

Constitution, Marriage and Family in Spain.

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1. First of all, I'd like to say that this contribution presents some tentative ideas about marriage and family in the current Spanish Constitution. No ideas are presented with the intention of closing the subject, but to provide elements for further discussion.

2. To assess the constitutional regulation of the family, we must ask two preliminary questions: the first question is whether the constitution should refer to the family or not; the second one is, in the case that the constitution should refer to the family, the content of that regulation.

The first question is not irrelevant; we must keep in mind that the original constitutionalism and even that which can be considered classic, ignored the family.

This is not surprising, because, in its origins, constitutionalism is linked to liberalism and thus distinguished and almost separated State and Society, and conceived the latter as a mere sum of individuals.

The Spanish Constitution of 1978, which defines the Spanish State as "social and democratic state of law" in Article 1, could not ignore the family.

3. But, to what extent should the Constitution regulate the family? In order to answer to this question, we must have an idea of what the duties of public authorities towards the family are, even though we cannot forget that the constitution does not have to gather them all, but must include the fundamental principles. And we must define the essential concept of family from which we depart.

With all due respect to any person who thinks differently about this, we consider a realistic concept of family the one which was implicit in the Spanish Constitution of 1978. That is to say the set of people consisting of a man and a woman united in marriage, and that includes children, if any. It is a concept of family in which we highlight two features: first, the reciprocal implication between marriage and family; second, that marriage is constituted by one man and one woman. This concept of family is prior to any recognition by the state or the constitution, so that it is imposed upon them.

The family thus conceived must be protected and fostered by the public authorities, a general obligation that could be developed in others.

But all these obligations, again, do not have to be in the constitution, which stipulates only the fundamental principles of a political organization and of its legal system.

4. Based on the above assumptions, what is our judgment on the current Spanish Constitution?

If we limit our consideration to the text of the Constitution, at first glance, the regulation of the family is satisfactory.

4.1 The concept of family in its regulation is consistent with the above: there is a link between marriage and family and, on the other hand, marriage is between a man and a woman. This follows, in particular, from Articles 32 and 39 of the Constitution. Under article 32, "the man and woman have the right to marry with full legal equality."

None of the countries that have accepted the legislative introduction of same sex marriage have a section in their constitution comparable to this one. In it, "Man and woman" are spoken as subjects of the right to marriage. The section does not refer to "all" or "all people" or similar expressions, as does the Constitution when it speaks of all other fundamental rights.

Besides, this interpretation of the above provision is impeccably consistent with international human rights treaties ratified by Spain and with the interpretation made thereof by their protection bodies. It is true that, in a deplorable decision, Judgment *Shalk and Kopf*, 2010, the European Court of Human Rights, admitted that Member States may allow same-sex marriage while recognizing that this was inconsistent with Article 12 of the European Convention on Human Rights. However, this is very different from considering that such kind of marriage should be established; the same must be said of the law of the European Union (Article 9 of the Charter of Fundamental Rights of the European Union, Judgment of the Court of Justice of the European Union *Tadao Maruko*, 2008, and *Jurgen Romer*, 2011).

Whether the State may or may not establish marriage between persons of the same sex, is a question that can be decided at a constitutional level. This is what the Spanish constituent decided.

4.2.- Moreover, in the Spanish Constitution, marriage and family appear interlinked. This follows from the fact that marriage is the only way to found the family referred to in the text. Also, you get to this conclusion by reading Article 39. Indeed, this provision begins by saying that "The public authorities ensure social, economic and legal protection of the family" (section one); and adds that "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." (section two). That is, the Constitution protects the family consisting of a man and a woman and their children, and also protects the children (even if they come from a non-marital union) and mothers, even if they are not united in marriage. But it extends no protection to fathers or any other forms of family.

To sum up, the constitutional regulation of the family is enough. Now it is necessary to analyze how the Constitutional Court has interpreted the Constitution.

5. The Spanish Constitutional Court, in the first years of application of the Constitution, was consistent with the concept of family that emerges from a neutral reading of the Constitution.

However, in 1992, the Court reviewed its prior jurisprudence, invoking the principle of equality in article 14 of the Constitution. With this argument, since judgment 222/1992, the Constitutional Court holds the provision of urban rents legislation that forced extension of the rent to the surviving spouse,

without recognizing the same right to the surviving member of unmarried couples, unconstitutional. The position of the Court applied Article 14 to match shapes or legal situations, not people, which is what the provision was intended for. Understandably, this judgment was the subject of several justices' dissenting votes, but it prevailed through the decision of the majority. The link between marriage and family disappeared.

Another feature of the institution that disappeared with Judgment 198/2012 is the rule which establishes that marriage is founded on the union of a man and a woman. Despite the clarity with which the Constitution prevented same-sex marriage, the Constitutional Court rejected a constitutional challenge brought about by the Popular Party Parliamentary Group in the Congress of Deputies against the law 13/2005, 12 July, which had introduced this form of marriage in Spain. The judgment states that constitutionality is left at the discretion of national legislature. However, the current government of the Popular Party supported by an absolute majority in Parliament, even though it had filed an appeal against the socialist law, has not repealed it.

To all of the above, another change dated in 2005, this time without the intervention of the Constitutional Court, must be added, which was Act 15/2005, which introduced divorce regulation precluding the need to prove a cause. This is arguably constitutional, as the second paragraph of Article 32 of the Constitution states that the law shall regulate *inter alia*, "the grounds for separation, dissolution and their effects." At this point, we must wonder if current Spanish law grants any content to marriage that is not patrimonial.

6. Interim conclusion.

All this has significantly distorted the institutions of family and marriage, turning them into something very different from what the constituents provided.

At present, it is questionable whether or not people who have a classical conception of marriage have their right to get married fully recognized. Undoubtedly, they can get married, but marriage is now a very different institution from what this people request. Some American States offer people the choice between several forms of marriage, some more stable than others. Some civil lawyers among us have proposed that the possibility to choose an indissoluble marriage should be established. It is objected that this would cause legal uncertainty, but it is debatable whether this would be the cause of the legal uncertainty that already exists.