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MITIGATION OF THE MANDATORY SEPARATION OF PROPERTY REGIME: AN ANALYSIS OF THE STF'S DECISION ON TOPIC 1236 AS A MILESTONE IN THE PROTECTION OF THE INDIVIDUAL FREEDOMS OF SPOUSES OVER 70 YEARS OF AGE[1]

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ABSTRACT

Within the scope of Family Law, the matrimonial relationship is still a sphere of great importance, given the special legislative focus on governing marriage, its mode of celebration, its effects, and its dissolution. With regard to marriage, article 1,641 of the Civil Code (CC) states in its item II that, in marriages in which one or both of the spouses is over 70 years of age, the application of the total separation of property regime is mandatory. From this perspective, the objective of this study is to seek to understand the decision of the Federal Supreme Court (STF) in the judgment of theme 1236, its impact on the protection of the individual freedoms of the spouses over 70 years of age, what are its grounds and their reasons for deciding. To this end, the present research, which has an exploratory and documentary character, with jurisprudential analysis, used the bibliographic and documentary methodology to study the theme, through articles and books related to the theme, as well as the decision, from a qualitative approach to the object, using the deductive method to analyze the results. In the results found after deep research, the negative impact of item II of article 1,641 of the Civil Code (CC) on the individual freedoms of septuagenarians was evidenced, as it directly hurts the principles of human dignity, equality and freedom. Advanced age cannot be viewed or interpreted as an impediment to freedom of choice, especially when it comes to marriage and its patrimonial effects. Therefore, it is concluded that the STF's decision has a positive impact on the protection of the individual freedoms of the spouses over 70 years of age, representing a crucial milestone in the protection of the fundamental rights of the elderly, as it mitigates such imposition, which previously only hurt the dignity of these people, annulling their decision-making power by the other regimes, affecting their autonomy, presuming a relative incapacity of fully capable citizens, and now it safeguards the right to choose and the private autonomy of such people, affirming their full civil capacity.

Keywords: Property Regime. Mitigation. Mandatory Separation.

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INTRODUCTION

The present work has as its central theme the analysis of the decision of the Federal Supreme Court (STF) in the judgment of theme 1236, which mitigated the imposition of the mandatory separation of property regime to the spouses over 70 years of age.

Marriage, as provided for in article 1511 of the Civil Code (CC), is an institution that, after formed, establishes full communion of life, and such communion, in addition to its personal nature, also has repercussions on the patrimonial sphere of the spouses, and it is necessary to establish a property regime to regulate the patrimonial relations between the spouses.

From this perspective, Orlando Gomes conceptualizes the property regime as a patrimonial statute that will govern the patrimonial relations between the spouses during the constancy and termination of the conjugal partnership (Gomes, 2011, p. 272).

Furthermore, in view of the patrimonial effects generated by the property regime to the spouses, it is necessary that there is freedom of choice for them so that they can freely choose which one best suits them.

However, as provided for in article 1641 of the Civil Code (CC), there are cases in which the spouses will not be given the freedom to choose the matrimonial property regime, and in these cases, the mandatory separation of property regime is imposed in a cogent manner.

As for the mandatory separation regime, Carlos Roberto Gonçalves (2021) advocates that it is the one imposed by law, in which there is no need for a prenuptial agreement. Such imposition is made because there has been a contravention of a legal provision that regulates the suspensive causes of the celebration of marriage, because one of the spouses is over 70 years old, or if the spouses have married under judicial supply.

Regarding the marriage of people over 70 years old, Maria Berenice Dias (2021) commenting on this that the law imposes the regime of mandatory separation for all those who will marry who have reached the age criterion, suppressing the individual freedom of the spouse.

It so happens that, in the judgment of the Extraordinary Appeal with Interlocutory Appeal (ARE) 1.309.642/SP, received as a subject of general repercussion 1236, the Supreme Court, when discussing the property regime applicable to marriage and stable union of people over seventy years of age, established the following thesis: In marriages and stable unions involving a person over 70 years of age, the separation of property regime provided for in article 1.641, II, of the Civil Code, may be removed by express manifestation of the will of the parties, by means of a public deed.

With this thesis, the Brazilian Supreme Court mitigated the imposition of the separation of property regime to the hypothesis of item II, of article 1641, of the Civil Code (CC), allowing the spouses over 70 years of age to freely choose the property regime.

In view of all the above, the work aims to seek to understand the decision of the STF in the judgment of theme 1236, its impact on the protection of individual freedoms of spouses over 70 years of age, what are its grounds and their reasons for deciding.

Therefore, in view of the mitigation perpetrated by the STF, the following question arises: What is the impact of the STF decision in topic 1236 on the protection of the individual freedoms of the spouses over 70 years of age?

To answer this question, the research has the general objective: to analyze the impact of the STF's decision on the protection of the individual freedoms of the spouses over 70 years of age.

For specific purposes: a) to probe the doctrinal position regarding private autonomy in marriage; b) to investigate the mandatory separation of property regime for the spouses over 70 years of age; c) to examine the decision of the STF in the judgment of topic 1,236, its grounds and effects.

In order to fulfill all objectives, the methodology of approach used for the execution consists of a qualitative approach to the object, presenting an exploratory character and jurisprudential analysis, using the deductive method. The methodology to be used is bibliographic and documentary research.

As for the structure, the work was divided into three sections. In the first, freedom and private autonomy are addressed as basic principles of marriage. The second deals with the imposition of the mandatory separation regime on the spouses over 70 years of age and the doctrinal position on the subject. In the third, the decision of the STF, its grounds and effects are analyzed.

MARRIAGE AND PRIVATE AUTONOMY

Family Law is considered one of the most important, if not the most important, as it is linked to the individual's own life. Regardless of the choice that people will make, whether it is the construction of a marriage or stable union, they all come from a family organism (Gonçalves, 2021).

For Maria Berenice Dias (2021) it is important to remember that marriage generates what is called a marital state, which the spouses enter of their own volition, through the so-called state seal.

Marriage is characterized by the constitution of a family nucleus, it is considered as a personal achievement, as it is a bond of solid character, since this is its main objective.

Within the main doctrinal currents that define the legal nature of marriage, Carlos Roberto Gonçalves (2021) adduces the three main ones: a) contractualist or individualist current, in which marriage is a simple contract, applying the rules of legal business; b) institutional current, in which marriage is a social institution, insofar as the rules that govern marriage and its effects are of public order, only the spouses adhering to such norms cannot be changed by agreement of the spouses; c) complex or eclectic current, in which marriage is a complex act, in its formation it is a special bilateral legal transaction of Family Law, since the applicable rules are not those of legal transactions, but the rules of Family Law, and the bilateral manifestation of the free and spontaneous will of the consorts to marry is necessary to generate the marriage bond, but once formed, the effects of this union are pre-established by law.

Paulo Lôbo apud Maria Berenice Dias (2021) states that marriage is a sui generis contract, as it is exclusive to Family Law:

> Paulo Lôbo says that marriage is a solemn, public and complex legal act of negotiation, since its constitution depends on successive manifestations and declarations of will, in addition to the officiality with which it is clothed, and its effectiveness is subject to state acts. Many consider it a sui generis contract, that is, a different contract, with special characteristics, to which the legal provisions of patrimonial transactions do not apply. Hence it is affirmed that marriage-act is a legal transaction and marriage-state is an institution. (Dias, 2021, p. 470).

Thus, from the eclectic current, marriage can be defined as a solemn contract, by which two fully capable people, through an express manifestation of will, according to the laws, unite with the intention of living mutually, legalizing their sexual relations through it, establishing rules that governed the patrimonial mass, reciprocal duties between the spouses, and duty to raise and educate the offspring that are born of both.

In this sense, care is taken to emphasize that marriage is an act of private autonomy, in which the spouses have a certain freedom, such as to marry or not to marry, to choose the spouse and the property regime applicable to marriage.

For Carlos Roberto Gonçalves (2021), the main purpose of marriage is the establishment of a full communion of life between the consorts, which is based on the equality of rights and duties between the spouses with the aim of mutual assistance between them.

That is why it is said that with marriage duties related to cohabitation and reciprocal assistance are established, and with the choice of the property regime, effects are

generated in the patrimonial sphere in relation to the assets constituted during the union, and how these will be shared with the end of the conjugal partnership.

According to Farias and Rosenvald (2012), the conjugal partnership gives rise to several duties and effects to the spouses, so that such effects of marriage derive from the law, and cannot be changed by agreement of the spouses.

However, Maria Berenice Dias (2021) states that, despite the cogent order of several rules that govern the celebration of marriage, its effects and its dissolution, the bride and groom are given a space of freedom, in which they can deliberate and choose the rules that will govern the patrimonial effects of marriage.

Therefore, the spouses are given the freedom to choose the marriage property regime that best suits them, as the regime will determine all the effects on the assets of the spouses before, during and at the end of the conjugal partnership.

In the words of the author, the property regime is a legal consequence of marriage, since there can be no marriage without a regime.

From this perspective, Orlando Gomes conceptualizes the property regime as being a patrimonial statute that will govern the patrimonial relations between the spouses during the constancy and termination of the conjugal partnership (Gomes, 2011, p. 272).

Under this bias, before the wedding, the bride and groom have the duty to choose one of the existing regimes, merge them, or even create a single model, doing so in the way that best suits their private interests.

It should be noted that the existence of a matrimonial property regime is mandatory, since the law determines that even if the spouses fail to comply with the property regime, the partial community of property, also known as the legal regime, will apply.

In addition, it should be noted that only the regime of partial community and mandatory separation of property do not require a prenuptial agreement, while the choice of a different regime can only be made through the agreement.

From such desiderata, it can be seen that marriage is strongly linked and based on the autonomy of private will, since its constitution depends on the free and spontaneous consent of the bride and groom, and with exceptions, the rule is freedom as to the deliberation on the patrimonial effects of the union.

Such is the understanding of Maria Berenice Dias (2021) when she states that the right to free choice is guaranteed to the bride and groom, with no limitation on their autonomy of will, safeguarding their individual freedoms:

> With some rare and unconstitutional exceptions (CC 1.641), the bride and groom can deliberate what they want and in the way that best suits them about their assets

> (CC 1.639). The law does not impose any restriction, ensuring full freedom to future spouses to make the stipulations they wish. They are not conditioned to legal suggestions. There is no obligation to choose one of the regimes made available by the legislator." The autonomy of will is not limited to the assertion contained in the legal text (CC 1.640, sole paragraph): the spouses, in the qualification process, may choose any of the regimes that this Code regulates. Nor are the bride and groom subject to mixing, at most, two or more regimes among those legally provided. Such a restriction would constitute a flagrant affront to the principle of autonomy of will. The bride and groom are free, and can establish a peculiar regime. (Dias, 2021, p. 678-679).

In this line of reasoning, it is also important to emphasize the phenomenon of the constitutionalization of Civil Law, especially the constitutionalization of Family Law.

This phenomenon comes with the promulgation of the Federal Constitution of 1988, which inserted in its text several rules of civil order, as well as brought several basic principles and fundamental rights of Civil Law.

In the view of Paulo Bonavides apud Maria Berenice Dias (2021), in the current conjuncture of Law, constitutional principles are the true normative foundation on which the entire Brazilian constitutional legal system is built.

In the author's view, the Federal Constitution, in particular, the fundamental principles and rights brought within it do not have mere rhetorical force, but have acquired immediate effectiveness and are the axiological basis through which the entire legal system must be interpreted.

Such axiological and binding force of the principles is evident, since the Constitution asserts that the dignity of the human person is the foundation of the Brazilian Democratic State of Law (Brasil. CF/88, 1st, III).

The dignity of the human person is considered by scholars as a macro-principle, from which the principles of freedom, private autonomy, equality, and free family planning radiate.

Therefore, it is evident that Family Law, especially the rules regarding marriage, must be interpreted in the light of constitutional principles, in order to guarantee the bride and groom their dignity, safeguarding their freedom and private autonomy, and must be treated equally, and in the end, the State refrains from interfering in free family planning, a right guaranteed in the constitutional text (Brasil, CF/88, art. 226, § 7).

It is concluded in the end that marriage, especially its rules, interpreted in the light of its legal nature, its purpose and constitutional principles, is an institute that has its foundation in the private autonomy of the will, since, even though there is a normative framework regarding its celebration, effects and mode of dissolution, it is only the free and spontaneous manifestation of the will of the spouses to marry that constitutes the necessary element for the emergence of the marriage bond and the conjugal partnership.

OF THE SEPARATION OF PROPERTY REGIME FOR THOSE OVER 70 YEARS OF AGE

The elderly population has an enormous representation in contemporary society, at the same time that it has been sent to the future with a growing curve in its numbers. Given this scenario, any topic related to this age group ends up being the subject of debate. Within the scope of this study, the analysis focuses on the mandatory separation of property regime for individuals over the age of 70.

Therefore, Azevedo (2019) ends up reminding us that the bride and groom have the prerogative to decide which regime present in the law they intend to follow, or determine a particular regime. In the situation where there is no express manifestation of which regime will be applied, the partial community regime becomes the rule.

However, the Civil Code in its article 1,641 ends up exposing different possibilities where the choice of the spouses does not receive due attention, and the mandatory separation of property regime is imposed. It is important to mention the text of the cited article:

> Article 1,641. The separation of property regime in marriage is mandatory:
> I – of persons who contract it with non-observance of the suspensive causes of the celebration of marriage;
> II – the person over 70 (seventy) years of age;
> III – of all those who depend, in order to marry, on judicial supply (Brasil, 2002).

This legal provision provides for the imposition of the mandatory separation of property regime on the spouses who fall under any of the three items.

Thus, in such cases, the bride and groom will not be given the freedom to choose the matrimonial property regime, and in these cases the mandatory separation of property regime is imposed in a cogent manner.

As for the mandatory separation regime, Carlos Roberto Gonçalves (2021) advocates that it is the one imposed by law, in which there is no need for a prenuptial agreement. Such imposition is motivated by non-compliance with the legal provision that regulates the suspensive causes of the celebration of marriage, because one or both of the spouses are people over 70 years of age, or in a situation in which the bride and groom were married under judicial supply.

The effect of the imposition of the mandatory separation regime as to the property is the total incommunicability of the assets of the spouses both constituted before the union and during the constancy of the same. In this way, there will be two distinct patrimonial masses.

Maria Berenice Dias (2021), when discussing the mandatory separation regime, states that these are hypotheses in which the autonomy of choice of the spouses is not respected.

The brilliant doctrinaire continues to advocate that it is a mere attempt to curb the autonomy of the couple through true sanction. The way found by the legislator to demonstrate his indignation at the insistence of those who disobey the legal advice and insist on fulfilling the dream of getting married, is to impose patrimonial sanctions. It is to hinder the patrimonial effects of marriage.

Regarding the marriage of people over 70 years of age, Maria Berenice Dias (2021) commenting on this that the law imposes the regime of mandatory separation for all those who will marry who have reached the age criterion, whether one or both spouses, suppressing individual freedom. The criterion used by the legislator to impose the rule is only the age group of the individual, which the doctrinaire understands to be a legislative presumption of mental incapacity based only on the age group, as it restricts freedom as a result of age, without taking into account the person's real mental faculties.

Therefore, the aforementioned article determines the obligation to adhere to the separation of property regime in marriage when spouses are over 70 years old, taking away their decision-making power.

This text has already been the subject of numerous debates in Brazilian doctrine and jurisprudence, with different opinion groups: some are in favor of the conformity of the item with the Constitution, while others argue its unconstitutionality.

In the group that sees the mandatory separation of property regime in the marriage of those over 70 years of age to be constitutional, they state that this imposition has as its main objective to protect the consorts who are older in the face of fleeting and pretentious relationships (Gagliano; Pamplona Filho, 2022).

In defense of this position, it is cited:

> [...] Many marriages are performed by people with high age differences and, above all, of an economic-patrimonial nature, in which one of the consorts – as a rule, the eldest – has a much higher purchasing power than that of the other party who intends to marry, showing that, in the most diverse cases, the greed for the goods and values owned by those whose age is older, together with the fact that the life expectancy of such individuals tends to be relatively lower, it ends up subverting the legal and social intention of fostering the creation of a family through marriage (Cunha; Ferreira, 2021, p. 20).

According to Farias and Silva (2022), the purpose of the infra-constituent legislator was to seek the protection of these people, as it understood that, at this stage of life, theoretically, their assets (of one or both spouses) would already be in a more stabilized

and large stage. Here, the objective would be to remove any patrimonial stimulus from the marriage of a younger person to someone older.

On the other hand, authors such as Carlos Roberto Gonçalves, Silvio Rodrigues, and Maria Berenice Dias, are against such imposition, because, in their interpretation, such imposition generates a suppression of individual freedom, finding the elderly in a situation in which they cannot choose the conjuration of rules that will govern their economic and succession relations in the constancy and end of the conjugal society.

According to Francisco José Cahali, updating the work of Silvio Rodrigues apud Carlos Roberto Gonçalves (2021):

> A respectable current maintains, however, that this restriction is incompatible with the constitutional clauses for the protection of human dignity, legal equality and intimacy, as well as with the guarantee of the fair process of law, taken in the substantive sense (FC, articles 1, III, and 5, I, X and LIV). The doctrine, almost unanimously, has positioned itself in this sense. Francisco José Cahali, updating the work of Silvio Rodrigues, ponders that the restriction pointed out is an attack on individual freedom and that the excessive tutelage of the State over an adult and capable person is certainly unreasonable and unjustifiable.

The same is the understanding of Paulo Luiz Netto Lôbo apud Carlos Roberto Gonçalves (2021):

> For Paulo Luiz Netto Lôbo, the hypothesis is also an attack on the constitutional principle of the dignity of the human person, as it reduces his autonomy as a person and constrains him to reductionist protection, in addition to establishing a restriction on the freedom to marry, which the Constitution does not do. Consequently, this burden is unconstitutional.

For Carlos Roberto Gonçalves (2021), the imposition of the mandatory separation of property regime on the spouses over seventy years of age reveals itself in a view of ageism of the legislator, as it reduces such people to a reductionist tutelage, based on the idea that such people do not have the necessary discernment to make their choices freely.

In the author's view, the imposition of the regime hinders the individual freedoms of elderly couples, provoking a real state prejudice, as it reduces septuagenarians to a reductionist state tutelage, totally excessive and without justifiable reason.

From this perspective, Carlos Roberto, citing Silvio Rodrigues (2021), asserts that the legislator would have made a better option if the Code provides for the *legal regime* of separation in a non-absolute way, allowing the execution of an agreement to choose another regime, or at least the possibility of, upon judicial authorization, being free to choose another patrimonial regulation.

Also contrary to such an imposition on septuagenarians, Maria Berenice Dias (2021) asserts that, of all the hypotheses of mandatory separation, the imposition on people over 70 years of age is the most unreasonable, being in total affront to the Statute of the Elderly and constitutional norms.

For the author, such a restriction totally hinders the self-determination of the elderly, being in total affront to private autonomy and the minimum intervention of the State. In her view, it is a true partial forced interdiction of the person solely for nuptial purposes.

Flávio Tartuce (2022), also dealing with the subject, comments that, in relation to its item II, the doctrinal and jurisprudential current that supports its unconstitutionality is strong, as it brings a discriminatory situation to the elderly, treating them as incapable of marriage. In fact, the rule does not protect the elderly, but only protects the patrimonial interests of the heirs, having a strictly patrimonialist character, contrary to the tendency of contemporary Private Law, to protect the human person (personalization of Civil Law).

Thus, the legal restriction does not protect, but constitutes a true sanction, because under the idea of patrimonial protection of the bride and groom over 70 years of age, and protection of the inheritance right of descendants, it seals such people with a totally reductionist state protection.

Furthermore, in order to sustain the constitutional illegality of the civil text, Rehfeld and Ribeiro (2023) point out, based on the content of EC/88 of 2015, which ended up changing the age for compulsory retirement of general public servants from 70 years to 75 years old, that the legislator recognizes the full civil capacity of people over 70 years of age to work, since he increased his length of service.

Following the critical analysis of the Constitutional Amendment EC/88 of 2015, it was noticed that there is a contradiction in the light of the constitutional legislation, which reinforces, on the one hand, the ability of the average citizen to maintain work activities until the age of 75, while on the other hand, it restricts their civil capacity and their right to choose the property regime after completing 70 years of age.

For Rehfeld and Ribeiro (2023) it is totally contradictory to admit the civil capacity of the person to work until the age of 75, while restricting the choice of the property regime for their marriage from the age of 70.

This inconsistency ends up signaling the need for a more in-depth evaluation of the implications of this amendment, seeking to ensure cohesion and equity in citizens' rights.

In view of the conjuncture presented in this discussion, without intending to exhaust the theme, it is understood that the imposition directed to those over 70 years of age ends

up going completely against the constitutional regime in force, because in the democratic state of law freedom is privileged as a greater good.

For this reason, national norms most often seek to protect the autonomy of the will in relationships between individuals. However, the text of article 1,641, II, of the Civil Code (CC) directs to the restriction of autonomy in situations where, apparently, such limitation was not necessary.

Therefore, it is concluded that the imposition of this matrimonial regime on citizens over the age of 70 is authoritarian, going against the fundamental principle of freedom of individual choice, hurting the human dignity of such people, and reducing them to a true partial interdiction forced by the State, endorsing a reductionist guardianship to septuagenarians.

ANALYSIS OF THE STF'S DECISION IN TOPIC 1236

In 2024, more precisely on February 1, 2024, the judgment of Extraordinary Appeal with Interlocutory Appeal (ARE) 1.309.642/SP began, which deals with the property regime applicable to marriages and stable unions of people over 70 years of age. The present case, due to the constitutional nature of its controversy regarding the constitutionality of article 1,641, II, of the Civil Code (CC) was recognized as having social, legal, and economic relevance that exceeded the limit of the subjective interests of the specific case, in such a way that, on September 30, 2022, the Plenary received the appeal and recognized its general repercussion (Topic 1,236).

> CONSTITUTIONAL LAW. EXTRAORDINARY APPEAL WITH AGGRAVATION. PROPERTY REGIME APPLICABLE IN MARRIAGE AND STABLE UNION OF PERSONS OVER SEVENTY YEARS OF AGE. 1. The controversy over the validity of article 1,641, II, of the CC/02, which establishes that the separation of property regime in the marriage of a person over seventy years of age, and the application of this rule to stable unions, is of a constitutional nature. 2. Issue of social, legal and economic relevance that goes beyond the subjective interests of the case. 3. General repercussion recognized (STF. ARE 1309642 RG. Plenary, Rapporteur: Justice Roberto Barroso, Judgment Date: 09/30/2022, Publication Date: 03/06/2023). (emphasis added).

In the specific case, the division of the inheritance of a man, who died leaving children and a partner with whom he formed a stable union only after his 70th birthday, was debated. It so happens that the widow requested in a court of first instance the participation in the inheritance of the deceased under equal conditions with the necessary heirs.

The judge of first instance accepted her request, understanding that the provision of article 1,641, II, of the Civil Code (CC) that required the separation of assets between the deceased and the partner was unconstitutional, so that he decided for the widow to be

entitled to the inheritance, and the estate should be divided between her and the children of the deceased.

The Court of Appeals of the State of São Paulo (TJSP) when judging an appeal against this decision understood that the provision was constitutional and fully valid, in addition, it recognized the application of the rule also to stable unions as a result of its equivalence to marriage. Thus, the Court reformed the decision, understanding that in the specific case the regime of mandatory separation would apply, so that it excluded the partner from the division of the inheritance.

The controversy reached the Federal Supreme Court (STF) through an appeal filed by the widow, in which two issues were discussed: a) the constitutionality of the rule provided for in article 1,641, II, of the Civil Code (CC), according to which, in marriages with a person over 70 years of age, the separation of property is mandatory; b) whether this rule should also be applied to stable unions.

In Full Court, the Supreme Court rendered the following decision:

> Summary: Constitutional and Civil Law. Extraordinary appeal with aggravation. General repercussion. Mandatory separation of property in marriages and stable unions with a person over seventy years of age. Interpretation in accordance with the Constitution. I. The case under examination 1. The appeal. Extraordinary appeal with interlocutory appeal and general repercussion recognized against a decision that considered article 1,641, II, of the Civil Code constitutional and extended its application to stable unions. This provision provides for the mandatory separation of property regime in the marriage of a person over seventy years of age. 2. The material fact. Partner in a stable union postulates participation in the succession of her deceased partner on equal terms with the necessary heirs. 3. The previous decisions. The judge of first instance considered the provision of the Civil Code unconstitutional and recognized the right of the partner in competition with the heirs. The Court of Appeals of the State of São Paulo reversed the decision, considering the rule that imposes the mandatory separation of assets valid. II. The legal issue under discussion 4. The present appeal discusses two issues: (i) the constitutionality of the provision that imposes the regime of separation of property on marriages with a person over seventy years of age; and (ii) the application of this rule to stable unions. III. The solution to the problem 5. The provision questioned here, if interpreted absolutely, as a binding rule, violates the principle of human dignity and equality. 6. The principle of human dignity is violated in two of its aspects: (i) individual autonomy, because it prevents people capable of performing acts of civil life from making their existential choices freely; and (ii) the intrinsic value of every person, by treating the elderly as instruments for the satisfaction of the patrimonial interest of the heirs. 7. The principle of equality, in turn, is violated by using age as an element of inequality between persons, which is prohibited by Article 3, IV, of the Constitution, unless it is demonstrated that it is a reasonable basis for the achievement of a legitimate purpose. This is not what happens in the hypothesis, because elderly people, as long as they retain their mental capacity, have the right to make choices about their lives and the disposition of their assets. 8. It is possible, however, to interpret article 1,641, II, of the Civil Code in accordance with the Constitution, attributing to it the meaning of a dispositive rule, which must prevail in the absence of an agreement between the parties to the contrary, but which can be set aside by the will of the spouses, spouses or partners. In other words: it is an optional and non-binding legal regime. 9. The possibility of choosing the property regime must be extended to stable unions. This is because the Federal Supreme Court understands that "it is not legitimate to unequalize, for succession purposes,

spouses and partners, that is, the family formed by marriage and the one formed by stable union" (RE 878.694, under my rapporteurship, j. on 05.10.2017). 10. This Decision has prospective effects and does not affect legal situations that have already been definitively established. It is possible, however, to change the regime by consensus, in cases where it is validly admitted (e.g., article 1,639, § 2, of the Civil Code). 11. In the present case, as there was no manifestation by the deceased, who lived in a stable union, in the sense of derogation of article 1,641, II, of the Civil Code, the rule is applicable. IV. Disposition and thesis 12. Extraordinary appeal dismissed. Judgment thesis: "In marriages and stable unions involving a person over 70 years of age, the separation of property regime provided for in article 1,641, II, of the Civil Code may be set aside by express manifestation of the will of the parties, by means of a public deed". Normative acts cited: Federal Constitution, arts. 1, III; 3, IV; 5, I, X; 226, § 3; 230, and Civil Code, arts. 1,641, II; and 1,639, § 2. Jurisprudence cited: RE 878.694 (2017), Rel. Min. Luís Roberto Barroso. (STF. ARE 1309642 RG. Plenary, Rapporteur: Justice Roberto Barroso, Judgment Date: 02/01/2024, Publication Date: 04/02/2024). (emphasis added).

It can be seen then that the STF, when analyzing the controversy, paid attention to the constitutional principles of equality and dignity of the human person to guide the judgment of cognition that would follow in the decision.

The court understood that the rule, if interpreted absolutely, as cogent, would offend the dignity of the human person, his freedom and his right to equality.

The understanding that the mandatory separation of property regime in marriages with a person over 70 years of age violates human dignity is based on two assumptions: a) such imposition violates private autonomy, since it prevents people who are fully capable and aware of their choices from practicing acts of civil life and making choices freely; b) it devalues the inherent value of the person of the elderly, as it treats them as mere instruments of succession, which only ensures the patrimonial interests of the heirs.

As for equality, the provision completely taints it, considering that, based solely on age, it discriminates and treats the elderly in a totally unequal way, relegating them to excessive state protection due to their age group without reasonable grounds, violating the rule of article 3, IV, of the Federal Constitution (Brasil, CF/88, article 3, IV).

So, for the STF, the provision of article 1,641, II, of the Civil Code (CC) if interpreted absolutely, only represents a stain on the elderly, who sees himself discriminated against and treated based on a legal presumption as relatively incapable for a specific act, that is, to choose the matrimonial property regime.

In addition, the Federal Supreme Court has previously established the understanding that in stable unions the same rules apply as marriage, so that the rules of succession, property regime and division of inheritance of marriage are also applicable to unions (RE 878.694, Rel. Min. Luís Roberto Barroso, j. on 05.10.2017). From this perspective, as a consequence, in stable unions with people over 70 years of age, the mandatory separation of property regime applies.

To resolve the case, the Court used the technique of interpretation in accordance with the constitution, based on a systematized exegesis of the norm in the light of fundamental principles and rights, so that the provision in question was removed from its mandatory, binding character, for violating constitutional principles, and was attributed the nature of a dispositive norm. This means that the imposition of the separation regime was mitigated, creating what the Supreme Court calls an optional legal regime, no longer cogent.

In practice, the mandatory separation regime will only be applied to septuagenarian spouses and cohabitants if they choose not to choose a different property regime or are silent about the choice of another patrimonial rule, while the freedom to remove the imposition of separation of property by mutual agreement of will, by means of a public deed, was guaranteed. signed in a notary's office.

Unanimously, the Plenary dismissed the appeal, upholding the decision of the Court of Appeals of São Paulo, understanding that, in the specific case, there was no prior manifestation of the deceased on the property regime applicable to the stable union in which he lived, and therefore the rule of mandatory separation should be applied to the case.

In the end, the Collegiate, understanding that the provision of article 1,641, II, of the Civil Code (CC), if maintained as a binding commandment, would be in clear affront to the constitutional principles of equality and dignity of the human person, discriminating against the elderly, established the following thesis: In marriages and stable unions involving a person over 70 years of age, the separation of property regime provided for in article 1,641, II, of the Civil Code, may be removed by express manifestation of the will of the parties, by means of a public deed.

In addition, in respect to the principle of legal certainty, the decision had its effects modulated only for the future, so as not to affect legal situations already defined, because if the effects were retroactive there would be a risk of rediscussion of succession and partition processes already finalized, generating legal uncertainty.

Such modulation is essential, as the decision also allowed that, for marriages and stable unions signed before the trial, the spouses and cohabitants modify the separation regime for a different one, which was not allowed before.

As for married couples, judicial authorization is required for the change of regime, while cohabitants must manifest their will to change by means of a public deed, signed in a notary's office.

Regarding the effects of this change in the property regime after the beginning of the marriage or union, the new property regulation will only produce effects for the future, from the change, not affecting the effects of the regime previously in force.

From this moment on, we have an overview of the STF's decision in the judgment of topic 1236.

As the Supreme Court had not yet issued a definitive decision on the issue in question before the judgment, the debate on the unconstitutionality of such an imposition was perpetuated only in the doctrinal sphere. A majority of jurists continued to support the thesis of the unconstitutionality of the normative text in question.

This position is based on a deep analysis of the constitutional principles and on the systematic interpretation of the laws in force from the constitution, understanding that such imposition on the elderly hurt the dignity of their human person, hurting their freedom, private autonomy and their self-determination, relegating them to unequal and discriminatory treatment, solely and exclusively based on an age criterion, based on a presumption of civil incapacity of septuagenarians.

From this point of view, taking the previous chapters as a line of reasoning, the Supreme Court's decision is in complete accordance with the legal nature of marriage, since it privileges the private autonomy of the spouses to the detriment of a supposed patrimonial protection, which proves to be only beneficial to the heirs, safeguarding respect for private autonomy and self-determination as basic principles of marriage.

Furthermore, taking into account the suppression of rights that the imposition of the regime perpetuates in the elderly, treating them unequally, causing real discrimination based solely on age based on a presumption of incapacity, the decision is uniform with the fundamental objective of the Brazilian Federative Republic of non-discriminatory treatment based on age (Brasil, CF/88, art. 3, IV).

From this perspective, we see that the resolution given to the appeal is largely supported by constitutional norms and fundamental principles, such as the dignity of the human person, freedom, equality and free family planning.

That said, it is concluded that the STF's decision on topic 1236 has a positive impact on the protection of the individual freedoms of the spouses over 70 years of age, representing a crucial milestone in the safeguarding of the fundamental rights of the elderly, as it mitigates the imposition of the separation regime, and safeguards the right of choice of the septuagenarian spouses, which previously only hurt the dignity of these people, annulling their decision-making power by the other regimes, reaching their autonomy, presuming a relative incapacity of fully capable citizens, and now safeguards

the right of choice and the private autonomy of such people, affirming their full civil capacity, being able to freely marry under the property regime that best suits them.

CONCLUSION

The research sought to understand the decision of the STF in the judgment of theme 1236, its impact on the protection of individual freedoms of the spouses over 70 years of age, what are its grounds and its reasons for deciding.

In view of this, the decision of the Federal Supreme Court (STF) was analyzed, which debated the constitutionality of article 1,641, item II, of the Civil Code (CC) that compulsorily establishes the mandatory regime of separation of property for people over seventy years of age. In addition to the constitutional questioning about the legal imposition of the provision, the appeal also discussed the application of this rule to stable unions.

In the search for a better development of the research objectives, first marriage was analyzed from its perspective as an institute based on the principles of freedom and private autonomy, from which certain rights and duties arise to the spouses by virtue of the law, but which in its very essence and formation is the expression of the private autonomy of the will, since it is only formed from the bilateral union of two consonant wills.

Afterwards, the imposition of the mandatory separation of property regime on the spouses over 70 years of age was analyzed, focusing on the doctrinal position regarding the legality of such imposition, both favorable and unfavorable.

In the results found after deep research, the negative impact of item II of article 1,641 of the Civil Code (CC) on the individual freedoms of septuagenarians was evidenced, as it directly hurts the principles of human dignity, equality and freedom. Advanced age cannot be perceived or interpreted as an impediment to freedom of choice, especially when it comes to marriage and its patrimonial effects.

Therefore, the imposition of the mandatory separation of property regime on those over seventy years of age is evident as harmful to the dignity of these people, nullifying their decision-making power by the other regimes, affecting their autonomy and there being no plausible justification for this, being considered a state intervention that does not achieve a clear objective and does not demonstrate any sense of social justice to the people involved, presuming a relative incapacity of fully capable citizens.

That said, it is concluded that the STF's decision on topic 1236 has a positive impact on the protection of the individual freedoms of the spouses over 70 years of age,

representing a crucial milestone in the safeguarding of the fundamental rights of the elderly, as it mitigates the imposition of the separation regime, and safeguards the right of choice of the septuagenarian spouses, which previously only hurt the dignity of these people, presuming a relative incapacity of fully capable citizens, and now safeguards the right of choice and private autonomy of such people, affirming their full civil capacity, being able to freely marry under the property regime that best suits them.

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