

## **Social Representations of Gender and Its Reflections on Family Law, With Focus on the Child's Custody**

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**Abstract:** This article sought to discuss the social representations of gender and its repercussions in the Brazilian legal system, especially in Family Law, regarding the legislation and application of child custody. To this end, a bibliographic search was conducted, considering renowned authors of family law, scientific articles from various areas of study and legislation related to the theme. In addition, the data obtained in IBGE, through BME and SIDRA, were analyzed, aiming to characterize the applicability of custody of the minor children in Brazil. The results showed that maternal unilateral custody still prevails. In this sense, it is considered that the social representations of motherhood (best caregiver) and paternity (best provider) are very ingrained in the popular imagination.

**Palavras-Chave:** Social Representations, Gender, Custody, children.

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### **1. Introduction**

This article is an analysis of the influences of social representation of gender on the legislation and application of family law in Brazil, especially on the institute of custody of minor children, when parents separated.

The importance of this theme derives from the sharp increase in the number of divorces registered in Brazil. According to the Brazilian Institute of Geography and Statistics (IBGE, 2015), in its last census, divorces registered in Brazil with minor children totaled 141,118 (one hundred and forty one thousand, one hundred and eighteen), and only in the State of Minas Gerais, this number reached 14,159 (fourteen thousand, one hundred fifty-nine). This tendency justifies the study of the custody of minor children, due to the need to identify and understand the consequences of its application, considering the fact that the separation of couples becomes increasingly common and, consequently, the issue of dispute for child custody, in the context of the judiciary

It is assumed that the practices of the justice system suffer interference from social gender representations, as well as institutional policies, which delimit specific roles and functions for men and women. For example, research conducted by Brazil (2018) shows that, in Brazil, the exclusion of women can be observed in the three political powers, which represent the democracy of a country: Legislative, Executive and Judiciary. In the legislature, 78 women federal deputies were elected in 2018, representing 15% in the Chamber of Deputies. For the Senate, in the same year, seven women were voted, totaling a bench of 12 representatives in this house (14.8% of the Senate). This participation of women in Parliament led Brazil to 154th position, in a ranking prepared in 2017 by the United Nations Organization (ONU) in partnership with the Interparliamentary Union (UIP), in a total of 174 countries.

Another fact that ratifies this underrepresentation of women in higher positions is presented by the National Council of Justice (CNJ), which announced in the year 2014 that only 35.9% of the magistrates were women. This percentage decreases in the highest positions, to 21.5% of the judges and 18.4% of the ministers of higher courts. It should be noted that in spite of the fact that the initial admission of the magistrate's career is by public competition, in the promotion to the High Courts it observes criteria of merit and also other political and corporate factors that are difficult to be directly regulated, such as political indications. (AQUA, 2018).

Consequently, there is a scenario in which women are underrepresented in institutional politics, having lower chances of political expression in public debate. In this sense, the female segment has a lower possibility of influencing the elaboration of norms, as well as the decisions in which they apply. This scenario is constructed by the social representation of gender, in which, according to Coelho (2019, n.p.)

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*“The public sphere, which is eminently masculine, is seen as the space of politics, where citizens, in an ideal condition of equality, deliberate publicly on the destiny of the country and where productive work is carried out. The private, eminently feminine sphere, in turn, is seen as the space of affections, of privacy, where the invasive power of the state should not be affected. This separation provokes the invisibility of power relations and inequality in the private sphere. In addition, private relations influence and provide elements for understanding the relationships built in the public space.”*

In this sense, it is justified to examine the social representations of gender and their reflexes on family law, focusing on the option of child custody, assuming that they influence the delimitation of roles, in which men are granted external work, representing the provider of the family and the woman fits the internal work of caregiver, which has been naturalized and entrenched in the popular imagination, expressed in social representations.

The concept of social representation has frequently appeared in works of various areas, being interdisciplinary, crossing the applied human and social sciences. Its roots are in sociology, with a marked presence in psychology, anthropology and history. It is considered that when conducting the historical study of law, one must pay attention to the need to understand the concrete specificities and representations of the social subjects involved, their values, worldviews and experiences.

Thus, the objective was to examine the influences that social representations of gender produce in the Brazilian legal system, especially with regard to the legislation and application of custody of minor children, based on and in the Infraconstitutional Laws on the theme the precepts arranged in the Federal Constitution and in the Infraconstitutional Laws on the theme, as well as its applicability in the concrete reality of the Brazilian judicial system.

To meet the objective of this article, a qualitative and quantitative research was carried out, performed in two complementary moments. At first, a bibliographic research was carried out, considering renowned authors of Family Law, scientific articles from various areas of study and legislation, aiming to analyze gender constructions, social representations and their reflexes in the choice of custodian mode.

Secondly, through a quantitative approach, the information obtained from the IBGE (Brazilian Institute of Geography and Statistics) database, specifically from the BME (Multidimensional Statistics Bank) and SIDRA (IBGE Automatic Recovery System) database were analyzed, aiming to examine the applicability of the legal provision, in terms of custody of minor children in Brazil.

## **2. Theoretical Framework - Conceptual**

### **2.1. Social Representations and Gender Constructions**

The analysis of the influence of gender social representations on family law is extremely relevant. For this, it is important to bring the Theory of Social Representations, which consists in the fact that the individual classifies, categorizes and names what is strange to him from the known.

The social representation of Durkheim's sociology in the nineteenth century had its theorization developed by Serge Moscovici (2009), in which he explored the common-sense knowledge produced by social groups in Paris about psychoanalysis (ROCHA, 2016). In Durkheim's conception, the primordia of the systems of representation that the human being realized is of religious origin. Religion would be a collective representation, involving the knowledge of the moral and intellectual reality through observation, as reported by Morera et al (2015, p.1159-1160): "This knowledge is constituted from individual experiences of the subjects, but also of the knowledge, practices and models of thought that are received by different social devices, such as customs, tradition, education and communication"

Analyzing the formation and origin of social representations, Moscovici (2009) concludes that his goal is to transform the non-family member into a family member. This phenomenon happens internally in the mind of the human being, in order to satisfy the physical or moral satisfaction of the individual, who tends to reject the information that is strange to him and the unpleasant perceptions. Thus, social representations are something that the individual creates from their values, beliefs and customs, to explain a daily situation.

In this sense, social representations are not mere reproduction, but a social construction of a sense of what is presented as new, synthesized from perceptions of the previously known; that is, what is familiar to you. According to Moscovici (2009), there are two processes of social representations: objectification and anchoring. In the process of objectification, abstract ideas become concrete images by grouping them into categories of ideas and images on the subject. Anchoring, on the other hand, corresponds to the assimilation of the images created by objectification, and the new images join the previous ones, enabling the birth of new concepts. This author points out that:

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*“Social representations are almost tangible entities; they circulate, intersect and crystallize continuously through speech, gesture, encounter in the everyday universe. Most of the social relations effected, objects produced and consumed, exchanged communications are impregnated with them. As we know, they correspond, on the one hand, to the symbolic substance that goes into the elaboration, and, on the other hand, to the practice that produces such a substance, as science or myths correspond to a scientific or mythical practice”* (MOSCOVICI, 2012, p. 39).

This construction can also be observed in relation to gender. In the late 1940s, by publishing the book "Second Sex," Simone de Beauvoir impacted the world with the phrase "No one is born a woman: she becomes a woman." This expression led several women from different positions to repeat it to show that being a woman was not the result of a single act; in other words, being born with the female gender, but acting as a woman implied a long social construction (LOURO, 2008)

The gender category was developed by feminist theorists of the 1980s, seeking to understand and respond scientifically to the situation of inequality between men and women, and how this characteristic operates in social reality and interferes in the set of social relations (CARLOTO, 2001). In this sense, Varikas (1989) states that by borrowing the term gender from grammar, feminists postulated the need to overcome biological sex, given by nature, of social sex, the product of a permanent social construction formed in each human society.

Thus, according to Carloto (2001), the notion of gender acquires a dual epistemological character, since, on the one hand, it functions as a descriptive category of social reality, granting a new visibility for the women, referring to diverse forms of discrimination and oppression. On the other hand, it functions like an analytical category, as a new scheme of reading of social phenomena.

For Scott (1994, p. 03) "in grammar, gender is understood as a way of classifying phenomena, a socially consensual system of distinctions and not an objective description of inherent traits." Additionally, Lauretis (1994, p. 210) argues that

*“(...) the term gender is a representation not only in the sense that each word, each sign, represents its referent, be it an object, a thing, or an animated being. The term “gender” is, in fact, the representation of a relationship, the relationship of belonging to a class, a group, a category. (...) gender builds a relationship between an entity and other entities previously constituted as a class, a relationship of belonging (...). Thus, gender represents not an individual but a relationship, a social relationship; In other words, it represents an individual through a class”.*

The author noted that the conceptions of masculine and feminine, in which all human beings were classified, formed, in each culture, a gender system, a symbolic system or a system of meanings that relates sex to cultural content, according to with values and social hierarchies. Although meanings may vary from culture to culture, any sex-gender system is always closely intertwined with political and economic factors in each society.

Thus, for Lauretis (1994), construction is both the product and the process of its representation. The sex-gender system is a system of representations that assigns meaning to individuals within society, such as identity, value, prestige, kinship position, status within the social hierarchy, among others.

According to Giddens (1991), gender "refers to the psychological, social and cultural differences between men and women. Gender is linked to socially constructed notions of masculinity and femininity."; therefore, it is not "necessarily a direct product of the biological sex of an individual" (GIDDENS, 1991, p.107). Not to be perceived and seem natural, control begins in childhood, with differences in the education of girls and boys.

In this sense, the concept of gender is a social construction, not presenting itself uniformly in all times and places, varying according to culture, customs, laws, religions and political life, as well as other variants that influence directly, such as: age, race and social class.

Therefore, it is considered that this theoretical foundation is an ideal instrument for the study of child custody, allowing the understanding of the influence of social representations, in the choice of a particular mode of custody of minor children, over another. That is, because it is the result of a social dynamic, the reflection of social gender representations within the legal system is notorious, especially at the moment of the elaboration of legal norms, their interpretation and application.

## **2.2. Dynamics of Legal Order: Women's Rights and Custodianship of Children**

The dynamics of the legal order are directly influenced by the society in which we live. The Brazilian Civil Code of 1916 considered women relatively incapable of performing civil acts. This code ensured that: "During marriage, the father exercises the 'patrio' power<sup>1</sup> the husband, as head of the family (art. 233), and, in his absence or impediment, the wife." According to Dias (2009, p.416): "so perverse was discrimination against women that when the widow married again, she lost her power over her children, only recovering it when she became widowed again".

The Brazilian Civil Code was a product of its time and of the prevailing social forces in the environment in which it arose. Thus, it mirrored the patriarchy of the society that generated it, translated into the absolutism of marital power in the pátrio power. In this patriarchalism, the family cell was characterized by the distribution of each member's function. Thus, the man held the leadership power in the family nucleus possessing the exclusive custody and fatherly power of the children. On the other hand, the woman played the domestic and procreation role, submitting to the determinations of the spouse (VENOSA, 2014).

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Looking at the 1916 Code, it can be argued that a situation of extreme subordination was imposed on the woman, since she was dependent on her father's consent to perform any act and, if married, was subject to her husband's assent. In this sense, women who wanted to work abroad could only do so with the authorization of their spouse (BRASIL, 1916)

Despite being seen as inferior, women began to fight for their space in society. Thus, in the eighteenth century, in the context of the French Revolution, feminist movements began to emerge, which each day had more participants. These movements aimed to equal women's rights in relation to men, ending the subordination imposed on women, including professionals.

The history of the feminist movement was divided into waves, with the first wave beginning in the eighteenth century and going to the middle of the twentieth century, dealing with the feminist suffrage movement and the claim to the promotion of equal contractual and property rights; that is, formally equal legal rights. The second wave originated from the second half of the twentieth century and lasted until the twenty-first century, leading to rise and appreciation of women in the world of work, seeking symbolic equality with men, with social and economic autonomy. Besides that, the right to decide on one's own body, and the full right to all rights, including the right to live a life without violence. The third feminist wave begins at the end of the twentieth century, in a redemocratized and questioning scenario regarding the essentialist paradigms of femininity established in the previous two waves, expanding its precepts (MOREIRA; BARROS, 2018).

With regard to civil capacity, the feminist movement aimed to modify the provision of the Civil Code of 1916, which included in its text the woman as relatively incapable, in which the acts of her civil life would only be valid if their parents or husbands assisted them. This was only possible in 1962, with the advent of the Married Woman Statute, when part of the code changed. The argument was that married woman was incapable only on the whim of the legislature, and was merely a matter of law. Thus, in Law 4,121 of 1962 (Statute of the Married Woman), the exercise of the power parental was legitimized as being the responsibility of both parents. However, this Law also determined that, in case of disagreement between the parents, the paternal decision would prevail, and the mother, in disagreement, has the right to appeal, as expressed by Caio Mário da Silva Pereira:

*"Brazilian positive law took an important step in its evolutionary line by recognizing in Law 4.121/62 (Statute of Married Women), as a corollary of women's legal equality, that the patrio power could compete with the father, who should exercise it with your wife's collaboration. The bnebo mother no longer lost her patrio power over the children of the previous union, exercising it without any interference from her husband"* (PEREIRA, 2010, p. 448).

This statute, only approved in 1962, thirty years after the first effective conquest of women's rights, which is the right to female voting. During this interregnum, there were several movements that sought to remove from the married woman the image of incapable. Thus, although the woman had won the political right

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<sup>1</sup> Patrio Power: The absolute and unlimited right granted to the head of the family organization over the person of the children. (RODRIGUES, 2008).

to vote in 1932, her relatively inadequate legal status meant legal uncertainty. With the power to be elected and elect candidates, women questioned their position in capacity situations.

Two important feminists of the time, also members of the Brazilian Institute of Lawyers - IAB, Ormind Bastos and Romy Medeiros, were the authors of this bill (Law 4,121 / 62), as exposed by Cunha (2015, p. 36):

*“The international context was favorable to women's demands. Because of the horrors of World War II, international agreements sought to secure human rights and women's rights, and then received attention again. Inter-American meetings collaborated to exert special pressure under national legislations.”*

Only after nearly ten years of debate, the Married Woman Statute was approved, thanks to the national and international context mentioned. Thus, the legal equality of the spouses was established, with the woman having full capacity in their legal actions, becoming an equal part in the administration of conjugal society. Also excluded was the need for authorization from the husband to work abroad

With the conquest of legal rights by the married woman, her freedom to dissolve the marriage remained. The next step came with the approval of the so-called Divorce Law (6,515) in 1977, which dealt with cases of dissolution of society and marital attachment, repealing the regulatory provisions of the 1916 Civil Code. In its article 10, on the judicial separation, the Law of Divorce favored the innocent spouse, with the custody of the minor children. In addition, in case both spouses were responsible for the separation, the mother would hold the minor children, unless the judge found that such a solution could result in moral harm to them.

This Law had great significance, since it gave the woman the right to choose or not to use her husband's family name. In addition, the Divorce Law represented a great advance in the conquest of the rights of children, recognizing the children considered illegitimate, although, during the marriage, and, consequently, gave them rights over their father's patrimony (DIAS, 2009).

In 1988, with the promulgation of the Federal Constitution, it is innovated in the legal system by consecrating in its article 5, I that: “[...] men and women are equal in rights and obligations [...]” And in its Article 226, § 5: “The rights and duties relating to conjugal society are exercised equally by men and women” (BRAZIL, 1988). It is thus observed that the Constitution brings a new view regarding custody, especially protection for children and adolescents, as in its article 227, “caput”, which states:

*“It is the duty of the family, society and the state to ensure, with absolute priority, that children, adolescents and young people have the right to life, health, food, education, leisure, professionalization, culture, dignity, respect, freedom and family and community life; as well as protecting them from all forms of neglect, discrimination, exploitation, violence, cruelty and oppression.”* (BRAZIL, Art. 227, CF / 88, online).

As noted, the Federal Constitution of 1988 internalizes the main guidelines pertaining to the human rights of women in vogue at the international level, recognizing, for the first time, equality in rights and obligations between men and women, prohibiting discrimination by sex. This device led to the modification and evolution of many normative aspects, with consequences on child custody.

In 1989, was instituted the Convention of ONU (United Nations Organization) on the Rights of Children and Adolescents, approved by the General Assembly and ratified by Brazil. As a result, in 1990, Law 8.069, Statute of the Child and Adolescent (ECA), was published, which represented a major advance in the recognition of their rights. The child came to be seen as a subject of rights and no longer as an object of dispute between parents. In matters relating to your custody and visitation, his best interest should prevail, and it is irrelevant to the solution who has given rise to separation, or, in other words, who is the guilty spouse.

Finally, the infraconstitutional norms, seeking equality between men and women, favored the satisfaction of the protection of children and adolescents, which culminated in new perspectives for custody regimes. This is what is observed in several provisions of the Child and Adolescent Statute and the Civil Code of 2002 (CC 02).

In the Civil Code of 2002, there was a concern of the legislator in equating both sexes, seeking to achieve, the equality of rights, long defended by the Constitution. In its article 1565, CC/02 determined that, by marriage, man and woman would mutually assume the condition of consorts, companions and heads of the family. In this sense, CC/02 changed the expression “pátrio power” to “family power”, consolidating the idea that such power should be exercised jointly by the father and the mother, on equal terms, representing a set of rights and duties assigned to both the person and the assets of the minor children (GONÇALVES, 2011).

With regard to the forms of command of conjugal society, article 1.567 provides that the direction of conjugal society is exercised, in collaboration, by the husband and wife, always taking into account the interests

of the couple and their children (BRAZIL, 2002), disconnecting the custodial institute to the issue of parental guilt in the separation

In terms of child custody, the Brazilian legal system has over the years been characterized by prioritizing unilateral custody. Other forms of custody arose only after the Federal Constitution of 1988, which, in its articles 227 and 229, brings the regulation of custody implicitly provided, assuring the child and adolescent the right to have a guardian to protect them, in absence of parents, being provided moral, material and educational assistance (BRASIL, 1988).

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In the Brazilian Civil Code of 2002, custody is included in the rights and duties achieved by family power, in article 1.634 and its items I and II, which prescribe that it is the parents' responsibility to direct the raising and education of their minor children, as well as to have them in his company and custody; existing three types of custody: unilateral custody, custody granted to third and shared custody.

Unilateral custody or exclusive custody was the most widely used modality in the history of family power, which is embodied in the system in which one parent consensually or by court order holds the position of custody, while the other parent has the right to visit. This type of custody restricts the decisions in the child's life to only one parent, such as education, health, food and leisure.

According to Sampei (2018), unilateral custody, also known as sole or exclusive custody, does not lead to the loss or diminution of family power, since both parents remain responsible for minors, in which the parent who does not have custody of the child, should supervise your child's upbringing so that your interests are well taken care of. However, unilateral custody, unlike shared custody, ultimately prevented the child from living with both parents and only one was responsible for issues related to the minor.

The custody deferred to third parties is due to the impossibility of coexistence and custody of the parents, applying to the reallocation of the child or adolescent in a substitute family, after the loss of family power by the parents, becoming exceptional. Provides in art. 33 caput of the ECA's Statute of the Child and Adolescent, as stated in article 1.584, § 5 of the Brazilian Civil Code that the judge will grant custody to a third party, if he finds that the child should not remain under the custody of the parent or of the mother, considering, preferably, the degree of kinship and the affinity and affective relations of this minor with the possible custody. .

On the other hand, the shared custody institute was officially introduced into the legal system through Law no. 11,698 in 2008. Under this law, Shared Custody must be considered as the first alternative in the absence of understanding between the parents of the minor. Thus, if there is no agreement on child custody, the magistrate should decide, according to the legal provision, preferably and whenever possible, by shared custody. According to Schneebeli and Menandro (2014, p. 176): "The scope of the law is to protect the interests of minors, assuming that it is best for children and adolescents to have the same conviviality with their mother and father as they would have, if no separation had occurred."

In the definition of Reis (2016), shared custody is a modality that brings a joint responsibility to the father and the mother, there being no exclusivity of custody or responsibility, both of which should strive for the well-being of their minor children. In this sense, the institute of Shared Custody aims at the best interest of the child and adolescent, who has the right to the company of their parents, who must in fact share the duties and rights resulting from the family power exercised over their children.

This modality is legally provided for in Article 1,583, § 1 of the Civil Code, with the new wording given by Law no. 11.698/2008, which brings the following concept: "joint responsibility and the exercise of rights and duties of the father and mother who do not live under the same roof, concerning the family power of ordinary children" (BRAZIL, 2002, online).

With the objective of prioritizing Shared Custody over Unilateral, Law 13,058 was published on December 22, 2014, determining the application of this institute as a rule. In other countries, such as England and the United States, the Shared Custody Institute was created in previous years. In 1970, in England, shared custody was created as a new possibility of custody by way of a court decision. With regard to standardization, the first joint custody statute was approved in Indiana, USA, in 1973 and 1975. Since then, laws have been established regulating the sharing of child custody (FARIÑA et al., 2017, p 108).

Thus, § 2 of art. 1,584 of the Civil Code, as amended by Law No. 13.058/14, provides that, in the event that there is no agreement between the mother and the father regarding custody of the child, shared custody shall apply, provided that both parents are able to exercise family power, with the sole exception if one of the parents declares to the magistrate that he does not want custody of the minor. It is inferred that the legislator used the term "will be applied", giving priority to shared custody, even when there is disagreement between parents (REIS, 2016).

However, as the author adds, given the impossibility of agreement between parents, the magistrate can hardly impose shared custody, since the absence of harmony of the couple could put the integrity of the children in check. In addition, it is assumed that gender issues influence this custody application.

The custody is embodied in the duty of the one whose obligation is the guardianship of the minor to take care of his interests, to preserve him and to assist him, guaranteeing the principle of the best interest of the child (SAMPEI, 2018).

Thus, it can be said that social dynamics directly influences law. In this sense, it is justified to study the reflexes of gender representations on the law, especially on child custody.

### **3. Results and Discussion**

#### **3.1. The issue of shared custody: A quali-quantitative approach**

As recorded, in Brazil, unilateral custody has been granted to women since 1977, through Divorce Law number 6.515/77. The social representations of gender, in the perspective of the division of roles, brought the woman - in the internal work - as “natural caregiver” of the children; while the father - at work abroad - as a family provider. And this was reflected in the moment of the dissolution of conjugality, in which the mother was kept with the physical custody of the child and, thus, exercising all the care with her; while the father, with the provision of child support, remained as a material provider, thus constituting a delimitation of roles.

The social construct that the mother is naturally better prepared to care for her children is strongly opposed by authors such as Elisabeth Badinter, a great feminist, who, in her book “Away from Love”, develops extensive historical research, resulting in conviction, that the maternal instinct is a myth, and there is no universal and necessary maternal conduct (BADINTER, 1985). On the other hand, the social construction of male identity is also beginning to be debated. According to Carmo (2013), masculinity is a social construction that must always be reaffirmed. It has to be conquered and regained through the trial of the virility of the masculine being, being intimately linked to external work; ie as provider.

This sexual division of labor, marked by the delimitation of socially constructed roles, is also cited by Moreno (1999) in his book “How to Teach a Girl”, in which she states that, from birth, the human being receives social influences, which condition to assume a division of roles and to accept them as truth, being these influences perpetuated in the school, which has a segregating role of sexism. In this sense, Hydrate and Kergoat (2007, p. 599) explain that:

*“Sexual division of labor is the form of division of social labor arising from social relations between the sexes; more than that, it is a priority factor for the survival of the social relationship between the sexes. This form is historically and socially modulated. Its characteristics are the priority designation of men to the productive sphere and women to the reproductive sphere and, at the same time, the appropriation by men of the functions with the highest added social value (political, religious, military, etc.).”*

Thus, since childhood, the girl is encouraged to develop this role of caregiver. Their games are different from those of boys. Girls receive delicate gifts, dolls, and household and kitchen utensils; while boys receive toys that stimulate creativity and, above all, aggression, since, in play, they play the role of strong and invincible heroes (MORENO, 1999).

However, this delimitation of roles - external and internal - was partially broken by the female external work, when the woman was no longer limited to the internal work of family caregiver. These changes in freedom of thought, action and the acquisition of financial power, have enabled the woman's right to decide on her life and choose her partners and, finally, break up a relationship (FREITAS, 2009).

In this sense, the shared custody must be analyzed from two perspectives: the best interest of the child, when living with parents; as well as gender equality, since both women and men, without distinction, have the right to live with their children and the duty to be responsible for them

Several authors, such as Schneebeli and Menandro (2014), Reis (2016), Denyse Côté (2016), Rasines (2017), Lehman (2017), Fariña et al. (2017), Marín et al (2017), Molina (2017) and Fransson (2018); conducted studies on the Shared Custody in Brazil and other countries. Among them, Brito and Gonçalves (2013) researched the application of the Shared Custody to the Courts of Justice of Minas Gerais, Rio de Janeiro and Rio Grande do Sul, in which they categorized the findings into: arguments that supported decisions favorable to shared custody and decisions supporting the contraindication of this institute. The coexistence of the child with both parents was the main argument that supported the decisions in favor of shared custody. On the other hand, the authors observed criticism directed to the application of this mode of custody, when the parents were unable to reach agreement on how custody of their children should be exercised or when there was litigation between the former couple (BRITO; GONSALVES, 2013).

In the view of Fariña et al. (2017), shared custody is the most appropriate modality for children's well-being and defense of the exercise of equality between men and women, and the defense of the principle of equality between men and women, although it is not always advisable or feasible. However, for Molina (2017),

when analyzing recent jurisprudential tendencies about shared custody, considered that this modality has as premise the need for a relationship of mutual respect between parents, which would benefit the children, contributing to their emotional development. In this sense, Majerčíková (2017) concluded that communication is considered the key to the optimal functioning of joint custody in everyday reality

According to this author, this type of custody was implemented in England in 1970 by a court decision. As regards standardization, the first joint custody statute was approved in the US state of Indiana in 1973 and 1975. (FARIÑA et al., 2017). For Denyse Côté (2016), in a study conducted in Quebec, shared custody evolved rapidly, becoming a model for gender equality, influencing the roles of motherhood and fatherhood, as well as gender relations, even in nuclear families intact.

However, despite the inclusion of women in external work and the legal imposition of the Custody Share as a rule, data obtained from the Brazilian Institute of Geography and Statistics (IBGE) show that the unilateral maternal guard in Brazil still corresponds to the vast majority, reaching 85.06% in 2014 and 69.39% in 2017, and only 5.49% and 4.76% of custody cases were paternal, in 2014 and 2017, respectively. However, shared custody has grown from 7.52% in 2014 to 20.88% in 2017. (Table 01).

**Table 01 - Custody granted in divorce cases at first instance with minor children, from 2014 to 2017**

<b>Child Custody granted in first instance divorces with minor children from 2014 to 2017 in Brazil</b>				
<b>Custodian</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
<b>Dad</b>	8.06 5,49%	7.40 5,25%	7.25 4,94%	7.52 4,76%
<b>Mom</b>	124.95 85,06%	111.71 79,16%	109.36 74,40%	109.74 69,39%
<b>Joint custody</b>	11.04 7,52%	18.23 12,92%	24.83 16,90%	33.02 20,88%

Source: IBGE - Civil Registry Statistics (2018)

The data from Table 01 show that maternal unilateral custody still prevails over other modalities, reinforcing the idea that, despite the fact that women are in the labor market, the social representation of gender, which makes women the best caregivers of children, it is a reality. Freitas et al. (2009), in a study on male social responsibility in the role of provider, conducted in 2003, with interviewed men/parents, concluded that, although the interviewees present some transformations in the scope of male responsibilities, the patriarchal model holds. Thus, men continue to understand their role of father predominantly as the material and moral provider of the family, with physical care and affection reserved for women.

The authors Schneebeli and Menandro (2014), in a study on the social representations of child custody after marital separation, concluded that the differences between female and male, incorporated in common sense, constitute the basis of social representations of motherhood and of paternity. As a result, in cases of separation or divorce, it is common sense to consider unilateral maternal custody under the presumption that mothers have always played the role of caregiver, while the father is of provider.

In this sense, unilateral maternal custody is still the most applied in Brazil. However, after the enactment of Law 13.508/14, it is clear that the number of Shared Custodian has tripled, demonstrating a tendency to its application, which highlights the dynamic aspect of social representations, under the gender bias, in the daily universe.

#### **4. Final Considerations**

The data show that there was a gap of almost 100 years between the two civil codes (1916 to 2002), during which several changes in society broke out. Social dynamism and its transformations, notably the feminist movements of the twentieth century, forced the once-patriarchal and chauvinistic society to revise its archaic concepts and change them according to the urgency of the new times.

Thus, it is clear that the custody of the minor has experienced an intense transformation throughout the legislative history, evolving from paternal “ownership”, moving to the preference for unilateral maternal custody and reaching shared custody. However, the social gender representations that make women "naturally" better suited to childcare are still present in our society.

It is recognized that the legislation reflects the social relations present at the time when they are elaborated. Thus, the civil code of 1916 brings conservative and patriarchal legislation, since Brazilian society



was essentially that way. On the other hand, the Federal Constitution, promulgated in 1988, supported the largest reform ever in the Family Law, symbolizing a legal framework of a new conception of equality between men and women, also reflecting the social transformation that occurred in society from the second. Mid-twentieth century, crystallized by the civil codification of 2002.

Thus, for this to be possible, women had to fight for their space, believing that they could have more than the submissive position given to them. Thus, through this struggle, they won the right to vote, to autonomy in the practice of acts of civil life, because they no longer needed to be assisted by their husbands in the process of organizing their family life. In addition, there was female participation in constituent assemblies so that their demands could be incorporated into the constitutional text, although still shy way.

However, despite the fact that shared custody is imposed as a rule, by law 13.058 14, its incidence is still very low, prevailing unilateral maternal custody, which demonstrates that the social representations of motherhood and paternity are still very ingrained in the imagination, being an obstacle to be overcome for the acceptance of this type of guard.

In this context, it can be concluded that the differences between the feminine and masculine, incorporated in common sense, constitute the basis of the social representations of motherhood and paternity, with reflexes on the choice of child custody modality, indicating that the legislative evolution is ahead of cultural evolution.

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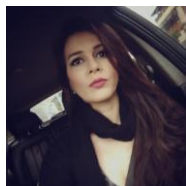
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#### **Conflict of Interests**

The authors have not disclosed any potential conflicts of interest.

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