“Same sex couples in Spain. Historical, contextual and symbolic factors”
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INTRODUCTION

In Spain a social and political debate is taking place. It focuses on the recognition of the relations of same sex couples, while giving legal cover to the so called “de facto” couples (which is also opened to the heterosexual couples) without recognizing all the inherent rights within marriage. This debate is also in response to the vindication of diverse Lesbians, Gays, Bisexuals and Transexuales (LGBT) organizations to give access to marriage to couples formed by two people of the same sex.

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

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

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

1. HISTORICAL AND CONTEXTUAL FACTORS

1.1 Looking back

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

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

In 1975 the dictator died and the transition towards the democracy took place in Spain. Guasch (1995) shows us a process that took place during the late years of Franco dictatorship. This process was marked by a detachment between real country and official country. Thus, while the dictatorial regime tried to maintain a moral of postwar period based on the National-Catholicism (political ideology based on the moral values of the Catholicism of the time), the society shows an important tolerance and openness to sexuality and sexual behaviors. This tolerance is restricted solely to the heterosexual behaviors, since in the case of the homosexuals stayed strongly stigmatized during further lustrums.

The first Gay Pride demonstration in Spain took place in 1977 in Barcelona. The event was strongly repressed by the police. Five thousand people participated in the gathering¹. During these first years of political transition the primary target of the homosexual movement was the abolition of the previously mentioned *Law of Dangerousness and Social Rehabilitation*.

By the 1980s the lesbigay movement's primary goals were achieved (through the abolishment of *Law of Dangerousness and Social Rehabilitation* and the legalization of homosexuality) and it suffered a fall in activism. The participation in the Gay Pride demonstrations in Madrid hardly reached 100 people in 1988².

As it had occurred in other countries in the region, the epidemic of AIDS brought the Gay and Lesbian movement back to life in Spain, largely because the epidemic placed homosexuality in the center of social and mass media attention. For homosexuals, it supposed the reconfirmation of all the offenses they were suffering because of their sexuality: not being able to visit their couples in case of disease if the biological family did not want, no access to inheritance, loss of the common home if the person who passed was the holder of the house or the contract of rent, common necessities of prevention programs and attention. During these years (end of the

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¹ Herrero Brasas, 2001:313
² Herrero Brasas, 2001:315
1980s and early 1990s) activism and participation in organizations increased. This is most likely the foundation on which later Spanish gay movement “boom” since 1995 was erected³.

Soon the need to regulate and protect couples formed by people of the same sex was realized by the couples themselves and society. In 1993 two of the main Spanish gay and lesbian organizations (CGL from Catalonia and COGAM from Madrid) began a campaign demanding the regulation of the de facto couples, a campaign to which they incorporated strategic allies, including heterosexual de facto couples that did not marry⁴.

During the 1990s, equality for homosexual people surfaced as a question in political debate. The Spanish Working Socialist Party (Partido Socialista Obrero Español, PSOE), in power since 1982, began to establish relations with the lesbigay movement. In the last years of its mandate they acceded to some of its demands (1994-1996) with the recognition of rights for the de facto couples in certain laws, especially in the Law of Urban Leasing (1994), which recognizes the right to subrogate a contract in a de facto couple regardless of sexual orientation⁵.

The Socialist Party lost the elections of March 1996 without fulfilling one of its main promises towards gays and lesbians: the approval of a de facto couples law that would gave them certain protection in different legal situations. The conservative Popular Party (PP), in government since then, has always restrained (stopped) numerous initiatives presented by diverse progressive and nationalistic groups in the Spanish Parliament. First was for the regulation of de facto couples and, later, for reforming Civil Code in order to recognize the right of the homosexual people to contract marriage (Perez Cánovas, 2001:500-501). They have not fulfilled the intentions expressed by some of the members of the Government or the Popular Party to approve a national law of civil unions that would include the same-sex couples⁶.

In the last municipal and regional elections of May of 2003 gay marriage happened to occupy the center of the political debate as one of the more controversial issues during the electoral campaign. Almost all candidates had to make clear their position on the matter. The controversies over gay marriage and the acceptability of child adoption by same sex couples has reached such levels that even a new political party has been created (“Family and Life”) to made the rejection of these two issues its main political flag. With 3,793 votes the Family and Life Party was the eighth most voted party out of 20 in Madrid Regional Parliament Elections⁷.

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³ From that date the participation in Madrid Gay Pride demostations has not stopped to grow. If in 1995 they were 5,000 people (the same as at the end of the 70s); in 1999 they were 30,000; in 2000, 70,000; in 2001, 150,000 people participated; reaching more than 350,000 people in 2002 and exceeding half a million people in 2003. (Herrero Brasas, 2001:315; Odisea, nº 59. Pág. 10; El País, 01 de julio de 2001, portada; www.elmundo.es 29/06/02 y 28/06/03).
⁴ El País, 17.02.02 Pág. D1-3
⁵ Pérez Cánovas, 2001, 497-498
⁶ El País, 17.02.02 Pág. D3
⁷ http://www.elmundo.es/especiales/2003/05/espana/25m/resultados/autonomicas/12/0.html
1.2 From dangerous to citizen

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

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

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

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

By all these reasons, the Spanish Constitution appears as a legal reference for political parties, lesbigay organizations and homosexual citizens who demand legal equality of their sex-affective relationships by acceding to these two institutions protected constitutionally and accepted social and legally: the marriage and the family.

In spite of this, when same sex couples have addressed civil registries or highest courts to be recognized as married, the answer has been to assume that marriage must take place between

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

\(^9\) Art. 10.1, 14, 17.1 y 23.1

\(^10\) The concept of spouses and relatives appears in many of the Spanish legislation: from labor legislation, to social security, tributary, civil code (inheritances and successions, parenting, etc.). An analysis of all these laws go beyond the purpose of this communication.

\(^11\) “Man and woman have the right to get married with total legal equality”. (Art. 32.1)
a man and a woman (Herrero Brasas, 2001:137-142, Perez Cánovas, 2001:496). This occurs despite the fact that this it is not specifically expressed that way in neither the Constitution nor in the Civil Code.

At the same time an evolution is taking place in the Spanish public opinion in regard to the acceptance of the extension of the assigned rights to the marriage to the homosexual couples. In 1997, according to the official Centro de Investigaciones Sociológicas (CIS, Sociological Research Center), most of Spaniards (57%) accepted homosexual couples living together in stable way as deserving the same rights and duties as married couples (Alberdi, 1999:41).

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

1.3 National Government, 0; Regional Governments, 11

With the Spanish Constitution of 1978 the Spanish State is defined as plurinational and is committed to respect and to protect cultural variety. It has decentralized the state with the recognition of the diverse nationalities and regions that make part of it in form of independent communities. Some issues stay exclusively in the hands of the state government (among others the regulation of marriage, registries, nationality and migration, labor, social security). The Autonomous Regions (Comunidades Autónomas), on the other hand, will have their own parliament, laws, president... Between the ample competitions assumed by these communities are those relative to health, education and social attendance.

In addition, 6 of the 17 autonomous regions and 2 autonomous cities in which is divided the Spanish State have a series of their own “fueros” (jurisdiction) that allow them to have their own legislation regarding subjects of civil rights, specially those related to family law, inheritances and successions and, in some cases (as in Navarre and Basque Country), these rights amply include the tributary system. I will illustrate further on how important this will be to

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12 Specially the recommendations of the European Parliament in 1984 to leave the repressive policies of homosexuality, the Resolution on Equal Rights for homosexuals and lesbians in the European Community (A-0028/94 Resolution, D.O.C. 28.02.94) and, lately, the approval by the European Parliament of a report in which it is requested to the states to grant same sex couples same the rights as marriages (www.elmundo.es, 05/09/03).

13 Aragón, Balearic Islands, Catalonia, Galicia, Navarre, Basque Country

14 In XVII century Spain was formed by a group of kingdoms (Aragón, Castile, Leon, Navarre, Majorca) with their own law codes named “fueros”. After the Succession War (1713) king Felipe V eliminated good part of these “fueros” in the territories that opposed him during the war (Aragón, Valencia, Catalonia, Balearic) and maintained them in the ones that were with him (Navarre and Basque provinces). These regional law codes were kept or disappeared in the different regions and kingdoms with different
explain the diverse level of capacities between the different autonomous regions to regulate same sex couples.

As we have seen previously, the Spanish central government, in spite of public opinion pressure, the diverse demonstrations and the different law proposals presented/displayed in the Spanish Parliament, has rejected to offer recognition and legal cover to same-sex couples. There exists, nevertheless, the possibility for many of these couples to register their unions in front of a representative of the State. This is possible thanks to the different laws approved in most of the regional parliaments recognizing this type of unions. Thus, 11 of the 17 autonomous regions have passed a law giving same-sex couples the possibility of contracting legal rights and duties. 77.82% of the Spanish population live in one of these autonomous regions.

Some of these autonomous laws discuss the necessity to regulate what they define as a “new social reality” in order to avoid “unfavorable treatment, “important injustices”, “legislative marginalization” and “legal discrimination” against non-married couples regardless of their sexual orientation. The approval of these laws by autonomous regions elevates same-sex couples to a legal category, in other words, it certifies its recognition by an institution of the state. In a sense this fact becomes another element pushing the National Government to establish legislation on the issues surrounding same-sex couples.

In the next chart we can find a panorama of the 11 laws that have been approved in the Spanish State to protect same sex couples. Although it is not the main aim of this communication, it provides a summary of the main aspects of each regional law:

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16 31,787,106 people of a total of 40,847,371 habitantes according to the Official Census of 2001 (www.ine.es)

17 Preamble in Valencia, Canary Islands and Madrid laws.

18 Exhibition of reasons in the law of Navarre, introduction of the one of Aragón, and exhibition of reasons for the laws of Extremadura and Basque Country, respectively.
Those autonomous regions with recognized “fueros” can legislate on inheritance issues and, in some cases, on family. This means that couples registered in these territories can gain access to successory rights or to joint adoption (in the case of Navarre and the Basque Country) that will never be allowed to same sex couples in the rest of the Spanish State until the National Government enacts legislation.

Here we can see how, by historical and cultural reasons, there is a different access to rights within the Spanish State. If a homosexual couple lives in the Basque Country will have the right (for historical reasons) to being able to adopt jointly, to receive the inheritance of its couple or to register its relation without cohabitation, whereas if they live in another region will not have these rights.

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

In Navarre (1) all the opposition parties were united in the Navarrese Parliament to pass the law against the wishes of local partner from the PP (Union of the Navarrese People, Unión del Pueblo Navarro, UPN) which governed as the minority. In the Basque Country (2), the party that reunites to reformed communists (Left United, Izquierda Unida, IU) established as a condition to join the governmental coalition with nationalists the approval of the mentioned law. The law that
was approved after the dialogue and the negotiation with Basque LGBT associations, is one of most progressive in Spain. It addresses questions of inheritance and adoption, and in its symbolic aspects: conceiving a familiar relation with no need for cohabitation, but simply on the the existence of a sexual-affective relation.

5 out of 6 of the autonomous regions that have not yet presented regulation on same-sex couples have been ruled in the last years by the conservative PP (Cantabria, Castile-Leon, Galicia, Murcia, Rioja) and 1 (Castile-La Mancha) by socialist PSOE. Therefore, in Spain progressive and nationalist parties are those that seem more prone to respond to the demands of the LGBT movement.

2. CULTURAL AND SYMBOLIC FACTORS

Which are the cultural and contextual factors that have allowed same sex couples think of themselves in terms of marriage, family or kinship? I try to answer this question in the second part of my paper by making a quick review of some of the elements considered in Western societies and Spanish legal ordering when regulating marriage and the family (2.1, 2.2, 2.3). After that, I will examine the way these elements are reflected, or not, in the set of laws that offer same sex couples the possibility of achieving legal protection (2.4).

2.1 The cultural model of kinship

Western societies understand kinship as a mediator between nature and culture: kinship becomes biological facts, socially understood\(^{19}\). Schneider, when analyzing western kinship as a cultural system of symbols, says that sexual intercourse between a man and a woman is the symbol upon which marriage, parenthood, and lately family and kinship, are constructed\(^{20}\). Thus, heterosexual intercourse provides the link between husband and wife and between each one of them and their children, making all of them share a common biogenetic link. By naturalizing this social relationship it becomes unchangeable.

Heterosexual sex then appears as the ultimate expression of conjugal love (in fact it is called “making love”) and as the element that differentiates the love between the spouses from the one

\(^{19}\) “… each element which is culturally defined as natural is at the same time augmented and elaborated, built upon and informed by the rule of human reason, embodied in law and morality” (Schneider, 1980:40)

\(^{20}\) “the fact of nature which serves as the symbol in terms of which member of the family are defined and differentiated and in terms of which each member of the family’s proper mode of conduct is defined is that of sexual intercourse” (Schneider, 1980:33)
they share with their children and, of course, with the rest of people who do not belong to the family.

Gender Theory and Women’s Movement have challenged the biological basis of kinship, gender roles and motherhood instinct. Feminism, Sexual Reform and New Reproductive Techniques have broken the link between sexuality and procreation, opening the way to overcome the social construct that puts heterosexual intercourse as the center of sexuality, reproduction, marriage and kinship. When the biological base of kinship blurs pointing out its social essence, what is then left to ground marriage family and kinship? Maybe cohabitation, perhaps love; maybe sex -understood now in a way that goes beyond the heterosexual intercourse- or perhaps a mixture of all or some of these elements. These institutions (marriage, family and kinship) would organize the socioeconomic reproduction as well as the biological reproduction of the human groups in western cultures.

All these events have made it possible for people who love and /or have sex with people of the same sex to think of their relationships in terms of marriage, family or kinship; thus, making it a social, legal and political demand. This is bringing a new challenge to one of the mainstream ideas that supports western symbolic and social order: heteronormativity.

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

Without trying to analyze deep too much these elements, since they go beyond the objectives and amplitude of this communication. I will make next an examination of which of them are symbolically founding the concept of marriage, family or kinship in some of the Spanish main laws. Doing the same thing later with the laws approved by regional governments to give legal protection to same sex couples.

Before going on I would like to point out, as Schneider does (1980:5,122), that the kinship model that appears here does not have to correspond necessarily with the social practices of people, not even a majority of them. What each person think of marriage, family and kinship is

21 “If reproduction is assisted, it seems as if kinship is also assisted, and its system of social representations lost coherence […] This intervention in a kinship system, based on the symbol of sexual intercourse and on interdependence of nature and law, seems to cause a deep separation between what we considered as cultural and natural respectively: law no longer recognizes nature and nature no longer founds law.” (Bestard, 1998:212)
also affected by the context in which the social agents lives, as well as by their ethnicity, social class, gender, age, etc.

This model becomes normative through particular institutions (law, residential models, church, norms, traditions, prohibitions, etc.) that have direct influence in people’s everyday life. According to Fassin (2000:404) family becomes a concept of order and organization, a fiction or social category that becomes real through the state and of other social institutions. The state and social agents reproduce the thought that makes part of the functioning of the family, institution that receives from the state at every moment the means to be, to exist and to subsist.

2.2 The Catholic Church

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

Although the Constitution (Art. 16,3) indicates that Spain is a lay state, the influence of the Catholic Church goes beyond the historical questions or the fact that most of the Spanish population defines themselves mainly as catholic[22]. The Spanish Civil Code (Art. 60) recognizes that “marriage celebrated according to the norms of the canonical Law [... ] has civil effects”.

What do the Roman Catholic Church’s Canon Law says in relation to marriage?

First, it makes clear that marriage is contracted between a man and a woman, the natural and indissoluble character of this institution and its reproductive purpose[23]. In addition, these canonical norms are totally explicit when talking about sex, since the consumation of the catholic marriage happens when the “conjugal act” takes place[24]. Through this act (sexual intercourse) the spouses become the same flesh. The conjugal act is so important, that sexual impotence can make a marriage null since, according to the understanding of the Catholic Church, if there is no possibility of making sex, there is no real marriage[25].

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[22] The great majority of the Spaniards, 83.6%, defines themselves as catholics, nevertheless the percentage of people who consider practising catholic is 56.3%. (El Pais, 13 abril 2000)

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

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

[25] Canon 1084 §1 - Antecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or on that of the woman, whether absolute or relative, by its very nature invalidates marriage.
The Catholic Church establishes a relation between cohabitation and sexuality when understanding that the first implies the consumation (by means of sex) of marriage (Canon 1061, 2). Cohabitation is a right for both spouses (Canon 1151). This cohabitation can be broken by unfaithfulness between the spouses but, if this happens, it is recommended, by charity, to pardon an adulterous partner. Anyway, separation does not break the matrimonial bond, considered to last for life. Love or affection between the spouses does not appear reflected in Title VII of Roman Catholic Church’s Canon Law, dedicated to marriage.

2.3 The Civil Code

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

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

Cohabitation is understood to begin when marriage takes place, but it is not a previous requirement to marry. Anyway the Spanish Civil Code does not speak about feelings, nor about affectivity, nor about love, nor about sexuality. The only sexual feature displayed in this law is the obligation to keep faithful: unfaithfulness can become cause of separation and, later, divorce (Art. 82, 1).

Although love appears in the symbolic model as one of the main components of marriage, love or affection are not presented explicitly neither in the civil legislation nor in the canonical law as a previous requirement of a marriage. The most important thing for a marriage to exist, in front of the eyes of the Catholic Church is the possibility of having sexual intercourse and, in front the eyes of the civil law, is that the couple has a common residence.

Any marriage constitutes a family and generates kinship relationships (when you get married in Spain the state gives you the “libro de familia” (Family Book)). However, family is a wide

26 1152 §1 - It is earnestly recommended that a spouse, motivated by Christian charity and solicitous for the good of the family, should not refuse to pardon an adulterous partner and should not sunder the conjugal life.

27 “Family is formed by two or more people tied by affection, marriage or paternity, that live together, have their economic resources in common and jointly consume a series of goods in their daily life” (Alberdi, 1999:60-61) “The different types of family are created from the combination of two elements: norms of residence and type of marriage” (González Echevarría, 1986:12)
concept and includes marriage and other social realities. The Spanish Constitution does not define what a family is, and the concept is left open. This is very important because if the family is considered as the cornerstone of our society, an institution to promote and protect, any relationship included under this family concept must then be protected by the State.

The definition of family and kinship is object of a social fight, creating a tension between law and social reality. Legislation (as result of certain political changes) has a great importance, as far as it has the chance to promote, protect or make possible certain behaviors (or to sanction them).

Thus, sometimes legislation boost social change, sometimes reality goes far ahead from legal norms, forcing their modification. Law makers are sometimes reluctant to recognize social change and become absorbed thinking within their own limits. When this happens, law is stuck in the past without being able to respond nimbly and suitably to society new situations and challenges. The results of this symbolic fight ends up being transferred to the laws, which implies legal consequences and, by extension, material consequences for the people.

Looking to same sex couples legislation we can see that while most regional same-sex couples laws recognize the necessity to regulate and give legal protection to a new reality in Spain, the National Government refuses to recognize that social change.

2.4 Laws recognizing same sex couples

The diversity between the different laws recognizing same sex couples in Spain is so big that begins in the way this type of relationships are named in each one of these laws:

- Stable Unions of Couples (Catalonia)
- Stable Couples (Navarrese, Asturias, Balearic)
- De Facto Couples (Aragón, Andalusia, Extremadura, the Canary Islands and Basque Country)
- De Facto Unions (Valencia, Madrid)

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

29 On the influence that law have in the definition of social models we can look to Alberdi’s work (1999) in which she explains the decisive contribution of the legal transformations that took place during the democratic transition in Spain. These transformations led to the creation of a new structure of familiar relations based on: the equality between man and woman; the equality between all the children; the possibility of ending a marriage through divorce; the State as childhood rights guarantor...
Four elements are combined to name these types of relationships: union, pair, stability and de facto. The laws that do not indicate they are talking about couples (two persons) in their title (Valencia and Madrid) make it clear in their following articles that are legisrating about relationships established by couples, that is to say, two people.

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

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

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

**Cohabitation**

In order to be able to get under these legal regulations, same sex couples must be “stables” (Aragón, Madrid, Asturias, Balearic, Andalusia, Extremadura, Catalonia, the Canary Islands); stability that will be demonstrated by “cohabitation” (Valencia, Madrid, Extremadura, Balearic, Canary); cohabitation that for many of these laws must be “marital cohabitation” (Catalonia, Navarre, Andalusia, Asturias, Aragón).

Although some of these laws do not require the existence of previous cohabitation, almost all of them expect it after registering. The Basque law is the only one that doesn’t require cohabitation neither before nor after the inscription, since people just tied by a sexual-affective relation can be considered de facto couples (Art.21). To require de facto couples previous cohabitation creates a discrimination in contrast with marriage: people who get married do not have to prove the existence of an affective relation through cohabitation.

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30 (Navarre, Art. 3.2; Asturias, Art.3.2; Andalusia, Art. 4; Canary Islands, Art.6.1)
The possibility of obtaining legal protection with no need of cohabitation, means an important symbolic rupture in relation to the previous model. Now it is possible for new types of sexual-affective relationships and agreements to find a place within the law. Once again, the fact that this law was one of the priorities of the coalition of the left party IU as member of the Basque Government has allowed to take into account this demand from LGBT organizations from the Basque Country, recognizing that a family does not necessarily have to live in the same home.

Cohabitation by itself is not a sufficient element for a stable couple or union to exist in front of the law, it must go accompanied by marital or conjugal affection, which lead us to the field of the sexuality.

**Love and sexuality**

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

Most of the laws, on the contrary, talk about relationships with an “affection analogous to the conjugal one” (Navarre, Aragón, Asturias, Andalusia, Extremadura, Balearic). However, only the Basque law requires the existence of a sexual-affective relationship. None of these laws makes explicit reference to fidelity, reason why sexual exclusiviness would not be an indispensable requirement to be under the protection of these norms.

**Family**

Throughout the debate on the regulation of same sex sexual-affective relationships, the family concept has become a symbolic battlefield. One of the reasons for this to happen is is that, as we have seen, family appears in the Spanish legal ordering as one of the pillars of our society, protected by the Constitution (Art. 39,1).

From the very moment when gays and lesbians change their ways of life and take, with paternity or no, the family concept for themselves, a new concept is created and extended: “lesbigay families” referring to those families formed by two people of the same sex and their possible biological (or not) children (or not). When this concept is created and used socially, it seems a contradiction to say that these “lesbiagay families” are not families. If we are talking
about “lesbiagay families”, then this type of families exists in people’s mind the social imaginary. To recognize them or not legally is a mere political question (Fassin, 2000).

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

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

We are in a context in which kinship seems to be losing its specificity in contrast to other type of communitarian organization of solidarity. These kinds of organization is necessary to cover certain material necessities plus physical and social reproduction. The symbolic order based on nature is broken if kinship relations become an intensification of the bows of solidarity between a group of social agents not on the basis of a series of biogenetic substances, but on the basis of a more or less lasting and exclusive sexuality (or not).

Making sexuality (instead of heterosexual sex) the specific element of kinship faces critics like those coming from Butler (2002:37) who thinks kinship should not even be based on enduring and exclusive sexual relations. If kinship lose any bond with sexuality and biology it will dilute in the rest of communitarian social relations creating more or less endure commitment and solidarity31. This would also mean that sexual practices would acquire autonomy from marriage, the family and kinship.

It seems that sexuality (accompanied by affection) maintains implicitly and by default a explanatory and referential role for kinship by replacing that way the biological connection, kinship will not lose their specificity.

_Paternity and adoption_

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31 “Kinship loses its specificity as an object once it becomes characterised loosely as models of enduring relationship” (Butler,2002:37)
Same sex couple laws regulate adoption to make clear the access (or not) for homosexual people to joint adoption. The national Adoption Law of 1987, of higher level than the regionals laws, allows any person, homosexual or no, to adopt a baby individually. It allows any heterosexual couple (married or not, registered in the registries of de facto couples or not) to adopt jointly.

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

The idea of thinking about reproduction exclusively through sexuality has already been questioned by the possibilities Assisted Reproduction Techniques have to offer. Thanks to them, to adoption and to the creation of reconstituted families, gays and lesbians have accessed paternity and maternity avoiding the need for hetero-sexual intercourse. This is questioning again the assumption that the difference of sexes is inevitable within kinship. The assumption that for reproduction you need a man and a woman, has been previously been challenged by single mothers and artificial insemination, too.

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

Numerous research have been made in different countries on the matter, reaching the conclusion that living with same sex couples does not affect negatively the development of the children (North American Association of Psychology). Despite this, Madrid’s Children Ombudsman sponsored a research done by University of Seville Faculty of Psychology the and the Madrid Official School of Psychologists (2002). This research reaches the conclusion that children raised by lesbigay families show the same degree of development than the rest, and the only difference that were found among them was greater tolerance towards homosexuality and more gender roles flexibility.

However, numerous conservative politicians continue to appeal to the supposed lack of agreement among scientists on the subject, in order for not recognizing joint adoption of those

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32 (Navarre, Art. 8, Basque Country, Art. 8)
33 El Mundo, 04.10.00 y Gara 02.08.03
34 Not only conservative politicians show reluctance to the possibility of recognizing joint adoption for same sex couples, the General Secretary of the Spanish Socialists talking about the demands of LGBT movement said: “Marriage, yes. Adoption, we will see…” (Zero Magazine)
children by same sex couples. Not even for children who, nowadays, are being already raised de facto by gay and lesbian couples.

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

3. CRITICS TO LESBIGAY MARRIAGE

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

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

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

Perhaps the route is to also incorporate new arrangements to the concept of family (having into account that sexuality, solidarity, affection and children rearing are important items for a human group or society). If the family is limited to nuclear family (which is not the tendency: lesbibag
families, reconstituted families, etc.) another possibility is that society organizes itself with
different models outside family. Without doubt, this last proposal would require a series of great
depth reforms, since as we have seen, good part of the Spanish legal ordering, beginning by
the Constitution, is based on the familiar institution.

Are LGBT organizations fighting, in addition to marriage, for the regulation of other forms of
social and familiar organization beyond marriage with the search of legal recognition of de facto
couples and, why not, of another type of familiar or community ties? Fundación Triangulo, for
example, considers the fight for de facto couples laws (in addition to lesbigay marriage)
continues being one of its main political objectives.

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

CONCLUSIONS

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

The pressure coming from LGBT movement, European instances and the existence of very
decentralized country has allowed same sex couples laws being passed in most Spanish
autonomous regions. Some of these regions have had the possibility, because of historical and
cultural reasons, to legislate about family, adoption and inheritance. This causes a differential
access to rights for same sex couples living in different places of the country.

The progressive parties (socialist and, mainly, reformed communists) and nationalists are the
main promoters of this type of legislation, whereas the Conservative Party is a brake to same
sex couples demands.

When talking about symbolic aspects, most of de facto couples laws in Spain conceive
cohabitation accompanied by a sexual-affective relation as the key elements to allow a same
sex couple to register.

The Basque Country law means an important symbolic rupture, since by demanding only the
existence of a sexual-affective relation recognizes a familiar model that goes beyond
cohabitation and locates sexuality (not necessarily procreative, coitus-centered or heterosexual) in the symbolic center that was occupied by heterosexual intercourse before.
BIBLIOGRAPHY


