

# The Spanish Law on Same-Sex Marriage: Constitutional Arguments

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## I. INTRODUCTION

The Spanish Constitution, approved in 1978, was a key instrument in the democratization process that began in 1975. The fathers of the constitution sought to agree on the principles that would sustain the new juridical order, which they felt should convey the evolution of society, the juridical developments, and the new patterns proposed by comparative law. Their prime concern was drafting a constitution that would obtain the approval of all, or at least the majority of, the political parties.<sup>1</sup> This led to a compromise with some institutions—mostly those with an ethical or moral foundation—that consequently shaped the constitution’s text. As a result, controversies over the interpretation of some sections of the constitution have often arisen as legislators take

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1. See DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, May 23, 1978, No. 72, p. 1155; PEDRO FARIAS, BREVE HISTORIA CONSTITUCIONAL DE ESPAÑA 30 (1981).

steps to develop certain rights and liberties that the constitution recognizes. This has happened with some of the fundamental rights, including the right to life, the freedom of education, and conscientious objection, just to mention some. Controversy also followed the right to marry, which although not included among the fundamental rights and public liberties in the Spanish Constitution, does figure among the rights and duties of Spain's citizens.<sup>2</sup>

In July 2005, the article of the Spanish Civil Code that contains the definition of marriage (Same-Sex-Marriage Law) was amended.<sup>3</sup> The modification seemed very simple—article 44 stated, “[m]en and women are entitled to marry in accordance with the provisions of this Code,”<sup>4</sup> and the amendment added “[m]arriage shall have the same requirements and effects when both prospective spouses are of the same or different genders.”<sup>5</sup> Other articles were also modified to replace the words *husband* and *wife* with *cónyuge* or *consorte*—gender-neutral words similar to the English *spouse* or *progenitor*, designating fathers and mothers without distinguishing sex.

When the procedure for amending the civil code to allow same-sex marriages began, a flood of reports and statements issued by public and private institutions arose, and a predictably overwhelming number of articles passionately supporting or opposing this legal change. Expectedly, a lawsuit asking for the repeal of the amendment of the civil code was brought before the Constitutional Court as soon as the amendment came into force.<sup>6</sup>

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2. The relevance of this structure comes, among other reasons, from the different protections that Spain's citizens enjoy. All rights and freedoms are binding on all public authorities, will be regulated by law—which must respect their essential content—and can be protected through appeal to the Constitutional Court. CONSTITUCIÓN ESPAÑOLA [C.E.] art. 53.1, Dec. 29, 1978, BOLETÍN OFICIAL DEL ESTADO [B.O.E.] n. 311, Dec. 29, 1978 (Spain). Fundamental rights enjoy stronger protection; citizens may assert claims to protect the fundamental freedoms and rights outlined in the Constitution “by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (recurso de amparo) to the Constitutional Court.” C.E. art. 53.2.

3. Amending the Civil Code Concerning the Right to Marry (B.O.E. 2005, 13) (Spain), available at <http://www.boe.es/boe/dias/2005/07/02/pdfs/A23632-23634.pdf> [hereinafter Same-Sex-Marriage Law].

4. *Id.* at art. 44.

5. *Id.*

6. S.T.S., Nov. 15, 2005 (Spain), available at <http://www.boe.es/boe/dias/2005/11/15/pdfs/A37313-37313.pdf>.

For complicated political reasons, the Constitutional Court did not pass a judgment until November 2012—seven years later.<sup>7</sup> The ruling upholds the Same-Sex Marriage Law.<sup>8</sup> It is a lengthy judgment that considers all the reasons posed by the plaintiffs as well as the opinions of the public institutions that offered their stance on the topic, including the Council of State,<sup>9</sup> the General Council of the Judiciary,<sup>10</sup> and the Royal Academy for Jurisprudence and Legislation.<sup>11</sup>

Even though this Constitutional Court ruling was supposed to end the harsh debates of past years, this article will not focus solely on that judgment. There are two reasons for this: First, while the judgment says that the Amendment of 2005 is constitutional, it does not say that regulating same-sex marriage is constitutionally required, instead leaving the door open to a new bill that may reinstate marriage as a union between a man and a woman. Second, the aforementioned reports and statements were issued by qualified institutions that reached a different conclusion than the Constitutional Court. Therefore, although the

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7. S.T.C., Nov. 6, 2012 (S.T.C., No. 198) (Spain), *available at* <http://hj.tribunalconstitucional.es/en/Resolucion/Show/23106>.

8. *Id.*

9. The Council of State is the Spanish Government's supreme consultative body. Consultations in regard to bills are not compulsory, but the Government decided to ask for a report from this body because of the importance of the matter. The Council of State observed that, due to the problems posed by this amendment, it would have been desirable to ask for reports from other institutions, both public and private, in order to achieve a better knowledge of the scope of the proposed law and its potential effects. *See* Dictámenes del Consejo de Estado [Council of State Opinion], Dec. 16 2004, (B.O.E., Dictámenes del Consejo de Estado, No. 2628/2004) (Spain) [hereinafter *Report of the Council of State*], *available at* [http://www.boe.es/buscar/doc.php?coleccion=consejo\\_estado&id=2004-2628](http://www.boe.es/buscar/doc.php?coleccion=consejo_estado&id=2004-2628).

10. The General Council of the Judiciary is the governing body of judges and courts. It can issue reports on the bills that relate to the protection of the fundamental rights. The government and this council did not agree that the government was obligated to ask for a report from the council on this particular bill, and the Secretary for Justice denied the request from the council to send the bill. The council nonetheless decided to deliver a report. *See* “*Estudio*” del Consejo General del Poder Judicial sobre el matrimonio homosexual, DIRECTORIO DE CODIGOS CIVILES (Jan. 2005) <http://www.codigo-civil.net/archivado/?p=467> [hereinafter *Report of the General Council of the Judiciary*]. The problem underlying this controversy was the ideological differences between the government and the General Council of the Judiciary, due to their respective composition at that time. The first pages of the report are devoted to justifying the powers of the council to release this item, called a “study” instead of report. *See id.*

11. The Royal Academy for Jurisprudence and Legislation has among its aims the research, appraisal, and contribution to the improvement of the law. The report issued on this Amendment of the Civil Code, dated March 1, 2005, is published in *Anales de la Real Academia de Jurisprudencia y Legislación*, n. 35, 937 (2005) [hereinafter *Report of the Royal Academy*].

Constitutional Court has made its decision regarding the constitutionality of this modification of the Civil Code, public institutions are far from agreeing on the matter.<sup>12</sup>

This article first analyzes the portion of the Spanish Constitution devoted specifically to marriage. It then examines the main juridical reasoning to uphold or dismiss the constitutionality of the 2005 Same-Sex Marriage Law. Finally, it gives brief attention applicable statistics, taking into consideration the numbers offered by the government before the approval of the Bill and the reality in the subsequent years.

## II. MARRIAGE IN THE SPANISH CONSTITUTION

The Spanish Constitution states in section 32:

1. Man and woman have the right to contract matrimony with full legal equality.
2. The law shall regulate the forms of matrimony, the age and capacity for concluding it, the rights and duties of the spouses, causes for separation and dissolution and their effects.<sup>13</sup>

The first thing that comes to mind is that the wording of this section neither explicitly requires nor bans same-sex marriage. This is quite understandable given when the constitution was enacted—only three years after the regime of General Franco came to an end.<sup>14</sup> Same-sex marriage, as well as other relationships like polygamy or civil partnerships, were not among the main concerns of the authors of the constitution.<sup>15</sup> But, it would be difficult today to hold a debate on marriage that does not mention same-sex marriage at all. Other topics like

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12. I will not consider in this paper all the juridical literature on the matter because it is not possible to convey all the scholarly opinions, valuable as they are. I will also set aside other problems posed by this amendment not directly related to same-sex marriage as a right, such as the powers of the regional entities (*comunidades autónomas*) to legislate on this matter, or the filiation or adoption by same-sex couples.

13. C.E. art. 32.

14. This regime was characterized, among other features, for an entanglement between the Catholic Church and the State. For more on this issue, see JUAN FERRANDO BADIA, *EL RÉGIMEN DE FRANCO; UN ENFOQUE POLÍTICO-JURÍDICO* (1984).

15. See Amending the Civil Code Concerning the Right to Marry, *supra* note 3. The preface of Same-Sex-Marriage Law recognizes that the marriage laws from the last century did not need to refer to same-sex marriage in any way because homosexual relationships were considered by no means able to bear out a marital relationship.

divorce (not allowed then), or the recognition of canon law marriages were the focus of their attention instead.<sup>16</sup>

The question we should ask ourselves, then, is whether section 32 of the constitution implicitly allows a law recognizing same-sex marriage. The most important item to highlight is that this section uses the words “man” and “woman” instead of “all persons,”<sup>17</sup> “all” or “everyone,”<sup>18</sup> “citizens,”<sup>19</sup> “all citizens,”<sup>20</sup> “Spaniards,”<sup>21</sup> or “all Spaniards.”<sup>22</sup> This is the only section that makes explicit the gender distinction, so it may be significant.

One common understanding is that the mention of equality between men and women in the conjugal relationship refers to the unequal husband and wife relationship that existed up until a few years before the enactment of the constitution. During that time women were subject to their spouses’ will, and required their husband’s permission for a number of juridical acts.<sup>23</sup> The constitution interdicts this difference of status—the guarantee that the inequality that had existed until then could not be permitted to continue, it had to be reflected in the constitutional text.<sup>24</sup>

But, the equality of men and women is already recognized in section 14 of the constitution, and there was no need to reiterate it.<sup>25</sup> Constitutions do not usually repeat their declarations. Moreover, the gender equality before the law stated in section 14 enjoys stronger protection than the assertions of section 32.<sup>26</sup> Therefore, the section related to marriage must be considered distinct from this mention of men and women.

16. The Judgment of the Constitutional Court admits it, without any reservation. See FJ 8.

17. C.E. art. 24.1.

18. *Id.* at art. 15, 24.2, 27.5, 28.1, 31, 43, 44.

19. *Id.* at art. 9.1, 18, 23.

20. *Id.* at art. 9.2, 41.

21. *Id.* at art. 19.

22. *Id.* at art. 2, 3, 29.1, 35.1, 47.

23. Diego Espín, *La igualdad conyugal en la reforma del código civil*, in *EL NUEVO DERECHO DE FAMILIA ESPAÑOL* (Jose Maria Castán ed., 1982).

24. See Judgment of the Constitutional Court FJ 8.

25. C.E. art. 14 (“Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”).

26. See *id.* at art. 53.2 (“Any citizen may assert a claim to protect the freedoms and rights recognized in section 14 and in division 1 of Chapter 2, by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for

According to the reports, the mention of men and women introduces the heterosexual element of the marital relationship.<sup>27</sup> This is also the interpretation stated in the 1994 Resolution of the Constitutional Court, which affirms that:

[T]he heterosexual element of the marriage stated in the Civil Code is consistent with the Constitution. Public authorities can grant advantages to the family constituted by a man and a woman in opposition to homosexual unions. It does not preclude the legislator from enacting a regime where homosexual partners may enjoy the same rights and legal advantages that marriage offers.<sup>28</sup>

In another paragraph within the text, the Constitutional Court said that “the union between persons of the same biological sex is neither a regulated juridical institution or a constitutional right; on the contrary, marriage between man and woman is a constitutional right.<sup>29</sup> The judgment of the Constitutional Court on the Same-Sex Marriage Law also refers to this resolution, but in rather complicated and confusing terms. The court tried to dismiss the previous interpretation by saying that Section 32.1 cannot be understood as the establishment of the heterosexual principle of marriage.<sup>30</sup> However, the court added that it also cannot be understood to mean that the heterosexual-only option was excluded. It arrives at the conclusion that considering marriage as only a heterosexual union, and not granting marital benefits to same-sex unions, would be consistent with the constitution.

There are two other sections in the constitution closely related to Section 32 that would support the principle that the constitutional text only permits heterosexual marriage. One is Section 39. Section 39 mandates the protection of the family and asserts the commitment of public powers to the protection of mothers and children. This provision indicates that the drafters had a heterosexual family in mind.<sup>31</sup>

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protection to the Constitutional Court.”).

27. See *Report of the Council of State*, *supra* note 9; see also *Report of the General Council of the Judiciary*, *supra* note 10.

28. Sentencia Tribunal Constitucional [S.T.C.], July 11, 1994 (S.T.C., No. 222) (Spain), available at <http://hj.tribunalconstitucional.es/en/Resolucion/Show/16344>.

29. *Id.*

30. *Id.*

31. C.E. art. 39. The section reads:

1. The public authorities ensure social, economic and legal protection of the family.
2. The public authorities likewise ensure full protection of children, who are equal before the law, regardless of their parentage, and of mothers, whatever their marital status. The law shall provide for the possibility of the investigation of paternity.

The Constitutional Court does not endorse that interpretation, and instead proposes another reading: marriage and family are addressed in different sections of the Constitution—therefore, families do not necessarily stem from marriage and can be based on other relationships that should be protected as well.<sup>32</sup> The other section is 58, part II, concerning the crown, that reads, “The Queen consort, or the consort of the Queen, may not assume any constitutional functions, except in accordance with the provisions for the Regency.”<sup>33</sup> Again, the drafters had heterosexual relationships in mind. Certainly these two sections are not decisive, but they are a clue to understanding the idea of marriage that those who drafted the constitution intended to convey.

In sum, the Spanish Constitution protects heterosexual marriage.<sup>34</sup> Homosexual unions can be granted the same benefits as marriage, but Section 32 of the constitution does not grant the same protections to homosexual marriage.<sup>35</sup> However Section 32 also does not expressly ban same-sex marriage, and defers to the legislature the regulation of

3. Parents must provide their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law so establishes.

4. Children shall enjoy the protection provided for in the international agreements safeguarding their rights.

32. S.T.C., Nov. 6, 2012, available at <http://hj.tribunalconstitucional.es/en/Resolucion/Show/23106>.

33. C.E. art. 58.

34. I will focus on Spain, but this conclusion is in line with the case law of the European Court of Human Rights. Just a week after the judgment of the Spanish Constitutional Court was released, the European Court of Human Rights issued a ruling asserting, once again, the definition of marriage as a heterosexual union:

The Court reiterates that Article 12 of the Convention is the *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. The Court points out that Article 12 of the Convention enshrines the traditional concept of marriage as being between a man and a woman (*Rees v. the United Kingdom*, 17 October 1986, § 49, Series A no. 106). While it is true that some Contracting States have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950 (*see Parry v. the United Kingdom* (dec.), no. 42971/05, 28 November 2006; *R. and F. v. the United Kingdom* (dec.), no. 35748/05, 28 November 2006; and *Schalk and Kopf v. Austria*, no. 30141/04, § 58, ECHR 2010).

*H. v. Finland*, App. No. 37359/09, at 38 (Eur. Ct. H.R. 2012).

35. *See* C.E. art. 32. The legislator who drafted the Same-Sex-Marriage Law was aware of this statement because the preamble avoids the foundation of same-sex marriage in Section 32. Instead, the preamble uses the negative reasoning (Article 32 does not proscribe it) and alludes to other articles that may support the regulation of same-sex marriage.

marriage in general. Thus the next question is whether the legislature, when regulating marriage, is bound by other sections of the constitution that would demand the recognition of same-sex marriage.

### III. THE RIGHT TO FREELY DEVELOP THE PERSONALITY

The preamble of the Same-Sex-Marriage Law states that the right to freely develop a personality demands a juridical framework, which would include same-sex marriage.<sup>36</sup> It makes clear that the fostering of equality and freedom regarding the different forms of cohabitation requires a regulation that conveys these values, and cites Sections 9 and 10 of the constitution in support of this idea.<sup>37</sup>

According to Section 9(2) of the constitution:

It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.<sup>38</sup>

Section 10(1) deals more specifically with this matter when it says, “The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.”<sup>39</sup>

In compliance with the constitution, freedom and equality must pervade all juridical acts, and failing to accomplish it will certainly be reproved. It would be difficult, however, to assert that people were not free to establish same-sex unions, and even to obtain most of the benefits of marriage, before the Same-Sex Marriage Law.<sup>40</sup> Still, being

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36. Amending the Civil Code Concerning the Right to Marry B.O.E. n. 157, Jul. 2, 2005 (Spain). The right to the free development of the personality played a similar role in Spain to the one that the right to privacy did in the United States in *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); or *Lawrence v. Texas*, 539 U.S. 558 (2003), among others. So, although the right to personal and family privacy is recognized in the Spanish Constitution, the Same-Sex-Marriage Law does not mention it.

37. See C.E. art. 1.1 (“Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.”).

38. *Id.* art. 9.1.

39. *Id.* art. 10.1.

40. An interesting detail is that the Council of State introduces a reference to the different situation in the U.S. in this regard. The Report says that the high degree of controversy over

free to establish a same-sex union is different than including that relationship in the definition of marriage, which poses other problems.

The Council of State deals with this reasoning in the Report. It affirms that the free development of personality did not demand opening marriage to same-sex couples. Even more, that right would be better protected if there were different patterns of cohabitation, each one with its own specific regulation, and people could choose the one they prefer. This would not oblige people of same-sex orientation to enter into a relationship whose juridical regime was designed to meet a different reality. As far as same-sex couples are a newly accepted pattern of cohabitation, the most coherent attitude is enacting a new accurate regulation for this pattern, one that meets its own necessities, without forcing it into a different regime. Basically, different institutions demand different juridical regimes. This would also avoid the juridical uncertainty that stems from a global application of the marriage legislation to another institution, which would require the intervention of case law to resolve any doubts or conflicts that may arise.<sup>41</sup>

It is worth remembering that the Spanish Constitution does not link family, mentioned in Section 39, only with marriage, cited in Section 32.<sup>42</sup> The Council of State deduces from this structure that stating a different way of granting benefits to marriages and same-sex couples is consistent with the constitution.<sup>43</sup>

The Government did not agree with the Council of State. They argued that banning same-sex couples' access to marriage entailed constitutionally prohibited discrimination against homosexuals. I analyze this reasoning in the next section.

#### IV. THE PRINCIPLE OF NONDISCRIMINATION

Section 14 of the constitution, cited above, establishes that there may not be any discrimination on the basis of sex "or any other personal or social condition or circumstance."<sup>44</sup> Sexual orientation is not

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same-sex marriage in the United States may be explained because in several States including same-sex couples in the marriage definition or not doing it determines the granting or refusal of marriage benefits to those couples. Spain neither had that problem nor is affected by conflicts similar to those posed by the Defense of Marriage Act and the Full Faith and Credit Clause of the Fourteenth Amendment. See *Report of the Council of State*, *supra* note 9, at 22.

41. See *id.* at 21–22.

42. See *Same-Sex-Marriage Law*, *supra* note 3.

43. See *Report of the Council of State*, *supra* note 9, at 23.

44. See C.E. art. 14.

mentioned in this section. It is different from sex, which alludes to a biological feature, but it can fall under the protection of this section, considering it a personal condition or circumstance. We can then assert that this norm prevents the public authorities from any act that may involve discriminating against homosexuals.<sup>45</sup>

Apart from that, Section 18 of the constitution protects the right to personal and family privacy.<sup>46</sup> Sexual relationships are included in the scope of this section.<sup>47</sup> According to the usual interpretation of this section, not only is the spreading of information without consent forbidden, but it also prohibits the interference of the public powers in punishing a personal behavior that is socially accepted, as would occur with homosexual relationships.

Having stated what public authorities cannot do, we must consider what they can do. More precisely, we should find out whether the non-discrimination principle demands opening the marital relationship to same-sex partners. This was, in fact, the main alleged reason to enact a law that will enable marriage between same sex couples in Spain—it would accomplish a claimed goal, the recognition of a fundamental right to homosexuals that had long been ignored. This idea, widely spread from media and government sources,<sup>48</sup> led a considerable amount of people to the conviction that, finally, everybody would have the same rights.

Here we come to one of the key points of the debate. It is an essential principle in democratic countries that everybody enjoys the same fundamental rights. Hence, homosexuals have the same rights as

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45. See S.T.C., Nov. 28, 2012 (mentioning that homosexuality is one of the classifications that deserves strict scrutiny).

46. C.E. art. 18.1 (“The right to honour, to personal and family privacy and to the own image is guaranteed.”).

47. See *Report of the Council of State, supra* note 9, at 5.

48. Among other things, the Secretary for Justice, with a rather complicated expression, said that the Bill:

extends the rights of citizenship, at the same time that go deeper in the freedom and equality with which those rights are implemented, because its aim is removing a ban of inequality that lasted hundreds or thousands of years; there have been centuries of negative inequality and discrimination against some people on grounds of their sexual orientation. Because such people, that have the same dignity than the others, have seen their rights denied, and have been discriminated for a long time, this Bill looks forward to implement the constitutional mandate of nondiscrimination.

Press Report on the comments from the Vice-President María Teresa Fernández de la Vega and the Secretary for Justice Juan Fernando López Aguilar (Oct. 1, 2004), available at [http://www.lamoncloa.gob.es/consejodeministros/ruedas/\\_2004/r0110040.htm](http://www.lamoncloa.gob.es/consejodeministros/ruedas/_2004/r0110040.htm).

heterosexuals—no more, no less. Homosexuals and heterosexuals have the same right to marry in the same way. That is to say, everybody has the right to marry somebody of a different sex, since marriage was defined as the union of a man and a woman. Therefore, the law that allowed same-sex marriage was not recognizing a fundamental right that had been previously denied to homosexuals and that discriminated against them. There would have been discrimination if the right to marry were denied to homosexuals, or if their sexual orientation prevented them, for example, from becoming civil servants or performing a public duty or any other such function. Similarly, it would be discrimination—in this case, against heterosexuals—if same-sex marriage were open only to homosexual couples. Marriage required two persons of a different sex. No one—irrespective of sexual orientation—could marry anybody of the same sex.

Therefore, when the Same-Sex Marriage Law was drafted, its real aim was not the recognition of a right denied to homosexuals until then. It was changing the definition of marriage to remove the heterosexual element; in other words, changing the definition of marriage in order to include relationships composed of two people of the same sex as well as two people of the opposite sex. Actually, the Law did not open marriage only to homosexual couples; it opened it to all same-sex partners, without regard to their sexual tendency. The Council of State followed this reasoning when it said that:

[T]he opening of marriage to same sex couples does not entail a broadening of the candidates for marriage, recognizing the right of same-sex couples which is not protected in the Constitution; it leads to a modification of the marriage institution, that requires from us an answer to the question whether this modification is affecting marriage to a greater extent than allowed by Section 32.<sup>49</sup>

The Council sheds further light on this matter:

[T]he removal of discrimination based on sexual orientation does not require the inclusion of a new pattern of couple in the marriage institution. On the one hand, because reserving marriage to heterosexual couples does not convey a discriminatory treatment, neither from the perspective of the Constitution or the International Treaties on Human Rights; on the other hand, discriminations that can arise in

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49. *Report of the Council of State, supra* note 9, at 15.

society are not wiped out through the legal configuration of a marriage that includes two different realities (moreover, this solution might even make it difficult to control those discriminations).<sup>50</sup>

It is important to be mindful that in Spain, same-sex couples enjoy the same benefits as married couples. Even if marriage equality were not available to same-sex couples, there is no restriction on the rights and benefits the latter might enjoy, as opposed to what happens in other countries. Therefore, the aim of removing any discrimination pursued by the Same-Sex Marriage Bill had no real content except for the name of marriage, and might be achieved by means other than the modification of the definition of marriage.

From another perspective, there is discrimination when different treatment of two comparable realities has no justification. In Spain, however, a family built from heterosexual marriage enjoys the protection of the constitution; homosexual partnerships do not enjoy this same protection, as already demonstrated. Even more, the total equivalence between heterosexual marriage and marriage without the heterosexual element is not possible, as the juridical problems posed by the regulation of marital filiations disclose.<sup>51</sup> As such, reserving marriage for heterosexual couples alone is not discriminatory insofar as there are reasons to do so. While the reasons to act this way may or may not be politically defensible, they are nonetheless accurate from a juridical point of view.

## V. THE REASONING BEHIND THE INSTITUTIONAL GUARANTEE

The Judgment of the Constitutional Court devotes its largest part to the reasoning behind the institutional guarantee of marriage that, according to the Court, might be the only grounds to consider the Same-Sex Marriage Law inconsistent with the constitution.<sup>52</sup>

The idea of the institutional guarantee is easy to understand and to endorse. It pursues the protection of certain institutions regulated in the constitution that can be considered structural or constitutive elements of the society, protecting them from legislative action that

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50. *Id.* at 21.

51. *See id.* at 23 (explaining that other problems may arise, for example in the field of inheritance law, international law, division of marital assets, and so on.); *see, e.g.*, Decision of the Secretary of Justice, Department of Registries and Notaries, of July 25, 2005, B.O.E. n. 188, Aug. 8, 2005 (Spain) (discussing the law applicable to marriages between a Spaniard and a foreigner).

52. S.T.C., Nov. 28, 2012.

could suppress or essentially alter their nature.<sup>53</sup> It is more difficult, however, stating what the essential content of a certain institution is, how that falls under that guarantee, and what features are contingent. The Constitutional Court did not shed light on the matter. In an early ruling, it said:

The institutional guarantee does not affirm a precise content once and for all, but the preservation of an institution in a way that were recognizable for the idea the social conscience has built in every time and place. That guarantee is ignored when the institution is in such way limited that it result deprived from their existence as institution to become just a name. These are the limits for their development and implementation. Hence, the only prohibition clearly stated is the departure from the plain and clear idea commonly accepted of the institution, which, as a juridical institution, is in a wide extent determined for the law in force.<sup>54</sup>

This is a highly relevant statement that helps explain the Constitutional Court's decision on the Same-Sex Marriage Law.

As already said, the Judgment of the Constitutional Court on the Same-Sex Marriage Law affirms that opening marriage to same-sex couples is not required by the constitution, but it can be allowed. The institutional guarantee of marriage in Section 32 would be the only possible grounds to ban it.<sup>55</sup> But the Constitutional Court was not alone in realizing the central role of the institutional guarantee on this issue. The Report of the Academy and the Report of the General Council of the Judiciary also pay special attention to the institutional guarantee, although they arrived at the opposite conclusion from the Constitutional Court.

The institutional guarantee of marriage means that its essential elements cannot be changed according to the social context or to a general understanding of its aim and function. The alterations in marriage regulation may apply only to accessory elements. The Council of State accurately expressed this idea:

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53. *Id.*

54. S.T.C., July 28, 1981.

55. *See* Same-Sex-Marriage Law, *supra* note 3. The Same-Sex-Marriage Law also implicitly assumes this interpretation, because it does not appeal to Section 32 of the Constitution to support the introduction of this new feature in the Civil Code, because it is not a strong enough rationale for the legalization of same-sex marriage. Instead, the preamble says that Section 32 describes marriage as “a manifestation” of personal relationships based on affection, and it mentions other sections of the Constitution that would back up the amendment of the Civil Code. Same-Sex-Marriage Law, *supra* note 3.

The institutional guarantee prevents the alteration of the marriage institution further than its own nature allows; it does not exclude that lawmakers could adapt the guaranteed institutions to the spirit of the time, but they cannot do it on a way that makes them unidentifiable by the social conscience of time and place.<sup>56</sup>

With the issue of same-sex marriage, the conflict arises when we come to determine whether the heterosexual feature is essential to the definition of marriage; in other words, whether the institutional guarantee includes it, or if it could be changed according to the decision of lawmakers on grounds of social acceptance or any other reason. Here the disagreement begins, and two opposing positions are clearly defined. The Constitutional Court maintains that the heterosexual element is not part of the essential content of marriage; rather, it belongs to the “traditional” idea of marriage, which is no longer the only or even the more relevant idea in today’s society.<sup>57</sup>

The other position, held by the Royal Academy and the General Council of the Judiciary, takes into consideration that the heterosexual element is an inherent characteristic of the marital union, and therefore, cannot wholly be determined by the concepts of law. If society demands the juridical recognition of a certain kind of union that implies the discharging of the heterosexual element, another law should regulate it, but the definition of marriage cannot be broadened to include those unions. I will examine the main arguments posed by both positions.

The ruling of the Constitutional Court uses the “accommodation to modern life” as the main reason to consider the Same-Sex Law consistent with the constitution. The Court admits that there was no real intent to include same-sex unions in the marriage definition when the constitution was enacted.<sup>58</sup> But constitutions demand an “evolving reading” as a way to reassure their legitimacy and make them operational throughout time. Then, concepts must be construed according to the social perception in the sense that the only changes not permitted would be those that made an institution not fully recognizable to

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56. *Report of the Council of State, supra* note 9, at 28.

57. This expression (“traditional” marriage) is used, for example, in the Decision of the Secretary for Justice, *supra* note 51, it entails a shade of historical and temporary meaning, not in the sense of something that has always existed, but of something that existed in certain times and places but can disappear without major concern. The Report of the General Council of the Judiciary warns of this nuance on the meaning of the word applied to this case.

58. S.T.C. Nov. 6, 2012 (S.T.C., No. 198, FJ 8) (Spain).

society. This applies distinctively to the category of the institutional guarantee, because it conveys institutions whose content is not perfectly shaped in the constitution.<sup>59</sup>

The Court uses two rationales to demonstrate that because same-sex marriage is integrated in juridical culture, the Court may use juridical culture to interpret the definition of marriage. First, same-sex marriage has been regulated in other countries belonging to the same juridical tradition, which the Court considers fits in its juridical systems.<sup>60</sup> The second rationale relies on data provided by the Spanish Center for Sociological Research—a major supporter of same-sex marriage in Spanish society.<sup>61</sup> The Court depicts the “new image” of marriage after the Civil Code’s amendment as a “community of affection that creates a bond,” or a

society of mutual help between two persons who bear an equal position in the relationship, who freely decide to unite themselves in a project of common family life, giving their consent to the rights and duties of the institution, and express it in compliance with the formalities stated in the Law.<sup>62</sup>

Several problems arise from both of these rationales.

It is difficult to believe that the changes introduced in the definition of marriage are not essential. Deprived of the heterosexual component—or as the dissenting opinions of Judge Rodríguez described, deprived of any biological element—marriage would be a union of two free individuals, without any other requirement or imperative purpose.<sup>63</sup> The requirement that marriage must be based on affection is not feasible from a juridical perspective, as it is based on will. Therefore, true will without affection is valid and marriage without true will is void, even if there is affection.<sup>64</sup> Moreover, the only way for marriage to survive would be if many “communities of affection” with a potential

59. *Id.* at FJ 9.

60. *Id.* (Aragón, J., concurring) (explaining that the Judgment does not distinguish between countries that have an institutional guarantee of marriage in their Constitution and those that do not).

61. S.T.C. Nov. 28, 2012 (B.O.E. No. 286, p. 168, FJ 9) (Spain). It is surprising that the Judgment does not mention the data from the National Institute for Statistics, representing the reality—rather than the perceptions—of same-sex marriages and same sex couples in Spain. *See infra* Part VI discussing social demand.

62. *Id.*

63. *Id.* (Arribas, J., dissenting) (arguing that this change is a leap that lacks all logic).

64. *See Report of the Royal Academy, supra* note 11, at 941.

for reproduction, other than that of a man and a woman, are established. The concept proposed by the Constitutional Court is so wide that unions of two relatives or two friends for any purpose easily fit within that description. Marriage, therefore, would become an aimless institution, or put another way, a multiple-aim, all-purpose institution.

Both the Royal Academy and the General Council of the Judiciary understand that the Spanish Constitution protects marriage as a juridical entity with certain specific features, including heterosexuality. According to the Academy, the institutional guarantee places some limits on the juridical developments of marriage because marriage enjoys a fixed content (including a man-woman relationship), together with other contingent features, and precludes public powers from passing laws that may suppress the structural elements, change its content, or create parallel legal entities to reach the same goal.<sup>65</sup> The Report of the General Council of the Judiciary strongly endorses this idea and devotes several pages to explain it on the grounds of the structure of Section 32 of the constitution.<sup>66</sup> According to the Report, Section 32-1 contains the definition of marriage and the core elements that cannot be changed—heterosexuality is among them.<sup>67</sup> Neither lawmakers nor Courts are allowed to modify it, because of the institutional guarantee.<sup>68</sup> Section 32-2, conversely, comprises various elements that may be regulated in different ways according to the social perception of the institution or the political reasons of the legislature since this Section would not be under the institutional protection of the marriage umbrella.<sup>69</sup>

On the subject of the role of social perception in the interpretation of the constitution, there is a fundamental distinction between two realities that must be taken into account. The constitution is a norm aimed to last for a long period of time. Thus it must be applied to new, unforeseen situations and interpreted according to reality and constitutional principles. This is different from changing the principles themselves, that is to say removing the foundations of the political and social order and replacing them with new ones. Therefore, if the public authorities understand that society has changed to the extent that its

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65. *Id.* at 937. The Report mentions other examples of constitutional facts that enjoy that institutional guarantee, like private property or inheritance *mortis causa*.

66. *Council of the Judiciary, supra* note 10, at 27–28.

67. *Id.*

68. *Id.*

69. *Id.*

constitutional definition of marriage is not accurate any more, they must propose a change to the constitution. But they cannot do it through a broad interpretation of the text in force that surpasses the acceptable limits.<sup>70</sup> If the significance of marriage, or any other legal institution that enjoys an institutional guarantee, could be freely modified, its configuration would be subject to change along ideological lines by the Government in power.<sup>71</sup> The constitution would lose its character of supreme norm, at least in the Spanish legal system, where any change or amendment to the constitution can only occur by means of a special procedure that requires the agreement of a qualified majority of both houses—Congress and the Senate.<sup>72</sup>

This argument is also developed in one of the dissenting opinions, arguing that it is not acceptable to force an interpretation of the constitution, or to make it say what it never wanted to say. The Court cannot override the foundations of society established in the constitution precisely to have a permanent reference for the fundamental principles of the social order. Otherwise, it implies that it is social behavior that legitimizes the constitution and not the opposite.<sup>73</sup> Legislators should have proposed a change in the constitution if they thought that Spanish society has changed so much as to set aside marriage and adopt a new kind of union for the foundation of society. Judge Ollero who wrote this dissenting opinion expressed his surprise that the legislators understood that an amendment to the Civil Code was needed to include same-sex couples in the definition of marriage, but an amendment to section 32 of the constitution was not needed when in fact both dispositions have similar content.<sup>74</sup>

70. See *id.* at 38 for a more in-depth discussion.

71. *Report of the Council of State, supra* note 9, at 25.

72. The Spanish Constitution reads:

1. Bills on constitutional amendment must be approved by a majority of three-fifths of the members of each House. If there is no agreement between the Houses, an effort to reach it shall be made by setting up a Joint Commission of Deputies and Senators which shall submit a text to be voted on by the Congress and the Senate.

2. If approval is not obtained by means of the procedure outlined in the foregoing clause, and provided that the text has been passed by an absolute majority of the members of the Senate, Congress may pass the amendment by a two thirds vote in favour.

3. Once the amendment has been passed by the Cortes Generales, it shall be submitted to ratification by referendum, if so requested by one tenth of the members of either House within fifteen days after its passage.

C.E. art. 167.

73. *Report of the Council of State, supra* note 9, at 28.

74. S.T.C. Nov. 28, 2012 (Spain) (Ollero, J., dissenting).

In fact, the Spanish Constitution was previously amended precisely because of a change in society. Specifically, the constitution was amended when Spain became a full member of the European Union. After joining the European Union, the Spanish Constitution was modified to allow all Europeans to vote in local elections, a privilege only given to Spaniards until then. Nobody, including the Court itself, considered “Spaniards” to be broadly interpreted as to include European non-Spaniards, even though the constitution did not expressly define “Spaniards.” The Court did not evolve the term, and the constitution was modified.<sup>75</sup>

The argument of the evolution of society is still awkward when we see how it is plainly ignored in other cases. An example of this is Section 57 of the constitution, which establishes the regular order of succession to the throne. According to the first paragraph, males would always have preference over females.<sup>76</sup> Even though the equality between men and women is a long established principle in society, much more so than same-sex marriage, nobody ever understood the evolution of society and the general acceptance of equality principles would allow a King’s older, female descendent to inherit the Crown if the Prince were still alive. Certainly, many voices asked for the abolition of this order of succession, but always knew that it required a change in the constitution. Perhaps the complicated procedure to amend it is the reason this proposal was never seriously considered. It seems that in some situations admitting the evolution of society as a preeminent standard of interpretation of the norms is easier than in others.

## VI. THE REASONING OF THE SOCIAL DEMAND

Social demand itself is not reason enough to make a juridical change constitutionally acceptable. All laws must be consistent with the constitutional principles. Nonetheless, social demand is not totally irrelevant. From a juridical point of view, social demand may make a

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75. *Id.*

76. The Spanish Constitution reads:

The Crown of Spain shall be inherited by the successors of H.M. Juan Carlos I de Borbon, the legitimate heir of the historic dynasty. Succession to the throne shall follow the regular order of primogeniture and representation, in the following order of precedence: the earlier shall precede the later lines; within the same line, the closer degree shall precede the more distant; within the same degree, the male shall precede the female, and for the same sex, the older shall precede the younger.

C.E. art. 57.1.

certain juridical option more accurate than another when achieving a specific aim. The Council of State, in the final comments of the Report, says that any innovation on the matter of marriage should be backed by a broad social consensus, due to the need for juridical certainty and stability.<sup>77</sup> The Report stresses that a gradual approach, rather than a traumatic change would be preferable, even if that means not recognizing the “right [of homosexual couples] to marry.”<sup>78</sup>

However, the urgency of responding to a compelling social demand was another one of the Spanish Government’s reasons to pass the Bill on same-sex marriage. Both the Vice-president and the Secretary for Justice asserted that the high number of homosexual couples that were waiting for a decision was a decisive factor in drafting the bill. Certainly, the high prevalence of a behavior does not make it legal. But the number of people potentially affected is somewhat unclear. Most of the data the government offered was based on “estimations”—the only reliable way to present a private reality that is not based on any kind of register, evidence, or compulsory declaration, like sexual orientation.

Perhaps for these reasons, government estimates seemed to far exceed reality. I will set aside comments about other expressions on that matter that would need a bit more accuracy as well, for example the words of the Vice-President who said that this law brought to an end *centuries* of discrimination against homosexuals.<sup>79</sup> The Secretary for Justice, even more enthusiastically, talked about *thousands of years* of discrimination, probably without realizing that *thousands of years* ago homosexual behavior was widespread and accepted in some Mediterranean cultures, although there never was any intent to regard homosexual relationships as marriages.<sup>80</sup>

With regards to the numbers, I will limit the reference to the data offered by the government, without analyzing other estimates offered by the juridical literature on the topic that vary so widely from one author to another that it makes it difficult to come to any conclusion. The Vice-President said that there were about four million homosexuals in Spain, that is to say around 9% of the total population in 2005. The Secretary for Justice added that although there were only 11,000 homosexual couples in the census by then (0.1% of the total number

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77. *Report of the Council of State, supra* note 9, at 28.

78. *Id.*

79. Press Report, *supra* note 48.

80. See KENNETH DOVER, GREEK HOMOSEXUALITY (1978).

of couples), they thought this percentage would soon rise to 10% after the approval of the Law. Perhaps the Secretary of Justice had second thoughts and made it clear that the issue at stake was not the number of people in same-sex relationships, but the general recognition of a right until then denied.

The data provided by the National Institute for Statistics shows that a total of 22,104 marriages have been celebrated since the approval of the Law until the end of 2011.<sup>81</sup> That means that 44,208 persons wanted to enter into same-sex marriages. The obvious question is what happens with the other 3,955,792 estimated homosexuals, or more, as the total Spanish population continued increasing since 2005. Of course, some of them would not want to marry, but is there not as high a prevalence of homosexuality in society, or is the Law a failure, insofar as only 1.1% of the estimated target was actually benefited by the Law? It is worth noting that the content of the Law cannot be challenged in this case because nothing else can be attributed to same-sex couples.

Furthermore, the average percentage of same-sex marriages celebrated is 1.8% of the total number of marriages<sup>82</sup> but 36.5% of same-sex marriages had at least one non-Spaniard, while this percentage was 20.9% of heterosexual couples.

It is the sociologist's job to interpret the data, analyzing its variations and explaining the tendencies in society they display. But it is far from clear that the high demand the government claimed was real in Spanish society.

## VII. CONCLUSION

The ruling of the Constitutional Court upholding the Same-Sex-Marriage Law lays to rest the discussion on this matter, but it will not be the end of the overall debate. Not all public institutions, as we have seen, and certainly not the whole of society, as the Constitutional Court recognizes,<sup>83</sup> share the idea that marriage can change its nature. The word now depicts such a different relationship as the *new image* of marriage defined in the judgment. Moreover, the conclusion of the Constitutional Court must be understood in its proper terms. It says

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81. NAT'L INSTITUTE FOR STATISTICS, <http://www.ine.es> (last visited March 29, 2013).

82. This percentage rises every year 0.1% although the number of same-sex marriages does not vary widely because the total number of marriages is decreasing. This difference is wider in the provisional numbers provided from the last year, when the total number of marriages decreased 4.4% and same-sex marriages increased 0.5%.

83. See S.T.C. Nov. 28, 2012 (Spain).

that the amendment of the Civil Code that introduced same-sex marriage is, in its opinion, consistent with the constitution. But it did not say that it was demanded by the constitutional principles. Besides, the court stated that the other possible option, reserving marriage to heterosexual unions and granting homosexual unions other regulation, would also be consistent with the constitution.<sup>84</sup>

But even if the door appears to be open for a law protecting marriage, it seems that the debate will be restricted, in the near future, mainly to the academic field. There is not a political will to change the current status of marriage. The political party now in power, which is different from the one that approved the law, has improperly used this judgment as an excuse to avoid the matter. According to the Secretary for Justice, the Government is bound by this judgment.<sup>85</sup> Surely, judgments bind the courts in the sense that they must apply the law, but nothing would prevent this government from passing another bill regulating marriage as a heterosexual union if they consider that it is the right way to protect this institution.

In any case, we cannot forget that the fundamental issue that underlies the conflict. The irreconcilable opposition of two ideas of marriage: a union oriented to the constitution of a family with a potential for reproduction and a projection on time, and marriage as a union based on affection, where bearing children or enduring through time are not necessarily essential. There seems to be no meeting point of these two extremes even without taking into account the ideological component that more often than not intermingles in the debate. Thus the future of the definition of marriage, even with no foreseeable changes in the immediate aftermath of the judgment of the Constitutional Court, is not definitively settled.

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84. *Id.*

85. Gallardón: "No modificaré la ley y la dejaré exactamente como está," EL PAÍS (Nov. 7, 2012, 2:27 AM), [http://politica.elpais.com/politica/2012/11/06/actualidad/1352226880\\_949406.html](http://politica.elpais.com/politica/2012/11/06/actualidad/1352226880_949406.html).