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**MARRIAGE INFIDELITY  
AND THE RIGHT TO  
INTIMACY IN THE  
AGE OF DIGITAL  
CONNECTIVITY**

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**Abstract:** This article will address an analysis of the legal consequences of marital infidelity connected to the digital age where the social interaction offered by technology generates impacts on relationships and is present as a means of facilitating the action of infidelity. The contemporaneity and dynamics of technology provide that information and interactions take place in real time, which impacts interpersonal relationships. We can count on the protagonism of technology, in the field of affective union, being the villain or the good guy, but the vertex that will be analyzed is how it promotes cases of marital infidelity and how far the right to privacy and intimacy goes in the digital medium.

**Keywords:** Infidelity; Digital age; Intimacy; Legal Consequences.

## INTRODUCTION

The evolution of technological means brought a great modernization and discovery in all areas of humanity, as a result it generated positive and negative reflexes in the legal field to which it seeks equity among the new disputes that are pointed out through technological dynamization. With regard to interpersonal and affective relationships, highlighting the affective unions arising from marriage or stable union, which are ongoing: civil contracts, which bring consequences and duties in the legal world, throughout this work the fruits will be treated of marital infidelity related to intimacy and inviolability in the days of the digital age.

With the advent of social media, cases of marital infidelity have become more comfortable, because there is a certain comfort in the feeling of anonymity in having conversations with other people through virtual means, which are factors that encourage the emergence of a delicate subject in the context juridical: "Virtual marital infidelity" that, through the investigation

of facts and evidence, reaches the person responsible who imputed the conduct, violates the fundamental precepts of family law, since it is assumed that everyone who is united in union is in stable union or marriage, wishes to form a family nucleus, as a result of the damages caused by the spouse, the same may be held responsible, if verified by the judiciary that there was moral or material damages to the partner. The constituent legislator, as well as civil legislation, institutes legal support about interpersonal and family relationships, according to article 1566 of the civil code and article 226, paragraphs 3 of the federal constitution, infidelity generates consequences: moral and material.

The stir of infidelity is faced by most spouses, even more so because of the ease of the virtual world. Furthermore, the violation of sworn fidelity between the cohabitants harms the dignity of the human person. It is also worth mentioning that the doctrine and jurisprudence understandings seek to add to the subject and adapt the interpretation, now versed in order to mitigate it to current times, so we see concrete cases where civil liability is applied in the context of marital infidelity in the virtual world.

It is a well-known fact that technological development has become part of social contemporaneity, with this, new solutions, dynamisms and consequently questions have emerged. Remaining for the role of the judiciary to follow the social questions that disappoint in the legal scenario, one of them aims at the consequences of marital infidelity and the right to intimacy in the digital age. The analysis of the effects of infidelity for the law is not unknown, since it has been foreseen since the beginning of civil law, it happens that, as society evolves in the same demand, the law must walk.

What is linked to the privacy of spouses, since many are discovered through concrete

evidence coming from the digital world, it happens that this evidence is often disseminated or obtained when the violation of individual privacy, both female and male, this way, the law makes it clear that he will be held responsible for the illicit act that violated the rights of others. It must be clarified that intimacy and intimate privacy must not be violated by the spouse. So, ask what are the legal consequences of infidelity and how the digital age is correlated, to the extent the right of one partner surrounds the other.

## RESULT AND DISCUSSION

### THE LEGISLATIVE EVOLUTION IN THE INSTITUTE OF MARRIAGE AND THE RECOGNITION OF THE STABLE UNION

Marriage can be defined as one of the oldest institutions in the world, and it has undergone significant changes over the ages, influenced by cultural, social and legal aspects that have evolved together with social demand.

In a historical line, it is possible to analyze the national evolution of the concept of family and marriage brought by the civil code of 1916, which according to Bittar (1993), *characterized it as people who have a relationship of consanguinity, and in this precept involved all those with the same genetics*. In Miranda's words, according to the Civil Code of 1916, the family receives a different concept, as follows:

Now it means the set of people who descend from a common ancestral stock, insofar as this ancestry is preserved in the memory of the descendants, or in the archives, or to a couple, by ties of consanguinity or civil kinship; sometimes the group of the same people linked to someone, or to a couple, by ties of consanguinity or civil kinship; sometimes the group of the same people, plus the affines indicated by law; now husband and wife, descendants and adoptees; now, finally, husband, wife and

successive relatives of one and the other. (Miranda, p. 204-205)

In the 1916 code we see that the concept of family is based on a rigid model, without further interpretations, this is linked to the social period in which it was developed in the definition by Silva (2002, p. 450-451) "the family of the Code Civil of 1916 was a transpersonal, hierarchical and patriarchal family.", limiting it to the original group of marriage, preventing its dissolution, distinguishing its members and giving discrediting qualifications to people united without marriage and to the children of that relationship.

The current civil code of 2002 brought significant changes to the concept of family, moving to a greater scope, also bringing changes to the union regimes, as well as the figure of the woman in the marriage relationship. In this sense, Gonçalves adds:

The changes introduced aim to preserve family cohesion and cultural values, giving the modern family a treatment more in line with social reality, taking into account the needs of offspring and affection between spouses and partners and the high interests of society. (Gonçalves, p.6)

It must be noted that the amendments to the CC of 2002 were a natural consequence of the first changes brought about by the Federal Constitution of 1988, but in a complementary and more comprehensive manner, seeking to contemplate fundamental rights, enshrining the demands of justice and ethical values, aiming at the preservation of the harmony of the national Judiciary, since it was able to modernize it to the new family arrangements.

Furthermore, the constitution of 1988 also brought regulation and recognition of the stable union, granting it the status of a family entity in article 226, § 3 of CF/88 as well as in Civil Code 02 through article 1723, in addition, the doctrine and jurisprudence

sought to define it, as in the words of Azevedo:

The non-adulterous or incestuous, lasting, public and continuous coexistence of a man and a woman, without a marital bond, living together as if they were married, under the same roof or not, thus constituting their de facto family. (Azevedo, p.58)

Previously, in order to be recognized as a stable union, a period of five years of coexistence between the spouses was necessary. Today, in turn, the national courts have not set a minimum time, it is only necessary that there is a publicly recognized coexistence, let's see:

Social Security. Military Police Benefit Box. Pension. Deceased Taxpayer's Companion. Admissibility. The Federal Constitution recognized the stable union between a man and a woman, regardless of the time lapse of the cohabitants. Article 226, § 3rd. Such rule concerning the Brazilian Major Standard provides a basis for the validity of infra-constitutional rules, and these cannot be divorced from the effectiveness of the former. What's more, the stable union between the plaintiff and the "de-cujus" has already been judicially recognized in another case. The author is therefore protected by the Federal Constitution. Completing the registration act as a beneficiary is complementary, of a strictly administrative nature, and does not have the power to change the factual situation that gives rise to the granting of the pension. Judgment of provenance. Improvised resources. (Emphasis was added in this stretch), (Appeal Number 0121103-68.2007.8.26.0053, Rel. Des. Guerrieri Rezende of the 7th Chamber of Public Law of the Court of Justice of São Paulo – DJE 04/07/10) (emphasis added)<sup>1</sup>

Once the stable union is recognized, the cohabitants start to have almost all the same rights and duties inherent to marriage: there is a right to share over the goods acquired during the union; the partner who does not

have conditions for their subsistence will be entitled to receive alimony; and in the case of death, the one who survived will enter the line of succession to the other.

It can be seen that the new guidelines brought by the CC of 2002 reinforced the dignity of the human person, legal equality between spouses, legal equality of all children to family law. In addition to family pluralism, the freedom to build a communion of family life, the consecration of family power, the best interests of children and adolescents, affection and family solidarity.

## THE RIGHTS AND DUTIES OF MARRIAGE AND STABLE UNION

Article 1566 of the civil code defined it as being direct and duties of companions, *in verbis*:

Article 1,566. The duties of both spouses are:

I - reciprocal fidelity;

II - life in common, in the conjugal domicile;

III - mutual assistance;

IV - support, custody and education of children;

V - mutual respect and consideration.

Reciprocal fidelity is understood on three foundations, namely: loving, personal and financial fidelity. Living in common, dividing life, can be understood as a more mitigated concept nowadays, given that, for some spouses who, due to the need for work, among others, need to reside in a different domicile from their spouse. Mutual assistance reflects both personal and patrimonial aspects, so that a spouse must support the other in their routine and problems, as well as be jointly responsible for family expenses or the

<sup>1</sup> Judgment taken from the internet belonging to the process <[https://esaj.tjsp.jus.br/cpopg/show.do?processo.codigo=1HZX6ZKJZ0000&processo.foro=53&processo.numero=0121103-68.2007.8.26.0053&uuuidCaptcha=sajcaptcha\\_fd88135e766749228f13](https://esaj.tjsp.jus.br/cpopg/show.do?processo.codigo=1HZX6ZKJZ0000&processo.foro=53&processo.numero=0121103-68.2007.8.26.0053&uuuidCaptcha=sajcaptcha_fd88135e766749228f13)>

domestic economy.

The support, custody and education of children, also listed on these three foundations, where both spouses have the obligation to provide food, keep their offspring under their responsibility, either in the represented or assisted form, as well as to cherish the moral and social development of the children. in communion and, finally, respect and mutual consideration, which consists in treating each other with respect and affection.

### **BREACH OF THE DUTY OF RECIPROCAL FIDELITY**

Fidelity can be understood as a virtue to be fulfilled in favor of the one who promises it is, therefore, loyalty to the other. This is how the reciprocal fidelity that is foreseen in the civil order in Peluso's lessons can be defined:

Moral and legal duty, which originates in the traditional monogamous constitution of marriage and the superior interests of society, and implies a foundation of conjugal life, restricting the sexual freedom of the consorts to marriage. (PELUSO, p. 1690).

The breach of fidelity presupposes a civil offense, since it is provided for in article 1,566, leading to the moral bankruptcy of the family nucleus, as stated by Maria Helena Diniz:

From a moral and legal point of view, both the husband's and the wife's infidelity deserve disapproval, as it is a factor that disturbs the stability of the home and family. It must not be forgotten that it is not only adultery (civil unlawful) that violates the duty of reciprocal fidelity, but also injurious acts, which, through their licentiousness, with sexual accentuation, break the conjugal faith, p. ex.: homosexual relationship, virtual dating, non-consensual heterologous artificial insemination, etc." (DINIZ, p. 133).

In the words of Maria Berenice Dias, fidelity can be understood as:

The duty of fidelity is a social, structural and moral norm, but, despite being among

the duties of marriage, its transgression no longer admits punishment, either in the civil or criminal spheres. Even so, in the event that one or both spouses do not fulfill the said 'sacred duty' of fidelity, the marriage does not break up. (...). Infidelity authorized the cheated spouse to seek separation (...). With EC 66/10, it's not even for that anymore. (...). No one is faithful because that is what the law determines or will cease to be faithful because of lack of legal determination." (DIAS, p. 175/176).

It clarifies that marital infidelity is seen as a civil offense, therefore, for there to be reparation in the civil sphere in the form of damage: material and moral, it will depend on a thorough analysis of the judiciary, since the spouses assume a moral duty and ethical, however, this cannot be expected from everyone who makes a commitment such as marriage or stable union, the law must be prepared to solve and mitigate the effects that this illicit can create in the legal world.

### **THE LEGAL CONSEQUENCES OF MARITAL INFIDELITY**

As already discussed, the bonds arising from marriage or stable union, have a legal and social contractual character, since, if the clauses are not complied with, the provoking consort may suffer the consequences, as in the case of infidelity brought as a reciprocal duty between the spouses by article 1,566 of the CC.

With this, there is the rupture and dissolution of the conjugal society and that can still be added to the obligation to indemnify, since situations of infidelity can occur that directly offend the principle of human dignity, provided for in article 1, item III of the Constitution, and such situations may lead to and justify the right to compensation for moral damage provided for in article 5, item X of the Federal Constitution.

It must be noted that historically adultery

had a legal provision in criminal law, being considered a crime against marriage, with a legal provision of 15 days to 6 months of seclusion provided for in article 240 of the CP, which was revoked in 2005 by law 11,106. It is evident that with the evolution of society and legislation, while one must accompany the other, adultery is no longer a crime in Brazil.

However, there are still the legal consequences of infidelity in the civil field, especially with regard to civil liability. It is also worth mentioning that despite the compensation for material or moral damages arising from marital infidelity being the premise of a family relationship, in the case of marriage or stable union, this matter will not be competent to a Family and Succession Court, but to the Judge Civil, this is because the matter discussed involves civil liability, and must then be appreciated by the civil court.

Faced with the disputes raised on the subject of the duty to indemnify when there is infidelity, the Judiciary has positioned itself to admit, in specific cases, the right to compensation for moral and material damages in cases of marital infidelity practiced in the constancy of the union.

Therefore, a brief conceptualization regarding moral and material damage is made.

### **MORAL DAMAGE**

In the words of Daniel Sarmiento, “personality is more than a right, it is a value – the most important of the order, by the way – that radiates and penetrates all fields of Law, public or private” (sarmiento, p.104), this consubstantiates with the constitutional principle of the dignity of the human person, from which the protection of various legal interests erodes.

Moral damage is characterized by a violation of some personality right provided for in article 11 of the CC, *in verbis* “With

the exception of cases provided for by law, personality rights are non-transferable and inalienable, and their exercise cannot be subject to voluntary limitation.” Therefore reinforced by our Magna Carta that provides covered by article 5 of the Constitution, precisely by item “X”.

Furthermore, the Civil Code provides in article 186, from which it is extracted that “anyone who, by voluntary action or omission, negligence or recklessness, violates the right and causes damage to others, even if exclusively moral, commits an illicit act”, establishing article 927 of the civil law the respective obligation to repair.

It is inferred that any damage caused to the violation of the right to the name, image, privacy, honor, good reputation, dignity, among others, must therefore feel injured and analyzed by the judiciary if illicit, willful or guilty, causing moral damage to someone, causing psychological suffering, then moral damage will arise.

The Civil Code adopts, as a rule, the theory of subjective responsibility, which provides for the characterization of responsibility through: a) action or omission; b) damage; c) causal link between the agent’s action or omission and the damage and; d) intent or fault (subjective element). In spite of the characterizing elements of responsibility within the family, Min. Nancy Andrighi in her vote on RESP 1159242/SP:

It is one of the most basic lessons of Law, the triad that configures the subjective civil liability: the damage, the guilt of the author and the causal nexus. However, the simple lesson takes on extremely complex contours when family relationships are focused, as factors of a high degree of subjectivity are intermingled, such as affectivity, love, sorrow, among others, which make it extremely difficult to define, or perfectly identify and/ or verify, the elements that configure the moral damage. (This stretch was highlighted by us)

Therefore, it appears that the presuppositions that characterize civil liability apply perfectly when it is configured in the family environment, being necessary, however, not to lose sight of the peculiarities of the family entity as a whole, since the moral damage must be intrinsically analyzed, given its breadth, being everything that shakes the psyche of the personality, not being able to be exhaustive in our legal system, but exemplary, giving rise to a cautious look by the magistrate who will analyze its constitution, allowing the Judiciary to enter, especially and in a quite subjective in the sphere of intimacy of a family group in order to scrutinize possible violation of a legally protectable duty.

### ***MATERIAL DAMAGE***

With regard to material damage, in cases of marital infidelity, its constitution is much more specific, that is, more difficult to appear in these types of litigation, as it depends on the specific case and whether there was tangible property damage and subject to evidence, distinguishing between the one that hurts the personality, which is the moral damage, so material damage can be conceptualized as the financial loss actually suffered by the victim, causing a decrease in his/her assets. This damage can be of two natures: what the injured party actually lost, emerging damage, and what he reasonably failed to gain, loss of profit.

### **THE ERA OF DIGITAL CONNECTIVITY AND ITS ROLE IN CASES OF MARITAL INFIDELITY**

21st century, the era of modernity and the emergence of connectivity: the real-time interaction between so many other advances that have brought us countless benefits as well as controversies in others. When talking about interpersonal relationships, it is common to have a WhatsApp number or friendship

on social networks, with those who live in our midst, whether at work, the gym, some religious group, etc.

Well, in the constant life in common, whether through stable union or marriage, digital connectivity becomes a little more delicate, given that today there are numerous relationship applications and exposure in digital media, this opens a window a means of communication between people, and from there the moral issue of the user also enters, which can hide data such as their marital status, or even so, foster conversations that disappoint in the future for some case of marital infidelity.

This must be considered as a variable to be analyzed in each case, because when we deal with issues related to the relationship of each couple, unique characteristics must also be considered. Therefore, it is important to make sure, when talking virtually with someone other than your spouse, whether or not it can be considered an act of infidelity. Well, there are those who consider that it can only be an affective bond, built and maintained only virtually and not passing from the virtual world to the real one.

Thus, it is necessary to consider what, in fact, the couple defines as virtual marital infidelity and, consequently, to know the evils arising from this virtual unfaithful behavior. As for the positioning of the doctrine on virtual infidelity, Maria Helena Diniz says about it:

Day-to-day problems can deteriorate the marital relationship, and in certain cases, the virtual space becomes an escape valve by allowing the dissatisfied spouse to communicate with another person, whose idealized figure does not face the wear and tear of coexistence. Such an erotic-affective, platonic bond with a person without a face and identity, since the internet user can defraud personal data, for example, using nicknames and showing characters different from their real behavior, can be stronger

than the real relationship, violating the obligation of respect and consideration that one must have in relation to the consort.

Corroborating with Maria Berenice Dias (2015, p. 171):

In the field of affective relationships, the use of the computer made it possible to use the virtual veil, breaking with the previously inescapable need for physical contact. But as there is no perfect “crime”, partners quite often end up discovering that their spouses, partners or boyfriends maintain very intense, intimate and even torrid affective bonds within their own home. Often in the inattentive presence of the pair.

As the illustrious scholar defines the virtual space, it can be an escape valve for the spouses, due to the dissatisfaction of the relationship, which can be characterized by several reasons. This virtual search occurs more easily before the infidelity is characterized, because the access is much broader and easier, where the agent can disguise himself through some social network hiding his own identity, as the saying goes. popular “internet is no man’s land”.

The truth is that when the case of infidelity materializes, whether in real or virtual form, and the other consort feels that he has been injured, he seeks justice to see his rights protected, generating consequences for the author’s spouse, which is usually weighed on his pocket, in addition to of all inconveniences in the harsh way that is given to the resolution of marriage or stable union.

Since there is a failure to comply with this basic principle, which is fidelity within the marital sphere, which ends up occurring through carnal conjunction of one of the spouses or partners with third parties or through gestures that demonstrate the real intention of a loving relationship outside the conjugal society, characterizing in fact virtual infidelity. In this sense, the Supreme Court of Justice understands that:

It violates the duty of fidelity, not only the spouse who has sexual relations with a third party, but also the one who lives lovingly with another person or is sentimentally linked to him (moral infidelity).

In the words of Carlos Roberto Gonçalves:

When personal conduct reflects a variety of situations that are disrespectful and offensive to the honor of the consort, an inconvenient way of acting for married people, including the so-called “virtual infidelity” committed via the Internet, can also be characterized as the offense to item V of the aforementioned article. 1566, which requires “mutual respect and consideration”. (Gonçalves, p. 131) (emphasis added)

Thus, all evidentiary material that comes from digital media such as: prints (screenshots) of messages in virtual applications, chat, emails. Satisfactory reasons for compensation for moral damages are considered, where copies of messages available on computers that the use is in common with the family become evidence of virtual infidelity, because as it is material that the use is common with the family there is no to speak of an infringement of the right to secrecy or invasion of privacy.

On the other hand, when in order to obtain evidence, there is a certain evidential difficulty, insofar as to demonstrate virtual infidelity, it would be necessary to demonstrate the spouse’s conduct that is usually protected through passwords, which is supported by the federal constitution, since it is, protects the right to inviolability of correspondence in its item XII of article 5.

Therefore, if this evidence arises from the violation of correspondence, telephone recordings and opening of e-mails from the spouse without their consent, the means of evidence will be considered invalid, as it will be illicit evidence, which is generally prohibited by the Federal Constitution in item LVI of article 5, *in verbis* “ the evidence obtained by illicit means is inadmissible in



the process”, to mention that some scholars defend the admissibility theory together with the principle of proportionality of the evidence that has as its scope the search for the real, independent truth. of how it was acquired, however the deepening of the theory is a subject for another article.

In this sense, there is a judgment of the Court of Justice of Rio Grande do Sul, *in verbis*:

CIVIL APPEAL. CIVIL RESPONSABILITY. ACTION FOR INDEMNIFICATION FOR MORAL DAMAGES. VIRTUAL INFIDELITY. BREACH OF MARRIAGE DUTY. EVIDENCE OBTAINED ILLEGALLY. PRINCIPLE OF PROPORTIONALITY. PREPONDERANCE OF THE RIGHT TO INTIMACY AND PRIVATE LIFE.

The duty to repair the damage arising from the practice of an illicit act, in the case of an action based on subjective civil liability, governed by article 927 of the Civil Code, requires the examination of the issue based on the assumptions of the matter, namely, the action / omission, fault, the causal link and the harmful result. In order to be successful in his action for damages, the plaintiff must add to the file elements that prove the presence of such elements that characterize subjective civil liability. Even if the fidelity duty of marriage is not fulfilled, the proof of such a situation cannot occur at any price, overlapping the fundamental rights guaranteed constitutionally, and each case must be submitted to a weighted judgment, under penalty of neglecting a greater legal interest. value, considered in the larger context of society. The evidence, at first considered illegal, may be admitted in the civil process and used, both by the author and the defendant, provided that the principle of proportionality is analyzed in light of the interests at stake in the search for justice in the specific case. And if such an examination is carried out in the case discussed in the case file, there is no way to admit the evidence then collected as lawful,

as it violates the defendants’ fundamental right to intimacy and private life. STF and STJ precedents. DENIED APPEAL. (Civil Appeal Number 70040793655, Ninth Civil Chamber, Court of Justice of RS, Rapporteur: Leonel Pires Ohlweiler, judged on 03/30/2011) (emphasis added)

Finally, it can be said that as for obtaining evidence by illegal means, these may be admitted depending on the case, observing the principle of proportionality, so it is up to the judiciary to assess its admissibility.

### THE JUDICIARY’S POSITION IN CASES OF CIVIL LIABILITY ARISING FROM MARITAL INFIDELITY

Despite the theme of virtual marital infidelity, it is new in the Brazilian judiciary, generating a lot of dubiousness and controversies between the courts, given that there is still no legal or jurisprudential sedimentation on it. But what is certain is that, given the new times, this demand tends to increase, forming the understanding of the judiciary until it settles, like any other theme of Brazilian law.

When analyzing a case of marital infidelity, published by a legal website, when deciding the Honorable Judge did so:

“Although it is considered that treason does not generate presumed moral damage”, it is admitted, at least in theory “ the duty to indemnify for cases in which the consequences of such an act go beyond the field of non-compliance with conjugal duties, to inflict on the other spouse, or partner, an exceptionally vexatious situation, verified true derision that comes from the publicity of the act and that substantially alters the conditions of coexistence of the social environment “ (emphasis added).<sup>2</sup>

It is extracted from the concrete case, the divorce of her husband in 2013, due to repeated failures of marital infidelity that were initially pointed out in the virtual environment, to this

<sup>2</sup> Judged available at < <https://www.migalhas.com.br/arquivos/2017/11/art20171107-08.pdf> > accessed on 11/21/2019

it is assumed the ease of virtual relationships, already discussed.

In another judgment of the Federal District Court of Justice, we have:

TJDF CIVIL LAW - COMPENSATION ACTION - MORAL DAMAGE - BREACH OF MARRIAGE DUTIES - INFIDELITY - VIRTUAL SEX (INTERNET) - DEFAMATORY COMMENTS - OFFENSE TO THE SUBJECTIVE HONOR OF THE BETRAYED SPOUSE - DUTY TO INDEMNIFY - EXEGESIS OF ARTS. 186 AND 1566 OF THE CIVIL CODE OF 2002 - REQUEST DEJUDED PRECEDING.

[...] If the betrayal, in itself, already causes psychological damage to the betrayed spouse, I believe that the author's subjective honor was much more attacked, in knowing that her husband, in addition to betraying her, did not respect her, making defamatory comments about his intimate life, before his lover, affirms the sentence. The evidence was collected by the deceived wife herself, who discovered the e-mails stored on the family's computer. She filed a claim for compensation for moral damages, alleging offense to her subjective honor and violation of her right to privacy. She adds that she had to undergo psychological treatment, as she believed that her husband had abandoned the family due to an existential crisis. He says that he never suspected the betrayal, only proved after he left the marital home. In her defense, the ex-husband alleged an invasion of privacy and asked for the emails to be disregarded as proof of infidelity. He claims that he did not defame his ex-wife and that she herself denigrated her image by showing the correspondence to other people. When analyzing the matter, the magistrate disregarded the allegation of breach of confidentiality. For him, there was no invasion of privacy because the emails were recorded on the family's computer and the ex-wife had access to the accused's password. Simple files are not protected by the secrecy given to correspondence, he concludes.

(Proc. Number 2005.01.1.118170-3 TJ-DFT TJDF, Judgment handed down by Judge Jansen Fialho de Almeida) <sup>3</sup>(emphasis added)

As can be seen in the specific case, the magistrate removed the premise alleged by the defendant of the illegality of the evidence, accepted the supporting e-mails and, given all the repercussions of the infidelity measured in moral damages, condemned the consort author of the infidelity.]

## FINAL CONSIDERATIONS

In view of the above, it is concluded that civil liability for marital infidelity is still very dubious in Brazilian courts. Even more, with regard to "virtual" marital infidelity, this is considered a novelty in the field of civil litigation.

However, this does not escape the appreciation of the Judiciary, although there are still few positions, it is already seen in the legal scenario its acceptance and the configuration of civil liability. As the suffering singer Marília Mendonça would say in the lyrics of infidel, "I am expelling you from my heart, assume the consequences of this betrayal" (Mendonça, 2016). The legal consequences must be borne by the consort author of the infidelity if the judiciary understands this about the moral damage.

Emerging times, digital connectivity, progress do not detract from jurisdiction, do not detract from the appreciation of the judiciary, of those who feel aggrieved. And even if in short steps, the legislator, the indoctrinators and the courts walk in the sense of adapting to the new realities of Brazilian law.

<sup>3</sup> Judged available at < <https://www.migalhas.com.br/Quentes/17,MI61104,91041-TJDF+Exmarido+infiel+vai+pagar+indenizacao+por+danos+morais+porque> > accessed on 11/21/2019

## REFERENCES

BITTAR, Carlos Alberto. **Direito de Família**. 2. ed. Rio de Janeiro: Forense Universitária, 1993.

BRASIL. Código Civil (2002). **Lei Federal nº 10.406/2002**: publicada em 10 de janeiro de 2002. Disponível em <[http://www.planalto.gov.br/ccivil\\_03/leis/2002/l10406.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm)>. Acesso em 21/11/2019.

BRASIL. Constituição (1988). **Constituição da República Federativa do Brasil**: promulgada em 5 de outubro de 1988. Disponível em <[http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm)> acesso em 21/11/2019.

DIAS, Maria Berenice. **Manual de Direito das Famílias**. 11ª ed. São Paulo: Editora Revista dos Tribunais, 2016.

DINIZ, Maria Helena. **Curso de Direito Civil Brasileiro, volume 5: Direito de Família**. 24ª ed. São Paulo: Saraiva, 2009.

GONÇALVES, Carlos Roberto. **Direito Civil Brasileiro, volume 6: Direito de Família**. 13ª ed. São Paulo: Saraiva, 2016.

MARÍLIA MENDONÇA. **Infel**. Disponível em <<https://www.letras.mus.br/marilia-mendonca/infel/>> Acesso em 21/11/2019.

MIGALHAS. **Homem deve indenizar ex-esposa por traição**. Disponível em <<https://www.migalhas.com.br/Quentes/17,MI268660,21048-Homem+deve+indenizar+exesposa+por+traicao>> acesso em 20/11/2019.

MIGALHAS. **TJ/DF - Ex-marido infiel vai pagar indenização por danos morais porque cometeu “infidelidade virtual”**. Disponível em <<https://www.migalhas.com.br/Quentes/17,MI61104,91041-TJDF+Exmarido+infiel+vai+pagar+indenizacao+por+danos+morais+porque>> acesso em 21/11/2019.

MIRANDA, Pontes de. **Tratado de direito privado**. Tomo 9. Campinas: Bookseller, 2000.

PELUSO, Cezar (Org.). **Código Civil comentado: doutrina e jurisprudência**. 6ª ed. Barueri, SP: Manole, 2012.

SARMENTO, Daniel. **Direitos Fundamentais e Relações Privadas**. 2. ed. Rio de Janeiro: Lumen Juris, 2008.

SILVA, Eduardo. **A dignidade da pessoa humana e a comunhão plena de vida: o direito de família entre a Constituição e o Código Civil**. In: MARTINS-COSTA, Judith. **A reconstrução do direito privado: reflexos dos princípios, diretrizes e direitos fundamentais constitucionais no direito privado**. São Paulo: Revista dos Tribunais, 2002.

Superior Tribunal de Justiça. RESP nº 1159242/SP. Relatora: Ministra Nancy Andrighi. **Diário Eletrônico de Justiça**. Brasília, 10/05/2012.

Tribunal de Justiça do Rio Grande do Sul. Apelação Cível Nº 70040793655. Relator: Des. Leonel Pires Ohlweiler. **Diário Eletrônico de Justiça**. Porto Alegre, 30/03/2011.