Multi-parenthood from a Legal, Doctrinal and Jurisprudential Perspective in Brazil: The Recent Decision of the Brazilian Supreme Court on Socio-affective and Biological Paternity

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I. The Brazilian Supreme Court Decision on Multi-Paternity

The concept of parenthood in Brazil has been modified recently by an important decision of the Brazilian Federal Supreme Court (STF) facing the revolutionary concept of multi-paternity in family law. The notion of parenthood and all the ideologies around parenting and kinship vary over time, as they are constantly changing to keep up with the dynamics of life.

On September 21st, 2016, the STF, by 8 votes against 2, decided the Extraordinary Appeal (RE) No. 898.060 recognizing the general repercussions to society (repercussão geral - item 622) of the debate over the possibility of the dominance of socio-affective paternity over biological paternity or their coexistence. The court established the contours for multi-paternity in the Brazilian legal context in an interesting leading case. The winning thesis serves as a parameter for future similar situations all over the country.

A. Case premises

Brazilian law recognizes the possibility of the concomitance of paternities, as Article 48 of the Child and Adolescent Statute (Law No. 8.069/1990) provides that the origin of paternity is biological and Article 1.593 of the 2002 Civil Code establishes that paternity may be affective.

B. Facts

The debate involved a woman who was raised by an affective-based parent. She wished to also have her biological father recognized as a parent, forming, thus, a multi-parental relationship. After turning 18 years old she discovered that her socio-affective father, the same that registered her, was not her biological father at all. To guarantee her legal rights and determine her ancestry she brought a suit into court asking for a DNA test.

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C. Judgements in the first (district court) and second (state court of appeals) instances

The Tribunal of Justice of the State of Santa Catarina confirmed the first-degree decision stating that genetic fatherhood should be recognized. The court chose not to establish any precedence among the modalities of parental attachment, pointing to the possibility of the coexistence of both paternities without any hierarchy between them.

D. Appeal to the Brazilian Supreme Court (STF) through an Extraordinary Appeal (RE)

The defendant's biological father appealed the State Court of Appeals' decision (upheld by the Superior Court of Justice – STJ),[2] which recognized the biological paternity, with all its patrimonial effects, independently of the previous socio-affective paternal bond with his genetic daughter.

The appellant (biological father) said that he was only "discovered" by the daughter when she was 18 years old. In addition, just because the young woman was registered by another person (the socio-affective father), he alleged that the subsequent kinship could not produce any patrimonial effects. The appellant claimed that not recognizing the paternal parenthood of a biological father would prevent the "convenience" of searching for family bonds just to obtain material gains since the daughter herself stated that she did not want to break ties with her socio-affective father.

E. Rapporteur's Vote

The reporting Justice for the case, Luiz Fux, stressed in his opinion that the Brazilian Constitution rules out a family-based model and, therefore, any choice between paternities must be rejected.

The rapporteur emphasized legislative developments in family law, noting that in the Brazilian 1916 Civil Code the concept of family was centred on marriage and on the "odious distinction" between legitimate and illegitimate children, with filiation being based on a rigid presumption of paternity. However, with social evolution, the field of family relations has accepted new forms of unions.

Justice Fux argued that since the 1988 Brazilian Constitution, there has been a reversal of goals in civil law. Currently, all legal statutes and regulations must to all the peculiarities of interpersonal relationships, rather than imposing static frameworks based on marriage between a man and a woman.

[2] The Superior Court of Justice (STJ) is the Brazilian Higher Non-Constitutional Tribunal.

The socio-affective relationship established with the civil registry at the notary does not prevent a paternity investigation, which can be proposed by the child, who has the most personal and imprescriptible right to clarify his biological paternity as well as his ancestry, according to her/his best interest. In the end, the General Repercussion thesis was summarized as follows: "*The socio-affective paternity, declared or not in public registry, does not prevent the recognition of the concomitant affiliation based on biological origin, with its own legal effects*."[3]

F. Rapporteur`s opinion

The trial of the case was guided by several legal principles, among them the principles of human dignity, the pursuit of happiness and the best interests of the child.

The principle of human dignity demands the overcoming of obstacles imposed by legal arrangements to the full development of the family formats built by the individuals themselves in their interpersonal affective relations. Justice Fux recorded that it is the law that should serve a citizen, not the opposite, to avoid the risk of transforming human beings into mere instruments of the application of the limits determined by legislators.[4]

For the rapporteur, the pursuit of happiness is a precept that elevates the individual to the centrality of the juridical-political order, protecting the individual from State invasion and from the risk of the State making choices in her/his place since no political arrangement can provide social welfare in the event of the overlapping of collective wills to particular ends.

For Justice Fux, the interpreter must abdicate standardized understandings about family to realize the dignity of its members and with full respect for people's personalities. To him, family should not portray a "*plastered and static configuration*".

On that matter, the jurisprudence of the STF has already had the opportunity to invoke the right to pursue happiness.[5] It is also important to emphasize that the Court has ruled earlier on the question of civil unions between persons of the same sex, also invoking the right to pursue happiness.[6]

In addition, the principle of human dignity, as a component of the protection of happiness, imposes the recognition of other family models, which are different from the traditional concept of family. Thus, the legal spectrum must accept both bonds of filiation, either the one built by the affective relationship between those

[3]<http://www.stf.jus.br/portal/jurisprudenciaRepercussao/abrirTemasComTesesFirmadas.asp > accessed 8 January 2017.
[4] <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060.pdf> accessed 8 January 2017.
[5] RE 477554-AgR, Justice Celso de Melo.
[6]ADI 4.277, Justice Ayres Britto.

involved, or the other originated from biological descendance as imposed by the principle of responsible parenthood expressly stated in Article 226, paragraph 7º, of the Brazilian Constitution.[7]

Although, based on a completely different factual assumption, Justice Fux's vision of the matter made it possible, by analogy, to apply the principle of the right to pursue happiness to the subject of family membership. For this reason, he sought the historical origins of a right to pursue happiness which is not related to family law, but rather, reflects the birth of civil rights in the United States of America.

Therefore, according to Fux, even though there is no direct provision for the right to pursue happiness in the text of the United States Constitution, its historical importance and its enormous value in the interpretation of other clauses of the charter are undeniable.

The Brazilian legal system is, by origin, descended from Roman-Germanic law. However, given the intense dynamics and complexity of the social facts, Brazilian legal operators also rely, alternatively, on other sources, such as precedents, leading cases and overall jurisprudence in Brazil, as well as those cases occurring in other jurisdictions, including the United States and other common law countries. That denotes plasticity, adaptation and new contours applied to Brazilian law and jurisprudence.

Legal chaos, comparable to that of the 1970s in the United States, was established in Brazil in the 1990s. Virtually any case, from condo bill suits to parochial matters, could reach the Brazilian Supreme Court (STF).

Law No. 11.418/16 was enacted, adding Articles 543-A and 543-B to Law No. 5.869/73 (CPC/1973) providing that the Federal Supreme Court, in an unappealable decision, would not hear the extraordinary appeal (RE) when the constitutional question raised does not have general repercussions. The Brazilian legal system had started to change. It is now midway between a 100% civil law system and a common law one. Filtering cases that can reach the Brazilian Supreme Court is ongoing and will probably make the Brazilian legal system a hybrid system.

The New Brazilian National Civil Procedural Code (approved by Law No. 13.105/2015 and modified by Law No. 13.256/2016) is a direct effect of this new "jurisprudential attachment" trend in the county's legal system.

The citation of leading US cases on human and civil rights is very common in significant Brazilian Supreme Court cases, as it should be, due to the US' worldwide leadership on those issues, which, by the way, was built on tough social events. In this way, Fux recognized the origin of the right to pursue happiness, pointing to some

[7] RE 898.060, Justice Luiz Fux.

interesting cases decided by the US Supreme Court. Among the US Supreme Court's cases cited in the decision, *Loving v. Virginia* stands as one of the most significant. In 1967, (388 US 1), the Court reversed the conviction of Mildred Loving, a black woman, and Richard Loving, a white man, who had been sentenced to one year's imprisonment for being married in breach of the Racial Integrity Act of 1924, a statute that prohibited marriages considered "interracial". By unanimous decision, the court declared that prohibition unconstitutional, adopting, among other grounds, that the right to free marriage is one of the vital rights of a person and is essential to his/her happiness ("freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").

The rapporteur for the Brazilian Supreme Court case also noted that this precedent was one of the bases of US Supreme Court's decision on same-sex marriage in *Obergefell v. Hodges* in 2015 (576 U.S.).[8] He concluded that, in his opinion, it is imperative to modernize the juridical approach to family membership, which is a central concern of the constitutional text that informs Brazilian democracy.

G. Comparative law cited by the rapporteur about multi-parenting

Justice Fux noted that the concept of multi-parenthood is not new to comparative law. In the United States, where states have legislative competence in family law regulation, the Louisiana Supreme Court has consolidated the jurisprudence regarding the recognition of dual paternity. In *Smith v. Cole* (553 So.2d 847, 848), 1989, the court determined that a child born during the marriage of his mother to a man other than his/her biological father might have the parenthood in relation to the two fathers (biological and affection-based) recognized, bypassing the rigors of art. 184 of the Civil Code of that State, which enshrines the rule "*pater is est quem nuptiae demonstrant*". In the court's words: "*the presumed father's acceptance of paternal responsibilities, either by intent or default, does not ensure to the benefit of the biological father. (...) The biological father does not escape his support obligations merely because others may share with him the responsibility*".[9]

Similarly, the same court in, the case T.D., wife of M.M.M. v. M.M.M., 1999 (730 So. 2d 873), recognized the right of both biological and affective fathers, resulting in a double paternity for the son. It was emphasized, however, that sometimes the biological parent can lose his right to a paternity declaration, though still maintaining his obligations, when it does not serve the best interests of the child, especially in cases of unreasonable delay in seeking recognition of the status of father ("a biological

[8] <https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf> accessed 14 July 2017.
[9] <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060.pdf> accessed 6 January 2017.
<https://www.courtlistener.com/opinion/1670353/smith-v-cole/> accessed 14 July 2017.

father who cannot meet the best-interest-of-the-child standard retains his obligation of support but cannot claim the privilege of parental rights").[10]

The precedent led to a Louisiana State Civil Code revision in 2005, recognizing dual paternity in Articles 197 and 198.[11] Louisiana became the first American state to allow a child to have two fathers, attributing to both the obligations inherent to parenting.[12]

The Brazilian legislators' omission about the diversity of modern family arrangements cannot serve as an excuse for denying protection to situations of multi-parenthood.

The existence of a link with the registered parent does not, therefore, prevent the exercise of the right to search for genetic origin or for recognition of biological paternity. Still, the rights of real ancestry, genetic origin and affection, are compatible.

H. Court's debate and conclusions

From the noted precepts, such as the right to happiness and the dignity of the human being, the new form of family structure can no longer be reduced to standardized or hierarchical models because it constitutes a cosmopolitan concept. In the same way, it is necessary to recognize a new conception of parenting besides the traditional ones.

Thus, from the Brazilian Supreme Court case, all kinds of responsible parenthood (article 226, § 7º, 1988 Brazilian Federal Constitution) may exist, such as (i) by presumption arising from marriage or other legal hypothesis (such as homologous artificial fertilization or heterologous artificial insemination - Article 1.597, III to V of the 2002 Civil Code), (ii) by biological offspring, or (iii) by affectivity. It can also be observed that affectivity was recognized as a legal value by the court.

Justices Rosa Weber, Ricardo Lewandowski, Dias Toffoli, Gilmar Mendes, Marco Aurélio, Celso de Mello and the current president of the court Justice Carmen Lúcia concurred with the rapporteur. Justices Edson Fachin and Teori Zavascki presented dissenting opinions.[13]

According to Justice Weber, it is possible to recognize a socio-affective paternity and a biological paternity, both producing legal effects. Similarly, Justice

[10] <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060.pdf> accessed 6 January 2017.
<https://casetext.com/case/td-v-mmm#!> accessed 14 July 2017.
[11] Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn, Cambridge University Press 2012).
[12] Sarah McGinnis, 'You Are Not The Father: How State Paternity Laws Protect (And Fail To Protect) the Best Interests of Children' (2008) 16 *Journal of Gender, Social Policy & the Law* 311.
[13]<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=325781&caixaBusca=N> accessed 6 January 2017.

Lewandowski acknowledged that a double parenthood, that is, biological and affective parenting, is possible and exclusivity is not always necessary.

Justice Dias Toffoli defended the right to love, which is related to the legal obligations of the biological father in parallel with his duties to feed, educate and care: "*If you had a child, then you have obligations, even if the child was raised by someone else*", he added in his opinion.

On the other hand, Justice Toffoli sustained[14] that the final thesis given by the court should be a minimalist one: "*Social reality cannot go beyond what is legal. With all due respect to those who think differently, it is impossible to recognize double parenthood if two uncles care for a child throughout life. There is no way to recognize, at least currently, the right of two or three neighbours that have taken care of a child for years to adopt just because a bond of care and affection has been formed among them*."

While concurring with the rapporteur, Justice Gilmar Mendes stressed that the thesis supported by the biological father represented, after all, a "*manifest cynicism*." The idea of responsible parenthood needs to be taken seriously, otherwise, it would stimulate similar situations, especially when the case is a binding precedent.

Justice Marco Aurelio, who also followed the majority, stressed that the right to be informed about biological parenthood is a natural right. For him, in the analysed case, the child had the right to change the birth records, with all necessary consequences.

In turn, Justice Celso de Mello reaffirmed the fundamental right to pursue happiness and responsible parenthood in order to accept the reasoning of the rapporteur's opinion. He noted that the purpose of the Brazilian Republic is to promote the welfare of all citizens without any prejudice based on origin, race, sex, colour, age or any other form of discrimination.

The president of the court, Justice Carmen Lúcia accentuated that love cannot be imposed but care can be, which seems to be the framework of the rights that are being ensured in the case regarding responsible parenthood.

For the Justices who dissented, genetic parenthood does not necessarily give rise to legal paternity, thus rejecting the possibility of the legal coexistence of two parents.

The first dissent was from Justice Fachin. He voted for the partial dismissal of the appeal, understanding that the socio-affective bond "is what can be legally imposed" in the case, considering that there is a socio-affective bond with a father and

[14] <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060DT.pdf> accessed 6 January 2017.

a biological bond with the parent. Therefore, there is a difference between the genetic dominant parent and the father, emphasizing that the existence of kinship cannot be confused exclusively with the question of biology. "The biological link, in fact, may be able, on its own, to determine legal kinship, if there was an absence of a relational dimension that overlapped it", he stated. In Fachin's view, in the examined case, there was a previous socio-affective relationship to be respected, which is not a second-class kinship. He emphasized similar cases such as heterologous artificial insemination (where the donor is third rather than the husband of the mother) and adoption as examples where the biological bond does not prevail, concluding that the coexistence of paternities is impossible.

Justice Fachin was consistent with his doctrinal approach. For him, genitor is only the progenitor because being a father is something else, a situation that adds value to life.[15]

Justice Teori Zavascki also dissented from the rapporteur. For him, biological parenting does not necessarily generate a paternity relationship: "*In the case there is a socio-affective paternity that persisted, persists and must be preserved*". He noticed that it is difficult to establish a general rule in this kind of process because each case submitted to the court should be considered independently, based on its on concrete and peculiar situations.

The General Prosecutor's Office representative and the *amicus curiae* (IBDFAM)[16] who acted in the case were concerned with the risk of opening a door to frivolous demands against biological parents, which aimed purely on the patrimonial consequences of dual paternity. In other words, the concrete risk of encouraging demands founded only on the virtual needs of alimony or to search for and justify a dual inheritance is a questionable situation because it would favour unjust enrichment and stimulate family relationships based on money and shady interests.

Having more than one father or more than one mother intersects with moral and economic questions. Anyone who receives a greater number of legacies is seen as a "bad" person, inhibiting the recognition of the existence of more than one paternal or maternal bond-affiliation, which is unacceptable since such recognition is a human and a civil right.

In the end, the prevailing court view was to affirm that socio-affective and biological paternities should have the same legal status. They should be treated on equal footing, without any hierarchy since it is impossible to establish, *a priori*, when

[15] Luiz Edson Fachin, *Comentários Ao Novo Código Civil: Arts. 1.591 a 1.638*, vol XVIII (Forense 2008).
[16] IBDFAM: Instituto Brasileiro de Direito de Família (Brazilian Institute of Family Law).

one prevails over the other, and they could coexist. Thus, according to the most current Brazilian legal precedent, multi-paternity is possible.

It can be mentioned that, even before STF's conclusion, an interesting decision from a state judge concluded that multi-paternity was in the best interests of the child, admitting the recognition of both paternities, the socio-affective and the biological one, with all their legal effects. The decision also made the information of the double paternity appear on the birth record of the minor.

The magistrate also favoured the affective parents but established free coexistence in favour of the biological father. In fact, the biological father knew from the beginning about the paternity and did not wish to reverse the situation at any time. Moreover, the biological father was the manager of the affective parent. According to the judge, the right to the recognition of multi-parenthood was based on personal rights in consideration of the principles of the comprehensive protection of children and adolescents and of the dignity of the human person.[17]

II. The Development of the Concept of Parenting

A. Brief historical analysis of family law in Brazil: a new concept of family membership and the consequences of changes to legislation

Under the 1916 Brazilian Civil Code, the biological fact was predominant in establishing parenthood. This legislation restricted parental relationships to consanguineous and adoptive children (Articles 330 and 336). It established that marriage was the most important origin of filiation, considering exclusively biological bonds. The ultimate purpose of the mentioned Code, which was based on the child's rigid presumption of paternity (*pater is est quem nuptiae demonstrant*), was to concentrate the families' patrimony, prohibiting the division of inheritances with "bastard" children born out of extramarital affairs.

The typical 19th century family in Brazil was not concerned with people's affection or happiness because what really mattered were the economic interests to protect and support the acquisition and construction of assets.[18]

Article 338 of the cited Code presumed that children born at least 180 days after marriage, and those born within 300 days after the dissolution of the marital society by death, "disquiet" or annulled were considered the couple's children.

During that time, the so-called "legitimate family" could only be established by marriage because other kinds of bonds were not recognized by the State and did not

[17] <http://www.migalhas.com.br/Quentes/17,MI204229,31047Multiparentalidade+preserva+interesse+de+crianca> accessed 12 July 2017.
[18] Rolf Madaleno, *Curso de Direito de Família* (6th edn, Forense 2015) 6.

receive its protection. A legal presumption of paternity, regardless the biological origin, predominated. By that time, legal science ignored genetics, putting in its place paternity based on family morality: a father was supposed to be the one married to someone's mother during the birth or as indicated in the previous legal presumption.

The 1916 Civil Code authorized a cruel classification of children by using terminology full of discrimination. Until then, children were qualified as legitimate (those born from a legal marriage), illegitimate (those generated outside a marriage: bastards or incestuous children) and legitimized sons (when recognized by parents after a subsequent marriage.)[19] In the end, children were punished for their biological parents' position, and, in most cases, biological parents escaped from typical parenting responsibilities.

The 1988 Brazilian Constitution finally recognized equality among all types of family membership. In its Article 227, paragraph 6º, the Constitution ensures that children, whether they have married parents or were adopted, shall have the same rights and qualifications, prohibiting any kind of discrimination. Regardless of their origin (adoption, marriage, artificial insemination or extramarital affair) all children have the same rights.

In addition, it cannot be forgotten that this same Constitution provides for, as one of its fundamental principles, the dignity of the human person (Article 1º, III) that also applies to family relationships. This Constitutional view undeniably reflected on the Civil Law, replacing the dominant patriarchal ideology present in the 1916 Code.

Currently, marriage is not considered to be the only way to form a family. There is now recognition of stable unions (*união estável*)[20] and single-parent families (*famílias monoparentais)*.

Article 1.723 of the 2002 Civil Code recognizes the "stable union" as a family entity, which is a civil relationship between two persons configuring a public coexistence with a lasting and solid relationship in order to form a family, even if the partners do not cohabitate, and should not be confused with marriage.

Brazil's Constitution Article 226, paragraph 4º, provides that a family can also be understood as "*a community formed by either parent and their descendants (single-parent families.)*" This means that a family can exist, and in particular be protected, if formed by only one parent, subtracting the sexual connotation that is typically a part of the concept of a "traditional family."[21]

[19] Articles 352 to 367 of 1916 Civil Code.
[20] STF recognized homosexual stable unions as family entities and their constitutional and civil rights on May 5th, 2011 - ADI 4.277 and ADPF 132 – Rappouteur Justice Ayres Britto.
[21] Article 42 of the Brazilian Statute for Children and Adolescents - ECA – Law No. 8.069/1990 - synthesizes the concept.

Dias affirms that the new century family cannot be defined by the classical triangulation: father, mother and son. Any living structure that somehow forms an affective unit that radiates effects deserves to be protected by law. It cannot be denied the existence of a family entity formed by only one parent, considering the affection that characterizes this unit.[22]

This development of a humanistic understanding of the social concept of family, based on Constitutional principles, undeniably sustained a new concept of paternity that especially values the bonds of affection.[23] This change permitted the development of socio-affective filiation, which is characterized by feelings of solidarity, responsible parenthood, respect, care and family coexistence, among others.

The principle of affectivity works as a vector that restructured the legal protection of families. The current social institution focus is more on the quality of the bonds held between parents than on the way in which entities formally present themselves in society, overcoming the liberal and patriarchal codifications. Conrado Paulino states that the real family is a "*communion of affections, before being a legal institute.*"[24]

The idea that the family was reduced to an economic, social, and religious unit has given place to other values, especially the value of affectivity in family relationships. Currently, the existence of non-genetic paternity is recognized since filiation can also originate from psychological roots since it is not only a mechanical or physical act.

Regarding socio-affective paternity as a form of transcendence of biological paternity, Farias and Rosenvald, while explaining socio-affective paternity (social parenthood), affirm that "*different studies from other branches of knowledge, especially Psychoanalysis, recognizes that the father figure is built daily - not a mere transmission of genetic load*".[25] This form of paternity is based on the general idea of guardianship of the human personality, supported on the principle of good faith and based on the prohibition of contradictory behaviours (*nemo auditur propriam turpitudinem allegans*) and on the moral characteristics that this affiliation possesses.[26] After all, affective bonds can induce civil kinship.[27] The concept of parenthood can result not just from a biological bond but also from a "*psychological*

[22] Maria Berenice Dias, 'Curso de Direito de Família' (11th edn, Revista dos Tribunais) 291.
[23] Conrado Paulino da Rosa, *iFamily: Um Novo Conceito de Família?* (Saraiva 2013) 109.
[24] Ibid.
[25] Cristiano Chaves de Farias and Nelson Rosevald, *Curso de Direito Civil: Famílias* (7th edn, Atlas 2015).
[26] Maria Berenice Dias, 'Manual de Direito Das Famílias', *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 402.
[27] Cristiano Cassettari, *Multiparentalidade e Parentalidade Socioafetiva: Efeitos Jurídicos* (2nd edn, Atlas 2015).

edification, through which the father or mother is the one who supports and assists the child in his/her discovery as a human being,[28] *loving and supporting him/her on his/her life*".

The socio-affective fatherhood relationship occurs when a father loves, educates and follows the development of another human being in a way that configures a strong bond.

The socio-affective membership is based on the recognition of the expressed state of child possession (posse de estado de filho), which is the belief that the condition of being considered a child is based on ties of affection. This state is the most exuberant expression of psychological kinship and affective affiliation. Biological parenthood is worthless when faced with the affective bond formed between a child and the one who cares for him/her, giving love and participating in his/her life. As noted, affection has legal value and can be understood as a legal principle, even if it may conflict, sometimes, with the "*pater is est quem nuptiae demonstrant*" presumption.

For Dias, in the clash between fact and law, presumption needs to give place to affection.[29] For her, the State has the primary responsibility to ensure it for its citizens[30] because the right to affection is closely linked to the fundamental right to happiness. It is important that the State acts to help people carry out their projects of legitimate preferences or desires. The mere absence of state interference is not sufficient. In addition, even if the word affection is not expressed in the Constitution, affectivity is linked to the scope of its protections.

Constitutional and non-constitutional Brazilian norms show that socio-affective affiliation has been accepted in Brazil's legal system, even if there is no biological link between the parties.

In addition to the already mentioned Article 1.593, another example of the importance of affection to the legal system is in Article 1.597, V of the 2002 Brazilian Civil Code, which presumes that the child conceived by heterologous artificial insemination, with the prior authorization of the husband, has a partially biological origin. In other words, the husband who authorises assisted human reproduction using another parent's genetic material will be exclusively socio-affective and cannot contest the paternity later, once the law authorizes the artificial procedure.

[28] Belmiro Pedro Welter, 'Teoria Tridimensional No Direito de Família: Reconhecimento de Todos Os Direitos Das Filiações Genética e Socioafetiva' (2009) 10 *Revista Brasileira de Direito de Família* 104.
[29] Maria Berenice Dias, 'Manual de Direito Das Famílias', *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 401.
[30] Maria Berenice Dias, 'Manual de Direito Das Famílias', *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 55.

Affection is also brought up by Article 1.605, item II of the Civil Code, which provides that, in the absence or defect of the term of birth, filiation may be proven by any admissible proof, especially "*when there are vehement presumptions resulting from certain facts*", for example, when there is personal and public behaviour and reciprocal affection between two people, as father and son and vice versa.

Article 57, paragraph 8 of Law No. 6.015/1973 allows the stepson or the stepdaughter, if there is a substantial reason, to request the competent court to include the family name of his stepfather or his stepmother as his own last names, with the express agreement of the parties involved, without prejudice to her/his family names. As a rule, three elements should be considered to characterize a filiation bond: name (*nomen*), the individual use of the father's name; treatment (*tractatu*s), which refers to the way the individual is treated by the family; and recognition (*famulus*), the public recognition of the bonds.

Therefore, parameters for the definition of parental ties that include affection are a reality that can no longer be disregarded.

However, on the other hand, after the development of medical science, given the possibility of using a DNA test to determine biological paternity, Brazil is experiencing a new era.[31] As a matter of fact, the search for genetic identity is also guaranteed by non-constitutional legislation, such as Article 48 of the Statute for Children and Adolescents that recognizes the child's right to know his/her biological origin.

Summing up, today it is possible to identify, in Brazil, three distinct forms of paternity: i) public notary registered paternity (Articles 1.604 and 1.609 – Civil Code),[32] ii) biological paternity (based on the genetic origin of the person), and iii) socio-affective paternity (extracts paternity from love and care given to children). Apparently, these concepts are not mutually exclusive.

It has been culturally analysed that parenthood is not just a construction of scientific data but also something that is built over time through dedication, attention, respect, love, zeal, and care for the child. As seen, multi-paternity is a reality that must produce legal effects. In addition, the same paternal-filial relationship can fit into several types of paternity or only one of them, as was exposed by the analysis of Brazilian Supreme Court's decision based on the principles of human dignity, the right to pursue happiness and the best interests of the child.

[31] RE 363.889, Justice Toffoli. STF assured the possibility of the relativization of the res judicata if a new DNA examination is taken, in respect of the fundamental right to search for genetic identity as a natural emanation of the right to human personality.
[32] Maria Berenice Dias, 'Manual de Direito Das Famílias', *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 386.

B. Brazilian adoption style (adoção à brasileira)

There is a peculiar aspect of Brazilian law known as "Brazilian Adoption style". It occurs when someone, without due process, adopts a juvenile person as if he/she was his/her own son/daughter, providing him/her with education and material support. This represents a concept named "the possession of a state of affiliation". It usually occurs when someone, without observing the regular adoption procedure imposed by Civil Law, registers an infant as his/her daughter/son assuming the risk of criminal liability.

Even though the recognition of non-biological paternity or maternity without due process of adoption is an act classified as a crime in Brazil, apparently, the crime is not very relevant to the courts. They seem to be more concerned with the welfare of the child since it is undoubted that this kind of act produces civil effects and may generate responsibility.

The Brazilian Superior Tribunal of Justice (STJ) has produced some interesting decisions about this clear conflict between criminal and civil law (Articles 242 and 299 of the Criminal Code). In most cases, the court affirms that the criminal aspects of the "Brazilian adoption" are irrelevant, which is mainly because the child's best interests must be considered first, and the affective bonds must be respected and considered irrevocable.

C. Is it also possible to have more than one mother?

Another interesting question can be raised: is it possible to have more than one mother? Although the STF's decision focused only on fatherhood, the answer to the question is positive as can be deduced from some Brazilian precedents.

For example, in 2014, a first instance judgement in Rio de Janeiro (15ª Vara de Família/Family Court) acknowledged the right of three siblings to have two mothers. Both biological and socio-affective mothers were recognized in their civil records.[33]

The STJ had the chance to hear another interesting case about the possibility of double motherhood.[34] The plaintiff explained that when she was 10 months old she was registered by a foster parent ("adopted on the Brazilian style"). According to reports, in fact, the child was "adopted" by a lesbian couple, therefore, involving 2 mothers. The daughter claimed to have been raised, indistinctly, by her two mothers, and since her non-biological mother died, she had a legal right to a *post-mortem* socio-affective maternity. High Judge Bellize, rapporteur for the case, considered that the request was possible and required the return of the case to the court of first instance for the production of more evidence on that issue.

[33] <http://www.ibdfam.org.br/noticias/5243/TJRJ+reconhece+multiparentalidade.> accessed 12 July 2017.
[34] REsp No. 1.328.380/MS, 21.10.2014, Rappourter Marco Aurélio Bellizze.

D. Parenthood and Multi-paternity in other legal systems

It is important to note that the matter discussed in this paper is not totally new since the "*concept of parenthood, the nature of parenting, even who is a parent, are all contested ideas*". In the context of the European Union, parenthood law is mostly attached to a traditional concept, even though it is "*imperative that a reconsideration of this limited atheoretical and apolitical approach to parenthood occurs*. *The Union must move away from a traditional ideology of motherhood and fatherhood (…) and must embrace more modern approaches to parenting based on principles of gender neutrality*" since "*parenting should be based on equality, on democracy within families and on parental roles being negotiated and not based on some pre-ordained gendered division of roles and competences*".[35]

As warned by Schaffer, those who assume that the bonds between a child and his or her attachment figures can be broken simply because they are not linked to each other by ties of blood make a serious mistake because "*children can suffer severe psychological trauma when separated from such care givers, whether they are biologically related or not.*"[36]

Unfortunately, the European Court of Justice has not yet been challenged to confront the theme of multi-paternity. Until now, Europe has mostly maintained a traditional ideologic pattern to family law when confronting parenthood based on Articles 7, 8 and 9 of the Convention on the Rights of the Child (CRC)[37] that provide the right of children to be brought up by their birth parents, considering the importance of their own natural families, and on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Without intending to exhaust the examples, there are some emblematic cases on the subject that can be presented in comparative law:

(i) In Italy, the Appeal Court of Trento (ordinanza – 23 February 2017)[38] decided the theme of multi-paternity. Some minors born through assisted procreation and gestation in a foreign country could be considered children of a homosexual couple consisting of two men, giving the status of a father to a man who had no genetic connection with the children.

The incontrovertible lack of genetic connection between the two children and the father does not represent an obstacle to the recognition of the filiation relationship ascertained by the judge, excluding the fact that in Italian law there is a

[35] Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism (Law in Context)* (Cambridge University Press 2006). 78-79 88.
[36] Jane Fortin, *Children's Rights and the Developing Law (Law in Context)* (3rd edn, Cambridge University Press 2009) 518.
[37] Adopted by Resolution No. L 44 (XLIV) of the General Assembly of the United Nations, on November 20, 1989, and ratified by Brazil (Decreto No. 99.710/1990).
[38] <http://www.biodiritto.org/index.php/item/897-trento-gpa.> accessed 9 July 2017.

model of parenthood solely based on the biological bond between the parent and the child.

The opposite must be considered. The importance, at the normative level, of the concept of parental responsibility that manifests itself in the conscious decision to raise and care for a child. The legal system, through the regulation of the institution of adoption, favourably considers the project of the formation of a family characterized by the presence of children independent of the genetic data. It is possible that there is an absence of a biological relationship with one of the parents (in this case the father) for children born from permitted heterologous fertilization techniques.

Courts around the world are dealing with hard cases when confronting disputes over children who are emotionally attached to those who care for them and love them on a day-to-day basis but who, for many reasons, are not their biological parents.

In this context, disputes between birth parents and private foster parents are being faced by European Courts, and the rationale and logic of their positions regarding the balance of blood ties and socio-affective bonds are not always easy to portray.

(ii) J. (a child) v. C (1970): The House of Lords faced a dispute between birth parents and foster parents and was challenged to whether a 10-year-old boy should be returned to his biological parents in Spain or remain with his foster parents who, for many years, based on an informal agreement, demonstrated excellent care for the child in England.[39] The court considered the entire context of the child's life, avoiding any presumption favouring the birth parents who did not benefit from their genetic position, and finally established that although the claims of birth parents often carry great weight and cogency when equally treated, they had to be 'assessed and weighed'[40] favouring the adoptive parents in this case.[41]

The non-privileged treatment of biological parents was replicated in other similar cases, contextualizing the concrete cases. However, in other precedents, the Court of Appeals has been inclined differently, favouring birth parents and sometimes not considering the possibility of the psychological damages that this type of claim can cause to the children involved.

(iii) Case Re K (minor) (ward: care and control) (1990): A boy, now aged 4½ years, had been placed by his father with his maternal aunt and uncle after his mother's suicide. The foster parents, after one year of care, refused to return the child

[39] Mary Welstead and Susan Edwards, *Family Law* (4th edn, Oxford University Press 2013) 269.
[40] Fortin (n 36) 521.
[41] Welstead and Edwards (n 39) 269.

to his biological father. In this case, the British House of Lords gave greater importance to blood ties. It ruled that the child's welfare principle and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms both expressed the concept that the natural bond and relationship between a parent and child should only be interfered with when the child's welfare so dictates.[42]

(iv) While criticizing the court's choice to presume that the blood tie between a child and his or her parent would always produce a relationship valuable to both, Jane Fortin cites a very interesting case: Re M (Child's Upbringing). The Court of Appeals ordered that a 10-year-old Zulu boy be returned to Africa with Neill LJ stating that he had "*the right to be reunited with his Zulu parents and with his extended family in South Africa*" after years (since a baby) of being well taken care of by his foster parents and despite expert warnings and evidence. The court solemnly ignored the psychiatrist's warnings that the damage to the boy's emotional well-being was unacceptable, and in the end, he was forced to return to his birth parents. Unfortunately, "*court orders cannot magically transform children's affections. The boy's unhappiness in South Africa forced his parents to admit defeat and to return him to his foster mother's care in England*".[43]

By the way, Jonathan Herring points out that "*Hayes and Williams note that the outcome of the court's ruling proved disastrous and the child eventually returned to his foster mother in England*".[44]

(v) It can be concluded that the court often tends to consider the time spent with foster parents and age factor to determine the best path, as whether to keep the child with the socio-affective parents or to return him to his biological family.[45]

As seen, the jurisprudence in this family law area is pretty much discretionary, often lacking clarity in the courts' choices, leading to some legal uncertainty. However, regardless, "*a court order is unable to put the clock back on a child's changed affections*."[46]

The focus of the complex controversies must always be the child's well-being, his safety and his happiness. It is not possible to simplify such demands with legal rigidity. It is necessary to evaluate meta-judicial questions and to consider the whole context of the cause, especially the possible real psychological harm to those involved.

[42] <https://www.ncbi.nlm.nih.gov/pubmed/12289194.> accessed 14 July 2017.
[43] Fortin (n 36) 526.
[44] Jonathan Herring, *Family Law, Issues, Debates, Policy* (Willan Publishing 2001) 215.
[45] Check Re P (a child) (residence order: restriction order), Görgülü v. Germany and Hokkanen v. Finland and Pini and Bertani; Manera and Atripaldi v. Romania - Jane Fortin, *Children's Rights and the Developing Law (Law in Context)* (3rd edn, Cambridge University Press 2009) 527-529.
[46] ibid, 530.

Sometimes the European Court lends value to the socio-affective relationship between a child and another family member with whom he/she has no biological link, considering the best interests of the child.[47] Still, its positions are not as progressive as the Brazilian STF's.

Recognition of this reality "*is necessary to ensure that families which do not conform to the married nuclear norm do not suffer, either with fathers being excluded from parental rights, or children being prejudiced as a result of their parents' status, or lack of status.*"[48]

For instance, in the US the law gives some recognition to social parenthood, although it is restricted to those who are married. When a married couple treats any child as a part of the family, even if they are not genetically related, the couple can be asked to provide financial support under Section 1 of the 1989 Children Act and under Section 38 of the 1978 Domestic Proceedings and Magistrates' Courts Act. It is, therefore, permissible for an affective child of a deceased adult to claim family status, even as against the State (1975 Family and Dependants Act).[49]

It is important to emphasize the relevance of the role of the child in the family that is given to the rise of the new family concept, which is different from the traditional unit that was formed only by a married heterosexual couple.

III. Conclusions

Some important conclusions can be drawn from the analysed decisions:

1) The decision defines who a parent is, a concept not always clear currently;
2) The central axis of the system shifted from the Civil Code to the Constitution;
3) There is legal recognition of affection. It was recognized that affection is a principle that can guide the court in other situations due to its legal significance, bringing a parameter of social life to the world of law;
4) Socio-affective and biological links are equally recognized. There is recognition by the Brazilian higher courts of both paternities – biological and socio-affective - with the same status, without any *a priori* hierarchy (in the abstract). This assimilation is important and constitutes a big step forward for family law since the concept of family cannot be reduced to standardized models anymore. In each case

[47] Suzana Assis, *Parentalidade Sócio-Afectiva: Portugal e Brasil*, vol 2 (Almedina 2012) 62.
[48] McGlynn (n 35) 108.
[49] Jonathan Herring, *Family Law* (Pearson Education Limited 2017) 382-383.

presented, the Justice should point to the best solution to the factual situation that is under review.

5) There is a legal possibility of multi-parentality. This is one of the major advances achieved by the vanguard thesis adopted by the STF. No longer can it be said that someone can have only one father or one mother in Brazil. As noted, this idea is being debated in several other countries as well;
6) After the STF's decision, a Brazilian citizen raised and registered by a socio-affective parent does not have to give up his biological parent or the rights that come with that recognition, such as pensions and inheritance.

All these changes in parenting portray the evolution that family law is going through, and this seems to be a path of no-return. The historical and revolutionary decision of Brazil's Supreme Court sought to answer some complex questions: (i) Does a biological father have the right to deny paternity? (ii) Does a person have the right to seek legal recognition of his/her biological status even if a socio-affective parent pre-exists?

It is, however, undeniable that some changes have brought about the possibility of searching biological parents only for financial purposes. To avoid this problematic mercenary action, it is important to remember that theories of abuse of law and of good faith are also applicable in family law. Some questions are, indeed, still open: (i) Do multiple parents also have rights to their children? (ii) What would occur if the child dies before his/her parents?

The courts have always looked at the problem from the children's point of view, seldom from the parents'.

Other questions from this perspective are what occurs if multiple parents need alimony? Could the child, strictly speaking, be called to provide alimony to multiple parents? In the end, multi-parentality may become a great burden on children, usually seen as benefiting from the judicial system.

Additionally, an issue that should also be better explained is whether the Brazilian STF's understanding will have any effect on formal adoptions that follow all the legal procedures necessary for the accomplishment of the right. The inquiry is relevant especially when thinking of those adoptions made without respect to formalities, a frequent situation in Brazil. Should adoption procedures be changed?

The general concept of the human being is not only affected by interactions with the world of things (genetic world), as has until currently been sustained by the western world's legal culture but also by the process of being in a family and in society (the affective world). In the 21st century, it is necessary to recognize that families are

not formed as they were in the past, based on procreation, but, essentially, by the freedom of democratic institutions. Therefore, understanding that the human being is, at the same time, biological, affective (or non-affective) and ontological resonates with the existence of a "family trilogy" and, consequently, with the possibility of establishing three paternal bonds (and other three, logically, maternal) for each human being. Hence, the existence of the family law expression “three-dimensional theory.” Therefore, all paternities are equal, without any priority among them, and all legal consequences must be guaranteed in relation to all types of affiliations.[50]

In this sense, the Brazilian Supreme Court has accepted the claim of dual paternity from a systematic interpretation of constitutional and non-constitutional provisions and based on principles of human dignity, affectivity, equality and the best interests of the child, concluding that biological character is not the exclusive criterion for the formation of a family due to the absence of hierarchy between the bonds. As is known, parenting is a day-by-day effort. In addition, the biological link helps, but it is not everything and does not exclude other links.

Family law could not be understood by closed rules. This requires that doctrine and jurisprudence be open to a vision that understands family in all its space of personal achievements and meta-juridical understandings, respecting social and individuals’ choices, freedom, prosperity and the equality of people, without any kind of discrimination.

In addition, the responsibility among relatives means the commitment to seek to practice positive behaviours and attitudes that will undoubtedly contribute to the promotion of a healthy coexistence, emotional balance and happiness for those involved in family relations that must be inspired by the objective of good faith and by the avoidance of adversarial behaviour. This is the challenge.

[50] Pedro Belmiro, *Teoria Tridimensional No Direito de Família: Reconhecimento de Todos Os Direitos Das Filiações Genética e Socioafetiva* (Livraria do Advogado 2009).