

The Relevance Of The Principle Of Affectivity In Family

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Abstract:

The aim of this article is to analyze affectivity and its importance in family relationships, as well as its main aspects and reflexes in the current social context. This is a topic that still generates controversy in the legal world, as there are differences of opinion regarding the acceptance of affectivity as a principle. This study will be based on the current and previous Civil Code, relevant scientific literature and the 1988 Federal Constitution, analyzing the transformations and insertions in Family Law, with the aim of ensuring the protection and material equality of the family in all its diversity. Despite the existing divergences, the study of the principle of affectivity is essential to improve understanding of a topic of great importance, considering that the family, seen as the "maternal cell" of society, has been undergoing significant practical and conceptual transformations.

Key Words: Principle of Affectivity; Civil Code; Federal Constitution. Family right.

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I. Introduction

The scope of this article is to analyze the indispensability of affection in family relationships, as well as the multiplicity of family clashes that occur due to a lack of awareness of its importance, which has repercussions for the Judiciary. Regarding what family is, it can be inferred that one of the great challenges of Family Law is to accurately conceptualize what it is, considering that over the years, the family has undergone significant structural changes, since it is a personal, patrimonial and assistance right, based, in principle, on consanguinity, monogamy and also on affective ties. In fact, conceptualizing the family is extremely complex, as it depends on various factors and perspectives, since culture, religion, regional factors, among others, are imbricated in this context.

It is known that dealing with affectivity as an element of family construction still generates objections and confrontations. However, it is essential to explore this subject, especially when it is configured as a legal principle, so that there is a new understanding of its importance. So much so that in the current Civil Code of 2002, there have been significant changes to the concept of the family, with a view to molding it to the new reality of family relationships, with their diverse forms. Similarly, our Citizen Constitution of 1988 is also innovative, with the aim of keeping up with the changes that have taken place in our society. In Article 226, the family is recognized as deserving of state protection. It is worth noting that in the Civil Code of 1916, marriage was the sine qua non condition for forming a family and thus being recognized. Moreover, it was indissoluble. As far as children born out of wedlock were concerned, they had no guaranteed rights. Women were extremely submissive to their husbands, did not work outside the home and dedicated themselves to raising children and looking after the home.

The 1988 Federal Constitution brought in a new concept of family, which is not restricted to the traditional family form, including affection as a sufficient condition for the union between people to be considered a family institution. Nowadays, families can be made up of mothers and children, regardless of whether they come from different fathers, homosexual families, families headed by grandparents, among other family entity models. Therefore, today's family is not limited to consanguinity, as it once was. Families in all their diversity are currently based on bonds of affection, and are supported by the legal principle of affectivity.

Therefore, this article will discuss the important aspects related to the principle of affection in current family relationships, searching the relevant literature, of recognized scientificity, for the foundations that underpin this study, starting with a brief approach to the evolution of the family, the relationship between the principle of human dignity and the principle of affection, and also the judicial understandings that deal with the application of the principle of affection.

II. Family Developments

In a brief historical look at family forms, in Roman law, for example, natural affection, even if it existed, did not represent the link between family members, nor did birth. Family members were united by domestic religion and the cult of deceased ancestors. For a long time, marriage had no emotional implications for the middle classes. Marriage was a dogma of domestic religion (RODRIGUES, 2014). But over the course of time, the family has undergone several important transformations, among which we highlight what has happened to its forms. Thus, it is possible to point to three phases of evolution: a) traditional family; b) modern family and. c) contemporary family, also called “post-modern” (CASTRO, 2018).

The traditional family was formed with the primary purpose of transmitting wealth, and was characterized by marriages between people of the same social level, or where one of the spouses had a higher social position, and where the man had hierarchical power in the home. As far as the modern family is concerned, it is based on romantic love, reciprocity of feelings and aspirations, the division of labor and authority between the spouses, but the man still has the hierarchical power of the home, even to a lesser extent compared to the traditional family style. As far as the contemporary or post-modern family is concerned, this is constituted by the union of two people (of the same sex or not) with pretensions of intimate, sexual relationships, happiness and affection. Thus, it is noticeable in this form of family that it is based on affection, and is not biological, but is born of coexistence (DIAS, 2021).

As has already been said, the Civil Code of 1916 named the family on the basis of marriage, since it considered marriage to be the only form that legitimized the family, and even assumed that the family was indissoluble. As such, children born out of wedlock were not guaranteed any rights, but only children born in wedlock enjoyed the rights provided for by law (DIAS, 2021).

Also, according to the aforementioned author, the evolution seen in the family over time led to the need to modify the relevant laws in order to update them in relation to this social phenomenon of great importance to society. One of these was the institutionalization of divorce, since the idea of indissoluble marriage no longer corresponded to the current reality. The Federal Constitution of 1988 modified the legislation that hierarchized men and women, and likewise the legislation that established the difference between children born out of wedlock and those born in wedlock, and even adopted children. Furthermore, it changed the concept of family that had existed until then, which was linked to compulsory marriage (DIAS, 2021). For the author, “The matrimonialized, hierarchical family, which was constituted only through marriage, has given way to the pluralized family, where everyone has equal rights, be it biological, homoparental, hetero, or socio-affective, based on affection”.

Old and current concept of family

Conceptualizing family is not easy, as many people think. The importance of the family is immeasurable. The family is the foundation of society, where people learn how to live in the community. Basically, it is responsible for raising children, shaping personality and influencing the social behavior of its members. The current concept of family, from the perspective of the law, is that it is a group of people who have a degree of kinship or affective ties (FARIAS, 2021).

In this sense, Madaleno (2017, p.51) adds that:

In recent decades, the family has undergone profound changes in function, nature, composition and, consequently, conception. The patriarchy that had earlier made society forget the natural attraction between human beings - affectus - has opened up to new, more flexible and plural forms of constitution, based on the bonds of affection between its members. The family, which earlier existed only to transmit property, is now a place for relationships.

Article 226, §3 of the Federal Constitution recognizes stable unions as families, i.e. they are not a family entity formed by de facto marriage. In this regard, Lôbo (2018, p.14) states:

Throughout history, the family has been assigned a variety of roles, depending on how it has evolved: religious, political and economic. Its structure was patriarchal, legitimizing the exercise of male power over women - marital power, and over children - patrio poder. The religious and political functions have left practically no trace in today's family, maintaining only historical interest, to the extent that the rigid hierarchical structure has been replaced by coordination and communion of interests and life.

It is appropriate to cite *ipsis litteris* the constitutional text referred to above in order to provide a better basis for this study. Article 226 of the 1988 Federal Constitution brought considerable progress to family law:

Art. 226. The family, the basis of society, has special protection from the State.

§ 1º - Marriage is civil and free of charge.

§2º- Paragraph 2 - Religious marriage has civil effect, under the terms of the law.

§3º - For the purposes of state protection, stable unions between men and women are recognized as family entities, and the law shall facilitate their conversion into marriage.

§4° - A family entity is also understood to be the community formed by parents and their descendants.

§ 5° - The rights and duties relating to marital partnership are exercised equally by men and women.

§ 6° - Civil marriage can be dissolved by divorce.

§ 7° - Based on the principles of the dignity of the human person and responsible parenthood, family planning is the free decision of the couple, and the State is responsible for providing educational and scientific resources for the exercise of this right, with any form of coercion by official or private institutions being prohibited.

§ 8° - The State shall ensure assistance to the family in the person of each of its members, creating mechanisms to curb violence in the context of their relations.

This article shows that marriage, from a constitutional perspective, goes beyond a simple contractual relationship, as it is, above all, a relationship of affection. In 2002, the new Civil Code came into force, but it failed to regulate some pertinent issues, such as same-sex unions, claimed by homosexuals, whose decisions have been made through case law (BARBOSA, 2008).

As a historical highlight, during the Roman Empire, the constitution of a family was already shaped by marriage - the so-called natural family, made up of a couple and their children. However, it was often not a marriage of affection, but of possessions. Fathers traded their daughters to the men, and thus had possession of the submissive woman and only of the home. The Catholic Church, however, transformed the natural family, making it an indissoluble union (DIAS, 2021).

Furthermore, according to the aforementioned author: “the Catholic Church has consecrated the union between a man and a woman as an indissoluble sacrament, until death do them part. The only affective relationships accepted are those resulting from marriage between a man and a woman,” even then, due to the interest in having children (DIAS, 2021).

Nowadays, the family is based on affection, with a view to feeling protected, seeking companionship, reciprocity, etc., considering that people come together out of sentiment and not because of their social and/or financial status, nor because of their religion, ethnicity, race, etc. They come together with the aim of building a family based on mutual respect, affection and affection. Thus, the patriarchal family has gradually been transformed, replaced by the post-modern family, with totally different foundations, as we know (SIMÕES, 2007). In this regard, Lôbo (2018, p.15) comments: “the personal realization of affection, in an environment of coexistence and solidarity, is the basic function of the family of our time”.

It can therefore be said that affection is the hallmark and basis of the contemporary family, also known as the post-modern family. The family relationship based on marriage, the ideal of indissolubility and the submission of women no longer exists. Times have changed, so have customs and concepts. Personal relationships have undergone countless transformations and there will certainly be others as time goes by. Everything changes, everything transforms, things evolve. It's a path of no return (CASTRO, 2018).

Our Citizen Constitution recognized what was already the practice of society, thus improving and making the concept of family more comprehensive, supporting new forms of family, respecting the principle of the dignity of the human person, it was not the promulgation of the Federal Constitution of 1988, that the transformation in the understanding of what is family took place. Our Magna Carta recognized values and customs that were already intrinsic to society and accepted them (DINIZ, 2005).

The constitutional principles of Family Law have brought about an important evolution in the Brazilian legal system, especially in terms of recognizing the family pluralism that already existed in fact, as a result of the new types of family that have emerged in recent times (MELLO, 2006).

According to Diniz (2005, p.114):

The new vision of Family Law brings together broader values and principles, encompassing fundamental rights such as the dignity of the human person (Article 1, III of the Federal Constitution); isonomy, by confirming the equal rights and duties of men and women and the equal legal treatment of children (Article 5, I of the Federal Constitution); social solidarity (Article 3, I of the Federal Constitution); and affection, which in this context takes on a legal dimension.

Also, according to Maria Berenice Dias (2021, p.45), modern Family Law, marked by major changes and innovations, is governed by principles (CF, art. 227) such as:

- a) the Principle of the “ratio” of marriage and stable union, according to which the basic foundation of married life is affection and the need for complete communion of life;
- b) the Principle of the legal equality of spouses and partners in terms of their rights and duties;
- c) the Principle of the legal equality of all children (CF, art. 227, § 6, and CC, arts. 1.596 to 1.629);
- d) the Principle of family plurality, since the constitutional rule covers the matrimonial family and family entities (stable union and single-parent family);
- e) the Principle of enshrining family power (CC, arts. 1.630 to 1.638), replacing marital and paternal power within the family;

f) the Principle of freedom, based on the free power to form a family life through marriage or stable union, and;
g) the principle of respect for the dignity of the human person, which forms the basis of the family community, guaranteeing the full development and fulfillment of all its members, especially children and adolescents.

The 1988 Federal Constitution innovated in terms of understanding what a family is, by recognizing stable unions as families between opposite sexes, thus deserving the protection of the State, and the law must accept their conversion into marriage (article 226, § 3). According to Diniz (2005, p.116):

There are three forms of family constitution: the one established by marriage, civil or religious with civil effects; the one formed by a stable union; and the family formed by either parent and their descendants. The Citizen Constitution not only mentions the guiding principles of relations between people and the Public Power, but also the rules of interaction inherent to human coexistence. In this way, constitutional rules are imposed on the family, the maternal cell of society, an element in the creation and formation of men, because the state is responsible for this legal order.

Therefore, in light of the above statements, it can be inferred that the legal recognition of the family without marriage represents a milestone, from which this reality is institutionalized, corroborating the organization of social relations.

New Forms of Family

With the advances made in various areas of human activity over time, including new technologies, as well as those that have occurred and are still occurring incessantly in customs, forms of relationship, among others, these changes have greatly altered the concept of the family, allowing for new family arrangements. Currently, there is a multiplicity of family forms (DIAS, 2021). According to Kaslow (2001, p.36): “one can no longer speak of family, but of families, considering family as a group of several people who choose to live together without any ties, simply for the sake of affection and mutual care”.

Nowadays, extended family is understood to be a family that goes beyond the union of the couple or the union of parents and children, consisting of close relatives, i.e. uncles, grandparents, stepchildren, cousins, people the family is related to and adoptive families, a couple or a single person who assumes legal and legitimate responsibilities for another person (LORESENT, 2012).

As you can see, the Brazilian family is undergoing significant structural changes every day, and these transformations imply the need for Family Law to be updated as these changes in the family form take place. With regard to Family Law, Dias (2021, p.66) states that:

Family law is umbilically linked to human rights, the axiological version of human nature. Ultimately, this means equal dignity for all family entities. It is therefore unworthy to give different treatment to the various forms of filiation or the various types of family constitution. That said, he believes that new family constitutions cannot be treated differently.

According to the aforementioned author, the law only recognized families formed by marriage, but this has changed. Extramarital relationships were not recognized as a family, and their children did not have the same rights as children of marriage. However, with the changes, the legislator felt obliged to recognize the stable union as a family institution. A stable union is an informal family, i.e. the couple live under the same roof, experience moments together, but are not married according to tradition. Even so, they have been given the same rights as marriage (DIAS, 2021).

Pessanha (2011, p. 08) observes that “when a couple with children break up, even if the offspring remain living with one of the parents, they become two single-parent families”.

Another form of family is the homoaffective family, as understood by the doctrine, which is characterized by the condition of affection. Previously, the same-sex family was considered to be a stable union, but now this type of union is recognized as a marriage. According to Pessanha (2011, p.9):

The plurality of families provided for in the Constitution shows that, due to the applicability of the principle of affection, all constituted families deserve the protection of the state. Affection is the guiding element of contemporary families, understood as an intrinsic element of each family, through attitudes of full life that structure family ties.

Within this diversity of families, there is one called anaparental, which has the following description according to IBDFAM (2018, p.1):

The anapparent family does not have parents, but is made up of collateral relatives or socio-affective siblings. In this form of family, individuals unite without sexual connotations, as they can often be made up only of blood siblings. They can also be formed by a man and a woman, only women or only men due to a feeling of friendship and cooperation. According to case law, it can also be recognized by grandparents and grandchildren.

For Dias (2021), the anaparental family is recognized by doctrine, as is the coparental family, which occurs when people only wish to have children, not assuming a relationship with the other conceiving the child

through artificial insemination. In this way, the children are the only bond, registered in both names and sharing paternity.

Another interesting family situation is when parents get divorced or widowed and remarry or form a stable union. They then unite the children from the previous marriage and the current one, thus forming a recomposed family, also known as a mosaic. Dias (2021, p.460) states that “the concept of family has expanded to such an extent that the doctrine began to determine “multi-species family”, that is, the one formed by owners and their pets, as non-human members”. Since there is still no legal provision for determining who should have custody of the pet when the relationship ends, the family court has jurisdiction in these actions.

All forms of family supported by current laws in Brazil are backed by legal principles that support them. Among others of equal importance are the principles of equality, affection and the protection of the dignity of the human person, all of which are enshrined in the 1988 Federal Constitution.

Principle of Protecting the Dignity of the Human Person

The definition of human dignity first emerged in the field of moral philosophy and only later came to be conceptualized in the legal sphere. It was the philosopher Immanuel Kant who formulated an idea of human dignity that serves as the dominant legal foundation to this day. For the philosopher Immanuel Kant (1984, p.134):

The idea of dignity is linked to man as a rational being who, through his will, obeys the laws that he himself establishes. morality consists of the legislation that makes the realm of ends possible. Thus, it (legislation) must be found in every rational being and must come from their will, according to the principle that imposes that one must “act only according to a maxim such that it can be erected as a universal law”.

Over time, this idea of dignity has become a legal principle, and in our country it is included in the Federal Constitution. As Piovesan (2009) rightly argues: “the 1988 Federal Constitution provides in Article 1, III, that our Democratic State of Law is founded on the principle of the dignity of the human person. It is therefore the highest principle, or super-principle”. The aforementioned author also points out that due to this unavoidable rule of protecting the human person, it is fashionable to talk about personalization, repersonalization and depatrimonialization of private law (PIOVESAN, 2009). As a result, property is no longer important and the person is overvalued.

The importance of the dignity of the human person is presented as the informing foundation of any legal system, as a rule and parameter of valuation to guide the interpretation and understanding of any normative system, especially the internal constitutional system of each country (PIOVESAN, 2009).

Based on the principle of human dignity, the main normative point of the system of fundamental rights and guarantees, it can be said that the Citizen Constitution enshrined an open family system, to allow other forms or family arrangements beyond those that exist constitutionally, such as same-sex unions (GAGLIANO; FILHO, 2006). Therefore, the Magna Carta brought about all these changes for the benefit of people, privileging and dignifying them above all. According to Pinto (2011, p. 107):

Since the Universal Declaration of Human Rights of August 26, 1789, resulting from the French Revolution, the principle of the dignity of the human person has acquired universalist contours. Article 1 of this declaration proclaimed that all human beings are born free and equal in dignity and rights. We can say that after the consequences of the Great World War, this principle was included in countless constitutional texts, with the human being becoming the main focus of law and the state.

This principle is essential in the legal order, because the constituent legislator elevated it to a fundamental principle, since it created the appreciation of the human person as a fundamental reason for the structure of the organization of the State and for the Law.

Article 1º of the Federal Constitution of 1988 states that the Federative Republic of Brazil, formed by the indissoluble union of states and municipalities and the Federal District, is a democratic state governed by the rule of law and its foundations are: “[...] III - the dignity of the human person”. Therefore, the constitutional text states that the dignity of the human person is the foundation of the Federative Republic of Brazil, from which it follows that the State exists for people and not people for the State (NOVAIS, 2015).

III. The Relationship Between The Principle Of Human Dignity And The Principle Of Affection

It is appropriate to point out here that constitutional principles underpin the Brazilian legal system, so that a solution can be found for each case that occurs on a daily basis, based on these principles. An example of this is the principle of the dignity of the human person, which is embodied in the protection of the human personality, guaranteeing the vital needs of each person. Article 1º, item III of the 1988 Federal Constitution deals with this: “Constitutional principles have come to inform the entire legal system in order to enable the dignity of the human person to be achieved in all legal relationships.” Therefore, it can be inferred that when the various family entities that are constituted by affection are not welcomed, or are treated differently, the principle of the

dignity of the human person is violated. Remembering that it is this principle that protects the interests of the person, in the face of clashes (DIAS, 2021).

The Principle of the Dignity of the Human Person is the main one, to which the others conform. Thus, freedom and equality have emerged with a view to ensuring respect for human dignity. For freedom to exist, there must be equality between people, so that they respect each other (SARLET, 2012). Maria Berenice Dias (2021, p.66) makes the following observation: “If there is no assumption of equality, there will be domination and subjection, not freedom”.

Freedom and equality are indispensable conditions for the family environment; without them, the atmosphere in the home becomes unbearable, and is not consistent with the principle of affection. Without respect for the principle of the dignity of the human person in family relationships, they become unviable, and the ties that bind their members together are broken. It is important to point out that the principle of human dignity has enshrined the principle of affection, which is intrinsically linked to family law. It is affection that makes socio-affective relationships legitimate and drives contemporary family entities. Although it is an implicit principle in the Constitution, affection and affectivity are at the heart of several explicit principles, such as the dignity of the human person (SARLET, 2012).

In the legal system, a constitutional principle can derive from another constitutional principle, i.e. it can take the implicit from a constitutional text that is explicit. Dias (2021, p.75) states that: “It is enough to observe the immense list of individual and social rights listed to guarantee the dignity of all. This is nothing more than a commitment to guarantee affection: the first person obliged to ensure affection for citizens is the state.”

Our Citizen Constitution lacks the terms affection and affectivity. However, the legislator dealt with the Principle of Affection from the point of view of protecting “the dignity of the human person” in Art. 1, III, the “protection of childhood and youth” - Art. 24, XV and, “the protection of the family, maternity, childhood, adolescence and old age; the support of needy children and adolescents” in Art. 203, I and II. Furthermore, “the family, the basis of society, has special protection from the State” - Article 226° of the Magna Carta (TEIXEIRA, 2008).

Therefore, affection stems from the principle of the dignity of the human person, and this principle is present in Article 5° of the Constitution of the Federative Republic of Brazil. At the same time, it is clear that affection is recognized as a fundamental right, taking into account that everyone is equal before the law, “without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality and security”. However, “this flexibility and recognition does not exist when it comes to affective unions between individuals of the same sex, i.e. homosexual unions, in which the partners live under the same roof, as if they were married”. It is clear that same-sex unions have ignored “society's prejudice and the discriminatory way in which they are viewed, and every day there are more and more same-sex unions” (TEIXEIRA, DIAS, 2008).

Article 2° of the 1948 Universal Declaration of Human Rights guarantees that everyone, without distinction of any kind, may enjoy the rights and freedoms referred to in the Declaration itself, extending to all differences, including: ethnic, sexual, linguistic, religious, political or “other, national or social origin, wealth” (TEIXEIRA, 2008).

Article 227° of the 1988 Federal Constitution states:

It is the duty of the family, society and the state to ensure children and adolescents, with absolute priority, the right to life, health, food, education, leisure, vocational training, culture, dignity, respect, freedom and family and community life, as well as to protect them from all forms of neglect, discrimination, exploitation, violence, cruelty and oppression.

Against this backdrop of challenges, it is important to highlight the right to “family life” as an absolute priority for children and adolescents. Consequently, the principle of affection represents the evolution of the law, configuring itself as an institute applicable to all new forms of family, restricted or not by the legal regulations applicable within the family, resulting in a legal culture from a new perspective, which allows the State to protect all family entities, (re) signifying social relations, valuing and protecting affection as an indispensable link in family relationships (BARANOSKI, 2016).

IV. Final Considerations

This article has made it clear how important the Principle of Affection is in family relationships. With the advances and achievements made in society as a whole, it would no longer be possible to agree with the old form of marriage, as, for example, it was in Roman Law, where natural affection, even if it existed in the family, was not considered as a link between family members, not even birth. But they were united by their domestic religion and the cult of deceased ancestors. Thus, for a long time, for the middle classes of that period, affection was not a priority for marriage, and was characterized as a dogma of domestic religion.

With this conceptual change in marriage, which is typical of the contemporary, post-modern era, the traditional family and the modern family have also undergone profound transformations. Today, what prevails in the family and is an essential factor for its existence and permanence is affection, the bonds of affection. The Federal Constitution of 1988 and the New Civil Code of 2002 made family unions based on affection legitimate, regardless of the sex of the couple, and went further by allowing the recognition of a diversity of family forms, from the single-parent family to the multi-species family. These advances in Family Law are the result of social change, a phenomenon that is constantly evolving.

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