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# **LEGAL REGULATION OF THE HOMOSEXUAL MARRIAGE IN SPAIN**

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According to the Spanish Constitution:

***Section 32***

- 1. Man and woman have the right to marry with full legal equality.*
- 2. The law shall make provision for the forms of marriage, the age and capacity for concluding it, the rights and duties of the spouses, the grounds for separation and dissolution, and their effects.*

So it can seem that the Spanish legal system does not accept the homosexual marriage.

Nevertheless we have to take into account other precepts of the Spanish Constitution...

## **Section 1**

1. *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 9**

2. *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. *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.*

## **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.*

According to the mentioned sections of the Spanish Constitution and the power and the duty of the Legislator to regulate the provisions of the marriage (section 31.2 Spanish Constitution), on 1<sup>st</sup> July of 2005 a new law was enacted:

***“Law 13/2005, of 1<sup>st</sup> July, which modifies the Civil Code regarding the right to get married”***

The main **reasons** to enact this law were:

- Evolution of the society
- The cohabitation in couple is further from being seen as a simple institution of procreation and starts to being understood as the right of development of itself and the economical and emotional support that people want to share.

The main innovation of this law is the **equation of rights and duties between the heterosexual marriage and the homosexual ones**.

This equalisation is done by redrafting some sections of the Civil Code, mainly:

- Addition of a new paragraph in Section 44: “*marriage shall have the same requirements and effects when both prospective spouses are of the same or different genders*”.
- First Additional Provision: “*The legal and regulatory provisions containing some reference to the marriage will be applicable independently from the gender of its members*”.
- Substitution of the expression “*husband and wife*” for “*partner*” or “*spouse*”.  
**EXCEPTION:** The expression “*husband and wife*” subsists in some articles related with the presumptions of paternity.

#### Effects of the law in international marriages:

It can arrive that the members of an homosexual marriage have different nationalities. In this case, according to the Spanish law the marriage will be valid – with all its consequences – because the applicable law stills being the Spanish ones, according to the criteria of *lex foris*.

Nevertheless, despite being the marriage valid in Spain, it can arrive that it is not recognize according to the national law of one of the members of the couple so the marriage may only have validity in Spain.

Despite the disapproval of some members of the Government with the equalisation of rights between the heterosexual and the homosexual couples, the Spanish Constitutional Court in its Judgement nº 198/2012 of 6<sup>th</sup> November 2012 made a comparison with the Constitution and an “alive tree” in order to express the necessity of evolution of the Magna Carta:

*“la Constitución es un «árbol vivo», --en expresión de la sentencia Privy Council, Edwards c. Attorney General for Canada de 1930 retomada por la Corte Suprema de Canadá en la sentencia de 9 de diciembre de 2004 sobre el matrimonio entre personas del mismo sexo-- que, a través de una interpretación evolutiva, se acomoda a las realidades de la vida moderna como medio para asegurar su propia relevancia y legitimidad, y no sólo porque se trate de un texto cuyos grandes principios son de aplicación a supuestos que sus redactores no imaginaron, sino también porque los poderes públicos, y particularmente el legislador, van actualizando esos principios paulatinamente y porque el Tribunal Constitucional, cuando controla el ajuste constitucional de esas actualizaciones, dota a las normas de un contenido que permita leer el texto constitucional a la luz de los problemas contemporáneos, y de las exigencias de la sociedad actual a que debe dar respuesta la norma fundamental del ordenamiento jurídico a riesgo, en caso contrario, de convertirse en letra muerta. Esa lectura evolutiva de la Constitución, que se proyecta en especial a la categoría de la garantía institucional, nos lleva a desarrollar la noción de cultura jurídica, que hace pensar en el Derecho como un fenómeno social vinculado a la realidad en que se desarrolla y que ya ha sido evocada en nuestra jurisprudencia previa”.*

## **Regulation of the homosexual marriage in Catalonia**

Catalonia has an own Civil Code split in six books. Concretely, the Book II, which dates to 2010, regulates the person and the family so it is in its sections where we will find the regulation of the marriage.

This Civil Code is very recent and it has as a result a very contemporary regulation which incorporates already the equalisation between the heterosexual and the homosexual marriage. This equation is being done by the use of the word “*spouses*” rather than the expression “*husband and wife*” which allows to include all type of marriages, no matter the gender of its members.

Moreover, the definition of marriage contained in the Civil Code is: “*legal bond between two persons*”, so, undoubtedly, the Catalan regulation does not foreseen any legal differences between the heterosexual and the homosexual marriages.

## **CONCLUSIONS**

As many countries around Europe, the Spanish Legislator has been obligated to redraft its Civil Code in order to adapt it to the new view that the society has of the marriage, extending such institution to all type of marriage without making any difference depending on the gender of its members.

This general equalisation has important incidence in other collateral institutions such as the affiliation, the adoption and even the inheritance, which will have to be applied equally no matter if its an hetero or an homosexual marriage.





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Juan Pablo Correa es socio de Ventura Garcés & López-Ibor Abogados, y es especialista en derecho procesal civil, penal y mercantil, derecho internacional privado, concursal, arbitraje y mediación.

A lo largo de su dilatada carrera profesional, Juan Pablo ha intervenido en numerosos litigios, defendiendo los intereses de empresas del sector farmacéutico, químico, alimenticio, inmobiliario o automovilístico, o actuando en defensa de numerosas empresas contra compañías aseguradoras, entre otras. En la actualidad actúa, asimismo, como árbitro y mediador en instituciones de reconocido prestigio, tanto a nivel nacional como internacional.

Como profesor titular contratado de la Facultad de Derecho de la Universidad de Toulouse (UT1 Capitole) y profesor de Derecho Procesal de la Universidad de Barcelona, participa asimismo en numerosos coloquios y proyectos financiados por la Unión Europea. Asimismo, es autor de una cincuentena de artículos y obras doctrinales publicadas en lenguas española, francesa e inglesa, tanto en Europa como en América Latina, donde imparte clases como profesor invitado en las Universidades de Paris Dauphine (Francia), Cúcuta (Colombia) y Mundiapolis (Casablanca).

### Áreas de práctica Procesal y Arbitraje

#### Formación

- Licenciado en Derecho por la Universidad de Barcelona.
- Doctor en Derecho por la Universidad de Barcelona, Cum Laude.

#### Idiomas

Español, Catalán, Inglés, Francés, Alemán.

#### Asociaciones

- Ilustre Colegio de Abogados de Barcelona.
- Círculo de Economía.
- Club Español de Arbitraje.
- Comité Français de l'Arbitrage.
- Association Française d'Arbitrage
- Jams International

