Judicial ethics in the regulation of marriage equality*

La ética judicial en la regulación del matrimonio igualitario

A ética judicial na regulamentação do matrimônio igualitário

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Abstract

The concrete, ultimate aim of this paper is to make an expository and analytical clear-out to open the concept of marriage to meanings or realities never considered until the early twenty-first century. That is, to create an access road to the institution of marriage to unions between people of the same sex. In the case of Spain, the subject of this study, such road has been created thanks to the application of judicial ethics by judges of the Constitutional Court. On the occasion of the constitutional change carried out by the ordinary legislator, they felt the obligation to provide a jurisprudential turn in response to the demands of a society whose reality is dynamic and changing. The Constitutional Court no longer holds the title of negative legislator but rather, with a much deeper social function, it is in charge of conferring validity and legitimacy to the Constitution.

Keywords: Same-sex marriage, Judicial ethics, Constitutional Court.

Resumen

El presente trabajo tiene una empresa última concretamente establecida que es la de hacer un barrido expositivo y analítico por la apertura del concepto matrimonio a acepciones o realidades hasta principios del siglo XXI jamás planteadas. Esto es, crear un camino de acceso a la institución matrimonial para las uniones entre personas del mismo sexo. En el caso español, objeto de este estudio, se ha dado gracias a la aplicación de la ética judicial por parte de los Magistrados del Tribunal Constitucional que, con motivo de la mutación constitucional llevada a cabo por el legislador ordinario, se han visto en la obligación de dar un giro jurisprudencial en atención a las demandas de una sociedad cuya realidad es dinámica y cambiante. Ya el Tribunal Constitucional no ostenta el título de legislador negativo sino que, su función social es mucho más profunda, es el encargado de dar validez y legitimidad a la Constitución.

Palabras clave: Matrimonio entre personas del mismo sexo, Ética judicial, Tribunal Constitucional.

Resumo

Este trabalho tem a finalidade específica de realizar uma varredura expositiva e analítica varrido pela abertura do conceito de casamento até o início do século XXI. Ou seja, criar uma estrada de acesso à instituição do casamento a uniões entre pessoas do mesmo sexo. No caso espanhol, objeto deste estudo, se deu graças à implementação da ética judicial por parte dos Juízes do Tribunal Constitucional, por ocasião da mudança constitucional realizada pelo legislador ordinário, eles se viram na obrigação de efetuar uma mudança jurisprudencial em atenção às exigências de uma sociedade cuja realidade é dinâmica e mutável. E o Tribunal Constitucional não detém o título de legislador negativo, mas a sua função social é muito mais profunda, é o responsável por dar validade e legitimidade à Constituição.

Palavras-chave: Casamento do mesmo sexo, A ética judicial, Tribunal Constitucional.

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Introduction

The object of the present study is the analysis of the respect to the constitutional and ethical principles that must be observed by any Chamber or Constitutional Court in any of its sentences. This analytical purpose is realized in the judgment of the Spanish Constitutional Court 198/2012 of November 6, 2012, which recognizes the constitutionality of the legal regulation of marriage between people of the same sex. In addition to being a novel sentence, it is considered that it owns an impeccable legal argumentation, getting the Magistrates of the Constitutional Court an exemplary wording in which they have remained faithful to the Spanish Constitution and its guiding principles, as it will later observe the reader, making a difficult exercise of self-review and jurisprudential turn towards the acceptance of the new and changed Spanish social reality through the reinterpretation of the constitutional text.

Moreover, there is a second motivation for which the author decides to address gay or egalitarian marriage and it is that the recent decision of the Supreme Court of the United States of America reopens a debate that never died in Colombia: provide new content to the concept of marriage, open it. The euphoria manifested throughout the region by this pronouncement has overwhelmed the repercussion forecasts, which has motivated the author to venture into the Spanish experience, where this type of civil union is recognized, guaranteed and protected by the legal system since the year 2005.

In addition, it could be say that if the judicial ethics are of interest, it is because people have become aware that in the postmodern state of law the figure of the judge obtains for himself a relevance of which he lacked in the traditional or classic state of law as functionally was reduced to a mere applicator of the law through the subsumption of the concrete case to the norm. Now,there is a clear emphasis on the judge as it makes fundamental rights effective, participates in the control of constitutionality of laws and interprets the rules taking into account that they have to obey principles that incorporate substantive values.

In the second that state models raised, the traditional rule of law, there is a clear positivist influence where there is no room for judicial ethics. In contrast, it is the postmodern state of law that causes judges to confront the problem of the material validity of norms and to apply a right that goes not only as a normative pyramid but as a very complex social reality that depends, to some extent, on the subjectivity of the actors, thus opening up a margin for judicial ethics. (Hernando, 2006, XIII Ibero-American Judicial Summit, 2006, June).

Ethics and Law

What is meant by judicial ethics?

In order to be able to carry out a deep analysis first is to know what is wanted in order to identify, select and dissect in order to, subsequently, be able to study the object of this work.

Aristotle, Guillermo de Ockham, Thomas Aquinas, Emmanuel Kant, Jorge Federico Hegel, among others, dedicated much of their work to delimiting the ethical reason of the human being and the ethical consequences of their behavior, however; one of the peculiarities of ethical reflection is that, being philosophical, it is not exclusive to philosophers. In other words, it naturally participates in the community, since in any human being arises spontaneously (Hernando, 2006; Savater, 2011).

In the case of jurists, their own work repeatedly prompts them to do so. The fields of ethics will constantly carry matters such as fundamental rights, such is the case study. However, to offer a conceptualization of judicial ethics is to venture too much, so it is considered appropriate to refer to the statement of motives of the Ibero-American Code of Judicial Ethics.

> Judicial ethics includes legal duties that refer to the most significant behaviors for social life, but it pretends that its fulfillment responds to an acceptance of them by their intrinsic value, that is, based on moral reasons; in addition, completes those duties with others that may seem less peremptory, but contribute to the definition of judicial excellence. Consequently, judicial ethics means rejecting both the standards of conduct of a "bad" judge and those of a simply "mediocre" judge who conforms with the minimum required by law. In this order, it should be noted that the current reality of political authority in general, and judicial in particular, shows a visible crisis of legitimacy that entails in those who exercise it the duty to ensure that citizenship recovers confidence in those institutions. The adoption of a code of ethics implies a message that the judicial branches themselves send to society recognizing the concern caused by that weak legitimacy and the determination to voluntarily assume a strong commitment to excellence in the rendering of the justice service. It is appropriate to point out that despite the use of terminology which is widespread in the legal world, such as 'code', 'court', 'responsibility', 'penalty', 'duty', etc., it is assumed not with that burden, but as terms that allow to be used in the ethical field with the particularities that this matter implies (XIII Ibero-American Judicial Summit, 2006, June).

The Regulation of Judicial Ethics

In a little more than a decade there has been a gestation and delivery truly striking initiatives that generate legal texts whose ultimate aim is what has been called "judicial ethics", as well as an important number of reflections from the judicial community with the same object. Many of these initiatives have given rise to work with a corpus with sufficient entity to generalize its classification as "Code of Judicial Ethics".

First and following a chronological order of

legislation, it is necessary to cite Report No. 3 (2002) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on principles and rules governing professional imperatives applicable to judges and, in particular, deontology, incompatible behavior and impartiality. This report was issued on November 19, 2002 and had its origin four years earlier, in 1998, in the European Charter of the Statute of the Judge (Strasbourg), which contains obviously qualifying provisions of ethics. Notwithstanding, the latest legal progress in this area is covered by the Code of Ethics of judges of the European Court of Human Rights of June 23, 2008.

Also on November 25 and 26, 2002, the Code Of Bangalore on judicial conduct, generated at the hearth of the United Nations. This code was approved by the Judicial Integrity Enforcement Judicial Group, as revised at the round table meeting of Presidents of High Courts held at the Peace Palace in The Hague.

In spite of these two major antecedents, the most striking example of this new legislative current is the Ibero-American Model Code of Judicial Ethics, approved at the XIII Ibero-American Judicial Summit in June 2006. This ethical code groups the relative novelty of the matter that it intends to order and the extraordinary importance of the pure fact of its creation by a unanimous agreement reached between all the Presidents of the Courthouse and the Supreme Courts and the Judicial Councils of the twenty-two countries that make up the Ibero-American Community of Nations.

Up to the date of its adoption - mid 2006 - 15 Latin American countries had established ethical-judicial regulations with diverse institutional content and designs. For this reason, the Ibero-American Judicial Summit drafts and approves the code as a homogenizing mechanism, having its most immediate precedent in the Charter of Rights of Persons before Justice in the Ibero-American Judicial Space -2002-, which recognized "a fundamental right of the population to have access to an independent, impartial, transparent, responsible, efficient, effective and equitable justice" (VII Ibero-American Summit of Presidents of Supreme Courts and Supreme Courts of Justice, November 27-29, 2002).

This concerns multilateral initiatives or attempts to reach a number of states but, from a purely national or internal perspective, the references also exist and can in fact be countless. In that order, the code of ethics was approved in the United States, Italy, or in several Latin American countries. This is the case in Argentina, Bolivia, Brazil, Costa Rica, Cuba, Chile, El Salvador, Guatemala, Honduras, Mexico and, in this case, both at the Federal level and in the States, Panama, Paraguay, Peru, Puerto Rico and Venezuela.

In light of all the previous international regulations, it is possible to extract a common denominator in all legislators and, therefore, to affirm that the ethical principles to be observed by the judiciary are the following: independence, impartiality, justice, motivation in resolutions, equity and institutional responsibility.

Judicial Ethics and Constitutional Ethics in the Spanish Case

At this moment there are no references about constitutional ethics for two essential reasons: first, it is not feasible to carry out the constitutional review of each country or, as minimum, of the western states, in favor of the search for ethical-judicial principles in the articles of their respective constitutions; and second, legal ethics, rather than judicial, is divisible into categories.

Related to the previous topic, following the classic tripartite division of the exercise of political power proper to the Montesquieu State (Sabine, 2012; Strauss & Cropsey, 2012), an executive power, a legislative power and a judicial power are visualized. The logical result of this classification will lead to specific competencies, so the ethics to be applied will also be specific to each branch. For this reason, opting for an organic vision, the political, constitutional and judicial ethics are presented correlatives to the executive, legislative and judicial powers.

As an example, it is possible to state that in the Spanish case, the head of the executive branch (President of the Government, Vice-President and Ministers) should not nor can they observe the principle of independence, since the President directs government action and coordinates functions of the other members of the same and the government responds solidarily in its political management before the congress of the deputies. This is totally unthinkable when we speak of the judicial power where the judges and magistrates are independent to the maximum degree. Nevertheless, there are common principles such as justice, equity or institutional responsibility, as long as the content of these is appropriate to the functions of power in question.

It seems to be guessed, for example, that some of the norms included in certain approved codes of ethics, respond to a purpose of substitution of certain deficiencies of the institutional systems of the countries for which they are elaborated. This is not the case in Spain, for which it can be stated without reservations that the 1978 Constitution has set up a complex normative with regard to the organic building of the judiciary. Here is the nexus between judicial and constitutional ethics within the legal system of Spain. The Constitution incorporates in its articulate the ethical-judicial principles thus elevating them to the category of constitutional principles.

However, at this point it is important to

make an effort to contextualize and concretize everything that has been exposed in order to relate it to the right of marriage between people of the same sex or; otherwise, it will be very difficult to understand the arguments of the Constitutional Court. For this reason, it is necessary and inevitable to speak of the rights to free development of personality and non-discrimination (Articles 10.1 and 14 Spanish Constitution) as they are the basis for the recognition, normalization and protection of homosexuality, a concept that will be extended to reach access to the institution of marriage and filiation.

For the purposes of this study, the author considers it appropriate to establish a timeline starting from the most immediate antecedent to the current Spanish democracy, due to the importance and temporal durability in which it was maintained, until reaching the Court's decision. In other words, the chronological order is adopted in order to make comprehensible to the foreign reader the recent historical reality of the sexual phenomenon beginning with the Francoist dictatorship and concluding with judgment 198/2012 (ABC, 2012; Historia del movimiento LGTB en España, 2015, Mira, 2004, Venegas, 2008).

The mentioned precedent is the dictatorship of General Francisco Franco, which lasted for almost 40 years (1939-1975) and produced a social disarticulation molding at will the morality of the generations who lived in that period. It is necessary to know that the Franco regime was a totalitarian and autocratic regime that never promulgated a Constitution but was organized through organic laws until the approval of the fundamental laws of the kingdom in 1967 in order to unify them under a single legal body. It is extremely relevant to observe the articles of these laws, for example, Articles II and VI of Ley de Principios del Movimiento Nacional (Law of Principles of the National Movement) establishes that "the Spanish nation considers as honorable stamp the compliance with the Law of God, according to the doctrine of the Holy Catholic, Apostolic and Roman Church, unique and true and inseparable faith of the national conscience, which will inspire its legislation" and by publishing that "natural entities of social life: family, municipality and union, are basic structures of the community", not to mention Article 22 of the Law of the Spaniards: "The State recognizes and protects the family as a natural institution and foundation of society, with rights and duties prior and above all positive human law. Marriage will be one and indissoluble" (Spain, Presidency of the Government, April 21, 1967).

It should be noted that legislation is based on the most exacerbated natural law and with its deeply rooted roots in canon law that are directly connected with the canons 1013 of the *Codex Iuris Canonici* of 1917 (Benedict XV, 1917, May 27) and 1055 of the Code of Canon

Law of 1983 (John Paul II, January 25, 1983). Therefore, the ethical principles of the moment will be in tune and aligned with this ethical-legal position. This philosophical substrate is the one that nourishes the legal argument of the appeal of unconstitutionality number 68642005, as will be studied later.

Given this legal basis, it is not surprising that during Francoist Spain homosexuality was not only frowned upon and not accepted, but criminalized and strongly persecuted as it was explicitly embodied in Ley de Vagos y Maleantes (The Vagrancy Act) of 1954, equating homosexuality to pimping. Little by little, the regime was "tolerating" the homosexual phenomenon with the approval of Ley de Peligrosidad y Rehabilitación Social (Law of Dangerousness and Social Rehabilitation) of 1970 when moving from the category of delinquent to the category of sick. Although both categories are unethical in the light of any 21st century democrat, at the time it was a very important step because society no longer criminalized homosexual practice but had an intention to "redeem" the "sinners". Obviously, everything under a tough Catholic morality where the temporal power of the Vatican prevails over the powers of the state.

With the death of General Francisco Franco began the transition, the first public homosexual demonstrations began without fear, "out of the closet", or lesbian and *gay* movements in 1977. There are some incipient changes in Spanish ethics; the stony and immovable foundations of Catholic morality begin to crack and there is a split between politics and religion, that is, secularization. This will change the results of the constitutional legislator to the point of accepting homosexuality and granting him legal protection under the Constitution in the articles 10.1 and 14, but for now he will consider it innocuous, with the exception of the military area, where it will be a crime against honor.

With the entry of the 80's in full democracy and with Felipe González as president (Partido Socialista Obrero Español -PSOE-), the social and sexual revolution breaks out. Homosexual movements are not only heard sporadically but also create associations, magazines and radio programs, among others. Towards the middle of the 90 the first "*gay* neighborhoods" - *gay* village - of Spain, being emblematic the district of Chueca in Madrid, and the claims for the access to theinstitution of marriage. This is held back with the arrival of José María Aznar to the Government (Partido Popular -PP-), despite different proposals made by the opposition to legalize same-sex marriage. Notwithstanding, at the regional level, there are innovative changes in the requirements for access to the legal figure of a partner, eliminating the principle of heterosexuality and that opened the door to the registration of homoparental couples.

With the mandate of José Luis Rodríguez Zapatero (PSOE), which began in 2004, the political party that he had, the general secretariat brings in its program the relevant legal reform to create the necessary channels to give access to the right to marriage among homosexuals. From this political debt arises the law object of unconstitutional recourse, Law 13/2005.

All of the above shows that in Spanish society an ethical earthquake has developed that has turned its *ethos* in less than 50 years. What initially looked like a despicable crime, went through a pseudo-merciless vision of the homosexuality as a curable disease, its subsequent indifference to a "different" sexual orientation until normalization and acceptance by the whole of society, recognizing the antidiscrimination protection against discrimination based on the sexual orientation of people. Such is the degree of acceptance of homosexuality in Spain that can be seen vital positions for the state occupied by homosexuals, as is the case of Jerónimo Saavedra, former President of the Government of the Canary Islands, former Minister of Public Administration and former Minister of Education and Science (Yagüe, 2001, June 24); Íñigo Lamarca, Ombudsman of the Basque Country between 2004 and 2014 (Lamarca, 2009); or Fernando Grande-Marlaska, current President of the Criminal Chamber of the National Court (Redondo, 2013, January 14).

***Iter* Procesal**

Once established the general theoretical framework of the conceptualization of judicial and constitutional ethics, delimited its international and national Spanish legal framework in which the evolution of Spanish society will be played and contextualized, from this moment on, it is necessary the establishing of the records which led to the pronouncement of the constitutional court, which will be dealt with in the next section. They will be treated briefly, without entering into the background or giving rise to debates that produce the deviation from the target set at the beginning of the work. Furthermore, it is necessary to present the two key articles and the modification of one of them in order to understand the appeal of unconstitutionality. Note that the underlined text is the paragraph added by Law 13/2005 that modifies the Civil Code so that, technically, there was no reform, but rather refers to constitutional mutation (De Vega, 1988).

> Article 32 of the Constitution: "1. Men and women have the right to marry with full legal equality.
>
> 2. The law shall regulate the forms of marriage, the age and capacity to contract it, the rights and duties of the spouses, the causes of separation and dissolution and their effects" (Spain, 1978).
>
> Article 44 of the Civil Code: "Men and wom-

> en have the right to marry in accordance with the provisions of this Code.
>
> The marriage will have the same requirements and effects when both contracting parties are of the same or different sex" (underlined by author) (Spain, Cortes Generales, 1889, July 25).

This brief constitutional regulation is inherited from the first contained in Article 43 of the Constitution of 1931 and drafted in accordance with Article 16 of the Universal Declaration of Human Rights of 1948, Article 23 of the International Covenant on Civil and Political Rights 1966, Article 10 of the International Covenant on Economic, Social and Cultural Rights of 1966, Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and the United Nations Convention of 15 April 1969, on consent for marriage, minimum age for marriage and registration of same.

Law 13/2005, of 1 July, amending the Civil Code on the right to marry

The purpose of regulating the legal body is very specific: to allow access to the institution of marriage, contemplated in Article 32 of the Constitution, to same-sex couples by amending article 44 of the Civil Code. And the legal argumentation of this Law runs around the promotion of effective equality of citizens in the free development of their personality (Articles 9.2 and 10.1 Constitution), the preservation of freedom as far as forms of coexistence is concerned (Article 1.1 Constitution), and the establishment of a framework of real equality in the enjoyment of rights without discrimination on the grounds of sex, opinion or any other personal or social condition (Article 14 of the Constitution), all of which are constitutionally recognized values that should be reflected, in the opinion of the legislator, in the regulation of the rules that delimit the status of the citizen, in a free, pluralistic and open society (Spain, Cortes Generales, 2005, July 2).

Appeal of unconstitutionality No. 6864-2005

This resource presented by 71 deputies of the Popular Group of the Congress before the Constitutional Court has a very strong moral and ethical load for the following nine pages (Spain, Constitutional Court, 2012, pp.168-177) and eight only the last section (section i) includes in nine lines all the legal arguments that may compel the TC to declare the law appealed as unconstitutional.

> The eighth and last reason of unconstitutionality is the violation of Article 167 EC, regarding the constitutional reform. According to the appellants, the contested law would have implicitly infringed Article 167 EC by failing to follow the formal procedure laid down in that provision to amend Article 32 EC and to have opted instead for a legal

> reform which, through the simple alteration of words, would have led to a genuine mutation of the constitutional order. In his opinion, the only possible way to introduce gay marriage into the Spanish legal system would be the constitutional reform, so its introduction by ordinary legislation would be a multiple violation of the Constitution that also affects Article 167 EC (Spain, Constitutional Court, 2012, p.176).

As regards the rest of the appeal, it is based on two pillars and a solution. In the first place, it is repeatedly stated that there are only two characteristics of marriage: heterosexuality and equality. Secondly, this institution is defined as the union between a man and a woman, and the idea of this as a "mother" which presupposes that of engenderment. Note the relevance of these statements because it is not unreasonable to make a deep comparative reflection by going to the Code of Canon Law, since Canon 1055 defines marriage as "the marriage alliance, by which the male and the female constitute a consortium with each other of all life, ordered by its very nature to the good of the spouses and to the generation and education of the offspring ..." (Juan Pablo II, 1983, 25 January). Therefore, the appellants do not make a purely legal foundation but a moral entity that has its roots in Canon Law and Natural Law. As already noted above.

With regard to the solution, it is very obvious: positive discrimination. Unequal situations require different regulations. The appeal reiterates the non-possible equalization between heterosexual unions (marriage) and those formed by persons of the same sex (coexistence more uxorio) for responding to different entities and the need for parallel legal regulations.

With all of this, what is wanted to make clear is that the appeal of unconstitutionality responds, mainly, to an original interpretation of the constitutional articles (Spain, Constitutional Court, 2012, p.191) in the light of a pseudo theological ethics thus displacing the importance which has legal ethics within the spectrum and scope of reading and implementation of the Constitution.

Judgment of the Constitutional Court 198/2012, dated November 6, 2012

Dismisses the appeal of unconstitutionality filed against Law 13/2005, of July 1, amending the Civil Code on the right to marry.

Ethical-Legal Analysis of the Judgment of the Constitutional Court 198/2012, of November 6, 2012

Having clarified all the possible doubts that could arise when facing an analysis of this scale, it is time to penetrate the adequacy or not of the actions of the Magistrates of the Constitutional Court when they had to resolve

the alleged misalignment of Law 13/2005 approved by the Parliament.

Judgment 198/2012 divides its legal bases into 12 points that will be observed in the light of the ethical principles mentioned above and, as a consequence of the principle of judicial independence, four particular votes corresponding to Magistrates who, with full respect for the opinion of the Majority, express their discrepancy with the decision. Votes that will not be detailed since they are in the same line of argument of the appeal of unconstitutionality filed and that gives rise to the pronouncement of the Court.

The object of the appeal is clear: the whole of Law 13/2005. It is understood that the nucleus is the first section of the single article of the law, which adds a second paragraph to Article 44 of the Civil Code. The remaining paragraphs of that single article, as well as the first and second provisions, only come to adapt some precepts of the Civil Code and the Law on civil registration, so that its unconstitutionality would be a simple consequence of that precept.

It is curious to observe how the Judgment is divisible into two blocks with a clear differentiation around points 2, 3 and 4 with respect to points 5 to 12. This corresponds to the nature of each of them, the first section (24) Has a pure legal entity, certain basic constitutional principles are observed on which the Spanish legal system is structured, and the second section (5-12) is steeped in a legal philosophy that revolves around concepts such as legal culture, criterion of evolutionary interpretation of the constitution or the conceptual autonomy of "family".

The Principles of Normative Hierarchy, Equality and Interdiction of Arbitrariness

During the points 2, 3 and 4 (Spain, Constitutional Court, 2012, pp. 185-188), it is studied the effect that might have the approval of that recourse legal text on the constitutional principles of normative hierarchy, equality and interdiction of arbitrariness, focusing on the most orthodox legal ethics.

With respect to the invocation of Articles 9.3 (in its dimension of principle of normative hierarchy), 10.2, 53.1 and 167 of the Constitution, the Court clarifies that such invocations are not autonomous, in such a way that the precepts pointed out would only be violated in case if so also Article 32 of the said legal body. It is for this reason that it focuses the analysis on the constitutional adjustment of the contested rule by confronting it with that precept, previously ruling out the rest of the allegations because it fully depends on the violation of Article 32.

In relation to the alleged violation of the principle of equality (Articles 1.1, 9.2 and 14

of the Constitution), this is a "discrimination based on undifferentiation" because they understand that it is not taken into account that marriage and same-sex couples are different realities must be treated differently (Spain, Constitutional Court, 2012, p.186). The Court is exhaustive in its reasoning: Article 14 does not establish a right to unequal treatment, nor does it cover the lack of distinction between unequal assumptions, so there is no subjective right to unequal regulatory treatment, a different question is that public authorities can, and should, adopt measures of differential treatment of certain groups in order to achieve constitutionally legitimate purposes, and it is not possible therefore to censor the act to open the marriage institution to a reality that has specific characteristics with respect to heterosexual couples.

As regards the alleged infringement of the principle of interdiction of arbitrariness (Article 9.3 of the Constitution), this infringement is linked to three circumstances: that the legislator treated equally unequal situations, that Article 32 (which reserves the title and exercise of the right to marry for men and women), and that this was done by ordinary law and without previous constitutional reform. Set out in these terms, the claim is rejected as it does not fulfill the requirements that the Court has repeatedly demanded through a jurisprudential way to analyze if the ordinary legislator has acted arbitrarily. It is understood that the formal requirement is not fulfilled, the one that the appellants have reasoned in detail the invocation of the violation of the interdiction of arbitrariness, offering a convincing justification to destroy the presumption of constitutionality of the contested law, nor does the material element which would lead to concurrent understanding in this case the arbitrariness and, consequently, the violation of Article 9.3 of the Constitution, because neither of the norm is normative discrimination, nor does exist in this case absolute lack of rational explanation of the measure adopted.

Marriage as Institutional Guarantee and as a Fundamental Right

In this second block (points 5 to 12), well differentiated from the previous one within the juridical foundations of the judgment, the influence of ethics and its principles can be clearly seen and the Judge's reasoning of the Court, as will now be seen, since concepts such as family, marriage and filiation by adoption are discussed; or, the correct way of applying an interpretative criterion to the constitutional body. Matters that, of course, are not purely legal and have a foothold within the spectrum of ethical action.

With respect to the concept of family, a concept that in the eyes of the appellants responds to the classic patterns established by natural law and canon law, as this thesis has already been manifested, it is essential to determine if

the regulation introduced by Law 13/2005 regarding the marriage institution in the strict sense supposes, in addition to an attack on article 32, a simultaneous injury to article 39 of the Constitution (family protection). The court is exhaustive in its response and recalls that marriage and family are different constitutional goods, which are found in different precepts of the constitution by the will of the constituent, so that the constitutional text does not make the constitutional concept of family exclusively dependent on the which has its origin in marriage, nor does it limit it to relationships with offspring. Therefore, from this it is derived that are worthy of constitutional protection, among others, marriages without descendants, extramarital or single parent families. Even in cases in which the parent has been excluded from parental authority and other tuition functions.

While it is true that the court has never carried out a constitutional conceptualization of the family, it does recall that the European Court of Human Rights disconnects the right to marry and the guarantee of family protection. As a result, the Constitutional Court and the European Court of Human Rights have separated themselves from the ethical principles of natural law and, above all, from the concept of Catholic, Apostolic and Roman marriage, advocating to a universalist ethic, where an ethical-legal evolution is observed in which its principles are not immutable but adaptable to the different social realities. Therefore, of all the constitutional precepts invoked, the only one that could lead to the declaration of unconstitutionality of the whole law, in case of being violated, is Article 32.

Evacuated the problematic around the family as an autonomous entity, the focus is on the legal concept of marriage. However, the situation here becomes very complex because Article 32 has been interpreted by the Spanish constitutional jurisprudence granting a double content: it is a constitutional guarantee and, simultaneously, a constitutional right which implies an analysis of the constitutional adjustment of the reform introduced in the Civil Code from a double perspective. In the first place, the answer to the question of whether the contested reform implies a constitutionally inadmissible impairment of the institutional guarantee of marriage and, second, to the question of whether or not the reform introduces constitutional limits unacceptable to the exercise of constitutional law to enter into marriage.

In 1981, the jurisprudence adopted the category of institutional guarantee as a mechanism for protection of certain constitutionally recognized institutions against legislative action that might attempt to suppress or denature them. It should be noted that they are institutions that finding a constitutional reflex and being fundamental within the constitutional order, have been only stated in the Constitution, without

finding in it the essential development. Therefore, marriage as an institutional guarantee requires objective protection on the part of the court that must ensure that the legislator does not suppress or empty the master image of the institution, which leads to unequivocally ask the following question, Law 13/2005 denatured the matrimonial institution or the ordinary legislator has acted within the margin that the Constitution grants him?

In order to be able to give solution it is necessary to know based on which interpretative criterion answers to such question. The appellants apply a literal, systematic and authentic interpretation of the aforementioned Article 32 as support for their argumentative thesis. Thesis which is rejected by the court not because it is erroneous, but because the criterion followed is not appropriate and, even if it is, a strict literal interpretation will result in that article 32 only identifies the holders of the right to marry and not with who should be contracted because the problems that occupied the constituent were the question of divorce, the conceptual differentiation between marriage and family and the guarantee of equality between men and women in marriage. It is understood that in 1978, in a post-Franco Spain, the legislator did not even consider the possibility of coexistence *more uxorio* among homosexuals and by not being considered such a hypothesis, could not close or open the doors to marriage.

The Tribunal does not stay there and goes a step further in interpreting from an initial budget based on the idea that the Constitution is a "living tree" (Privy Council, Edwards c. Attorney General for Canada judgment of 1930 taken up by Supreme Court of Canada in its judgment ofDecember 9 of 2004 on same-sex marriage) that accommodates to the realities of modern life as a means of ensuring its own relevance and legitimacy, not just because it is a text whose main principles are applicable to assumptions that its editors did not imagine, but also because the public authorities and particularly the legislator, are updating these principles gradually and, because the Constitutional Court, when it controls the constitutional adjustment of these updates, the norms of a content that allows reading the constitutional text in the light of contemporary problems, and the demands of society today that must meet the fundamental rule of law at risk, otherwise, become a dead letter. This evolutionary reading of the Constitution, which is projected in particular to the category of institutional guarantee, leads to develop the notion of legal culture, which makes law as a social phenomenon linked to the reality in which it develops. This interpretation referred by the Constitutional Court is the one that facilitates the answer to the previously raised question of whether marriage is still recognizable as such in the Spanish socio-legal context and that following the reforms introduced in the Civil Code, the institution maintains its essential notes: the equali-

ty of the spouses, the free will to marry the person of their own choice and the manifestation of that will. Consequently, the only difference in marriage, before and after July 2005, refers to the fact that the spouses can belong to the same sex.

Additionally, if the evolutionary criterion is based on social reality, it is necessary to determine how integrated is the marriage between homosexuals in the Spanish legal culture, by referring to the elements that conform it or to the opinions of the legal doctrine and of the advisory bodies provided for in the same law, in the comparative law and the international activity of the States manifested in the international treaties, to the jurisprudence of the international bodies that interpret them, and to the opinions elaborated by the competent organs of the United Nations system, as well as by other international organizations of recognized standing; concluding that the legislator develops the matrimonial institution according to our legal culture, without making it at all unrecognizable in contemporary Spanish society. Therefore, from the point of view of the constitutional guarantee of marriage,

> it is not possible to make a complaint of unconstitutionality to the option chosen by the legislator in this case, within the margin of appreciation that the Constitution recognizes, because it is an option not excluded by the constituent, and which may have a place in Article 32 CE interpreted in accordance with an institutional notion of marriage increasingly extended in Spanish society and international society, although not unanimously accepted (Spain, Constitutional Court, 2012, p.196).

Having completed the reasoning concerning marriage as an institutional guarantee, it is necessary to address the question of marriage as a constitutional right that enjoys the guarantee of preservation of its essential content against the freedom of the legislator, so, the new wording of the Civil Code introduced by Law 13/2005 is an attack on the essential content of the fundamental right?

In order to approach this reflection the fundamental right to marriage must be observed from a double dimension: one objective, one subjective. As for the objective dimension of the constitutional 32, its essential content converges with the notion of institutional guarantee defined above although dogmatically its nature is different; therefore, if it has already been stated previously that the second remains intact with the new legal regulation, it is understood that the first, the objective dimension of the right remains unchanged. And from the subjective perspective of such a right to marriage, it is affirmed that it is a right of individual ownership but of shared exercise since there is no marriage without consent (Article 45 Civil Code) and that the marriage bond generates

ope legis a plurality of rights and duties to the spouses. But not only this, but from it is extracted the freedom not to contract it, although in this end is not going to deepen. Now, subjectively, it is essential to determine whether the contested regulation precludes the exercise of the right by heterosexual persons under the same conditions as before, thereby affecting the essential content of that right.

It is obvious that there is no affectation in the access to the marriage by heterosexual people. What there actually is, is recognition of the enjoyment of the title of the right to the marriage to the homosexual collective, an extension of the sphere of freedom that was not recognized. Therefore, what makes the legislator in use of the freedom of configuration granted him by the Constitution is to modify the regime of exercise of constitutional right to marriage without affecting its content, nor impair the right to marriage of heterosexual persons, given that the act does not introduce any material modification in the legal provisions governing the requirements and effects of civil marriage of persons of different sex, and without the option adopted assume denying any person or restricting the constitutional right to contract marriage or not . "Therefore, from the perspective of the configuration of marriage as a fundamental right, there is no reproach of unconstitutionality that can be made to Law 13/2005" (Spain, Constitutional Court, 2012, p.200).

Conclusion

The end of this essay study corresponding to the valuation and evaluation of the circumstances developed throughout the work has already been reached, firstly to say that the Constitutional Court's arguments are impeccable. In their method of elaborating motives for the legal basis of the judgment, the Magistrates deal with principles that are exogenous to their religious or moral convictions and beliefs, thus appealing to the criterion of evolutionary interpretation of the constitutional text taken from the Supreme Court of Canada. This interpretation means that a contextualized reading of the Magna Carta must be carried out taking into account the social reality, since not only is there a single mechanism to update the legal system that structures the Constitution, this being the reform in the Spanish case, but that the public authorities and particularly the legislator should update these constitutional principles by adapting their meaning to the demands of contemporary society and contemporary problems. The Court's role here it is fundamental because it is the encharged that these conceptual updates of the principles fall under the Constitution without any friction that may lead to an imminent declaration of unconstitutionality.

Going deeper to stay on the surface, this evolutionary reading leads to develop the concept of legal culture, which makes law as a social phenomenon linked to the reality in which

it develops, having as one of its configurator elements the observation of legally relevant social reality. The Court, therefore, to clarify whether or not same-sex marriage is a social requirement exposes the following:

> the most recent data from the Center for Sociological Research on this subject is found in the study on "the attitude of the young people to the sexual diversity" (No. 2,854) between November and December 2010 for young people between the ages of 14 and 29, with 76.8% of those interviewed considering same-sex marriage as acceptable. For its part, the figures of the National Institute of Statistics [belonging to the Spanish Government] contained in the statistics on "natural movement of the population", let us know that during the years of validity of Law 13/2005 and until December 2011, 22,124 same-sex marriages had been contracted [...] there is a growing tendency to recognize that the fact that same-sex marriage is integrated into the marriage institution is a reality that can be assumed in our legal culture [...] (Spain, Constitutional Court, 2012, p.195).

Also, it is remarkable the respect shown by the magistrates to the public authorities, specifically to the legislature when saying that, it is not for the Constitutional Court to judge the opportunity or convenience of the choice made by the legislator to assess whether it is the most appropriate or the best of the (among many other STC 60/1991, dated 14 March, FJ 5), since we must respect legislative options as long as they comply with the constitutional text (Spain, Constitutional Court, 2012, p.200).

It should be recalled that the Constitutional Court does not integrate within the judicial power in the style of other options of partition of power, as is the Venezuelan case, within the judicial power, but in a similar way to the Colombian model, forming an owned and special competence set to the margin of the tripartite or classic branch of the exercise of public power. A Supreme Court is, thus, presented as a higher court in all orders, except for the provisions on constitutional guarantees, exclusive jurisdiction of the Constitutional Court.

And finally, concluding this analysis of Judgment 198/2012, the argument of the Constitutional Court is consistent and picks up with correct criteria the current tendencies of the law in the sense of including the manifestations of the social order that genuinely constitute part of the human dynamic linked to freedom and personal dignity. It is true that one can be in favor or not of the matrimonial institution as it was outlined after the judgment, but the tribunal interpreted the constitution in the light of reality and in favor of the extension of the concept of justice, which cannot be achieved but through the reasonable logical exercise of law, that is, an interpretation in which values and axiological questions prevail rather

than formalism. Otherwise, non-observance of ethics in the dynamics of the state, politics and social reality would be the most serious crisis.

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