

Family Law as a Right to Freedoms: The Case of Same-Sex Marriage in Spain[†]

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ABSTRACT

The family as a social group has experienced a radical change especially after the end of the Second World War. The first question that arises from this concerns the role the legal system has to play when social circumstances change so fast that no sooner has the legislature decided to regulate a situation than it is already overtaken by events that are heading in another direction. To try to find the most appropriate response to this, this article uses different ideological approaches that lead to protecting autonomy as the best way of regulating family circumstances in the present context. The problems of the constitutionality of marriage between persons of the same sex and the protection of independence for those who do not want to marry are analysed from that perspective.

I. INTRODUCTION

In Haydn's oratorio, *The Creation*, Eve addresses Adam as follows:

Your wish is my command. The Lord has to provide and by obeying you, I find joy, happiness and glory.

This extract demonstrates an old-fashioned type of family. All European codes, including that of Spain, have removed the former obligation imposed on a woman to obey her husband and his corresponding obligation to protect her. Eve did not have the right to freedom. Nevertheless, those words sum up in clear terms the view of spousal relations held until very recently throughout Europe. But the family has undergone radical changes, especially after the end of the Second World War. This includes equality between men and women, women entering the labour market, widespread access to birth control and systems of artificial insemination, demands from people of the same sex to be able to join institutions that were traditionally designed for heterosexual couples, weakening of the institution of marriage as a form of creating a family, widespread application of human rights in the field of family law together with the corresponding popularization of divorce as a form of terminating

marriages, and the need to rebuild post-divorce relationships. All this leads to a certain lack of clarity about how we should legally regulate families.

The first question that arises from this concerns the role the legal system has to play when social circumstances change so fast that no sooner has the legislature decided to regulate a situation, than it is already overtaken by events that are heading in another direction at a rate that was unimaginable only 25 years ago. As one might expect, there are many important wide-ranging issues that affect family law today, starting with its fundamental purpose. My impression is that neither lawmakers nor their advisors are aware of what they have to deal with and even less of the role judges play in the whole system, since their role is far more limited as is clearly outlined in Article 117.1¹ of the CE (Spanish Constitution) according to which judges are subject 'exclusively' to the rule of law, which means that formally they do not play a decisive role in innovating the legal system, although they may do so when they adapt rules designed for outdated conditions, which are not very different despite seeming similar on the surface.

This article addresses several problems that arise in this context, based on Spain's constitutional approach. The first issue to be addressed refers to the kind of legislation that best suits the changing social environment to which it is addressed. The second concerns the influence of certain ideologies contained in regulations regarding the family, although I cannot explore this here fully in the depth it requires.²

II. REGULATION OR DEREGULATION

I often cite an article written by Professor Petit Calvo,³ which explains that one of the concerns of the codifiers was whether families should be regulated under the Civil Code (CC) or whether people should be free to organize their relationships according to their needs. The application of the principle of legal certainty led lawmakers to codify rules relating to the family in all its aspects and in all branches of law. Clear proof of this is Article 39.1 CE that states that authorities must ensure the social, economic, and legal protection of families.

The principle of legal certainty has been accepted as one of the cornerstones of our constitutional system. As set out in Article 9.3 CE,⁴ the principle prevents leaving the application of constitutional principles such as equality and freedom in the hands of individuals. Therefore, it is necessary to have legal rules regulating the family system. But changes occur so quickly and so deeply that once lawmakers decide to regulate this system (Article 9.2 CE), they need immediately to decide what kind of legislation is best suited to this task. I have repeatedly argued that legislative solutions must be adaptable, since the subject matter of the regulation is highly volatile. At this point, there are two schools of legal thought regarding which methodology should be used: on the one hand are those who believe we should legislate through general clauses, and on the other, those who believe that the legislation that best complies with constitutional requirements is that which anticipates every possible problem that may arise and develops rules to achieve completeness.

Choosing one or the other system leads to quite different consequences: (i) open legal clauses such as the 'the best interest of the child',⁵ 'needs', 'interests needing of protection', which are commonly used in legislation create a feeling of uncertainty

for anyone working in the field of law since they have no control over the meaning given to them in everyday legal practice; (ii) the need to interpret events in each case gives the impression that this is a matter of the discretion of individual judges; (iii) with these types of general rule there is an ‘area of uncertainty’⁶ and the judge must seek the best solution for each case, without this being regarded as an arbitrary exercise of discretion, which is the objection supporters of a specifically rule-based approach make; and (iv) the system of general rules requires highly trained judges and a major investment in support to enable them to reach the most appropriate decision for each case and avoid judicial activism.

In short, legislation regarding the core aspects of family law uses a mixed system that includes specific and general rules. Using general rules that use indeterminate concepts does not imply judicial arbitrariness, although it does involve the exercise of judicial discretion. Two examples appear in Supreme Court rulings where we can see how the criteria of the best interests of the child should be applied. In STS [Supreme Court Ruling], 1 October 2010, the Supreme Court granted shared custody using the criteria based on the best interests of the child. The ruling states that the line of arguments of the lower court were incorrect because shared custody ‘... must always be settled in *the best interests of the child*, as this is *the fundamental criterion* to be taken into account when making such decisions, and *that criterion is independent of the views of those taking such decisions and it must be based on objective reasons*’. (Emphasis added). According to this, the Supreme Court says that to argue that shared custody can only be ordered in exceptional cases is wrong because every case must be determined according to the best interests of the child, which is the fundamental criterion. The second is the case of STS, 13 March 2010. In this ruling, the Supreme Court reinstated a shared custody order because the court below had overturned the original order partly because it involved moving the child and partly because the mother had left the home. The Supreme Court stated that moving children is a consequence of shared custody and ‘shared custody does not consist of “rewarding or punishing” the parent who has behaved better during the marital crisis, but of a certainly complex decision, in which one should take into account the aforementioned open criteria that determine what to consider when determining the best interests of the child’.

In fact, every case has a unique correct solution, so there are no ‘general and abstract’ best interests of the child but interests of each child in each circumstance. So when applying a general rule to a specific case, such as the best interests of the child, it is a case of judicial interpretation that can be controlled by means of the appropriate appeal.⁷ Therefore, the conclusion is that the specific application of a general rule is perfectly controllable by judges through the usual appeals system.

III. FAMILY AUTONOMY: AN INDETERMINATE LEGAL CONCEPT

Interpretation of dilemmas arises starkly in one of the most crucial concepts of family law: *autonomy*. To what extent may we allow spouses to exercise their autonomy when making decisions that affect the group members?⁸

The traditional view of the compulsory nature of family law regulations has changed dramatically.⁹ In the codification period, possibly due to the desire to

arrange the family system uniformly, most of the rules governing families were compulsory. For example, spouses could not alter the prenuptial agreements after marrying although they could agree, to a limited extent,¹⁰ on the economic system that they thought best suited their needs, but always prior to marriage.

However, legislators began to reconsider this serious limitation once divorce had become a normal way to end marriage. Law 30/1981 of 7 July introduced a divorce agreement as a way to facilitate divorce or separation by mutual agreement (Articles 81 and 86 CC). Article 90 CC laid down the issues the spouses have to include in the agreement, especially those relating to 'the person whose custody the children will be under, how this is conducted, the visitation regime, the children's communication with, and visits to the parent that does not live with them'. This was not the only concession granted to the spouses or future spouses and parents regarding autonomy. In pre-marital agreements spouses or future spouses may now agree what they deem to be the most appropriate matrimonial property regime (Article 1325 CC), provided that the particular stipulation does not violate any law or morality or limit the equal rights of each spouse (Article 1328 CC). Article 156 CC implicitly allows agreements when exercising parental responsibility. Article 92.4 CC expressly allows these regarding the custody of minors following the divorce or separation of their parents and Article 96.1 CC allows agreements as regards the parent who will keep the family home after divorce.

But autonomy has limits. The examples I have mentioned refer to regulating relationships between people who either have already formed a family unit or are planning to do so. What I have not discussed is the freedom to form groups that will lead to the formation of a family. Here, we face one of the most important issues in our modern family system, ie whether freedom includes being able to demand that legislators grant legal effects to different groups that are formed outside the range of forms laid down by law. This dramatically affected same-sex partnerships before Law 13/2005 came into force, which legalized these marriages.

Legislators can limit autonomy. One clear example is when someone marries again without previously having dissolved the first relationship, ie bigamy. Another example is the case of legal parenthood granted to two married men who contracted a surrogate motherhood in a country where this is legal. In judgment 835/2013, 6 February 2014, the Spanish Supreme Court denied registration of legal parenthood on behalf of both spouses who had signed the contract in California as a result of which twins were born. The ruling states that people may choose from among legal solutions in different legal systems '... but this has several limits that, as far as this case is concerned, are based on respect for public order which basically regards the system of individual rights and freedoms laid down by the Constitution and international conventions of human rights that have been ratified by Spain and the values and principles that these embody'. Article 10 Law on Assisted Human Reproduction Techniques (LTRHA) forbids surrogacy contracts in Spain; consequently, the Supreme Court considered that this prohibition forms part of the international Spanish public order and, therefore, Article 12.3 CC prevents the application of a rule allowing such foreign contracts. The judgment argued thus: (i) the decision by the state registrar in California who granted the status of parenthood to the married couple who contracted the surrogate mother who gave birth in that State 'is contrary

to international Spanish public order'; (ii) the reasons for this are, according to the Supreme Court, based on the incompatibility with Spanish rules governing key aspects of family relationships, specifically parentage, inspired by the constitutional values concerning the dignity of individuals, their moral integrity, and protection of minors; (iii) the parenthood intended to be registered in the Civil Register is the direct and main result of a surrogacy contract, thus 'the dissociation between contract and parentage as defended by the appellants cannot be accepted'; and (iv) 'such intended parenthood in the Civil Registry is completely contrary to the case provided for in article 10 LTRHA and, as such is *incompatible with public order*' (emphasis added).¹¹

Hence, autonomy is not absolute. It has important limitations, but can serve as a completion clause in the classic sense in order to understand that what is not prohibited is, therefore, allowed.

IV. FREEDOM AND THE RIGHT TO MARRY

1. Marriage, a Neutral Institution

Diez Picazo Giménez (2013) says that although the tradition of constitutionalism is based on the idea that society should not be directed by the state, most Declarations of Human Rights include a number of rights whose purpose is precisely to protect certain features essential to society itself, such as in matters relating to how families are regulated.

Considering the increasing importance of the right to marry, one may note that this is considered to be a fundamental right according to Article 16 of the United Nations Universal Declaration of Human Rights 1948, to which is added Article 12 of the European Convention of Human Rights 1950, which states that men and women of marriageable age have the right to marry and form a family in accordance with the national laws governing this right. Article 32 CE states 'Men and Women have the right to marry with full equality'. Accordingly, the Law 13/2005 modified Article 44 CC and now states that 'Men and women are entitled to marry, according to the provisions of this Code. Marriage shall have the same requirements and effects when both prospective spouses are of the same or different genders.'

But autonomy is not absent in this matter either. Authors that have dealt with this issue¹² distinguish between two aspects of the right to marry, according to classic civil law doctrine after the Constitution came into force. These two aspects are the right to marry itself, the most common representation of which is found in Constitutional Court ruling (STC) 198/2012, and the right not to marry, whose basis is found in the SSTC 93/2013 and 184/1990. My thoughts will focus on these decisions.

The interpretative options given by the Constitutional Court in its various examinations in adapting ordinary laws to the Constitution presently follow several lines of methodology. The first is found in the decision in the STC 198/2012, in which the Court considered whether Law 13/2005, referred to above, was consistent with the Constitution. On the one hand, the Constitutional Court held that those with the right to marry included persons of the same sex, thus allowing them to marry. This apparently extends the right to marry. STC 198/2012 states that 'the equality

of spouses, the freedom to marry the person of their choice and the expression of that will are the essential features of marriage that existed in the Civil Code prior to the 2005 reform and are still recognized in the new system designed by the legislators'.¹³ Moreover, the Court used a neutral definition of marriage, which is in line with the latest decision of European Court of Human Rights in *Schalk and Kopf v. Austria*, 20 June 2010,¹⁴ which comments on how the institution of marriage has evolved since the Convention was signed. The Constitutional Court states that, following the reform passed in 2005,

... the institution of marriage remains perfectly recognizable, according to the image Spanish society has of marriage as a community of affection that generates ties, or a partnership providing mutual aid between two people with identical positions within the institution, who have voluntarily decided to unite in a project of common family life, consenting to the rights and duties that make up the institution and expressly declaring such through the formalities established by law'.

The Court did not, therefore, recognize the right to marry as a new right given to the same-sex couples, but merely declared that same-sex marriage was not inconsistent with the Constitution. The case does not, therefore, establish that there is a constitutional right to same-sex marriage.

Similarly, the European Court of Human Rights has held that states are not required under the Convention to introduce same-sex marriage. In *Aldeguer Tomás v. Spain*,¹⁵ that court recognized (i) that 'the applicant's relationship with his late partner fell within the notion of "private life" and that of "family life"'; (ii) that 'on the other hand, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general economic or social measures, which are closely linked to the States financial resources'; and (iii) ... 'The Convention does not oblige Contracting States to grant same-sex couples access to marriage.'

After the Spanish Constitutional Court ruling 198/2012, same-sex marriage was introduced in France in Decision 2013-669 DC,¹⁶ 17 May 2013, by the *Conseil Constitutionnel*, which ratified the law passed by the National Assembly on 23 April, extending marriage to persons of the same sex. Ruling No. 121/2010 handed down earlier by the Constitutional Court in Portugal also declared the Civil Code reform to be in line with the Constitution, thus recognizing the right to marriage for people of the same sex.¹⁷ As in the Spanish case, these decisions held that the law was not inconsistent with the respective Constitutions. In contrast the important US Supreme Court ruling, *Obergefell et al v. Hodges*¹⁸ recognized that marriage 'is a keystone of the Nation's social order' and that 'there is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable'. In this way, the limitation of marriage to opposite-sex couples may long have seemed natural and just, 'but its inconsistency with the central meaning of the fundamental right to marry is now manifested'. The outcome of this important judgment is different from the Spanish ruling. As we have seen, the Spanish Constitutional Court

judgment focuses on the constitutional consistency of the inclusion in Article 32 CE of same-sex marriages, while the USA Supreme Court focuses the decision on the right to marry. If there is a right, the state cannot forbid same-sex couples to exercise the right, whereas if we focus the argument on the consistency of same-sex marriages with the constitutional rule recognizing both men and women have the right to marry, there is no a fundamental right and the state is entitled to decide whether or not to recognize same-sex marriages. This is also the position of European Court of Human Rights.

The second way in which the Spanish Constitutional Court manages to extend autonomy is by giving it overriding effect. This is clearly reflected in the STC 93/2013, which overturned the Navarra law regulating civil partnerships. The overturned law required conditions to be accomplished by the partners in order to recognize their rights and duties and imposed legal consequences on the partners irrespective of their will. The ruling is built around the concept of self-governance in relationships between unmarried couples. The judgment assumes that the state cannot impose regulations on those who reject the institution of marriage. On one hand, it cannot '[i]mpose an option or limit the possibilities of choice by conditioning the circumstances that may arise as a result of regulating domestic public order' since freely developing one's personality 'would be affected whenever the authorities attempt to impose a certain bond against the couple's will'. That is, autonomy is relevant not only with regard to the formation of the unit, but also to how it is organized. That should be free from specific rules. Indeed, whoever wants to be free is free to be so. STC 93/2013 makes this clear in paragraph 8 when it states that 'this respect for autonomy for those who decide to form a civil partnership involves recognizing that, in the interests of individual freedom, they may conduct their relationships – before, during and after the break-up of the couple – according to any agreement they may regard as most appropriate, without any limits other than those imposed by constitutional public order and morality . . . '.

We might infer that the Constitutional Court has made an interpretation that comes closer to recognizing the autonomy of the members in a family group, which derives from protecting individuals, particularly with regard to those aspects that are not recognized directly as fundamental rights, as occurs in the case of unmarried couples.

2. Do Public Authorities Need to Provide for All the Possible Forms of Cohabitation?

The Constitution requires public authorities to provide social, economic, and legal protection for families (Article 39.1 CE). But from the earliest interpretations of constitutional rules it was highlighted that there is no constitutional concept to identify the type of family to which Article 39.1 CE refers. True, STC 222/1992 stepped beyond what we might call 'traditional' interpretations and stated: 'No constitutional problem would exist if the concept of family provided for in article 39.1 of the Constitution were understood to refer exclusively to families based on marriage.' Our Constitution has not equated the family to be protected with families based on marriage, a conclusion imposed not only by the regulation that clearly differentiates

between one institution and another (Articles 32 and 39). The aforementioned judgment says that: ‘This protection is a consequence linked to the “social” character of our state (articles 1.1 and 9.2) and therefore to the actual reality of the models of cohabitation existing in our society. So the meaning of these constitutional norms is not consistent with restricting the concept of families to matrimonial families, however relevant these may be in our culture’, and adds: ‘Thus there is no need to seek any necessary differentiation in article 39.1 between families based on marriage and those that are not, and nor was this differentiation mentioned by STC 184/1990.’

This issue is part of a major subject of discussion in western legal systems. The reason is that we must consider whether or not we should provide for these family groups, which are an undisputed fact. This means that it is up to public authorities to decide what forms will be able to claim certain benefits, whether civil or social. As the Constitutional Court in STC 184/1990 says, marriage and extramarital cohabitation are not the same situations, since marriage is guaranteed in Article 32 CE, while:

None of this occurs with civil partnerships, which are neither a legally guaranteed institution nor are there any specific constitutional rights to support it. Marriage generates a series of rights and duties for wives and husbands, by virtue of the law, that are not automatically generated between men and women who cohabit without being married. Such constitutional differences between marriage and civil partnerships can legitimately be taken into account by legislators when regulating benefits.

The Constitutional Court has deemed that differences may be made between both types of partnerships, so negative liberty must be respected by not imposing effects other than those intended to protect equality between the partners. Hence, as far as civil unions are concerned, the important conclusion is that legislators enjoy freedom concerning how far to equate this with marriage. This was stated in STC 184/1990, since it is not contrary to Articles 32 and 39 Spanish Constitution. Although legislators may acknowledge certain effects for unmarried couples with respect to the survivor’s pension, as they later did in Law 40/2007, non-recognition is not contrary to Article 14 Spanish Constitution and is, therefore, not arbitrary. However, when it does recognize retroactive effects linked to the survivor’s pension, as does the third additional provision of Law 40/2007, this cannot contravene constitutional principles, as stated by the STC 41/2013, 4 December.¹⁹

The problem arises when regulating the civil consequences of living together unmarried. As a result of the reform of the Civil Code by Law 13/2005, which accepted same-sex marriage, one significant effect comes to light: respect for the principle of freedom is not absolute and the hidden reasons that led many autonomous communities to regulate such ‘partnerships’ have ceased to exist.²⁰ In fact, their regulations looked for a legal status for same-sex couples before the modification of the Civil Code in 2005. Now that marriage as such is accessible to both same and different sex couples, there is no reason to continue to uphold different legal rules depending on whether the cohabitants are married or unmarried. However, this statement is not

accepted uniformly by Spanish authors. The most important work in this regard was published by Professor Martín-Casals, a critical commentary on STC 93/2013.²¹

Casals highlights the three models used by legislators when faced with the issue of regulating unmarried couples, regardless of their sexual orientation. (i) The first consists of total absence of regulation and, despite involving different reasons, this can be summed up by Napoleon's famous saying, '*les concubins ignorant la loi, la loi les ignore*'; Martín-Casals points out that in this model the only possible regulation comes from what the individuals concerned agree on. These models are present in Quebec and in the so-called French 'PACS'. (ii) The second model is what he calls an *opt-out agreement*, in which, according to Martín, 'the members of the couple make no formal declarations relative to wanting to submit their relationship to a particular regulation'. Accordingly, legislators establish a model system which can be modified by the parties as a result of the partners' autonomy and this will apply if nothing else is agreed. According to Martín-Casals, this applies to Australia and New Zealand and is present in the regulation of Articles 234-5 and 6 Catalan Civil Code. (iii) The third model is described as an *opt-in agreement*, ie the couple signs a public document or is registered, so partners adhere to a predetermined regime provided by legislators; in any case, this requires the couple to expressly declare their will to establish a partnership. Martín-Casals points out that in most cases the models do not appear in their pure form. After a major analysis of the reasoning of the judgment, Martín-Casals declares himself to be against the opinion of the Constitutional Court in STC 93/2013 (overturning the Navarra law), which held that the only consequences of living together without marriage should be those voluntarily accepted by the couple, and he ends up by saying that establishing certain provisions which couples could accept would not be unconstitutional, contrary to what the Constitutional Court says.

I have always said that once a work is published, it ceases to belong to the author and should be analysed according to the criteria of the interpreter, which must be respected. But I must say that in this ruling the Constitutional Court does not address the possible models legislators may use to regulate a particular institution. However, what legislators cannot do is violate the fundamental rights of citizens. And this is the leitmotiv of the declaration of constitutional inconsistency of the Navarra law 6/2000. Of course, the couple is free to enter into the union, but the meaning of the Constitutional Court judgment is that legislator cannot impose compulsory effects regardless of the will of cohabitants, effects similar to those of the marriage that the couple rejects. It is precisely the limited issue that the STC 93/2013 referred to.

So we still face the problem of organizing negative liberty or the freedom not to marry. Most European legal systems respect negative liberty by means of some of the models Martín-Casals mentioned and these do not generally impose effects on cohabitation while it lasts unless the parties agree on such. But the moment cohabitation ends, either by death of a cohabitant or by other reasons it seems appropriate to protect the interests of one of the cohabitants, the person in a situation of inequality compared to the other cohabitant. This is the purpose of the so-called 'reintegration pension' and further compulsory regulations found in Articles 234-8 to 234-14 of the Catalan Civil Code, which legislators may impose to avoid the contravention of the principle of equality and only because this might be violated when the partnership breaks up, as well as the right to claim support from the estate of the deceased

partner. This statement is included in the preamble of Catalan Law 25/2010, that approved the second book (regulating Family Law matters) of the Civil Code of Catalonia, which states that 'while cohabitation exists, stable unions are regulated exclusively by agreements among cohabitants' and after making several arguments about civil partnerships as a social reality, the preamble notes that in general these are 'trial marriages', and 'this fact justifies foregoing a legal status of stable cohabitation which is very difficult to harmonize given the wide variety of situations it includes'. But this 'does not exclude that, when the breakdown of cohabitation causes one member of the couple to find themselves in need – owing to the length of the relationship, of having children in common or generally owing to decisions taken by each of the cohabitants in common interest – they may obtain the necessary means from the other party to rebuild their lives'. In short, this involves applying the general rules of law.

This last statement stems from a thought whose consequences I believe have been little discussed and which I think are essential to this problem: family models have continued to expand and now have increasingly widespread legal recognition. So far no problem, but what should negative liberty consist of and how should this be treated in the field of law? This is a debatable issue and a number of examples should be examined. The first is provided by Constitutional Court rulings that have accepted that the survivor of a civil partnership (not a married couple) had no constitutional right to a widow's pension. The reasons for this are clear. If the law requires that the deceased and the beneficiary of the pension should be married when the pension becomes payable following the death of the person paying the contributions then refusing such a pension in the case of unmarried couples does not violate the principle of equality.²² On the contrary, it would be unconstitutional to recognize such a right: after all, this is just another case of what to do when unmarried cohabitation terminates. However, the solution will not be the same if a previous law existed prior to the Constitution that established a different regime among marriages and de facto partnerships.²³ STC 222/1992 concerned a mandatory rule made prior to the 1978 Constitution requiring that one spouse be awarded the subrogation of the lease signed between the other spouse and the owner of the leased property. This rule did not apply to cohabitants. The rule was challenged because, if the aim of the rule was the protection of the housing right of the survivor partner, it had to be applied, irrespective if they were married or not. According to the equality principle, therefore, the Court decided that both married and unmarried couples were entitled to subrogation of a lease contract. Moreover, since the regulation had been made prior to the Constitution, it might be regarded as repealed as being inconsistent with the Constitution itself. But we can go even further: the decision given on 7 May 2013²⁴ by the second senate of the German Constitutional Court stated that unequal treatment between civil partnerships and marriages with regard to applying the *splitting* charge was unconstitutional because the tax rules on income statements in the Income Tax Law (*Einkommensteuergesetz*) discriminates against unmarried cohabitation without there being any sufficient objective reasons to justify such treatment.²⁵ We must clarify that civil partnerships, including same-sex couples and, therefore, different from simple cohabitation, were regulated in Germany in 2001. So this is not just a de facto situation but one that is fully incorporated into law.

Strictly speaking, this means that so-called negative freedom is limited to unmarried couples, because once they choose not to marry, the applicable rules will be different. Negative liberty is, therefore, limited to situations where cohabitation takes place entirely outside the legal system.

I believe that once the Constitutional Court has accepted that same-sex marriage is not inconsistent with the constitution, it is no longer necessary to regulate stable cohabitation outside marriage, the regulation of which, in my opinion, is justified only if it meets the following criteria: (i) it introduces a non-compulsory regulation; (ii) it has protective effects for the weaker cohabitant once the relationship breaks down, and fully respects the freedom of partners to agree on the terms of their relationship; (iii) it does not impose any effect comparable to marriage for the simple reason that partners have ignored this institution by not marrying; and (iv) marriage rules are not applied by analogy.²⁶

V. CONCLUDING REMARKS

First, family law is a very malleable system that allows practitioners to operate freely in order to solve the problems that arise in society. It cannot operate with mandatory rules only, because social changes will destabilize them. The best approach is to employ general concepts. Judges will have to investigate whether the remedies at their disposal or the ones proposed by those involved are the most useful to solve problems in each particular case. We must not confuse a regulation with undefined outlines with the possible arbitrariness of judges. I do not advocate imprecision, but flexibility.

Legislators must take into account what in my view is more decisive when setting the rules concerning family matters, both in situations of normal cohabitation and in family crises: namely, family law has a hard core formed by the rights of individuals who are part of it. It is true that in a system that recognizes fundamental rights, this statement does not offer anything new. What I mean is that laws affecting the family must be designed by taking into account that individuals have rights and all disputes should be resolved in this way. Obviously, this rule prevents arbitrariness by judges. Having said that, those directly involved in family conflicts often demand more specific rules in order to avoid uncertainty. I think this is impossible and I would even go so far as to say counterproductive. A judge who is unable to take into account the circumstances of each case in order to resolve it by applying the rights of those members of the group would be deciding unfairly because he or she would be conferring or denying rights to those to whom they actually belong.

Secondly, the intrinsic fragility of this system means practitioners must have a clear view on certain issues: family law is made up of a huge number of mandatory rules and an even larger number of regulations that accept decisions taken by those involved when exercising their rights. Mandatory rules fulfil several objectives: first and foremost, protecting the rights of citizens; and secondly, but not less important, they make clear the objectives of social policy expressed in legislative acts. Thus, the state must respect marriage in accordance with the provisions of Article 32 CE, yet depending on the objectives to be achieved, it can organize it as society demands by accepting that two people of the same sex may marry or not; by accepting or

rejecting different forms; by attributing certain effects to marriage and denying these effects to those who cohabit without being married, and so on.

Although we might agree on this approach, we must accept that this also has a large impact on the rules governing the relations between parents and children, to the point that the very existence of the relationship may be affected by autonomy. This is clear when acknowledging the parenthood of children born out of wedlock, in adoption, in the assumption of co-maternity in marriages between women and in co-paternity in marriages between men. Respect for the freedom of individuals leads to acknowledging their autonomy by first setting and later renewing the most convenient solutions regarding both economic and personal family relationships. Families are not an administrative body regulated wholly by mandatory laws. The decisions taken by members of the household are based on freedom.

Thirdly, divorce has become a clear way of exercising personal freedom. Legal regulations will not solve the personal problems of those affected by breakups, nor do they intend to do so. This is beyond the law. But law can provide a means to facilitate rational solutions for those involved, since the consequences of marriage endure far beyond any break-up when dependent children (both minors and handicapped) or elderly persons are involved, and when alimony must be paid due to an imbalance caused by divorce. The means will be based on autonomy: premarital or marital agreements in anticipation of divorce and a system of mediation that allows one to reach voluntary agreements, as well as the judicial powers to balance the position of the partners when the agreements cause an imbalance. Despite contrary views, the law cannot seek to save marriages, because this would be contrary to the freedom of the spouses. What it should seek is for life without marriage to be organized rationally.

Fourthly, the family remains an important feature in human relations and also fulfils important social functions both in times of economic crisis and in more normal situations. Not all care needs should be provided by public authorities, because human dignity as well as personal freedom demands that people meet their own needs. What is certain is that the family model that was governed by the Code Napoleon has changed profoundly. A standard based on the extended, bourgeois-type nuclear family, and consolidated in the Spanish Code of 1898, based on marriage and the exceptional acceptance of divorce as a form of terminating such, was the pattern until recently. But this type of family has not been able to prevent the generalization of divorce.

Constitutional protection of the family is based on a flexible interpretation of what we have come to call 'family forms'. But we are still limited by the need for public authorities to clearly identify the beneficiaries, widowers, orphans, etc. It is true that these are individual not family benefits, yet they also benefit the family group. That is why the forms taken by groups of people we have come to call 'families' should be recognized by law.

Families are not in crisis, but there has been a transformation of one basic model, the nuclear family, which the law accepted since it was considered to be the most suitable one for implementing certain policies. The generalization of divorce has led to a number of unforeseen consequences: the termination of the relationship between couples while still maintaining parental relationships and the creation of new

families formed by subjects that coincide with what we previously identified as families, or what have come to be known as ‘reconstituted families’. When there are several family types and when these relate to situations created freely without crossing the red lines of constitutional rights, the only way these families can operate is with autonomy.

Therefore, a system of rules based on principles, combined with wide recognition of the freedom of those involved, determined by virtue of their autonomy, is the only possible way for families to organize their lives in the most appropriate way according to their personal and financial means. Only with this type of legislation can the state fulfil the constitutional role of protecting fundamental rights. We must recall that marriage and family are different: marriage is a form of family, probably the most common, but families exist without marriage, either through relationships among parents and children that may have been formed outside marriage or because there may be stable cohabitation or not, or because there are extended families that consist of parents/cohabitants with children from previous relationships.

NOTES

1. Article 117.1 ‘Justice emanates from the people and is administered in the name of the King by Judges and Magistrates who are members of the judicial power and are independent, irremovable, and subject only to the rule of the law.’
2. Regarding this issue, see *Roca Trias* (2014: chapter 1, 29–71).
3. Calvo (1997: 618).
4. Article 9.3 CE. 3. ‘The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non retroactivity of punitive measures that are unfavorable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter.’
5. This kind of rule is used in Articles 92, 96.3, 103, 2nd, 159, 172 (situation of distress), 176, all of which are found in the Civil Code. Also in Article 2.1 Organic Law 26/2015, 29 July 2015, which states: ‘When applying this law, the child’s best interests shall take precedence over any other legitimate interest that might arise.’
6. *Roca Trias* (2014: 64), with a quote by *de Enterria and Fernández* (2000: 458).
7. As in the STS of 25 May 2012 that accepted an extraordinary appeal due to a procedural infringement because of lack of motivation, even though the Provincial Appeals Court had referred to the best interests of the child as a criterion for judging a particular case.
8. This issue is raised by *Eekelaar* (2015: 352) in the paper delivered at the workshop in Oñati 2014 entitled ‘Can there be Family Justice Without Law?’.
9. STC 120/1984, 10 December.
10. The original Article 1317 CC did not allow future spouses to agree on a regime contained in regional law: ‘... the clauses that generally determine that the parties signing any agreement concerning the property of the spouses will be subject to the local customs and regional laws and not the regulations in this Code and the latter shall be considered null and void’. This prohibition is no longer in force.
11. The judgment has been criticized by scholars. See, among others, *Amorós* (2010, 2015: 5–61).
12. *Diez Picazo Giménez* (2013: 464–7).
13. *Diez Picazo Giménez* (2013: 470).
14. Moreover, in cases of marriage between transsexual persons, see *Christine Goodwin v. UK*, 11 July 2002, *I v. UK*, 11 July 2002, *Parry v. UK*, and *F. v. UK*, both from 28 November 2006.

15. Judgment 14 June 2016. The applicant, Aldeguer Tomas, cohabited with another man from 1990 until the latter's death on 2002; in September 2003, the applicant claimed social security allowances as a surviving spouse, arguing that he has lived as a husband and wife for many years with the deceased cohabitant and they could not marry because same-sex marriage was not allowed. The National Institute of Social Security refused on the ground that he has not been married to the deceased. After several complaints, the Madrid High Court of Justice 'upheld the appeal and reversed the first-instance judgment. The court found that the legislature had not intended Law no. 13/2005 to cover same-sex partnerships which had been ended by the death of one of the partners before such law had entered into force and that the lack of protection of these unions could not be considered discriminatory in the light of Article 14 of the Spanish Constitution' [23]. For the court, it was only as from the entry into force of Law no. 13/2005 that marriage between same-sex couples was recognized and that this law affected other rights for those persons who would wish to marry thereafter. Hence, the court was of the view that Law no. 13/2005 had no retroactive effects, except as otherwise expressly provided, which was not the case at hand. The applicant argued that he has been discriminated against on account of his sexual orientation and claimed on the grounds of Articles 8 and 14 ECHR. See also *Oliari and others v. Italy*. Judgment 21 July 2015.
16. 21. Whereas, secondly, the Republican tradition can only be effectively used to argue that any legal text that contradicts it is deemed contrary to the Constitution while this tradition has created a fundamental principle recognized by the laws of the Republic in accordance with the meaning in the first paragraph of the Preamble to the Constitution of 1946; that if the Republican legislation prior to 1946 and subsequent laws, and even the disputed law, have regarded marriage as the union of a man and a woman, this rule does not affect the fundamental rights and freedoms, or national sovereignty, or the organization of public powers, and cannot be deemed a fundamental principle recognized by the laws of the Republic within the meaning of the first paragraph in the Preamble of 1946; which in any case should also rule out the argument that marriage would "naturally" mean the union of a man and a woman; 22. Considering, thirdly, that by opening the doors of the institution of marriage to same-sex couples, the legislature has deemed that the difference between traditional couples and same-sex couples does not justify that the latter should not be allowed the status and legal protection related to marriage; it is not for the Constitutional Council to substitute the legislature's opinion by evaluating the difference between each kind of marriage.
17. 'Conclui-se, assim, que, de acordo com a jurisprudência constitucional portuguesa, firmada no Acórdão n.º 359/2009, a Constituição não obriga à consagração legal do casamento entre pessoas do mesmo sexo, sendo legítimas quer a sua proibição pura e simples, quer a previsão de regimes diferenciados – de que é exemplo, entre muitos outros, o regime alemão.'
18. 135 S.Ct 2584 (2015).
19. It declared that the requirements for a widow's pension established in the supplementary provision 3 of Law 40/2007 was against the principle of equality since the deceased and the beneficiary had had children together.
20. Roca Trias (2001: 370–72)
21. Martín-Casals (2013).
22. And once they regarded this situation as forced, for the couple had not been able to marry because divorce was then forbidden, the additional provision 10 of the Law, 13 May 1981 recognized the right to claim part of the pension with retroactive effects for the years the deceased and the beneficiary of the widow's pension had lived together. This provision was considered to be constitutional according to STC 260/1988, 22 December, among others.
23. Ibid.
24. 2 BvR 909/06; 2 BvR 1981/06; 2 BvR 288/07, accumulated appeals.

25. Yet one should make clear that the comparison was made by Germany's Constitutional Court regarding marriage reserved for different sex couples and registered civil partnerships, ie same-sex couples, who have not yet been granted the same legal recognition as marriage.
26. Spanish Supreme Court judgments 10 September 2005, 19 October 2006, 8 May and 30 October 2008, 7 February and 16 June 2011, among the most recent.

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