

Florida Journal of International Law

Volume 29 | Issue 1


Article 3

2017

General Overview of Cuban Family Law Legislation

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Recommended Citation

Álvarez-Tabío Albo, Ana María (2017) "General Overview of Cuban Family Law Legislation," *Florida Journal of International Law*: Vol. 29 : Iss. 1 , Article 3.
Available at: <http://scholarship.law.ufl.edu/fjl/vol29/iss1/3>

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GENERAL OVERVIEW OF CUBAN FAMILY LAW LEGISLATION

*Ana María Álvarez-Tabío Albo**

I.	IN THE FIELD OF FILIATION AND PARENT-CHILD RELATIONS	23
II.	MARRIAGE AND DE FACTO UNIONS	24
III.	ECONOMIC REGIME OF MARRIAGE (AND APPLICABLE BY EXTENSION TO THOSE RECOGNIZED)	27
IV.	MARRIAGE CRISIS AND DIVORCE.....	27
V.	INSTITUTIONS OF GUARDIANSHIP, PROTECTION, AND KINSHIP.....	28
VI.	CONCRETE PROJECTIONS FOR CUBAN FAMILY LAW IN THE FUTURE?.....	31

This Essay will take four routes that converge at multiple points. First, we will review the social context prevailing when the Family Code (Código de Familia) was promulgated on March 8, 1975, coinciding with International Women’s Day. Afterwards, we will briefly refer to other pieces of legislation that complete the universe of judicial ordinances protecting the family. Next, we will dedicate more time to examining the fundamental characteristics of the principal institutions of Cuban Family Law. Finally, we will see the challenges that must be confronted in the prevailing reality in the Cuban family and society.

The Cuban Family Code entered effect on March 8, 1975, more than 15 years after the Revolution. The profound transformations that this event produced in the social reality and the core of the Cuban family are unquestionable. It is impossible to offer a general overview of the Cuban legislation affecting Family Law without first addressing the social context in which it arises and in which the family develops, and therefore we must dedicate a few words to these topics.

The institutions that are traditionally protected by Cuban Family Law are almost the same as those protected by other pieces of Latin American legislation and even beyond the subcontinent.

But Cuba is unique; the changes in Cuban society that occurred after

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1959, although we remained in the condition of an underdeveloped Third World country, allow us to display certain indices of developed countries, especially in matters of health, education, women's rights, children's rights, and youth in all areas of social life, circumstances that have had Deep repercussions in the family organization and that has produced a *sui generis* normative treatment of many of the institutions that the law, in its regulatory function over the predominant values in the context of a social reality, is called upon to protect.

The Cuban family transformed radically in tune with new currents:

- Women were incorporated gradually and massively into the workforce. In 1975 the incorporation of women into the workforce was an unstoppable fact: 25.3% of every 100 workers were women and their representation in distinct occupational categories rose to 11.6% of workers, 48.7% of service employees, 49.1% of technicians, 67.5% of administrators, and 15.3% of managers, which demonstrates the advances achieved by women in less than two decades.
- The equality between children was assured through comprehensive protection and assistance to children and with measures that eradicated child begging and homelessness.
- An attempt was made (and is still being made, as it is a slow process) to root out every discriminatory feature but, for example, the taboo of virginity no longer exists, or the stigma that weighed upon conjugal unions other than formal marriage or upon the divorced woman or single motherhood.
- Realities that historically have placed women in an inferior position, for example, the elimination of prostitution that is converted from being a classist phenomenon of social degradation into something resulting from personal choice.
- Effective maternity protections were granted, ranging from facilities for working women to the creation of children's clubs.

However, gender prejudices and stereotypes remained latent and the obligation of domestic work remained entirely upon the shoulders of women. The challenge before the new legal text that would discipline the life of the Cuban family was enormous.

The principal institutions of Family Law are essentially contained in a new Code which reinforced its complete independence from the old Spanish Civil Code still in effect, and provided not only legislative, but also scientific, doctrinal, didactic, and institutional autonomy.

But the protection provided to the family does not fall within the

exclusive framework of the Family Code; it is completed in the legal system with other legislation enacted after its entry into force:

- First and most important, the Constitution of the Republic, enacted in 1976, dedicates Chapter IV and various other articles indirectly to the protection of the family.¹
- Others are focused on the legal protection of children and youths, with the promulgation of the Children and Youth Code (Código de la Niñez y la Juventud) in 1978, which although it contains norms of a more moral than purely legal tone, sets forth declarative principles, with a character of recommendation that shows the best values to consider in the ethical formation of Cuban children and youth.
- Along the same line of protection for minors, Decree-Law 64 was enacted on December 30, 1982, the system of care for children with behavioral disorders (removing them from the field of Criminal Law and Criminal Procedure); later, a short text of immeasurable impact, Decree-Law 76 of 1984, about Adoption, Children's Homes and Surrogate Families, and its complementary rules contained in Ministerial Resolution 48 of 1984, enacted by the Minister of Education radically modifying previous adoption regulations and introducing full adoption.
- Likewise the Penal Code contains specific rules for the protection of the family, childhood, and youth that are distinguished either by the peculiarity of the treatment of

1. Chapter IV. The Family.

Article 35: The State protects the family, motherhood and matrimony. The State recognizes in the family the fundamental cell of the society, and attributes to it essential responsibilities and functions in the education and training of the new generations.

Article 36: Marriage is the voluntary established union between a man and a woman, who are legally fit to marry, in order to live together. It is based on full equality of rights and duties for the partners, who must see to the support of the home and the integral education of their children through a joint effort compatible with the social activities of both. The law regulates the formalization, recognition and dissolution of marriage and the rights and obligations deriving from such acts.

Article 37: All children have the same rights, regardless of being born in or out of wedlock. Distinctions regarding a child's filiation are abolished. No statement shall be made either with regard to the difference in birth or the civil status of the parents in the registration of the child's birth or in any other documents that mention parenthood. The State guarantees, through adequate legal means, the determination and recognition of paternity.

Article 38: The parents have the duty to provide nourishment for their children; to help them to defend their legitimate interests and in the realization of their just aspirations; and to contribute actively to their education and integral development as useful, well-prepared citizens for life in a socialist society. It is the children's duty, in turn, to respect and help their parents.

certain types of offenses or with the reinforcement of their sanctioning frameworks.

- Law 51, the Civil Registry Law (*Ley de Registro del Estado Civil*), was enacted on July 15, 1985, complemented by its Regulation (*Reglamento*), which has played an important role in the guarantee and security of the facts and legal acts related to the civil status of persons, especially Orders of Filiation, by expressly repealing the articles of the Family Code that dealt with the recognition and registration of children and which included the procedure for the birth registry of a child in or outside the marriage.
- Decree-Law 154/94 regarding notarial divorce introduces the possibility of making public the divorce by mutual consent before a notary even with minor children.
- The Maternity Law enacted by Decree-Law 234 in 2003 and some rules in the recently-unveiled Work Code (*Código del Trabajo*). Mothers have a paid leave of 18 weeks—6 weeks before birth and 12 weeks after—with an economic benefit equal to 100% of the average income that a working woman has received as salary during the previous 12 months. After the postnatal leave, the working mother can choose to join the workforce or to take care of the son or daughter and is paid a social benefit of up to 60% of the basis of calculation for the paid maternity leave, until the first birthday of the son or daughter.

The father's rights to care for his children are recognized once the stage of the breastfeeding is finished and in later periods (paid and unpaid leave), preserving his rights as a worker based on the principle of sharing parental responsibility through the first year of life.

- Law-Decree 242 of 2007 establishes the System of Prevention and Social Care especially when dealing with young people.

Surely there are some others remaining but this is a fairly complete picture.

All the institutions developed and protected by the Family Code are previously outlined in its first article which establishes its objectives:

Article 1. This Code regulates the institutions of the family: marriage, divorce, parent-child relationships, the obligation to provide food, adoption and guardianship, with the principal objectives of contributing:

- to the strengthening of the family and the reciprocal ties

- of care, help, and respect among its members;
- to the strengthening of legally formalized marriage or judicially recognized, founded on the absolute equality of men and women’s rights;
- to the more effective compliance with parental obligations with respect to the protection, moral formation, and education of children so that they develop fully in all aspects and as worthy citizens of the socialist society;
- to the full realization of the principle of equality of all children.

Let us make a succinct examination of some fundamental characteristics; the essential features of each one that, although they do not all conform to the legislative universe in force, is an abundant sample of the *ratio essendi* of the prevailing Cuban family legal system.

I. IN THE FIELD OF FILIATION AND PARENT-CHILD RELATIONS

- First, the guiding principle that is reflected in practice is the absolute equality between children, whatever the marital status of their parents. In other words, there are no longer any legal differences between legitimate and illegitimate children, and for purposes of parent-child rights or succession, all are legitimate and enjoy absolute equality of access without limitation to family inheritance and to the enjoyment of all rights and duties emanating from parent-child and parental relationships.

With that, civil or formalized marriage was shaken from its ancestral legitimizing function of paternity; filiation is established by juridical acts of registry and recognition of the child, whether voluntary or forced, and in the latter case is imposed by courts, even regarding a child conceived in a casual relationship.

The Civil Registry Law (which we earlier said forms an indispensable part of the Cuban family legal system) establishes unequivocally that the only admissible test of filiation is the birth certificate of the child, issued with the formalities established by the same Law; only in its absence can one use the subsidiary test of continuous possession of the “child state” to presume and, if proved, to confirm “filiation.”

This is particularly true for the legal treatment of the social problems of the single mother and single-parent families, which holds the possibility of exercising the action of paternity imputation and safeguards

any lack of legal protection in which children are usually treated as inferior to the parent.²

Naturally, this right of the mother to impute paternity has corresponding rights of the father, such as the right to challenge such an imputation in a judicial process within a year of the registration. The Law establishes equality in treatment when it is the father who imputes maternity, an obviously more exceptional situation.

- The content of the exercise of parental authority, which in principle is shared by the mother and father, implies a relationship of more duties than rights for each with respect to sons and daughters under 18 years of age. That is to say, it is the binomial right-duty/right-function of a tuitive and eminently social character, of public order and for the benefit of minor children.

The causes of extinction, suspension and deprivation of the same are regulated.

- Full adoption is established, which is irrevocable and has the same effects as a parent-child relationship of consanguineous or biological origin.
- The Family Code advanced the concept of “the best interest of the child,” as recognized by the Convention on the Rights of the Child of 1989, by establishing a concept of judicial arbitration which called for “the benefit of the interests of minors.”

II. MARRIAGE AND DE FACTO UNIONS

- The sole purpose of marriage for Cuban legislation is specified in article 2 of the Family Code,³ to make a life

2. Almost 100% of births in our country take place in hospitals, and the birth declaration must be made before the Director of the Health Unit or whoever he delegates this function to (namely, Civil Status Registrars in the National Health System), which logically can be made first by the mother within seventy-two hours after the birth of the child and in any case always before the discharge of the newborn from the Health Unit. In an informal union, continuing with our example, if the father does not voluntarily participate in the act of registration of the child, the mother may declare his name or not; if she does, even if it was a casual union, or the father is formally married to another woman, the Registrar will summon him to appear before him, informing him that if within the term of ninety working days he does not agree to accept or deny paternity, the child will be registered as his. And if the father does not agree, the child is registered as his, for all legal purposes.

3. Which defines it as “la unión voluntariamente concertada de un hombre y una mujer

together, or rather, to overcome taxes by patriarchal societies that focused on the transmission of family assets and, likewise, the trilateral formula of Saint Thomas Aquinas that identified them with two specific goals—procreation and education of children—and an individual goal—mutual support. It only makes sense now to develop relationships of mutual support or life in common.

Inevitably various analyses and unanswered questions derive from this concept. The first of these is if procreation is excluded from the purposes of marriage, why are same-sex marriages not accepted? In addition to the fact that marriage is a legal institution whose effects are beyond the will of the parties, and are a matter of public order, the way in which the coexistence between the spouses develops is freely chosen by them, which is to say that they will plan whether to procreate and when to have sexual relations (or not), and no one can complain of their decision.

If life in common is required, should it be understood that if they decide to live apart, that conjugal union will cease to have effect? This relates to the Cohabitation Duty that forms part of the personal content of the conjugal legal relationship, which involves maintaining a common home as a normal element of a marriage, and which cannot be limited to a simple appearance of a common life but rather involves a behavior of coexistence, because only when there is an authentic and true coexistence can the remaining conjugal duties be complied with intensely.

However, in the case of Cuba this is accentuated with its own nuances, coexistence is not essential for a marriage to exist because the spouses may not live together physically by their own will or for outside causes, and it would be a “relaxed marriage,” or one lacking resources to provide for a common living arrangement, or one in crisis, or even a failed marriage, but after all still a marriage.

Coexistence needs the presence of body and soul. The latter is the most important, and more than the fact of having a common place to reside, the fact of intent must be taken into account.

Regardless, the lack of cohabitation should be provisional and external to the pair, who wish to live together sincerely, but they cannot manage it at the moment due to finances, work, studies, sickness, or other motives.

- Civil marriage is the only valid one, called *formalized marriage*, and may be entered by persons of different sexes

con aptitud legal para ello, a fin de hacer vida en común.”

that have reached 18 years (the age of civil majority), even if they lack the natural capacity for procreation or for consummation.

- Notwithstanding, boys reach legal puberty at 16 years of age and girls at 14. The marriage of pubescent minors is permitted with the permission of the parents or other authorized persons.
- De facto marriage is recognized. It is regulated through retroactively-formalized marriage and through the judicial recognition of non-formalized marriage, in order to equalize its effects with those of formalized or civil marriage. These are new legal treatments not only for our own legislative history, but also in the context of Latin American Comparative Law.

There has been an increase in marriages that merely formalize a previous free and stable union. Cuban Family Law provides the possibility of formalizing a preexisting informal union before an appropriate functionary (notary or civil status recorder) with retroactive effects to the initial moment of union.

Retroactively formalizing marriage is an extrajudicial means of legalizing a union from its beginning, with testimonial evidence that “it had” legal capacity or ability to backtrack the effects of the marriage to that date.

If, on the contrary, the free union was never legalized and one of the partners dies or abandons the relationship after years of cohabitation, it falls to the other partner to make a claim urging the court to recognize that union from its beginning to the date of its termination, with the same civil effects upon its termination as those of a formalized marriage, that is, the right to liquidate common property, and to access the “pension or inheritance” of the deceased partner.

- The benefits of putative marriage are also admitted for the judicial recognition of the de facto union.
- The principle of absolute equality between men and women governs the personal sphere of the legal-conjugal relationship. The wife does not owe obedience to the husband, nor is she obligated to follow him wherever he establishes his residence; nor is the husband the protector of the woman. Both do maintain consideration and due respect, and help each other mutually. Partnership is established in domestic roles, assigning economic value to domestic work.

III. ECONOMIC REGIME OF MARRIAGE (AND APPLICABLE BY EXTENSION TO THOSE RECOGNIZED)

- The only economic regime of marriage is that is established is one of marital community property (Art. 29), which will exist from the time the marriage is formalized or from the moment on which the effects of marital union are recognized (Art. 19 and Art. 20).
- The costs or expenses of marriage, per the established principle of equality, will be paid by the marital community property (Art. 33).
- Spouses, once the marriage has been terminated, retain all property acquired before the marriage, any gifts or inheritance received during the marriage, or any lucrative title, exchange or substitution of personal property, or those acquired with their own money, or those of exclusive personal use.
- The community administration corresponds to both spouses without distinction and either of them may also acquire the goods that by their nature are destined to the family's ordinary use or consumption.
- Acts of ownership over common property require the consent of the wife and husband.
- Upon termination of the marriage the community property is divided in half between the spouses, regardless of the amount that each has contributed. In the latter case, it may be provided that certain domestic goods necessary for the education and development of the children are awarded to the spouse that will have their custody and care, which has similar effects upon the institution of the "family patrimony."
- Divorce is regulated by just cause before the courts, as well as by mutual agreement that is usually aired before the Notary Public, even with minor children.

IV. MARRIAGE CRISIS AND DIVORCE

The system of divorce here contemplated is the legal doctrine of remedy-divorce and not penalty-divorce, with no guilt or pre-established causes. That is to say, abolishing the restrictive relationship of causal factors in divorce for just cause did not establish a system of no-fault divorce, but rather only indicated that such causes are not pre-established, so guilt is not valued.

Remedy-divorce is conceived to end an intolerable situation that makes it impossible to achieve the purposes of marriage, with the requirement, of course, of alleging the existence of causes that would have created that objective situation, but without a declaration of guilt. In no way has there been established a system of no-fault divorce, but rather a kind of *causa generalis*: the objective discrepancy.

Separating the divorce process from guilt has also separated the possibility of alimony from innocence or guilt; it arises in any case as a result of the needs of the ex-spouse (whether man or woman) no matter what was the cause of the divorce or which spouse caused the marital rupture.

Although it is true that liberating divorce from these requirements and formalities has expedited the process, the high rates of divorce in Cuban society are not due to the manner in which divorce is regulated, but rather are fundamentally a result of the profound qualitative changes in the socioeconomic, educational, and psychological status of women.

V. INSTITUTIONS OF GUARDIANSHIP, PROTECTION, AND KINSHIP

- The obligation to provide “support” includes spouses (and ex – spouses in certain cases), to all ancestors and descendants, and to siblings and half-siblings. The “support” contemplated is always civil, not natural.
- Guardianship is established for minors and adults who lack legal capacity. It is conceived as a public or quasi-public judicial authority, with more “tuitive” purposes than patrimonial protection.
- Kinship extends beyond the parent–child relationship, establishing reciprocal legal duties and obligations between siblings and half-siblings, grandparents, aunts and uncles.

In the absence of a law of family procedure, special judges have provided conflict resolution in the field of family justice per the Instructions of the Governing Council of the People’s Supreme Court. The first, #187 of 2007 and the reigning Instruction 216 of 2012 that, among its most relevant points, refers to the Convention on the Rights of the Child as the mandatory and direct standard of application; establishes a hearing for the child in adequate space and conditions taking into account their progressive capacity; the presence of a multidisciplinary with specialized professional criteria for integral solutions; the specialization of family judges; establishes hearings to rationalize litigation and leaving latent only those topics in which there is no agreement: conflicts arising from separations and divorces, especially

questions related to the care and reporting regime of minors and the conciliating role of the Court.

In the little more than four decades since the Family Code was enacted, the social context in which family norms apply has been transformed radically, not only by the position women have achieved on the social sphere, which has had repercussions in the family sphere, but also by the increasingly active role assigned to children and adolescents as part of more democratizing styles within the family, between the couple and their children, where children reclaim the right to participate actively in family and social life, to have their opinions heard, to defend their views and to hear arguments to persuade them.

The treatment of some of the institutions covered in the standard has already been overtaken by time:

- In 2014 60.3% of college graduates, 66.3% of professionals and technicians, and 47.2% of managers are women.
- Low levels of fertility: 1.6 children per woman, far below the replacement rate of 2.1.
- Progressive aging of the population: a life expectancy of 76.5 years for men and 80.5 for women.
- Internal migrations to provincial capitals creating marginal strips and a growing process of urbanization.
- Emigration to the United States and other countries—approximately 30,000 people per year, including a large number of women.
- A large number of couples living together consensually. Few marriages and a high rate of divorce: 55.3 divorces for every 100 marriages.
- Large numbers of new unions, second and third marriages, and female heads of households.
- The minor as an active subject in legal relationships and the introduction of a dynamic notion of the exercise of capacity, forcing the gradual evolution of their powers to be recognized.
- Diverse family typologies that despite maintaining patriarchal stereotypes tend towards democratization and a matricentric family structure.

Today in Cuba women constitute:

- 48% of the work force in the state civil sector.
- 46% of managers.
- 66% of professors and technicians of the country, 81.9% of teachers and scientists.

- More than 70% of prosecutors, Presidents of Provincial Tribunals, professional judges, and the work force in the health and education sectors.
- 53.5% in the system of Science, Innovation and Technology and more than 64.2% of the staff that provides collaborative services in various countries of the world.
- Exceed 29% of self-employed workers.
- They are more than 63.6% of university graduates and 66.0% of technicians and professionals in all the country.
- They have broken stereotypes by breaking into non-traditional careers.
- They represent 49.8% of students pursuing careers in Natural Sciences and Mathematics, 70% of Economics, 74.7% of graduates in Medicine, and 53.4% of the teaching staff in higher education.

Important progress has been made in rural areas:

- The number of women in the agricultural sector and in cooperatives has increased.
- In terms of economic control, they represent 59%, and those in charge of the organization represent 64%.
- The technical force exceeds 5,000 women, 36.7%, and 31% are engineers (1,665 women).
- The training of women in these areas has been strengthened through different training programs and workshops on gender awareness.

As fewer and fewer Cuban households recognize a man as the principal person or head, the proportion of female-headed households is increasing. The increase in the proportion of female-headed households is associated, in the Cuban case, with the changes that women have experienced within society and the family, which have increased their autonomy and authority.

But that transforms women into multi-functional beings in detriment to other aspects. Today the Cuban woman is capable of maintaining a home, educating her children, and making family as well as non-family decisions, an authentic Wonder Women given that in daily life the roles of men and women follow conventional stereotypes outlined by sexist values and customs.

VI. CONCRETE PROJECTIONS FOR CUBAN FAMILY LAW IN THE FUTURE?

Although it does not cover all deficiencies, some important changes are already foreseen in the projections of a new Family Code:

- Raising the age for women to consent to marriage to 16, equalizing the standard for both sexes.
- Establishing the right of family communication of grandparents, other relatives, and third persons with legitimate interests with minors or legally incapacitated persons.
- Explicitly introducing the rights of children and adolescents in family relationships in accordance with the Convention on the Rights of the Child.
- Incorporating new institutions of great importance for the exercise of parental authority, such as extended, rehabilitated, and assisted parental authority.
- Regulating shared care and custody between mother and father when circumstances require. Likewise, when there are difficulties in family communication between the custodial and non-custodial parent, the Court may arrange a meeting point or meeting place to have effective communication.
- Paying special attention to everything related to domestic violence, with the specific objective of its being explicitly considered as one of the distorting evils of family relations, with consequent references to the Penal Code when appropriate.
- Introducing three new Titles: “Assistance to the mother or father in special circumstances”; “Assistance to the elderly” and “Assistance to persons with disabilities.”
- Introducing a Title regarding respect for the rights of individuals on the basis of their sexual orientation and gender identity, as well as the possibility of legally recognizing same-sex unions, and authorizing their legalization and dissolution, without designating them marriages, with the goal of having legal effects, mainly in the patrimonial order.

The challenges are many and changing the rules will not be enough without reaching everyone’s mind and consciousness in order for protection and the resolution of conflicts that are generated in the family environment.

First, “addressing the pressing and already urgent reforms necessary

to move towards a 21st century Family Law according to the changes that this group suffers in the Cuban social context and to enact them once and for all;” although these reforms of Family Law require deep reflection by the legislators and great doses of legislative prudence, as Aristotle reminds us, neither should they be eternal.

Second, “generating spaces for discussion with the presence of all legal and non-legal disciplines involved that allow” the multidisciplinary treatment of the family.

Third, in line with the previous, promoting effective legislative and jurisdictional policies aimed at the legal protection of the family in all spheres, whether judicial through the expeditious and efficient resolution of family conflicts or through practices that dejudicialize them to the extent possible; eliminating the stigma of incapacitation and the binomial of incapacity-capacity, by providing systems of *ad hoc* assistance and guardianship tailored to each individual's circumstances; reinforcing measures to protect disadvantaged persons within the family and society, specifically children and adolescents, persons of advanced age, and persons with disabilities based on the basic principles of the best interests of the child, healthy aging, and support for disability.

These spaces of legal discussion and the concrete measures that are derived from them, will respond to the current challenges of Family Law spread through several areas:

- The impact on the family of new technological and scientific advances reflected in forms of communicating within the family environment and in new forms of procreation.
- Early marriages and high divorce rates.
- The displacement of the law's concern towards other family structures or cohabitations, no longer focusing exclusively on the nuclear family (father, mother and children) based on heterosexual marriage.
- The role of minors.
- The debate over migration processes that have generated so-called *transnational families*.
- The declining fertility levels which require addressing the fact of an *aging population*, the regulation of agreements for the care of the elderly, with special attention to dependence and the precise regulation of food.
- The fight against the shameful stain left on society and on the family by *gender violence, domestic violence, and emotional abandonment*.
- The regulation of *alternative dispute resolution systems*, such as *family mediation*, which tend to *de-judicialize* family law as much as possible.

Fourth, though not least important, “it is necessary to design all the regulations as part of a systemic effort to produce the profound regeneration demanded by society.” Reforms on transcendent issues like the family must be endowed with the necessary stability and, consequently, they require consensus, but also some urgency, without impairment to reflection, intellectual certainty, and trust from the social, economic, and legal points of view.

Left Blank Intentionally