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## Marriage Regulation in Spain. Current Situation and Challenges

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Marriage has changed profoundly during years. The current definition of marriage in Spanish law has abandoned the pattern of a stable union of a man and a woman aimed to raise the next generation. Several problems arise from this departure; the most important ones are figuring out which are the constitutive elements of marriage according to the laws in force, and trying to build a consistent regulation of this relationship. The article includes a general overview of the history and the current regulation of marriage, and subsequently explores the main challenges to the regulation of marriage in the near future.

**Keywords:** marriage in Spain, family law.

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### Introduction

The institution of marriage for centuries has been a well-established relationship in Spain. Everybody was aware of its nature, aims, and its main characteristics. The law that regulated the marriage, either religious or civil (in the short periods during which the latter was allowed), corresponded to that general idea of the marital union: it was understood as a stable union of a man and a woman aimed

at rearing the next generation. From a sociological point of view, marriage was the principal way to create a family. Surely, other kinds of unions – mainly cohabitation, which had not been preceded by marriage – were known in the country, but only the marital union enjoyed the legal status and social recognition.

Since the last decades of the XX century, major changes took place in Spain regarding the structure of the families. Family units became more diverse; factual unions and same-sex unions, among others, were socially accepted and legally recognized. The regulation of these other kinds of unions followed a specific pattern: instead of enacting a new regulation for each of these unions, taking into account its aims and characteristics, most of them were embedded in the marriage. As a consequence, the marriage gradually lost its clear shape and became a union that barely resembled the one of thirty or forty years ago. At this point, some authors wonder whether it makes sense to regulate marriage as a distinctive institution in the Spanish Civil Law. Others try to figure out the essential elements of the current legal marriage, as new challenges are still ahead.

The current article has three parts. The first one is a historical approach to the regulation of marriage in Spain. The second one explains the current situation, and the third one addresses the prospective of marriage in the Spanish law.

## 1. Historical Overview

The regulation of the marital relationship in Spain has directly descended from the Canon Law. Although Spanish Law belongs to the Roman-Germanic tradition, marriage has not retained many features from the Roman marriage – which is the antecedent of current factual unions, not marriage<sup>1</sup>.

The fall of the Roman Empire made Canon Law succeed in this field. After the Reformation, Europe split up into Protestant and Catholic countries, with Spain falling into the Catholic area. Thus, Catholicism became the official religion between 1492 and 1978. Hence, from the end of the Middle Ages until the end of the XIX century, Canon Law marriage was the only one regulated in Spain, and then the prevailing marriage until the end of the XX century<sup>2</sup>. There were two short breaks, with two laws of compulsory civil marriage<sup>3</sup>.

The first modern law of civil marriage was enacted in 1870. It established that only the civil marriage would have civil effects, but it was ignored by most people who continued to marry according to the Canon Law<sup>4</sup>. To prompt the citizens to comply with the law, in 1872 the legislator approved a Decree that declared the children born within the Canon Law marriages illegitimate. Far from solving the problem, it worsened the situation, as thereby the number of illegitimate children in Spain increased. At that time, it was a major issue because of the succession

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\*\* Only literature available in English is cited in this article, although a number of articles in Spanish have been consulted for this work.

<sup>1</sup> Nonetheless, the modifications of the regulation of the marital union in the latest years have introduced nuances to the idea of marriage that was prevalent in the past.

<sup>2</sup> In 1564, King Philip II ordered that the dispositions of the Council of Trent about marriage were published as Law of the country and in all territories dependent on the Spanish Kingdom.

<sup>3</sup> Cfr. *Martínez-Torrón*, J. Religion and Law in Spain. 2<sup>nd</sup> edition. The Netherlands: Wolters-Kluwer, 2018, p. 233.

<sup>4</sup> Actually, this law was a kind of replica of the regulation of Canon Law marriage. It maintained impediments such as sacred orders and the vow of chastity in a religious institute, and considered the marital union indissoluble.

laws in force. This situation was resolved in 1875, when the Law of civil marriage was repealed and the children born within Canon Law marriages since 1872 were recognized as legitimate with retroactive effect.

A system known as “subsidiary civil marriage” was in force since 1875. It meant that Catholics should marry according to Canon Law, and those who did not belong to the Catholic Church, or had declared that they did not profess that religion, could celebrate a civil marriage. Besides, the decisions of ecclesiastical courts about the validity or nullity of marriages were granted civil effect.

The second attempt to implement a system of obligatory civil marriage took place during the Second Republic, in 1931, when for the first time ever, divorce was accepted as a way to dissolve the marital bond, to the point that it was formally recognized within the Spanish Constitution<sup>5</sup>, leading to the enactment of the Spanish Divorce Law during the following year (1932). However, the aforementioned law still required a “justified cause” in order for the divorce to be accepted<sup>6</sup>, and ended up being formally repelled in 1938, in the middle of a civil war that lasted from 1936 to 1939. Once the war ended, there was a return to the system of subsidiary civil marriage that remained in force until the contemporary Spanish Constitution was enacted, on December 27, 1978, and the Civil Code was modified to be consistent with the Constitution<sup>7</sup>.

## 2. The Current Marriage System

### 2.1. The Constitution

The Spanish Constitution provides the framework for the regulation of marriage. It does not contain a definition of the marital relationship; it does not stipulate the marriage system that must be implemented, either<sup>8</sup>. As expected in the fundamental text of a juridical body, it solely encompasses the main features of marriage, leaving its regulation to the lawmakers. For the purposes of the current article, two main sections can be highlighted: Section 32 and Section 16.

Section 32 stipulates:

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>5</sup> Section 43 of the Spanish Constitution 1931: “Marriage is based on equal rights for both sexes, and may be dissolved by mutual dissent or at the request of either of the spouses with allegation in this case of just cause.”

<sup>6</sup> The grounds for divorce are contained in Section 3, and include bigamy, one of the spouses being charged with deprivation of liberty for over ten years; suffering a contagious and serious venereal disease acquired through sexual relations either outside of the marriage and after its celebration, or before it, had they been purposefully concealed from the other spouse at the time of concluding the marriage.

<sup>7</sup> Law 30/1981, July 7, that modifies the Civil Code in matters of marriage, B.O.E. No. 181, July 30.

<sup>8</sup> Marriage system, in this context, refers to the norms stipulating the kinds of marriages which are granted civil effects, and on what conditions it is done.

Section 16 states:

1. *Freedom of ideology, religion and worship is guaranteed to individuals and communities with no other restriction on their expression than may be necessary to maintain public order as protected by law.*
2. *No one may be compelled to make statements regarding his or her ideology, religion or beliefs.*
3. *There shall be no state religion. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.*

Some elements pertaining to marriage can be deduced from these articles.

The mention of the “full legal equality” between the spouses in Section 32 could be rendered, nowadays, as an open door to same-sex marriages. However, it was not the particularly feasible rendering of this concept at the time when the Constitution was firstly enacted. The reference to the equality between men and women in the marital relationship refers to the unequal relationship between husband and wife that existed until a few years before the Constitution was approved. During that time, women were subjected to their spouses’ will, to the point that they required their husbands’ permission for a number of juridical acts.

The current Spanish Constitution interdicts such a difference of status, guaranteeing that the inequality which has existed until the previously mentioned era would not be permitted to continue by reflecting this commitment in the constitutional text<sup>9</sup>.

Nonetheless, a reference to the heterosexuality of marriage is given in order to better understand the subject at stake. The wording of Section 32 of the Constitution neither explicitly requires nor bans the same-sex marriage. This is quite understandable, given the time when the Constitution was enacted – only three years after ending of Franco regime. The 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. Their attention was focussed instead on other topics like divorce (not allowed then) or the transition from a confessional to a secular marriage system.

The most important item to highlight is that Section 32 uses the words “man” and “woman” instead of “all persons”, “all”, “everyone”, “citizens”, “all citizens”, “Spaniards”, or “all Spaniards”. This is the only Section that explicitly indicates the gender distinction, hence, it may be significant. The Constitutional Court understood it when stated, in 1994, that “[T]he heterosexual element of the marriage 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 offered by marriage. [...] The union between persons of the same biological sex is neither a regulated juridical institution nor a constitutional right; on the contrary, marriage between man and woman is a constitutional right”<sup>10</sup>.

<sup>9</sup> See, in this regard STC No. 198, Nov. 6, 2012, FJ 8. Available: <http://hj.tribunalconstitucional.es/en/Resolucion/Show/23106> [last viewed 04.20.2021].

<sup>10</sup> STC No. 222, July 11, 1994. Available: <http://hj.tribunalconstitucional.es/en/Resolucion/Show/16344> [last viewed 04.20.2021].

The same-sex marriage was recognized in Spain in 2005<sup>11</sup>, after a rigorous social debate and an appeal to the Constitutional Court<sup>12</sup>. The Court issued a ruling in 2012 where it tried to dismiss its previous interpretation by saying that Section 32.1 of the Constitution cannot be understood as the establishment of the heterosexual principle of marriage<sup>13</sup>. However, the Court added that it cannot be understood either to mean that the heterosexual-only option was excluded. It comes to the conclusion that considering marriage only as a heterosexual union, and not granting marital benefits to same-sex unions would be consistent with the Constitution, as it recognizes the same-sex marriage. In other words, it considers that there is no pre-legal definition of marriage; marriage will be interpreted by the legislator any given time.

Another sensitive issue, not solved by the Constitution, concerns the kind of marriage – civil or religious – which the Constitution accepts or favours. The Constitution does not impose a mandatory civil marriage. It is clear, pursuant to Section 16-2, that it prohibits the system of compulsory religious marriage or subsidiary civil marriage, as Spain is no longer a confessional state and its citizens cannot be obliged to pledge allegiance to its ideology or religion to obtain the benefits of the law. Certainly, Section 16 recognizes the freedom of religion, stipulating that the state must take into account the religious beliefs of the society, but it does not imply the recognition of religious marriages.

To sum up: the Spanish Constitution merely provides some negative clues as to which marriage systems are not acceptable in Spain. Other legislative sources must be considered on order to ascertain the characteristics of the current Spanish marriage system.

## 2.2. Other Norms

The Spanish Civil Code does not contain a definition of marriage. Instead, it relies on a universal idea of marriage, and regulates it. This way, Section 44 states that “Men and women are entitled to marry in accordance with the provisions of this Code. Marriage shall have the same requirements and effects when both prospective spouses are of the same or different genders.” It continues with the requirements of consent, the impediments to marriage and the diverse forms of marriage.

The most important element of marriage, the consent, attracts little attention; only a short article (45) refers to this aspect, asserting that it is necessary for the constitution of a valid marriage, and it cannot be conditioned or in any other way limited<sup>14</sup>. Such consent, as the Spanish legal doctrine points out, lies within the premise that those who are going to marry must “have the ability to understand and want the act that is performed”<sup>15</sup>. The impediments are treated similarly – simply mentioned without any other explanation. On the contrary, the legislator pays much

<sup>11</sup> Law 13/2005, of 1 July, amending the Civil Code concerning the right to marry, B.O.E. No. 273, Nov. 15, 2005.

<sup>12</sup> Appeal of unconstitutionality No. 6864-2005, in relation to Law 13/2005, of 1 July, amending the Civil Code concerning the right to marry, B.O.E. No. 273, Nov. 15, 2005.

<sup>13</sup> STC No. 198, Nov. 6, 2012, cit.

<sup>14</sup> Section 45: “There shall be no marriage without matrimonial consent. Any condition, term or mode limiting consent shall be deemed not to have been written.”

<sup>15</sup> *Ortega Gimenez, A.* Back to the “Marriages of Convenience” in Spain. Commentary on the Judgments of the Provincial Court of Barcelona of November 19, 2019 and January 29, 2020.