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NATIONAL REPORT: URUGUAY

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1. INTRODUCTION

In the Uruguayan legal system, marriage is monogamous and intended exclusively for heterosexual couples.

Even though lawmakers have not criminalized marriage between people of the same sex, the doctrine is unanimous in considering that sexual diversity is a component of the bond.

The non-existent theory of marriage, created by doctrine, albeit with legal support, allows us to solve questions where it is not possible to maintain the existence of a valid and effective marriage bond, but for which lawmakers have not provided the sanction of annulment either.

On the basis that annulments can only be carried out by law, in specific cases in which it is inadmissible to maintain the presence of a marriage (e.g. between people of the same sex or people who do not have the necessary authorization to celebrate it), the doctrine found that non-existence was a convenient formula in order to avoid deploying legal effects, with connotations much more serious than an annulled marriage.

The non-existent marriage is not a marriage and, therefore, it does result in a putative bond (Art. 208 of the Uruguayan Civil Code, hereinafter U.C.C.); it is irremediable and an extensive active authentication process exists in order to obtain a court decision that states this condition. On the other hand, in contrast to annulled heterosexual marriages, the children of this relationship do not receive legitimate status (Art. 210). Also, a child born of such a marriage partnership does not prevent one of the partners of the thwarted bond from claiming paternal rights against the other partner, alleging the existence of a *de facto* relationship or the presence of baseless enrichment.

Even so, Act No. 18,620, of October 25, 2009, establishes a series of rules relating to gender identity, intended for the registration of modification and adaptation of name and gender on identification

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documents of the person, provided in article 7, which states that “this act does not change the existing marriage system regulated by the Civil Code and supplementary legislation.”

Consequently, even when proceeding with the amendment of the documents that identify a person, it does not allow the marriage of this person to someone of the same sex as was identified before the documentary transformation. Given that the act does not expressly provide for this situation, the change will not affect a marriage that includes someone whose sex was changed that was celebrated prior to the amendment being made. Therefore, this situation suggests that the bond will be dissolved by the corresponding divorce proceedings.

There are also currently no bills that have been introduced in the country that support same-sex marriage.

However, the emotional bond between people of the same sex has not gone unnoticed by the Uruguayan legislature, given that Act No. 18246 of December 27, 2007, which regulates various aspects of non-spousal relationships, is explicitly applicable to heterosexual couples as well as to same-sex couples.

2. PAST INDIFFERENCE OF THE URUGUAYAN LEGISLATURE TOWARDS COMMON-LAW MARRIAGES

Up to January 20, 2008, when Act No. 18,246 took effect, Uruguayan lawmakers had almost completely ignored *de facto* couples, also legally labeled “common law couples” or “non-spousal partners”. Incidentally, when the U.C.C. took effect in 1869, no regulation of these relationships was provided and that situation remained virtually unchanged until the aforementioned law was approved.

However, there is no denying that the legislature was progressively considering *de facto* relationships—usually only referring to heterosexual non-spousal relationships—in order to confer various conclusions, in different scopes: a) in labor matters, relating to workplace accidents and for the family allowance system covered by the State social security agencies;¹ b) in Act No. 16,081, of October 19, 1989, expanding on article 881 of the U.C.C., it is considered calling for a lower term for common-law relationships than for marriages in order to create rights of property and use that are provided in favor of the surviving spouse; likewise, living in a common-law relationship leads to the beneficiary of these rights losing them; c) article 51 of the Code on Children and Adolescents, hereinafter C.A.C., (Act No. 17,823, September 7, 2004), provides that non-spousal

1. De los Campos, *Effects of common-law marriages in social security rights*, Montevideo, Fundación de Cultura Universitaria (F.C.U.), 2008, page 8.

partners are obliged to pay maintenance to children conceived by their partner from another relationship while they are living together; etc.

3. THE EVOLUTION OF THE DOCTRINE AND JURISPRUDENCE IN RELATION TO DE FACTO RELATIONSHIPS

In family matters the Uruguayan codifier was a faithful tributary of the paradigms followed by the Napoleonic Code and, based on the ideas of this legal body, non-spousal relationships can be summarized by the phrase “*les concubins se passent de la loi, la loi se désintéresse d’eux,*” meaning that the circumstances of de facto families are neither received nor regulated in a systematic way.²

And subsequent legislators took the same process, at least up until the start of the 21st century.

In spite of this, mainly for reasons of fairness, since two people living together are inclined to forge disputes and disagreements, especially when the relationship ends, the doctrine, and, more importantly, jurisprudence were looking to provide solutions for established disputes. This was done mainly through the application of provisions that, while they were not made taking the existence of an unmarried couple into consideration, were able to bridge the differences that appeared between the partners (for example, the unjust enrichment model was used on countless occasions in order to solve problems that were generated through financial ties between the common-law partners).

The main conflicts in this regard had to do with property claims between ex-common-law partners in relation to acquisitions made by one of them during the period in which they were together; with legal standing to bring legal action against third parties who, by way of an illicit act, brought about the death of one of the partners; with problems relating to leases and the eviction of one of the partners; and, with the ability to claim alimony against the other partner at the end of the relationship.

The Uruguayan system did not have a solution for any of these situations until Act No. 18,246 was adopted, which meant that the courts had to use their imagination in order to resolve such claims as they arose.

Given the above, in many situations the partners of a common-law relationship were deprived of the support of the law in issues in which it was quite evident that the lack of regulation led to situations of deep injustice. Thus, de facto partners had no rights to demand alimony from the

2. Two orders of the U.C.C., since revoked, mentioned non-spousal relationships: a) that the husband have a concubine was one of the requirements for the spouse to be able to request divorce for adultery; b) one of the grounds that was established in Art. 241 of the U.C.C. in order to initiate an action of paternity investigation was that the mother and the alleged father be living in a non-spousal relationship at the time of conception.

other partner at the termination of the relationship; this was notwithstanding the fact that, without legal basis, in certain rulings the courts were setting alimony.

The surviving common-law partner was also not recognized as a grantee in a lease held by the other partner (Art. 20 of Decree-Law No. 14,219 of June 4, 1974), and had no hereditary right to the inheritance of the partner.

The absence of any legislative provisions designed to regulate these very common situations provoked, along with uncertainty at the legal level, damages and losses to partners in a de facto relationship. This revealed situations of marked injustice in which, on the one hand, de facto partners were excluded from many benefits that were provided to married couples; and, on the other hand, the recognition of their rights was subject to the courts' discretion, which ruled on situations when presented with the assessment criteria, which, as such, rely heavily on subjective considerations about what should be understood about these relationships and the protection that they deserve.

4. FACTORS THAT INFLUENCED THE ENACTMENT OF ACT No. 18,246, OF DECEMBER 27, 2007

*The main issues that interceded in the Uruguayan Parliament for the purposes of the sanction of this law are as follows:*³

a) The decline of the institution of marriage as the only way to be united romantically. The legislature took into consideration that in Uruguayan society there are new types of families and emotional relationships and that marriages of couples currently lack the stability that characterized them in the past. Specifically, it looked at the fact that, given the volatility and instability that many modern relationships assume, people were increasingly opting to form de facto relationships, where there are no administrative requirements at its formation or judicial proceedings for its dissolution.

b) The progressive social acceptance of same-sex marriages and relationships. The act prevented discrimination against unions between people of the same sex.⁴

3. From the statement of reasons that accompanied the bill presented to the Uruguayan Parliament, it is possible to flag the following objectives: a) *exceeding all discrimination* by reason of condition or personal or social circumstance of all members of the family; b) *broad concept of the family*, understood in the diverse forms of expressing love and sexuality, culturally accepted or admitted in the social environment (Pérez Manrique, "Law on Common-law Unions, Act No. 18,246: Objectives and Reality," *Factors and Contents of the Evolution of Family Law: Family Law Symposium*, University of Montevideo, May 19-21, 2008, at 70).

4. Unlike what has taken place in other societies, such as in Spain, in Uruguay, it was not the influence of the media nor the insistence of gay rights groups that led to the enactment of Act No. 18,246.

However, the act that was enacted does not achieve, in any great way, either of the aims that were sought.

Regarding the first of the factors cited above, the attempt to avoid administrative red tape to celebrate marriage is replaced by a judicial procedure noticeably longer and onerous in order to obtain a judicial declaration for the existence of a common-law union. And the same thing happens with its dissolution.

In regards to the second aspect, the targeted discrimination (which in the opinion of this writer did not exist) could have been averted, even before the law, through the principle of autonomy of will. Certainly, core damages that one of the partners was able to present in same-sex relationships was able to submit were avoidable through legal proceedings: for example, by setting alimony through a contract or a will, by establishing the surviving partner as the heir, or by creating the real right of usufruct, use or rental rights to ensure their housing needs. It is apparent that for patrimonial matters, there was the possibility for common-law partners to establish a claim for unjust enrichment, in addition to the courts recognizing the possibility of claiming damages, material damages, and losses suffered as a result of the crimes committed against the other partner.

5. CLASSES OF COMMON-LAW PARTNERS

According to Act No. 18,246 there are two kinds of common-law partnerships in the Uruguayan legal system:

- a) those that are included in the legislation in question and comply with the elements contained therein; and
- b) those that do not comply with the requirements prescribed by the law.

The new act considers a common-law relationship as one that arises from two people sharing their lives together—whatever their gender, identity, sexual orientation, or sexual preference—who have lived together continuously for at least five years, that is of a sexual nature, exclusive, singular, stable and permanent, not bound by marriage, and never including subjects that are pubescent, certifiably insane, or who are blood-related in a way that prevents them from being married, that is, other than immediate relatives by blood, marriage or siblings.

Meanwhile, couples who do not meet the requirements of the law (for example, who have not yet reached five years of cohabitation) will be subject to the solutions provided by the courts and by the doctrine assumed for common-law relationships in general; for example, in property issues where one partner initiates claims for acquisitions based on unjust enrichment.

Therefore, not all de facto cohabitating couples are regulated by Act No.

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18,246. To be included in the law it is necessary to comply with the following conditions:

i. Uninterrupted cohabitation for five years

This period is a condition of admissibility of the relationship; if it is not reached, the relationship will not be covered by the Act.⁵ The requirement that cohabitation be continuous does not mean that there cannot be a break or that discontinuities in specific cases are not allowed, but in all respects it requires that the will of the partners is to continue developing their lives together. For that reason, the period is interrupted when there is a separation and then a reconciliation between the partners;

ii. Emotional relationship of a sexual nature

With this requirement, the law excludes from its provisions some cohabitating couples who have a different way of identifying their relationship, e.g. the legal framework does not include couples who are living together and whose relationships are founded on friendship, for economic reasons, studies, etc.

However, in spite of the law, effective proof of the existence of sexual relations⁶ is not required, as they may be absent for justified reasons, such as age or mental or physical conditions that prevent them.

iii. Exclusive and singular

The requirement that the relationship is “exclusive,” which is imposed by the law, is excessive, since common-law relationships can exist without sexual exclusivity. Therefore, the infidelities of either partner do not affect the existence of the relationship.

When it says that the union must be “singular,” what is demanded is that neither of the partners maintain another relationship under similar conditions to that laid out by the law.⁷

iv. Stable and permanent

With these words the legislature ensures that the law does not apply to those relationships that are inconsistent or that are frequently discontinued.

The requirement is somewhat redundant since it was already required that the relationship be uninterrupted, but additionally, the term “permanent” set out in the article is wrong, since no relationship, not even

5. Rivero de Arhancet and Ramos, *Common-law Unions*, Montevideo., F.C.U., 2008, page 31.

6. Carozzi, *Law on Common-law Unions*, Mdeo., F.C.U., 2008, pages 18-19.

7. Equal: Rivero de Arhancet and Ramos, *op. cit.*, pages 29-30.

marriage, is *a priori* this way by nature.

- v. *When dealing with adolescents or legally competent persons that they have no family relationship between them that prevents them from marrying, that is, that they are not immediate relatives by blood, marriage or siblings*

The effects provided by the law occur when the above-mentioned requirements are verified. Therefore, even though the Act requires that in order to obtain legal recognition of the union, that requirement is not designed so that all the rights and duties conferred or imposed therein emerge, but only so that the common-law property system arises (see part 7).⁸

Meanwhile, these conditions are not demanded by the law in the configuration of common-law relationships as follows: a) the gender diversity of the partners; b) the ability of the partners to marry; c) the publicity, notoriety, or social knowledge of the relationship.

Temporal scope of the Act: Act No. 18,246 was approved by the Legislative Branch on December 17, 2007, propagated by the Executive Branch on December 27, 2007, and published in the Official Journal in issue No. 27,402 on January 10, 2008, which meant that it—in the absence of any other effective date determined by the Act itself—came into force ten days from the date of publication, that is, on January 20, 2008.

It applies as much to common-law couples that are created after the term of the Act as well as to those active when it came into force, whether the duration is already five years or will attain the required time period at a later time.

6. ALIMONY IN COMMON-LAW RELATIONSHIPS

Article 3 of Act No. 18,246 extends certain rights and obligations arising from existing marriages of the partners. In this sense, similar to the provisions in article 127 of the U.C.C. for married persons, article 3 of the Act provides that common-law partners must give mutual personal and material assistance and are required to contribute to household expenses according to their respective economic situations.

Unlike the rules for child support as a result of divorce, where the woman is in a very convenient situation when she has not been declared culpable for the separation, in the case of common-law relationships, gender distinctions are erased. The law allows either of the former partners to claim a pension if it is necessary for the partner's survival, regardless of whether who was responsible for the breakup. And, of course, alimony

8. Carozzi, *op. cit.*, page 12.

obligations exist independently of whether the relationship is heterosexual or homosexual, since the legislature has given equal protection to both.

In these cases, the alimony has a time limit: it cannot exceed the period of cohabitation. Therefore, the ability to claim alimony and the obligation to pay them will be extended as long as the relationship lasted. The viability of establishing the action arises the moment the relationship is broken (without the need for a ruling on this) and prescribes when a time equal to the period of the relationship has elapsed.

When the recognition of a common-law relationship has not been requested before the breakup of the couple, it will be necessary to prove in the alimony process that the couple met the requirements required by articles 1 and 2 of the Act. This proof will only be effective for this case and, therefore, may be discussed again if either partner initiates an action under articles 4 and thereafter to establish the existence of the relationship, even when it is already dissolved.

However, the alimony should be dismissed by the presiding judge in the procedure when the partner who has claimed it has been convicted for committing one or more crimes against the other partner or the partner's relatives up until the third degree in the descending, ascending, or collateral line. Similarly, if the verdict is made once alimony has already been awarded, the judge, at the request of the other party, must order its removal.

On the other hand, article 24 of the Act modified article 194 of the U.C.C. when it added that the alimony established in subsection 1 of article 183 in favor of the woman when she is not responsible for the divorce, when she decides to remarry, or when she lives in a legally declared common-law relationship.

The provision is incomplete, insofar as:

a) it only refers to the alimony of article 183(1) (in favor of the woman not responsible for the divorce), but does not include the provisions in subsection (2) (alimony for the man and for the woman responsible for the divorce);

b) grounds are provided only for the termination of the legally declared common-law union, and not for the mere existence of a common-law relationship, even though it does not meet the circumstances prescribed by the Act. However, this, by doctrine and jurisprudence, is also grounds for termination, given the moral foundation on which alimony is supported;⁹

c) if what is required by the new article 194 of the U.C.C., that alimony obligations cease when the woman lives in a legally-approved common-law relationship, even when it was a *de facto* family that lasted more than five

9. Howard, "Alimony between Ex-spouses", *R.U.D.F.* No. 20, Annotated Jurisprudence, Montevideo, F.C.U, 2008, pages 89-95.

years with the requirements prescribed by the law, is admitted, the alimony obligations of the former partner could continue indefinitely, if they fail to apply for the legal declaration of the existence of the relationship. Note, in this course, that the only couples entitled to request such legal declaration are the common-law partners (Art. 4, subsec. 1).¹⁰ Linked to the topic under analysis, the C.A.C., in article 51, includes among those liable to pay alimony to children and adolescents “of the partner, in relation to the child or children of the other partner, who is not born of that relationship, if they live together forming a de facto family.”

7. FINANCIAL TIES IN COMMON-LAW UNIONS

7.1. The legal recognition of the common-law union. One of the new additions presented in Act No. 18,246 is the possibility that the partners, acting jointly or separately, may initiate a legal declaration for recognition of the common-law union (Art. 4)

Even when the death or the declaration of absence of either partner occurs, those enabled to call for a judicial order increases significantly given that any interested party may establish this action. Among the interested parties, even though the law does not expressly determine it, are heirs and creditors of the deceased partner and the surviving partner.¹¹

The recognition of the common-law union is processed voluntarily, and whoever initiates it must provide the court with the names and addresses of the people whose property rights, arising from a marriage or other common-law union, may be affected by the recognition. In the event that there is opposition, the procedure becomes contentious and the Public Prosecutor must intervene.

7.2. Object

In order to declare legal recognition of a common-law relationship, the following is required:

- a) the date that the union began; and
 - b) whether the assets were acquired through effort or shared finances.
- The purpose of the latter is—according to the law—to determine the

10. Rivero de Arhancet and Ramos state that “although the law determines that the termination of alimony paid by the former partner to the legal declaration of the common-law relationship, even if no legal declaration exists, the duty of the former partner ends because the solidarity that underlies the alimony payments must be found from the new partner, not a former partner” (Rivero de Arhancet and Ramos, *op. cit.*, pages 52-53).

11. Yglesias, “Considerations on the Law of Common-law Unions,” *Annual Journal of Uruguayan Civil Law*, T. XXXIII, Doctrine section, Montevideo., F.C.U., 2008, page 836.

incorporation of new shared property formed between the partners.

The legislature only referred to the requirement to determine the property acquired by effort or shared finances to form shared property, but failed to mention at least two important aspects:

- i. on one hand, the powers of the purchaser in regards to property acquired under these conditions, that is, if after the shared property is established, any previous property acquired enters a system of joint ownership or the buyer maintains exclusive title allowing them to dispose of it without any restrictions;
- ii. on the other hand, taking this into account, the contribution that each partner made for the acquisition of the property.

7.3. Nature of the assets acquired before the declaration of a common-law union

i. Positions that deny the change of the nature of the assets acquired by one of the partners as a result of legal recognition of the relationship

In my view, given that the legal declaration of a common-law relationship has constitutive effects and is governed by the enforceability and registration of the ruling, no power or authority to vary the exclusive ownership of the property that the buyer has over the property exists. Therefore, whoever acquired the property, whether through their exclusive economic contribution, or whether in collaboration with their partner, is the exclusive owner of the acquired property. Consequently, the owner can freely dispose of that property, both before and after the court has legally declared a common-law union; likewise, that asset is fully affected by the power to reclaim of the purchaser's creditors, but it is immune from the right of persecution of the non-buying partner's creditors. However, it is possible that the other party—where appropriate, and based on the contributions that were made—can make a claim against the buyer based primarily on unjust enrichment.¹²

ii. Positions that support the changing nature of these assets as a result of legal recognition of common-law relationships

The doctrine is not in agreement with the recently carried out assessment, as this is one of the topics that generated the most doubts about Act No. 18,246. Furthermore, many authors have expressed different

12. A similar stance was adopted in Uruguayan doctrine: Domínguez Gil, "Property Regime of Common-law Unions," *A.D.C.U.*, T. XXXIX, Second Doctrine, Montevideo, F.C.U, 2009, pages 680-682; and Arezo, *Law No. 18,246 of December 27, 2007 on Common-Law Unions*, Montevideo, Association of Notary Publics of Uruguay, 2008, pages 158, 160 and 161.

opinions about the positions cited above and concede that the nature of property acquired by one of the partners in the period prior to the legal declaration of a common-law must change.

Rivero de Arhancet and Ramos believe that the property acquired by either partner, through effort or shared finances, prior to the advancement of legal recognition with the effort or the shared finances and identified as such in the ruling, acquire the quality of common-law assets.¹³ For Carozzi, however, the declaration of a common-law union has declarative effects by virtue of the fact that property is acquired through effort or shared finances is recognized and established, and constitutive effects, as these assets become part of the common-law relationship. Furthermore, they note that the declaration of a common-law union has constitutive effects in regards to the common-law regime referred to in the Act as “shared property,” which is subject to the rules governing the shared property, as applicable. In this way, assets purchased through effort or the shared finances before legal recognition are transformed in nature as a result of this recognition (section B of Art. 5 of the Act). Consequently, according to this author, the reference in the Act that property acquired before the declaration becomes “constitutive parts of the new shared property” must be understood as a transformation of the legal nature of the property¹⁴.

Yglesias points out that when the law requires the indication of the assets acquired “through effort or shared finances . . . to determine the incorporation of the new shared property” is done in order to integrate those assets as joint property created by the declaration of a common-law union. But this author goes further and refers to both the property acquired through effort or shared finances and that obtained by each partner since the beginning of the relationship (although there is no minimum legal basis to support the latter), as becoming shared when it makes up shared property generated by the relationship. In conclusion, the doctrine states that “shared property between common-law partners is produced from the registration of legal recognition, only thereafter being opposable to third parties (Art. 54 of the Registries Act), but takes effect (between the parties) from the beginning of the relationship, without damaging the validity of the acts carried out legally before the inscription and rights acquired by third parties.”¹⁵

It is clear that the adoption of these positions can only be deemed correct when it is considered that the legal recognition is declarative and not constitutive, which in my view it is not possible to deduce from the law.

13. Rivero de Arhancet and Ramos, *op. cit.*, pages 82 and 109.

14. Carozzi, *op. cit.*, pages 82, 91, and 92.

15. Yglesias, *op. cit.*, pages 832-34.

It should also be noted that the position that all property acquired by just one of the partners increases the assets of the couple does not take the amount of the contribution made by the purchaser, nor by the other partner, into consideration. Therefore, even when the contribution that the latter partner made for the acquisition is minimal, the consequence of adopting the position with which I disagree remains the same: the transformation of the property acquired by one of the partners to that shared by the couple.

The importance of the above conclusion influences the effects of the disposal of property acquired in the period before the legal declaration of a common-law union, since if the first position—which I agree with—is taken for the disposal of the property entered into by the purchaser only, notwithstanding the other party’s choice ability to claim monetary compensation for assisting in the acquisition that they made. However, if the second position is taken, since property and assets change in nature and become shared, in order to dispose of them the consent of both parties is required, pursuant to article 1971 of the U.C.C.

But the adoption of one of these two positions also has importance when the shared goods are disposed of when the shared property is dissolved, since in the first position the assets acquired by just one of the partners are not included in the shared property and are not subject to disposal, unlike what occurs in the second position.

7.4. Evidence of a common-law union

For the registration of common-law unions, the section “Common-law unions” was created in the National Registry of Personal Acts, part of the Ministry of Education and Culture, in which is registered:

- 1) the legal recognition of the common-law relationship;
- 2) the establishment of shared goods arising from the common-law relationship;¹⁶
- 3) cases of legal dissolution of the relationship, with the exception of that which occurs as a result of the death of one of the partners.

When the declaration of a common-law union is registered in the aforementioned Registry, it introduces shared property between the partners, with enforceability *erga omnes*, which is regulated as applicable to the provisions of the joint property.

16. As can be seen with the Uruguayan legislature—clearly influenced by the diversity of projects that it took into consideration before arriving at the decision to adopt the Act of Common-law unions—it errs in demanding in different items, firstly, legal recognition of common-law relationships, and secondly, the shared goods derived from these relationships. The mistake lies in the fact that some recognitions may appear as a result of the shared property, naturally when no other regime has been established.

Once this shared property is created, the joint property derived from a previous relationship that existed between one of the partners and another person is dissolved (Art. 5, final subsection of the law).¹⁷

7.5. Contractual limitations

In addition to shared property arising from legal recognition of the common-law relationship, the same contractual prohibitions provided by the law, in regards to partners, are in effect. This represents standing assumptions of receptive authentication that are sanctioned with absolute invalidity of the negotiations; *see* Arts. 1675 and 1657 of the U.C.C. in which the sale and donation between partners is prohibited.

7.6. Common-law agreements

Common-law partners may opt, by agreement, to other forms of administration of the rights and obligations that are generated during the term of the relationship (Art. 5, penultimate section of Act No. 18,246).

The law does not demand formalities for the issuance of these agreements, nor the possibility of registration in the Registry. However, even when doubtful, applying the rules of joint property, they can be registered, which will inevitably require that they be given in writing and comply with the formalities required by article 1943 of the U.C.C., normally public deed.

The law also does not provide the time in which this must be carried out. Therefore, in my view, it could be carried out both before and after the legal declaration of a common-law union. In the event that they happen before the declaration is made, they will have effect throughout the duration of the relationship, unless modified during the relationship, since the Act does not plan for the anachronistic principle of immutability which was established (and is still in force) for premarital agreements.

One of the most significant doubts that the precept being analyzed presents is the possibility of establishing through these agreements a different legal system regarding property ownership, where future partners can enforce prenuptial agreements for this purpose. In my opinion, it is possible that common-law partners—pursuant to the principle of autonomy of will—reach such agreements in order to exclude their property relations from the system created by Act No. 18,246.¹⁸

17. The Act failed to refer to the grounds for dissolution of shared property formed in a common-law union, the de facto separation or marriage of either partner (Carozzi, *op. cit.*, page 88).

18. In the same sense, *see* Rivero de Arhancet and Ramos, *op. cit.*, pages 129-130, and Carozzi, *op. cit.*, pages 71-72. Against: Yglesias, who notes that there is no possibility in these type of relationships to celebrate agreements such as marriage and there can only be agreements regarding the administration of property prior to legal

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7.7. *Goods acquired after the declaration of a common-law union*

In accordance with article 5(2) of Law No. 18.246, “registered recognition of common-law unions produces shared goods that are subject to the provisions governing joint property.” As such, after the establishment of a common-law union, it enters a regime that is greatly similar to joint property, except that the couple agrees to another system pursuant to private autonomy.

The Act dispenses with in this stage, similar to what happens with the marital partnership, the existence of effort and shared finances for the acquisition of goods, but that all acquisition for valuable consideration will be joint, unless they are able to prove that there is a title prior to the declaration of the common-law relationship or that there was an acquisition in which the institute of subrogation operated (Arts. 1957-59 of the U.C.C.).¹⁹

Therefore, during the term of the common-law union, various provisions of the U.C.C. are applicable which were originally intended to regulate joint property systems. The law does not confer special status regarding financial ties between common-law partners, either heterosexual or homosexual, but relies instead on the implementation of the regime established by reference to the joint property derived from marriage, which is regulated in articles 1938-2018 of the U.C.C..

As for property, the Uruguayan marriage system embodied in the U.C.C. in its original text, which has been abrogated since 1946, provided that the administration of the joint property was always individual: pursuant to article 1970, the husband was the boss and sole administrator of the joint property, and the woman only managed special administration cases, that is, when he was prevented from doing so due to incapacity, absence or otherwise.

Act No. 10,783, of September 18, 1946, substantially amended the prevailing regime because it wanted to equip the civil capacity of man and woman and impose the *regime of participation in the assets or deferred*

recognition (*op. cit.*, pages 834); Arezo, who says that it is impossible to make an agreement such as a regime of absolute separation of assets and debts between them, since that aspect would refer to the regime or composition of the shared property and not the administration (*op. cit.*, pages 149-150).

19. And this path is followed mainly by the doctrine. See Carozzi, *op. cit.*, pages 101-07; Arezo, *op. cit.*, pages 155-57; Domínguez Gil, *op. cit.*, pages 683-84. Against: Rivero de Arhancet and Ramos, these authors maintain that the Act requires in article 5 “that the goods have been acquired with effort or shared finances and even though this turn is employed in order to refer to the indication of the goods acquired before the advancement of the recognition, it is not to be understood that it loses vigor during the existence of the shared property, meaning that it is a key element that the goods derive from such effort and shared finances” (*op. cit.*, page 100). And this idea is repeated in page 104 of the work.

community.

That is to say, this is a system that functions on separation and dissolves a system of community: during the life of the partnership there is separate administration of each partner's property; the community appears only after the dissolution of the partnership, forming a single mass of assets, whose liquid funds are divided in half.

Therefore, each spouse or partner manages his or her own goods as well as acquired assets, with limitations established mainly by article 1971 of the U.C.C. (that requires the consent of both parties in order to dispose of assets of greater economic significance: properties, businesses, etc.); and the creditors can only look to recover the separate property and assets or goods that the spouse or partner who incurred the debt administers (Art. 1975 of the U.C.C.).

7.8. The legal separation of assets

The Uruguayan legislature provides a mechanism by which, despite maintaining the marriage bond, the joint property system between the spouses is dissolved. However, Act No. 18,246 says nothing in regards to the possibility that those common-law partners that have recourse to a legal proceeding, for the purpose of declaring their non-spousal relationship, can establish action to separate goods, even when their emotional relationship continues.

The doctrine based on the application of the provisions of joint property to common-law relationships allows the legal separation of property between the partners, as is regulated in the U.C.C. for spouses (Arts. 1985 and 1986 of the U.C.C.).²⁰

This legal separation can be obtained at any time, without requiring that a given term has passed since the declaration of the common-law union. This can be done by either or both of the partners acting together and they are not required to state the reason for the separation. The ruling that decrees the dissolution of the shared property must be registered in the National Registry of Personal Acts —Common-law Unions section—by applying article 39 *bis* of Act No. 16,871, incorporated by Act No. 18,246. The registration protects third parties, since through it the contracting parties will know the property regimen they are subject to. Therefore, after registration, the ruling shall be effective against third parties.

The main effect of the figure being analyzed is that shared property, produced as a result of a legal declaration of a common-law union, is dissolved and enters into a regimen of absolute separation of the assets.

20. In this course, see Carozzi, *op. cit.*, page 80 and Rivero de Arhancet and Ramos, *op. cit.*, page 124.

Therefore, each partner is the sole owner of the assets he or she acquires and has the freedom to manage and dispose of them. Each partner is also solely responsible for the debts obtained.²¹ However, the separation of property is not necessarily definitive, since pursuant to article 1996 of the U.C.C. it may stop and reestablish the shared property at the request of both partners. As a result, the shared property returns to the status that it had before the dissolution, that is, that the reestablishment works as if it had never taken place.

7.9. *De facto separation*

The de facto separation between partners may affect several aspects, such as the beginning of the period to claim alimony or the loss of inheritance, but does not affect the property regime, when there is a recorded declaration. Therefore, their shared property is maintained until none of the grounds that the law provides for its dissolution exist. As a result, any of the goods acquired by the partners for valuable consideration enters the partnership.²²

However, the Uruguayan doctrine is not unanimous regarding this aspect.²³

7.10. *Marriage of one of the partners*

The Act did not plan for the celebration of marriage by either, naturally with a third party, as grounds for the demise of the shared property which existed between the partners. However, it should be understood that despite this omission in the regulation, the dissolution of shared property is imposed.²⁴

21. Nevertheless, the separation of goods does not impede the application of the provisions of unjust enrichment (ruling of the Family Appeals Court in the Second Hearing, April 23, 1995, published in *J. of Uruguayan Civil L.*, T. XXVI, folio 939, pages 324-25).

22. See on the same position: Yglesias, *op. cit.*, page 159.

23. Against: Domínguez Gil, *op. cit.*, page 685, for whom, in contrast to marriage which endures independently of the will of the spouses if they do not solicit its dissolution, the shared property is only maintained insofar as the de facto relationship exists. That is, cohabitation is an essential component of the relationship, and without this it does not endure, for which it no longer exists as a generating institute of the legal effects. Therefore, the mere voluntary separation of the partners, as with the previous marriage of either one of them, the assets and liabilities that enter the properties are not incorporated into the regime of the shared property.

24. Against: Rivero de Arhancet and Ramos, *op. cit.*, page 125, for whom marriage does not produce the dissolution of the previous relationship and as a result the shared property from which it is derived continues to exist. However, for these authors the problem is not serious, since if the common-law partners separate, it will be “a structure without new content,” as more goods through shared effort will not be entered.

8. SUCCESSION RIGHTS

8.1. Incorporation of the common-law partner to the second order of appeal

In accordance with article 11 of Act No. 18,246, where the common-law partnership is dissolved by the death of a member of the couple, the surviving partner, whatever his or her sex, will have the same inheritance rights as in article 1026 of the U.C.C. relating to the surviving spouse. However, despite the legislature's clear intention put the surviving partner of a common-law relationship in a similar situation to that of a spousal relationship, this equation is not complete. Incidentally, the surviving partner does not benefit from one of the rights given to a surviving spouse, called "marital share" (Arts. 874-883 of the U.C.C.).

On the other hand, when a person dies when married to a person, but is living in a common-law relationship with a different person, the rights to property and use benefits the surviving spouse and not the common-law partner. This is a result of the final part of article 11, which states that "these rights will not affect the legitimate rights of other forced heirs, nor the forced allowances of other beneficiaries."

8.2. Requirements

For the surviving common-law partner to enjoy the rights provided by law regarding inheritance, the following is required:

a) that the couple has lived together for a period of five years, meeting the requirements provided in articles 1 and 2 of the Act, even when no legal declaration of the relationship has been obtained;²⁵

b) that the breakup of the common-law relationship is due to the death of one of the partners, or in another case not expressly set out by the law, through the declaration of absence (Art. 1037 of the U.C.C.);

c) that there are no descendants of the deceased called to succeed him or her (Art. 1025 of the U.C.C.).

Therefore, a partner whose union had already been broken by the death or disappearance of the absent partner does not have inheritance rights, although the declaration of the common-law relationship remains formally registered.

8.3. Inheritance rights of common-law partners

In Uruguayan law, the first order of appeal is made for the children and other lineal descendants of the deceased, entered on behalf of them (Art. 1025 of the U.C.C.). According to Act No. 18,246, the surviving common-law

25. Equal: Carozzi, *op. cit.*, page 126.

partner enters the second order of appeal along with the ancestors of the deceased (Art. 1026). In case there are both classes of heirs—common-law and ancestors—the inheritance is divided into two equal parts, corresponding to each class of successors.

The surviving common-law partner—just as the spouse—is not a forced heir, therefore the assignation of beneficiary may be unknown if the inheritance is made through donations or bequests.

However, when the deceased common-law partner was married to someone other than their common-law partner, the inheritance of the surviving spouse will be divided between the spouse and the surviving common-law partner in proportion to the years in which each of them lived with the deceased. In this way, the number of years of cohabitation is considered and not the time that, from the formal point of view, the marriage or common-law relationship lasted.

Therefore, when the constitutive circumstances of the relationship are proven legally, which means that it lasted for at least five years, this means that the common-law partner who died was actually separated from their spouse, and both survivors are called to the inheritance.

8.4. The rights of property and use planned by Act No. 16,081 in favor of the surviving common-law partner

In addition to the above, when the surviving common-law partner is over 60 years old and lacks sufficient resources to ensure that they have housing, and they had lived with the deceased for at least ten uninterrupted years, they are granted property and use rights provided by Act No. 16,081, of October 19, 1989.

This means that the surviving common-law partner will have free and lifelong rights to the property, which includes the couple's home, either owned by the deceased or jointly owned by the couple, and the right of use of the furniture that furnishes this property. These rights are lost in the event that the surviving partner marries, lives in a common-law relationship, or acquires a property of similar conditions that meets the partner's housing needs.

However, the rights established by the Act in their favor cannot affect the forced allowances of other people, so if the deceased was married, those rights do not benefit the surviving common-law partner, but the surviving spouse.²⁶

26. Against this theme: Yglesias, *op. cit.*, page 838.

9. COMMON-LAW RELATIONSHIPS IN LEASE CONTRACTS AND EVICTION PROCEDURES

Until the “Common-law unions” law was sanctioned, Uruguayan courts often had to rule on two issues which the legislature had not provided a clear solution.²⁷

The first of these problems occurred when the lessor of an estate intends to evict one of the partners by virtue of the breakup of the union with the other partner (e.g. death), as it was this partner who had signed the respective lease contract.

The difficulty arises because article 20 of Decree-Law No. 14,219 on “Urban leases” did not include the common-law partner as a beneficiary of the legal assignment of the established lease by provision. For that reason, it was mostly understood that the lessor could initiate a process in order to evict a member of the couple as a squatter who was living in the house but who did not hold the respective lease.

The second issue occurred when, by virtue of the breakup of the union, the partner who owned the property where they lived tried to evict the other partner, arguing that they were a mere squatter.

In this case, the doctrine and jurisprudence considered the non-owning partner as a squatter and conceded the applicability of the requested eviction. However, there were also reasons to deny this character, primarily based on the “estoppel theory” as a consequence of which every person must respond to the expectations that their behavior caused. Therefore, it was deemed that a partner who was part of a de facto family cannot then base themselves on a lack of legitimacy of the union to implore the eviction of the other partner as a squatter.

Act No. 18,246 sanctioned provisions expressed by the indicated cases, that govern all common-law relationships, apart from couples that have been living together for five years.

In effect, article 25 of the Act provided that all rules concerning the issue of leases that provide benefits for the spouse, would replace the word “spouse” with the phrase “spouse or common-law partner;” so that the legal assignment of the aforementioned lease contract would benefit the common-law partner as it would a spouse.

On the other hand, article 26 of the Act adds article 36 *bis* to Decree-Law No. 14,219 of July 4, 1974, which states that “the former common-law partner may evict from their property, or enact any other right which they hold, the person who was part of the common-law union, within the

27. See Ordoqui, “The Natural Family (*more uxorio* common-law relationship) and Leasing Contracts,” published in *the Uruguayan Family Law Magazine* No. 6, Montevideo, F.C.U., 1991, pages 123-40.

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timeframe and with the limited exceptions provided in Article 35 of this Act.” That is to say, that if necessary the eviction of the squatting partner can be applied.²⁸

10. CLAIMS FOR DAMAGES CAUSED TO ONE OF THE COMMON-LAW PARTNERS.

In Uruguayan law, there are no legal provisions about who is entitled to demand compensation for damages resulting from the occurrence of an unlawful act; however, the courts have agreed to partners’ claims in this respect.²⁹

Even though in the first stage it was understood that a common-law partner was not entitled to claim compensation for damages suffered as a result of the death of the other, this position has been changing over time. In this course, from the year 1965, in recognition of a ruling by Judge Frigerio, rights of the partner to claim compensation were recognized when the other partner, who was the victim of an unlawful act that caused his or her death, acted as financial support in the relationship and the existence of damage is true and real.³⁰ Also, after 1992, courts began to allow claims by the common-law partner even if the deceased partner was married, whenever they were actually separated from their spouse.

More recently, by a resolution of May 7, 2003 issued by the Court of Civil Appeals of the Fourth Hearing, a lower court ruling was confirmed in which it recognized the right of a member of a same-sex couple to be compensated for the death of the other which was caused by the illicit act of a third party. The ruling acknowledged that the stable relationship between the deceased and their same-sex partner, which, according to the Court, cannot be categorized as illegal nor rejected by the current valuation standards in today’s society, so it cannot be doubted that emotional ties were disrupted by the death.

The courts must follow the position taken in this latest ruling in the future and it shall be applied that “homosexual unions are equal to heterosexual unions regarding the right to sue for damages,” which is supported by the fact that there is no reason to justify different treatment.³¹

28. Tomé Gómez, “Reflections on the Law on Common-law Unions and their Incidence in Leases and Evictions,” *Uruguayan Family Law Magazine* No. 21, Doctrine section, Montevideo, F.C.U., 2009, page 229.

29. In one ruling it was decided that the partner of the victim, who was riding a bicycle on the road and was hit by a car driving in the same direction, had active standing to claim, as it was a stable relationship, compensation for their own moral damage, as well as on behalf of their minor children recognized by the victim (Court of Civil Appeals 8th Hearing on November 23, 1993, published in *Annual J. Uruguayan Civil L.*, T. XXIV, f. 179, page 69).

30. Ordoqui Castilla, *Common-law Relationships*, *op. cit.*, page 139.

31. Venturini, “Evolution of Doctrine and Jurisprudence of the Active Legitimacy

11. ADOPTION

The approval of Act No. 18,590, on September 18, 2009, produced substantial amendments to Uruguayan law to regulations that for decades had governed non-biological parentage. In essence: a) it set aside the distinction between simple and full adoption, as a single adoption model exists, which relates to what was adoptive legitimation or full adoption; b) the “Uruguayan Institute of Children and Adolescents” administrative body was granted broad powers to act on adoptions.

With the approval of Act No. 18,590, national and international media gave attention to the fact that Uruguay had become the first South American country to support adoption by same-sex couples. However, in the legal environment that statement does not so appear. Actually, the Act did not, in any of the revealed precepts, explicitly allude to two people of the same sex being allowed to adopt a child or adolescent together.

The first section of article 139, entitled “Adoption of the child of a spouse or common-law partner,” states that “adoption is permitted by the new spouse or common-law partner of the parent of a child who was born within or outside of the marriage recognized by the other spouse or common-law partner, provided that the child or adolescent has lost all bonds with the other parent . . .” And in article 140(A) it emerges that “no one can be adopted by more than one person apart from two spouses or common-law partners. This prohibition shall not apply to divorced spouses and ex-common-law partners who are subject to conform to both and when the care or custody of the child or adolescent began during the marriage or common-law relationship and was completed after its dissolution.” Also, article 140, in the final paragraph, states that: “in this case of spouses or common-law partners, they must have lived together for at least four years.”

From all this it clearly emerges that common-law partners can adopt, unlike what is set forth in the regime prior to the Act, in which in order to proceed to full adoption the adoptive parents are inevitably required to be married.

However, as I previously stated, the Act at no time refers specifically to same-sex couples. And, it goes without saying that if you wanted to produce a change of such magnitude in the Uruguayan system, the legislature should refer to such couples expressly.

But the doubts increase when analyzing the determination on the surname of the adopted child, given that article 1 of the Act replaces ordinals 9 and 10 of the C.A.C. and states that “in adoption cases, the child

to Claim for Extrapatrimonial Damages: from ‘Common-law Partner’ to ‘Homosexual Couple,’ *Annual J. Uruguayan Civil L.*, T. XXXIII, Doctrine section, Montevideo, F.C.U, 2003, pages 630-31.

will substitute his or her first surname for that of the adoptive father and the second surname to that of the adoptive mother . . .” As such, the legislature understood that adoption made by a couple could only be carried out by a man and a woman, assuming the roles of mother and father.

In the view of the writer, it is clear, on the one hand, that *homosexuality does not affect whether the person will be a good or bad parent; however, on the other hand, it is also evident that the most suitable environment for children usually consists of a family that, wherever possible, has a paternal and a maternal figure.*

This, coupled with the absence of a conclusive statement by the legislature in regards to adoption by same-sex couples, leads me to believe that in Uruguay this type of adoption is not permitted.

However, given the short period of time since the new adoption law was approved, it is impossible or unrealistic to know how the courts will act and especially the Uruguayan Institute of Children and Adolescents, which is now the organization responsible for policies on adoptions.

12. SOCIAL SECURITY PROVISIONS

Act No. 18,246, which refers to “Common-law unions,” added common-law partners to the beneficiaries of the right of a pension,³² assigned by social security bodies appointed in Act No. 16,713, of September 3, 1995, provided that they comply with the legal requirements that have already been mentioned (see part 5).³³ In regards to pension benefits paid by the state agency “Social Security Bank,” the Uruguayan legislature followed differential criteria in assigning the right to a pension, according to the sex of the recipient. For a woman, all that is required is that they earn below the minimum wage required by the law, while for men it is necessary to show proof of economic dependence on the deceased or the lack of sufficient income.

In the case of widows and common-law partner beneficiaries who are aged forty or above at the date of death of their partner, or who turn this age while they are receiving the pension, will be able to use it for the rest of their lives. In the case of male beneficiaries, the pension will also be for life, unless they marry or improve their fortune.

If the beneficiary is aged between thirty and thirty-nine at the date of the partner’s death, the pension will apply for a period of five years, and for a

32. Beneficiaries already included in the law were: a) widows and widowers; b) unmarried children under twenty years of age and unmarried children over twenty-one who are absolutely unfit for work; c) parents absolutely unfit for work; and, d) divorced people.

33. The above regarding the links to the social security system was extracted from: de los Campos, *op. cit.*, pages 27 and ff.

period of two years when the beneficiaries are younger than thirty years old.

The differences according to sex are maintained when analyzing the grounds leading to the loss of pension rights. The surviving female common-law partner only loses the pension when she comes into “better luck.” This is maintained even when she remarries or forms another de facto family. For men, meanwhile, the pension is lost when he remarries or when his wealth increases.

In the case of the public state social security agencies (Caja Notarial de Seguridad Social, Caja de Jubilaciones y Pensiones de Profesionales Universitarios, and Caja Bancaria), the law likened surviving common-law partners to surviving spouses and similarly gave out the same pension entitlements regardless of the sex of the recipient. In pensions funded by these institutions, the only factor considered is the existence of the union with the requirements of the Act, so the requirements around pensions provided for the Social Security Bank lack importance, that is, they fail to reach a certain monthly income or economic dependence.

13. CONCLUSIONS

It is a well-known fact that since some time ago, numerous changes have occurred in families that were never imagined in the previous generations of legislators. Even so, the speed at which these changes have occurred makes it difficult to comprehend in its entirety the moment you are living in.³⁴ Still, it is clearly an undeniable affirmation of the fact that the family, historically, has positioned itself as one of the central figures of every society, and this is certain whatever the regulation that is analyzed, regardless of temporal or spatial parameters. But this last statement brings with it an impossibility which is to make it a conceptual approach that seeks to understand all species of family. In any case, it would depend on the location for a certain era and social context, and therefore be controversial, as it would surely be ignoring the essential characteristics that surround the families of other historical or territorial environments. It is evident that each type of family is born of the time in which it exists, of society and the cultural heritage in which it is integrated, and of economic or religious acceptances, among many other aspects. It is not possible—nor at all convenient—unlike what happens with other legal dogmatics, to receive a conception with an air of absolute permanence in time, based on

34. Hence the question of family law of “diritto vivente” (cf. Zatti, “Familia, familiae – Declinazioni de un’idea. I. La privatizzazione del Diritto di Famiglia” (Familia, Familiae – Variations of an Idea: I. Privatization of Family Law), *Rev. Familia. Rivista di diritto della famiglia e delle sucesioni in Europa (Family Review. Journal of Family and Succession Law)*, No. 1, January - March 2002, Doctrine section, page 12).

what each society has given itself and according to the family needs.

Faced with the above, as it cannot be expressed otherwise, as a consequence of the fact that legislators should not remain indifferent to social circumstances, they followed these paths of doctrine and jurisprudence as a way of solving the problems that the new realities instituted, until later, as usually happens, when the legislature made contact with them and regulated them. The changes produced have demanded, therefore, the probing of notions that were settled with some firmness in each regulation and give a new configuration to phenomena that the legislature had previously ruled on other parameters (such as marital indissolubility) or discarded outright (e.g. “*more uxorio*” cohabitation or marriage between people of the same sex).

It is evident that the increase in marriage-based family breakdowns and the increase in de facto unions pertaining to relationships in contemporary society, just to name a few relevant cases and with mere graphic value, now take place in a society based on family permanence and the prevalence of marriage above extramarital conditions. And, as is logical, the new characteristics assumed by the family in contemporary society, with disruptions of values that traditionally prevailed, did not remain distant from the legislature, and so it has served the law that it considers appropriate for diverse themes in the emerged social framework³⁵. The above leads us to the logical conclusion that there is no concept of family that can encompass all the ways in which people with blood and kinship ties have been organized throughout the ages, and perhaps it will not even be possible to do this in reference to the current family model. Indeed, rather than “family” in singular, as a universal and unique institution, it is more correct to speak of “families” in the plural, in order to designate models according to the way in which human groups have been organized historically.³⁶ As an indicative of what I have been exhibiting, the term “family,” which not only is frequently used by the legislature but also by the constituent, often appears an insufficient word to encompass the

35. In recent decades, according to statistics, there has been a process of simplification in the family in Western countries, in the sense that the number of families has increased and the average number of members has decreased; but there was also a process of family diversification as the variety of family types has increased. The close relationship that previously existed between marriage and family has been reduced, resulting in the steady increase of *more uxorio* cohabitation, reconstituted and nuclear families, while same-sex couples have also procured a place in some regulations and are aspiring to obtain full social and legal recognition in others (cfr. Prospero, “La famiglia nell’ordinamento giuridico” (Family in Legal Guidelines), *Rev. Il Diritto de Famiglia e delle persone (Family and Personal Law)*, 2008.2, Study section, page 791).

36. Cf. Rescigno, “Le famiglie ricomposte: nuove prospettive giuridiche” (The Recomposed Family: New Legal Perspectives), *Rev. Familia. Rivista di diritto della famiglia e delle sucesioni in Europa (Family Review. Journal of Family and Succession Law in Europe)*, No. 1, January - March 2002, Doctrine section, page 3.

phenomenon being represented since the meanings that fall under its umbrella are more than varied. In effect, in some cases the term is used synonymously with kinship, whether by blood or through marriage, while in other cases it is reduced to the so-called nuclear family, consisting of the parents and their children. But it is known that these families are not even remotely the only groups that can be called families, but that modern times have required the presence of additional terms to label other models not traditionally included in those; so now we also have marital, de facto, single parent, blended or assembled families, etc.

In Uruguayan society, it is evident that, for a long time now, the option of two heterosexual people living together without having to solemnize their union through the act of marriage has noticeably increased. Also, even though there is no specific census data, it is now expected that the number of de facto unions between people of the same sex will also increase, or at least receive more publicity, as much in vernacular society as in nearby societies.

Up until early 2008, the Uruguayan legal system lacked a legislative framework to regulate common-law relationships or de facto unions as a legal institution, although the increase in this phenomenon in society was noticeable, and such unions, following a universal trend, were not viewed by the general public or the legal system (as used to happen in the past) with suspicion, disfavor or discrimination.

However, the prevailing regulatory silence could not necessarily be considered a negative, or at least not in all cases. It is true that in some areas where they chose to resort to the creation of a de facto family they appeared at a distinct disadvantage compared with those who were married (e.g. to highlight the most notable cases: in matters of inheritance or alimony), but for other fields, the courts were applying models already established in the legal system (as in the case of unjust enrichment) in order to end the conflicts that arose as a result of the cohabitation of two people.

The Uruguayan legislature – through the adoption of Act No. 18,246 – largely sought to equalize de facto unions with marriages, collecting ideas from comparative law.³⁷ While it is undeniable that there do not have to be differences in the emotional bonds developed in the two institutions, a

37. As aptly pointed out in the Italian doctrine in the context of the relationship between marriage and common-law relationships, a double trend is witnessed: on the one hand, towards the *regulation of common-law relationships*, in so much as it aims to raise its legal status to the position enjoyed by marriage; and on the other hand, towards the *de-regulation of marriage*, similar to what is happening in free unions, which recognizes wide expanses of private autonomy of spouses, which make it a more private institution, in which individual choices assume greater prominence and controls are reduced (cf. Palazzani, “La famiglia ‘di fatto’ è giustificabile giuridicamente?” (Are De Facto Families Legally Justifiable?), *Rev. Il Diritto de Famiglia e delle persone (Family and Personal Law)*, 2000.1, Study section, page 249).

system of absolute equality—if it is not properly implemented—can bring disadvantages if the different structures of each are not addressed.

Marriage arises from the will of the participants to commit to sharing their lives together, assuming the rights and obligations that arise from the civil status. Meanwhile, in *de facto* unions, the proposal is much different: a constitutive commitment between the partners does not exist; being able to do it—at least between heterosexual common-law partners—they choose to maintain the absence of rights and duties and the possibility of causing the freefall of the relationship, even when it is untimely and arbitrary, when either of them deems appropriate.

The absence of this initial commitment means that the common-law relationship, even when there is a *more uxorio, or marriage-like*, status cannot be fully equated to marriage: in that commitment or constitutive obligational link is absent, and freedom, arbitrariness or discretion as to its dissolution is present, unlike what happens with the marriage bond.

That lack of a constitutive commitment and the freedom of breaking that commitment conspire against family stability advocated by Art. 40 of the National Constitution, which makes it inconvenient to regulate equality between marriage and common-law relationships.

In another directive, the non-acceptance of marriage between same-sex couples also does not constitute an attack or discrimination against those who choose to form a relationship. It is possible to envisage that even before Act No. 18,246 was introduced, Uruguayan law did not forbid or punish homosexuality or the existence of same-sex couples, but only did not recognize them legally. But what is more, the rights and duties between same-sex partners could be produced by the free play of the principle of autonomy of the will of the partners, since nothing prevented them – either contractually or through a will – from creating reciprocal alimony obligations or through the act of the last will and testament give the right of heir or legatee to the other. Furthermore, sometimes when this was not possible, the courts, by applying different general principles of law, was able to solve the issues that these relationships produced (such as property claims based on unjust enrichment or damages caused by the unlawful act of one of the partners). This was, and still is, permissible for different of same-sex couples.

Although it has been more than two years since the adoption of the “common-law unions” law, few couples have resorted to obtaining the cited recognition, so it seems that the most common future scenario will be that the legal declaration will only be sought for the breakup of the relationship, in order to resolve financial matters generated during the relationship. And this was predictable, given that heterosexual couples rarely resort to legal proceedings, which are always long and onerous, in

order to recognize a common-law relationship, when in Uruguay there are no barriers in getting a divorce (in fact quite the contrary) and where marriage is celebrated through a speedy and cheap administrative process.

Even same-sex couples, despite the fact that Uruguay has vetoed the possibility of them getting married, have not used the courts to obtain legal declaration of their relationship.

The Uruguayan common-law relationships law has had its successes, but has also produced gross technical errors.

Thus, in terms of alimony, the law provides a solution that has long been claimed by the doctrine and jurisprudence, that is, to include common-law partners among the subjects, regardless of the sex of partners, able to claim alimony after the breakup of a relationship.³⁸

With equal success, the law recognizes inheritance rights of surviving partners after the death of the other partner. However, in the opinion of the writer, in this case the solution provided by the Act is not entirely satisfactory. Incidentally, it is important to note that there still remains an unwarranted benefit for the spouse of the deceased living in a common-law relationship, even when the separation happened many years before. In this regard it is evident that the intestacy succession part of the law, which is based on the attachment between the deceased and the successor (Art. 1013 of the U.C.C.), should have excluded the spouse as heir and instead put the surviving common-law partner in their place.

On the other hand, the law should also exclude the surviving spouse as beneficiary of property rights established by Act No. 16,081, if the deceased was living in a common-law relationship with another person. However, the legislature implemented the opposite solution, since the aforementioned right, when it aims to validate the surviving cohabitant, cannot affect "the forced allowances of other beneficiaries," among which include a person who was married to the deceased, even when they were separated (Art. 11 of Act No. 18,246).

Nevertheless, the area in which Uruguayan law makes the biggest mistakes is in the regulation of the financial aspects of common-law relationships. This is based on a number of reasons.

Firstly, the inability of the legislature to regulate these issues led to the law producing a major legal uncertainty for those who seek to procure the interpretation of the law. It shows the different standpoints taken in the Uruguayan doctrine around whether goods acquired before the legal

38. The law even shows certain advantages that are only justifiable in contemporary society, such as the eradication of differences in terms of the sex of the person demanding alimony. This is because in terms of alimony owed by the ex-husband to the wife who is not responsible for the divorce, article 183 of the U.C.C. establishes a privileged position for this, which is not consistent with the labor and professional autonomy obtained in the present.

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declaration of a common-law union, once it is declared, remain the financial property of each of the partners or whether they change to joint property.

Secondly, the law is not clear when deciding on the viability of common-law couples proclaimed apart from the established system, as occurs with the option of celebrating marriage vows before the marriage. And as it cannot be otherwise, the doctrine gives conflicting answers on this subject.

Thirdly, the legislature demands legal proceedings for the legal declaration of a common-law relationship, which goes against the reasons that led these people to form a *de facto* family in the first place, that is to avoid the red tape that marriage imposes. However, in Uruguay, where marriage is a simple, fast and cheap procedure, and there are no significant obstacles in dissolving a marriage, the complexity, lengthiness and expenses that the legal process generates surely implies that heterosexual common-law couples will not resort to the courts to declare their relationship legal. In view of that, perhaps the law is more suitable for solving problems that arise in relationships between people of the same sex than for relationships between heterosexual cohabitants. This will lead to the verification of the existence of common-law unions with the requirements of the law only taking place once the *de facto* partnership is dissolved, when they make claims for acquisitions that was made by one of the partners. However, as I previously stated, the legislature has not made it clear in the solutions given exactly what can be claimed, nor what is the nature of those assets.

Lastly, Uruguayan law makes a huge error in not setting out what happens after the termination of a common-law relationship when shared assets that were formed as a result of the legal declaration of the relationship also cease. It should be noted in this course that although a common-law union can only be legally declared if the couple has cohabitated for at least five years, after it is declared and registered in the National Registry of Personal Acts—Common-Law Unions section—the shared goods are maintained, even if the *de facto* couple have broken up. And this will happen when the request for the dissolution of the relationship, requiring the separation of property, is taken, when one of the partners marries, when there is a death of one of the partners, or as new shared goods are created by at least one of the partners.

It is paradoxical, then, that a law created to regulate the consequences that arise as a result of the *de facto* cohabitation of two people, continues to produce actions when the factual platform taken into account already fails to deal with what happens after the breakup of such a union.

For all these reasons, the Uruguayan legislature only had to intervene in order to fill those gaps that caused injustice to any member of a common-

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law union, especially when the relationship was dissolved. Meanwhile, it was convenient that the prevailing situation was kept in legislative silence so that the courts were able to gather solutions without significant discrepancies (in this case, the application of unjust enrichment for property claims was emblematic).