XXVII CONGRESO INTERNACIONAL
DEL NOTARIADO

PRESENTATIONS SUBMITTED BY THE ARGENTINE REPUBLIC

Based on the presentations submitted, the analysis conducted and the talks proposed by the notaries that have contributed to this Conference, we submit to the consideration of the XXVII INTERNATIONAL CONFERENCE OF NOTARIES, under Topic I: **"SOME THOUGHTS ABOUT FAMILY LAW AND THE LAW OF SUCCESSION IN VIEW OF THE NEW SOCIAL RELATIONSHIPS",** the following conclusions and presentations:

UPON CONSIDERING: the proposal made by the organizers of this Conference, in connection with Topic I, and developed in accordance with the guidelines set by the International Coordinator, which leads us to reflect on how changes in social conduct boost changes in statutory law, specifically, regarding family law and the law of succession.

AND WHEREAS:

a) this reflection involves a retrospective view, that is: how changes in human behavior occurred over the years and within such specific fields have been taken into account, firstly by the courts when pronouncing judgment, and then by the lawmaker, in order to incorporate them into statutory rules which, generally, have received and incorporated the judicial decisions. At the same time, this reflection entails a prospective view of said changes in human conduct, which presently requires to be governed by new or different rules;

b) in the field of private law, and particularly as long as family law and the law of succession are concerned, the tension between free will –expression of individual liberties, and mainly, of the right to self-determination and to privacy- on the one hand, and public policy (*public ordre*), -repository of the values that are the essential basis of each society in each historical time, such as the respect for life and human dignity, the integral protection of the family and personal development, equality, solidarity, morals and good customs-, on the other hand, has been and shall be permanent; and regulations must always tend to achieve a fair balance;

c) the historical and genetic process of amendment of legal rules always originates in the interaction of human conducts, and is then transferred to the rule, which must seek to arrange and direct them to the attainment of certain values, mainly as regards family law. This is the way it occurs, and not the other way around.

d) In the Argentine Republic, changes in legislation have recently occurred, which are very important from both the legal and social standpoint, modifying the traditional concept of family by eliminating the requisite

of diversity of sex for the prospective spouses; and such a change has directly affected different legal institutions, though not only those related to family organization;

e) Besides, it is worth bearing in mind the proposed legislation in civil and commercial matters in the Argentine Republic, where significant amendments are also proposed to be introduced in the field of family law and the law of succession; they have been the subject matter of the several papers submitted to the Conference;

WE HEREBY PROPOSED as CONFERENCE PRESENTATIONS:

I) In GENERAL:

1) Not all changes in conducts necessarily involve an amendment to legal rules: it shall always be necessary the long-standing practice of such new conduct, as well as its acceptance and practice by a significant number of individuals involved in such change, otherwise, there exists the risk of reversing the order of the specific process of transformation of a legal institution.
2) The legislative power, as delegate and branch of government vested with such power by the community, must decide whether the change in conduct justifies changing the rules, and if such were the case, how should such new conduct be regulated and on the basis of which values and principles.
3) This delicate task requires a fine sensitivity and a thorough understanding of the feelings, convictions and needs of the whole community, as well as an approach that overcomes any sectorialism, targeting the permanently searched for "common good", which involves a real challenge for government power and tests its capacity to react timely and adequately, and therefore, tests its governance capacity.
4) A body of rules that goes unchanged despite the actual changes in the conduct of a whole society, or which is modified contrariwise to the changes actually occurring in the society, becomes completely useless, and it will probably fall into disuse without fulfilling the needs of the community.
5) A body of rules that is modified following the changes in social behavior, but disregarding the highest values of the society, not only becomes useless but also dangerous for the intimate axiological framework upon which said society is based.
6) In this process, the participation of the notary is two-fold: on the one hand, as counselor on aspects not foreseen by the law or not regulated, in order to channel the will of those who require their services as efficiently as possible, despite of any loopholes; and on the other hand, as a relevant institution acting in the community to which it belongs and with which it has a daily and direct contact, in order to state and disclose its position and opinion as it plays an important role in the

legal field and because it could be useful for the law-maker when trying to "understand" the changes in the conducts and values involved.

II) PARTICULARLY, and regarding each area of the law, as indicated in the headings:

II.1.FAMILY LAW:

II.1.1. MARRIAGE

a) Law 26,618:

By eliminating the requisite of diversity of sex for the existence of a valid marriage, law 26,618 has not only altered the essence of such institution, but it has also generated, though through a faulty methodology, serious inconsistencies both in the family law rules and in the rest of the legal system, giving rise, in certain cases, to discriminatory situations regarding heterosexual marriages with respect to homosexual ones, and even regarding woman. Furthermore, the abovementioned process consisting of a logical and chronological sequence for the modification of any legal rules and, mainly, of a pivotal institution as marriage, has not been observed; consequently we consider that:

1) It is mandatory for the legislative power to review, at least from a strict legal point of view, the regime established by law 26,618, adapting and harmonizing properly and systematically its incorporation into the legal system currently in force in the Argentine Republic, absolutely abiding by principles enshrined in the Argentine Constitution and the human rights treaties that are part of the supra-national law, trying not to create privileges or arbitrary exceptions in pursuit of an alleged non-discrimination;
2) Such review should go deeper, with an analysis sufficiently thoughtful and prudent that, taking into account the significance of the institution involved and the seriousness of the amendment introduced, will include what should have been the first stage when discussing this law, that is: to really know what is the evaluation currently existing in the Argentine society regarding this matter, and to such end, we propose that a popular vote be called pursuant to section 40 of the Argentine Constitution, to decide what is going to come of said law.
3) Without prejudice of the foregoing, we back the need for a specific legal regime applicable to same-sex unions, -which could be either the same applicable to concubinage or a different one- that should meet the needs and typical characteristics of this kind of couples, both from the personal and property standpoint.

b) Bill of Civil and Commercial Code (Executive Order 191/2011)

As regards the marriage property system, we back the proposal consisting in giving the prospective spouses the possibility to choose the property system they deem convenient, establishing the community property system as the system applicable by default and including a minimum number of imperative rules dealing with the protection of the marital home, the duty to contribute to the maintenance and support of children and household expenses, and the liability for debts with third parties, based on the principles of family responsability and joint and several liability, with the following exceptions:

1) The option for a property system should be made before the marriage, with the right to opt for other property system only once during the existence of the marital bonds, so as to prevent that the ongoing change from one system to another, may be used to prejudice the rights of third parties, generating uncertainty and affecting legal certainty.
2) Should the unlimited option to change the property system be maintained, and with the purpose of avoiding the above-referred uncertainty, we propose: the possibility that the Registry of Vital Statistics may issue a certificate, upon notary´s request, stating the property system applicable to the spouses and their impossibility to change it during a specific period of time (similar to the closing of register sheet of the Real Estate Registry), for the purpose of executing deeds o conveyance regarding the spouses´ property. We also suggest that, in order to be valid as against third parties, marriage agreements be also registered with real estate registries with jurisdiction over the place where property is located; that in order to change from the community property system to the system of separate property spouses shall first carry out the division and adjudication of the marital property and register such changes with the pertinent registries, as applicable.
3) In order to avoid fraud against third parties, under the community property system spouses should be barred from entering into contracts between them involving conveyance of property.

c) Marriage before a Notary Public

De lege ferenda we propose to introduce the option of a marriage entered into before a Notary Public due to the advantages involved as it entails greater flexibility and availability regarding the place and date of marriage. Such incorporation could be made either in the Bill of Civil and Commercial Code we are discussing here, in which case it will also allow to include, in the same document, the marriage agreements whereby the prospective spouses shall choose the property system that will apply to them; or in a special law that will amend those sections of the Civil Code currently governing marriage.

II.1.2. CONCUBINAGE

1) Regardless of the reason that originates it, the existence of concubinage is an undeniable reality existing in the Argentine society since a long time ago. The law-maker, inter alia, has considered it a valueless fact and tried to discourage it in different ways; however, it is a social behavior, a type of family that has increased in number and represents an ongoing conduct, rooted in our customs, and therefore it deserves as much attention from the State as that given to marriage.
2) We do not adhere to the position based on the absolute observance of free will pursuant to which no set of rules should be passed to regulate concubinage, thus allowing the courts to settle the conflicts which may arise. Such a position disregards the values of family responsibility and solidarity that must be taken into account and which the State must also take care of under an express constitutional mandate and, because in a written system as our system, this implies disregarding the value of "legal certainty", which requires clear and consistent general rules, with binding and coercive force typical of the law, and cannot be subject to the ups and downs of court interpretation.
3) Rules to be enacted cannot put on an equal foot concubinage and marriage as they are not identical. The equality and non-discrimination principles are not violated by giving them different legal treatment, provided justified on reasonable grounds and not upon arbitrary reasons, although the regulation of some aspects is practically the same, since there exists an apparent marriage and consequently, similar effects arise.
4) Therefore, we propose that said conducts be regulated by rules that, on the one hand, shall respect the free will of the partners of the union that have decided not to marry; and, on the other hand, shall assure the protection that the State must grant to the nuclear family created under such form of union –even if there are no issues-, thus establishing the principles of family responsibility and joint and several liability by means of a minimum number of imperative rules, whether there exists a cohabitation agreement or not.

As regards the Bill of the Civil and Commercial Code, Executive Order 191/2011:

1) In view of the complex system designed on the basis of the possibility to register concubinage and cohabitation agreements, as well as their amendments and termination, with different effects, we suggest to review the Bill and replace it with a clearer and simpler system where recordation of the union or concubinage will be optional and only for evidentiary purposes. And the rest of the regulation, under such title and further rules established in other provisions of the Bill shall be maintained, assigning them the effects provided as minimum protection, whether the union had been recorded or not.

2) Mandatory registration shall only be established with respect to property interests and effects that need to become valid against third parties, such as restrictions to the right to dispose of property and to foreclose the family residence.
3) It would be convenient that marriage agreements be made through notarial deeds so that they would benefit with a date certain and with the notarial principle consisting in keeping notarial records with the original notarial deeds and further notarial instruments –in addition to the special advisory services received from notaries- and they shall only be recorded in the pertinent property registries whenever it is necessary.
4) The so-called *Registros de Uniones Convivenciales* (Registries of Cohabiting Partners) must be clearly established, specifying where and how will they operate and, mainly which will be the reporting system they shall apply, allowing that the existence of such unions be disclosed through a flexible, simple and safe manner.
5) Among the mandatory rules, we deem it should be convenient to include the right to palimony, which is related to the obligation to give assistance and support for household expenses, both during the term of cohabitation and upon separation, and pursuant to the same terms and conditions provided for marriage.
6) We think that due to the equity principle, the surviving domestic partner should be recognized as prospective heir, though not as forced heir, but taking before collaterals.

De *lege ferenda:*

In case the bill of the Argentine Civil and Commercial Code that is presently under analysis by the Argentine Congress were not enacted, we propose that a special law be passed dealing with all those effects deemed essential, and which are as follows: the obligation of mutual assistance; right to palimony during cohabitation and upon termination of cohabitation in case of need, the obligation to contribute to the support and maintenance of children, joint and several liability for debts with third parties, undertaken for household expenses, the protection of the family home, the preferential adjudication of the right to use the family home to the partner in charge of the custody and care of minor or disabled children, and the right of habitation of the surviving domestic partner in case of death.

De *lege lata:*

1) In the meantime, as notaries public, we must comply with our duty to give advice to those who have chosen this type of union, about the current state of law and case-law, trying to suggest the best alternatives available to protect the rights and expectations of our clients..

2) Among said alternatives, we deem it is possible to execute, before a notary public, agreements to regulate several property issues, including the right to palimony, since although they have not been foreseen by the law-maker in our legislation, they are not prohibited provided they do not violate public policy, morals and good customs, and therefore they are absolutely effective and enforceable.

I.1.3.FILIATION:

As regards the Bill of Civil and Commercial Code, Executive Decree 191/2011:

1) In general, we think that the changes introduced in the Bill regarding filiation actions are positive, since they are intended to cure current inequities and they create a system based on the actual acknowledgment of different types of family from a pluralist and equalitarian perspective, in accordance with the mandates established in our Constitution, as it establishes that all children (both legitimate and illegitimate) are on an equal footing, makes the legal determination of filiation easier and speedier; and highlights the access to and significance of genetic evidence as the means to attain biologic truth.
2) The incorporation of a new source of filiation, the result of assisted reproductive technologies, consisting of the express will to procreate, introduces the need to effectively and safely obtain the consent of the prospective parents, even after death. So, we recommend that the acknowledgment of paternity/motherhood, in those cases of assisted reproductive treatments, be made before a notary public, since the latter is the legal professional skilled in notarial techniques and the officer whose acts are given full faith and credit, and who will give certainty about the lawfulness of the act and provide such notarial act with the pertinent legal formalities necessary to avoid, to the extent possible, future disputes.
3) Without prejudice of the rules included in the Bill, and bearing in mind that there is a legal loophole in Argentina regarding this matter, we consider that the enactment of a law to regulate all aspects related to assisted reproductive technologies is really urgent, since the advances in the arena of technology must be backed by a legal structure so that such activities may be correctly channeled, avoiding their denaturalization, mainly when human integrity and dignity are involved.

I.1.4. <u>ADOPTION</u>:

1) Due to the actual state of legislation and social circumstances existing in Argentina, together with overloaded courts, we suggest that the convenience and usefulness of notarial intervention be seriously considered in connection with adoption proceedings, with the effective performance of legal acts intended to complete and perfect adoptions, since the notary public is a skilled legal

professional vested with a public task. .

2) Current regulations, and those included in the Bill, should improve adoption proceedings, making them more efficient and as speedy as possible, taking into account the interests at stake.
3) We agree with the expert legal scholars that consider that the Argentine Republic cannot indefinitely reject international adoption, without urgently establishing legal protection mechanisms to prevent and fight against sale and trafficking of children.

I.1.5. MEDIATION IN THE FIELD OF FAMILY LAW AND THE PARTICIPATION OF THE NOTARY PUBLIC:

Considering:

- That mediation has become a powerful tool for those who are the real protagonists of the dispute, and provides them with inclusive, effective, sustainable and reasonable solutions;
- That the particular characteristics of notarial activity put the mediator/Notary Public in an unbeatable position that encourages his/her vocation of service, strengthening his/her skills for the pacific resolution of conflicts.
- That mediation in family matters encompasses both property and personal disputes arising from family relationships or involving interests of family members or conflicts related to the subsistence of the bonds of marriage, thus generating the need for "agreements" between family members;
- That a responsibility inherent in the social role of notaries consists in making available the elements and conditions necessary to sustain a participatory, equitative and inclusive society;
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Our proposal is as follows:

The participation of the notary public as mediator in family disputes, due to notary´s proven positive experience in our country and to the impartial and confidential conditions inherent in the notarial profession.

I.2. THE LAW OF SUCCESSION: INTESTATE SUCCESSION-TYPES OF HEIRS PROTECTION OF THE LEGITIMATE SHARE

As regards the Bill of Civil and Commercial Code, Executive Order 191/2011.

We back the change proposed regarding the law of succession, since:

1) It reduces the legitimate share of forced heirs, and improves the freely disposable share, thus reinforcing the principle of free will, which is significantly restricted in succession matters.
2) It introduces the institution of "share improvement" for the benefit of vulnerable persons (physically or mentally disabled descendants or ascendants) who, in addition to the decedent´s freely disposable share can also be benefitted with one-third of the legitimate shares of his/her co-heirs,

which could even be agreed and established *inter vivos.*

2) It expressly contemplates the possibility of waiving actions for the protection of the legitimate share in those cases where property is transferred to any of the legitimate heirs, provided made with reservation of the right of usufruct, use or habitation or for a consideration consisting of a life annuity, without any other requirement than the consent of the remaining future heirs.
3) Under extraordinary circumstances, it admits the possibility to transfer to heirs the obligation to pay alimony to the former spouse who is not self-supporting and suffers from a pre-existing disease.
4) It allows contracts on future inheritance with the purpose of protecting family businesses and interests and holdings in companies, based on the protection of family and social interests.
5) It adds new grounds for disqualifying heirs, it updates the existing ones and makes them more operative.

Notwithstanding the foregoing, we wish to make the following remarks:

1) As regards the increase of the freely disposable share, we deem that although the current situation is improved, it should be the starting point towards a greater relevance of free will, considering the possibility to reduce, in all cases, the legitimate share to one half of the decedent´s estate so as to allow, in conjunction with the other succession-related institutions, a fairer and more equitable estate planning - effective upon decedent´s death-, in full accordance with the changes occurred in family and social relationships in general.

2) The limit of said free will, which the legislation must protect, shall be the right to alimony and support and the protection of vulnerable persons.

3) It is necessary to revise the broadening of the exceptions to the agreements on future inheritance, of distributive nature, in general, and in specific cases where the agreements involve a waiver. Moreover, post mortem alimony should also be considered.

4) Taking into account that the increase in the freely disposable share could foster the execution and use of wills, we deem that the elimination of the grounds for disinheritance is a negative change, as new grounds should have been added, thus making possible the disqualification of legitimate heirs.

5) Postmortem effectiveness of powers of attorney granted by the decedent must be recognized, regarding the fulfillment of business obligations assumed by decedent while alive, which, under the current law, has proved to be a very useful and efficient tool as it assures certainty and warrants minimum litigation.

6) With respect to succession proceedings, we consider that the Bill affects powers not delegated by the

provinces, when it regulates such proceedings, and said provisions would be unconstitutional.

7) The Bill would definitely prevent any possibility that succession proceedings be conducted by a notary public, contradicting several prior bills and the trend existing in comparative law.

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