

WITH OR WITHOUT YOU: REGULATION OF DIVORCE AND INCENTIVES

Economic analysis of no-cause divorce

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Abstract*

During the past decades there has been a radical change in family structures and many questions have arisen posing many challenges to the legislator. These questions must be addressed and new laws must come into force. Indeed, many laws have been passed in this respect. However, one more question is still to answer: how do these laws affect individual choices?

In this paper we will address this question in regard to divorce laws. There is a tendency, which started in the United States during the 70s to remove fault divorce systems and replace them with no-fault ones. Much more recently, in 2005, Spanish Parliament passed a divorce reform act that basically had the same aim: to introduce a “free” divorce system that disregards the spouses’ behaviors to grant it.

Our purpose is to evaluate using economic analysis, the impact of the abolishment of cause in divorce proceedings and the simplification of the procedure to obtain a divorce. In other words, how does the loosening of requirements to divorce, and thus the easier exit of the marriage contract, influence individual incentives with respect to marriage?

We argue that the free exit from marriage lowers transaction costs, favors efficient breach of the marriage contract and avoids opportunistic behaviors from the spouses. However, the willingness to marry has lost its signaling function.

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Summary

1. Catholic marriage in Spain4
2. Major changes in Spanish family law5
3. Classical analysis of traditional marriage with cause divorce: Becker’s model5
 3.1 Basic assumptions.....5
 3.2 The model.....7
 3.3 Implications and criticism.....8
4. Policing the marriage contract.....10
 4.1 To marry or not to marry: asymmetric information and opportunistic behavior .11
 a. Signaling: pooling and separating equilibria.....11
 b. Opportunistic behavior13
 4.2. Filing for divorce.....15
 a. Efficient breach15
 b. Transaction costs.....16
5. Empirical evidence17
 5.1. Impact of Act 15/2005 on marriage creation and destruction.....17
 5.2. Labor division in Spanish married couples.....19
6. Conclusions22
7. References24

1. Catholic marriage in Spain

The fundamental distinction in the historical Spanish marriage system was to profess or not the Catholic religion: the only legal form of marriage was the Catholic one. The Spanish Constitution of 1876 finally stated the principle of confessionality and the principle of tolerance¹. Result of this combination, the original section 42 of the Spanish Civil Code (1889) established that Catholic spouses had to marry under this religious form of marriage and, if both were non-Catholic, they would have to marry under the civil form.

During the dictatorship (1939-1977), the civil form of marriage continued as subsidiary, reserved for non-Catholic. Moreover, after the Concordat of 1953, the Act of 24 April 1958 granted automatic civil effectiveness to the religious authorities' decisions regarding marriage.

Paradoxically, without divorce, canon law offered a much wider basis for marriage dissolution than the Civil Code, since the number of causes is much higher: a total of 25, in contrast with 5 envisaged by section 73 Civil Code. In addition, instead of one, there are two procedures in canon law to obtain the dissolution of a Catholic marriage: dispensation of a marriage *ratum et non consummatum*² and annulment based on particular grounds³. Hence, spouses could exit a religious marriage much more easily than a civil one alleging the *Codex Iuris Canonici* (Code of Canon Law) in force⁴.

¹ Exceptionally, in the context of a liberal revolution, Act of 18 July 1870 solely recognized marriages under the civil form. After the restoration of the Bourbon dynasty (1874-1931), the scope of the so-called principle of tolerance was very restricted, since it only allows the private practice of a non-Catholic confession. The weighting of both principles was not stable: the burden of proof that a person was not Catholic fell upon the spouses and the mere declaration was not enough, they had to prove that they have not been baptized or that they have abandoned the Catholic Church (Royal Order of August 27 1906, Act of 24 April 1958 and Act 44/1967, of 28 June).

² Dissolution of non-consummated marriage by the Roman Pontiff for a just cause (cann. 1142), following a process *ad hoc* (cann. 1697-1706).

³ Dissolution of the bond on the grounds of specific diriment impediments (cann. 1083-1094), defects of matrimonial consent (cann. 1095-1099 and 1101-1103) and defects of the canon form of marriage (cann. 1108). Concerning the regulation of the process to declare the nullity of marriage, see cann. 1671-1691.

⁴ Until the *Codex Iuris Canonici*, promulgated in 1917 and revised in 1983 for the Latin rite and in 1990 for the Eastern rites, canonical courts applied the *Corpus Iuris Canonici*, a collection of significant sources of canon law of the Catholic Church that was universally applicable.

The current marriage system was developed after the Spanish Constitution of 1978. It allows four religious forms of marriage (Catholic, Protestant, Jewish and Muslim) plus the civil form, all of them with identical legal effects. The sole remaining difference is that now the civil effectiveness of Catholic authorities' decisions is subject to the control of ordinary civil courts (section 80 Civil Code).

2. Major changes in Spanish family law

Many major changes in Western societies had occurred in the end of the past century and all these changes demanded substantial reforms in family law. In Spain, the legislative, both at national and regional levels, gave responses to the spread of a new conception of the family regulating cohabitation and reforming marriage contract.

In 2005, regarding marriage contract, two acts were passed: Act 13/2005, of 1 July, authorized same-sex marriage with full legal effects; and Act 15/2005, of 8 July, eliminated the requirement to adduce legal grounds for separating or divorce and allowed either spouse to file for divorce without previous judicial separation. Act 15/2005 facilitates divorce even when it is requested unilaterally by one of the spouses, and shortens from one year to three months the minimum marriage duration in order to file for divorce. Spanish marriage law has become the most liberal divorce system in Europe (FERRER, 2006, p. 142).

With the only exception of the republican Act of 2 March 1932, repealed after the civil war (1936-1939), divorce was introduced in Spain by Act 30/1981, of 7 July, under the requirement of alleging a ground or mutual consent, undergoing always previous separation proceeding.

3. Classical analysis of traditional marriage with cause divorce: Becker's model

3.1. Basic assumptions

This work starts from Gary BECKER's model, a pioneer in applying law and economics to family law. In his *Treatise on the Family* (1993)⁵, BECKER studies the family as a production

⁵ Despite the first edition of the book dates from 1981, his earlier work goes back as far as 1973 with his article "A Theory of Marriage: Part I", *The Journal of Political Economy*, Vol. 81, No. 4, pp. 813-846,

unit formed after a search process in the marriage market. BECKER applies the classical economic model of utility maximization to explain the behavior of husband and wife while the marriage lasts.

As acknowledged by Gary Becker himself, economic theory had tried to explain almost all behaviors involving scarce resources but one: marriage; and yet “marital patterns” have major implications for, among other things, the number of births and population growth, labor-force participation of women, inequality of income, ..., allocation of time on leisure” (BECKER, 1973, p. 813).

The model relies on three basic assumptions:

1. According to the search theory, the marriage market is in equilibrium: a person will invest in the search for a partner until the costs of further search exceed those of remaining single or with the current partner. In other words, one will stop searching when marginal cost of search equals marginal revenue of remaining with the current partner⁶.

Nevertheless, this does not imply that marriage market is perfectly competitive, as this would mean that there are an infinite number of people seeking and an infinite number of people offering themselves to a long-term relationship. There is not just one market for wives and husbands and the price is unclear at the moment of contracting. On the one hand, all potential husbands and all potential wives cannot be aggregated to form respectively a demand curve and a supply curve, or the other way around. On the other hand, the price, as an economic value of the decision to marry someone, is mostly determined by the duration of the marriage, increasing with respect to time.

2. In most cases, the decision to marry is voluntary, which means the utility of spouses will be higher if they marry rather than if they remain single.

Becker defines marriage as a couple sharing the same household, regardless of legal status, whether they are married or cohabitating (BECKER, 1973, p. 820). However, we will distinguish between married and cohabitating couples, since their legal status determines substantial different consequences from break-up.

3. Spouses maximize “household commodities”, Z , that includes children, but also company, love, prestige, health, leisure... Apart from family life, spouses also

followed by “A Theory of Marriage. Part II” (1974), *The Journal of Political Economy*, Vol. 82, No. 2, pp. S11-S26.

⁶ This assumption may seem unromantic, but one can interpret the “marginal revenue” simply as the love for the current partner.

enjoy economies of scale derived simply from sharing a household and its expenses.

3.2. The model

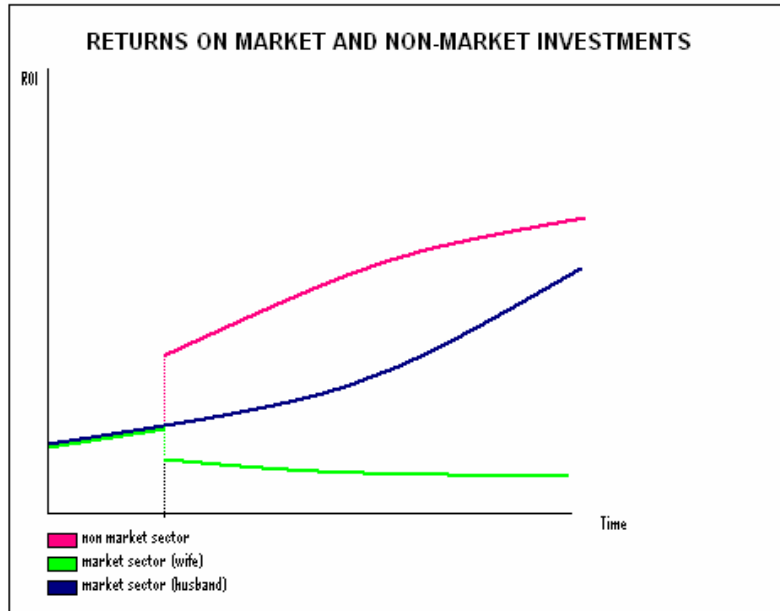
To maximize Z spouses must allocate their time between the market sector (a paid job) and the non-market (the so-called household commodities: child rearing and house keeping). Each spouse will specialize in each sector so as to maximize their comparative advantage, which, in turn, depends on their relative wage. Once spouses have placed in one sector or the other, they will proceed to carry out their “specific investment”⁷.

Typically, says BECKER the woman’s wage will be lower than the man’s –and in many countries this is still the case– so she will specialize in household work. POSNER (2003, p. 146) explains that the reason for the difference in relative wages is sexual discrimination, but even if this was not the case, there are still biological reasons for which the cost of the woman staying at home is lower.

Even more, as COHEN (2002, p. 17) points out that the wife’s specific investment is higher at the beginning of the marriage, when the decision of having children and leaving the market sector is taken, while the returns on the husband’s investment will take place in a later time, as his professional career develops. Marriage, then, is an asymmetric contract: the wife must invest much more at the beginning of the marriage, when the decision of having children and not pursuing a career is taken. She will benefit later from her husband’s investment. In turn, the husband will benefit from wife’s investment from the beginning of the marriage and will profit later in time from his own investment in his career as well. In addition, the man’s investment is much less specific than the woman’s, since as it is a market investment it does not lose value outside marriage.

This unbalanced return on investment in time can be depicted as follows:

⁷ A “specific investment” is the one that loses value outside the context it was made.



The graphic shows that, if spouses divorce, the overall return on investment for the housewife is negative, due to the increasing loss in her own market investment value along time. If the average marriage duration is 15–20 years, the question is the next: what is the “resale value”⁸ of a housekeeper in her forties with two kids? On the contrary, what is the “resale value” of career man, not yet in his fifties, with kids but no custody?

This negative ROI suffered by the housewife necessarily will give rise to compensation, a wealth transfer in her favor under one form or another: either by marriage economic regime liquidation rules or, by an entitlement to periodical payments or a lump-sum one.

3.3. Implications and criticism

According to this Beckerian approach, marriage is a contract of indefinite duration, and its policing must take into account the convenience of protecting the woman’s initial specific investment and avoid opportunistic behavior by the husband.

However, one must distinguish between:

1. Duties of spouses, as set in the marriage contract before the reform, were fidelity,

⁸ “Resale value” refers to specific investments. The higher the specificity, the lower the price one can get from reselling the asset in the market (SHÄFER and OTT, 2004, p. 381).

mutual care and life together⁹.

2. Grounds for divorce, that is, what the parties can invoke to ask for divorce, as can be the breach of duties of the spouses, but also the breach of parental responsibilities, drug and alcohol abuse or imprisonment.

The grounds for divorce include but are not restricted to breach of duties of spouses. That is because some behaviors might not be specifically linked to the marriage contract but seriously affect family life (like drug abuse, alcohol abuse or imprisonment), thus damaging prior specific investments. This means that grounds for divorce are not directly linked to specific investments, they act as a barrier to exit, designed to protect the wife and children against the husband's opportunistic behavior once the wife has made the specific investment.

Since the marriage contract can only be voluntarily complied with, specific performance in case of breach is impossible. Therefore, parties can either ask for the termination of the contract (through divorce) or suspend its enforcement through separation. This implies that the wife can only obtain the returns on the specific investment of her husband by monetary equivalent in the proportion determined by the mandatory rules and economic regime of the marriage.

The aforementioned implies that the duties of the spouses are no longer so, but mere behavior expectations. Therefore, a decrease in specific investment in household commodities as well as a decrease in sector specialization can be expected.

Strict applying of productivist view, with causal divorce, upholds the creation of "traditional" families. Nonetheless, it is not for the State to do so, but to guarantee individual freedom and promote the free unfoldment of the personality.

We also argue that Becker's approach, and the traditional division of labor between wife and husband is not necessarily Pareto efficient. Even if a comparative advantage exists (even if it is only because of biological reasons) and therefore the economic theory would advise an specialization in order to benefit from the advantage, the fact that the marriage can come into an end (and many times it does happen so) suggests that it would be more efficient that the wife also invested in a market career. A woman in the market force will

⁹ Act 15/2005 introduces a new duty of spouses: sharing both housework and child rearing, as section 68 of the Spanish Civil Code states.

need less alimony¹⁰ from her former husband and will be able to support herself after divorce.

Statistics also support this suggestion, since in Spain the average age of wife at divorce is 40-50 and the average lasting of divorce is 15-20 years, one can expect that housekeepers ex wives will have a difficult time finding a paid job, because of education but also because of age.

Almost two decades ago, CARBONE and BRINIG (1991) concluded that the empirical assumptions in which Becker's model was based have been broadly overcome by the massive participation of women in the labor market and the weakening of gender roles. Although these phenomena began in Western societies during the second half of the 20th century, both are still in development, among other factors, because they do not equally affect all generations.

4. Policing the marriage contract

Before undertaking the analysis, we must define divorce as dissolution of the marriage bond and the subsequent possibility of remarriage, considering that economic consequences always follow up, especially if the couple has had children.

We must also distinguish between:

- (a) "Cause" invoked in the claim for divorce, which will be the breach of some marriage duty.
- (b) "Effects" of separation and divorce: use of family dwelling, alimony, custody and child support

"Cause" and "effects" will affect the spouses' behavior, so the modification of either one effect will have an effect on it. This paper is mainly focused on the outcome of the casual-divorce suppression

¹⁰ Amounts paid by one spouse to another in discharge of the paying spouse obligation to support the other spouse. Alimony is different from "child support", a distinct obligation consisting in the payment of an amount of money by one spouse to the other whom has custody of the spouse born of marriage.

4.1. To marry or not to marry: asymmetric information and opportunistic behavior

a. Signaling: pooling and separating equilibria

Signaling takes place in a setting of asymmetric information: parties do not have complete information on the other, so some behaviors are taken as an indication of their purposes. In other words, agents indirectly convey information about themselves through their actions, the so-called “signal”. The effectiveness of such signal depends on the cost born to send it. The higher the cost, the more valuable it will be¹¹.

In our model we have two types of agents: **(i)** those who want to acquire a high level of commitment with their partner and are willing to undertake a high investment to obtain household commodities. We will call them C_H ; and **(ii)** those who want a low level of commitment and will be prone to opportunistic behavior. We will call this type C_L .

We assume that both types of agents will want to marry a C_H ; C_H types to match their level of commitment and C_L types to seek rents.

We will call our couple H and W. W knows his type but does not know H’s type. We define p as the probability that H is C_H , and $q = (1-p)$ the probability that he is C_L . The signals sent by H are the willingness to marry or the willingness not to marry. Once the signal is sent (marriage proposal or lack thereof) W will decide to accept or not.

Actually, there are two simultaneous signaling games since H does not know W’s type neither. Otherwise the game would not exist, since H would not want to marry W unless he was C_H .

If H does not propose to marry different outcomes may take place depending on W’s type: if W is C_H he will either propose or eventually break down the relationship if he takes H’s actions as indicative of low commitment willingness. If W is C_L , they may just decide to cohabitate.

Depending on the cost of the signal, we can achieve two types of equilibria:

- a) There will be a **separating equilibrium** when each type signals his true intentions. In this way, if the cost of marrying is very high only C_H will choose to marry. Under this equilibrium only same type agents will marry.

¹¹ See MACHO STADLER and PÉREZ CASTILLO (2001, pp. 185 - 210). The classic example is the one given by Spence (1973), when a worker signals his abilities in the job market by higher education.

For example, if divorce is not allowed, only people interested in a high level of commitment will choose to marry. The cost of marrying for a C_L is so high that he will never propose it nor accept it. In this scenario, C_H will marry and C_L will cohabit.

- b) However, there will be a **pooling equilibrium** when the signal is not revealing of the type (it is 'cheap talk') because cost of marrying is low and both types send the same signal (that is, willingness to marry). H will not distinguish W's type (and vice versa) and both will be unhappy with a probability q . If agents cannot distinguish among themselves, the couple's expectations may be frustrated if they belong to different types, C_H married with C_L .

The decrease of barriers to divorce affects the quality of the signals that future spouses send each other, thus increasing uncertainty with respect to the level of commitment that each spouse wants to acquire. In other words, the possibility of unilateral divorce with no cause dilutes the signaling function of the willingness to marry (ROWTHORN, 2002). The uncertainty is much more so if we take into account that the couple can organize their life together without resorting to marriage.

As BRINIG (2003, p. 205) explains, during the first half of the XXth century the engagement ring served as an insurance to the bride in case the marriage never came about, as a woman was morally obliged to get married, but all her marriage value was lost if she had had sex with her former fiancée. The ring then was not only an insurance but a signal that the husband to be has a serious intention of marrying.

This lost of meaning could result in an increase of prenuptial agreements, because it would help to reduce uncertainty of marriage exit. Additionally, the spouses would be forced to agree on the consequences of future behaviour (SMITH, 2003)¹².

However, to evaluate the effectiveness of the signal we must look at, not only the free exit from marriage, but also the economic effects of divorce, because one may counteract the other, as it would happen if an exorbitant compensation would be granted to the spouse that opposes to divorce. In this case, the barrier would be placed in the effects of

¹² See LAMARCA, FARNÓS, AZAGRA and ARTIGOT (2003), regarding the evolution of premarital agreements in Spain.

divorce, and not its causes.

In this sense, Act 15/2005 goes in the opposite direction: it reforms section 97 Spanish Civil Code, dealing with alimony, and it allows it to be limited in time, and its payment as a lump sum. Also, the progressive regulation of cohabiting couples and the approximation of both regimes, marriage and cohabitation, in terms of alimony, survivor's social security benefits and, in some regions like Catalonia, also inheritance rights.

In sum, both the abolishment of invoking a cause in order to get a divorce, and the progressive acknowledgment of cohabiting couples as a relationship analogous to marriage decrease the value of the signal, loss that the Spanish law does not amend because it weakens the effects of divorce by means of temporary alimony, with the possibility of a single payment, and joint custody.

b. Opportunistic behavior

"[Opportunistic behavior] occurs when a performing party behaves contrary to the other party's understanding of their contract, but not necessarily contrary to the explicit terms of the agreement, leading to a transfer of wealth from the other party to the performer" (MURIS, 1981, p. 521, see also BRINIG, 1994)¹³. This is the case when the contract performance is not verifiable.

Let us go back to our couple: H and W have decided to marry; each one expects a certain behavior from the other one during their married years. In our model this expectation corresponds to the specific investment of the other spouse in order to produce household goods. These goods are non-excludable, that is, both spouses can enjoy them regardless of who produces them. Opportunistic behavior can take two directions, depending on when the returns on investment are obtained.

Class 1 opportunistic behavior:

Class 1 opportunistic behavior occurs when a contracting party takes advantage of the other's specific investment. This kind of behavior is found in asymmetric marriage contracts, those in which each spouse invests in different specific goods: one spouse specializes in the market sector, which yields their return at a later time in life -let us

¹³ "Opportunistic behaviour" is also referred to as "moral hazard", especially in the market for insurance: insured party decreases his level of precaution because he does not bear the total cost of suffering an accident. At the same time, the insurance company cannot verify insured parties' level of precaution. See MACHO STADLER and PÉREZ CASTILLO (2001, pp. 185 - 210).

assume H- and the other in non-market goods – let us assume W-. In a scenario in which W has already invested (and have had children) and H has not yet received his returns on investment (in other words, has not achieved full promotion yet), opportunistic behavior occurs when H files for divorce. This behavior implies that H has enjoyed W's investment but not the other way around. COHEN (2002, p. 25) qualifies this wealth transfer as a quasi-rent, defined as the difference between the specific goods' value inside and outside the marriage. But the value of the specific goods outside the marriage is zero, so W incurs in a sunk cost, since she gave up investing in market goods, and will never be in a position to invest in such sector with the same intensity that before marriage.

Class 2 opportunistic behavior:

Class 2 opportunistic behavior occurs when the level of effort of one party is less than the other one expected. Here opportunism is seen from the perspective of effort undertaken, regardless of the contract being asymmetric or not.

In the production of household goods one can undertake high effort (e_H) or low effort (e_L). Each spouse wishes for the other to exert a high level of effort, but it is not possible to contract over the level of effort nor is it possible to verify it by a third party after the marriage contract has been executed (SMITH, 2003). This means that *ex ante*, the only thing that spouses can hold on to is their expectation that the other party is e_H ; and *ex post*, their effort will only be known to the other spouse. If the effort effectively undertaken does not correspond to the expected effort, the spouse that has seen his or her expectation frustrated will file for divorce.

The object of class 2 opportunistic behavior is the necessary level for investment, whereas the object of class 1 opportunistic behavior is the result of investment, which determines that, necessarily, the former comes up before the latter.

Suppression of a causal divorce decreases class 2 opportunistic behaviors, since, once the lack of effort has been detected, the unsatisfied spouse can obtain a divorce right away. However, it increases class 1 opportunistic behavior as the removal of exit barriers eases the marriage departure to the opportunistic spouse.

4.2. Filing for divorce

a. Efficient breach

There is an efficient breach of the marriage contract if the “marital surplus” vanishes or one of the spouses does not receive any share of this surplus (WAX, 1998, p. 529)¹⁴. Negative externalities on children are not considered in our analysis of efficient breach, since marriage is one path to procreation, but it has substitutes (COHEN, 2002, p. 12).

For our purposes, we consider only unilateral divorce, only one party wants to break off the relationship because were both parties be willing to separate, the breach will always be efficient. In this context, it is sufficient that the breach is efficient for one of the parties as long as he has the possibility to compensate adequately the other party. In other words, the spouse that wants to divorce must be able to cover the utility loss born by the other party (DNES, 1998, p. 341; and CABRILLO, 1999, p. 70). Efficiency of the result will be measured according to a Kaldor-Hicks criterion rather than a Pareto one since unilateral divorce always makes one party worse off, i. e. the party that did not want to divorce. The efficiency of this result is measured according the Kaldor-Hicks, which only requires the mere possibility of compensation but not an effective one.

$$|U_W(D)| \geq | -U_H(M) | \text{ or } | -U_W(D) | \leq | U_H(M) |$$

Compensation must cover economic consequences of divorce *as well as* the personal costs derived from breaking the relationship and therefore should place the spouse in such a position that he or she would be indifferent between divorcing or remaining in the marriage.

Kaldor-Hicks efficiency differs from Pareto efficiency in that the latter requires effective compensation, or as the classic definition states: “there will not be a Pareto improvement unless some party is better off and no party is left worse off” (SHÄFER and OTT, 2004, p. 23). A Kaldor-Hicks improvement may imply an effective welfare loss to some parties, but as long as the global gain exceeds the loss it will be efficient. For instance, the change in an allocation from (100, 50) to (130, 25) will never be a Pareto improvement, but certainly is a Kaldor-Hicks improvement.

¹⁴ Amy WAX (1998, p. 529, note 40) defines “marital surplus” as “all utility-enhancing effects that would not exist in the absence of the relationship”. This authoress (1998, pp. 591-593) defends that women accept a smaller share of marital surplus, because their value in the remarriage market declines relative to that of their husbands and therefore their bargaining power is lower.

Costs of divorce are higher with a causal divorce system (Act 30/1981), both economic and personal costs since it required fault or a minimum period of separation (old article 86 Spanish Civil Code) as well as a double procedure (first, a separation procedure and, after, at least a year, the final divorce procedure) which meant double legal costs and need of invoking a cause, i.e. blame the other spouse in order to get the divorce. The new no-cause divorce act (Act 15/2005) promotes efficient breach in the following cases, distinguishing between bilateral divorce and unilateral divorce:

- When divorce is bilateral, that is, wanted by both parties, it anticipates the result because it eliminated double procedure.
- However, as stated before, unilateral divorce may not always be efficient, only the ones that fulfill the Kaldor-Hicks requirement, that is, when the increase in utility obtained from divorce by one party is higher than the utility loss born by the other party (in an ideal setting of perfect information). Of course, it is not possible to distinguish efficient from inefficient breach, that is to say, it is impossible to measure global utility gains from efficient breaches against global utility losses from inefficient breaches and formulate a certain assessment of the reform.

Nevertheless, the overall evaluation of the reform must be positive, because most divorces are bilateral, mutually consented and hence mutually advantageous, and a certain number of unilateral divorces will be efficient too. Therefore, the final outcome of the new legislation is an increase of efficiency.

<i>Year</i>	<i>Mutual consent separations</i>	<i>Mutual consent divorces</i>
2007	57,29%	63,59%
2006	51,96%	65,27%
2005	62,16%	66,7%
2004	80,11%	71%
2003	81,5%	70,87%
2002	79,7%	69%

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

b. Transaction costs

Beyond economic consequences and emotional costs derived from the breaking, spouses have to bear transaction costs, those necessary to obtain the divorce, which include both monetary –attorneys, negotiation time, time at courts,...- and non-monetary –to prove

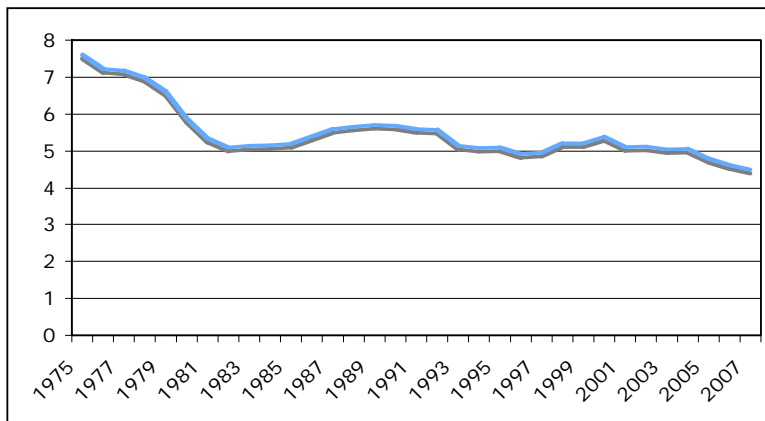
the cause which is the basis to divorce or to complete the required period of separation-. Undoubtedly, Act 15/2005 diminishes transaction costs. The Coase theorem predicts that, without transaction costs or with low transaction costs, the initial allocation of property rights is irrelevant, since the bargaining of the parties will lead to an efficient outcome.

5. Empirical evidence

5.1. Impact of Act 15/2005 on marriage creation and destruction

Act 15/2005 came into force four years ago and we now have some data that can show how the divorce legislation has affected the celebration of marriages as well as their dissolution.

First of all, the nuptiality rate¹⁵ has constantly decreased since 1975, but it is worth noticing that since 2004 the drop has been more pronounced, but we cannot conclude that the decrease has been due solely to Act 15/2005. In fact, this trend started much before due to the popularization of cohabitation, a non-marital relationship statutorily regulated by regional legislations –starting Catalonia with Act 10/1998, of 15 July-, regarding cohabitants’ rights and duties.

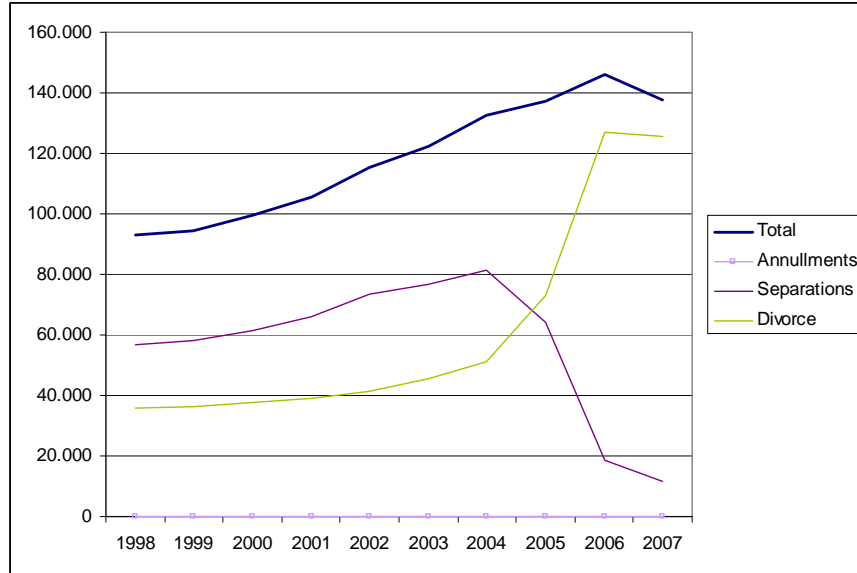


Graph 1: Nuptiality rate in Spain (1975-2007)

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

¹⁵ Measured as number of marriages per 1000 people.

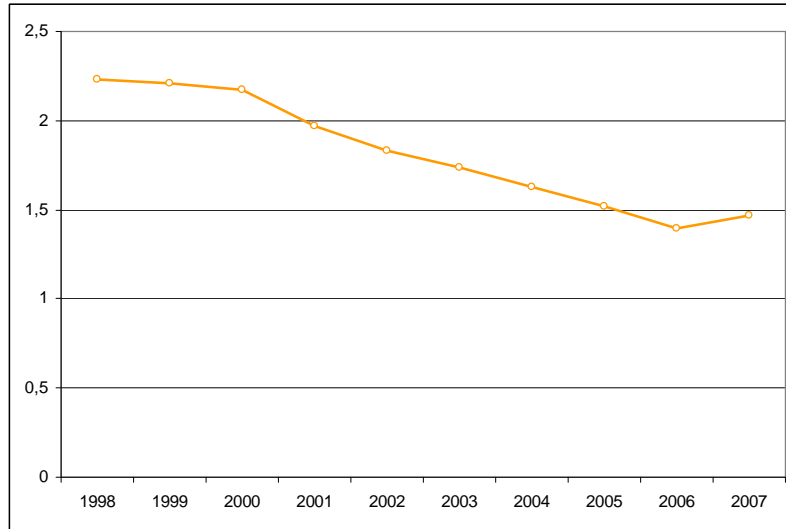
However, as a direct effect of Act 15/2005, the number of separations has dropped dramatically whereas the number of divorces has increased, because of the removal of the double procedure in which a couple had to first separate and could only divorce a year after the separation. The fact that most couples choose to directly divorce, and very few opt for the separation, is a clear indication that transaction costs are lower.



Graph 2: Separations, divorces and annulments in Spain (1998-2007)

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

Second, the ratio of marriage destruction from 1998 to 2007 informs us about how many couples marry in relation to how many get a divorce each year, which should be distinguished from the number of marriages that end up divorcing. This ratio has substantially decreased from 2.3 marriages for each divorce in 1998 to 1.4 marriages in 2007, which means that the divorce rate has increased. Again, Act 15/2005 cannot be blamed for this situation because many other factors interfere. Moreover, this trend began in the early 2000s and it slightly withdrew in 2006, after Act 15/2005.



Graph 3: Marriage destruction rate in Spain (1998-2007)

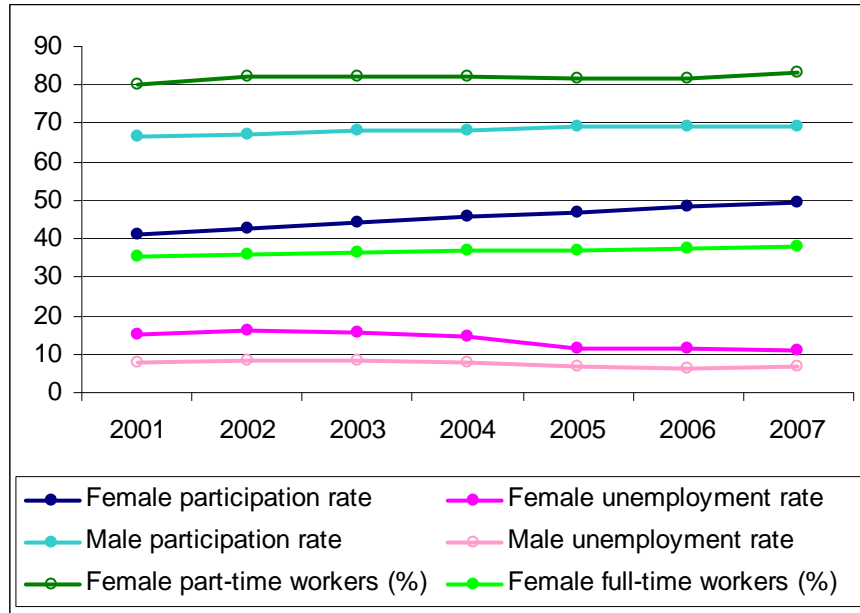
Source: Based on data from INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

5.2. Labor division in Spanish married couples

Another question to answer is whether married couples are homogeneous or not, i.e. whether they respond to a model as Becker envisioned, in which husbands are ‘breadwinners’, whereas wives are homemakers. Does still exist a different role of spouses based on their gender?

In Spain, this weakening of gender roles started relatively later, in the 80s, but it is not only constrained by the generational change, but also by the fact that wife is still the main responsible for child rearing and housekeeping, even if she has a paid job. The average Spanish wife works outside home and bears the responsibility of housework (house and children care). Using Beckerian terms, she is no longer specialized in non-market sector, she produces households goods in both sectors. Unlike her husband, who is strongly specialized in market sector and contributes to housework in a much lesser portion than her.

On the one hand, taking labor market in 2007 from a gender perspective, despite during the last decade the participation of woman has experienced a significant rise (from 40,96 % in 2001 to 49,37 % in 2007), their unemployment rate doubles the one of male employees and they concentrate part-time jobs, being the minority in full-time employments.



Graph 4: Spanish labor market figures (2001-2007)

Source: INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute)

On the other hand, the *Instituto de la Mujer* (Spanish Institute for Woman), belonging to the Ministry of Equality, has statistics that reflect how men and women use their hours of the day, unfortunately they do not separate for married couples. These data provide the average hours a day a man and a woman in Spain respectively spend in market sector (a paid job) and non-market sector (housework and family care).

Sector	Men 1993	Women 1993	Men 2006	Women 2006
Market sector	3h 20'	1h	4h 30'	2h 30'
Non-market sector	2h 30'	8h	2h 20'	6h

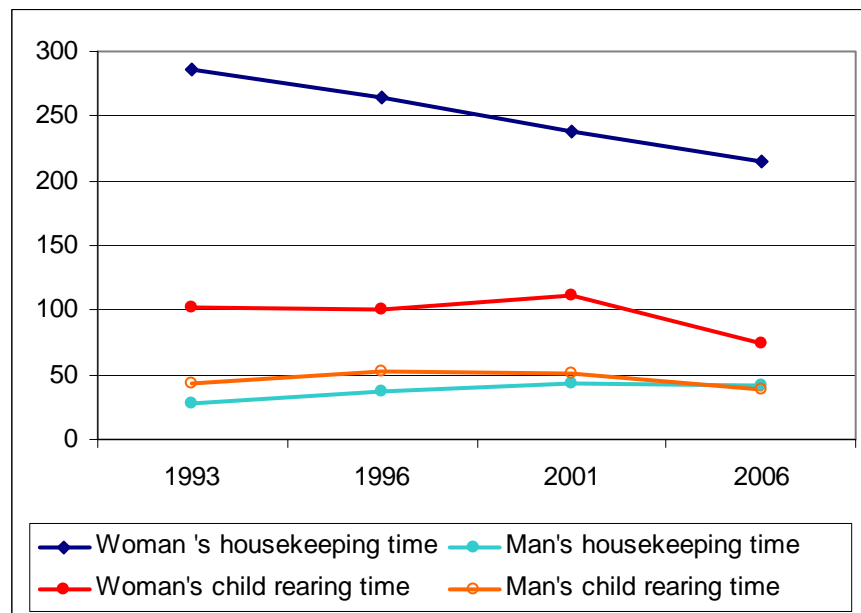
Source: Spanish Institute for Woman (*Instituto de la Mujer*)

Therefore on average, men *still* do about a third of the housework that women do; and they yet only work less than twice as women. We, of course, cannot directly extrapolate these results to married couples, but it does give an indication that men and women are not homogeneous in their daily tasks: nowadays people do less housework and work more, but the huge difference in the non-market sector between men and women remains, despite women has doubled the time spent in market sector.

Moreover, other figures describe the unequal situation of spouses in Spain: in 2007, men were less than 2 % of workers that ask for a parental leave after child's birth and less than 6 % of workers with an extended leave of absence for child care. Also, over 95% of people that leave their job in order to take care of family members (children or elder) are women; also, the participation rate of men in relation to the number of children remains the same -around 90%) whereas the participation rate for women goes from a little over 70%, if a woman is childless, to less than 50%, if a woman has 3 or more children¹⁶.

However, there is a trend to externalize tasks related to housework, as it shows the increasing percentage of pupils (0-5 years) having lunch at school or staying there before its opening: from 25,18 % in the school year 2000-2001 to 35,30 % in 2006-2007 and from 1,93 % to 6,12 %, respectively¹⁷.

All in all, in Spain, women dedicates more time than men to housekeeping and children care, being much wider the difference in the first field, where there is a long way to run.



Graph 5: Distribution of the housework (1993 - 2006)

Source: Spanish Institute for Woman (*Instituto de la Mujer*)

¹⁶ Data from the Spanish Institute for Woman (*Instituto de la Mujer*) and INE (*Instituto Nacional de Estadística*, Spanish National Statistics Institute). For further information and data, see http://www.migualdad.es/mujer/publicaciones/docs/Mujeres%20en%20cifras%201983_2008.pdf.

¹⁷ Data from the Spanish Institute for Woman (*Instituto de la Mujer*).

Hence, there is an empirical basis to protect women through alimony and there always will be for biological reasons: the specific investment of motherhood cannot be undertaken by man. Legislation, except for motherhood, should provide a fair compensation for that spouse in a married couple, regardless the gender, who takes family and domestic responsibilities. In fact, this is the current regime in Spanish family law system, which now compensates women for the aforementioned reasons. Nonetheless, in Spanish society wives as a whole are not only mothers, but also the primary caretakers of children, elder people and home.

6. Conclusions

The relatively recent diversification of family models has entailed a reduction of legal intervention in the personal sphere, which in marriage law has translated into the elimination of the requirement to adduce legal grounds for separating or divorce.

Classic contract theory understands divorce as a consequence of breaching the marriage contract, so the removal of grounds for divorce cheapens the costs of breach. Thus, duties of spouses lose their content causing an uncertainty that may lead to a decrease of specific investment in non-market sector. However, family law should not be aimed at promoting the preservation of traditional families, but to encourage cooperation among family members, regardless of its structure. Family law should only provide a suitable benchmark for spouses to freely organize their married life.

Act 15/2005 slightly affects the effects of divorce, as it only modifies the potential duration of alimony and regulates joint custody, safeguarding then the protection of the spouse devoted to family and home without distinction for gender reasons. The “caretaker” can now easily exit marriage and receive certain compensation for his or her specific investment. Notwithstanding, the reform has the following implications:

1. Reduction of transaction costs through the elimination of mandatory previous judicial separation and the shortening of the minimum marriage duration in order to file for divorce.
2. Increase of efficient breaches if divorce is mutually consented, in spite of increasing inefficient unilateral breaches as well. The global result is uncertain, since it is not possible to aggregate gains and losses of efficiency.

3. Blurring the information value of the signal, whose quality was already questioned by the legal protection awarded to cohabitation.
4. Restraining opportunistic behaviors arisen from the performance of different effort levels during marriage, although the risk of opportunistic behavior rises in asymmetric contracts. Nonetheless, the progressive homogeneity within the couple plays down the importance of this kind of moral hazard.

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