

129 - THE ELDER AUTONOMY AND THE ARTICLE 1,641, II CIVIL BRAZILIAN CODE

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INTRODUCTION:

Before, viewed as natural phenomena of life, aging is part of the reality of the most part of the current societies, what means, the World is aging as said national and international demographic statistics. In Brazil, Health Ministry considers that exist nowadays, about 17.6 million of elderly and this number tends to increase rapidly due life expectation of the population. Recent epidemiological studies preview that in 2025, Brazil that was in 16th place in 1950 could shift to 6th placing in quantity of elderly, with about 30 million elder people. This increasing will change the demographic Brazilian profile. (BRASIL, 2006; SILVESTRE, 1996 apud TEIXEIRA, 2002; CAMARANO, 1999).

Onto the group of elderly, those called "more elder, very elder or advanced elder" (more than 80 years old) are increasing very fast, and nowadays are the group that increases more than rest of elderly population (12.8%). Facing this situation, it's normal that many widower or divorced elderly or, even that single, want to restart their lives e find a consort, "giving a new chance to love and, many times to themselves," as remark Paloma Souza (2007). The wish to establish a communion of life permeated by tender and reciprocal collaboration is part of human being, independently of the age.

The obligatory separation of goods to people over sixty is completely wrong, because comes from false premises. First of them is that that the new wedding is between people with very different ages and there is an economical interest. Second, keeping this marriage couldn't exist reciprocal effort for acquisition/preservation of the couple property. The presence of this rule in the Brazilian Civil Code launches elderly to the condition of incapable, infringing the isonomy, the human dignity and the wish of autonomy.

Facing of the right of freedom and equality, nobody could be discriminated because of his/her sex or age as they were motive for civil incapacity. It reaches right placed at the front door of the political Letter of 1988, which has as priority the human being dignity. (MADALENO, 2005)

However, as cited Souza (2007) the unreasonableness of that rule is not only about discrimination, because lawmaker didn't make any exceptions to the people over sixty that wish establish their lives under a stable communion. To the partners of this familiar community, recognized by Federal Constitution, independently of the ages, is guaranteed any kind of communion regimen established by the parts in coexistence contract. As we see, Federal Constitution of Brazil, stimulates affective union between men and women, but the Civil Code runs to the opposite way. The obligation of separations of goods in marriages of people over sixty is against the rights of freedom, isonomy e dignity of human being. Besides Brazilian Federal Constitution, the Senior Citizen Statute is against any kind of prejudice against those are in "best age."

OBJECTIVE

To present a qualitative study about the situation of elderly in the article 1,641, II, Brazilian Civil Code with emphasis on the aspect of the constitutionality.

JUSTIFICATION:

Before evaluate the obstacle that the Brazilian Civil code place in the life of elderly that want to get married or live together, needs to look at health aspects in that age. Healthy elderly must rediscover possibilities to live their own lives under the maximum possible quality, despite of some limitations. Those are possibilities that appear according as society consider social and familiar context and get recognize potentialities and value of elderly. Moreover, most part of the difficulties of elderly are linked to a culture that devalue and impose limits, like that of Brazilian Civil Code (ancient and the new one). Because of that, must understand senescence not as time to disaggregation of the community life, but as part of human development – a time of active joining in challenges and activities that can bring benefits for the society and for individuality of elderly. For that, needs that society consider and accept elderly as a person, nevertheless without disconsider her needs, anytime his/her needs. It must change the view that elderly only as someone unproductive and sick waiting for death (VERAS, 1994) and, in this sense, it's important to valorize transdisciplinares knowledge of Nursing and Gerontology that provide a more practical and sensitive view of de elderly life, their perspectives and aspiration, because are those professionals that are the ones that experience the process of aging, in to health care teams.

The functional capacity that maybe has aspired in the past, the disbelief on the capacity of elderly to manage own life, today is a new paradigm of health and life. Surely, the National Policy of Senior Citizen's Health (NPSC), includes independence and autonomy, during most time as possible, objectives of the attention to elderly health. (BRAZIL, 2006).

Facing this facts, it's evident the necessity of more studies and more attention to elder population that is increasing in number, but unattended and, according to Moidano (1997), it's urgent start programs to attend elderly, because their problems are unfamiliar for the public and for law professionals. In this context lawyers have important room to act with autonomy, using their knowledge, experience and creativity (SOUZA, 2007) to join this group of people who deal the aspects of "better age."

METHODOLOGICAL PROCEDINGS:

From a bibliographic review about the issue, the part of law about the issue cited in the title of this report, besides studies about the law and about the elderly rights, including the Senior Citizen Statute, that demand for the non-social exclusion of the elderly.

RESULTS:

The investigation on the aging process, the diseases related to that age e the hazard factors, stated to intensify with the American Metchnikoff (1903) that presented a study which linked senescence to a kind of self intoxication, introducing for the first time the word "gerontology". After that, comes Nascher (1909), American pediatrician born in Vienna, Austria, that created

the term geriatrics to define a part of Medicine that treats biological, psychological and social aspects of the elderly diseases. The adopting of the term gerontology occurred later, as a specialty with a global feature – part of the Sciences that studies aging process and different problems involving human being in this period of time. (SANTOS, 2003).

In 1950's, Edgar Morin (1997) presented some considerations about the aging and death, correlating the process of aging to biological issues, as that had confirmed by Metchnikoff. Based on theses of different writers, Metchnikoff concluded that aging is a break in the balance, caused by a decadence of endocrine system, sclerosis of the conjunctive tissue and of the result of the intestinal fermentations that poison the body. To him, "aging couldn't be considered as a general waste of the organism, id est, of cells, but aging express this waste". Aging and death are part of the genetic human heritage, they are normal and natural, because they universals and there is no exceptions among mortals. (MORIN, 1997, pp.318-320).

Silvana Santos (2003), nurse, noted in her theses that in her research on bibliography of geriatric issues, that talk about health and illness, alterations during aging were the most explored.

However, studied a little or rarely the social relations of elderly people, and the difficulties faced in their relations with other people, what shows the inadequate control of the elderly wishes.

Nowadays, there are studies that point to aging as a fluid process, changeable, that could stop or go, and even reversed. Aging process can be recast when the connection body and mind is used correctly, good food, relation with exterior world and exercise of inner silence. (SANTOS, 2003). Those studies, done in the last three decades of Twentieth century, proved aging depends on human being. Sets the vision that [...] although senses say to you that you inhabited a solid body in the time and space, this is only the most superficial layer of the reality. This intelligence is dedicated to observe constant changes inside you. Aging is a mask to the loss of this intelligence. (CHOPPRA, 1999, p. 19 apud SANTOS, 2003),

In fact, aging could be considered under the concept of abstract because talks about a period of life that people are old. (MARTINS; MASSAROLLO 2008). Could be differentiation between the terms Old or Elderly?

Since Senior Citizen Statute's approval in 2003, many social changes occurred, a new concept of elderly is set and new political programs to elderly were implemented.

Senior Citizen Statute is called one of the most advanced laws in the world, respecting Brazilian Federal Constitution and United Nation principles: independence, participation, assistance, self-realization, and dignity. We must consider following principles: elderly people are protected by the law; families are responsible for them, State must protect them; they can't suffer discrimination; they must be consider as part of society.

In fact, rules of law must be reasonable. Without that we could face contradictory situations that justify the obvious and necessary used of good sense – said Antônio José Calhau de Resende.

To the same direction is the positioning of Superior Federal Court:

SUBSTANTIVE DUE PROCESS OF LAW AND LEGISLATIVE FUNCTION: The substantive of due process of law - object of the proclamation by 5th article of Brazilian Federal Constitution – must be understood, not only under the aspect merely formal, that imposes restrictions of ritual features to acting of Public Power, but especially on to its material dimension, that is a decisive obstacle to editing arbitrary legislative acts. The core of substantive due process of law is in the necessity to protect the rights and freedom of the people against any kind of legislation that could be oppressive or without coefficient of reasonability (ADI-MC 1063 / DF – Rapporteur, Ministry Celso de Mello, judgment: 18/05/1994)

So, there is no doubt that the rule that doesn't observe the principle of reasonability violates substantive due process of law and, even though all of the requirements of elaboration were attended, would suffer vice of material constitutionality.

CONCLUSION:

Notes material unconstitutionality after the law 10.741/03, called Senior Brazilian Citizen Statute, that guarantees for everyone over sixty special State protections. Now, elderly have right to get opportunities and ease to preserve their mental and physical health, moral, intellectual, spiritual and social improvement, under conditions of freedom and dignity" (clause 2nd, in fine).

The obligation of the family, community and government, according to clause 3rd, of cited law, is give priority to effective right to life, health, freedom, dignity, respect and familiar coexistence. Nevertheless this condition was guaranteed by Brazilian Civil Code, there were remnants of dictatorship in the obligation of regimen of separation of goods in the marriage.

Apparently could be considered the protection of patrimony of elderly by the law. However, there is no reasonability because of the principle of equity, says Paloma Braga Araújo de Souza (2007).

According to Paulo Otero (2003, p.123), men have "holly nature inalienable rights", man has also an indispensable value that is the core of constitutional model, that serves as a basis of Legal System. "Men and their dignity are the reason of the existence of the State and the Laws." (OTERO, 2003, P. 123). Because of that, all the fundamental rights and guaranties must be interpreted under this principle. It's not a case only of biological approach, but about the life as a whole.

The Senior Citizen Statute, when gives special protection for those are in the "best age", respects the principle of isonomy and remind all (society and state) that they have right to a worthy life, they can't be forgotten, neither suffer prejudice, especially in the access to work, leisure, health and social life. Souza (2007) reminds that is the real isonomically protection of the State, and not the imputation of any inability. Also, is important to pay attention to the fact that the weight of life comes later and later, maybe due increasing preoccupation with physical and mental health, more access to information and worship to vanity.

Because of that, the project of law number 108/2007 of the congresswoman, Solange Amaral, wants to shift the legal age limit from 60 to 70 years old, but unfortunately keeps the State intervention on the willingness of elderly. This theme is interesting do Brazilian jurisprudence, but brings many embarrassments to elderly with healthy life expectation over 80 years old. 12.8% of Brazilian elderly population, according to IBGE, 2006.

To Humberto Ávila (2001), the principle of reasonability imposes the observation of the individual situation before any rule decision. According to him, reasonability "translates a material condition for the application of the individual justice."

Notes the unreasonableness principle, because the impose of the regimen of obligatory separation of goods to people over sixty (or over seventy, as Brazilian Congress wants) is completely wrong, starting from wrong and biased hypotheses. First hypotheses analyzed in the beginning treats the economical interests between people with different ages. The second treats the fact of, in case marriage continues, there is no reciprocal effort to conservation/acquisition of patrimony. Besides that, it reveals a prejudice against the women, saying that they have economical and no affective interests in getting married and other stereotypes that the law 11.340/2006 can't get apart effectively.

These hypotheses takes the legislator to give inability to the elderly, setting the obligatory regimen of separation of goods to people over sixty, notes violation of isonomy, of the dignity of the people and the autonomy of will and the elementary principles of Right, according to Rolf Madaleno (2005).

"Because of the right to freedom and equality nobody can be discriminated because of sex or age, as if they causes of civil inability. It strikes out Brazilian National Constitution of 1988, which has as priority the principle of human dignity" (MADALENO, 2005)

In the mitigation of the incoherence into item II of the clause 1.641 of the Brazilian Civil Code, the interpreter has a consolation. The docket 377 of Superior Federal Court (apud Souza, 2007), indicates that in the regimen of Legal separation of goods communicates the acquired in the constancy of marriage. The objective of this decision of the Superior Court, approved in 1964, is the division of goods acquired by common effort in the constancy of marriage, denying thus illegal enrichment of one of the spouses.

The theme is inspired interesting discussions in the doctrine and jurisprudence in Brazil, it brings a lot of embarrassment and moral damages for the elderly with projection on healthy living for up to 80 years after, what comes to prove that the concept of age or older can not be located only in age. Moreover, we believe it is a mistake to classify people in age groups, when it comes to matters of life, dignity and functional capacity.

The discussion of this matter in the courts and the generation of decision even in the higher courts does not mean, however, that the issue is free discussion. The Pronouncement 377 no exception, for example, that the possessions that communicate are shown under the common effort. On this issue there was an imbalance between the doctrine and jurisprudence, which recommends a comprehensive review on the subject, in respect for the dignity of those who are in full force and effect of age and can decide on their own inner life.

REFERENCES:

ÁVILA, Humberto. *A distinção entre princípios e regras e a redefinição do dever de proporcionalidade*. **Revista Diálogo Jurídico**, Salvador, CAJ - Centro de Atualização Jurídica, v. I, nº.4, julho, 2001. Acesso em: 12 de fevereiro de 2008.

BEAUVOIR, S. **A velhice**. Rio de Janeiro: Nova Fronteira, 1990.

BRASIL. Ministério da Saúde. Secretaria de Atenção à Saúde. Departamento de Atenção Básica. **Envelhecimento e saúde da pessoa idosa** / Ministério da Saúde, Secretaria de Atenção à Saúde, Departamento de Atenção Básica – Brasília: Ministério da Saúde, 2006. Disponível em:

http://portal.saude.gov.br/portal/arquivos/pdf/caderno_do_idoso_2007.pdf Acesso em: 13/03/2008

CAMARANO, A. A. (Org.) 1999. **Muito Além dos 60: os novos idosos brasileiros**. Rio de Janeiro: IPEA. Disponível em:

<http://www.desafios.org.br/Edicoes/6/artigo13414-1.asp?o=s> Acesso em 12/04/2008

CUSACK, S. & THOMPSON, W., 1999. **Leadership for older adults: aging with purpose and passion**. Philadelphia: Brunner/Mazel. (CD) Disponível em:

<http://books.google.com/books> Acesso em: 4 maio 2008

MADALENO, Rolf. Do Regime de bens entre os cônjuges. In: PEREIRA, Maria Berenice; DIAS, Rodrigo da Cunha (coord.) **Direito de Família e o Novo Código Civil**. 4. ed. rev. atual. Belo Horizonte: Del Rey, 2005. p.191

Martins, M. S.; Massarollo, M. C. K. B. Changes in the care of the elderly after the enactment of the Elderly Statute according to professionals of a geriatric hospital. **Rev. esc. enferm. USP** [serial on the Internet]. 2008 Mar [cited 2008 May 09]; 42(1): 26-33. Disponível em:

http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0080-62342008000100004&Ing=en&nrm=iso.

MENDONÇA, Jurilza M. B. **Políticas do Ministério da Previdência e Assistência Social. Intexto Net/doso**. 1998. Disponível em:

<http://www.desafios.org.br/Edicoes/6/artigo13414-1.asp?o=> Acesso em: 26 Mar 2008.

MORIN, E. **O homem e a morte**. Rio de Janeiro: Imago, 1997.

_____. **A cabeça bem feita** – repensar a reforma, reformar o pensamento. Rio de Janeiro: Bertrand Brasil, 1999a.

NEVARES, Ana Luiza Maia. **Impor a idoso regime de bens é inconstitucional**. *Recivil*. Sindicato dos Oficiais do Registro Civil. Artigo (online). Disponível em:

<http://www.recivil.com.br/news.asp?intNews=1864> Acesso em: 20/03/2008

OTERO, Paulo. **Legalidade e administração pública. O sentido da vinculação administrativa à juridicidade**. Lisboa: Almedina, 2003. 188p.

RESENDE, Antônio José Calhau. O princípio da razoabilidade dos atos do poder público. In: **Revista do Legislativo ALMG**, Belo Horizonte, n. 26 abr-dez 1999. Disponível em <http://www.almg.gov.br/revistalegis/Revista26/calhau26.pdf>. Acesso em 01 mar. 2008

SALGADO M. A. Velhice uma questão social. São Paulo: SESC, 1980. 121p.

SANTOS, S. S. C.. **O ensino da enfermagem gerontogerátrica no Brasil de 1991 a 2000 à luz da complexidade de Edgar Morin**. 2003. 199 f. Tese (Doutorado em Enfermagem) – Pós-graduação em Enfermagem. Universidade Federal de Santa Catarina. Disponível em: <http://www.tede.ufsc.br/teses/PNFR0421.pdf> Acesso em: 12 set. 2008

SOUZA, Paloma Braga Araújo de. *Da inconstitucionalidade material do art. 1.641, II, do Código Civil*. **Jus Navigandi**, Teresina, ano 11, n. 1349, 12 mar. 2007. Disponível em: <http://jus2.uol.com.br/doutrina/texto.asp?id=9586>. Acesso em: 18 abr. 2008.

TEIXEIRA, M. B. *Empoderamento de idosos em grupos de Promoção da Saúde*. Dissertação (mestrado) Rio de Janeiro: Fiocruz, ENSP, Curso de Pós-Graduação em Psicologia, 2002. Disponível em:

http://portalteses.cict.fiocruz.br/transf.php?script=thes_cover&id=000034&Ing=pt&nrm=iso. Acesso em: 28/04/2008

VENOSA, Sílvio de Salvo. **Direito Civil - Direito de Família**. 3 Ed. São Paulo: Ed. Atlas, 2003, v.6, 196 p.

VERAS, R.P. **País jovem com cabelos brancos: a saúde do idoso no Brasil**, Rio de Janeiro: Relume Dumará/UERJ, 1994.

VICENTE, José Carlos. *Regime de bens entre os cônjuges*. Artigo (online) 18/10/2006. **Direitonet**. Disponível em: <http://www.direitonet.com.br/artigos/x/29/48/2948/> Acesso em: 12/04/2008

THE ELDER AUTONOMY AND THE ARTICLE 1,641, II CIVIL BRAZILIAN CODE ABSTRACT

This work is a theoretical deductive study, of reflective nature, compound by bibliographic and documental research, under the focus of the qualitative approach. Tried to know the legislative and juridical and legislative contributions about the elder autonomy according to article number 1,641 of Brazilian Civil Code that forbids wedding for elderly people in universal communion of possessions. This work is about a study of the process of aging by the point of view of nursing, that emphasizes the

autonomy of the people to choose the better of their lives, followed by a brief analyses of points of the law that treat of communion of goods between consorts. In the sequence of this work, presents material unconstitutionality of the cited article of Brazilian Civil Code, reasoning its unreasonableness and the prevailing of the docket 377. This subject is like that which there is a lack of understanding between the axiom and the jurisprudence, what recommends a wide review on the subject in respect to dignity of ones that are considered old people and can decide what to do about their own social, familiar and close lives.

KEY-WORDS: wedding and separation of possessions, personal autonomy, elder, aging.

L'AUTONOMIE AÎNÉE ET L'ARTICLE 1.641, II CODE CIVIL BRÉSILIEN LE SOMMAIRE

Ce travail est une étude théorique déductive, de nature réfléchie, composé de recherche bibliographique et documentaire, sous centre de l'approche qualitative. On a essayé de savoir les contributions juridiques et législatives sur l'autonomie de l'aîné, à la vue de l'article 1.641, II, du Code Civil (CC), ce proïbe mariage aîné dans communion universelle de marchandises. La monographie consiste en une étude sur le processus du vieillissement, pour l'inclination de l'enfermagem qui accentue l'autonomie de la personne dans le choix du meilleur pour votre vie suivie par une analyse de l'abréviation des appareils sur régime de marchandises parmi époux. Dans la séquence, ils viennent les discussions sur l'inconstitucionalidade matériel de l'article 11.641, II, de CC, qui discute votre irrazoabilidade et le présent temps du registre des jugements rendus 377. Cette matière est de ceux dans qu'il y a un desaccord entre la jurisprudence et la doctrine, ce qu'il recommande une révision générale dans le sujet, à l'égard de la dignité sur la meilleur âge qui peut l'homme au sujet de votre propre vie intime, familial et social.

MOT CLEF: mariage et séparation des possessions, autonomie personnel, aîné, vieillir.

LA MAYOR AUTONOMÍA Y EL ARTÍCULO 1.641, II CÓDIGO BRASILEÑO CIVIL RESUMEN

Este trabajo es un estudio teórico deductivo, de naturaleza reflexiva, compuesto de investigación bibliográfica y documentaria, bajo el enfoque del acercamiento cualitativo. Se intentó saber el jurídico y contribuciones del legislativo en la autonomía de los ancianos, a la vista del artículo 1.641, II, del Código Civil (el C.C.P.), que prohíbe la boda para las mayores personas en la comunión universal de posesiones. Consiste en un estudio en el proceso de envejecimiento, para la inclinación del oficio del enfermero que da énfasis a la autonomía de la persona en la opción del mejor para su vida seguida por un análisis de la abreviación de los dispositivos en el régimen de género entre los esposos. En la sucesión, ellos vienen las discusiones en la inconstitucionalidad material del artículo referido. 11.641, II, de C.C.P., que sostienen su irrazoabilidad y el tiempo presente de la minuta 377. Esa materia es de aquéllos en que hay un desacuerdo entre la doctrina y la jurisprudencia, lo que recomienda una revisión general en el asunto, en el respeto a la dignidad de quién está en la edad mejor y los se pueden decidir sobre su propia vida íntimo, familiar y social.

PALABRAS-IMPORTANTES: el matrimonio y separación de género, autonomía personal, mayor, envejecimiento.

A AUTONOMIA DO IDOSO E O ARTIGO 1.641, II, DO CÓDIGO CIVIL BRASILEIRO RESUMO

Este trabalho é um estudo teórico dedutivo, de natureza reflexiva, composto de pesquisa bibliográfica e documental, sob enfoque da abordagem qualitativa. Procurou-se conhecer as contribuições jurídicas e legislativas sobre a autonomia do idoso, à vista do art. 1.641, II, do Código Civil (CC), que proïbe casamento de idoso em comunhão universal de bens. Consiste de um estudo sobre o processo de envelhecimento, pelo viés da enfermagem, que enfatiza a autonomia da pessoa na escolha do melhor para sua vida, seguido de uma breve análise dos dispositivos sobre regime de bens entre cônjuges. Na seqüência, apresentam-se as discussões sobre a inconstitucionalidade material do referido artigo do CC, argumentando a sua irrazoabilidade e a atualidade da Súmula 377. Essa matéria é daquelas nas quais há um descompasso entre a doutrina e a jurisprudência, o que recomenda uma revisão geral no assunto, em respeito à dignidade de quem esteja na melhor idade e possa decidir sobre sua própria vida íntima, familiar e social.

PALAVRAS-CHAVE: casamento e separação de bens, autonomia pessoal, idoso, envelhecimento

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