

# Same-sex couples in Spain. Historical, contextual and symbolic factors

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## INTRODUCTION

In Spain a social and political debate is taking place in response to the vindication of diverse Lesbian, Gay, Bisexual and Transsexual (LGBT) organizations to give same-sex couples access to marriage. It focuses on the recognition of the relations of same-sex couples, while giving legal cover to the so called "de facto" couples (which is also open to the heterosexual couples) without recognizing all the inherent rights within marriage.

In this article I initially review the historical and social circumstances in Spain that have allowed the transition from the persecution of homosexuals to the recognition of certain rights and duties for couples formed by two people of the same sex. I will give special attention to the existence of a consciousness of inequality in comparison to the heterosexual couples that is now the source of a fight to obtain total equality.

My next point is an analysis of the symbolic and cultural elements that are being discussed and used when allowing the recognition of this type of homosexual relationships. Although an analysis of this type would have to include social actors' discourses and their practices, we will limit ourselves to the specifics that are being addressed in the Spanish legal system.

I conclude with a brief review of the criticisms, the challenges and possibilities that are being generated by the legalization of this type of sexual relations between people of the same sex.

## 1. HISTORICAL AND CONTEXTUAL FACTORS

### 1.1 Looking back

During the diverse stages of the dictatorship of Franco (1939-1975) homosexuality in Spain was synonymous with persecution, exile and even murder. The *Crooks and Vagrants Act* was modified in 1954 to include the category of homosexuals (next to gypsies, drug addicts and vagabonds) and to allow repression and punishment of homosexual practices during the first part of this period.

In 1971 the *Law of Dangerousness and Social Rehabilitation* took effect. This statute considered homosexuals dangerous people and caused their separation from the society in an attempt to rehabilitate them. During the period in which this law was enforced (1971-1979) approximately 1,000 homosexual men were locked up. They were taken to jail or to special disciplinary centers for homosexual men. At the same time lesbians, once again at the cost of their invisibility, escaped repression during the dictatorship (Calvo, 2002).

In 1975 the dictator died and the transition towards democracy took place in Spain. Guasch (1995) shows us a process that took place during the late years of Franco's dictatorship. This process was marked by a detachment between the real country and the official country. Thus, while the dictatorial regime tried to maintain a morality of the postwar period based on National-Catholicism (a political ideology based on the moral

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values of the Catholicism of the time), Spanish society showed an important tolerance and openness to sexuality and sexual behaviors. This tolerance is restricted solely to heterosexual behaviors, since the homosexual remained strongly stigmatized for about two more decades.

The first Gay Pride demonstration in Spain took place in 1977 in Barcelona. The event was strongly repressed by the police. Five thousand people participated in the gathering.<sup>1</sup> During these first years of political transition the primary target of the homosexual movement was the abolition of the previously mentioned *Law of Dangerousness and Social Rehabilitation*.

By the 1980s the lesbigay movement's primary goals were achieved (through the abolishment of the *Law of Dangerousness and Social Rehabilitation* and the legalization of homosexuality) and it suffered a decline in activism. The participation in the Gay Pride demonstrations in Madrid hardly reached 100 people in 1988.<sup>2</sup>

As it had occurred in other countries in the region, the epidemic of AIDS brought the Gay and Lesbian movement back to life in Spain, largely because the epidemic placed homosexuality in the center of social and mass media attention and made the needs of same-sex couples visible. For homosexuals, it meant the confirmation of all the offenses they were suffering because of their sexuality: not being able to visit their couples in cases of illness if the biological family did not allow it, not having access to inheritance, losing the common home if the person who passed away was the holder of the house or the rent contract, common necessities of prevention programs and attention. During these years (end of the 1980s and early 1990s) activism and participation in organizations increased. This is most likely the foundation on which the later Spanish gay movement "boom" since 1995 was erected.<sup>3</sup>

Soon the need to regulate and protect same-sex couples was realized by the couples themselves and society. In 1993 two of the main Spanish gay and lesbian organizations (CGL from Catalonia and COGAM from Madrid) began a campaign demanding the regulation of de facto couples, a campaign to which they incorporated strategic allies, including heterosexual de facto couples that did not marry.<sup>4</sup>

During the 1990s, equality for homosexual people surfaced as a question in the political debate. The Spanish Workers Socialist Party (Partido Socialista Obrero Español, PSOE), in power since 1982, began to establish relations with the lesbigay movement. In the final years of their term of office they acceded to some of its demands (1994-1996) with the recognition of rights for de facto couples in certain laws, especially in the *Law of Urban Leasing* (1994), which recognizes the right to subrogate a contract in a de facto couple regardless of sexual orientation.<sup>5</sup>

The Socialist Party lost the national elections of March 1996 without fulfilling one of its main promises towards gays and lesbians: the approval of a de-facto couples law that would give them certain protections in different legal situations. The conservative Popular Party (PP), in government since then, has always restrained numerous initiatives presented by diverse progressive and nationalistic groups in the Spanish Parliament. First it was for the regulation of de facto couples and, later, for reforming the *Civil Code* in order to recognize the right of homosexual people to contract marriage (Pérez Cánovas, 2001:500-501). They have not fulfilled the intentions expressed by some of the members

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<sup>1</sup> Herrero Brasas, 2001:313

<sup>2</sup> Herrero Brasas, 2001:315

<sup>3</sup> Since then participation in the Madrid gay pride demonstrations has not stopped growing. In 1995 there were 5,000 people (the same as at the end of the 70s); in 1999 there were 30,000; in 2000, 70,000; in 2001, 150,000 people participated; the total reached more than 350,000 people in 2002 and exceeded half a million people in 2003. (Herrero Brasas, 2001:315; Odisea, nº 59. Page. 10; El País, 01/07/2001, cover; www.elmundo.es 29/06/02 y 28/06/03).

<sup>4</sup> El País, 17.02.02 Pages. D1-3

<sup>5</sup> Pérez Cánovas, 2001, 497-498

of the Government or the Popular Party to approve a national law of civil unions that would include same-sex couples.<sup>6</sup>

In the last municipal and regional elections of May of 2003, gay marriage happened to occupy the center of the political debate as one of the more controversial issues during the election campaign. Almost all candidates had to make clear their position on the matter. The controversies over gay marriage and the acceptability of child adoption by same-sex couples has reached such levels that even a new political party has been created (*Familia y vida*: "family and life") to make the rejection of these two issues as its main political banner. With 3,793 votes the Family and Life Party was the eighth most voted party out of 20 in the Madrid Regional Parliament Elections<sup>7</sup>.

### 1.2 From dangerous to citizen

It is interesting to analyze the process by which the homosexual people in Spain have gone from suffering from laws that jailed and discriminated them to becoming social actors who also demand their right to equal citizenship. From the first demands of rights for same-sex de-facto couples they progressed (in 1997) to demanding access to marriage with the same rights as heterosexual couples, including the right of joint adoption<sup>8</sup>.

There is little doubt that the transformation of Spain from a dictatorial society into a democratic one has been a key element in this change. The Spanish Constitution, enforced since the end of 1978, promotes the values of freedom, dignity, free development of personality, equality in the eyes of the law and participation<sup>9</sup>. It is the recognition of these values in Spanish society that has created the possibility for homosexual couples to claim equality in the eyes of the law.

The Spanish Constitution specifically compels public authorities to ensure the social, economic and legal protection of the family (Art. 39,1), ensuring that family is one of the foundations on which the social organization of Spanish society is sustained<sup>10</sup>. As Jaurena i Salas (2001, 515) points out, although in the Spanish legal system any marriage constitutes a family, marriage is not an indispensable requirement for creating a family. Both elements (marriage and family) appear in different articles of the Constitution (32 and 39 respectively) and are not necessarily connected.

The access of homosexuals to both institutions (marriage and family) would not require constitutional reform because the Spanish Constitution never defines what a family is. This allows the extension of this concept to nontraditional families, that is to say, non-nuclear ones. When speaking about marriage the Constitution indicates the right of man and woman to get married, but it does not specify that it must be between a man and a woman<sup>11</sup>.

Because of all these reasons, the Spanish Constitution constitutes as a legal reference for political parties, lesbian organizations and homosexual citizens who demand legal equality for their sex-affective relationships by gaining access to these two institutions that are protected constitutionally and are accepted socially and legally: marriage and the family.

In spite of this, when same-sex couples have addressed civil registries or the highest courts to be recognized as married, the answer has been to assume that marriage must take place between a man and a woman (Herrero Brasas, 2001:137-142, Perez Cánovas,

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<sup>6</sup> El País, 17.02.02 Page. D3

<sup>7</sup> <http://www.elmundo.es/especiales/2003/05/espana/25m/resultados/autonomicas/12/0.html>

<sup>8</sup> The Asturian group Xega proposed this demand which was adopted immediately by the National Federation of Lesbians and Gays (Herrero Brasas, 2001:142). Homosexual marriage became the main demand of the demonstration that took place in Madrid on June 30 2001 with the attendance of more than 150,000 people.

<sup>9</sup> Art. 10.1, 14, 17.1 y 23.1

<sup>10</sup> The concept of spouses and relatives appears in much of Spanish legislation: from labor legislation to social security, tributary or civil code legislation (inheritance, parenting, etc.). An analysis of all these laws goes beyond the purpose of this article.

<sup>11</sup> "Man and woman have the right to get married with total legal equality". (Art. 32.1)

2001:496). This occurs despite the fact that this it is not specifically expressed that way in either the Constitution or the *Civil Code* ("Código Civil").

At the same time an evolution is taking place in the Spanish public opinion with regard to the acceptance of the extension of the rights assigned to marriage to homosexual couples. In 1997, according to the official *Centro de Investigaciones Sociológicas* (CIS, Sociological Research Center), most Spaniards (57%) accepted that homosexual couples living together in a stable way deserve the same rights and duties as married couples (Alberdi, 1999:41). In the recent years, Spanish public opinion is becoming the European vanguard in this sense, being the fifth country of Europe with the greatest acceptance (68%) of homosexual marriage and the third most favorable country with regard to joint adoption by same-sex couples (57%).<sup>12</sup>

It is also important to acknowledge the influence of the international context in this process that is turning homosexuals into political subjects who demand complete citizenship and equality of rights. This influence comes, on one hand, from the resolutions and recommendations of the Council of Europe and the European Parliament<sup>13</sup> and, on the other, from the international Human Rights and LGBT movement. In the previous decade all of these have exerted important pressure on the states for the recognition of rights for gays and lesbians.

### 1.3 National Government, 0; Regional Governments, 11

With the Spanish Constitution of 1978 Spain is defined as a plurinational country committed to respecting and protecting cultural variety. The state became decentralized with the recognition of the diverse nationalities and regions that, in the form of independent communities or regions, make up Spain. Some issues stay exclusively in the hands of the national government (among others, the regulation of marriage, registries, nationality and migration, labor and social security). The autonomous regions (Comunidades Autónomas), on the other hand, have their own parliament, laws, president, etc. Among the ample jurisdictional areas assumed by these autonomous regions are those relative to health, education and social assistance.

Six, out of the 17 autonomous regions and two autonomous cities into which Spain is divided, have a series of their own "*fueros*" (jurisdiction) that allow them<sup>14</sup> to have their own legislation regarding matters of civil rights, especially those related to family law, inheritances and successions; and, in some cases (as in Navarre and the Basque Country), these rights include the tributary system<sup>15</sup>. I will illustrate further how important this will be to explain the diverse level of capacities between the different autonomous regions to regulate same-sex couples.

As we have seen previously, in spite of public opinion pressure, the diverse demonstrations and the different law proposals presented in the Spanish parliament, the Spanish national government has rejected offering recognition and legal coverage to

<sup>12</sup> "Homosexual Marriage, child adoption by homosexual couples: is the public ready?". Survey made in January 2003 with more than 15,000 interviews in 30 European countries by EOS Gallup Europe: [www.eosgallupeurope.com/homo/index.html](http://www.eosgallupeurope.com/homo/index.html)

<sup>13</sup> Especially the recommendations of the European Parliament in 1984 to abandon policies repressive of homosexuality, the Resolution on Equal Rights for homosexuals and lesbians in the European Community (A-0028/94 Resolution, D.O.C. 28.02.94) and, recently, the approval by the European Parliament of a report in which it is requested that states grant same-sex couples the same rights as married couples ([www.elmundo.es](http://www.elmundo.es), 05/09/03).

<sup>14</sup> Aragon, Balearic Islands, Catalonia, Galicia, Navarre, Basque Country.

<sup>15</sup> In 17<sup>th</sup> century, Spain was composed of a group of kingdoms (Aragon, Castile, Leon, Navarre, Majorca...) with their own law codes called "*fueros*". After the Succession War (1713) king Felipe V eliminated a good part of these "*fueros*" in the territories that opposed him during the war (Aragon, Valencia, Catalonia, Balearic Islands) and maintained them in the ones that were on his side (Navarre and Basque provinces). These regional law codes were kept or disappeared in these regions and kingdoms with diverse consequences at different moments in history. Eliminated by the centralizing spirit of Franco the dictator, they were later recognized again for six autonomous regions in the 1978 Constitution.

same-sex couples. There exists, nevertheless, the possibility for many of these couples to register their unions with a representative of the state. This is possible thanks to the different laws approved in most of the regional parliaments recognizing this type of unions. Thus, 11 of the 17 autonomous regions have passed a law giving same-sex couples the possibility of contracting legal rights and duties<sup>16</sup>. 77.82 % of the Spanish population live in one of these autonomous regions<sup>17</sup>.

Some of these regional laws discuss the necessity of regulating what they define as a "new social reality"<sup>18</sup> in order to avoid "unfavorable treatment," "important injustices," "legislative marginalization" and "legal discrimination" against non-married couples regardless of their sexual orientation<sup>19</sup>. The approval of these laws by autonomous regions elevates same-sex couples to a legal category; in other words, it certifies its recognition by an institution of the state. In a sense, this fact constitutes another element pushing the national government to establish legislation on the issues concerning same-sex couples.

The chart below is a panorama of the 11 laws that have been approved in the Spanish state to protect same-sex couples. Although it is not the main aim of this article, it provides a summary of the main aspects of each regional law:

Those autonomous regions with recognized "fueros" can legislate on inheritance issues and, in some cases, on family matters. This means that couples registered in these territories can gain access to inheritance rights or to joint adoption (in the case of Navarre and the Basque Country) that will never be allowed to same-sex couples in the rest of Spain until the National Government enacts the necessary legislation.

Here we can see how, because of historical and cultural factors, there are different degrees of access to rights in Spain. If a homosexual couple lives in the Basque Country, they will have the right (for historical reasons) to adopt jointly, to inherit from his or her partner or to register their relation without cohabitation, whereas if they live in another region they may not have any of these rights.

Looking to the political tendency of the regional governments approving these laws, mainly progressive and nationalist parties are the ones that promote and sponsor the different projects. Only three of these laws (those of Valencia, Madrid and the Canary Islands) have been promoted or supported by the conservative party (PP). These three laws are indeed the most criticized by the LGBT community. I will discuss how these three laws share common characteristics in relation to the symbolic aspects they reflect (not considering these couples as a family, not mentioning sexuality, etc).

In Navarre (1) all the opposition parties were united in the Navarrese Parliament in passing a De-Facto Couples Law against the wishes of the local Partido Popular coalition (Union of the Navarrese People, Unión del Pueblo Navarro, UPN) which governed without an overall majority. In the Basque Country (2), the party that is composed of reformed communists (Left United, Izquierda Unida, IU) established, as a condition to joining a governmental coalition with nationalists, the approval of a same-sex couples law. This law, which was approved after dialogue and negotiation with Basque LGBT associations, is one of most progressive in Spain. It is progressive not only in its symbolic aspects -

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<sup>16</sup> Cataluña: Ley 10/1998 de 15 de julio de Uniones Estables de Pareja; Aragón: Ley 6/1999 de 26 de marzo relativa a Parejas Estables No Casadas; Navarra: Ley Foral 6/2000 de 3 de julio para la Igualdad Jurídica de las Parejas Estables; Valencia: Ley 1/2001 de 6 de abril por la que se regulan las Uniones de hecho; Baleares: Ley 18/2001 de 19 de diciembre de Parejas Estables; Madrid: Ley 11/2001 de 19 de diciembre de Uniones de Hecho de la Comunidad de Madrid; Asturias: Ley 4/2002 de Parejas Estables del Principado de Asturias; Andalucía: Ley 5/2002 de 28 de diciembre de Parejas de Hecho de Andalucía; Extremadura: Ley 5/2003, de 20 de marzo, de Parejas de Hecho de la Comunidad Autónoma de Extremadura ; Canarias: Ley 5/2003 de las Parejas de Hecho de la Comunidad Autónoma de Canarias; País Vasco: Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho.

<sup>17</sup> 31.787.106 people, out of a total of 40.847.371 inhabitants, according to the Official Census of 2001 ([www.ine.es](http://www.ine.es))

<sup>18</sup> Preamble in Valencia, Canary Islands and Madrid laws.

<sup>19</sup> Exhibition of reasons in the law of Navarre, introduction of the one of Aragon, and exhibition of reasons for the laws of Extremadura and Basque Country, respectively.

conceiving a familiar relation with no need for cohabitation, but simply on the existence of a sexual-affective relation- but because it includes inheritance and adoption rights too.

Autonomous Region	YEAR	Political Tendency	Previous cohabitation requirement	Adoption	Fostering	Inheritance	Separation demanding rights
CATALONIA *	1998	Nationalists	Registering, NOT previously	NO	NO	YES, but limited	YES
ARAGÓN*	1999	Progressives + nationalists	Registering, NOT previously	NO <sup>20</sup>	NO	YES, but limited	YES
NAVARRRE*	2000	Progressives + nationalists (1)	1 year, although previous cohabitation can be demonstrated	YES	YES	YES, but limited	YES
VALENCIA	2001	Conservatives	Registering, 1 year	NO	NO	NO	Through a private contract
BALEARIC ISLANDS *	2001	Progressives + nationalists	NOT previously	NO	NO	YES, but limited	YES
MADRID	2001	Conservatives	1 year, previous cohabitation can be demonstrated with witnesses	NO	NO	NO	Through a private contract
ASTURIAS	2002	Progressives	1 year, previous cohabitation can be demonstrated with witnesses	NO	YES	NO	Through a private contract
ANDALUSIA	2002	Progressives	Registering, 1 year	NO	YES	NO	Through a private contract
EXTREMADURA	2003	Progressives	1 year, previous cohabitation can be demonstrated with witnesses	NO	YES	NO	Through a private contract
CANARY ISLANDS	2003	Nationalists + Conservatives	1 year if there are no common children	NO	NO	NO	Through a private contract
BASQUE COUNTRY *	2003	Progressives + nationalists (2)	NO, even after registering	YES	YES	Identical to marriage	Through a private contract

\* Communities with “*fueros*” and capacity to legislate on family law and successions.

Five out of six of the autonomous regions that have not yet presented legislation on same-sex couples have been in recent years ruled by the conservative PP (Cantabria, Castile-Leon, Galicia, Murcia and Rioja); and 1 (Castile-La Mancha), by socialist PSOE. Therefore, in Spain progressive and nationalist parties are those that seem more prone to respond to the demands of the LGBT movement.

## 2. CULTURAL AND SYMBOLIC FACTORS

What are the cultural and contextual factors that have allowed same-sex couples to think of themselves in terms of marriage, family or kinship? I will try to answer this question in the second part of my paper by making a brief overview of some of the elements considered in Western societies (2.1) and Spanish legal ordering when regulating marriage and the family (2.2 and 2.3). Afterwards, I will examine the way these elements are

<sup>20</sup> In December 2003, the Aragon Parliament modified the regional *Stable Couples Law* to allow same-sex couples adopt jointly.

reflected or not, in the set of laws that offer same-sex couples the possibility of achieving legal protection (2.4).

### **2.1 The cultural model of kinship**

Western societies understand kinship as a mediator between nature and culture: kinship becomes biological facts, socially understood<sup>21</sup>. Schneider, when analyzing western kinship as a cultural system of symbols, says that sexual intercourse between a man and a woman is the symbol upon which marriage, parenthood, family and kinship are constructed<sup>22</sup>. Thus, heterosexual intercourse provides the link between husband and wife and between each one of them and their children, making all of them share a common biogenetic link. By naturalizing this social relationship it becomes unchangeable.

Heterosexual intercourse then appears as the ultimate expression of conjugal love (in fact it is called "making love") and as the element that differentiates love between the spouses from the one they share with their children and with people who do not belong to the family.

Gender theory and the women's movement have challenged the biological basis of kinship, gender roles and the maternal instinct. Feminism, sexual reform, contraception and new reproductive techniques have broken the link between sexuality and procreation, opening the way to overcoming the social construct that puts heterosexual intercourse at the center of sexuality, reproduction, marriage and kinship<sup>23</sup>.

When the biological base of kinship blurs, what is then left to ground marriage family and kinship? Maybe cohabitation; perhaps love; maybe sex -understood now in a way that goes beyond heterosexual intercourse- or perhaps a mixture of all or some of these elements. These institutions (marriage, family and kinship) organize the socioeconomic reproduction as well as the biological reproduction of the human groups in western cultures.

Non-reproductive and non-coitus-centered sex -taking the symbolic place that heterosexual intercourse can no longer occupy- constitutes the last element able to give specificity to the relations of marriage (and, by extension, to family and kinship). Couples formed by two persons of the same sex, who share that non-reproductive and non-coitus-centered sexuality, can now demand the recognition of its affective relations in terms of marriage (and, by extension, of family and kinship) making it a social, legal and political demand. Questioning the heteronormative this way takes a step further in the challenge to the biological conception of kinship and to the place heterosexual intercourse occupied as the central symbol of kinship.

Without trying to analyze too deeply these elements, I will next make an investigation of which elements of them are symbolically grounding the concept of marriage, family or kinship in some of the main laws in Spain. I will do the same thing later with the laws approved by regional governments to give legal protection to same-sex couples.

Before going on, I would like to point out, as Schneider does (1980: 5,122), that the kinship model that appears here does not have to correspond necessarily to the social practices of people, not even to a majority of them<sup>24</sup>. What each person thinks of

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<sup>21</sup> "...each element which is culturally defined as natural is at the same time augmented and elaborated, built upon and informed by the rule of human reason, embodied in law and morality" (Schneider, 1980:40)

<sup>22</sup> "the fact of nature which serves as the symbol in terms of which member of the family are defined and differentiated and in terms of which each member of the family's proper mode of conduct is defined is that of sexual intercourse" (Schneider, 1980:33)

<sup>23</sup> "If reproduction is assisted, it seems as if kinship is also assisted, and its system of social representations loses coherence .... This intervention in a kinship system, based on the symbol of sexual intercourse and on the interdependence of nature and law, seems to cause a deep separation between what we considered to be cultural and natural respectively: law no longer recognizes nature and nature no longer grounds law." (Bestard, 1998:212)

<sup>24</sup> "The traditional familial archetype, integrated by mother, father and children, is still deep-rooted among most North Americans, but today it represents less than 25% of the families". La Nación, 09.08.03. Page 6

marriage, family and kinship is also affected by the context in which the social agents live, as well as by their ethnicity, social class, gender, age, etc.

This model becomes normative through particular institutions (laws, residential patterns, religion, norms, traditions, prohibitions, etc.) that have a direct influence on people's everyday life. According to Fassin (2000:404) family is a concept of order and organization; it is a fiction or social category that becomes real through the state and other social institutions. The state and social agents reproduce the thought that is part of the functioning of the family, an institution that receives from the state the means to be, to exist and to subsist.

## 2.2 The Catholic Church

Before examining the Spanish National law, I want to begin by analyzing what the Catholic Church says in its norms in reference to marriage and the family. When studying Spanish society, the influence of this institution cannot be left aside: during more than 45 years of Franco's dictatorship, National-Catholicism (which involves identification of the Spanish national identity with Catholicism) was the dominant ideology. As a result, catholic religious morality penetrated the country's legislation (Roca, 1996:336).

Although the Constitution (Art. 16,3) indicates that Spain is a secular state, the influence of the Catholic Church goes beyond the historical questions or the fact that most of the Spanish population defines itself mainly as catholic<sup>25</sup>. The Spanish *Civil Code* (Art. 60) recognizes that "marriage celebrated according to norms of the canonical law [...] has civil effects". What does the *Roman Catholic Church's Canon Law* say in relation to marriage?

First, it makes it clear that marriage is contracted between a man and a woman, and asserts the natural and indissoluble character of this institution and its reproductive purpose<sup>26</sup>. In addition, these canonical norms are very explicit when talking about sex, since the consummation of the catholic marriage happens when the "conjugal act" takes place<sup>27</sup>. Through this act (sexual intercourse) the spouses become the same flesh. The conjugal act is so important that sexual impotence can nullify a marriage since, according to the understanding of the Catholic Church, if there is no possibility of having sex, there is no real marriage<sup>28</sup>.

The Catholic Church establishes a relation between cohabitation and sexuality when understanding that the first implies the consummation (by means of sex) of marriage (Canon 1061,2). Cohabitation is a right for both spouses (Canon 1151). This cohabitation can be broken by unfaithfulness between the spouses, but, if this happens, it is recommended, by charity, to pardon an adulterous partner<sup>29</sup>. Anyway, separation doesn't break the matrimonial bond, which is considered to last for life. Love or affection between the spouses does not appear in Title VII of the *Roman Catholic Church's Canon Law*, the title that addresses marriage.

<sup>25</sup>The great majority of Spaniards, 83.6%, defines itself as Catholic, nevertheless the percentage of people who consider themselves practicing Catholics is 56.3%. (El País, 13 abril 2000)

<sup>26</sup> Canon 1055 § 1 - "The marriage covenant by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized".

<sup>27</sup> Canon 1061 §1 - "A valid marriage between baptized persons is said to be merely ratified, if it is not consummated; ratified and consummated, if the spouses have in a human manner engaged together in a conjugal act in itself apt for the generation of offspring. To this act marriage is by its nature ordered and by it the spouses become one flesh".

<sup>28</sup> Canon 1084 §1 - "Antecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or on that of the woman, whether absolute or relative, by its very nature invalidates marriage".

<sup>29</sup> Canon 1152 §1 - "It is earnestly recommended that a spouse, motivated by Christian charity and solicitous for the good of the family, should not refuse to pardon an adulterous partner and should not sunder the conjugal life".



### 2.3 The Civil Code

The Spanish *Civil Code* never explicitly states that marriage is formed by a man and a woman: Art. 44 states "man and woman have a right to contract marriage". In Art. 66 and 67, it speaks of husband and wife.

The *Civil Code* explicitly requires a conjugal common address (Art. 70), indicating that the spouses are supposed to live together, to be faithful and to help each other (Art. 68). The effective cease of cohabitation is a fundamental cause of separation or divorce (Art. 82,1, 86, 87). Marriage appears then to be tied to cohabitation, a requirement that seems to have a central place in the Spanish body of laws, in the Mediterranean tradition (Bestard, 1980:180-182) and in the anthropological and sociological tradition in Spain<sup>30</sup>.

Cohabitation is understood to begin when marriage takes place, but it is not a requirement for marriage. However, the Spanish *Civil Code* speaks about neither feelings, nor affection, nor love, nor sexuality. The only sexual feature displayed in this law is the obligation to remain faithful: unfaithfulness can constitute cause for separation and, later, divorce (Art. 82,1).

Although love appears in the symbolic model as one of the main components of marriage, love or affection are not presented explicitly in the civil legislation nor in the canonical law as a requirement for a marriage. The most important thing for a marriage to exist, from the perspective of the Catholic Church, is the possibility of having sexual intercourse and, for civil law, is that the couple should have a common residence.

Any marriage constitutes a family and generates kinship relationships (when you get married in Spain, the state gives you the "*libro de familia*" [Family Book]). However, family is a wide concept and includes marriage and other social realities<sup>31</sup>. The Spanish Constitution does not define what a family is, and the concept is left open. This fact is very important because if the family is considered as the cornerstone of our society, an institution to promote and protect, any relationship included under this family concept must then be protected by the State.

The definition of family and kinship is in dispute, creating a tension between law and social reality. Legislation (as a result of certain political changes) has great importance, as far as it has the chance to promote, protect or make possible certain behaviors (or to sanction them)<sup>32</sup>. Lawmakers are sometimes reluctant to recognize social change and become absorbed in their own thought and limitations. When this happens, the law is stuck in the past without being able to respond nimbly and suitably to new societal situations and challenges (Nieto, 1989:139,152). The result of this symbolic fight ends up being transferred to the laws, which implies legal consequences and, by extension, material consequences for the people.

Looking at legislation on same-sex couples, we can see that while most regional same-sex couple laws recognize the necessity of regulating and giving legal protection to a new reality in Spain, the national government refuses to recognize this social change.

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<sup>30</sup> "Family is formed by two or more people tied by affection, marriage or paternity, that live together, have their economic resources in common and jointly consume a series of goods in their daily life" (Alberdi, 1999:60-61) "The different types of family are created from the combination of two elements: norms of residence and type of marriage" (González Echevarría, 1986:12)

<sup>31</sup> Many people do not follow the traditional model of the nuclear family for life formed by a marriage and its children: divorces, new marriages, reconstituted families, unmarried parents, single mothers, families without children, homosexual families, couples without a formal bond, several generations coexisting in the same house, grandmothers raising grandsons, women not staying home, people who live alone, people sharing residence with other people... It seems that the traditional nuclear family model is in crisis or, at least, must be reviewed (Viñuales, 2000: 129-136; Weston, 1991; Donoso, 2002, 171; Guasch, 2002:14-17).

<sup>32</sup> To see the influence that law has on the definition of social models we can look to Alberdi's work (1999) in which she explains the decisive contribution of the legal transformations that took place during the democratic transition in Spain. These transformations led to the creation of a new structure of familial relations based on equality between man and woman, equality between all the children, the possibility of ending a marriage through divorce, the State as the guarantor of childhood rights...

#### 2.4 Laws recognizing same-sex couples

The diversity between the different laws that recognize same-sex couples in Spain is so big that it begins with the way these types of relationships are named in each law:

- Stable Unions of Couples (Catalonia).
- Stable Couples (Aragon, Navarre, Asturias, Balearic Islands).
- De Facto Couples (Andalusia, Extremadura, Canary Islands and Basque Country).
- De Facto Unions (Valencia, Madrid).

Four elements are combined to name these types of relationships: union, couple, stability and de facto. The laws that do not indicate that they are talking about couples in their title (Valencia and Madrid) make it clear in their following articles that they are talking about relationships established by two people.

The first problems arise with the "de facto" concept, since a couple, homosexual or heterosexual, is going to have different rights regardless of being registered or not in the registries created by these laws. For example, they have the right to subrogate, which is recognized by the *Law of Urban Renting* of 1994. According to the *Adoption Law* of 1987, if they are a heterosexual couple, they will have the right to adopt children jointly, even if they are not married or registered as a de facto couple.

Some laws specifically state the obligation to register in the de facto couples registries created in the different autonomous regions (all the laws create one). However, some of these regions<sup>33</sup> recognize rights for all de facto couples, registered or not, offering the possibility of claiming their rights whenever they can demonstrate cohabitation with legally admitted means.

The Catalan law is the only one that establishes a clear difference between homosexual and heterosexual de facto couples. Sometimes it offers similar rights for both kinds of couples. Other times, the rights acknowledged are different: joint adoption for heterosexual couples and inheritance for homosexuals. This tendency, which clearly marks the differences between different types of couples in the first of these laws, is not consistent with the rest of the regional laws.

#### Cohabitation

In order to be able to be covered by such legal regulations, same-sex couples must be "stable"<sup>34</sup>; stability must be demonstrated by "cohabitation"<sup>35</sup>; cohabitation, for many of these laws, must be "marital cohabitation"<sup>36</sup>.

Although some of these laws do not require the existence of previous cohabitation, almost all of them require it after registering. The Basque law is the only one that requires cohabitation neither before nor after the inscription, since people bound together only by a sexual-affective relation can be considered de facto couples (Art.2.1). Requiring previous cohabitation in the case of de facto couples creates discrimination in contrast to marriage: people who get married do not have to prove the existence of an affective relation through previous cohabitation.

The possibility of obtaining legal protection with no need of cohabitation means an important symbolic rupture in relation to the previous model. Now it is possible for new types of sexual-affective relationships and agreements to find a place within the law. Once again, the fact that this law was one of the priorities of the coalition of the left party Izquierda Unida (IU) as member of the Basque Government has allowed taking into account this demand from LGBT organizations from the Basque Country and recognizing that a family does not necessarily have to live in the same home.

<sup>33</sup> (Navarre, Art. 3.2; Asturias, Art.3.2; Canary Islands, Art.6.1)

<sup>34</sup> Catalonia (Art. 19), Navarre (Art. 2), Aragon (Art. 1), Valencia (Art. 1), Madrid (Art. 1), Asturias (Art. 2 y 3), Balearic Islands (Art. 1.1), Andalusia (Art. 1), Extremadura (Art. 2.1) and Canary Islands(Art. 1).

<sup>35</sup> Valencia (Art. 1), Madrid (Art. 1), Asturias (Art. 1, 2 y 3.1), Baleares (Art. 1.1), Andalucía (Art. 1 y 3.1), Extremadura (2.2) y Canarias (Art. 1).

<sup>36</sup> Cataluña (Art. 19), Navarra (Art. 2.2), Asturias (Art. 3.2) y Aragón (Art. 3.1).

Cohabitation by itself is not a sufficient element for a stable couple or union in the eyes of the law. It must go accompanied by marital or conjugal affection, which leads us to the issue of sexuality.

### ***Love and sexuality***

Speaking of marital cohabitation seems to refer to affective and sexual aspects. Some laws prefer to speak merely of "affection" between the members of the couple (Valencia, Madrid, Canary Islands). They do not make clear what type of affection they are talking about. In a broad sense, it can be understood that friends have affective relations too, and, if they cohabit, perhaps they can be included in these types of law. This question is not trivial, since the laws approved by regional governments of the conservative Partido Popular (Valencia and Madrid) or of its allies, the Canarian Coalition (Canary Islands), are the ones that do not make explicit or implicit reference to sexuality. Perhaps this is an attempt to point out the symbolic distance of same-sex couples from heterosexual couples and, of course, from marriage.

Most of the laws, on the contrary, talk about relationships with "affection analogous to the conjugal one"<sup>37</sup>. However, only the Basque law requires the existence of a sexual-affective relationship. None of these laws refers to faithfulness; and this makes sexual monogamy not an indispensable requirement for inclusion under the protection of these norms.

### ***Family***

Throughout the debate on the regulation of same sex sexual-affective relationships, "family" as a concept has become a symbolic battlefield. One of the reasons is that, as noted, the family appears in the Spanish body of laws as one of the pillars of our society, protected by the Constitution (Art. 39,1). Many of these laws consider any kind of de facto couple as a new kind of family, regardless of its sexual orientation<sup>38</sup>.

From the very moment that gays and lesbians change their ways of life and adopt, with or without paternity, the family notion for themselves, a new concept is created and extended: the concept of "homosexual, lesbian or gay families", which refers to those families formed by two people of the same sex, who may or may not have biological or non-biological children. When this concept is created and used socially, it seems contradictory to say that these "lesbigay families" are not families. If we are talking about "lesbigay families", then such kinds of families exist in people's minds. To legally recognize them or not is a mere political question (Fassin, 2000).

Fassin also indicates (2000:406) that in the search for a universal definition of family by social scientists, the difference of sexes seemed to be the last common denominator that remained. Now, with the demands of gays and lesbians, this denominator is on the verge of disappearing. The simple existence of the lesbigay families touches a raw nerve when forcing (the rest of the society and the social scientists) to rethink what until that moment was unthinkable: heterosexuality and the difference of sexes as one of the main conditions for defining the family.

It does not seem that we are going to witness the disappearance of the concept of the family, but we will probably see the redefinition of it through the modification of the symbolic elements on which it is sustained. The element that, in most of the approved same-sex couple laws in Spain, seems to constitute the specificity of certain types of relationships as family is sexuality accompanied by love (in the form of "marital cohabitation", "affection analogous to the conjugal one" or simply "a sexual-affective relationship"). This remains the only differentiating element for these relationships in comparison to any other type of relationships.

We are in a context in which kinship seems to be losing its specificity in contrast to another types of communitarian organization of solidarity. These kinds of organizations

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<sup>37</sup> Navarra (Art. 2.1), Aragón (Art. 1), Asturias (Art. 1 y 3.1), Andalucía (Art. 1 y 3.1), Extremadura (Art. 2.1), Baleares (Art. 1.1).

<sup>38</sup> Navarre, Asturias, Andalusia, Extremadura, Basque Country, Canary Islands.

are necessary to cover certain material necessities plus physical and social reproduction. The symbolic order supposedly based on nature is probably broken if kinship relations become an intensification of the bonds of solidarity between a group of social agents not on the basis of a series of biogenetic substances but on the basis of a more or less lasting and exclusive sexuality (or maybe is not broken).

Making sexuality (instead of heterosexual sex) the specific key element of kinship faces criticisms like those coming from Butler (2002:37), who thinks kinship should not even be based on enduring and exclusive sexual relations. If kinship loses any link with sexuality and biology, it will fade into the rest of communitarian social relations that create commitment and endure solidarity<sup>39</sup>. This would also mean that sexual practices would acquire autonomy from marriage, the family and kinship.

### ***Paternity and adoption***

Same-sex couple laws regulate adoption to make clear whether homosexual people may or may not have access to joint adoption. The national *Adoption Law* of 1987, which is of a higher level than the regional laws, allows any person, whether homosexual or not, to adopt a baby individually. It allows any heterosexual couple (whether married or not and registered or not in the registries of de facto couples) to adopt jointly.

Two of these laws, those of Navarre and Basque Country, recognize the right of same-sex or not de facto couples to joint adoption<sup>40</sup>. However, both laws have been appealed against in front of the Constitutional Court by the Popular Party and the National Cabinet respectively. The Constitutional Court has still not come to a decision on the matter<sup>41</sup>.

The idea of thinking about reproduction exclusively through sexuality has already been questioned by the possibilities that new reproductive technologies have to offer. Thanks to them<sup>42</sup>, to adoption and to the creation of reconstituted families, gays and lesbians have gained access to paternity and maternity, while avoiding the need for hetero-sexual intercourse. This event is questioning again the assumption that the difference of sexes is inevitable within kinship. The assumption that a man and a woman are needed for reproduction has been previously challenged by single mothers and artificial insemination as well.

Opposition to the recognition of gay marriage is looking for arguments between psychologists and social scientists in order to be able to say that gay or lesbian joint adoption would put in danger the symbolic order on which our society relies and that it can put the children adopted by same-sex couples in danger. Detractors of legal recognition for joint adoption by gay and lesbian families have espoused the argument of the child's superior interest and the protection of children, saying that it is necessary for these kids to have a masculine and feminine referent.

Extensive research has been conducted in different countries on this matter. It reached the conclusion that living with same-sex couples does not negatively affect the development of children<sup>43</sup>. Despite this, Madrid's Child Ombudsman sponsored research on children raised by lesbian families by the Seville University Faculty of Psychology and the

<sup>39</sup> "Kinship loses its specificity as an object once it becomes characterized loosely as models of enduring relationship" (Butler, 2002:37).

<sup>40</sup> (Navarre, Art. 8, Basque Country, Art. 8)

<sup>41</sup> El Mundo, 04.10.00 y Gara 02.08.03

<sup>42</sup> The Law on Techniques of Asisted Reproduction (1988) allows any woman older than 18, whether married or not, to use any of the assisted reproductive techniques covered by this law (Art. 6.1).

<sup>43</sup> A good review of the numerous studies made in the United States on the subject can be found in Charlotte J. Patterson ([www.apa.org/pi/parent.html](http://www.apa.org/pi/parent.html)) who concludes: "In summary, there is no evidence to suggest that lesbians and gay men are unfit to be parents or that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth."

Madrid Official School of Psychologists. This research has concluded that these children show the same degree of development as others, and the only difference found was greater tolerance towards homosexuality and more flexibility with gender roles (González, 2002:37-38).

However, numerous conservative politicians<sup>44</sup> continue to appeal to the supposed disagreement among scientists on the subject, and for this reason, they refuse to acknowledge joint adoption of children by same-sex couples, including children who, nowadays, are in fact already being raised by gay and lesbian couples.

They are trying to transfer to social scientists the responsibility of making decisions that are not scientific but political. If we are conscious of the social and constructed character of kinship relations, it will be much easier for us to avoid naturalizations and, in the case of the recognition of same-sex couples, to realize that, as Fassin says (2000:392-393), opening up marriage and joint adoption to same-sex couples is a question of political choice and does not respond to scientific motivation. The responsibility of that decision belongs to the citizenry, not science.

### 3. CRITICS TO LESBIGAY MARRIAGE

"These transformations do not come without resistance and this resistance reveals fears of a new order [...]. Approaching something unknown and uncertainty about the future produces much mistrust. Fear of things changing too much and the confusion about what can come are expressed in very varied ways. One of them is foretelling the world will crumble, beginning with the family. Fear of losing prerogatives and privileges is almost never openly acknowledged; what is used instead are more valuable and undisputed arguments, mainly children's well-being." Alberdi (1999:289-290) makes this statement when talking about resistance to the symbolic rupture of the link between woman-maternity-care. Such resistance is easily extended to the symbolic breakdown caused by same-sex couple recognition (which is indeed related to the symbolic rupture of the woman-maternity-care axis).

But resistance does not come only from conservative groups. There are also some activists and groups from the LGBT movement who oppose gay marriage. They fear the threat for those non-monogamous gays and lesbians of being excluded from this type of social legitimation. Other groups simply do not want to imitate those institutions: they consider marriage and the family to be heterosexual and hierarchic.

The Grup de Lesbianes Feministes of Barcelona, for example, demand that we go beyond marriage and the family, giving social validity to other types of sex-affective relationships, solidarity, cohabitation and children rearing. That means going to other models of familial organization that would include different proposals or just overcoming the concept of family as the only way towards respectability for gays and lesbians.

Perhaps the route is also to incorporate new arrangements into the concept of "family" (taking into account that sexuality, solidarity, affection and child rearing are important aspects of a human group or society). If the family is limited to the nuclear family (which is not the tendency: lesbigay families, reconstituted families, etc.), another possibility is for society to organize itself with different models outside the family. Without a doubt, this last proposal would require a series of profound reforms, since, as we have seen, a good part of the Spanish body of laws, beginning with the Constitution, is based on the familial institution.

Are LGBT organizations fighting for the regulation of other forms of social and familial organization other than marriage with a search for legal recognition of other types of familial or community ties? Fundación Triángulo, for example, takes the fight for *de facto* couple laws (in addition to lesbigay marriage) to still be one of its main political objectives.

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<sup>44</sup> Not only conservative politicians show reluctance to recognize joint adoption for same-sex couples, the general secretary of the Spanish socialists talking about the demands of LGBT movement said: "Marriage, yes. Adoption, we will see..." (Zero Magazine, num. 46, cover)

However, it seems that for most LGBT organizations in Spain, the fight at this moment is not for getting recognition for de facto couples but for opening the marriage institution to same-sex couples, which is something that can only be done by the national government.

## CONCLUSIONS

Among the historical and contextual elements that have led to the approval of laws giving legal validation to same-sex couples in Spain is the transition from a dictatorial society to a democratic one whose constitution makes equity and non-discrimination one of its main values.

Pressure coming from the LGBT movement and European institutions and the existence of a very decentralized country have allowed same-sex couples laws to be passed in most Spanish autonomous regions. Some of these regions have had the possibility, because of historical and cultural reasons, of passing legislation on the family, adoption and inheritance. This has brought about differing amounts of access to rights for same-sex couples living in different parts of the country.

Progressive parties (i.e., the socialists and the reformed communists) and nationalists are the main promoters of this type of legislation, whereas the conservative party is an impediment to same-sex couple demands.

As for symbolic aspects, most de facto couple laws in Spain conceive cohabitation accompanied by a sexual-affective relationship as the key element for allowing a same-sex couple to register.

The Basque Country law carries with it an important symbolic rupture in that it recognizes a familial model that goes beyond cohabitation and places sexuality (which is not necessarily procreative, coitus-centered or heterosexual) in the symbolic center that was occupied by heterosexual intercourse before.

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