able to protect it and/or enforce it fairly (CASAGRANDE; TEIXEIRA, 2019). In other words, it is of no use to the person of the child to have his or her right regulated in a judicial executive order if the latter cannot be fulfilled when there is resistance of the parent to comply with his or her obligation to do (coexist).

The Civil Process is the form that is today for the realization of the material rights conceived in the legal order, and it is through the Code of Civil Procedure 2015 - Law n. 13.105/2015 - that this execution procedure is organized that aims at the satisfaction of an obligation determined in a judicial or extrajudicial enforcement order.

Normally, family life, because it is a right of vulnerable person, will be available in a judicial executive order (art. 515, CPC), whether rendered in a judgment or even in an agreement made by the parties, approved by the competent court. That will follow the procedure of the Fulfillment of Sentence that Recognizes the Requirement of Obligation to Do or Not to Do, stipulated in art. 536 to 537 of the 2015 Civil Procedure Code. (BRASIL, 2015).

About the subject, Madaleno (2019, p. 475-476) says:

The doctrine and jurisprudence have understood the right of visits as a duty enforceable, including by the imposition of a financial fine of the children, it being certain that the parents have the duty of contact with their children and whether, perhaps, they are bound by this obligation, out of selfishness or revenge against the other parent, his former affective partner, [...] being salutary that the judge state force, through financial threat, custody-free parents exercising the duty of coexistence, because only in this way can realize that there are other ways to distill their hatred for the conjugal love that has been undone.

The process of sentence enforcement is initiated when there is no addition of the determinations listed in the judicial executive order spontaneously. This is a typical document that guarantees the holder the right to a certain benefit (certain, net and enforceable - art. 783, CPC), allowing, if not fulfilled, the initiation of judicial protection of an executive nature, which

5 Special Resource. Civil and Civil Procedure. Regulation of visits. Approved agreement. Noncompliance. Execution. Fitting. 1. In the field of visits, the guardian of the minor is liable for an obligation to do, or is, has the duty to facilitate the coexistence of the child with the visitor on the days previously stipulated, should refrain from creating obstacles to the fulfilment of that which has been determined in judgment or laid down in agreement. 2. A transaction, duly approved in court, equates to the judgment of the merits of the contract and has value of sentence, giving rise, in case of non-compliance, to the execution of the obligation to do, being able the judge, including set a fine to be paid by the refusing guardian. 3. Special appeal known and provided in order to determine the return of the case to the judgment of first degree for regular prosecution. (STJ. Resp. n. 701.872-DF. Fourth Turma. Rapporteur: Minister Fernando Gonçalves. Tried on 12.12.2005).



has as main characteristic the practice of coercive material acts, which aim to provide the forced addition of the service. (GARJARDONI; et al., 2018).

Because the realization of family life depends almost exclusively on the fulfillment of the obligation to make the parent not guardian, the executive title does not prove to be self-sufficient, in that the assured right depends on a benefit by the plaintiff, thus requiring an executive tutelage, so that there is the implementation by the executioner (GARJARDONI; et al., 2018). "The right to coexistence creates an obligation to make a unique, personal obligation that must be fulfilled personally" (DIAS, 2017, p. 566).

The Judiciary Branch may use coercive measures (periodic fine) - which "has and must have, within the Family Law, discouraging character of the inadequacy of the assumed obligations" (MIGUEL FILHO, 2006, p. 818) - or subrogation (search and seizure or reinstatement of ownership) so that it can provide the execution with the proper executive guardianship, however, in the case involving noncompliance of coexistence, it remains only

the possibility of application of *astreinte*<sup>6</sup>, based on art. 213 of the Statute of the Child and Adolescent - Law n. 8.069/90 -, since only the parent can fulfill this obligation and no one else. (BRASIL, 1990).

About the application of daily fine involving the noncompliance of living with children, Teixeira and Tepedino (2020, p. 318) clarify that:

One of the possibilities to compel one of the parents to live with their children is the imposition of a fine provided for in arts. 497 ff. of the CPC, when it is understood that coexistence is an obligation to do, because it is through it that many duties arising from parental authority, such as education and creation, are realized. However, the solution is criticized in that it leads to the monetarization of family relations and the imposed conviviality will not always be better for the child. Although the fine was provided as a penalty to the alienating parent by art. 6º, III, of Law 12.318/2010 (ending the argument that family relations would be mixed with financial matters), its function in these cases is coercion to comply with the cohabitation clauses established judicially (by agreement, interlocutory decision or judgment).

The monetary value of the daily fine is not the focus the execution, in fact it is only the available means to try to achieve the realization of the obligation to do, thus, such measure aims to "constrain the debtor not to default, ie to fulfill the assumed obligation. And it is not punitive in nature of the inadequacy" (MIGUEL FILHO, 2006, p. 819).

It basically consists of psychological pressure exerted on the executed person, putting him before two scenarios: either he fulfills the judicial command or he will be fined (*astreinte*) (ASSIS, 2013). "That is, it is thought in the coercive practice of material acts that aim to provide the forced satisfaction of a due and inadvertent service, to conform the external world to the determination constant in the judicial executive order" (GARJARDONI; et al., 2018, p. 672).

Unlike the food execution that has the possibility of using the threat of arrest (art. 528, § 3º, CPC), as well as the expropriating means (attachment) (art. 528, § 8º, CPC), the execution

6 Enforcement of obligation to do. Visits. Fine. Having determined that in case of breach of the visitation agreement would be imposed a fine on Vairago and having her, even aware of the decision, ignored the determination, correct if it shows the fixed indemnity. Until, it brought no foundation plausible that causes the payment of the fine to be elicited. Appeal devoid. (TJ/RS. Seventh Civil Chamber. Civil Appeal n. 70.012.800.207. Rapporteur: Des.ª Maria Berenice Dias. Tried on 21.12.2005).

of family coexistence only has this indirect execution mechanism, which is the fine in money (astreinte). (BRASIL, 2015).

Concerning these issues, Amarilla (2014, p. 205) lists that:

Regarding the practice of parenting, it is understood that the State may require fathers and mothers to provide all the material support necessary for the offspring, always with a view to the integral protection of the interests of children and adolescents. However, it should be emphasized that the material support will not provide the offspring of what it most needs, because the most profound and significant bond that can be conceived for a child as to his father and mother [...].

As is well known, such a tool of coercion ends up being ineffective when the executed has no assets to be pawned. On this point, Assis (2013, p. 176) precepts about this "failure" that permeates the execution process, "[...] and consists in the fact that it does not induce to the fulfillment the recipient of the order devoid of attachment". In this way, the parent who refuses to carry out the coexistence, if he has no assets to answer, the fixation of astronomer in nothing will change his attitude, which will continue to inertia in the face of the child and/or teenager.

The process is not only an individual guarantee, but is also regarded as a transcendental fundamental right, which aims at positive state actions (KNOPFHOLZ, 2011). When the process does not reach the desired end, then there is talk of a fruitless executive process. But by placing a fundamental, essential and structuring right for the person, a right that is that of family coexistence, the State cannot remain inert, under pain of violating its own foundations. "We understand, in this situation, the complex causes of the present serious crisis of the executive function" (ASSIS, 2013, p. 13).

The simplistic treatment that the Judiciary continues to give to issues related to the reorganization of relations between parents and children cause a crisis in the face of the realization of the rights of juvenile (GROENINGA, 2009). "It is clear that the Judiciary can not fail to protect the rights of the holders of a claim, or let go of parental irresponsibility cases" (CARDIN; SANTOS; GUERRA, 2015, p. 142). However, to expect that the affective abandonment, and consequently irreparable harm to the child and adolescent, and to believe that only the indemnities will solve the problems of psychic and structural order of the person, is a direct violation of the Federal Constitution and the international values of respect and promotion of human rights.

What is currently evident is that the process of sentence enforcement, which aims at the adimplementation of family coexistence, has a superficial treatment, applying "remedies" (astreinte), which often render ineffective in its application. "The remedy, however, acts only on the wound, not attacking the cause" (SPENGLER, 2006, p. 51).

The patrimonialista ideology that marked the codification of 1916 is still present in the Civil Code of 2002 and reflects directly in the Code of Civil Procedure of 2015, however, this cannot prevail over the existential values that emanate from the Federal Constitution of 1988, under penalty of leading to a systematic and axiological inversion (SCHREIBER, 2016). "The procedural laws in force in our order, including the novel of 2015, have a strictly patrimonial character and are, in essence, bureaucratic, which prevents an effective protection of these ethereal rights" (MEDINA, 2017, p. 40).

The possibility of civil reparation is already pacified in the courts when the negligence or rejection of the duty of care is established. In this sense, the failure to do so, the repeated and unjustified parental omission regarding family coexistence by the guardian parent, could be grounds for liability for moral damage to the child. (BOSCHI, 2005).

Concerning the issues questions, Basset (1993, p. 228-229) considers that:

*Any action or omission that totally or partially violates the subjective rights-duties of the family that emerge from the filiatory bond, that causes appropriate damage, Whether these are of an extra-marital or patrimonial nature, must oblige to repair. The right may not remain impassive in the face of irresponsible paternity or motherhood, enshrined in an immunity that secures the parent from his duties, from the obligation, in the face of the damage caused, to make full reparation, although this qualifier is presented in the historical-experiential reality of the victim as a utopia.*

However, the financial compensation in these cases of affective abandonment, or even the application of a daily fine for failing to live together, does not stop carrying traces of capitalist order, "in the sense that with the condemnation, the person receives a value to compensate or mitigate an ill suffered, a fact that increases the judicial process too much without really solving the problem" (CARDIN; SANTOS; GUERRA, 2015, p. 142).

The problem that plagues procedural effectiveness is related to its interpretation and application. The Process is an instrument in favor of the Judicial Power for the resolution of conflicts, and for its effectiveness to be satisfactorily effective, it cannot be left aside that the Process (and the Law) is a cultural identification, and then needs to be applied to the light of time and reality that if this (MÖLLER, 2029). "There is a real social and legal crisis that affects numerous institutions of society, the family being the main affected by this phenomenon" (CARDIN; SANTOS; GUERRA, 2015, p. 132).

The way to treat the right of family coexistence is totally inadequate and insufficient. It is demonstrated that the legal and legislated technical means in the implementation process have not yet evolved sufficiently to guarantee the effective legal protection. (ASSIS, 2013).

Understanding these questions involved procedural insufficiency, it is noted that the civil process needs a greater cognitive openness to the protection of rights, so that it can respond in a way that does not simplistic the complexities of the world. The process needs to be observed from its complexity and importance, in short, enable this, means that can give a satisfactory response to the social diversities that flow into the judiciary every day. (MÖLLER, 2029).

It remains clear that there is a limitation of the procedural mechanisms in the face of the implementation of the stipulated family coexistence regime (TARTUCE, 2019). However, such limitations cannot be an obstacle to the realization or at least the attempt to materialize the fundamental right of the child and the adolescent.

In this way, "the Family Law demands speed in the solution of its conflicts, because the dissatisfaction supported by the parties involved in pendenga causes so much bitterness that a time-consuming process will not help, quite the contrary" (BEZERRA; SOARES, 2019, p. 72). Access to justice not only embraces its literal meaning, but also covers having the right to a due process, a process that needs to respect individual guarantees and still manages to produce an effective decision. (CASAGRANDE; TEIXEIRA, 2019)

As already maintaining, it is possible to impose the daily fine payment for the parent who fails to comply with their duty of coexistence, and also in fixing compensation to the parent who is missing their care obligations, which end up violating the fundamental rights and personality of the child and the adolescent.

However, it is also known that such decisions alone do not solve family problems at their source.

For these reasons, it is necessary to rethink the process, the coercive measures and the way in which family conflicts are dealt with, going beyond the predominant patrimonial vision in material and procedural legislation, in order to at least try to protect subjective rights, existential and structuring of the human person.

### 3 THE PHILOSOPHY AND THE NEED FOR A PROCEDURAL AND REGULATORY AMENDMENT

The family modification and restructuring not only changed the form of treatment, but also put the child and adolescent at the top, as the first and most important family member, aiming to have their needs met in a comprehensive and satisfactory way.

It broke with the old notion of belonging (related to property) of the parent (usually the male figure of the relationship), thus causing the repositioning of children to the center of any legal discussion (AMARILLA, 2014). That said, "with the new contours, drawn from the principle of dignity humana, the child and the adolescent began to be perceived differently in the family group" (BRETAS; OLIVEIRA, 2019, p. 47)

On the theme Grisard Filho (2016, p. 46) clarifies that: "What exists is a uniform conception centrist son, which shifts its fulcrum from the person of the parents to the person of the children [...]". In other words, the conception of the centrist child came to honor the child within this family relationship, entrusted to parents to observe, respect and promote their rights.

This new concept of family relationships is justified in so far as children are vulnerable persons, "since they can be oppressed in various possible ways, such as the lack of responsible parenting portrayed by rejection or intrafamily violence [...]" (MORAES; ROSA, 2017, p. 39). The issues involved in protecting children and adolescents are now treated as a supraindividual and internationalized problem. (MARQUES; MIRAGEM, 2012).

The principles aimed at the Law of Families suffered in their entirety a rereading, turning to the protection and welfare of the child and the adolescent, and in a subsidiary form of the other members. In short, the principles act as true enforceable norms to be applied to the greatest extent possible, varying on a case-by-case basis.

The principle application before the specific case becomes imperative and necessary, given that this protective framework contributes "to the realization of the full development of the personality of family members and the protection of their personality rights" (BARRETO; CARDIN, 2007, p. 304).

These rights that in the sayings of Tartuce (2017, p. 153) have as objective "the ways of being, physical or moral of the individual and what one seeks to protect with them are, exactly the specific attributes of personality, being personality the quality of the entity considered person".

It is understood that the constitutional principles show a path to follow, limits to be observed and yet, a minimum to be respected given the weighting and proportionality, of those who are in short the fundamental rights and personality (BARRETO; CARDIN, 2007). It follows that, regardless of the branch of law, whether public or private, all are influenced by the Constitution and the international precepts of protection of the human person.

In this logic, civil procedural law should also be guided by constitutional principles aimed at protecting children and adolescents. Since the constitutional precepts are the basis of the Democratic Rule of Law and that aims at the valorization of the human being (CAMARGO; JACOB, 2020). "Procedural law, a branch of public law, is governed by rules that are found in the Federal Constitution and in infraconstitutional legislation" (NERY JUNIOR, 2017, p, 56).

Exacerbated individualism and the liquidity of relationships put at risk the fundamental rights and personality of vulnerable staff within the family relationship, because without the proper surrender and support of parents, The son will not be able to fully develop his personality, thus giving rise to an evil for the whole society, which only maximizes this crisis of post-modernity. (CARDIN; SANTOS; GUERRA, 2015).

At this point, regardless of the feeling that the parent nourishes by the child, family coexistence is a fundamental right for the development of the child and adolescent, so its effectiveness cannot be hostage to the subjective wills and desires of the guardian parent.

This statement is based on the primacy of human dignity and current legal values. (MORAES; VIEIRA, 2020).

As already stated, the civil liability applied to matters involving parental care only provides for the pecuniary conviction, or even the daily fine applied for the default of the regulated coexistence, which as you well know, does not repair the damage caused, can only provide a mitigation of the damage, through the payment of therapy. "In the perspective of full reparation of the victim, the son, who had his psychic integrity violated - and, ultimately, his dignity - continues without any kind of compensation for the damage suffered" (TEIXEIRA; TEPEDINO, 2020, p. 298). Since, what is desired is conviviality, care, zeal and not money, one wants to have a father and mother, not numbers in a bank account.

Thus, it is necessary a much more creative, sensitive and capable jurisdictional action for conflict resolutions, even in the execution phase, since the judge can, based on art. 139 of the 2015 Code of Civil Procedure, to adopt atypical coercive measures (item IV), to encourage the promotion of self-composition (item V), or to determine, the personal attendance of the parties to try to understand the reason for such resistance in the fulfillment of coexistence (item VIII), among other provisions that are in its power. (BRASIL, 2015).

Under the theme addressed Bezerra and Soares (2019, p. 57) clarify that:

It is of utmost importance that the Judiciary Power always remains active as a controlling and protective entity of family rights, considering that any society is structured and has as a basis for the formation of the State a healthy

and conflict-free family. Since the damage caused by the failure to resolve family disputes can result in serious irreversible damage to society.

While an adequate law for the treatment of family conflicts does not come, it is the duty of the Judiciary to remedy the legislative failures of the current legal act (SCHERBAUM; ROCHA, 2018). It needs to equip itself with tools that strengthen the legal system, focusing on the protection of the person and their individual guarantees (FERMENTÃO, 2016). It seems that the Judiciary forgets that "conflict is a complex mechanism, derived from the multiplicity of factors, which are not always defined in its regulation, and therefore are not only normativity and decision" (SPENGLER, 2006, p. 34).

No normative device, whether of material or procedural law, should have its interpretation removed from the impositions and limits set by the Federal Constitution of 1988 (CAMARGO; JACOB, 2020). In this way, it is stated that, "the enforcer of the infraconstitutional rule, among more than one possible interpretation, should seek to make it compatible with the Constitution, even if it is not the one that most obviously stems from its text" (BARROSO; BARCELLOS, 2003, p. 164).

It is necessary to break with old conceptions and lessons, so that in jurisdictional practice a positive effect on reality can be achieved (BARROSO; BARCELLOS, 2003). Given that, "[...] it is only through a differentiated action of the role of the judge, to be obtained through hermeneutic activity, that it will be possible to guarantee the effectiveness of the jurisdictional provision and the so desired justice' in the most complex cases" (MEDINA, 2017, p. 84).

If we insist on the current procedural formulation for the Law of Families, we will only perpetuate situations of insufficiency, violations of rights and irreparable damage, especially to the vulnerable person of this relationship, the child. It is well known that, the solution of the family conflict in the process of knowledge comes only after a long process, that usually does not come to pacify the parties, but on the contrary, imposes something that does not solve, only attacks (SPENGLER, 2006). "The judicial decision of merit carries the weight of state intervention, is due to the exclusive duration of the process, contributes to exacerbate contentiousness in the community, besides counting on the low credibility of the population" (SILVA; CARACIOLA, 2018, p. 447).

Moreover, it is common that, in family relations, the judicial process is only the most apparent portion of a much broader and deeper conflict, which is not brought to the record. The solution imposed by the judge on the parties, under such conditions, will represent a new source of dispute, which will often trigger new judicial measures, including to obtain enforced compliance with the previous decision. (GARJARDONI; et al., 2018, p. 1177).

It remains clear that when it comes to family issues, the judge is technically limited to appreciate and glimpse all the nuances that permeate the parties. Because usually disputes, in the knowledge or execution phase, have a great load of feelings and stories. For this fact is that, "interdisciplinarity imposes then to the right operator who, aware of its own limits, transcends its specialty, welcoming contributions from other disciplines" (TOMASZEWSKI, 2004, p. 237). In order for conflicting family relationships to be adequately grasped and understood, specialized knowledge is required, which the judge usually does not have. (GARJARDONI; et al., 2018).

Thus, it is highlighted the auxiliary professionals of justice who work on psychological and social issues. "In this sense, it is indispensable to the work of the psychologist who mediate the processes in Family Law, contemplating the affective ties that will be beneficial in the evolution of the child" (PEREIRA; ARAÚJO; RIBEIRO, 2020, p. 10). It will be these professionals who will really capture possible outcomes for the resolution of family conflicts, and from the reports the judge may grant a more specific and effective judicial benefit. "And interdiscipline has played a fundamental role in this process of awareness of the complexity of relationships and the multidetermination of conflicts and impasses" (GROENINGA, 2009, p. 154).

The consensual environment already widespread in both practice and theory is the most appropriate form of conflict resolution of a family nature, as these contribute to the parties' finding the reasons and reasons for the actions taken, and from this identification, on their own to solve the problems (TARTUCE, 2019). And yet, it turns out that, "consensual means are less impactful, faster, less bureaucratic, and tend to last. This is because the composition is achieved through the participation of the interested parties, and is therefore not imposed coercively" (SILVA; CARACIOLA, 2018, p. 455). However, due to the constant situations of family conflicts and offenses to the rights of children and adolescents, it is necessary that the Brazilian legislator provide immediate protection regarding family coexistence.

For these and other reasons, the law must be the means of achieving justice, and not just legislative ideas. For justice to occur effectively, it is necessary to have human dignity as its mirror, objective (FERMENTÃO, 2016). Therefore, when it does not occur to coexistence in a repeated and unjustified way, the dignity will be violated, and immediately there will be an injustice, which ends up tarnishing the entire legal system.

Thus, Scherbaum e Rocha (2018, p. 15) point out that:

The right itself is in constant motion. All aspects of life in society influence the creation of law in the same way that created law directly influences society. Under this same tuning fork, it is evident that the right that emanates from society to society accompanies the facts, and must comply with the demands created by the society to which it was created.

Given this, it is evident that the advances of the national and international society, make it stand out the need for new effective instruments for the effective protection of existential rights (CASAGRANDE; TEIXEIRA, 2019). Thus, rights and guarantees addressed to jurisdictional issues and their way of conducting - the process - should be able to keep up with these advances. (KNOPFHOLZ, 2011).

In view of this, it is clear that the litigants, when using the Judiciary Power, have certain expectations in face of it, being they: (a) that a concrete legal rule be formulated, demonstrating how this relationship should take place - which of them is right; (b) the possibility of enforcing the legal rule imposed on the "loser", if the latter does not comply voluntarily; and (c) in situations that require some urgency, the judicial benefit is swift and satisfactory (ASSIS, 2013). "The provision of jurisdiction is the essence and purpose of the judiciary, one of the pillars of the democratic rule of law. With it, the Judiciary Power is in charge of resolving dealings and granting guardianship, in order to promote justice and social peace" (FERIATO; MARCH, 2019, p. 300).

The Civil Process and its effectiveness are necessary for the realization of the various fundamental rights and personality conferred to persons through the legal system. A law

will be a mere statement of intent if there are no means to ensure its proper enforcement (FERIATO; MARCH, 2019). In no way does the Federal Constitution of 1988, come to guarantee rights, if, in practice, the responsible power, the Judiciary, It is discredited and inefficient. (CASAGRANDE; TEIXEIRA, 2019).

The procedural vehicles adopted both in the resolution of conflicts involving patrimonial law and existential law are the same, there is no distinction. There is a clear structural deficiency in procedural legislation. "And executive measures, which represent the core of the forms of action of rights, fall into obsolescence" (ASSIS, 2013, p. 13). This failure makes the realization of the right to family coexistence unfeasible. Because there is no legislation or still a north for the judge to "force" the parent to comply with the conviviality.

That said, "[...] it is necessary to overcome the idea that the loss of family power is the only possible sanction for the parent who does not fulfill the duties of fatherhood" (TARTUCE, 2019, p. 433). For this "sanction" is more for a prize, exempting the parent from his duties. After all, the family is and always has been the social entity responsible for the development and structuring of the personality of the new citizens (CARDIN; SANTOS; GUERRA, 2015), and can no longer accept omissive, negligent and harmful postures aimed at children. Both parents are responsible, and when one fails to do his duty, it is up to the State to enforce it, even if necessarily.

Based on the above, what is proposed to solve the demands involving the right to family coexistence and so many other conflicts of a family nature, is the implementation of a specific procedural system, since it is no longer possible to continue with the current one, that it ends up violating rights rather than protecting them. The current procedural law tends to deal with conflicts of a strictly patrimonial and non-existent nature. (MEDINA, 2017).

The need for specific procedural legislation for family conflicts is extremely urgent, given the peculiarities of these conflicts, and also the insufficiency of the current code in dealing with them. Thus, for effectiveness to occur in the process of fulfilling the sentence of family coexistence, it is necessary to implement adequate means for this purpose. It is only possible to protect children and adolescents when mechanisms are created that can, in fact, resolve disputes involving them and not inflame them further.

The new procedural legislation should be adopted as a coercive measure for this type of obligation, in addition to existing assets. Thinking about the possibility of determining its compliance under penalty of focusing on the crime of disobedience (art. 330 of the Penal Code of 1940) and consequently in prison 15 (fifteen) days to 06 (six) months of the parent executed, and also in the application of fine (BRAZIL, 1940). In addition, in a supplementary and analogous way, provide in its legal body that the judge will have to determine the psychological and/or biopsychosocial accompaniment both of the parent who refuses to perform the coexistence, as the child and/or adolescent, in the same molds of art. 6 of Law No. 12,318 of 26 August 2010 on parental alienation.

The formulation of a procedural law aimed at the Law of Families, does not aim to violate the principle of minimal state intervention, nor even dictate a formula ready and plastered for all families with regard to the raising of children. "However, a minimum state does not mean disregard for people, but respect for their individual capacities, such as the faces of the same coin" (GRISARD FILHO, 2010, p. 72).



It is up to the State to curb attacks on rights aimed at the protection of human dignity, this being the very reason for the existence of the State - protection of the person, and especially of the vulnerable (FERMENTÃO, 2016). "In order to advocate the realization of responsible parenthood, it is essential that there are instruments that mean a form of sanction for the violator of the ordinance" (TARTUCE, 2019, p. 433).

In the words of Boschi (2005, p. 213) "What is lost and what is lost in terms of love, affection, attention or assistance can never be restored". Thus, this sentence raises the urgency of procedural mechanisms that effectively guarantee satisfactorily, compliance with the right to family coexistence, avoiding the configuration of harm, and consequently the need for civil reparation for affective abandonment, and still promoting an improvement throughout society.

## CONCLUSIONS

Children and adolescents are vulnerable as they are at a delicate stage of development. Glimpsing such vulnerability the Federal Constitution of 1988 considered necessary the protection of this person, and entrusted the family, society and the state itself in the guardianship of the infant population.

Faced with this protection, the right to family coexistence is shown to be the main fundamental right of this developing person, because it is through this right that all others will be realized. It is through living together that the person of the child learns, grows and develops. Thus, a right mainly of the child and not of the parents, for this one it is much more as a moral duty, but mainly legal, in doing, to carry out the coexistence when there is no longer the affective bond between the parents. Parents are separated but not these from their children.

Thus, at a time when there is parental negligence, an omission in the observance of properly regulated coexistence in a court order, it is possible to speak of a forced execution. However, the legal act that regulates civil proceedings has a patrimonial and non-existent bias, imposing certain limitations on the judge, which is only seen in the possibility of daily fine (astreinte) as a coercive measure.

It is well known that when there is no equity at all it is no use to impose a fine. Thus, it is concluded that there is a procedural deficiency in the protection of this fundamental right of the child and the adolescent. There is an urgent need for a rereading of coercive measures, as well as in the conduct of the sentencing process, and even previously, in the regulation of family coexistence.

Aware that there is a problem in the treatment of family conflicts, and that the self-compositional methods are the true salvation for the resolution of these conflicts which in their great majority are existential in nature. It is the responsibility of both the Legislative Power and the Judiciary to promote these methods more and more, in an adequate and satisfactory way, in order to foster dialogue and not litigation, which aims at the actual resolution of the problem and not only to treat it superficially and inadequately.

However, it is also up to these same bodies to provide an immediate and to some extent effective solution to issues involving the right to family coexistence. Thus, it is possible to think of the possibility of the Judiciary to adopt as a coercive measure the arrest of the non-guardian parent who does not comply with the coexistence, based on the crime of disobedience provided for in art. 330 of the Penal Code, as well as determine that this parent and offspring, undergo psychological and/or biopsychosocial follow-up, aiming at reestablishing communication and effective right to family coexistence.

It is clear that we need our own legislation to deal with family conflicts, from the knowledge stage to the implementation process. Having as a premise the protection and promotion of children's rights.

With regard to the right to family coexistence, it is well known that, the time lost and the damage caused by family not living together are not repairable with compensation. This is why it is necessary to think of ways to avoid harm, to effect family coexistence, even if initially forced, in order to rescue this absent parent, and to promote their awareness of their duties, and thus responsible parenting.

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