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## Same-sex marriage in Spanish law

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The institutionalization of same-sex relationships, mainly in its form of “same-sex marriage” is, without any doubt, one of the most controversial topics in current family law. A certain number of countries have legalized this, whilst a large majority have not: so, same-sex marriage has been accepted in North America and in many European western countries, with relevant exceptions such as Germany, Austria or Switzerland; it has had some success in Latin America and Oceania, and has been rejected in Eastern Europe and in Asia: more or less 23 countries out of 193 members of the United Nations have introduced same-sex marriage (12% of world countries). On the other hand, 21 more countries have institutionalized same-sex relationships, but outside of marriage, that keeps being an essentially heterosexual union in these countries. Words, and concepts, like discrimination, equal marriage, human dignity of homosexuals, have been used in the debate as kind of intellectual weapons. I would like to address this topic, which is still relevant for many countries, including the ones in which same sex marriage has been approved: this is the case of Spain, where we have had same sex marriage for more than ten years, since 2005. On the other hand, I will focus on same-sex marriage, because after its introduction in Spanish law, the regional laws regulating same-sex couples have become pointless.

This paper is organized in two sections: the first one, regarding the process of introducing same-sex marriage in Spanish law and its consequences; the second one, including some theoretical considerations about the meaning of marriage and the principle of non-discrimination.

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## I. THE INTRODUCTION OF SAME-SEX MARRIAGE IN SPANISH LAW: A GENERAL APPROACH.

### 1. Introduction: a brief note regarding the Spanish legal system and the regional laws concerning same-sex couples.

The Spanish legal system follows the continental European model in its basic guidelines: the supremacy of written law over other legal sources, the very limited role of custom, and the existence of a flexible and open decision-making system (the so-called “general principles of law”). The judgements of the Supreme Court play an important role in the interpretation of written laws, but they themselves do not constitute a source of law.

The Constitution is the supreme rule of the Spanish legal system, which means that the laws of a lower status that contradict it are not legally valid (written or not, and whatever their source). It is a written Constitution that can only be modified by following the procedures established by the Constitution itself: neither the Constitutional Court nor the Supreme Court have the authority to change the Constitution. The duty of the Constitutional Court, as far as it refers to the Constitution, is limited on the one hand to interpreting it (wherein the Constitutional Court can act creatively, but at least in theory must respect the limits of interpretation, meaning that it cannot either repeal or modify the Constitutional rules) and on the other, to guaranteeing that it is not infringed by ordinary laws.

For the purposes of this paper, it should be emphasized that the Spanish legal system is a complex one, since different regional (“autonomous”) legal sub-systems are included in it, without the criteria regarding the distribution of competences between the central Parliament (*Cortes Generales*) and the autonomous legislators being clear<sup>1</sup>. This question is important in relation to the legal regulation of same-sex marriage, as it has led to a legal system that is especially complex:

1. On one hand, the central Parliament (*Cortes Generales*) is the only body constitutionally competent to legislate on the personal aspects of marriage: this specifically means that it is the only body that can decide if two people of the same sex can marry. The Spanish legislator has so ruled through the 13/2005 Act of 1 July 2005.
2. On the other hand, a large number of regional acts regarding civil partnership have been approved: Catalonia (the 10/1998 Act on Civil Unions), Aragón (the 6/1999 Act on Unmarried Couples), Navarra (the 6/2000 Act for the Legal Equality of Unmarried Couples), Valencia (the 1/2001 Act on Civil Unions), Balears (the 18/2001 Act on Unmarried Couples), Madrid (the 11/2001 Act on Civil Unions), Asturias (the 4/2002 Act on Unmarried Couples), Andalusia (the 5/2002 Act on Unmarried Couples), Canary Islands (the 5/2003 Act on Unmarried Couples), Extremadura (the 5/2003 Act on Unmarried Couples), the Basque Country

<sup>1</sup> See de Pablo Contreras, in de Pablo *et al.*, *Curso de Derecho civil I, vol. I, Derecho Privado y derechos subjetivos*. (5<sup>th</sup> edition, Madrid, Edisofer, 2016), p. 87 et. seq., regarding the structure of the Spanish legal system and the distribution of competences regarding civil law.

(the 2/2003 Act on Unmarried Couples), Cantabria (the 1/2005 Act on Unmarried Couples) and Galicia (2/2006 Act of 14 July). These Acts have very different scope and content, but without exception all of them include both heterosexual and homosexual couples within their field of application. The constitutionality of these acts is doubtful, due to reasons of competence: in fact, the Constitutional Court ruled against the constitutionality of the Acts of Navarre, Valencia and Madrid (rulings 81/2013 of 11 April, 93/2013 of 23 April, and 110/2016 of 9 June).

This paper will deal with the 13/2005 Act, which accepts that two people of the same sex can get married. This Act is for general and direct application throughout Spain. The approval of this Act directly affects the regional acts regarding unmarried couples, at least as for the legal situation of same-sex couples: when the possibility to enter into a civil marriage is given to homosexual couples, it goes without saying that a specific legal regulation of same-sex partnership is no more necessary. From this point of view, the regional acts on unmarried couples have lost a large part of their meaning regarding same-sex relationships<sup>2</sup>. And that is why this paper is going to focus mainly on same-sex marriage.

## 2. The introduction of same-sex marriage in Spanish law.

Spanish Marriage Law experienced a major change in 2005. This year, the Spanish Parliament passed two bills that affected two of the main legal features of marriage: the 13/2005 Act of 1 July 2005, providing for same-sex marriage, and the 15/2005 Act of 8 July 2005, providing for divorce “on demand”<sup>3</sup>. The 13/2005 Act abolished the requirement of the difference of gender of the prospective spouses. In light of the contents of the above-mentioned Act, today, in Spanish law, marriage is a union between two people, regardless their sex: indeed, according to Article 44 SCC, “*men and women are entitled to marry in accordance with the provisions of this Code. — Marriage shall have the same requirements and effects when both prospective spouses are of the same or different genders*”.

The Spanish Government presented the 13/2005 Act as a demand derived from the Spanish Constitution. The Preamble to the Act tries to justify this reform stating

<sup>2</sup> The same is true, from another perspective (that of the free dissolvability of civil partnerships), after the introduction of divorce on demand (i.e., without the need of alleging any legal ground) through the 15/2005 Act. See MARTÍNEZ DE AGUIRRE, “El Nuevo matrimonio civil”, in *Novedades legislativas en material matrimonial* (Madrid, Consejo General del Poder Judicial, 2007), p. 47 et. seq. for more information; a short explanation in English in MARTÍNEZ DE AGUIRRE, “Family Law in Spain: Contractualisation or Individualisation”, in *Contractualisation of Family Law. Global Perspectives* (F SWENNEN ed., Springer, 2015), pp. 306 et seq. See also note 3.

<sup>3</sup> According to the Spanish Civil Code –SCC– (Articles 86 and 81), divorce shall be granted by the Judge at the request of both spouses or only one of them, provided this request is made after the lapse of three months from the wedding: neither a specific ground for divorce nor an agreement between the spouses are needed to obtain the divorce. It follows that the mere groundless will of one of the spouses is enough: the Judge is not allowed to reject the request of divorce, provided this request fulfills the (merely) formal legal requirements. The Spanish legislature turned another screw towards the facilitation of divorce in 2015 when the *Cortes Generales* passed a bill that eliminated the need for a judicial decision granting divorce: if there is an agreement between the spouses, and children are not involved, a notarial deed is enough to get the divorce (Article 87 SCC, as modified by Act 15/2015 of 2 July). The English translation of the Spanish Civil Code, before the reform of 2015, is available at <http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf> (last visited, 10 October 2016). Hereinafter, translations of the SCC come from this source.

that Article 32.2 of the Spanish Constitution<sup>4</sup> allows the legislator to regulate “relationships between couples in a different way (...) that provides an opportunity for new types of emotional relationships”, considering marriage as “a personal framework that allows those who freely adopt a sexual and emotional option with people of their own sex to develop their personality and exercise their rights under equal conditions”; on the other hand, the Preamble invokes the constitutional principles of liberty, equality and free development of personality to put an end (according to the Preamble of the Act) to “a long history of discrimination based on sexual orientation”. We will return to some of these questions later, when developing the theoretical analysis of the topic.

The approval of the 13/2005 Act caused heated debate in Spain, with relevant critical voices coming from the Spanish institutional and legal world. The *Consejo de Estado* (State Council), in a report dated 16 December 2004 (requested by the government)<sup>5</sup>, was against the reform and expressed doubts about its constitutionality. The *Consejo General del Poder Judicial* (General Council of the Judiciary), which is the constitutional governing body of the courts, stated that the Bill –later approved as 13/2005 Act– was clearly unconstitutional<sup>6</sup>. There were reports against it from other relevant judicial institutions, including one prepared by the *Real Academia de Jurisprudencia y Legislación* (Royal Academy of Jurisprudence and Legislation)<sup>7</sup>.

Regarding the parliamentary process, there was a disagreement between the two cameras that compose the Spanish parliament (*Cortes Generales*, composed of the Senate and the Congress of Deputies): whilst the Congress of Deputies passed the law, the Senate vetoed it, so the bill had to be definitely approved in a second reading in Congress. The law was passed by the *Cortes Generales* on 30 June 2005, published on 2 July 2005, and took effect the very next day, making Spain the third country in the world to allow same-sex marriage<sup>8</sup>.

The 13/2005 Act was appealed to the Spanish Constitutional Court on the grounds of unconstitutionality at the request of members of parliament and senators

<sup>4</sup> “1. Men and women have the right to marry with full legal equality. 2. The law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefor, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof”. An English translation of the Spanish Constitution is available at <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> (last visited, 10 October 2016).

<sup>5</sup> Available (in Spanish) at: <http://www.boe.es/buscar/doc.php?id=CE-D-2004-2628> (last visited, 10 October 2016).

<sup>6</sup> Report dated 26 January 2005, available (in Spanish) at: <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Informes/Estudio-sobre-la-reforma-del-Codigo-Civil-en-materia-de-matrimonio-entre-personas-del-mismo-sexo> (last visited, 10 October 2016).

<sup>7</sup> Report dated 1 March 2005, published in *Anales de la Real Academia de Jurisprudencia y Legislación*, No. 35 (Madrid, 2005), p. 937 et. seq.

<sup>8</sup> The bibliography regarding this Act was abundant at the time of its approval, and mostly critical. See, amongst others, the contributions by Espejo, García Cantero, Hernández Ibáñez, Martínez Vázquez de Castro or Torralba in the *Libro-homenaje a Manuel Amorós*, I, (Madrid, 2006) pp. 1.461 et seq.; Martínez de Aguirre and de Pablo Contreras, *Constitución, derecho al matrimonio y uniones entre personas del mismo sexo*, (Madrid, Rialp, 2007); García Rubio, “La modificación del Código civil en materia de derecho a contraer matrimonio”, *La Ley*, 6359 (2005); Carrión Olmos, “Reflexiones de urgencia en torno a las Leyes 13 y 15/2005”, *La Ley*, 6298 (2005); Valladares Rascón, “El derecho a contraer matrimonio y la Constitución”, *Aranzadi Civil*, 9–2005; Cerdeira Bravo de Mansilla, “¿Es constitucional, hoy, el matrimonio homosexual?”, *RDP*, March-April 2005; Ramos Chaparro, “Objeciones jurídico-civiles a las reformas del matrimonio”, *Actualidad Civil*, 10–2005; and de Amunátegui, “Argumentos a favor de la posible constitucionalidad del matrimonio entre personas del mismo sexo”, *RGLJ*, July-August 2005.

from a parliamentary group that did not vote in favour of it. The judgement of the Court took more than seven years: on 6 November 2012, the Constitutional Court upheld the law with 8 support votes and 3 against. The decision of the Court has been criticised, even for authors that support same-sex marriage, because it relied on the so called “evolutionary interpretation” of the Spanish Constitution, whose Article 32 stated that “*men and women have the right to marry with full legal equality*”: this wording is consistent with the notion of marriage as a heterosexual union (in fact, this is the only Article in the Spanish Constitution that uses the words “men” and “women”: all other Articles referring to constitutional rights use words referred both to men and women: “everyone”, “no one”, “all”, “all human beings”, and so on<sup>9</sup>). On the other hand, through this “evolutionary interpretation” the Court arbitrarily changed the meaning of marriage, getting rid of heterosexuality as structural requirement of marriage<sup>10</sup>; by changing the meaning of marriage, the Court also changed the Constitution, without following the procedure of constitutional amendment set out by the Constitution itself.

Let us go now to the figures. The 13/2005 Act was presented as a response to a social need. The Government that proposed and supported this legal reform suggested that the number of people who would benefit from it was four million<sup>11</sup>. Journalistic sources also spoke of one hundred thousand couples waiting for the approval of same-sex marriage<sup>12</sup>. None of these widely differing figures seems to have been right, especially when we compare them with the actual number of same-sex marriages entered into in Spain since the approval of the law: on 2 July 2015, the Spanish national statistics institute revealed that 31,640 same-sex couples got married from the beginning of July 2005 (when same-sex marriage became legal in Spain) to the end of December 2014. This accounted for 1.72% of all marriages contracted in Spain in that time. There were 3,677 same-sex marriages in 2014 (2.2% of the total number of marriages that took place in Spain in 2014). These figures are certainly low compared to the one hundred thousand homosexual couples spoken of in the press, or the four million people spoken of by the government. If we look at the number of homosexual people or the number of marriages that took place since the entry into force of the Act, it does not seem that there was a real social need, but rather an artificially induced one. These figures allow us to venture a conclusion: the discrimination and injustice to which this Act was supposed to put an end, according to its Preamble, either had not really existed or had not been as sharply felt by the affected as was said, since those suffering from

<sup>9</sup> Deeper on the debate about the constitutionality of the law, and the main arguments against the law, Martínez de Aguirre and de Pablo Contreras, *Constitución, derecho al matrimonio y uniones entre personas del mismo sexo*, (Madrid, Rialp, 2007); and, in English, Martínez de Aguirre and de Pablo Contreras, “Four years of same-sex marriage in Spanish law: a discussion ranging from constitutionality to the obstinacy of biology”, *American University Journal of Gender, Social Policy, and the Law*, Vol. 19, no. 1, pp. 289 and seq.

<sup>10</sup> See Martínez de Aguirre, “Comentario a la sentencia del Tribunal Constitucional 198/2012, de 6 de noviembre (matrimonio entre personas del mismo sexo)”, in Martínez Vázquez de Castro and Escribano Tortajada, *Comentarios a las sentencias del Tribunal Constitucional en materia civil* (Valencia, Tirant lo Blanch, 2016), pp. 313 et seq..

<sup>11</sup> See the transcription of the press conference after the meeting of the Spanish Government that approved the Bill, in <http://www.lamoncloa.gob.es/consejodeminstros/ruedas/Paginas/2004/r0110040.aspx> (last visit, 10 October 2016).

<sup>12</sup> See *El Periódico de Aragón* of 30 September 2004 available at: <http://www.elperiodicodearagon.com/noticias/noticia.asp?pkid=141553> (last visit, 10 October 2016).

this discrimination decided not to make use of the instrument that the law offered them to avoid it. Same-sex marriage seems to be more a symbolic demand than a real need. The real issue at stake is the meaning of marriage<sup>13</sup>.

### 3. The obstinacy of biology: legal differences between homosexual and heterosexual marriage.

The 13/2005 Act allowed same-sex marriage through the introduction of a new second paragraph in Article 44 of the Civil Code: *“marriage shall have the same requirements and effects whether both parties are of the same or different sex”*. The article is a statement of equal treatment between same-sex and opposite-sex marriages. Consequently, the same 13/2005 Act replaced in the Spanish Civil Code the words reflecting heterosexuality with other words sexually neutral: “spouses: – in Spanish, *“cónyuges”* – instead of husband and wife, and “progenitors” – in Spanish, *“progenitores”* – instead of mother and father. The objective was therefore to make the differences disappear.

However, the Spanish Civil Code keeps attesting the legal link between marriage and procreation, as well as the relevance of heterosexuality in legal marriage. This can be found within the provisions that regulate the presumption of paternity of the husband (Articles 116 and 117 SCC)<sup>14</sup>. These articles of the Spanish Civil Code keep using the words “husband” and “wife” (and not “spouses”, as many of the Articles of the Spanish Civil Code relating to marriage do, in order to include same-sex spouses). And this is the final result of a conscious decision of the legislator, who explains the rationale behind this choice in the Preamble to the Act, with the following words: *“however, the reference to the couple composed of husband and wife remains in... the Civil Code, given that the de facto assumptions that these Articles refer to can only occur in the case of heterosexual marriages”*. Thus, there is a relevant legal difference between opposite-sex marriages and same-sex marriages in Spanish law, and this difference has to do with children (sons and daughters), who are the, so to speak, teleological element of family law<sup>15</sup>.

<sup>13</sup> In the Spanish debate about same-sex marriage (but not only in Spain...), the discussion mainly focused on symbolic issues, as the dignity of homosexuals, or the principle of non-discrimination: in the second part of this paper we are going to address these topics. First, I would like to emphasize that, after the approval of same-sex marriage in Spain, some of the stronger supporters of same-sex marriage acknowledged that their objective was to change the institution of marriage: “At this point I have to admit (once we have won the battle) that I have always thought that those who opposed to same-sex marriage because this ‘denaturalized’ real marriage were right. Another thing is that many of us are happy with the denaturalization of this structure” (original in Spanish, author’s translation into English): GIMENO and BARRIENTOS, “La institución matrimonial después del matrimonio homosexual”, *Íconos. Revista de Ciencias Sociales*. No. 35 September 2009, p. 19.

<sup>14</sup> Article 116: “Children born after the marriage is performed and before three hundred days after the dissolution thereof, or after the legal or de facto separation of the spouses, shall be presumed to be children of the husband”.

Article 117: “If the child should be born within 180 days following performance of the marriage, the husband may destroy the presumption by declaring otherwise in a public instrument executed within six months of his becoming aware of the birth.

The cases where he should have expressly or implicitly acknowledged his paternity, or should have been aware of the woman’s pregnancy prior to performing the marriage shall be excepted from the foregoing, save when, in the latter case, such declaration in a public instrument should have been executed, with the consent of both spouses, prior to the marriage or subsequently thereto, within six months following the birth of the child”.

<sup>15</sup> See Martínez de Aguirre, “The evolution of Family Law: Changing the Rules or Changing the Game?”, *BYU Journal of Public Law*, vol 30–2 (2016), pp. 244 et seq.

In this case, the legal affirmation of the equality between same-sex and opposite-sex marriages, needs to be adapted to the reality of the situation, using the sole argument of the evidence of the situation itself: only when there is procreation and therefore heterosexuality (procreation coming from the sexual intercourse between one man and one woman) can it be logical to establish that the husband is the father of the child his wife has given birth to. This presumption is based on solid biological facts (that children are the ordinary outcome of the sexual intercourse between men and women), and cannot remain without it. The presumption of paternity is not applicable to same-sex unions, because the sexual intercourse between two men or two women never produces a child. That is why the Spanish 2005 reform had no choice but to reserve the application of the presumption of paternity to marriages between a man and a woman. It follows that the presumption of paternity continues to recognize the connection between marriage, heterosexuality and procreation in current Spanish law<sup>16</sup>. Children make a difference<sup>17</sup>.

Nevertheless, the presumption of paternity has now been, so to speak, “imitated” through the new paragraph 3 of Article 8 of the 14/2006 Act on Assisted Human Reproduction Techniques (LTRHA), introduced by the 13/2007 Act. In accordance with this Article “*when the mother (user of the techniques) is married to another woman, and not legally or informally separated, the latter may declare before the Registrar of the Civil Register of the couple’s domicile that she consents to the fact that when her partner gives birth to the child, that the filiation between her and the child be determined in her favour*”. According to this Article, two married women could legally be “mothers” of the child born as a consequence of the use of those techniques: one of them because she gave birth, and the other insofar as she made the declaration that the Article refers to.

As a result, this regulation introduces a legal landscape that is certainly complex, as:

- a) Only heterosexual marriages can be parents either through natural means or through assisted reproduction techniques or finally through adoption.
- b) Two married women can be parents, but only through assisted reproduction techniques or through adoption.
- c) Finally, two married men can only be parents through joint adoption<sup>18</sup>.

Biology (nature) is at the base of this result: it is nature itself that prevents from a complete comparison not only between opposite-sex and same-sex marriages, but also between homosexual marriages made up of men and made up of women. So to speak, biology imposes here its force and its obstinacy.

<sup>16</sup> de Pablo, “El Matrimonio y el Derecho Civil” in Martínez de Aguirre (ed.), de Pablo & A. Pérez Alvarez, *Curso de Derecho Civil IV. Derecho de Familia* (5th ed., Madrid, Edisofer, 2016), pp. 76 and seq.

<sup>17</sup> Regarding the repercussions of the legal reform for the law on filiation and the problems that it entails, see de la Cuesta Saénz, “La filiación en las reformas del Código civil”, in *La reforma del modelo de familia en el Código civil español* (Granada, Comares, 2005), pp. 133 et seq.

<sup>18</sup> This last statement must be clarified: article 10 of the LTRHA clearly bans surrogate motherhood agreements; however the *Dirección General de los Registros y del Notariado* (General Directorate of Registries and Notaries) accepts the registration of children born out of Spain using this reproductive technique despite the decision of the Spanish Supreme Court upholding this ban, and stating that surrogacy is contrary to the dignity of women and the basic rules of Spanish public policy (Judgement of 6 February 2013): see Barber Cárcamo, “La legalización administrativa de la gestación por sustitución en España (Crónica de una ilegalidad y remedios para combatirla)”, *RCDI* 739 (2013), pp. 2905 and seq.; and “Doble maternidad legal, filiación y relaciones parentales”, *Derecho Privado y Constitución* 28 (2014), pp. 93 and seq.

## II. THE THEORETICAL DEBATE ABOUT SAME-SEX MARRIAGE: DISCRIMINATION AND THE MEANING OF MARRIAGE.

The second part of this paper deals with the debate about same-sex marriage, focusing on two main points: the principle of non-discrimination, and the meaning of marriage.

### 1. Same-sex marriage and the principle of non-discrimination.

One of the arguments usually put forward in favour of same-sex marriage is the principle of equality and non-discrimination. In Spain, this principle has been widely used in the Preamble to the 13/2005 Act to justify the legal change.

The first point to stress is that the European Court of Human Rights did not find any discrimination in the fact that two people of the same sex are not allowed to enter into marriage<sup>19</sup>: the best known case is the case *Schalk and Kopf versus Austria* (6 June 2010), in which the ECHR rejects the idea that the non-recognition of same-sex marriage by one State entails unfair discrimination (mainly in its §§101 and 108<sup>20</sup>), and states that Article 12 of the Convention does not impose an obligation on the European Governments to grant a same-sex couple access to marriage (§63). This opinion is sustained on subsequent Judgements of the EHRC: cases *Hamalainen versus Finland* (16 July 2014), *Oliari and Others versus Italy* (21 July 2015) and *Chapin and Charpentier versus France* (9 June 2016).

On the other hand, it is very doubtful that stating that marriage is an institution reserved for people of different sexes entails discrimination due to reasons of sex (or sexual orientation). Let us look at this point in greater detail.

We can begin the analysis by asking the following question: in classic family law, in which marriage always has been between a man and a woman, are homosexuals being discriminated against? The clearest answer would be, no, because a homosexual can enter into marriage with the same people and under the same conditions as a heterosexual: that is, with a woman (if he is a man) or with a man (if she is a woman): there is not any difference, there is not any discrimination. It would be discriminatory if homosexuals were stopped from marrying any person due to his or her sexual orientation. But this is not the case: a homosexual can

<sup>19</sup> See an explanation of these judgements in the report of the *Consejo de Estado* and in the work of De Pablo, “La Constitución y la ley 13/2005, de 1 de julio, de reforma del Código civil en materia de derecho a contraer matrimonio”, in Martínez de Aguirre and De Pablo, *Constitución, derecho al matrimonio y uniones entre personas del mismo sexo* (above, note 9), pp. 98 and seq.

<sup>20</sup> “101. In so far as the applicants appear to contend that, if not included in Article 12, the right to marry might be derived from Article 14 taken in conjunction with Article 8, the Court is unable to share their view. It reiterates that the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another (see *Johnston and Others*, cited above, §57). Having regard to the conclusion reached above, namely that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.

...  
108.... the applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition”.



marry anyone of the opposite sex, like everyone else. It would also be discriminatory if only homosexuals (and not heterosexuals) were stopped from marrying people of the same sex. However, in classic family law, neither homosexuals nor heterosexuals could marry people of their same sex. It would also be discriminatory if only men or only women could marry people of the same sex, but this is not the case either. Therefore, there would not be any discrimination from this point of view.

This conclusion could be challenged from the, so to speak, sexual orientation perspective: a homosexual is prevented from marrying the person he or she has chosen according to his or her sexual orientation, whilst a heterosexual can marry the person he or she has chosen according to his or her sexual orientation. In short, there would be unfair discrimination because a homosexual cannot marry the person he or she loves and wants to marry, because this person is of his or her same sex.

The problem is that this approach is based on a very problematic assumption: indeed, it assumes that the right to marry includes both same-sex and opposite-sex couples. It also assumes that the word “marriage” lacks any real meaning, from this point of view, so that it could include unions between two men and two women as well. Only on the assumption that marriage is an institution in which heterosexuality is not an essential requirement, one could conclude that denying two people of the same sex the possibility to marry is discriminatory. This leads us to a very different question, which is the meaning of marriage: and this is the real question underlying the debate about same-sex marriage.

Indeed, in this debate the issue at stake is not the dignity of gay and lesbian people: their dignity does not depend on the possibility of getting married to a man or a woman of their same sex: their dignity only depends on the fact that he or she is a human being. The real question is the meaning of marriage as such. As Justice Cordy said in his dissenting opinion in *Goodridge v. Department of Public Health*, “the Court has transmuted the *right* to marry into a right to change the institution of marriage itself... only by concluding that *marriage* includes the union of two persons of the same sex does the Court conclude that restricting marriage to opposite-sex couples infringes on the *right* of same-sex couples of *marriage*”<sup>21</sup>. So, the right to marry of same-sex couples implies the right to change the social and legal meaning of marriage, as Justice Cordy said.

So, we have to deal with the meaning of marriage, which is the real issue at stake.

## 2. The meaning of marriage.

A good starting point for this analysis could be the classic (i.e., previous to the recent legal changes) definition of marriage in the Dictionary of the Spanish Royal Academy of Language: in Spanish “*unión de hombre y mujer concertada mediante determinados ritos o formalidades legales*”; in English, “*the union of a man and a woman entered into through determined rites or legal formalities*”; we can find a very similar definition in the *Cambridge Dictionary of American*

<sup>21</sup> *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 984 (Mass. 2003) (Cordy, J., dissenting).

*English: “a legally accepted relationship between a man and a woman in which they live as husband and wife”.* So, from this grammatical (and semantic) point of view, heterosexuality forms part of the meaning of the word “marriage”. I would like to clarify this point. When we say that marriage is a union between a man and a woman, we are not indicating one of the possible meanings of the word “marriage”, but rather the meaning of the word itself. “Marriage” is precisely the word used to describe the long-term and committed union between a man and a woman, with sexual content and for that reason linked to procreation. This could be easier to understand by reversing the sequence: there is a social and human phenomenon that consists of the long-term, committed union between a man and a woman, related to procreation, and this social and human phenomenon is called “marriage”. So, “marriage” is the word we use for this type of union, which is heterosexual, and not for anything else.

At this moment, we could recall the wording of the Article 16 of the Universal Declaration of Human Rights, according to which “*men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family*”. This wording is consistent with the notion of marriage as a heterosexual union: in fact, this is the only Article in the declaration that uses the words “men” and “women”: all other Articles use words referred both to men and women: “everyone”, “no one”, “all”, “all human beings”, and so on.

If the union is between two men or two women it is not marriage, but another different human and social phenomenon, for the same reason that a sale without any price is no longer a sale but a donation, and saying that a donation is not a sale is not pejorative against the donation, but simply defining different legal concepts, subject to different legal rules. Stating that a union between two men or two women is marriage is like claiming that these unions are heterosexual ones: kind of a contradiction in terms. On the other hand, saying that they are different is not saying anything bad about same-sex unions, but simply distinguishing them from opposite-sex unions, which are, in fact, different.

However, are these situations really different? Is the obvious difference between same-sex and opposite-sex couples relevant, from the social and legal point of view? If so, what are the differences? The first and most basic difference derives from the very structure of the unions: man-woman in one case and man-man or woman-woman in the other. This, which is pretty obvious, reveals its importance when related to the biological and social consequences of the complementary nature of the sexes, and of the existence of sexual intercourse between the members of the couple. In the case of opposite-sex unions, the complementarity of the sexes means that the sexual intercourse between a man and a woman can result in the birth of new human beings, i.e., of new citizens: this gives these unions a particular, strong social value, compared to same-sex unions: in fact, same-sex unions cannot lead to the birth of new citizens not because of the pathology of the union (as if one of its members was infertile), but because of the structure of the union itself: so, same-sex unions have a much more limited social importance. Two men or two women may have sexual relations but **this alone** does not result in the birth of new human beings. A man and a woman may have sexual relations

and **this alone** may result (and in many cases does result) in the birth of new human beings. It is the structure and operation of the sexual union between opposite-sex people that produces these effects, without any need for the intervention of third parties. So, same-sex couples have a **non-procreative structure**, while opposite-sex couples have a **procreative structure**: let me underline again that same-sex couples are infertile not because a pathology of the relationship, but on account of the very structure of this relationship.

From a social point of view this is a very relevant difference between same-sex and opposite-sex couples, and it is also clear that the social importance of opposite-sex couples is far superior than that of same-sex ones. Society is more interested in heterosexual couples, first of all because citizens are born as a result of the, so to speak, internal dynamics of the relation itself (i.e., as a result of the sexual intercourse between the man and the woman composing the couple), and no citizens are born as a result of sexual intercourse in same-sex couples.

This is neither the product of the will of mankind, nor the fruit of the social environment or history, as if cultural evolution or a conscious decision of mankind had chosen this particular system of reproduction: this has been given to us by nature. We human beings are not very original in this point: the same pattern can be found in thousands of animal species. For instance, regarding hippopotamus, it would be very complicated to justify that the cultural evolution or a hetero-sexist prejudice have led them to differentiate between male and female hippopotami, and thus to sexual reproduction. At this level the distinction between male and female is natural, and is related to procreation.

Changing the perspective could be of help: from the point of view provided by the presence of a child (i.e., a son or a daughter), there is only a generating couple, and this couple consists of a man (only one man: the father) and a woman (only one woman: the mother). Thus, family law is about couples because family law is about children. Indeed, one of the main social aims of marriage is uniting the father to his children: as ancient Roman lawyers used to say, *mater semper certa est, pater vero is est quem nuptiae demonstrant* (the mother is always certain, the father is he whom the marriage indicates as such). If this presumption was applied to same-sex marriages, it wouldn't be a presumption any longer, but a legal fiction. family law is about having and raising children, and not only about raising children.

Losing the original meaning of marriage entails, in a first step, losing the reason for the social and legal benefits usually linked to marriage, and in a second step, losing the benefits themselves, and this way discouraging people from getting married. This is an effect very well known in economics, where according to Gresham's Law bad money drives out good (and both are "money": we use the very same word for both good and bad money); it is also well known in Trademark Law, where confusion of marks is bad for consumers inasmuch as can deceive them and deprive them of making informed purchasing decisions. Calling "marriage" both opposite-sex and same-sex unions would be considered as an infringement of Trademark Law, as it can cause confusion among the, so to speak, consumers of family models.

**Słowa kluczowe:** *małżeństwo osób tej samej płci, redefinicja małżeństwa, dyskryminacja osób o orientacji homoseksualnej, prawo rodzinne.*

### Streszczenie

#### Carlos Martínez de Aguirre – *Małżeństwo osób tej samej płci w prawie hiszpańskim*

W artykule przedstawione zostało zagadnienie wprowadzenia do hiszpańskiego prawa instytucji małżeństwa osób tej samej płci oraz konsekwencji dokonanej modyfikacji. Na wstępie zaprezentowane zostały podstawowe założenia hiszpańskiego systemu prawnego wynikające w szczególności z podziału kompetencji ustawodawczych pomiędzy centralny parlament a organy autonomicznych regionów. W pierwszej części zaprezentowana została historia przyjęcia ustawy nr 13/2005 z 1 lipca 2005 r. wprowadzającej małżeństwo osób tej samej płci oraz sporu dotyczącego konstytucyjności wskazanej ustawy, rozstrzygniętego przez hiszpański sąd konstytucyjny orzeczeniem z 6 listopada 2012 r. W drugiej części opracowania zawarte zostały rozważania o różnicach (biologicznych jak również prawnych) pomiędzy małżeństwem osób odrębnej i tej samej płci. Rozważony został również argument o dyskryminacji (z powodu orientacji seksualnej) osób homoseksualnych uniemożliwieniem zawarcia małżeństwa z osobą tej samej płci. Na zakończenie zaprezentowane zostały teoretyczne rozważania dotyczące znaczenia małżeństwa, które zgodnie ze stanowiskiem Autora historycznie i semantycznie jest pojęciem odnoszącym się wyłącznie do związku osób o odmiennej płci. W opracowaniu przedstawiony został pogląd zgodny z którym podstawowym celem zmiany dokonanej w 2005 r. była redefinicja prawnej i społecznej definicji małżeństwa.

**Keywords:** *same-sex marriage, redefining marriage, discrimination of persons with homosexual orientation, family law.*