1. Introduction

The current Spanish Constitution approved in 1978 was a key instrument in the process of democratic implementation that began in 1975. The Fathers of the Constitution sought to agree on the principles that would sustain the new juridical order, which should convey the evolution of society, the juridical developments and the new patterns proposed by Comparative Law. Their prime concern was drafting a Constitution that would obtain the approval of all or at least the majority of the political parties. This led to a compromise with regard to some institutions, mostly those with an ideological perspective, that, as a consequence, were not perfectly shaped in the Constitutional text. Therefore, controversies over the interpretation of certain sections of the Constitution have arisen since its enactment, mainly when legislators have taken steps to develop certain rights and liberties recognized in the Constitution. This has happened, for example with the right to life, the freedom of education and conscientious objection, just to mention some of the conflicts related to fundamental rights. It occurred also with the right to marry, which, although not included among the fundamental rights and public liberties in the Spanish Constitution, does figure among the rights and duties of citizens.

In July 2005 the article of the Spanish Civil Code that contains the definition of marriage was amended. The modification seemed very simple. Article 44 said that “Men and women are entitled to marry in accordance with the provisions of this Code.” The 2005 Law added a phrase saying “Marriage shall have the same requirements and effects when both prospective spouses are of the same or different genders.” Other articles were also modified to delete the words husband and wife and say, instead, cónyuge, which is a neutral word in the sense that it can be used for men and women alike -as in the English spouse-, or progenitor, which designates fathers and mothers without distinction of sex.

When the procedure for amending the Civil Code to allow same-sex marriages began, a flood of reports and statements issued by public and private institutions, as well as a foreseeable overwhelming number of articles passionately supporting or opposing this legal change, arose. Of course, a lawsuit asking for the repeal of the amendment of the Civil Code was brought before the Constitutional Court as soon as it came into force. For complicated political reasons, the Constitutional Court has not passed a judgment yet, despite the same-sex marriage law having been approved more than seven years ago.

I will analyze the main reasons posed to uphold or dismiss the consistence of the modification of the Civil Code with the Spanish Constitution. I will focus mainly on the reports from public institutions that offered their stance on this topic. These institutions are the Council of State¹, the General Council of the Judicial Power² and the Royal Academy for Jurisprudence and Legislation³.

¹ The Council of State is the supreme consultative body of the Government. The consultation in regard to Bills is not compulsory, but the Government decided to ask for a report from this body because of the importance of the matter. The Report 2628/2004 - Justicia, on the Amendment to the Civil Code regarding the right to marry, approved on December 16th 2004 (hereinafter Report of the Council of State), is available at http://www.boe.es/buscar/doc.php?coleccion=consejo_estado&id=2004-2628. The Council of State observed
2. Marriage in the Spanish Constitution

The Spanish Constitution states in section 32:

“1. Man and woman have the right to contract matrimony with full legal equality.

2. The law shall regulate the forms of matrimony, the age and capacity for concluding it, the rights and duties of the spouses, causes for separation and dissolution and their effects.”

The first thing that comes to sight is that the wording of this section neither requires nor bans explicitly same-sex marriage. This is quite understandable taking into consideration the time when the Constitution was enacted: only three years after the regime of General Franco came to an end. Same-sex marriage was not among the main concerns of the authors of the Constitution. As it would be difficult today to hold a debate on marriage that did not mention this issue at all, it is fair saying that same-sex marriage, as well as other relationships like polygamy or civil partnerships, were not in the mind of the authors of the Constitution when they wrote the sections regarding marriage. There were other topics that caught their attention much more, like divorce -not allowed then- or the recognition of canon law marriages.

The question, then, is not whether same-sex marriage is demanded or prohibited under Section 32 of the Constitution, but whether it implicitly allows a law recognizing same sex marriage. What can we deduce from its terms?

The most important item to highlight is that this section uses the words “man” and “woman” instead of “all persons” (Section 24-1), “all” or “everyone” (Sections 15-1, 24-2, 27-1, 28-1, 31), “citizens” (Section 23), “all citizens” (Section 9-2) “Spaniards” (Sections 19, 30-1) or “all Spaniards” (sections 2, 3, 29-1, 35-1). This is the only section that makes explicit the gender distinction, so it may have a significance.

A usual understanding is that the mention of equality between men and women with regards to the conjugal relationship refers to the unequal situation that husband and wife underwent until a few years before the enactment of the Constitution. Women were subject to their spouses' will, and required their husband’s permission for a number of juridical acts. This difference of status is interdicted by the Constitution from then on, but it made sense that that, due to the relevance and the problems posed by this Amendment, it would have been desirable to ask for Reports from other institutions, both public and private, in order to achieve a better knowledge of the scope of the Law and its potential effects.

2 The General Council of the Judicial Power is the governing body of Judges and Courts. It can issue Reports on the Bills that have contents related the protection of the fundamental rights. The Government and this Council did not agree on the obligation of the Government to ask for a Report from the Council on this particular Bill, and the Secretary for Justice denied the request from the Council to send the Bill. The Council nonetheless decided to deliver a Report (hereinafter Report of the General Council of the Judicial Power). The problem underlying this controversy was the ideological differences between the Government and the General Council of the Judicial Power, due to their respective composition at that time. The first pages of the Report are devoted to justifying the powers of the Council to release this item, that is called “Study” instead of “Report”. It is available at http://www.codigocivil.net/archivado/?p=467.

3 The Royal Academy for Jurisprudence and Legislation has among its aims the research, appraisal and contribution to the improvement of the Law. The Report issued on this Amendment of the Civil Code, dated March 1st 2005 (hereinafter Report of the Royal Academy), is published in Anales de la Real Academia de Jurisprudencia y Legislación, n. 35, Madrid (2005), 937.
such an important change, and the guarantee that the inequality that had existed until then could not be permitted to continue, had to be reflected in the constitutional text\textsuperscript{4}.

However, the equality of men and women is already recognized in Section 14 of the Constitution, and there was no need to reiterate it\textsuperscript{5}. Constitutions do not usually repeat the declarations; moreover, the equality before the law stated in Section 14 enjoys a stronger protection than the assertions of Section 32\textsuperscript{6}. Therefore, the section related to marriage must be interpreted from this separate mention of men and women.

According to the Reports, the mention of men and women introduces the heterosexual element of the marital relationship. This is also the interpretation stated in a Resolution of the Constitutional Court, which affirms that “the heterosexual element of the marriage stated in the Civil Code is consistent with the Constitution. Public authorities can grant advantages to the family constituted by a man and a woman in opposition to homosexual unions. It does not preclude the legislator from enacting a regime where homosexual partners may enjoy the same rights and legal advantages that marriage offers”.

There are two other Sections in the Constitution, cited in the Reports, that mention not marriage, but family, which would support this idea. One is Section 39, which mandates the protection of the family and asserts the commitment of the public powers to the protection of mothers and children; this would indicate that the legislator had in mind the family based in a heterosexual relationship\textsuperscript{7}. The other is Section 58, Part II, about the Crown; it says that “The Queen consort, or the consort of the Queen, may not assume any constitutional functions, except in accordance with the provisions for the Regency.” Again the legislator had in mind heterosexual relationships. Certainly, these two articles are not decisive, but they are a clue to understanding the idea of marriage that those who drafted the Constitution had intended.

To sum up, we must say that the Constitution protects heterosexual marriage. Homosexual unions can be granted the same benefits as marriage, but homosexual marriage is not protected according to Section 32\textsuperscript{8}. At the same time, this section does not expressly ban same-sex marriage, and defers to the legislator the regulation of marriage in general. The next question, then, is whether the legislator, when regulating marriage, is bound not by Section 32, but by other sections of the Constitution that would demand the recognition of same-sex marriage. I will examine the different reasons given to consider whether same-sex marriage is protected or not protected under these other sections of the Constitution.

\textsuperscript{4}Report of the Council of State, p. 11.

\textsuperscript{5}Section 14: “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”

\textsuperscript{6}According to Section 53-2, “Any citizen may assert a claim to protect the freedoms and rights recognized in Section 14 and in division 1 of Chapter 2, by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection to the Constitutional Court.”

\textsuperscript{7}Section 39: “1. The public authorities ensure social, economic and legal protection of the family. 2. The public authorities likewise ensure full protection of children, who are equal before the law, regardless of their parentage, and of mothers, whatever their marital status. The law shall provide for the possibility of the investigation of paternity. 3. Parents must provide their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law so establishes. 4. Children shall enjoy the protection provided for in the international agreements safeguarding their rights.”

\textsuperscript{8}The legislator who drafted the Same-Sex Marriage Law was aware of this statement, because the Preamble avoids the foundation of same-sex marriage in Article 32. Instead, the Preamble uses the negative reasoning (Section 32 does not proscribe it) and alludes to other articles that may support the regulation of same-sex marriage.
3. The reasoning of the free development of the personality

Closely related to the non-discrimination reasoning, is the one, also mentioned in the Preamble of the Same-Sex Marriage Law, of the right to the free development of the personality, that would demand a juridical framework which would include same-sex marriage. According to section 9-2 of the Constitution,

“It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.”

Section 10-1 deals more specifically with this matter when says

“The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace”.

The Preamble of the Law cites these two sections⁹, making clear that the fostering of equality and freedom with regards to the different forms of cohabitation requires a regulation which convey this values.

As a principle of juridical practice, the more general and abstract a justification is, the less robust the foundation of the reasoning. The Spanish Constitution, in its first section, states freedom as one of the principles of the juridical order. Therefore, freedom must pervade all juridical acts, and failing to accomplish it will certainly be reproved. It would be difficult, however, to assert that people were not free to establish same-sex unions, or even to obtain most of the benefits of marriage. Nobody could affirm that before the Same-Sex Marriage Law there was no freedom to establish such a kind of union.

The Council of State deals in the Report with this reasoning. It affirms that the free development of the personality would be better protected if there were different patterns of cohabitation, each one with its own and specific regulation, and people could choose the one they prefer. This would not oblige people of same-sex orientation to enter into a relationship whose juridical regime was designed to meet a different reality. As far as same-sex couples are a newly accepted pattern of cohabitation, the most coherent attitude is enacting a new accurate regulation for this pattern, one that meets its own necessities, without forcing it into a different regime: different institutions demand different juridical regimes. Besides, this would avoid the juridical uncertainty that would stem from a global application of the marriage legislation to another institution, which would require the intervention of case law to resolve any doubts or conflicts that may arise from this situation.

It is worth noting that the Spanish Constitution does not link family, mentioned in Section 39, only with marriage, cited in Section 32. We could deduce from this structure that stating a different way of granting benefits to marriages and same-sex couples is consistent with the Constitution.

4. The reasoning of the discrimination

⁹ It refers also to Article 1-1, that states that “Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.”
Section 14 of the Constitution, already cited, establishes that there may not be any discrimination on account of sex or any other personal or social condition or circumstance. Sexual orientation is not mentioned in this section. It is different from sex, which alludes to a biological feature, but it can fall under the protection of this section, considering it as a personal condition or circumstance. We can then assert that this norm prevents the public authorities from any act that may involve discriminating against homosexuals.

Apart from that, Section 18 of the Constitution protects the right to personal and family privacy. Sexual relationships are included in the scope of this section. According to the usual interpretation of this section, not only is the spreading of information without consent forbidden, but it furthermore prohibits the interference of the public powers in punishing a personal behavior that is socially accepted, as would occur with homosexual relationships.

Once stated what public authorities cannot do, we must wonder what they can do apart from refraining from sanctioning the homosexual relationships. More precisely, we should find out whether the non-discrimination principle demands opening the access of same-sex partners to the marital relationship. This was, in fact, the main alleged reason to enable marriage between same sex couples in Spain: it would accomplish a claimed goal, the recognition of a fundamental right of the homosexual community that had long been ignored. This idea, widely spread from the media and the government sources, led a considerable amount of people to the conviction that, finally, everybody would have the same rights.

Here we come to one of the key points of the debate. It is an essential principle in democratic countries that everybody must enjoy the same fundamental rights. But neither homosexuals nor heterosexuals could marry anybody of the same sex before. Marriage required two persons of different sex.

Therefore, when the Same-Sex Marriage Law was drafted, its real aim was changing the definition of marriage in order to include relationships composed of two people of the same sex as well as two people of the opposite sex. The Council of State followed this reasoning when it said that “the opening of marriage to same sex couples does not entail a broadening of the candidates for marriage, recognizing the right of same-sex couples which is not protected in the Constitution; it leads to a modification of the marriage institution, that requires from us an answer to the question whether this modification is affecting marriage to a greater extent than allowed by Section 32”. The Council provides another clue on this matter: “the removal of discrimination based on sexual orientation does not require the inclusion of a new pattern of couple in the marriage institution. On the one hand, because reserving marriage to heterosexual couples does not convey a discriminatory treatment, neither from the perspective of the Constitution or the International Treaties on Human Rights; on the other hand, discriminations that can arise in society are not wipe out through the legal configuration of a marriage that includes two different realities (moreover, this solution might even make it difficult to control those discriminations)”.

It is important to be mindful that in Spain, same-sex couples may enjoy the same benefits as married couples. Even if marriage equality is not available to same sex couples, there is no restriction on the rights and benefits the latter might enjoy, as opposed to what happens in other countries. Therefore, the aim of removing any discrimination pursued by the Bill of Same-sex Marriage might be achieved by means other than the modification of the definition of marriage; by, for example, creating a legal regime for same-sex partnerships similar to the marital one.

10 Section 18-1: “The right to honour, to personal and family privacy and to the own image is guaranteed.”
Besides, there is discrimination when the different treatment of two comparable realities does not have any justification. In Spain, the family based on a heterosexual marriage enjoys the protection of the Constitution; homosexual partnerships do not enjoy the same protection, as already seen. Even more, the total equivalence between heterosexual marriage and marriage without the heterosexual element is not possible, as the juridical problems posed by the regulation of marital filiations disclose\textsuperscript{11}. As such, reserving marriage for heterosexual couples is not discriminatory in as far as there are reasons to do it. While the reasons to act this way may or may not be politically defendable, they are nonetheless accurate from a juridical point of view.

5. The reasoning of the institutional guarantee

The Preamble of the Same-Sex Marriage Law, as previously stated, does not appeal to Section 32 of the Constitution to support the introduction of this new feature in the Civil Code. Instead, it says that this section depicts marriage as “a manifestation” of personal relationships based on affection, and it mentions other sections of the Constitution that would back up the amendment. Likewise, scholars who favor the regulation of same-sex marriage usually agree that Section 32 would not be an obstacle to it, but it would be a weak foundation for a positive demand of approval of same-sex marriage.

On the other side, those who consider that same-sex marriage is not consistent with the Constitution usually turn to this section, which, in their opinion, contains an “institutional guarantee” on marriage as a relationship between a man and a woman which cannot include a union of two persons of the same sex.

The Spanish Constitution protects marriage as a juridical entity that conveys certain specific features. The lawmaker, as well as the Courts, cannot alter its profile; in other words, this institutional guarantee poses some limits on the juridical developments of the institution, which enjoys a fixed content together with other contingent features, and precludes public powers from passing laws that may suppress the first ones, change its content or create parallel legal entities to obtain the same goal.

Therefore, the essential elements of marriage cannot be changed according to the social context or to a general understanding of its aim and function. The alterations in marriage regulation may apply only accessory elements. If the significance of marriage -or any other legal entity which enjoys an institutional guarantee- could be freely modified, its configuration would be subject to change along ideological lines by the Government in power. The Constitution, then, would lose its character of supreme norm, at least on the Spanish legal system, where any change or amendment to the Constitution can only occur by means of a special qualified procedure. The Council of State clearly endorsed this idea when it said that “the institutional guarantee prevents the alteration of the marriage institution further than its own nature allows; it does not exclude that lawmakers could adapt the guaranteed institutions to the spirit of the time, but they cannot do it on a way that makes them unidentifiable by the social conscience of time and place”.

The idea of the institutional guarantee is easy to understand and to endorse. But it is more difficult to state what the content of a certain institution is, how that falls under that

\textsuperscript{11} There may arise other problems, for example in the field of inheritance law, international Law, division of marital assets, and so on. See Report of the Council of State, p. 23, that mentions these problems. As an example, see the Decision of the Secretary for Justice, Department of Registries and Notaries, of July 25\textsuperscript{th} 2005, on the law applicable to marriages between a Spaniard and a foreigner.
guarantee and what features are contingent. The Constitutional Court, which dealt with this issue, did not shed light on the matter. In an early ruling, it said: “The institutional guarantee does not undertake a precise content once and for all, but the preservation of an institution in a way that were recognizable for the idea the social conscience has build in every time and place. That guarantee is ignored when the institution is in such way limited that it result deprived from their existence as institution to become just a name. These are the limits for their development and implementation. Hence, the only prohibition clearly stated is the departure from the plain and clear idea commonly accepted of the institution, which, as a juridical institution, is in a wide extent determined for the law in force”.

With the issue of same-sex marriage, the conflict arises when we come to determine whether the heterosexual feature is essential to the definition of marriage; in other words, if the institutional guarantee includes it or if it could be changed according to the decision of lawmakers. Here is where the disagreement begins, and two opposing positions are clearly defined. One of them maintains that the heterosexual element is not part of the essential content of marriage, rather it belongs to the “traditional” idea of marriage, which is no longer the only or even the more relevant one in today’s society. The problem, then, is stating the essential elements of marriage. Deprived of the heterosexual component, marriage would be an agreement of two people in order to live together, but without any other requirement.

The other position understands that the heterosexual element is an inherent characteristic of the marital union, and therefore, part of the content not available to lawmakers. If society demands the juridical recognition of a certain kind of union that implies the discharging of the heterosexual element, another law should regulate it, but the definition of marriage cannot be broadened to include those unions. The Report of the General Council of the Judicial Power strongly endorses this idea, and devotes several pages to explain it on the grounds of the structure of Section 32 of the Constitution. According to the Report, Section 32-1 contains the definition of marriage and the core elements that cannot be deemed changeable; heterosexuality is among them. Neither lawmakers nor Courts are allowed to modify it, because of the institutional guarantee. If the public authorities understand that society has changed to the extent that this definition is not accurate any more, they must propose a change to the Constitution, but they cannot do it through a broad interpretation that surpasses the acceptable limits. Section 32-2, on the contrary, comprises the variable elements, that may be regulated in different ways according to the social perception of the institution or the legislator’s decisions based on political reasons, because this Section would not be under the umbrella of the institutional protection of marriage.

The expected ruling from the Constitutional Court will temporarily put a rest to this discussion, but indeed it will not be the end of the debate. One or the other side will consider that the ruling is not accurate, and will continue to struggle to change the tide. Besides, the Constitutional Court is not ideologically neutral, as its Members are nominated by the Parliament, which can add more trouble to the debate.

6. The reasoning of the social demand

The social demand in itself is not a legitimate reason to allow a juridical change. It may be a reason of political opportunity, but in any case the laws are subordinated to the constitutional principles.

Nonetheless, the social demand is not totally irrelevant from a juridical point of view, in the sense that it may make a certain juridical option more accurate than others to achieve a specific aim. The Council of State, in the final comments of the Report, says that any
innovation on this matter should be backed by a broad social consensus, due to the need for juridical certainty and stability. The Report stresses that a gradual approach, rather than a traumatic change would be preferable, even if that would mean not recognizing the “right to marry” of homosexual couples.

However, the urgency of responding to a compelling social demand was one of the Government’s main reasons to pass the new Bill, together with the need to end a manifest discrimination. Both the Vice-president, who was then in charge of the public announcements to the press, and the Secretary for Justice, asserted that the high number of homosexual couples that were waiting for this Law was a main factor in the drafting of the Bill. However, it should be remembered that the high prevalence of a behavior is not reason enough to make it legal.

It is the sociologist’s job to interpret the data, analyzing its variations and explaining the tendencies they display in society. However, it is far from clear that the high social demand the Government claimed was real in Spanish society.