Journal of Gender, Social Policy & the Law

Volume 19 | Issue 1 Article 16

2012

National Report: Spain

Carlos Martínez de Aguirre Aldaz

Pedro de Pablo Contreras

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CARLOS MARTÍNEZ DE AGUIRRE ALDAZ* &
PEDRO DE PABLO CONTRERAS**

Four Years of Same-Sex Marriage in Spanish Law: A Discussion Ranging from Constitutionality to the Obstinacy of Biology

1. INTRODUCTION: A BRIEF NOTE REGARDING THE SPANISH LEGAL SYSTEM

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)—art. 1 of the Civil Code. The rulings of the Supreme Court play an important role in the interpretation of written laws, but, in themselves, do not constitute a source of law—art. 1.6 of the Civil Code.

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 strictly regarding the interpretation of constitutional law; therefore, it cannot either repeal or modify it) and on the other to guaranteeing that it is not infringed by lower laws.

For the purposes of this discussion document, it should be stated that the Spanish legal system is a complex one, since different regional ("autonomous") sub-systems are included in it, without the criteria

* Professor in Civil Law at the University of Zaragoza.
** Professor in Civil Law at the University of La Rioja.

regarding the distribution of competences between the state or central legislature and the autonomous legislators being clear.[1] This question is important in relation to the legal regulation of same-sex marriages, as it has led to a legal outlook that is especially complex:

1. On one hand, the central legislator is the only body that is 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 (without prejudice to the possible constitutional problems of that decision, which we will refer to later). The Spanish legislator has so ruled through the 13/2005 Act of 1 July.

2. On the other hand, a large number of regional acts regarding civil partnerships have been passed: 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), the Autonomous Community of Valencia (the 1/2001 Act on Civil Unions), the Baleares (the 18/2001 Act on Unmarried Couples), the Autonomous Community of Madrid (the 11/2001 Act on Civil Unions), Asturias (the 4/2002 Act on Unmarried Couples), Andalusia (the 5/2002 Act on Unmarried Couples), the Canary Islands (the 5/2003 Act on Unmarried Couples), Extremadura (the 5/2003 Act on Unmarried Couples), the Basque Country (the 2/2003 Act on Unmarried Couples), Cantabria (the 1/2005 Act on Unmarried Couples) and Galicia (uncharacteristically, in the problematic Third Additional Provision of the 2/2006 Act of 14 July). They are acts with very different reaches and contents, although without exception they include both heterosexual and homosexual couples within their field of application. The constitutionality of these acts is doubtful, due to reasons of competence, but what is true is that the majority of them have not been challenged, and those that have been challenged are still awaiting a ruling from the Constitutional Court.

This paper will deal with the 13/2005 Act, which accepts that two people of the same sex can enter into civil marriage. Said Act is for general and direct application throughout Spain. We do wish to say that the enactment of this Act directly affects the regional acts regarding unmarried couples in a general way, at least as regards the legal situation of same-sex couples. When the possibility to enter into a civil marriage is given to homosexual couples, and to thereby have access to the legal statutes of married people, it goes without saying that it is necessary to give homosexual civil partnerships a specific legal system, because if not they would be outside of

1. See DE PABLO CONTRERAS, in DE PABLO *et al., Curso de Derecho civil I. Derecho Privado. Derecho de la Persona* (3rd edition, Madrid, Colex, 2008), p. 87 et seq. regarding the structure of the Spanish legal system and the distribution of competences regarding civil law.

the law. From this point of view, the regional acts on unmarried couples have lost a large part of their meaning.[2]

2. THE 13/2005 ACT: A GENERAL APPROACH

Spanish law is one of the few in the world that accepts the marriage of two people of the same sex. This possibility was introduced by the 13/2005 Act of 1 July, as a reform of the Civil Code regarding the right to enter into marriage. Said Act abolished the requirement—until then implicit and assumed to such an extent that the law did not refer to and had obviously never referred to it as such—of the difference of sex of the parties entering into marriage. In light of the contents of said Act, today, in Spanish law, marriage is a union of two people of undefined sex.

The Act was presented as a demand derived from the Constitution. The preamble to the 13/2005 Act justifies this reform on the grounds that, in its criterion, article 32.2 of the Spanish Constitution allows the legislator to regulate "relationships between couples in a different way . . . that provides an opportunity for new types of emotional relationships," defining 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," and invokes the constitutional principles of liberty, equality and free development of personality to remove "a long history of discrimination based on sexual orientation." We will return to some of these questions later when developing the analysis of the constitutionality of this Act.

The 13/2005 Act was presented as a response to a social need. The government that supported the reform put the number of people who would benefit from it at four million.[3] Journalistic sources also spoke of one hundred thousand couples waiting for the approval of an Act similar to the one that was finally enacted.[4] Neither of these widely differing figures seems to have any real grounds. If we study reliable available data, it turns out that the existing number of homosexual unions in Spain is far from significant. According to the latest census carried out by the National Institute of Statistics (2001), homosexual couples make up approximately

2. The same is true, from another perspective (that of the free dissolvability of civil unions), after the introduction of divorce without grounds 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.

3. A reference can be seen as an example at: http://www.abc.es/hemeroteca/historico-30-09-2004/Home/el-gobierno-modificara-el-codigo-civil-para-que-los-matrimonios-gays-puedan-adoptar-niños_9623907984924.html.

4. See, *El Periódico de Aragón* of 30 September 2004, available at: http://www.elperiodicodearagon.com/noticias/noticia.asp?pkid=141553.

0.11% of the total number of existing couples in Spain. To be precise, 10,474 same-sex couples were recorded: 3,619 female, and 6,855 male. If we compare these figures with the number of homosexual marriages entered into in Spain, according to the data supplied by the National Institute of Statistics, it calls into doubt the statement that the Act was responding to a social need. Based on the fact that, between 2005 and 2008 inclusive, 12,324 marriages took place between people of the same sex, a figure that seems to confirm the aforementioned census data rather than the government or newspaper estimates; it is certainly low compared to the 100,000 homosexual couples spoken of in the press, or the 4,000,000 spoken of by the government. If we look at the number of homosexual people or the marriages entered into 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 going to put an end, according to its preamble, either did not really exist or were not as sharply felt by those affected as was said, especially if one notices that those suffering from this discrimination have decided not to make use of the instrument that the Act offers them in order to avoid it.

The approval of the 13/2005 Act caused heated debate in Spain, which still continues. The *"Consejo de Estado"* (State Council), in a report dated 16 December 2004 (requested by the government),[5] was against the reform and expressed doubts about its constitutionality. The *"Consejo General del Poder Judicial"* (General Council of the Judiciary), the constitutional governing body of the courts, expressed the same opinion but even more strongly, that the project for which it was later approved was clearly unconstitutional.[6] 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).[7]

Regarding the parliamentary process, Congress approved the Act, but the Senate vetoed the Act, which meant that it had to be approved in a second reading in Congress. Once it entered into force, several judges responsible for the Civil Register, those that are responsible for authorising civil marriages, prepared questions of unconstitutionality, but these were not admitted to be heard by the Constitutional Court using the argument (debateable, as their individual votes show) that in these cases the courts

5. Available at: http://www.codigo-civil.org/archivado/?p=463.

6. Report dated 26 January 2005, available at: http://www.codigo-civil.net/archivado/?p=467.

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

did not exercise a jurisdictional duty, not even of voluntary jurisdiction, but merely one of registration or administration (Resolution 505 and 508/2005 adopted at the plenary session of the Constitutional Court of 13 December). Apart from that, the Act has been appealed against on the grounds of unconstitutionality at the request of members of parliament and senators from a parliamentary group that did not vote in favour of it.

As we have stated earlier, the 13/2005 Act is generally applicable throughout Spain, because the regulation of personal aspects of marriage is the competence of the central legislator.[8]

3. SAME-SEX MARRIAGE: THE CONSTITUTIONAL PERSPECTIVE

3.1. Approach: methodological assumptions

The 13/2005 Act, in its preamble, states as constitutional grounds the admission of same-sex marriage under the provisions of the Spanish constitution: Arts. 9.2 and 10, insofar as they refer to the promotion of effective equality of the citizens and the free development of personality; art. 1.1, insofar as it upholds the principle of freedom that would also be applicable to the various forms of cohabitation; and finally art. 14, insofar as it provides for the establishment of a framework for real equality in the enjoyment of rights, without any discrimination due to sex, opinion, or any other personal or social situation. Both in Spain and in other countries, these constitutional rules, or similar ones, have been used as grounds for the legal regulation of same-sex couples, or for the admission of same-sex marriage. However, it must be said that this approach assumes a certain interpretation of said rules and principles, as well as of the word "marriage" itself. For example, it specifically assumes an understanding that the fact that two people of the same sex cannot marry each other is contrary to the principle of equality, which in turn assumes an understanding that the term "marriage" does not have a meaning that is essentially related to heterosexuality. Therefore, as we have stated, it implies first adopting a

8. The bibliography is very rich—the majority critical—regarding this Act. Please 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) pages. 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.

certain interpretation.

The largest constitutional hurdle to same-sex marriage in Spanish law is derived from art. 32 of the Constitution, which has also been the object of contradictory interpretations. The presence of this provision is essential from a methodological point of view, in order to correctly deal with the constitutionality or unconstitutionality of the 13/2005 Act. Indeed, the analysis of the constitutionality in Spanish law is firstly the analysis of the compliance of the 13/2005 Act with art. 32 of the Spanish Constitution, and more specifically with the specific mention that said provision makes to men and women as holders of the right to enter into marriage (to quote the text: *"men and women have the right to enter into marriage with full legal equality"*). This constitutes a peculiarity in Spanish law compared to others in which the question of constitutionality has been basically approached from the point of view of discrimination. It is however similar to Germany, given that art. 6 of the German Constitution makes marriage the object of constitutional protection (although in this case without expressly mentioning men and women). The reports issued by various technical bodies (the *"Consejo de Estado"*—State Council, the *"Consejo General del Poder Judicial"*—General Council of the Judiciary, the *"Real Academia de Jurisprudencia y Legislación"*—Royal Academy of Jurisprudence and Legislation) were specifically founded on this art. 32 of the Spanish Constitution, including the reservations of varying emphasis and strength expressed regarding the constitutionality of the project derived from the 13/2005 Act.

The question therefore is to determine how far art. 32 closes the door (or not) to the possibility that the ordinary legislator will admit same-sex marriages. To do this, it seems appropriate to refer to the usual rules of interpretation of the legal norms included in art. 3 of the Civil Code.[9]

3.2. The grammatical interpretation of art. 32 of the Constitution: the meaning of the word "marriage"

The first of the criteria set out by art. 3.1 of the Civil Code is the meaning of words. A good starting point may be the definition of marriage in the Dictionary of the Spanish Royal Academy of Language: "the union of a man and woman entered into through determined rites or legal formalities."[10] From this grammatical (and semantic) point of view, heterosexuality forms part of the meaning of the term "marriage." When it

9. Regarding the criteria for interpretation contained in art. 3.1 of the Civil Code, see PÉREZ ALVAREZ, *Interpretación y jurisprudencia* (Pamplona, Aranzadi, 1994).

10. The definition was not modified in the 2006 edition of the "*Diccionario Esencial de la Lengua Española"* (Essential Dictionary of the Spanish Language) (Madrid, Spanish Royal Academy of Language, 2006).

is stated that marriage is a union between a man and a women, it is not indicating one of the possible meanings of the term "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. To clarify what we mean, it may be easier to understand by reversing the sequence: there is a social and human phenomenon that consists of the long-term union between a man and a woman, and this social and human phenomenon bears the name "marriage." The term "marriage" is the word used for this type of heterosexual union, and not for anything else.

If the union is between two men or two women it is then not marriage, but rather another different human and social phenomenon, for the same reason that the sale of something for no money is not a sale but a donation, and saying that a donation is not a sale is not pejorative against the donation, but simply defining substantially different truths, subject to different legal treatment. Claiming that a homosexual union is marriage is like claiming that a homosexual union is heterosexual: a contradiction in terms.[11] And saying that they are different facts is not saying anything bad about same-sex unions, but simply distinguishing them from other types of unions (those of different sex couples), which are, in fact, different.

However, are these situations really different? What are the differences? The first and most basic difference derives from the structure itself of the respective unions: man-woman in one case and man-man or woman-woman in another. This, which is stating the obvious, reveals its importance when it is related to the consequences (biological and social) of the complementary nature of the sexes, and of the existence of sexual relations between the members of the couple. In the case of heterosexual unions, the complementary nature of the sexes means that the sexual relations between man and woman result in the birth of new human beings, of new citizens, which gives the unions that have this efficient characteristic a particular and strong social value, compared to unions that structurally (not, therefore, temporarily or pathologically) cannot lead to the birth of new citizens, these latter therefore having a much more limited social importance. Two men or two women may have sexual relations and **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 people of different sexes that produces these effects, without any need for the intervention of third parties.

Art. 32 of the Spanish Constitution enables us to reach these conclusions

11. See RAMOS CHAPARRO, "Objeciones jurídico-civiles a las reformas del matrimonio", *AC* 2005-10, p. 1170.

with even greater confidence, by stating that men and women have the right to enter into marriage "with full legal equality." This reference to equality has a double meaning. Firstly, as a reaction to the unfair discrimination suffered by women as a consequence of entering into marriage until a few years before the Constitution was enacted: art 32 prohibits any form of legal discrimination between men and women derived from entering into marriage. However, together with this, which is evident, the reference to equality again assumes the heterosexuality of the marriage. What it says is that the difference in sexes between the parties entering into marriage may not give grounds and may not result in legal inequality, which assumes a sexual difference to then go on and state that this difference does not justify inequality in treatment, because more important than this difference is the essential, ontological equality of men and women, based on the fact that they are human beings endowed with the dignity that art. 10 of the Spanish Constitution recognises, this time for any person as a human being. In conclusion, what the provision means is that the difference in sexes, which is assumed precisely because it constitutes the marriage, is not a sufficient basis for the parties entering into marriage to be treated unequally.

3.3. Systematic interpretation and legislative background

a) Art. 32 of the Spanish Constitution contains an express reference to a man and a woman being entitled to enter into marriage. This reference does not result in any other constitutional provision used to recognise the rights of citizens. These provisions talk about "all" (articles 15.1, 24.2, 27.1, 27.5, 28.1, 31.1 and 45.1), "any person" (articles 17.1 and 17.2), "all people" (article 24.1), "the citizens" (articles 18.4 and 23), "the Spanish" (articles 19 and 30.1), "all Spanish people" (articles 29.1, 35.1 and 47), "no one" (articles 16.2, 17.1, 25.1 and 33.3), "is guaranteed" (articles 16.1, 18.1 and 18.3), "is recognised" or "are recognised" (articles 20.1, 21.1, 22.1, 27.6, 28.2, 33.1, 34.1, 37.2, 38 and 43), without deeming it necessary in any of said cases to refer to the holder of the rights or to the specific sex of the person. The reference to sexual diversity ("man and woman") is explained precisely because the provision regulates the right to enter into marriage, which in itself assumes the heterosexuality of those who enter into it.[12]

12. The argument has been widely used in here, since the relatively early "*Resolución de la Dirección General de los Registros y del Notariado"* (Ruling by the General Directorate for Registries and Notaries) of 21 January 1988. It is used, for instance, in the reports of the "*Consejo de Estado*" and the "*Consejo General del Poder Judicial."* Among the Spanish authors, see DE VERDA Y BEAMONTE, "Principio de libre desarrollo de la personalidad y *ius connubii*", *RDP* 1998, p. 720; RODRÍGUEZ-ARANA MUÑOZ, "Sobre el Dictamen del "*Consejo de Estado*" y el matrimonio entre personas del mismo sexo", *La Ley* 2005-1, p. 1614 and ESCRIVÁ-IVARS, "Sistema matrimonial y derechos fundamentales. Notas sobre la *nueva* legislación matrimonial",

b) Moving on now to the *"historic and legislative background,"* it is useful to remember that during the preparation process of the Constitution several initiatives aimed at giving art. 32 of the Spanish Constitution a draft that would have enabled homosexual marriage to be protected under Spanish law were not successful. For example, the specific vote presented (and later withdrawn) by the socialist party, proposing the following text: "all people are entitled to the development of their emotions and their sexuality, to enter into marriage . . . ." As Gavidia points out, if this draft had been successful it would not have been difficult to understand that the right to enter into marriage with a person of the same sex had been constitutionally recognised.[13] An amendment was also presented in the Senate in this same regard ("all people are entitled to the development of their emotions and of their sexuality, to enter into marriage . . ."), with express mention in the debate "of the enormous number of homosexuals." The amendment was rejected. All of this allows us to conclude that the possibility that said initiatives tried to open was intentionally rejected by members of parliament when they wrote and approved the Constitution.

3.4. The limits of the lawmaking power of the ordinary legislator: an essential condition of the right to enter into marriage and an institutional guarantee of marriage

So, could the ordinary legislator broaden the meaning of the constitutional expression to also allow people of the same sex to enter into marriage? In other words, we could agree that the institution provided for in art. 32 of the Spanish Constitution is characterised by heterosexuality, but would that be affected if the ordinary legislator broadened the legal concept of marriage to also allow marriage between people of the same sex?

At first, one might think that there is no problem—the right that two people of different sexes have to enter into civil marriage is neither limited nor affected, it simply allows people of the same sex to do the same. However, our analysis should be a little deeper from two points of view: the right to enter into marriage as a constitutional right and the institutional guarantee of marriage, both contained in art. 32 of the Spanish Constitution.

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in the vol. *La reforma del modelo de familia en el Código civil español* (Granada, Comares, 2005), p. 84.

13. GAVIDIA SÁNCHEZ, "Uniones homosexuales y concepto constitucional de matrimonio", *REDC,* No. 61 (January-April 2001), p. 35, note 22.

3.4.1. Ius connubii *(right to enter into marriage) and the institutional guarantee of marriage in the Spanish Constitution*

As we have said, on one hand the right to enter into marriage is a constitutional right that binds all public powers and "only the law, which in any case must respect its essential content," can regulate its exercise (art. 53.1 of the Spanish Constitution). On the other hand, the structure of this right and the constitutional provision itself that recognises it, demands that the legal system provides for and regulates the institution of marriage, which must be available so that men and women can exercise said right. Therefore, the existence of an *institutional guarantee* of marriage must be recognised in the Constitution, that is, as the Constitutional Court has said, "a social institution guaranteed by the Constitution" (STC – Constitutional Court Ruling 184/1990, 15 November), which understands its provision and recognition by law as positive to the extent that it is legally protected in recognisable terms for the image from which the social consciousness is drawn.

Therefore, from the perspective of the institutional guarantee, the margin that the Constitution grants the legislator is wide and can change to suit the swings of developing social convictions. However, although this is true, when exercising said regulation the law must at all times respect the essential content of the right to enter into marriage that the Constitution itself recognises for men and women (art. 53.1 of the Spanish Constitution), to which delimitation are added "the Universal Declaration of Human Rights and international treaties and accords on the same matters ratified by Spain," in accordance with which it must be interpreted (art. 10.2 of the Spanish Constitution). Article 32 of the Spanish Constitution therefore includes two perspectives—the institutional guarantee of marriage and the right to enter into marriage—that should be distinguished.

In brief, as—through STC 32/1981—the Constitutional Court repeats, "the institutional guarantee does not ensure specific, fixed contents once and for all, but rather the protection of an institution in recognisable terms for the image from which the social consciousness is drawn at any given time or place." However, when, as is the case with marriage, the institution in question in turn constitutes the object of a constitutional right, its regulation by the legislator may not suppose any detriment to the essential content of the right regarding the specific legal power that the Constitution recognises for its subjects.

Interpreting article 32.1 in accordance with the content of article 10.2 of the Constitution, they belong to the essential content of the *ius connubii*, not available for the ordinary legislator at least its relational and reciprocal

character of man and woman;[14] the full equality of each one to enter into marriage, which extends to the subsequent state and to the contingency of its possible dissolution;[15] the impossibility of blocking access to marriage based on differences of race, nationality or religion of the parties[16] and the restrictive nature of other obstacles, which must always have reasonable and sufficient explanation;[17] the requirement that there be full and free consent of the parties;[18] and finally the linking of the right to the fact that the man and woman have reached the *age of consent,* which may be fixed by each legislator based on the objective conditions of maturity needed in order to give the required full and free consent and to "start a family."[19] Regarding this essential content of the right to enter into marriage, the legislator can establish the legal marriage system without any other limit apart from that derived from its institutional guarantee.

3.4.2. The 13/2005 Act in light of the essential content of the right to enter into marriage and the institutional guarantee of marriage

The 13/2005 Act, as has been stated, generally modifies the concept of marriage in Spanish law, considering it to be sexually undifferentiated.

The basic premise on which to judge the reform is that the right to enter into marriage included in article 32.1 of the Spanish Constitution is, as we have indicated, relational and reciprocal between man and woman, meaning that the possibility of two people of the same sex entering into marriage that the 13/2005 Act has allowed is not governed by the Constitution or by the international texts that include the right to enter into marriage. This has been declared by both the Constitutional Court (*Resolution* 222/1994 of 11 July) and the European Court for Human Rights (Rulings ECHR 17 October 1986, *Rees v. the United Kingdom,* 27 September 1990, *Cossey v. the United Kingdom* and 30 July 1998, *Sheffield*

14. Arts. 16.1 of the Universal Declaration of Human Rights, 23.2 International Covenant on Civil and Political Rights and 12 European Convention on Human Rights; Constitutional Court 222/1994, of 11 July, Rulings of the European Court of Human Rights 17 October 1986, *Rees v. United Kingdom,* 27 September 1990, *Cossey v. the United Kingdom* 30 July 1998, *Sheffield and Horsham v. United Kingdom,* and 11 July 2002, *Goodwin v. United Kingdom and I. v. United Kingdom*.

15. Arts. 16.1 of the Universal Declaration of Human Rights and 23.4 of the International Covenant on Civil and Political Rights.

16. Art. 16.1 of the Universal Declaration of Human Rights.

17. Rulings of the European Court of Human Rights 18 December 1986, *Johnston v. Ireland,* 18 December 1987, *F. v. Switzerland,* and 13 September 2005, *B. and L. v. the United Kingdom.*

18. Arts. 16.2 of the Universal Declaration of Human Rights and 23.3 of the International Covenant on Civil and Political Rights.

19. Arts. 16.1 of the Universal Declaration of Human Rights and 23.2 of the International Covenant on Civil and Political Rights and 12 of the European Convention on Human Rights.

and Horsham v. the United Kingdom).[20]

The relational and reciprocal character between a man and a woman entering into marriage means that the holders of this right are not merely human beings as such, but are specifically man and woman.[21] This statement clearly matches (and is demonstrated in the constitutional perspective) the literal reading of art. 32 of the Spanish Constitution which attributes the right to enter into marriage not to people in general but specifically to a man and a woman (which is also the same as international texts as we have stated above). That constitutionally the holders of the right to enter into marriage be a man and a woman is not merely anecdotal, but is directly connected to this relational and reciprocal character between man and woman that defines the right to enter into marriage. Ignoring this subjective legal structure when entering into marriage means introducing a radical change to said right and to the institution to which it gives access.

This latter statement allows us to enter the second of the mentioned perspectives. The authors that have dealt with this question, including those who consider the 13/2005 Act to be in accordance with the Constitution, mainly agree that the aforementioned Act has caused a major, even essential modification in the concept of marriage.[22] This has occurred precisely because what the Spanish legislator has attempted is for same-sex unions to receive the same legal name and treatment as marriage. In contrast to what English and German legislators have done for example, the Spanish legislator has chosen this path of homogenisation of two very different phenomena, which means a radical change in the concept of marriage. If we start from the assumption that, as we have seen above, the

20. The rulings of the latter on 11 July 2002, *Goodwin v. the United Kingdom* and *I. v. the United Kingdom* (that considered this right to be infringed by British legislation insofar as it did not allow marriage of a man to a transsexual man with similar characteristics to a woman), reaffirm the earlier conclusion, although they may be understood as overcome for the determination of sexual diversity—in the extreme case of the person who feels, appears and is taken to be the opposite sex of his/her partner—the mere chromosomic data from the psychologist and anatomist/physiologist. In fact, the *Dirección General de los Registros y del Notariado* (rulings of 8 and 31 January 2001) had already admitted that a transsexual entered into marriage with a person of the same biological sex, but without denying that sexual diversity was a structural requirement of marriage; whereas, the Supreme Court showed its opposition against that possibility in several rulings in which, however, it accepted an attempt to change the mention of sex in the Civil Registry (Supreme Court, 2 July 1987, 15 July 1988, 3 March 1989 and 19 April 1991).

21. Cf. ESCRIVÁ IVARS, *op. cit.*, p. 85.

22. See for example, MARTÍNEZ CALCERRADA, "La homosexualidad y el matrimonio. La nueva ley 13/2005 de 1 de julio", *AC* 20 (November 2005), pp. 2437 et seq.; DE PABLO, "La Constitución y la ley 13/2005 de 1 de julio, de reforma del Código civil en materia de contraer matrimonio", in MARTÍNEZ DE AGUIRRE-DE PABLO, *Constitución, derecho al matrimonio. . . cit.*; or CARRIÓN OLMOS, "Reflexiones de urgencia en torno a las leyes 13 y 15/2005" *La Ley* 6298 (2005), who goes so far as to state that this reform makes marriage irreconcilable. We can also cite the reports both by the "*Consejo de Estado"* and by the "*Consejo General del Poder Judicial"*.

constitutional concept of marriage includes heterosexuality, through the admission that two people of the same sex can enter into marriage, what is happening is that the concept of marriage in the Constitution is being changed by an ordinary law. In other words, the ordinary legislator, through the proceedings consisting of a change in the meaning of the words used by the constituent, is surreptitiously changing said art. 32 of the Spanish Constitution. In this regard, the *"Consejo de Estado"* has indicated in its report that "the opening of the institution of marriage to same-sex couples does not represent a simple broadening of the subjective basis, granting same-sex couples a right that they do not have constitutionally guaranteed, but determines a change to the institution of marriage, which raises the question whether with this regulation—through legislative channels—the right recognised in article 32 of the Constitution is being affected beyond what is constitutionally admissible," furthermore "when the right in question is directly connected or associated with the institution of marriage (the right to enter into marriage), this means that if this institution is affected then so is the right of reference."

This constitutional determination of the right to enter into marriage limits the possible action of the legislator beyond the limit that it also finds in the institutional guarantee of marriage that also forms part of article 32 of the Spanish Constitution. If this, generically considered, refers to the social recognition of the institution, it does the same to an individual right whose essential content must be respected by any law that regulates its exercise.

However, it seems that the legislator has not taken into account that the relational and reciprocal nature between a man and a woman forms part of the essential content and that this places conditions when granting legal rights to same-sex marriages that may only be dealt with without harm to that content. In particular, it is very debateable constitutionally that, as a consequence of the solution adopted by the 13/2005 Act, same-sex unions generate any binding impediment to marriage for both parties, with the consequent nullity of the marriage that, without the first being dissolved, is later entered into with a person of the opposite sex, as this restricts the freedom to enter into the latter, which is precisely and solely what the Constitution protects (cf. the ruling of the German Constitutional Court on LPartG, on 17 July 2002).

Finally, although the institutional guarantee is a broad concept that refers to social recognition of the institution and not to a specific legal content (cf. STC 32/1981 for all), the fact is that when the Constitution defines a right regarding a certain institution, the guarantee of this institution means that the legislator must respect its essential content when regulating it (see, in this regard the STC 26/1987, of 27 February, legal grounds 4). The application of this doctrine to article 32.1 of the Spanish Constitution

obliges us to understand that the subjective structure that forms part of the *essential content* of the right to enter into marriage, characterised by the limitation of the legal capacity for its application to men and women, is extended to the regulation of the institution of marriage that the Constitution guarantees.

3.5. The doctrine of the Constitutional Court: the Resolution 222/1994

The Constitutional Court has had occasion to rule regarding the interpretation of art. 32 of the Spanish Constitution about some of the questions dealt with here. It has specifically done so in its *Resolution* 222/1994, of 11 July. From what was stated there by the High Court, it is appropriate to extract some especially important paragraphs:

> The union between people of the same biological sex is not a legally regulated institution, nor is there any constitutional right for its establishment; on the contrary, marriage between a man and a woman is a constitutional right (art. 32.1) that generates, *ope legis*, a series of rights and responsibilities . . .
> the full constitutionality of the heterosexual principal must be admitted as a definer of the matrimonial tie, as provided for in the Spanish Civil Code, so that public authorities can grant special treatment to the family union constituted by a man and a woman compared to a homosexual union. Which does not exclude that through the legislator a system of provisions can be established through which cohabiting homosexuals can benefit from the full rights and benefits of marriage, as advocated by the European Parliament.

Two points should be stressed from these paragraphs:

Firstly, that the Constitutional Court expressly refers to the constitutional right regulated in art. 32.1 of the Spanish Constitution CE to the marriage between a man and a woman.

Secondly, but related to the same idea, that the Constitutional Court, by stating "the full constitutionality of the heterosexual principle as definer of the matrimonial tie," it does by referring to the Civil Code, a legal text in which the expression that would establish said heterosexuality, before the reform of July 2005, perfectly matches, in the part that concerns us, with the formula employed in art. 32 of the Spanish Constitution ("a man and a woman have the right to enter into marriage . . ."). When the Constitutional Court says that "the heterosexual principle is the definer of the matrimonial tie, as provided for in the Spanish Civil Code," what it is saying (because the expression in the Code is identical to that in the Constitution) is that the heterosexual principle is the definer of the matrimonial tie, as provided for in art. 32 of the Spanish Constitution.

3.6. Same-sex marriage and the principle of non-discrimination

The constitutional perspective would be incomplete if we did not make a brief consideration from the point of view of non-discrimination and equality, which is fundamental for the allegations in the Preamble to the 13/2005 Act. The first point to stress is that neither the European Court of Human Rights, nor the Court of Justice of the European Union, nor the Spanish Constitutional Court have found any discrimination in the fact that two people of the same sex are not allowed to enter into marriage.[23] However, we have also explained how, in the case of Spain, this is a secondary perspective of very limited importance, given the existence in the Spanish Constitution of an article like 32; insofar as it can be concluded (as is the case here) using the expression of the Constitutional Court in its *Resolution* 222/1994, that in said precept the heterosexual principle is a definer of the matrimonial tie, it would not be possible to understand that there is any discrimination against the constitutional principle of equality.[24]

However, it is very doubtful that stating that marriage is an institution reserved for people of different sexes entails discrimination due to reasons of sex (nor to sexual orientation). Let us look at this point in greater detail.

We can begin our analysis by asking the following question (which would initially place us within the field of discrimination due to sexual orientation): are homosexuals unfairly discriminated against because they cannot marry each other? The clearest answer, on its first level of argument, is no. In the system prior to the 13/2005 Act, a homosexual person could enter into marriage with the same people and under the same conditions as a heterosexual person: that is, with a woman (if a man) or with a man (if a woman). It would be discriminatory if a homosexual were stopped from entering into marriage with any person due to being homosexual. But this was not the case: a homosexual could marry anyone, but it had to be a person 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 the repealed Spanish system (still in force in the vast majority of legal systems in the world, including in Spanish culture and legal tradition) neither one nor the other (homosexuals or heterosexuals) could marry people of the same sex. Again, the treatment was what any person would receive. It would also be

23. See the explanation of this jurisprudence that contains both the report of the "*Consejo de Estado"* and the work of DE PABLO, "La Constitución y la ley 13/2005 . . .", *cit.*

24. Even in the event that it were admitted that we are dealing with a case of discrimination, it would be constitutionally admitted discrimination through art. 32 of the Spanish Constitution, whose correction would need constitutional reform, as demanded in the case of preference for men over women for the purposes of succession to the Crown as established in art. 57.1 of the Spanish Constitution.

discriminatory, this time due to sex, if only men or only women could marry people of the same sex and men and women could not marry each other, but that is not the case either. There would, therefore, not be any discrimination from this point of view.

Against this argument, it could be impugned by saying that the discrimination lies in not allowing a person to marry another person that he/she has chosen, specifically because they are of the same sex (while it would be permitted if they were of different sexes). But this is a question based on an assumption; that is, it assumes that there is a right for people of the same sex to marry each other, which is exactly what is under discussion. It also assumes that the word "marriage" lacks any meaning, from this point of view, so that it could also include unions between two men and two women. Only based on the assumption that marriage is an institution in which heterosexuality is not an essential requirement, could it be concluded that denying two people of the same sex the possibility to marry is discriminatory. The truth is, as we have seen, that this is not the case grammatically, historically, or constitutionally. We should also now return to art. 32 of the Spanish Constitution and to its interpretation under the terms that have been explained.

We should also remember that there is no discrimination when the difference in legal treatment is supported by good reasons. In fact, in accordance with the established case law of the Spanish Constitution, the judgement of equality requires that situations brought forward for comparison be comparable and that the difference in treatment lack any objective basis (STC 148/1986), meaning that what art. 14 prohibits is unfounded distinction (STC 86/1985). In this case, it is clear that the union between two people of the same sex is not the same as between two people of different sex: establishing different institutions for each of these situations is not unfairly discriminatory but fulfills the existing differences between models of personal relationships. Said differences are socially relevant and, therefore, justify not only that they result in the establishment of differentiated legal institutions, but also that they should have different treatment (for example, regarding the assumptions of paternity of the husband, or the general system of filiation derived from existing sexual relationships between the members of a couple, which only make sense to unions between people of different sexes. We will return to this point shortly). Apart from that, we also wish to repeat that stating that homosexual unions are not marriage is not, in itself, saying anything bad about homosexual unions, just as saying that donations are not sales is not saying anything bad about donations, it is simply distinguishing between two different situations.

4. THE OBSTINACY OF BIOLOGY: LEGAL DIFFERENCES BETWEEN HOMOSEXUAL AND HETEROSEXUAL MARRIAGES

The 13/2005 Act allowed same sex marriage through the introduction of a new second paragraph in art. 44 of the Civil Code, which reads as follows: "marriage shall have the same requirements and effects whether both parties are of the same or different sex." The precept constitutes an affirmation of equal treatment between a marriage composed of members of different sexes and a marriage composed of members of the same sex. Consequently, the same 13/2005 Act replaced legal expressions that used to reflect heterosexuality with other sexually neutral ones. Basically, *spouses*—in spanish, "cónyuges"—(instead of husband and wife) or "*progenitors"* (instead of mother and father). The objective was, therefore, to make the differences disappear.

However, in the Civil Code, there are some precepts that continue to contain express references to husband as different from wife; this is the case in arts. 116, 117 and 118 of the Civil Code, which refer to the presumption of paternity of the husband and not to a possible presumption of parenthood of the partner who has not given birth. This is the result of a conscious decision by the legislator, who explains it in the Preamble to the Act in the following words: "however, the reference to the couple composed of husband and wife remains in articles 116, 117 and 118 of the Civil Code, given that the de facto assumptions that these articles refer to can only occur in the case of heterosexual marriages."

In this case, the legal affirmation of the equality of effects has had 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, can it be logical to set forth that the husband is the father of a child given birth to by his wife. The presumption is based on solid biological facts (that it is usual for children to be born when a man and a woman maintain sexual relations), and cannot remain without it. Hence, the fact that the husband and wife have sexual relations is united with the principle of exclusivity of said relations, in order to conclude and legally establish that the usual situation is that the children of the mother are also (biologically) the father's. That is why the presumption of paternity is not applicable to same-sex unions, based on the fact that children are never born when two people of the same sex (men or women) have sexual relations. And that is why the 13/2005 Act had no choice but to reserve the application of the presumption of paternity to marriages between people of different sexes. In this way, the presumption of paternity continues to attest to the connection between marriage, heterosexuality and

procreation in Spanish Civil Law.[25]

However, the presumption of paternity has now been imitated through the new paragraph 3 of art. 8 of the 14/2006 Act on Assisted Human Reproduction Techniques (LTRHA), introduced by the 13/2007 Act. In accordance with said precept:

> 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.

By virtue of this, the two women partners could be mothers of the child born as the consequence of these techniques. One because she has given birth and the other insofar as she has made the aforementioned declaration before (not after) the birth using the declaration that the poorly thought-out precept refers to.[26]

This regulation however has, as a consequence, the introduction of a legal view that is certainly complex, as:

a) Only heterosexual marriages can be parents either through natural means or through assisted reproduction techniques or finally through the option of adoption.
b) Civil partnerships made up of two women can be parents, but only through assisted reproduction techniques or through adoption.

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25. Regarding the repercussions of the legal reform in the law on filiation and the problems that it entails, see DE LA CUESTA SAÉNZ, J., "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.

26. This law, introduced in a hurry and without thought in the LTRHA, presents some very difficult aspects which should be studied carefully.

Firstly, the absence of any type of control or counterbalance to the will of the declaring partner is very striking: the establishment of her filiation depends exclusively on her will, in contrast to what happens in other situations in which will plays a decisive role in the establishment of filiation, as could be the case in the recognition (which in accordance with art. 124 of the Civil Code requires the express consent of the legal representative of the recognized party or judicial approval), adoption (which needs a declaration of suitability proposed by the administrative entity and judicial ruling: art. 176 of the Civil Code) or the case of art. 8.2 of LTRHA (in which the attribution of paternity is made through a governmental proceedings of art. 49 of the Civil Registry Act, with its corresponding precautions: lack of opposition from the "*Ministerio Fiscal"* (Public Prosecution Service) or from the interested party made in person, so that if there is opposition a judicial decision will be necessary. In this regard, it is striking that the will of the biological mother (the partner that gives birth) is not taken into consideration for any legal purpose, who, on the other hand, has been able to submit herself to these techniques without needing the prior consent of her partner. Insofar as said controls are established for the benefit of the child, the complete lack of filters in the establishment of this filiation derived solely from the will, could clash with the constitutional principle of full protection of children (art. 39 of the Spanish Constitution).

c) Finally, civil partnerships made up of two men can only be parents through joint adoption.[27]

Once again it is biology (nature) that the legal reforms appear to wish to dispense with, which is at the bottom of this result and is currently taking place in Spanish Civil Law. It is nature itself that stops a complete comparison not only between heterosexual and homosexual unions, but also between homosexual unions made up of men and made up of women—positive law must reflect this reality. Biology imposes its force here, both on will and on the Law.

27. This last statement must be clarified after the *Resolución de la Dirección General de los Registros y del Notariado* (Ruling of the General Directorate of Registries and Notaries of 18 February 2009). The situation that it resolves is as follows: two Spanish men entered into marriage in October 2005. After entering into a gestation by substitution contract in California, which is expressly prohibited by Spanish law (art. 10 of the 14/2006 Act on Human Assisted Reproduction Techniques), they requested the registration of the two children born as a consequence of said contract in the Civil Register of the Spanish Consulate of Los Angeles as children of them both. The Consul denied the registration, based on the aforementioned art. 10 of the LTRHA. That ruling was appealed against before the *"Dirección General de los Registros y del Notariado" (*General Directorate of Registries and Notaries) and the ruling upheld the appeal and agreed on the registration of the two children as the children of the requesting parties. If this case law were consolidated, which certainly infringes art. 10 of the LTRHA, and gives legal validity to what is in reality an abuse of the law, it would have to be understood that men can also be parents through assisted reproduction techniques, probably regardless of whether they are married or not, but only if they enter into the gestation by substitution contract outside of Spain and when the domestic law of the place where the birth takes place is similar to that of the State of California.