

# **MARRIAGE LAW IN WESTERN COUNTRIES: SOME JURIDICAL CHALLENGES**

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In modern western juridical systems, we can perceive that marriage is losing its features in the midst of a number of legal experiments, which seem to be relinquishing the role of marriage as the basis of the family. Marriage would become only a choice among different kinds of unions, all of them at the same level of protection and worthiness.

In this context, we can ask ourselves whether the defence of marriage makes any sense. I think it does, from a sociological point of view and from a juridical perspective. The focus of this presentation is on the latter, and particularly on the main threats to marriage that are trying to achieve a general legal status.

## **Same-sex marriage**

I will begin with same-sex marriage, a shared battleground in Europe and North America, with different results. Grounds for legalization of same-sex marriage are mostly the same everywhere. As I am a national of one of the eight countries where same-sex marriage is legal, I will consider, for the sake of this argument, the harsh debate held in its wake in Spain.

One of the main alleged reasons to enable marriage between same sex couples was that it would involve the accomplishment of a claimed target: the recognition of a fundamental right to a community that had long been ignored, the homosexuals. This idea, widely spread from the media and the government sources, led a considerable amount of people to the

conviction that, at last, everybody will have the same rights. However, this is not an accurate assertion.

Everybody must enjoy the same rights. Hence, homosexuals have the same rights as heterosexuals, neither more nor less. Consequently, homosexuals have the right to marry the same way heterosexuals do; that is to say, everybody has the right to marry somebody of different sex, since marriage is defined as the union of a man and a woman. Therefore, the laws that allow same-sex marriages are not recognizing a fundamental right that had been previously denied to homosexuals, discriminating them. There would have been discrimination if the right to marry was denied at all to homosexuals, or, for example, if this circumstance prevented them from becoming civil servants or performing any public duty.

Thus, what is really challenged is the idea of marriage itself. The actual plea is that marriage can be celebrated between opposite sex or same sex couples. I would like to do some remarks about this.

Human gender is divided up into men and women, which is a biological permanent condition. Homosexuality is a tendency, or simply a sexual preference. But law cannot be based on tendencies.

1. First of all, if the law were to take into account sexual tendencies, it should consider all of them, including promiscuity, pedophilia, etc., and not only the ones the legislator likes now. Why should certain tendencies get legal recognition while others are rejected in spite of being widespread? Who is going to say which tendencies are “normal”, and which ones are not?.

2. Let us go further. Some people wonder why two men or two women cannot marry if they love each other. Affectivity, or more precisely, relationships based on any kind of affection or love, have not juridical consequences by themselves. For example, friendship has not juridical

consequences, as deep as it can be. A man or a woman can love very much a child other than his or hers, but if there is only love, affection, the child will inherit nothing unless there has been a previous adoption. On the contrary, if there is a juridical tie, as it happens with adopted children, the child will inherit their parents' properties irrespectively of their great or lukewarm and tepid affection.

The same principle applies to marriage. When somebody is going to get married, the religious minister or the civil servant does not ask “do you *love* your partner?”, but “do you *want* to marry this person?”. Even if the affection is not so great, but they really want to marry each other, they will become married; and if they are deadly in love, but they do not want to marry, the marriage will be void.

Furthermore, if two persons of different sex love each other it does not necessarily imply they are legally eligible to marry. That happens, among other situations, if they are already married –to other partners-, or if they have a blood relationship that does not allow them to get married. And we do not find these situations something harsh or unjust. Then, the purpose of marriage law is not to grant a juridical recognition to a particular feeling, but to regulate and protect an objective structure, where the partners enter by means of their free will.

Other argument in favor of same-sex marriage deals with the evolving side of the institutions. There are some realities that are not created by the legislator. Legislators regulate them, but do not decide on their constitutive elements. Of course, these institutions evolve; however, while the accidental elements can change –and in fact, change in different countries and times-, the evolution must respect its essentials, or the institution itself would disappear.

Marriage is one of these institutions. We know what marriage is without any written law. This is easily perceived in some juridical systems, or international treaties, which do not contain a definition of marriage.

Along with marriage, other kinds of unions, lawful or unlawful, more or less accepted or regulated, can be found in different times and countries; but marriage is the union that always remains, with all its elements. The fact that only a man and a woman can marry is not a circumstantial constraint stated by public authorities or by ancient customs, that can be removed; it is one of the elements that shaped marriage.

If new demands -like recognition of same-sex couples- arise in a society, regulation of those natural institutions cannot be forced to fit the current demands, because law will become useless. If needed, political powers must find other ways of satisfying social claims, but they cannot deprive a juridical institution of a constitutive element. If they do that, things come at odds.

Let us see what happened in Spain. The Spanish Parliament passed a law, not without controversy, on July 1<sup>st</sup>, 2005. This law, quite simply, states that marriage will have identical effects whether both partners are the same or different sex. So now, according to Spanish civil code, “marriage” can be a union of two men or two women, not necessarily with a sexual preference for people of the same sex. I mean, partners can be any two same-sex heterosexuals that decide to marry each other. Obviously, civil servants who perform marriages cannot ask a couple about their sexual preferences; and even if the partners declare they are heterosexuals, marriage must be allowed.

As far as Spanish marriage has not a compulsory sexual content –it is not void if the couple decide not to bear children, nor if one of them is impotent, etc.-, we might find that two male or female friends decide to

marry only to enjoy a particular legal advantage, but fulfilling all the requirements of marriage: living together, helping each other, and so on. I would not dare to say it is a fraud of law. Just in case, it is a “use” of the law for their own benefit. Neither would I dare to say it is a marriage, but it is. Sure, only the name, but it is.

The nuance of marriage, then, is a consequence of the legislator’s decision. If we can still talk about marriage in the countries where the law allows same-sex marriage, it is because the overwhelming number of marriages are “traditional” ones. Otherwise, the legislator would be forced to introduce a definition of marriage in the laws to draw a line between marriage and other juridical figures. Once the legislator has departed from the reality of marriage, that new construction must be defined. We know what marriage is, but we cannot know what the limits of that new figure are.

If same-sex unions do not fit in marriage shape, we may wonder if public powers should regulate these unions, with everything but the name similar to marriage. This is a usual request in countries that face a social or juridical resistance to expand the limits of marriage. But marriages have a different social function than same-sex unions. We can conceive a society without homosexual couples, but a society without heterosexual couples would disappear. It is not unfair that public powers take into account the social function of an institution, project or reality. In fact, we see that public powers usually do it in order to bestow specific benefits. For example, tax cuts or public funds are usually granted to enterprises with a suitable environmental policy. Then, marriage gives benefits to society, and therefore society –the law- gives benefits to marriage. Same-sex couples would have to prove the benefits that they accomplish in order to achieve the same benefits as marriage.

## **Polygamy**

If western countries seem prone to modify certain essentials of marriage, other elements, like monogamy, face more resistance to change. Notwithstanding, if the gender requirement is not considered an essential element of marriage, we might sustain that the number restriction is also a discriminatory denial of individual choice. By now, the two partners requirement to marriage appears to be clearer than heterosexuality, but perhaps the reasons to preserve it are not fully consistent. I will mention some examples.

In April 2007, in Italy, a special Commission appointed by the government prepared the draft of a Bill of Values, Citizenship and Immigration. It is not a law, but a survey of values that must be respected by people who go to live in Italy. What it says regarding marriage is interesting: “Italy forbids polygamy”; “marriage in Italy (...) is a monogamous structure”. This sounds like totalitarian, if we consider that some lobbies in that country are fighting for the recognition of same-sex marriage, and there has not been –as far as I know- any strong reaction from public powers. In some cases, it seems easy to define marriage, yet in others it appears to be a bit more complicated.

Let us look at France, where polygamy is also at stake, due to the high levels of Muslim immigration. Chirac's government proposed a law that made more difficult for French residents to bring in foreign spouses, and Sarkozy has issued repeated calls for a more strict enforcement of the polygamy ban. However, the enforcement of the legal ban is called into question, no matter how strengthened it is on paper.

Holland, one of the European Social laboratories, is not an exception in the linkage of same-sex and polygamy, but in this country it is so in a

practical way, as a result of the De Bruijn's case. In this case, two women that declared themselves bisexuals and a man who described himself as heterosexual were formally united by a public notary in a "cohabitation contract". The authorities declared that the union would not be annulled. Some groups defended the multiple partner union by saying, with a quite logical reasoning, that what same-sex marriage is to homosexuality, group marriage is to bisexuality. Therefore, polygamy should be recognized on the same grounds same-sex marriages are trying to be. To the extent that bisexuals are not permitted to get legal recognition to their dual desires, they might fairly characterize themselves as discriminated.

As it has been noted, the acceptance of same-sex marriage and resistance to polygamy is historically odd. Homosexual relations were common in some cultures, but, as far as we know, same-sex marriage has never been sanctioned by any society, anywhere at any time in history. However, polygamy not only was sanctioned in large parts of the world through large swaths of history, but nowadays it is still accepted, for example in most of the Islamic world.

### **Factual unions**

While same-sex marriages and polygamy are perceived at least as controversial, there is another anomaly in the marriage field widespread around western countries which has been accepted despite its nonsense from a juridical perspective. I am referring to the pursuit of legal effects of factual unions, that are coming closer and closer to marriage; and, we could add, marriage going closer to factual unions, once it has been deprived of its indissolubility hallmark.

But, why would somebody want its factual union to be legally recognized? There are two reasons: because they cannot get married, or

because they do not want to. In the first case, there would be a fraud if the law granted them the same rights that married couples enjoy, but without meeting the legal requirements. In the other situation, that is, if a couple enters into a relationship similar to marriage but ignoring the legal requirements and duties related to marriage, it is not acceptable that he or she asks for the legal benefits; that would be quite a profitable relation, but also a way to deceive the law regulating marriage.

From another perspective, we could think that legal regulation of factual unions does not affect marriage because it does not deprive it of any of its essential elements. That is true from a technical point of view, but that is not the only side of the problem that must be considered.

Legal norms regarding marital rights and duties -the law of the ongoing marriage- tend to take the form of pronouncements of general models of behaviour rather than specific rules of conduct with direct sanctions for their violation. These general rules often come to be a representation of what a marriage should be like, more than what spouses are obliged to do. In the background of this idea is the notion that law can persuade as well as command, and that it becomes operative not only through enforcement, but also through education. Regulation of factual unions becomes relevant in this educational process. In countries where factual unions are regulated in coexistence with marriage, the perception will be that a couple can choose the more convenient of the different rules that may be applied to their projected union.

This multiple choice carries another high risk: a backward movement towards different types of marriage. Nowadays, factual unions appear to be a second-class marriage for those who do not meet the requirements to come into a marriage, or those who do not want to assume a “full” marriage, with all its rights and duties. Not without careful consideration

should public authorities admit a set of rules that, in the long term, could result in damage to those whose situation is trying to improve.

### **Stability and divorce**

Another element of marriage that has been deeply eroded is stability. In this case, divorce does not try to coexist with indissoluble marriages. Dissolubility is conceived as a quality that law cannot give up, and it is there for all marriages, without regard to the couples' will or even the law applied to the marriage celebration.

So, no indissoluble marriage can be celebrated in the civil arena in Europe and North America, as a general rule. Moreover, divorce is increasingly becoming a personal, not a conjugal issue. This is a dangerous idea, that may remind us of repudiation, unacceptable nowadays because of the inequality of spouses' rights. When a couple marry, their tie is not of singular concern any more; it is, at least, a two-partner business; and often there are also children whose welfare must be taken into account.

Then, if stability is seen as something casual, not a goal to achieve, and dissolution of marriage is a personal choice, marriage becomes more and more a shaky agreement that only by chance may survive the difficulties of a whole life. The breakup of marriage, that was once considered a pathology of the relationship, will then be treated as a normal stage of it.

### **Conclusions**

Family is a matter of social and public interest. Most changes introduced in the regulation of marriage in the latest decades did not contribute to the well-being of the family. We must be honest and admit

that family is not healthier now than before the admittance of non fault divorce, the recognition of civil effects to almost all kind of unions, and, shortly, the weakening of marriage.

Certainly, there have been great social changes. Nevertheless, public powers have also a responsibility on this issue. They should foster the welfare of the family by promoting means such as mediation or counselling, easing conciliation of family and work, instead of developing fast ways to solve problems that, in fact, become higher.