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INTER-AMERICAN LAW SECTION

ANOMALOUS MARRIAGES

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INTRODUCTION

Contemporary society finds itself besieged by problems which many times can be solved in the same manner, wherever they may arise, independent of any circumstances of place and time; but national divisions and age-old prejudices have produced different ways of dealing with the same matter, and consequently, different solutions. These latter, considering how similar the problems are that determine them, usually do not differ greatly; but their characteristics, arising from differences in time and place, present certain elements which may cause the superficial observer to believe the problems and their solution to be radically different.

Between an institution of Cuban law ("anomalous marriage" or matrimony by equiparacion) and the other in Anglo-Saxon law (common-law marriage) we find numerous points of similarity, notwithstanding differences in origin, in nature and operation.

A journey to the beautiful City of Miami, while participating in the exchange program of professors between the Universities of Havana and Miami, gave me the opportunity of augmenting my materials on common law marriage. There I prepared this article which I dedicate, in gratitude, to the School of Law of the University of Miami, where I was received with an affection and benevolence which I shall never forget.

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I. THE COMMON LAW MARRIAGE

Brocklebank¹ points out, discussing the origins of the common law marriage in the United States, that until the Council of Trent, Canon Law had followed the consensual theory of matrimony. The Council of Trent added to the consent of the parties a requirement of form or solemnization. While England had embraced the Reformation before this Council, the new regulation was not adopted by the Church of England, but instead, the traditional consensual theory was continued until 1753, when, in Lord Hardwicke's Act, the traditional rule of informality was replaced by the requirement of a religious ceremony. In the American Colonies, there were many laws of the Colonial Assemblies relating to matrimony and its forms, but none expressly abolished the common law marriage. The traditional principle of informal consent remained, apparently not affected by any statute. Brocklebank points out that an important work of a somewhat later period, *Kent's Commentaries* (1827), defends the validity of the common law marriage. Another authoritative treatise, *Greenleaf On Evidence* (1842), reaffirms Kent's approval of the institution. Finally, in the celebrated case, *Meister v. Moore*² the United States Supreme Court decided in favor of the common law marriage, which is now a fully recognized legal institution where it remains in force.

Meanwhile, several states enacted laws in derogation of the Common Law, providing that only a ceremonial marriage be valid. In other states, such as Louisiana, the common law marriage never was engrafted into the local law.³ The attitude of the courts has also varied. First the common law marriage was freely accepted. By degrees this anomalous form of matrimony was subjected to increasingly strict scrutiny, reaching the point where it could be stated that courts "do not regard this form of marriage with favor."⁴ This trend of judicial authority in the United States which is opposed to common law marriage establishes the most important distinction between Cuban law and American law.

Elements. The law has always considered common law marriage as a degenerate type of matrimony because of its lack of form. The fundamental element is always the agreement of the parties. As an echo of the timeless maxim *consensus facit nuptias*, we encounter the rule that "there should be an actual and mutual agreement to enter a matrimonial relation."⁵

1. BRICKELBANK, *La Formation du Mariage Dans le Droit des Etats Unis*, 247 (1935 Ed.); COLIN & CAPITANT, *Cours Elementaire de Droit Civil Francais*, 122 (1927); I ESMEN, *Le Mariage en Droit Canonique* (1929); MADDEN & COMPTON, *Cases and Materials on Domestic Relations* (1940); McCURDY, *Cases on the Law of Persons and Domestic Relations* (1939).

2. *Meister v. Moore*, 96 U.S. 76, 78 (1877).

3. 55 C. J. S., MARRIAGE §6.

4. *Id.* at 818.

5. *Ibid.*

This agreement must be reached by parties legally capable of carrying out their marriage contract; and the agreement must be consummated either by cohabitation as husband and wife or by the "mutual assumption of marital duties and obligations."⁶ The most important additional factor is, however, that no solemnization or form is required. "The consent of the parties to the common law marriage must be mutual and must include, as an element, the intention to enter into a marital relation, but no particular form or manifestation of consent is essential."⁷ In some cases, a private instrument has been utilized to set forth the agreement of the parties to be husband and wife, one party executing it in a state where common law marriage is valid, and sending a copy to the other party.⁸ In one case, an army officer, on learning of the birth of a child, asked the mother to obtain her parents' permission to marry. He prepared and signed a matrimonial agreement, sending two copies to the woman. She executed them and returned them to him. Although there was no subsequent consummation of the agreement by cohabitation the court held there was a common law marriage.⁹ In another case, in which the parties agreed "to live as husband and wife until . . . lawfully married," the court found no common law marriage because no present intent to marry was shown.¹⁰

In general, proof of the parties' consent must be unequivocal, although no special formal requirements exist. The evidence may be written, oral or even based on conduct alone.¹¹ Cohabitation has been held by courts to be "only an element of a common law marriage." The rule has been applied "even though the cohabitation is apparently decent and orderly."¹² "Cohabitation, general repute, and holding out do not make a marriage, and are not a substitute for a marriage,"¹³ since consent to establish a marital community is lacking. The parties must be of legal age and capacity so as to enable them to give their consent. A minor may be capable if permission or authorization of the parent is obtained. In accordance with common law rule persons under the age of seven have

6. *Id.* at 819.

7. *Id.* at 841.

8. *Great Northern Railway Co. v. Johnson*, C.C.A.N.D., 254 F. 683, McCURDY, *op. cit. supra* note 1, at 93-95 (especially notes *ivi*).

9. *Commonwealth v. Amann*, 58 Pa. Dist. & Co., 669. 95 PITT. LEG. J. 195.

10. *State v. Grimes*, 215 Iowa 1287, 247 N.W. 664.

11. 55 C. J. S. MARRIAGE §19; many California, Kansas, Kentucky, Nebraska, Oklahoma, Texas decisions are cited. McCURDY, *op. cit. supra* note 1, at 95 and 96 (note 4).

12. *Associated Indemnity Corp. v. Billberg*, Tex. Civ. App. 172, S.W.2d 157; *Zy v. Zy*, 13 N.Y.S.2d 415.

13. *In re O'Neill's Estate*, 64 N.Y.S.2d 714, 184 Misc. 832; *Taegen v. Taegen*, 61 N.Y.S.2d 869; *Rodman v. Rodman*, 140 Misc. 642; 251 N.Y.S. 270, MADDEN, *op. cit. supra* note 1, at 64 (notes 1 and 2); McCURDY, *op. cit. supra*, at 95 (notes 2 and 3).

no capacity to enter a common law marriage. From that age to the normal age of consent, any act beyond such capacity is subject to annulment.¹⁴

Should any one of the requirements of common law marriage be lacking, especially the proof that there was an agreement to enter into the relation of husband and wife, the union is regarded as "merely meretricious" and "... not a marriage."¹⁵

Effects. It is in this regard that the most interesting aspect of a common law marriage becomes apparent. It must be borne in mind that, at all time, we are dealing with a type of marriage, not with something lesser than a marriage which must be elevated in some fashion to that category. The entire history and growth of common law marriage show this to be true. Formless it may be, nevertheless the agreement of the parties establishes a true marriage, not some other type of union.

"Wherever it is recognized, the common law marriage is as valid as a ceremonial marriage, and a subsequent denial of the former by the parties thereto would no more destroy its validity, than would the repudiation by the parties to the latter change or effect the status created by it."¹⁶

II. MATRIMONY BY EQUIPARACION¹⁷

The requirement of religious marriage according to the Spanish Civil Code which, with some amendments, is still in force, obtained in Cuba until 1918 when "civil marriage", ceremonial marriage performed by a judge or a notary, was introduced as the exclusive form. Other types of unions between man and wife were not recognized by the Code and, consequently, no rights or duties based on the status were created between such parties. This rigid rule, in many instances, caused severe injustice in that, frequently, a man and woman, having lived in a "marriage-like community" all their lives, would find that on the death of one of them, all property would pass to distant relatives of the decedent leaving the survivor and any children nothing.¹⁸

In 1940 the Constitution (Art. 43 paragraph 6) introduced the following provision:

14. 55 C. J. S. *Marriage* §11, 1. Esmein, *op. cit. supra* note 1 at 166, concerning this requirement of seven years of age to enter into a contract or agreement of betrothal (*desponsatio*).

15. 55 CORPUS JURIS SECUNDUM 819 and 850.

16. *Id.* at 817, *in fine*. There remains the problem, which must be noted, of the availability of the common law marriage where the initial relationship is meretricious, but later ripens into, what the parties allege to be a nonmeretricious union.

17. "Equiparacion" means equalizing, i.e., granting identical effects. Alternative terminology used for the verb "equiparar" is "to convert". (Note by translator).

18. Notarial marriage was established in 1929 by the Notarial Code. Concerning certain effects of *de facto* unions, our decisions with various criteria have admitted their efficacy in creating "associations *de facto*" in the case of concubinage, in order that property gained in such cases may be divided; also this situation is taken into account in investigations of paternity in matters of bastardy.

The courts shall have authority to declare, where equitable reasons compel such a result, that a monogamic¹⁹ and stable union between persons with legal capacity to marry is equivalent to a civil marriage.

In this way, the Cuban Constitution dealt with the problem posed by such marriage-like communities existing on the very margin of the law. Persons who qualify under this constitutional provision will not be considered, in the eyes of the law, to be living in concubinage or some other inferior form of union. They are not merely endowed with certain rights: by force of law and the necessary decision of the court such unions become the same as normal marriages, not more, nor less. In truth, the only thing lacking in this type of union is the initial intent to "celebrate" a formal marriage. If the case before the court meets the requirements as established by Art. 43 of the Constitution, there is no doubt that the parties have "worked" at the marriage day by day far more than any couple who, although married before a judge or notary, separate a short time later, probably never to see each other again.

Elements. The requirement *sine qua non* of an "anomalous marriage"²⁰ is the decision of a competent court, declaring such union "converted" into the equivalent of a normal ceremonial marriage. The acts of the parties alone have no legal effect, nor can they give rise to any legal claim; in all cases the decision of the court, rendering its judgment of equalization, is indispensable. Consequently, it may be stated that this decision creates rather than declares a status. And the court will give such a judgment only if it finds the necessary equitable grounds, that is, of justice and morality, in addition to the required factual circumstances. This equitable basis is the most helpful guide to the judge in making his determination and also allows him to make a flexible interpretation of the other statutory requirements.²¹ Flexibility is not arbitrariness, nor discretion license. There are always limitations on what the judge may freely decide. The sum of the considerations of morality, justice, plus the will to aid those whose need is the greatest (the true act of mercy as Ferrara defines it) marks the outer limit of judicial liberty.

First of all the union must have existed, but no rigid standards may be set up regarding its external manifestation. The couple may have kept house together. Generally this is the case but it is not necessary. They

19. The term "singularidad" could also be said to have the meaning of "unique" but it is here translated as monogamic to show clearly the intent not to establish another relationship of the same quality. That it does not refer merely to lack of promiscuity, see below *sub nomine*. (Note by translator)

20. The terminology is mine, in my book, *Anomalous (Equivalent) Marriage* (1942).

21. Case decided by Judge Dr. Valle More, 6 Sept. (1944); the man and the woman were single, they had lived together many years, they were not united with anyone else . . . but the woman lived a life of sin with the approval of the man, who enjoyed the earnings of her "profession"(!). The judge dismissed the case "for lack of any reason of equity".

may or may not have had children. The man may or may not have supported the woman. Normally the union would be open with the holding out, the reputation in the community, the *nomen, tractatus, fama* of being spouses. But even a completely secret union can be "converted". In summary, nothing more is required of a "convertible" union than is required of an ordinary marriage.

The legal capacity of the parties involved in this type of union is the ordinary capacity required by the Civil Code (Arts. 83 and 84) for ceremonial marriages. Since many of the requirements of that type of capacity are merely reasons for annulment operating after the event, they become, to that extent, inapplicable to this institution. It suffices, therefore, that, for a union to be "converted", the parties be not related within the prohibited degrees, that they be not already married (the union would be adulterous) and that they be not of insufficient age (below twelve for a woman and fourteen for a man). In my opinion no other defects stemming from lack of capacity exist.²²

The determination of the element of stability is left to the judge. This will vary according to the particular equities of the case. For instance, if the union was dissolved by death, a shorter period of living together will suffice. However, stability must not be construed to mean "permanence" or "continuity". It may even happen, that the union was stable at one time, and now it no longer exists; nevertheless the petition for an equalizing declaration may be successful except where there are grounds for fraud on the court.

"Singleness"²³ is defined in a negative manner; it is the absence of another union of the same dignity. The best way to prove that the union should not be "converted" would be to show that another union existed simultaneously. It is also necessary to stress the distinction between the lack of monogamic quality and infidelity by way of incidental promiscuity. The former presupposes proof of another stable union, while in case of the latter it could easily be shown that no stable relationship was created to replace the one already existing. Were this distinction not preserved, infidelity could be alleged, even falsely, to bar a valid "equiparación".

The decision granting equivalency has retroactive effect. Therefore the decision must state the date from which the union is declared equivalent to marriage (it may be the date of its commencement), and the date it ended (if one of the parties has died or married a third person); or that the union still continues at the time of the demand for declaration. In

22. Decisions: No. 86, April 1, 1949, and No. 254, November 16, 1949, both of the Supreme Court. They set forth an exaggerated theory, which requires proof of the absence of "all impediments" Montagu, Perera, and Bru, JJ. dissented, as they considered that "it was not logical to impose a greater burden of proof on a free union between a man and woman" than was demanded in the case of an ordinary marriage.

23. For an explanation of the other meaning assigned this term see note 19 *supra*.

this case, the decree of equivalency will convert the union into a continuing marriage, which like any other marriage, is, in my opinion, subject to dissolution only by divorce or death.

The action at law to have such a union, meeting the requirements discussed above, declared equivalent to a marriage falls within the class of "status actions". In all such actions notice to intervene must be given the Attorney General's Office (Ministerio Fiscal) in order that the public interest be properly represented. The procedure is the same as that governing declaratory judgments in major claims (as distinguished from small claims) which is the most complete set of procedural safeguards established by our Code of Civil Procedure (Ley de Enjuiciamiento Civil).

The effects of the judgment are that, during the entire period for which the formerly voluntary union has been declared to be equivalent to marriage, the same rights and obligations arise without limitation just as if there had been a true marriage *ab initio*. The text of the Constitution says "to make equivalent" and this, in my opinion, shuts the door on any attempt to introduce limitations, other than those envisaged in express statutory provisions. For example, if property, acquired during the "marriage", is sold prior to the decree, no retroactivity can divest rights of the third persons who, in good faith, acquired the property from one who was legally "single" at that time.

Our Supreme Court has passed on many aspects of this institution. Its decisions may be consulted in "*La Jurisprudencia al Día*."²⁴ It may also be added here that recent social security laws, both for professional persons and workmen, expressly recognize the rights arising from such judgments of equivalency.²⁵ In addition, in examining the field of comparative law, we find that this institution has already been adopted in several Latin American countries. This ready acceptance indicates a possibility of even greater utility in solving a difficult sociological problem in an even broader territorial sphere.²⁶

24. The first was No. 45, of April 9, 1945. No. 57 of May 2, 1945 established the rule that in order for a union to be declared equivalent, it must have lasted until 10 October, 1940, when the Constitution came into effect; those abandoned before could not be rendered equivalent. No. 17 of February 12, 1946, treats of the necessary age and states that parental consent is not required. No. 124, of May 23, 1950 resolves in the negative a case in which, besides the union that was alleged, the concubine had had another of equal importance; therefore, there was no "singleness", as the two unions were simultaneous. No. 129, of November 17, 1952, applies this institution to non-Cubans, for reasons of public order. There were many other cases before our Supreme Court, but I cite only some, for their importance.

25. The laws establishing "Social Security for Lawyers", "Social Security for Congressmen", "Druggists' Retirement", "Professional Social Security for Newspapermen", that of Customhouse Brokers, that of Textile Workers, that of Workmen and Laborers employed by the State and others.

26. Panama Const., Art. 56; Guatemala Const. Art. 74; Bolivia Constitution, art. 131. Those of Chile and Ecuador, a Decree of 1945 in Paraguay, and many more.

III. CONCLUSION

It is easily seen that there are similarities and, at the same time, differences between the two legal concepts that we have briefly examined, namely between the common law marriage and the matrimony "*por equiparación*".

Both are intended as a solution to cases where two persons have lived together like spouses without the marriage-creating ceremony, and for one reason or another, claims arise which deserve to be dealt with in a just manner. The starting point from which, on the one hand, the common law marriage arises, and on the other hand, the equalized matrimony is declared, is different; (a) in the first, it is the intent to marry, the formal manifestation, *i.e.*, the celebration that is omitted; (b) in the latter, the only important thing is the fact that the union has really existed, regardless of whether there was any initial intent to establish a unit. Therefore, the Common Law looks for a clear agreement, or its equivalent, to unite people in a life of marital community; in case of *equiparación*, a contrary intent, even if clearly demonstrated (perhaps by a signed document), is of no importance, since the union will be equalized in spite of such fact.

In the case of *equiparación* a valid judicial decision is necessary before any other rights, similar to those arising from a true marriage, may be claimed since without such a decision the union has no legal effect. In the case of a common law marriage, acts alone constitute a common law marriage, and the decision of the court, if any, is only declaratory, since this status arises from intention and agreement, express or tacit, to live as husband and wife.

What is certain is that, in a majority of cases, in common as well as Cuban law in regard to such anomalous marriages, what is necessary is something distinct from marriage. However, it is apparent that Cuban law relies more on the mere acts, without investigating the intent, while the Anglo-American law in determining a case of common law marriage relies upon the intent, interpreting the facts with considerable liberality in order to recognize common law marriages in situations where the intent was not clearly manifested. As far as the underlying legal policies are concerned, there is indeed an apparent divergence between the two systems. The Cuban system grants greater protection to persons who would be victims of their own legal neglect; the Common Law—so it seems—tries on the contrary to push this anomalous concept over to one side and, in a somewhat contradictory manner, makes it more flexible and of greater practical value. In Anglo-American law, the historical origins of common law marriage demanded the fundamental requirement of agreement; but, social needs and a spirit of justice warrant a liberal interpretation. There the courts are asked not to close their eyes or fail to apply common sense in an effort to cloak with respectability a

relationship that is not entitled to that protection;²⁷ and, as a consequence, numerous laws in many states²⁸ have deprived common law marriages of their original defects. On the other hand, we find a trend toward a liberal interpretation. This seems to be evidence of the struggle between the traditional law and the demands for a solution for a free union. For this reason, also, it has been said that general statutes are directive only and a formal prohibition of the common law marriage is required, which statute will then be considered in derogation of common law.

If Anglo-American law terminates in total abolition of the common law marriage and concubinage and irregular unions were not to disappear completely (a most unlikely thing), then the Anglo-American law would be in the same state as ours was prior to 1940. The common law marriage has a long tradition and has shown its usefulness. For this reason it will probably not be abandoned, but, in any event, both societies, United States and Cuban, would still be confronted with the phenomenon of voluntary or free unions. The most serious ones, the true *de facto* marriages—consummated, permanent, partners cleaving to one another, showing the same degree of stability as ordinary marriage—these unions are born on the margin of the law, caused by emotional forces stronger than the law, and whose real juridical nature confuses even the most clear-sighted observer; and other unions are not quite as solid, but similar in fact, being not mere temporary unions, contracted from motives of pure pleasure; all these cases require solutions by the law in Cuba as well as in the United States. The law in the United States may yet reach across to its Cuban neighbor for another solution to the problem of the anomalous marriage, matrimony by equiparación, which might salvage for society some of the worthwhile voluntary unions not reached by common law marriage.

27. In *re* O'Neill's Estate, note 13.

28. 55 C. J. S. *Marriage* §6.