

## Brigham Young University Journal of Public Law

---

Volume 27

Issue 2 *Symposium: On Whether Legalization of Same-Sex Marriage is Constitutionally Required*—2012

Article 10

---

3-1-2013

# How the Battle to Redefine Marriage Affected Family Law in Argentina

Ursula C. Basset

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

 Part of the [Comparative and Foreign Law Commons](#), and the [Family Law Commons](#)

---

### Recommended Citation

Ursula C. Basset, *How the Battle to Redefine Marriage Affected Family Law in Argentina*, 27 *BYU J. Pub. L.* 529 (2013).  
Available at: <https://digitalcommons.law.byu.edu/jpl/vol27/iss2/10>

This Symposium Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

*Symposium on Whether  
Legalization of Same-Sex Marriage  
Is Constitutionally Required—2012*

III.

INTERNATIONAL AND  
COMPARATIVE PERSPECTIVES ON  
CONSTITUTIONAL MANDATES FOR  
SAME-SEX MARRIAGE

*Contributing Authors*

CARMEN GARCIMARTÍN  
AUGUSTO ZIMMERMANN  
LYNN D. WARDLE  
URSULA BASSET



# How the Battle to Redefine Marriage Affected Family Law in Argentina

*Ursula C. Basset*\*

## ABSTRACT

*The Argentine experiment with same-sex marriage was groundbreaking. Only a year after its legalization, almost every institution in family law (and some other institutions based on marriage) was partially or entirely reformulated.*

*This Article describes the implosion in civil law resulting from the redefinition of marriage. It reviews main developments in Argentine law since the legalization of same-sex marriage. As the gender-neutral paradigm expands, heteronormativity and the peculiarities of heterosexual relations are gradually being banished from positive law. The redefinition of marriage also impacts inequalities that stem from sexual diversity, like the rights of women, filiation, and the identity rights of children.*

*In light of the Argentine experience, this Article calls for a preservation of the peculiarities of heteronormativity in positive law. The legal recognition of same-sex couples should not involve an abolition of the special rights that emerge from heterosexual partnerships.*

## CONTENTS

I. THE LAW IN CONTEXT: THE HISTORY OF LEGALIZING SAME-SEX MARRIAGE IN ARGENTINA .....	530
II. WHAT THE SAME-SEX-MARRIAGE LAW MEANT TO ARGENTINA.....	533
III. THE AFTERMATH: THE EXPANSIVE FORCE OF GENDER NEUTRALITY .....	534
IV. THE LAW TURNED UPSIDE DOWN.....	539
V. CONCLUDING THOUGHTS .....	540

---

\* PhD; Faculty of Law, Pontificia Universidad Católica Argentina; member of the Executive Committee of the Academy for the Study of the Family and of the Executive Committee of the International Society of Family Law; expert witness during the process to legalize same-sex marriage in Argentina; author of the Draft of Civil Unions Law, approved by a majority of the Law Commission in the Argentine Senate.

I. THE LAW IN CONTEXT: THE HISTORY OF LEGALIZING  
SAME-SEX MARRIAGE IN ARGENTINA

Argentina was the antepenultimate Latin American country to pass laws permitting divorce.<sup>1</sup> In fact, it was one of the last countries in the world to do so.<sup>2</sup> Yet it ended up being the first Latin American country, and tenth in the world, to enact a same-sex-marriage law.<sup>3</sup> Before Argentina legalized same-sex marriage, it did not even have legal recognition of civil unions or partnerships<sup>4</sup> How did this substantive change to the law happen so suddenly?

In 2002, the city of Buenos Aires passed a law legalizing civil unions within the city.<sup>5</sup> The draft of the legislation did not contain the duty of fidelity.<sup>6</sup> This meant that only two years of cohabitation were required, and the parties could mutual agree to waive that requirement.<sup>7</sup> Leaders of the Homosexual Community in Argentina (CHA) had expressly asked: (a) to exclude the duty of fidelity; (b) to facilitate as much as possible the dissolution of those unions; and (c) to provide ample faculties to make agreements concerning property rights, alimony, and other issues.<sup>8</sup> The civil partners were granted social-security rights, including pension rights, but not rights of succession.<sup>9</sup>

---

1. The last Latin American country to pass a divorce law was Chile in 2005. Before that, Paraguay passed its divorce law in 1991. Argentina passed its divorce law in 1987. Before that, during the second government of Juan Domingo Perón—while he was married to the famous “Evita”—there was a short period in which a divorce law was enacted. However, this law was soon “suspended” by the military government after a coup d’état (law 14.394 in 1954, later “suspended” by decree 4070/1956). Jesus de Galíndez, *El divorcio en el derecho comparado de América*, 6 BOLETÍN DEL INSTITUTO DE DERECHO COMPARADO DE MÉXICO 9 (1949) (Mex.), available at <http://www.juridicas.unam.mx/publica/librev/rev/indercom/cont/6/dtr/dtr1.pdf>. A short history of divorce in Argentine law can be found in DIEGO LUCIO BARROETAVEÑA, *EL DIVORCIO EN EL DERECHO ARGENTINO* (1967) (Arg.).

2. Apparently, the only countries in the world without a divorce law are the Philippines and Vatican City. Malta passed its divorce law in 2011, Chile in 2005, Paraguay in 1991, and Argentina in 1987.

3. See Lynn D. Wardle, *Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and “Thick” and “Thin” Conceptions of Marriage*, 81 FORDHAM L. REV. 771, 825 (2012).

4. FRANCISCO M. FERRER ET AL., *NUEVO RÉGIMEN DEL MATRIMONIO CIVIL: LEY 26,618* (2010) (Arg.).

5. Law 1004/2002. City of Buenos Aires.

6. *Id.*

7. *Id.*

8. FERRER ET AL., *supra* note 4, at 31.

9. Néstor E. Solari, *Beneficiarios de las obras sociales. Situación de las parejas homosexuales*, REVISTA JURÍDICA ARGENTINA—LA LEY [L.L.] (2010-C-546) (Arg.); Néstor E. Solari, *La orientación sexual en materia previsional*, L.L., Sept. 9, 2008; Diego Dellavedova, *Pensión por fallecimiento para parejas homosexuales*, L.L. (2011-DT-2451); German J. Bidart Campos, *La ley de*

This local regulation was received with criticism not so much because it granted rights to same-sex couples,<sup>10</sup> but because civil law is a federal matter in Argentina.<sup>11</sup> Local legislatures cannot pass civil laws.<sup>12</sup> Despite that, however, the bill was successfully enacted. After the passage of the Buenos Aires law, same-sex unions were still very rare. They occurred at a rate of five to twenty per month.<sup>13</sup> Several years then passed without much ado, and in 2005, Spain legalized same-sex marriage.<sup>14</sup> This reignited the spark for a similar law in Argentina—but only mildly—as a few voices began suggesting passage of a national civil-union law.<sup>15</sup>

The Peronist party (which currently rules in Argentina) had never been fond of minorities' claims. Peron flourished during nationalist political movements, and his followers were reluctant to discuss same-sex marriage or even civil unions. By 2006, the main LGBT associations had managed to form a national front to unite the LGBT communities (known as “Federación Argentina LGBT”).<sup>16</sup> The leader was María Rachid, a self-confessed Trotskyist who studied queer studies in America.<sup>17</sup> In an interview, she stated that she never even dreamed of passing a same-sex-marriage law—the most she had hoped for was a national civil-union law.<sup>18</sup> She further narrated the chain of events leading to the legalization of same-sex marriage.

In a debate, a priest said to me: We do not object to your being to-

“*unión civil*” de la Ciudad Autónoma de Buenos Aires, L.L. (2003-C-1495); Jorge O. Perrino, *Derecho de Familia*, ABELEDO PERROT No. 7002/004329 (2006) (Arg.).

10. Criticism because of the recognition of legal effects to same-sex couples was not very widespread. See, e.g., Omar U. Barbero, *Convivencia de homosexuales (ley 1004 de la Ciudad Autónoma de Buenos Aires)*, EL DERECHO [E.D.] (2003-205-672) (Arg.).

11. Perrino, *supra* note 9. German Bidart Campos, an expert in public law, did not criticize the law on this subject. Instead, he pointed out that the law's scope was restricted to local competencies of the City of Buenos Aires. See Bidart Campos, *supra* note 9.

12. Art. 75, inc. 12, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

13. See Ministerio de Justicia y Seguridad, *Cuadro 7 Uniones civiles inscriptas en el Registro Civil por composición de la pareja. Ciudad de Buenos Aires. Julio 2008/julio 2009*, BUENOSAIRES.GOB, [http://www.buenosaires.gob.ar/areas/hacienda/sis\\_estadistico/boletin/agos\\_to09/vitalesc7.htm](http://www.buenosaires.gob.ar/areas/hacienda/sis_estadistico/boletin/agos_to09/vitalesc7.htm) (last visited June 6, 2013).

14. Same-Sex-Marriage Law (B.O.E. 2005, 13) (Spain).

15. Representatives Guillermo F. Baigorri and Adriana del Carmen Marino introduced Law No. 4050-D-2006, July 20, 2006, available at <http://bit.ly/Law4050-D-2006>.

16. See *Objetivos y Propuestas*, FEDERACIÓN ARG. LGBT, <http://www.lgbt.org.ar/02-objetivos.php> (last visited June 6, 2013).

17. Soledad Vallejos, *La presidenta de la FALGBT, María Rachid, narra el camino que llevó al matrimonio igualitario* [The President of the FALGBT, Maria Rachid, Recounts the Path that Led to Marriage Equality], INSURRECTASYPUNTO (July 18, 2010, 9:12 PM), <http://bit.ly/19NGBam>.

18. *Id.*

gether and having some rights and duties and calling it as you wish to. However, do not mess with marriage, because marriage is a sacred institution. Having heard these words, I thought: If these people do not want us to mess with marriage, it has to be because marriage touches a nerve central to society.<sup>19</sup>

Ms. Rachid went on to explain that from the beginning, the political parties on the left supported LGBT rights.<sup>20</sup> This support was not enough, however, since in the Argentina Parliament the parties on the left were always in the minority.<sup>21</sup> Ms. Rachid's group also struggled with the CHA because it did not support passing a same-sex-marriage law.<sup>22</sup> The CHA held the historical position that marriage was ill-suited to homosexual relationships. The activists presented the issue as one of equality: it was not so much about the essence of marriage, but about gaining social recognition for the equal dignity of homosexuality. In 2009, the majority Peronist party had a bad election and lost many seats in Parliament, though it retained the majority.<sup>23</sup> Statistics showed that the only way they could regain the lost votes was by moving the party to the left.<sup>24</sup> At that time, Nestor Kirchner, an influential representative and past President whose wife was by then President, decided he would support same-sex marriage as a part of his new political strategy.<sup>25</sup> The only time he voted during the year and a half he had occupied the seat was when the vote for same-sex marriage took place.<sup>26</sup>

In the Senate, half of the members represented conservative provinces. Conservative senators agreed upon a draft of a national civil-union law for heterosexual and homosexual couples. Two-thirds of the Senate Commission on Legal Matters approved the draft.<sup>27</sup>

---

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See, e.g., *Dura derrota de Kirchner*, LA NACIÓN (Jun. 29, 2009), <http://bit.ly/15R5kbf>.

24. Fernando Laborda, *Matrimonio homosexual: las razones de los Kirchner*, LA NACIÓN (Jul. 13, 2010), <http://bit.ly/ZUsoXo>.

25. See, e.g., *Néstor Kirchner prometió impulsar el matrimonio gay lésbico en Diputados*, AG MAG. (Dec. 9, 2009), <http://bit.ly/11orbCT>.

26. *Kirchner irá a Diputados para votar a favor del matrimonio gay*, INFOBAE (Apr. 30, 2010), <http://bit.ly/10UVt3I>. Kirchner's first appearance in the House of Representative since his election seven months before was to vote for same-sex marriage. *Kirchner reapareció en el Congreso y votó a favor del matrimonio gay*, ÁMBITO (May 5, 2010), <http://bit.ly/11IWYNy>.

27. Diego González, *Fracasó dictamen sobre matrimonio gay en el Senado, pero avanza uno sobre unión civil*, ÁMBITO (Jul. 6, 2010), <http://www.ambito.com/noticia.asp?id=530856>.

Despite that, it was anticipated that that bill would eventually fail.<sup>28</sup>

The governing party then took three measures. First, it turned down the civil-union bill without explanation and postponed the right to appeal this measure until after the vote for same-sex marriage took place.<sup>29</sup> Second, some opponents of same-sex marriage were pressured or offered favors in return for their votes—or just for their absence—during the ballot.<sup>30</sup> Third, some of the senators opposing the bill were passed narrowly: by only three votes and three absences.<sup>31</sup> Scholars who backed the bill did not call it merely a “reform to the marriage law” (as the previous divorce law was called) but “egalitarian marriage.”

A law of such importance to the LGBT movement may have eventually gained legitimacy without undermining the rules of the process. Further, the wording of the bill that was passed was very deficient and triggered countless loopholes. Proponents always held, however, that no matter what, the approval of this law would lay the groundwork for long-lasting changes.<sup>32</sup>

## II. WHAT THE SAME-SEX-MARRIAGE LAW MEANT TO ARGENTINA

Only one month after the law was enacted, the main leftist newspaper in Argentina (quite close to the Government)<sup>33</sup> published an interesting interview from the lawyers of the LGBT front.<sup>34</sup> Among other questions, they were asked about the concept and duties that

28. Soledad Vallejos, *Matrimonio gay con final abierto en el Senado*, PÁGINA 12 (Jul. 7, 2010), <http://www.pagina12.com.ar/diario/elpais/1-149024-2010-07-07.html>.

29. *El oficialismo presentó una impugnación contra el dictamen de unión civil en el Senado*, ÁMBITO (Jul. 8, 2010), <http://www.ambito.com/noticia.asp?id=531361>; *Duro cruce entre Negre de Alonso, Pichetto y el presidente provisional*, INFOBAE (Jul. 14, 2010), <http://bit.ly/ZxhmVy>.

30. Some of the concerned senators stated this publicly. *E.g.*, Lucrecia Bullrich, *El poder invisible de las ausencias*, PERIODISMO DE VERDAD (Jul. 16, 2010), <http://bit.ly/11IXpHS>; Mariano Obarrio, *Menem prefirió la promesa de Kirchner a votar*, PERIODISMO DE VERDAD (Jul. 16, 2010), <http://bit.ly/19Oc38l>; Gustavo Ybarra, *Presiona el gobierno a favor de la boda gay*, LA NACIÓN (Jul. 2, 2010), <http://bit.ly/1254NmU>.

30. This process is well documented in Ursula C. Basset, *Una ley con marca de nacimiento y sin denotado: la 26.618 de matrimonio “gender neutral,”* L.L. (2010-36-2482) (Arg.).

31. *Id.*

32. *A la Vista: 20 preguntas antes del sí, quiero*, PÁGINA 12, Sept. 17, 2012.

33. In a press release, the government stated that it provided the newspaper *Página 12*—from which this Article quotes the interviews of Maria Rachid and the LGBT lawyers—with nearly \$10 million of publicity. José Crettaz, *La pauta oficial crece y se concentra*, LA NACIÓN (Sept. 27, 2012), <http://bit.ly/189X6zh>.

34. PÁGINA 12, *supra* note 32.



stemmed from marriage.

The essence of civil marriage is based on nineteenth-century criteria inspired by the doctrine of the Catholic Church. There are duties that make the institution obsolete. That is why the CHA has presented a draft bill in order to modify marriage, so that it liberates the couples instead of oppressing them. The same sex marriage law has set the minimum standard of equality in order to bargain in the future.<sup>35</sup>

Regarding the nature of marriage, it was also said that “society expects a romantic relationship in order to enter marriage. It could as well happen that it is just two friends who marry to grant each other social right. These cases are not yet installed in the social imaginary. These debates are just beginning.”<sup>36</sup> Concerning the addition of adultery as grounds for divorce, another lawyer stated: “We do not know if a judge would apply the same criteria to divorce a heterosexual couple as those applied to divorce a homosexual one. The proof provided by the parties might be determinative: for instance, if adultery was a practice previous to marriage or not.”<sup>37</sup> These assertions reveal some of the complexities of the aftermath of the same-sex-marriage law.

### III. THE AFTERMATH: THE EXPANSIVE FORCE OF GENDER NEUTRALITY

The “egalitarian-marriage law” has been widely criticized. The criticisms generally fall into four categories:

1. criticism that the redefinition of marriage is unconstitutional;<sup>38</sup>
2. criticism that the law altered the nature of marriage;<sup>39</sup>

---

35. *Id.*

36. *Id.*

37. *Id.*

38. In the important *XXIII Jornadas Nacionales de Derecho Civil* (National Congress, celebrated every two years in which only Civil Law professors can vote), the majority of professors voted that the same-sex-marriage law was unconstitutional, following a paper by Catalina E. Arias de Ronchietto, *Efectos de la ley 26.618 en el Derecho de Familia*, L.L., Dec. 27, 2011, at 1. The complete vote can be found in Fernando Millán, *Incidencia de la ley 26.618 en el Derecho de Familia. Conclusiones de las XXIII Jornadas Nacionales de Derecho Civil*, L.L., Dec. 13, 2011, at 1, <http://bit.ly/11loh0N>.

39. Horacio A. García Belsunce, *Las mutaciones conceptuales del matrimonio*, L.L. (2011-F-1330); Jorge Adolfo Mazzinghi, *Ley de matrimonio entre personas del mismo sexo: A la sombra de Lucrecio*, L.L., Aug. 12, 2010, at 1; María V. Famá, *Hacia una revisión de la teoría sobre la inexistencia*, L.L., Aug. 12, 2010, at 1.

3. criticism of the text;<sup>40</sup> and
4. criticism that the new marriage law was not egalitarian, but in fact treated the rights of women, children, and heterosexual couples with inequality.<sup>41</sup>

Same-sex marriage was introduced in Argentina as a modification of the current Civil Code. As with other gender-neutral legislation, this law suppressed every mention of men and women from the marriage portions of the Civil Code.<sup>42</sup> There was no place for grandmothers, grandfathers, mothers, wives, or husbands—only “spouses” and “parents.”

The structure of the institution of marriage and the legal presumptions to establish parenthood, however, were left untouched, which caused myriad problems. Not a month had passed before several other bills were proposed to adjust the system to the new gender-neutral paradigm.<sup>43</sup> A quick search within the local legal literature showed an overwhelming list of collateral issues that were adjusted because of the marriage reform.<sup>44</sup> It quickly became clear that legislating same-sex marriage required a revolution to our internal law. It

*tencia del matrimonio entre las personas del mismo sexo*, ABELEDO PERROT, Dec. 15, 2010 (explaining that the general theory concerning the nonexistence of juridical acts of general civil law should be revised to comply with the existence of same-sex marriage) (responding to Ursula C. Basset, *Estudio sobre algunos aspectos relativos al reclamo de reforma en torno al matrimonio*, SUPLEMENTO JURISPRUDENCIA ARG. [S.J.A.], Aug. 4, 2010; Mazzinghi, *supra*). I argued that marriage is a suit that does not fit both homosexual and heterosexual relationships at the same time. Since the Argentinian law had preserved intact the definition of marriage, even if it had introduced a gender-neutrality clause, those marriages would be unfit for homosexual couples. My assertion proved correct only a few days later in the interview with the LGBT lawyers. See PÁGINA 12, *supra* note 32.

40. Luis María López del Carril, *El matrimonio homosexual y la nulidad matrimonial*, L.L. (Oct. 7, 2010). Graciela Medina, *Ley de matrimonio homosexual: Modificación de paradigmas*, L.L. SUPLEMENTO ESPECIAL: MATRIMONIO CIVIL ENTRE PERSONAS DEL MISMO SEXO [SPECIAL SUPPLEMENT: SAME-SEX MARRIAGE], Aug. 2010, at 81 [hereinafter L.L. S.E.]; Eduardo Sirkin, *Apuntes sobre las omisiones en la reforma al Código Civil por la ley 26.618 que habilita el casamiento entre personas del mismo sexo*, EL DIAL., Aug. 19, 2010.

41. Carlos Goggi, *Matrimonio igualitario y el apellido de las personas (Las desigualdades subsisten, entre otras cuestiones)*, L.L. S.E., Aug. 2010, at 37; Graciela Medina, *La ley de matrimonio homosexual proyectada: Evidente retroceso de los derechos de las mujeres*, L.L., May 17, 2010; Eduardo A. Zannoni, *Matrimonio entre personas del mismo sexo: Ideología de género y derecho de familia*, L.L. 1 (2011-B-742) (“Nevertheless, the legislative technique answers to a sort of voluntarism with clearly political connotations . . . . However, it should not be forgotten that juridical voluntarism creates an illusion, a mirage consisting in fantasizing that Constitutional principles or International Treaties have the magic power to transform reality.”).

42. Basset, *supra* note 39; Medina, *supra* note 41.

43. For example, the gender-identity law allowed people to adapt the name and the secondary sexual characteristics to conform themselves to their autoperceived gender identity.

44. See *infra* notes 56–73.

impacted laws regulating public order,<sup>45</sup> identity,<sup>46</sup> gender, rules of kinship,<sup>47</sup> filiation,<sup>48</sup> marriage,<sup>49</sup> names,<sup>50</sup> marital property arrangements,<sup>51</sup> alimony,<sup>52</sup> parental rights,<sup>53</sup> succession,<sup>54</sup> domestic violence,<sup>55</sup> adoption,<sup>56</sup> artificial reproductive techniques,<sup>57</sup> surrogate motherhood,<sup>58</sup> liberty of conscience,<sup>59</sup> criminal law,<sup>60</sup> tax law,<sup>61</sup> and

45. Julio C. Otaegui, *La moral pública y el matrimonio homosexual*, L.L., July 22, 2010 (arguing that redefining marriage is against public order and morality and, therefore, unconstitutional).

46. Carolina Von Opiela, *Reflexiones sobre la identidad autopercibida*, L.L. (2012-C-1066).

47. See María Magdalena Galli Fiant, *Reformas legales referidas al parentesco*, in FERRER ET AL., *supra* note 4, at 99; Fernando Millán, *El derecho a procrear en los matrimonios de personas del mismo sexo: Una división comparada*, REVISTA DE DERECHO DE FAMILIA Y DE LAS PERSONAS [D.F.Y.P.], Sept. 2011, at 47, available at <http://bit.ly/18UAy2n>.

48. See Jorge Osvaldo Azpiri, *Los matrimonios homosexuales y la filiación*, D.F.Y.P., Oct. 2010, at 3; Andrés Gil Domínguez, *Comaternidad y copaternidad igualitaria*, L.L. (2012-B-1251) (asking to adapt the law to equalize parenthood by heterosexual and homosexual couples through jurisprudence and executive orders); Adriana Krasnow, *La filiación a la luz de la ley 26618*, S.J.A., Oct. 20, 2010; Graciela Medina, *El proyecto de matrimonio homosexual: Vulneración del interés superior del niño: Caos filiatorio*, L.L., June 24, 2010, at 1.

49. Eduardo Sirkin, *El "adulterio" y su eventual inaplicabilidad como causal de divorcio ante la vigencia de la ley 26.618 de reforma al Código Civil que habilita el casamiento de personas del mismo sexo*, EL DIAL., Aug. 5, 2010, available at <http://bit.ly/1285V9r>.

50. Goggi, *supra* note 41; Edgardo Ignacio Saux, *La ley 26.618 de matrimonio de personas del mismo sexo y su incidencia sobre el apellido marital y familiar*, in FERRER ET AL., *supra* note 4, at 175.

51. Francisco A.M. Ferrer, *Esquema de la sociedad conyugal*, in FERRER ET AL., *supra* note 4, at 199; María Josefa Méndez Costa, *La ley 26.618 y el régimen patrimonial matrimonial*, in FERRER ET AL., *supra* note 4, at 235; Néstor E. Solari, *El régimen patrimonial del matrimonio en la ley 26.618*, L.L., May 11, 2010. I also dealt with this matter in Ursula C. Basset, *Calificación de bienes en la sociedad conyugal*, 2010 ABELEDO PERROT 852.

52. Claudio A. Belluscio, *Alimentos entre cónyuges del mismo sexo*, L.L. S.E., Aug. 2010, at 31.

53. Adriana N. Krasnow, *La custodia en la ley 26.618: Una pérdida de oportunidades*, L.L. S.E., Aug. 2010, at 23; Néstor E. Solari, *Régimen de tenencia de los hijos*, L.L. S.E., Aug. 2010, at 17; Carlos H. Rolando, *La ley 26.618 y la patria potestad*, in FERRER ET AL., *supra* note 4, at 129.

54. Juan José de Oliveira, *Los efectos de la ley 26.618 sobre el derecho sucesorio*, L.L. S.E., Aug. 2010, at 43; Francisco A.M. Ferrer & Roberto M. Natale, *La ley 26.618 y el derecho sucesorio*, in FERRER ET AL., *supra* note 4, at 251; Luis A. Ugarte, *La ley 26.618 y su incidencia en el derecho sucesorio*, D.F.Y.P., Jan. 2011, at 135.

55. Basset, *supra* note 39.

56. For the view favoring LGBT adoption, see Yamila Soledad Cagliero, *Adopción por parejas homosexuales y el derecho a gozar de una vida familiar plena*, L.L., June 2, 2011, at 1. *Contra* Matilde Zavala de González, *Casamiento y adopción por homosexuales*, L.L., July 8, 2010, at 1. See also Sabrina M. Berger, *Adopciones por parejas del mismo sexo: Problemas latentes*, L.L., Oct. 10, 2012 (pointing out problems with the existing law of allowing adoption for same-sex couples); Rodolfo G. Jáuregui, *Adopción por parejas del mismo sexo*, L.L. S.E., Aug. 2010, at 3 (pointing out problems, but agreeing to LGBT adoption).

57. Mauricio Luis Mizrahi, *El niño y la reproducción humana asistida*, L.L., Aug. 30, 2010.

58. María V. Famá, *Maternidad subrogada: Exégesis del derecho vigente y aportes para una futura regulación*, L.L. (2011-C-1204) (“[A]unque la reforma de la ley 26.618 ha sido segura-

employment law,<sup>62</sup> among other topics.<sup>63</sup> All of these subjects would need to be attuned to the gender-neutral paradigm.

Six months after the enactment of the egalitarian-marriage law, the president created a commission to draft a new civil code.<sup>64</sup> Egalitarian marriage would be an undisputed starting point for the drafters. In the area of family law, the drafters decided to adjust all the current institutions “to equalize heterosexual to homosexual or lesbian relationships.”<sup>65</sup> To be more precise, as a leader of the reform process put it, any “heteronormativity” in family law had to be erased so as to attain equality.<sup>66</sup> The draft for the Civil Code is now a bill, and a special Committee is discussing its approval.

The main traits of the bill containing the new Civil Code<sup>67</sup> are summarized and commented on below.

mente el disparador más poderoso de un debate que había sido algo rezagado en los últimos tiempos.”).

59. Juan G. Navarro Floria, *Matrimonio de personas homosexuales y libertad de conciencia*, D.F.y.P., Oct. 2010.

60. Carlos Ignacio Ríos, *El nuevo matrimonio civil en la ley penal*, L.L. S.E., Aug. 2010.

61. Fernando Carlos Kalemkerian, *El impuesto a la renta y sobre los bienes personales y la reciente modificación del régimen matrimonial*, L.L. S.E., Aug. 2010, at 55; Darío M. Rajmilovich, *Nueva ley de matrimonio y sus implicancias en el sistema de imposición de las personas físicas*, L.L. S.E., Aug. 2010, at 59.

62. Esteban Carcavallo, *El nuevo régimen de matrimonio civil en el ámbito de las relaciones laborales*, L.L. S.E., Aug. 2010; María E. López, *El matrimonio entre personas de igual sexo y sus efectos en las relaciones laborales y en materia de seguridad social*, REVISTA DE DERECHO LABORAL Y SEGURIDAD SOCIAL (2010-19-1709).

63. Lord Dear quoted this language twice during the parliamentary debates over same-sex marriage in the House of Lords. See 3 June 2013, PARL. DEB., H.L. (2013) 947 (U.K.); 4 June 2013, Parl. Deb., H.L. (2013) 1107 (U.K.) (quoting Ursula C. Basset, *How the Battle to Redefine Marriage Affected Family Law in Argentina*, 27 BYU J. PUB. L. 529, 536–37 (2013)).

64. Presidential Decree 191/2011. Créase la Comisión para la Elaboración del Proyecto de Ley de Reforma, Actualización y Unificación de los Códigos Civil y Comercial de la Nación [Establishing the Commission for Drafting the Bill to Reform, Update, and Unify the Nation’s Civil and Commercial Codes], Feb. 28, 2011, [32101] BOLETÍN OFICIAL [B.O.] 4 (Arg.).

65. Aída Kemelmajer de Carlucci, *Lineamientos del actual Proyecto de Modificación del Código Civil*, L.L., Sept. 12, 2011, at 1 (Arg.). Concerning filiation, see Aída Kemelmajer de Carlucci, Marisa Herrera & Eleonora Lamm, *Filiación y homoparentalidad: Luces y sombras de un debate incómodo y actual*, L.L. (2010-E-977) (“Uno de los desafíos más complejos a los que invita la ley 26.618 reside en qué y cómo regular el derecho filial en general, en sus tres fuentes (biológica, procreación asistida y adoptiva); a tal fin, se debe salir de la perspectiva “heteronormativa,” vigente hasta hace poco en el derecho argentino como un regla intocable.”).

66. *Id.*

67. For the full text of the bill, see *Proyecto de Reformas del Código Civil y Comercial de la Nación*, INFOJUS, [http://www.infojus.gov.ar/index.php?kk\\_seccion=codigo\\_civil](http://www.infojus.gov.ar/index.php?kk_seccion=codigo_civil) (last visited June 8, 2013). For a complete analysis of the bill, see Ursula C. Basset, *Libro II—Derecho De Familia*, in ANÁLISIS DEL PROYECTO DE NUEVO CÓDIGO CIVIL Y COMERCIAL 205 (Jorge Nicolás Lafferrère ed., 2012) (Arg.), available at <http://bit.ly/1bg4BAU>.

Two principles preside over the entire chapter of family law: autonomy and the equality of same-sex couples and heterosexual couples.<sup>68</sup> Principles such as the protection of the child within marriage or the protection of the family, principles to which Argentina is constitutionally bound, were omitted.

Marriage is defined as neutrally gendered.<sup>69</sup> Therefore, some of the special protections devised to protect women have vanished, and others are blotted out.<sup>70</sup> For example, the economic protection of women after divorce has decreased and equals the economic protection of men; and men can claim compensation from their wives, even if the wives have primary care of the child.<sup>71</sup>

Neither the duty of fidelity nor the duty of cohabitation is required.<sup>72</sup> However, nowadays every heterosexual couple promises to be faithful to each other when they marry.<sup>73</sup> This tailoring of marriage to fit the expectations of some may make the institution unsatisfactory or even unfit.

No reflection period is required before divorce, and divorce may be unilateral.<sup>74</sup> As marriage has come to be regarded as an eventually uncommitted relationship, it is natural to create an ample exit door for spouses.<sup>75</sup> This eases the burden for the State, however, who is obligated to protect the family so it can provide children, when possible, with a stable environment in which to be raised.

To grant the right of a child to homosexual couples, surrogate motherhood is to be incorporated.<sup>76</sup> Once again, the perspective of the law is adult-centered; it focuses on the right of some adults to achieve their goals in life. In any legislation there is a hierarchy of values, and in this legislation, the most highly esteemed values appear

---

68. Art. 402, Proyecto de Reformas del Código Civil y Comercial de la Nación Argentina [hereinafter PRCCC].

69. *Id.*

70. Ursula C. Basset, *Modificaciones al regimen económico del matrimonio en el Proyecto de Reformas*, 2012 REVISTA DE DERECHO PRIVADO Y COMUNITARIO 507.

71. Agustín Sojo, *Divorcio express en el anteproyecto*, 28 CUADERNO JURÍDICO DE FAMILIA, May 2012, at 9 (Arg.), available at <http://bit.ly/11ngqj4>.

72. The duty of fidelity—previously a juridical duty—would become a “moral duty” if the bill is passed. Art. 431, PRCCC (“Los esposos se comprometen a desarrollar un proyecto de vida en común basado en la cooperación y el deber moral de fidelidad. Deben prestarse asistencia recíproca.”).

73. In Argentina, the duties stemming from marriage are read to the spouses by the officier who celebrates the marriage.

74. Arts. 435–36, PRCCC.

75. Ursula C. Basset, *El matrimonio en el Proyecto de Código*, 2012-D L.L., Sept. 5, 2012.

76. Art. 562, PRCCC.

to be (1) adult autonomy to choose their own lifestyle; and (2) the consequent duty of the state in a democratic and participative society to grant the feasibility of those ideals.<sup>77</sup> Once this hierarchy is set, it follows that if heterosexual couples yearn to have children, the law must pave the way for it. Therefore, surrogate agreements, heteronomous fertilization, and anonymity of the donor must be a consistent part of the scheme. At least, such was the explicit reasoning of the drafters.<sup>78</sup>

For similar reasons, legal presumptions are extended to same-sex couples without different treatment for marriages or de facto cohabitation.<sup>79</sup> Equalizing marriage and de facto unions is also consistent with the line of reasoning seen throughout the bill: since marriage is fragile and does not imply commitment, it is quite reasonable to put it at the same level of de facto unions.<sup>80</sup>

Same-sex adoption is granted.<sup>81</sup>

Occasional cohabiting partners are recognized as having parental rights over the children of previous couples.<sup>82</sup>

#### IV. THE LAW TURNED UPSIDE DOWN

The former paragraphs should not be understood as a veiled slippery slope argument. This paper is not about dim prophecies that will fall upon humanity when same-sex marriage is legalized. Over a year has passed since it was legalized in Argentina, and no tragedy has occurred. However, we are not yet in a position to assess the long-term consequences. Thus, one side may argue it is not fair to submit children to an uncertain social experiment. And to that, the other side responds that no change would ever succeed if we did not try. At that point, recognizing that there are risks involved, each side questions the other's risk tolerance. As you could guess, each side likely differs in the amount of risk it is willing to take on. And with that, the dis-

---

77. NORA LLOVERAS & MARCELO SALOMÓN, *EL DERECHO DE FAMILIA DESDE LA CONSTITUCIÓN NACIONAL* 109 (2009) (Arg.).

78. Carlucci, Herrera & Lamm, *supra* note 65.

79. Arts. 566, 585, PRCCC.

80. It is astonishing to discover that in the Argentinian Civil Code bill, de facto unions imply a higher level of commitment than marriage. To enter a union, cohabitants must have an enduring, exclusive, affectionate, and cohabiting relationship that lasts at least two years. None of those requirements are in the projected institution of marriage (no need to cohabit, be faithful, or have an enduring relationship).

81. Art. 599, PRCCC.

82. Art. 672, PRCCC.

cussion would start all over from the beginning, in an endless and probably unresolvable dispute.

In any case, the same-sex-marriage law in Argentina has turned the law upside down—no stone has remained unturned. This was likely an unavoidable consequence once same-sex marriage was approved. With gender neutrality infused into marriage, *every* institution in family law must be rearranged to accommodate the “new order.” Even the interests of children and special protections given to women in heterosexual relationships must be revisited to comply with gender-neutral equality standards.

Gender neutrality is based in theoretical differences, not real-life differences. It is more of an abstract theory than a verifiable suspect category. It is based on the freedom to choose human behavior, not the acquired characteristics of human beings.<sup>83</sup> Any restriction might imply an unjustified discrimination between heterosexuality and homosexuality. Thus, gender neutrality calls for a complete overhaul. Every institution must now be carefully scrutinized to correct areas of previous “heteronormativity.”

It is possible that gender neutrality, like other quests for equality, is blind to some real-life differences to facilitate the rebalancing of former inequalities. This blindness, however, generates new and unexpected inequalities for those formerly protected by a heteronormative paradigm.

## V. CONCLUDING THOUGHTS

Argentina is moving toward uniformity. Previously, it had two brothers: homonormativity and heteronormativity. They both desired the “marriage word.” Homonormativity won, and it redefined marriage to adapt to its needs. Homonormativity imposed the new definition and its consequences on the whole of society. Heteronormativity and its peculiarities were abolished as a rule, and heteronormativity lived as an expatriate in its own land without any visible juridical recognition in society.

Let us hope others can do better than that.

---

83. Lynn D. Wardle, *Beyond Equality*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 186 (Lynn D. Wardle et al. eds., 2003).