

## Families and couples

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### Abstract

*This article analyses the common-law couple and formulates coherent answers, based on Catalan civil law, that meet the needs posed by this kind of relationship. The confusion between married couples and common-law couples and between marriage and family has triggered the main problems and distortions. The article addresses the regulation of vertical and horizontal couple relationships and assesses the meaning and functions of a regulation on common-law couples in legal systems which have approved same-sex marriage. It also considers the need for different levels of legislative intervention for different models of couple and warns against harmonizing the laws on couplehood in the autonomous communities with the competencies to enact these laws in Spain.*

**Key words:** common-law couple, same-sex couples, Catalan civil law, registered couple, informal cohabitation, family

### 1. Introduction: Families, marriage and couples from a constitutional standpoint

The purpose of this study is to analyse the phenomenon called the *common-law couple* in order to formulate arguments and proposals capable of providing coherent answers based on Catalan civil law, and to ensure that these answers also meet the needs posed by this kind of relationship.

This analysis will focus on the sphere of private law, despite the fact that common-law couples affect such fundamental issues in public law as the taxation system, the social security system and the public system designed to handle dependency. Any social policy must necessarily take family policies into account because families serve functions (involving custody, finances, care, education, etc.) that are in the public interest and that the public authorities

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would have to provide direct were there no families.<sup>1</sup> For this reason, families must also have public protection (art. 39 SC), which particularly includes the public instruments of collective solidarity which make up the welfare state.

One of the problems of the laws on common-law couples enacted to date<sup>2</sup> is that they have considered the model of marriage both when defining the legal effects of common-law couples and when determining the kind of couple that is protected.

This has led to confusion between married couples and common-law couples and between marriage and family. This latent confusion between these different realities can only trigger significant problems and distortions, as we shall see in this study.

Within today's constitutionalism, there are constitutions that equate families with a specific, traditional conception of family. Perhaps the most paradigmatic case is the Italian constitution.<sup>3</sup>

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<sup>1</sup> In this sense, see the concept of *mixed system* in which the institution of the family participates in Roca (1999: 69-86).

<sup>2</sup> Catalonia (which has legislative competences in civil law): the law dated 15 July on stable couple unions; Aragon (which has legislative competences in civil law): the law dated 26 March on stable unmarried couples; Navarra (which has legislative competences in civil law): the law dated 3 July on the legal equality of stable couples; Castilla-La Mancha (which has no legislative competences in civil law): the law dated 11 July which regulates the creation and system of how the Register of Common-Law Couples of the Autonomous Community Castilla-La Mancha operates; Comunitat Valenciana (which has legislative competences in civil law based on the new Charter of Self-Government, Organic Law 1/2006 dated 10 April 2006): the law dated 6 April which regulates common-law unions; the Balearic Islands (which has legislative competences in civil law): the law dated 19 December on stable couples; Madrid (which has no legislative competences in civil law: administrative law): the law dated 19 December on common-law couples in the Community of Madrid; Asturias (which has no legislative competences in civil law: administrative law): the law dated 23 May on stable couples; Castilla-León (which has no legislative competences in civil law: administrative law): Decree 117/2002 dated 24 October which creates the Register of Common-Law Unions of Castilla-León and regulates their operation; Andalusia (which has no legislative competences in civil law: administrative law): Law 5/2002 dated 16 December 2002 on common-law couples; Canary Islands (which has no legislative competences in civil law: administrative law): Law 5/2003 dated 6 March 2003 regulating common-law couples in the Autonomous Community of the Canary Islands; Extremadura (which has no legislative competences in civil law: administrative law): Law 5/2003 dated 20 March 2003 on common-law couples in the Autonomous Community of Extremadura; Basque Country (which has legislative competences in civil law): Law 2/2003 dated 7 May 2003 which regulates common-law couples; Cantabria (which has no legislative competences in civil law: administrative law): Law 1/2005 dated 16 May 2005 on common-law couples in the Autonomous Community of Cantabria; Galicia (with legislative competences in civil law): third additional provision of Law 2/2006 dated 14 June 2006 and Law 10/2007 dated 28 June 2007 reforming the third additional provision of Law 2/2006.

<sup>3</sup> Article 29 of the Italian constitution states that the family is a natural society grounded in marriage. On the other hand, the same article says that the Republic "recognises" the family, but it does not say what the family is. Italian jurists with progressive leanings find it more difficult to argue that other families exist outside of marriage based on their Constitution. To the contrary, these two constitutional statements in article 29 have allowed more conservative jurists to promote two ideas: first, that the family only exists within marriage, and therefore all other forms of cohabitation remain outside the protection that the state should grant the family; and secondly, that this doctrinal sector posits a natural, pre-state nature of the family, which means that the state has no legitimacy to introduce norms that depart from the traditionally accepted concept of *family* (heterosexual marriage). Art. 29: "La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. Il matrimonio è ordinato sulla

Unlike other constitutions, such as Italy's (art. 29) or Ireland's (art. 41.3), the 1978 Spanish constitution (SC) has never equated the family with marriage. The constitutional regulations of the institutions of marriage (art. 32 SC) and the family (art. 39 SC) are quite different, they are located in different chapters (chapter II and chapter III, respectively) and they are unconnected to each other.

The jurisprudence of the Constitutional Court, based on ruling 222/1992, stipulates that the Constitution imposes no specific legal concept of family, and that its content is totally pre-established and temporally determined forever. The ruling goes on to indicate that in a social, democratic state, the essential elements of the family are the ones that make the family identifiable as an institution within the social consciousness.

For this reason, the laws should identify and refer to the socially defined concept of *family* that is valid in society at any given point in history in order to ensure the social, economic and legal protection of the family that the Constitution imposes upon all public authorities (art. 39 SC). This requires the laws to be pluralistic and to accept the different models of family valid in society, and, in turn, that they be dynamic enough to adapt to what is considered a family at any given time in order to always provide an effective response to the social, economic and legal needs in family matters.

Nor has the jurisprudence of the European Court<sup>4</sup> exclusively equated the notion of family as regulated in article 8 of the European Human Rights Convention (ECHR) with the institution of marriage (art. 12 EHRC). Thus, at least three times<sup>5</sup> the European Court of Human Rights (ECtHR) has established that an unmarried, childless heterosexual couple also has rights that derive from article 8 ECHR (right to family life). With regard to childless same-sex couples, the ECtHR's rulings have not been as clear as in the case of couples of the opposite sex (ruling dated 24 July 2003).

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eguaglianza morale e giuridica del coniugi, con i limiti stabiliti della legge a faranzia dell'unit  familiare.”

<sup>4</sup> To see the effects and assess the rulings of the ECtHR, see the Constitutional Court Ruling 303/1993 dated 25 October 1993, eighth legal rationale, as well as the Constitutional Court Ruling 245/1991 dated 16 December 1991, third legal rationale. ECtHR rulings not only have direct effects on the affected state, namely the immediate applicability of the ruling, which could entail the obligation to adapt the state legislation to the Convention as interpreted by the ECtHR and the obligation to require the courts to adopt to the new doctrine; the sentences also have an indirect effect on the other states not involved in the case as a consequence of the fact that ECtHR jurisprudence becomes an integral part of the content of the European Convention.

<sup>5</sup> The 30<sup>th</sup> paragraph of the ruling dated 27 October 1994 states: “30 [...] the notion of ‘family life’ [...] is not confined solely to marriage-based relationships [...] Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate [...] sufficient constancy to create *de facto* ‘family ties’.” Another ruling in the same vein is the one dated 26 January 1999. In this case the court stipulated that there was no doubt that family life had existed between a woman and a man who had lived together outside of marriage. Finally, see the ruling dated 18 May 1999: “A couple who have lived together for many years constitute a ‘family’ for the purposes of Art. 8 [...] and are entitled to its protection notwithstanding the fact that their relationship exists outside marriage.”

## 2. Vertical couple relationships

### 2.1. *Different constitutional treatment between vertical and horizontal relations*

The basic point of departure entails distinguishing between the relationships between the members of the couple themselves (or horizontal couple relationships, as some of the doctrine has called this kind of relationship) and the relationships that the members of the couple have with their children, or vertical relationships.

As the Constitutional Court<sup>6</sup> and the ECtHR<sup>7</sup> have reiterated, vertical relationships are subjected to the principle of full equality between children of married couples and children from outside wedlock, so that in both public and private law, the law cannot attribute different rights and responsibilities to children of married couples and children of unmarried couples because different treatment is banned in accordance with an entire series of regulations that affect constitutionality (art. 39.2 and 3 SC, in relation with the more generic art. 14 SC; art. 2.1 and 3.1 of the United Nations Convention on the Rights of the Child dated 20 November 1989; and art. 14 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, and other articles and the jurisprudence derived therefrom).

Consequently, the relationship between the members of common-law couples and their children is fully subjected to the principle of equality and becomes a question which is quite placid today in the realms of both doctrine and jurisprudence and legislation.

In contrast, with regard to horizontal couple relationships, the laws may legitimately introduce different treatment for married and unmarried couples based on the fact that marriage is an institution which has a constitutionally-based institutional nature (art. 32 SC) while common-law couplehood is not. This is the interpretation that the Constitutional Court has used repeatedly.<sup>8</sup>

Upon this foundation, the regulation of horizontal couple relationships within common-law couples has become one of the least placid and most controversial realms within family law. What is more, the phenomenon of common-law couplehood is not homogeneous but instead highly heterogeneous, which means that it would not be reasonable to subject common-law couples to a single legal system, as we shall see below.

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<sup>6</sup> See, among others, Constitutional Court ruling (abbreviated STC) 154/2006 dated 22 May 2006, and the STC 200/2001 dated 4 October 2001, FJ 4t.

<sup>7</sup> See, among others, the European Court of Human Rights ruling dated 13 June 1979 and the one dated 29 November 1991.

<sup>8</sup> See STC 184/1990 dated 19 November 1990, FJ 2<sup>nd</sup> and 3<sup>rd</sup>. Despite this, in FJ 2<sup>nd</sup> of the STC 184/1990, the Constitutional Court holds that all treatments in favour of marriage are legitimate because the right not to marry has to be protected and the family protection called for in article 39 SC must be fulfilled. It was not until STC 222/1992 that the Constitutional Court established a criterion based on which it could predicate which differences are legitimate and which are not. The differences in treatment which are based on an intrinsic element in the institution of marriage must be considered reasonable. In this same vein, see STC 47/1993 dated 8 February 1993 and STC 155/1998 dated 13 July 1998.

## *2.2. Adoption by same-sex couples: issues in internal law and international law*

Without leaving behind the matter of vertical relationships, and after having clarified the full equality between children of married couples and children of unmarried couples, another issue that affects vertical relationships and still arouses controversy is the possibility of same-sex couples adopting.

Whereas a mere ten years ago only the Netherlands (1998) and several states in the United States allowed joint adoption by same-sex couples, or allowed one same-sex partner to adopt the biological or adoptive child of their partner, which is called second-parent adoption, today (2009) more than 31 states or territories accept at least one of these two kinds of adoption.

A constant feature in this process has been that the adoption of a child has almost always been the step prior to the subsequent acceptance of joint adoption by same-sex couples (ruling dated 30 January 1992). This is so because the minor's interest with respect to the father's or mother's partner is much easier to claim because of the existence of affective ties, as we shall see below.

Both joint adoption and second-parent adoption are allowed for same-sex couples in Holland, Belgium, Sweden, Iceland, the United Kingdom, Spain, South Africa, Norway (but only in domestic adoptions), the United States (California, Connecticut, Colorado, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, Washington state and Washington D.C.) and Australia (Western Australian and the capital region).

Second-parent adoption in same-sex couples is only allowed in the following states or territories: Denmark, Germany, Israel, the Australian territories of Tasmania and Victoria, the U.S. states of Pennsylvania and France (after its appeal before the ECtHR).

Catalan laws have also joined this surging legislative trend. Law 3/2005 dated 8 April 2005 paved the way for homosexual couples to jointly adopt a child that was not the biological child of either partner, as well as the chance to individually adopt either the biological or the adoptive child of the other partner. It also placed homosexual couples on equal footing with heterosexual couples in guardianship and care issues. With this reform of the Family Code, Catalonia became the fourth autonomous community that allowed for adoption in same-sex couples, after Navarra (Foral Law 6/2000), the Basque Country (Law 2/2003) and Aragon (Law 6/1999).

I believe that there are significant reasons for retaining this legislative option in the future. The rationale of this option lays in the very nature and identical functions played by the institution of adoption today, namely the defence of the higher interest of the minor over any other consideration.<sup>9</sup>

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<sup>9</sup> In Catalonia, just as in most Western countries, adoption has ceased to be a strictly private institution in which the public authorities did not intervene because its sole goal was to cover the unrealised expectations of childless couples. Today, adoption has become a mixed institution which belongs to a more general system whose goal is to protect minors.

The purpose of the system is to protect minors, and therefore their interests are considered to be higher than any others. As a result, the goal that adoption seeks is to create stable affective ties

From this standpoint, there are assumptions in which the law's absolute refusal to allow a gay or lesbian couple to have joint authority over a minor run directly counter to the minor's higher interest. We should distinguish between these two kinds of adoption:

a) Second-parent adoption. Even though this is an individual adoption, its result is joint custody shared by both members of the couple. In these cases, a certificate of suitability is not required.

The law's traditional refusal to accept this kind of adoption denied or ignored the affective ties that may have been established between the minor and his or her parent's partner.

In turn, the death of the parent led his or her partner to be regarded as a simple third party with regard to the minor. This required the guardianship of the minor to be attributed to other family members with whom the minor had never lived, some of whom might be quite advanced in age (such as the grandparents).

If the deceased person was the partner of the minor's parent, he or she had no rights under the laws of succession if the deceased was intestate. To conclude, the potential break-up of the couple created no right to child support for the minor from the other partner, nor did this partner have any right to visitation with the minor.

b) Joint adoption. In these cases, the certificate of suitability issued by the public administration is needed. The authorities' traditional utter refusal to open a joint adoption proceeding for a homosexual couple made it impossible to assess this phenomenon from the outset. In many cases, it required only one member of common-law couples to adopt, which meant that the minor would live in a single-parent family. The result was perverse in terms of the minor's interest because one of the partners in the couple with which the minor had to live had never been screened for their suitability.

Internationally, in addition to the inherent difficulties that may arise from the fact that very few home countries allow same-sex couples to adopt, it has been alleged that this kind of adoption may run into two stumbling blocks when being implemented internationally.

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between the adopters and the minor and to thus ensure that a potential second abandonment is avoided.

In a legal system whose cornerstone is protecting the higher interest of the minor over any other interest, even respect for the interests of the biological and potential or future parents, we have to conclude that not any individual or couple necessarily has the right to adopt; rather that the minors have the right to have the right family or individual parent.

Consequently, the issue of homosexual couples or others adopting minors must be assessed via a discourse that is argued from the perspective of the minors' rights, instead of from the perspective of any individual's supposed right to adopt.

It must be understood that the different laws in Spain's autonomous communities which allow homosexual couples to adopt (Basque Country, Navarra, Aragon and Catalonia) and the amendments to the state Civil Code via Law 13/2005 recognise no one's right to adopt but instead the right for the minor's interest and the suitability of gay and lesbian couples to be taken into consideration through an objective, transparent process.

One of the problems involves adoption by one member of a homosexual couple of the child of the partner who had previously been adopted internationally; this is called a consecutive adoption. It has been argued that consecutive adoption violates the regulations contained in article 21c of the United Nations Convention on the Rights of the Child dated 20 November 1989. International regulations stipulate that infants who are adopted in a different state should have guarantees and norms equivalent to the ones in force in their home state.

This thesis confirms the idea that the judge who has set up this adoption must determine whether homosexual couples are allowed to have guardianship over a minor according to the law of the minor's home state. If not, the adoption cannot be completed.

We believe that the obligation imposed by article 21c of the United Nations Convention on the Rights of the Child does not refer to the result but to the deed or activity itself. That is, what the judges (in this case, Spanish judges) must guarantee is that the rights and guarantees that the host country grants the infant are at least as strong as those granted in the infant's home country.

Likewise, Spanish judges may cite the Spanish international public order when stating why the impossibility for the other partner to adopt the minor may be considered a violation of the minor's higher interest, as we have seen above.

With regard to international joint adoption, it has also been alleged that the subjective sphere of application of the Hague Convention does not cover homosexual couples. It has been argued that article 2.1 of the Convention only refers to married couples and single persons. Despite this, it should be borne in mind that the Hague Convention does not aim to introduce substantial regulations or matters that regulate adoption. The Convention leaves the material regulations to the discretion of the state lawmakers.

What is more, based on the process and proceedings of drawing up the Convention, we can glean that the reference to married couples and single persons only alluded to the most common circumstances of adoption but did not seek to exclude other possibilities.

### *2.3. Assisted reproduction and filiation*

Recently, the third final provision of Law 10/2008 dated 10 July 2008 from the fourth book of the Civil Code of Catalonia was approved. This provision amended articles 92.2 and 97.1 of Law 9/1998 on the Family Code, by allowing the woman or the companion of the future mother who expressly agrees to it to engage in assisted reproduction. Thus, the ties of filiation between the woman or the mother's partner and the child are established from the moment of birth, and both women also share authority over the child from birth. Consequently, in the event of assisted reproduction following this procedure, the child's adoption by the mother's partner or wife is no longer needed in order for her to achieve joint custody of the child.

Even though Law 10/2008 from the fourth book of the Civil Code of Catalonia shall not enter into force until 1 January 2009, the third final provision has already been in force since 11 July of that same year.

#### 2.4. *Presumption of maternity or paternity in a same-sex marriage or couple*

Today a man is solely allowed to establish biological filiation via marriage (art. 87 Family Code [henceforth FC]) or as a member of a common-law couple (art. 94 FC) with the mother of the child. It is assumed that the child born during marriage or during the couple's cohabitation for a certain length of time is the child of the mother's husband or partner. This assumption of paternity is grounded in a biological truth and must therefore be disproven through overwhelming evidence at a trial.

This situation has been placid in Spain and in comparative law, but now the first cracks in this scheme are beginning to appear. The first clear problem arose in the U.S. state of Vermont. House Bill 847 dated 26 April 2000<sup>10</sup> recognises the establishment of biological filiation for a child born during a civil union regardless of the parents' sexual orientation and outside the sphere of assisted reproduction.

With regard to the other states in the U.S. which have approved civil union laws (New Hampshire in 2007 and New Jersey and Connecticut in 2006), as well as the states that have opened up civil marriage to same-sex couples (Massachusetts and California), there are no explicit exceptions to the generic equivalence that the respective laws have established between different- and same-sex couples. Despite this, in the latter states the equivalence between different- and same-sex couples has been generic and is not defined with regard to the specific issue at hand. The lack of an explicit regulation on the presumption of parenthood in same-sex couples will require jurisprudence to weigh in on this issue. What must be determined is whether this specific realm is comparable to what happens inside a heterosexual relationship, bearing in mind that the birth of a child within same-sex couples always involves the existence of a third person.

In contrast to this, Belgium expressly excluded the presumption of maternity in same-sex marriages. See article 143 of the Belgian Civil Code, which was amended by the law dated 13 February 2003. Other states seem to

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<sup>10</sup> The law was the outcome of the obligation to fulfil the ruling issued by the Supreme Court of Vermont on 20 December 1999, which recognised that same-sex couples have the right to the same benefits and the same guarantees as heterosexual married couples:

§ 1204. BENEFITS, PROTECTIONS AND RESPONSIBILITIES OF PARTIES TO A CIVIL UNION

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

[...]

(f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

exclude this presumption implicitly.<sup>11</sup> Both the United Kingdom and the Netherlands are studying the feasibility of extending this presumption to same-sex couples. In any event, this summary may only serve to point out a relevant issue that nonetheless extends beyond the scope of this study.

### **3. Meaning and functions of a regulation on common-law couples in legal systems which have approved same-sex marriage**

There are authors who support the abolition of all systematised legal regulations on common-law couples because they believe that this institution no longer serves any purpose within a legal system that has approved civil marriage for same-sex couples (Law 13/2005).

These authors have no dearth of reasons for asserting that behind the enactment of the laws regulating common-law couples there always existed the legislative desire to provide common-law couples who wanted to marry but could not do so because of a lack of sexual diversity with legal coverage. Perhaps the most paradigmatic case was Catalan Law 10/1998, whose explanatory statement expressly mentioned this circumstance.

#### *3.1. Matters remain the same between married couples and families: two different realities*

Despite these considerations, we should stress that the relationships between married couples and families have not changed drastically, and they continue to be two different realities. Therefore, couples who may marry and those who may not (now not only heterosexual couples but also homosexual ones) can exercise their right not to marry yet nonetheless are still a family if there are bonds of solidarity and dependence, as defined by Constitutional Court Ruling (henceforth STC) 2221992.

A regulation of common-law couples would clearly outline the social, economic and legal protection contained in article 39 SC in favour of the family, not of the married couple (art. 32 SC). For this reason, couples who have made no official declaration of couplehood cannot be subjected to a system that is identical or very similar to marriage.

In turn, systematic solutions could be provided to the conflicts that are still arising, which the courts would otherwise be required to resolve without any legislative aid and therefore with disparate solutions, with all the concomitant legal insecurity this entails.

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<sup>11</sup> South Africa may well implicitly exclude this. From the text of the law one could assume that the presumption of maternity by marriage or civil union within a same-sex couple has been excluded. See, at the website <<http://www.info.gov.za/gazette/acts/2006/a17-06.pdf>>:

Civil Union Act, 2006, section (art.) 13(1)

Legal consequences of civil union [the same-sex couple chooses whether they want to call their bond a marriage or a civil union]

13. (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context [this could be assumed to refer to the presumption of maternity] to a civil union [...].

Likewise, there will always be family models quite distant from the marriage model which will require systematised, homogenous solutions. A regulation on common-law couples could deal with the conflicts that arise in this kind of couple.

### *3.2. What response has come from comparative law?*

The majority of states which have approved civil marriage for homosexual couples<sup>12</sup> have shown a tendency to keep the legislation that regulated common-law couples.

In this sense, in Holland, after allowing same-sex marriage in 2001, three institutions now coexist: marriage, registered couples (the law dated 17 December 1997) and informal cohabitation.<sup>13</sup>

In Belgium, these same three institutions also coexist, but with much less regulation of registered couplehood in terms of content.

In Spain, the central government has not yet systematically regulated common-law couples. To date, none of the autonomous communities which have civil authority in this matter has amended its legislation on common-law couples since same-sex couples were allowed to get marriage.

Nor have there been any changes of this kind in Canada. We should distinguish between the province of Quebec (where marriage, registered couples and cohabitation coexist) and the remaining provinces (where only marriage and informal cohabitation exist).

The approval of marriage between individuals of the same sex has not justified a change in the previous regulations on couplehood in South Africa. This country has maintained the pre-existing regulations on cohabitation. On the other hand, the members of the couple can decide whether their relationship should be called a marriage or a civil union.

The only exception to this legislative trend has been in Norway. Once the law which allowed same-sex marriage entered into force (1 January 2009), the registered couples established prior to that date were allowed to keep their

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<sup>12</sup> Holland became the first country in the world that allowed marriage between people of the same sex with the law dated 21 December 2000. With the law dated 30 January 2003, Belgium became the second state to do so. With Law 13/2005, Spain became the third state to open up civil marriage to homosexual couples on 1 July 2005. With the law dated 20 July 2005, Canada became the fourth. South Africa became the fifth with Law 17 from 2006. Finally, Norway became the sixth state to recognise this kind of marriage on 1 January 2009. In the United States, the states of Massachusetts (2004) and California (15 May 2008) have allowed civil marriage in same-sex couples. In reaction to the approval of marriage between same-sex couples in these two states, the federal government enacted the Defence of Marriage Act, which partly emended the Full Faith and Credit Clause with the goal of eliminating any other state's legal duty to recognise a homosexual marriage made in these two states.

<sup>13</sup> The coexistence in Holland of marriage for same-sex couples and the institution of the registered couple has very special features. Registered couples can be married, but Dutch civil marriages can also revert back to registered couplehood, and the latter can be dissolved without any legal intervention via a declaration of the will to do so by both members of the couple. That is, registered couplehood can also become an instrument to achieve consensual divorce. However, it should be noted that there are plans to abolish this latter possibility with a draft law (October 2008) whose purpose is to put an end to this latter kind of reconversion.

status or even convert it to marriage. However, after 1 January 2009 no new registered couples were allowed.

#### **4. The two basic models of common-law couples: the registered couple and informal cohabitation**

##### *4.1. Diversity of couples and differentiating criterion*

The phenomenon of common-law couplehood is very heterogeneous. The concept of common-law couplehood encompasses an entire range of unions which are substantially different to each other because they have highly disparate purposes and needs. As we shall see below, these differences justify different treatment, because distortions would arise if they were all subjected to a single system.

We should question whether the distinction made in Catalan Law 10/1998 between homosexual and heterosexual couples is still functional and legitimate. On this issue, Catalan laws no longer have the wide range of estimation and configuration which they had in the year when the Law on Stable Unions was enacted (1998), because today any different treatment that might exist between heterosexual and homosexual common-law couples is suspect of discrimination, and significant arguments and purposes must be found to reasonably and objectively justify different treatment, while this differentiation must also be proportional.

Catalan laws' low margin of estimation in this sphere is framed by two new regulatory conditions.

The first condition is that article 40.7 of Catalonia's Charter of Self-Government makes the equality of different stable couple unions a guiding principle in public policies, bearing in mind their characteristics but regardless of their members' sexual orientation. Even though this article does not immediately create any subjective right, it does create a prism through which the entire Catalan legal system can be interpreted, as well as a guideline for lawmakers when determining legislative policies, which must be justified should they depart far from these guidelines.

The second condition that impedes or at least hinders Catalan law from making distinctions between heterosexual and homosexual couples is the jurisprudence of the ECtHR, especially since the ruling dated 24 July 2003.<sup>14</sup> Laws that aim to distinguish between heterosexual and homosexual couples must demonstrate the proportionality of the measure and provide objective, reasonable justifications that seek to achieve a legitimate end.

Once we have noted that the distinction between heterosexual and homosexual couples is not just not functional (especially since approval of Law 13/2005, which opened up civil marriage to homosexual couples) but also

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<sup>14</sup> It was declared that articles 8 (family life) and 14 (right to equality) of the Convention were infringed upon by Austrian law because it stipulated different treatment for unmarried heterosexual couples and same-sex couples, in this case with regard to the right to subrogation of rents *mortis causa*. Paragraph 37 states that the differences in treatment based on sexual orientation, just like differences based on race, religion or sex, can only be justified by particularly important reasons. Paragraph 41 states that the measure must be necessary in order to achieve an end that is equally legitimate.

suspect of discrimination, we must determine the criterion by which we may distinguish between the different kinds of couples in order to provide them with the body of laws that best fits their needs and circumstances.

I believe that this solution must entail distinguishing between couples depending on whether or not they have made an official declaration of couplehood.

#### *4.2. Registered couples and informal cohabitation*

From this vantage point, we can distinguish between two different kinds of couples:

a) *Registered couples*: This includes couples who have made an official declaration stable couplehood union. This kind of union tends to be aimed at creating a long-term, lifelong partnership, and therefore the members seek and use the means that enables them to do so, such as deeds establishing a stable union, either heterosexual or homosexual. We could note that this kind of couple looks not only at the present but also the future. The members believe that they live as a married couple yet without the mores of marriage.

In this category we can find both heterosexual and homosexual couples who could marry but do not do so for some reason.

b) *Informal cohabitation*: In contrast, this model of couple refers to couples who also share a life together, not for life but for the time being. The affective relationship and solidarities and dependencies entailed in this kind of couple are always experienced from the standpoint of the present.

From this psychological perspective, it makes no sense for the members of this kind of couple to either seek or use the means that the law allows to officially declare their couplehood because the members' sights are always set on the present, not the future.

Sociologically speaking, this model encompasses a plurality of couples: young couples who are in their first relationship and have secured a home, adults who cannot marry because their previous marital relationship has not yet been dissolved, and people who, though they could marry, do not do so as a result of an experience of divorce, widowhood or another kind.

#### *4.3. Comparative law*

Particularly in Europe, registered couples reflect the model of registered partnership. Regulations of this kind of couple have undergone extraordinary expansion ever since Denmark chose this model for the first time in June 1989. At first it was a replacement for marriage for same-sex couples who were barred from getting married. Later, there was a certain trend to open registered couplehood up to heterosexual couples as well (Netherlands, Belgium and France). Registered couplehood has effects on the horizontal couple relationship very similar or equivalent to those of marriage. For this latter reason, some doctrines call this model *quasi-marriage*.

Today eleven European states<sup>15</sup> have adopted this model of couplehood whose effects are equivalent to marriage: Denmark, Finland, Iceland, Holland, Norway, the United Kingdom, the Czech Republic, Romania, Sweden, Switzerland and, starting on 1 January 2009, Hungary. This list will soon be lengthened by the addition of Austria, which now has a political agreement along these lines.

Exceptionally, other states have also adopted the institution of registered couplehood, but the effects they assign to the horizontal relationship are substantially lower than those assigned to marriage. This holds true in Germany, France, Luxembourg and Slovenia.<sup>16</sup>

In comparative law and especially in Europe, common-law couplehood reflects the model of informal cohabitation. Even though many countries in Europe do not yet regulate couples under the model of registered couplehood or registered partnership (Bulgaria, Estonia, Croatia, Greece, Ireland, Italy, Cyprus, Latvia, Lithuania, Malta, Poland, Portugal and Slovakia), many of these countries do regulate informal cohabitation, not systematically but via disperse

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<sup>15</sup> Denmark: *Lov om registreret partnerskab* (Law on Registered Couples) dated 7 June 1989, no. 372 (“registrerede partnere”; “registered partners”).

Finland: *Laki rekisteröidystä parisuhteista* (Law on Registered Couples) dated 9 November 2001, no. 950 (“parisuhteen osapuolet”; “registered partners”).

Hungary: Civil Code, art. 685/A, as amended by Law no. 42 from 1996.

Iceland: *Lög um staðfesta samvist* (Law on Confirmed Cohabitation) dated 12 June 1996.

Holland: *Geregistreerd partnerschap* (Law amending the first book of the Civil Code and the Trial Code in relation to the introduction of registered couples) dated 5 July 1997, *Staatsblad*, 1997, no. 324 (“geregistreerde partners”; “registered partners”).

Norway: *Lov om registrert partnerskap* (Law on Registered Couples) dated 30 April 1993, no. 40 (“registrerte partnere”; “registered partners”).

United Kingdom: *Civil Partnership Act 2004* (“civil partners”).

Czech Republic: Law on Common-Law Couples dated 15 March 2006.

Sweden: *Lag om registrerat partnerskap* (Law on Registered Couples) dated 23 June 1994, SFS 1994:1117 (“registrerade partner”; “registered partners”).

Switzerland: *Bundesgesetz vom 18 Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (Partnerschaftsgesetz)*, *Bundesblatt*, no. 25 (29 June 2004); *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (Loi sur le partenariat)*, *Feuille Fédérale*, no. 25 (29 June 2004), p. 2935 (“partner/partnerinnen”; “partenaires”; “partners”). Approved via referendum in June 2005 with 58% of the votes in favour. It entered into force on 1 January 2007.

<sup>16</sup> Slovenia: *Registered Partnership Law*, which entered into force 23 July 2006.

Luxembourg: *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats* dated August 2004 (“partenaires”; “partners”).

Germany: *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften* (Law to abolish discrimination against same-sex communities: couple life) dated 16 February 2001, *Bundesgesetzblatt*, no. 266 (“Lebenspartner”).

France: *Loi no. 99-944, du 15 novembre 1999, relative au pacte civil de solidarité* (“partenaires”; “partners”). This law has also entailed including article 515-8 in the Civil Code: “Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple.”

legislation. Examples of systematic<sup>17</sup> regulations include Portugal and Croatia, which require two and three years of cohabitation, respectively. In any event, the level of effects prompted by this kind of couple is substantially lower than what is prompted by the registered couple, with two exceptions: Sweden and Holland,<sup>18</sup> where informal cohabitation has more effects than registered couples in Germany, Belgium and France. Informal cohabitation has often been used as an instrument to equalise same-sex couples and unmarried heterosexual couples.

## 5. Unity or plurality of systems? Plurality

### 5.1. Need for different levels of legislative intervention

One of the problems of the couple laws approved to date is the tendency to subject the different kinds of couples to a single legal system. This uniformity in the system has prompted distortions which have sometimes even resulted in the erosion of fundamental rights.

The desire to create a lifelong, long-term partnership expressed by couples who fall within the registered couple model would justify more intense legislative intervention when complying with the constitutional mandate to protect the family (art. 39 SC). This regulation does not necessarily have to be marriage, but it would be the only case in which lawmakers might legitimately extend the effects of marriage to stable unions because the members of these unions have officially declared their desire to live similarly to married couples.

Couples who fall within the model of informal cohabitation tend to show a lack of desire to create a lifelong, long-term partnership. Thus, coupled with the absence of an official declaration of couplehood, this requires minimal legislative intervention in order to ensure that the protection of this kind of family is constitutionally compatible with the sphere of personal freedom that the members of the couple wish to preserve.

For this reason, giving registered couples a system with little content coherent with the profile of informal cohabitation may be felt by the members of the couple to be insufficient. In turn, establishing a regime that is similar to married or registered couplehood for couples who live together informally may be viewed as interference from the legal system.

From a legal standpoint, the model of registered couplehood or registered partnership entered our legal system via law 10/1998 on stable couple unions

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<sup>17</sup> Examples of systematic regulation of informal cohabitation:

Croatia: *Zakon o istospolnim zajednicama* (Law on Same-Sex Civil Unions), approved by Parliament on 14 July 2003 and signed by the President on 16 July 2003.

Portugal: *Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto* [2001] 109 (I-A), *Diário da República*, no. 2797 (“uniões de facto”; “de facto unions”).

<sup>18</sup> In Sweden, the *Sambolag* (Law on Unregistered Cohabitation) (2003:376) from 2003, which replaced a previous law that dated from 1988, basically recognises rights within the realm of rentals and property. The subjective sphere of application of this law encompasses both heterosexual and same-sex couples. In Holland, there has been increasing recognition of the rights and obligations of unregistered couples since the 1970s. This recognition covers not only areas of private law (basically rentals) but also public law, including social security, income tax, estate taxes, pensions and the migration system.

(abbreviated LUEP) for heterosexual unions (art. 1.1 LUEP). These couples not only have access to the system based on the facts (two years of cohabitation or having a child together), but they also have the opportunity to become a stable union through the granting of a public deed. In contrast, homosexual unions may only formally become a stable couple via a deed (art. 21.1 LUEP).

The model of informal cohabitation entered our legal system only via stable heterosexual unions in which the couple has lived together for two years or has a child together (art. 1.1 LUEP).

### *5.2. Problems caused by having a single system*

Law 10/1998 on stable couple unions, as well as the laws in the autonomous communities which followed Catalonia's legislative option to basically apply a single legal system to both kinds of couples, has created problems.

One of these problems affects couples who fall within the model of informal cohabitation, which in our legal system corresponds exclusively to heterosexual unions via two years of cohabitation or having a child together, as stipulated by Law 10/1998.

The effects that the LUEP attributes to relationships thus established can be viewed as excessive by the members of the couple, who feel that the law imposes on them a legal system very similar to that of marriage without their having made any formal declaration. They may view this situation as interference by the law.

The imposition of effects very similar to those of marriage on a couple that falls within a model of informal cohabitation may mean infringing upon the couple's right not to marry. Article 32.1 of the Spanish Constitution (SC) not only establishes a constitutional institutional guarantee in favour of marriage; it also recognises the right to marry in accordance with the law.

The right to marry (in accordance with the law) is yet another specification of the right to individual freedom (art. 17 SC). Many freedom rights have not only a positive but also a negative side. That is, freedom rights not only protect the right to do something but also the right to refuse to do it without this refusal leading to a direct or indirect sanction by the person refusing.

As a right involving individual freedom, the right to marry has two different facets: 1) a positive facet: the right to marry, which requires the public authority to comply with the obligation to establish by law a system and institutional mechanisms that enable individuals to exercise this right, meaning that the law is forbidden from imposing unreasonable or disproportional impediments to marriage; 2) a negative facet: the right not to marry. This means that the law cannot impose either direct or indirect sanctions on individuals who voluntarily decide not to marry. Yet what is even more important for the issue at hand is that the law cannot impose a legal system that is identical or very similar to the system for married couples on couples that have not expressed their desire to marry. In this latter sense, we believe that the laws on common-law couples that actually impose legal effects very similar to those of marriage simply because a given period of time has elapsed, the couple has had children together or any other criterion are disrespectful of the individuals' right not to marry.

Nor would all the laws that required couples to make an express declaration of exclusion from the effects stipulated by the law be respectful of this right. This kind of legislative solution (the contract-out system) means burdening citizens regarding a right that requires no action to be effectively exercised, as it is simply the negative side of a freedom right. The imposition of this kind of burden could only be justified for rules whose sole purpose is to protect the family per se, not marriage.

Another problem that arises from applying a single legal system to both couples that reflect the tradition model of informal cohabitation and registered couples is that the latter, unlike the former, view the effects derived from their official declaration of couplehood via a formal act as insufficient.

Given the distortions and problems prompted by applying a single legal system to two different models of couple, we only have to recall that the plurality of common-law couples revolves around two basic models which are quite different yet which share the fact that they are couple relationships that generate dependencies and solidarities within their members common to those of a family, which are therefore subjected to legal, economic and social protection (art. 39 SC).

However, this protection must be distinct because each model of family reflects substantially different realities. Specifically, these differences between both models would justify different legal treatment in three different spheres: 1) the subjective sphere, which encompasses both kinds of couple; 2) the system of access to the legal system; and 3) the content of the rights and responsibilities contained in the system.

## **6. Subjective sphere of application**

Which kinds of couples should we regulate and within which of the two models? In this section, we shall study two issues:

- 1) Couples who cannot marry because one or both members is separated de facto but not legally from a previous marital partner.
- 2) Civil vicinity.

### *6.1. Couples who cannot marry because one or both members are not yet divorced from a previous marital partner*

In the previous section, we have seen that the diversity of common-law couples can officially be categorised into two models (registered couple and informal cohabitation), that each of these models reflects different circumstances and needs and that therefore different legal treatment should be given to each of the models.

The model of registered couple follows a somewhat marriage-based logic because the members agree to formally declare their desire to create a lifelong partnership. This is logical when the perspective on which registered couplehood is grounded is creating a long-term, lifelong partnership. It might even be logical to define the subjective scope of this kind of couple through regulations similar to those applied to marriage, and therefore to exclude couples who cannot marry from this model.

In contrast, informal cohabitation reflects a family model which is quite distant from the marriage model, as we have seen in the previous section (no formal act has been made to officially declare the members' couplehood, nor do they have the desire to create a long-term, lifelong partnership). Despite this, legal systems use the same marriage rules to define the scope of application of this kind of union.

One of the problems that has been prompted is the exclusion of families whose members may not marry because one or both members still has marital bonds with former partners with whom they are *de facto* separated.

This kind of couple cannot marry because this violates an objective institutional element of marriage (in this case, monogamy). These couples fall within the model of informal cohabitation, and they should be granted the legal system befitting this model.

The fact that this kind of couple cannot marry should not bar them from being protected by a legal system which can protect them as a family. Lawmakers may legitimately issue family-protection norms in favour of this kind of couple. These norms would only partially dovetail with the norms of marriage, those whose goal is to protect the family, but not with the institution of marriage itself.

Excluding heterosexual couples (and, after Law 13/2005, homosexual couples as well) in which one or both members is *de facto* separated from previous marital partner yet not legally divorced from the scope of application creates more problems than systematic legislative regulations would.

A systematised, homogeneous legal response must be provided through which a legally secure solution can be provided to the conflicts that this kind of couple prompts as a result of the termination of the relationship. This can only be undertaken by lawmakers. Otherwise, these conflicts will continue to shift to the courts without receiving standard responses which are coherent with the legal system, which would seriously jeopardise legal security.

Since the approval of law 10/1998 on stable couple unions, which excluded this kind of couple from its subjective scope of application, all the other autonomous communities that have issued laws regulating couples have followed the example of Catalonia and have excluded couples with previous marital bonds from their subjective scope of application.

Beyond couples who cannot marry because one or both members are not yet divorced, there are other unions in which there are bonds of solidarity and dependence between the members (the most common cases in Spain are Koran-sanctioned Islamic polygamous marriages). Neither society nor lawmakers are prepared to recognise this kind of union, which today violates the public order of our legal system.

Despite this, denying a union that was legitimately entered into abroad and valid according to the personal law of its members not only runs counter to the principle of spatial continuity of private international situations but also, more importantly, could give rise to material injustice and vulnerability in the weakest party or parties in this relationship, which is equally incompatible with the standards of our legal system. In this sense, the partial and minimal civil effects that informal cohabitation could provide may be useful in protecting the

weakest party in the relationship, in addition to the family. This would mean attenuated application of our international public order, which is increasingly common. It should be borne in mind that today our laws, as well as the legal system in most European countries, already recognise certain effects in polygamous Islamic marriages.<sup>19</sup>

### 6.2. *The issue of civil vicinity*

One of the issues in law 10/1998 on stable couple unions that aroused the most heated controversy and still does today entails limiting the regulation to couples in which at least one of the members has Catalan civil vicinity (art. 1.1 and 20.2 LUEP).

There are still authors who regard this norm as unconstitutional because they believe that this is a conflict rule, and only the state has exclusive competences over conflict rules according to article 149.1.8. SC.

The purpose of the norms contained in articles 1.1 and 20.2 LUEP is not to designate the legal system that should regulate couple relationships but to limit the subjective scope of application of a law (in this case, the LUEP) once the Catalan legal system has been declared applicable via the norms established by the state. Therefore, these are not norms that can displace any legal system but norms that diminish the subjective scope of a law by introducing a required matter; nor are they bilateral or multilateral norms that resolve conflicts among laws. Consequently, the functionality and nature of the norms contained in articles 1.1 and 20.2 LUEP are far from being conflict rules (González, 2004: 110; Jaurena, 2000: 26 and following).

Catalan lawmakers are fully competent to establish the material requirements that circumscribe the subjective scope of application of one of their laws; if these material requirements are not met, it should be applied. It is fully legitimate for Catalan laws to consider shared habitual residence in Catalonia as an insufficient tie to justify applying the LUEP and to require a more intense couple relationship with the laws of Catalonia.

Another issue is the precarious legislative technique used by Catalan law when it requires civil vicinity in Catalonia. Civil vicinity is a personal condition which reflects a person's marital status but is not a territorial criterion.

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<sup>19</sup> 1) Maintenance obligation: The Hague Convention dated 2 October 1973 on the law applicable to maintenance obligations, which was signed and ratified by Spain, stipulates that the second and later spouses will be considered as "spouses" when receiving maintenance and/or a post-divorce compensatory pension. The amount must be determined by the law that regulates maintenance as determined in the Convention.

2) Right to widowhood pension by the different spouses of a polygamous husband: Spanish jurisprudence has recognised this right in numerous rulings. See the ruling by the Higher Court of Justice of Madrid dated 29 July 2002, the ruling by Social Court no. 6 of Barcelona dated 10 October 2001 and the ruling by the Social Court of La Coruña dated 13 July 1998. The legal rulings have chosen to divide the widowhood pension equally among the husband's different spouses.

3) Family reunification: In the Federal Republic of Germany, family reunification is recognised not only for one of the wives but even for a second wife if the latter has children with the husband. In both Spain and France, the right to family reunification is recognised, but only for one of the wives of a polygamous husband.

The criterion of civil vicinity is functional within the civil sphere, but not in public law, which follows a territorial logic. Therefore, it would be more appropriate to condition the aspects of public law (tax law, benefits and public aid, etc.) upon the criterion of habitual residence.

To decide which existing civil laws should be applied to couples in which one of the members does not have Catalan civil vicinity, we should use the norms contained in Chapter VI of the preliminary section of the Spanish Civil Code in accordance with article 16.1 of the same code.

The problem arises when, unlike married couples, common-law couples and the conflicting laws that they may present, both domestic and international, have no specific norms.

In a pluri-legislative state like Catalonia, where six bodies of civil law that regulate common-law couplehood and nine that regulate them from the perspective of civil law all coexist, the lack of norms that provide a systematic response to conflicts posed among these bodies of law has led to vast legal insecurity which has been transferred to the courts.<sup>20</sup>

Ultimately, the problem lies not in the legislative activity of the autonomous communities which, like Catalonia, have issued self-limiting material norms but in the lack of legislative activity by those who have competences but do not exercise them.

The state's failure to enact legislation on this matter is tantamount to its failure by omission to comply with its duty to promote legal security (art. 9.3 SC) and its duty of good faith when exercising its competences, as suggested in STC 46/1990.<sup>21</sup>

## 7. Systems of access to legal systems

The very nature of each of the models of couplehood predetermines their system of access, and the latter shall determine a specific set of laws for each kind of couple.

### 7.1 *Factual system of access*

The model of informal cohabitation, which consists of the concurrence of facts which the lawmaker defines while dismissing the need for a statement of intention expressed via a formal act, will always be necessary in order to encompass family models that are a far cry from marriage whose problems must be resolved legislatively in a homogenous, systematic way. Legislative regulation of this kind of family which falls outside the logic of marriage would avoid the

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<sup>20</sup> Ruling of the Provincial Court of Girona dated 2 October 2002 and ruling of the Provincial Court of Navarra dated 12 June 2002.

<sup>21</sup>FJ 4t of STC 46/1990 stipulates: "Certainty with regard to what law should be promoted and sought, and with regard to the interplays and relationships between norms, should not be prompted which leads to the introduction of difficult-to-resolve confusion on the predictability of which law may be applicable [...]." Within the same rationale: "[...] the obligation of all public authorities to abide by the Constitution and the remaining legal system [...] implies a duty of good faith to all of them in the exercise of their own competences such that they do not hinder the exercise of others' competences."

legal insecurity we currently find as a result of the dispersion of solutions handed down by the courts. As we have seen in the previous section, the most paradigmatic case today is couples in which one or both members are only *de facto* separated from their previous spouse but not legally divorced.

In addition to Catalonia, which adopted the model of informal cohabitation for stable heterosexual couples who have lived together for two years or have a child together, there are three other autonomous communities with competences in civil law that have adopted informal cohabitation as one of their models of couple: Aragon, with Law 6/1999 (two years of cohabitation); Navarra, with Foral Law 6/2000 (one year); and finally Valencia, which won back its competences in civil law with its Charter of Self-Government, which was recently approved by Organic Law 1/2006 dated 10 April 2006; Valencia's Law on Couplehood 1/2001 stipulates one year of cohabitation. Despite this, none of these laws has departed from the marriage model when defining its subjective scope of application. We have already discussed the problems entailed in this legislative option owing to the fact that it excludes many couples.

### *7.2. Formal system of access*

The model of registered couple is close to the logic of marriage given that to exist it requires a statement of intention expressed via a formal act. There are three autonomous communities with civil legislative competences that combine the model of informal cohabitation and registered couple: Catalonia, Aragon and Navarra. Only the autonomous communities of the Balearic Islands (Law 18/2001) and the Basque Country (Law 2/2003) accept an express statement filed in an administrative registry as the sole way to establish this kind of couple. In the latter two autonomous communities, this registration has constitutive effects. Requiring an express declaration as the only way of accessing the couple system means leaving the majority of couples unregulated.

### *7.3. Registration and legal security: civil registry or state-wide administrative registry?*

Another important question in legislative policy affecting couples that fall within the model of registered couplehood is the advisability of entering their express statement of intention in a registry.

The model chosen by the Catalan legal system via Law 10/1998 regarding the model of registered couple consists of requiring a public constitutive deed (the only avenue of access for homosexual couples and an optional route for heterosexual couples).

We have to question whether the legislative option taken by Catalan lawmakers has proven functional. There are many factors that indicate that a system through which couples who fall within the registered couple model would have access to a registry would be more operative:

a) Even if the public deed entails the existence of a preventative screening exercised by a specially qualified professional, this screening could not avoid a potential double or multiple registration at the same time, which is

contradictory in a model that follows a somewhat marriage-based logic (ban on double bonds).

b) The constitutive public deed does not guarantee either public notice or existence of the registered couple, nor does it state any agreements that the cohabitators may have reached.

c) Catalonia is the only autonomous community that has accepted a non-marital assumption of parenthood (art. 94 FC). Couples' future access to the registry would encourage the application of this presumption. The current impossibility of couples accessing a registry means that it is difficult to prove how long they have lived together when applying this assumption.

d) We must also take into consideration the needs for legal security of couples established in Catalonia one of whose members is neither a European Union citizen nor a citizen of any of the countries that have joined the Treaty on the European Economic Area.

If the member of the couple from a third country wants to exercise their right to the freedom of movement and temporary or permanent residence, or if they want to meet with their partner, they must fulfil an entire series of requirements. Directive 2004/38/EC of the European Parliament and Council dated 29 April 2004 has conferred a broad margin of discretion on the member states in its implementation.

Entering a couple in a registry can facilitate the proof that the directive and its respective implementations require in order to apply the rights and freedoms contained in it.<sup>22</sup>

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<sup>22</sup> Directive 2004/38/EC of the European Parliament and Council, dated 29 April 2004, regulates EU citizens' and their families' right to circulate around and live freely within the territory of the European Union member states.

The other noteworthy innovations of Directive 2004/38/EC that are interesting for our purposes include the fact that this directive represents the first time common-law couples have earned explicit recognition in European Union law.

The inclusion of common-law couples in the subjective scope of application falls under the concept of *registered couple*. In this sense, section *b* of article 2 states that the partner with whom the citizen has engaged in a registered union is considered a family member.

The inclusion of registered unions within the functional concept of *family* as contained in Directive 2004/38/EC has extraordinary effects on the legal status of third-country nationals who are family members with European Union citizens.

For these third-country nationals who are in a partnership with an EU citizen and their partner, the general immigration system may not be applied when fulfilling the requirements of the directive, as well as any requirements that the member states may stipulate through their respective laws of transposition; rather they have the right to be subjected to the much more beneficial system of EU law.

The directive requires the EU member states to extend the right to free movement and residence to the individual partnered with an EU citizen but who is not a national of any member states if three conditions obtain:

- a) The union has been officially registered in accordance with the legislation of a member state.
- b) The host member state treats registered unions the same as marriages.
- c) The couple meets the conditions stipulated in the applicable legislation of the host state.

What registry would fit the requirements? In fact, we already have a registry which can meet the needs of legal security posed by the different laws on common-law couples whose effectiveness has already been proven: the Civil Registry. Therefore, there is no need to create a new registry.

On 23 April 2004, Draft Law 122/000024, submitted by the Parliamentary Group of the Esquerra Republicana party, was admitted for consideration. This draft law called on the state lawmakers, who hold the sole competences regarding the Civil Registry (149.1.8 SC), to implement the constitutional principle of legal security within the sphere of stable unions or common-law couples, which would allow this new institution to have access to the Civil Registry. The effects of this registration would have to be determined by the substantive laws of the autonomous communities.<sup>23</sup>

In order to offset the lack of a registry, all the autonomous communities which have regulated stable unions or common-law couples,<sup>24</sup> with the exception of Catalonia, have chosen to create an administrative couple registry. We can distinguish between two circumstances:

a) The autonomous communities that have chosen a registration model with constitutive effects: Andalusia, Aragon (only for the purposes of public law), Cantabria, the Balearic Islands, Madrid, Galicia, the Basque Country, Extremadura and Valencia.

b) The autonomous communities that have chosen a registration model with declarative effects: Navarra, Castilla-León, Castilla-La Mancha, the Canary Islands and Asturias.

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In any event, the host state must facilitate the entry and residence of the member of the couple from a third country if he or she shares a house with the EU citizen, or if he or she can duly demonstrate that the relationship is long-term.

Article 8, section 5, letter *f* of the directive allows the host states to require that proof be submitted of the existence of a stable relationship with the EU citizen.

This possibility has been interpreted by most of the member states as meaning that they can require the couple to be entered in a public registry of a member state.

This holds true of the Spanish regulation that transposed the directive. Article 2*b* of Royal Decree 240/2007 dated 16 February 2007 conditions the application of the EU legal system to the member of the couple who is not a national of an EU member states or one of the states participating in the agreement on the European Economic area upon the fact that the union similar to marriage has been entered in a public registry set up for this purpose. This registry must prevent the possibility of two simultaneous entries within the same state. The Spanish norm also requires proof that the registration has not been cancelled.

<sup>23</sup> This legislative initiative expired as the result of the dissolution of the chambers which took place upon the calling of general elections. An alternative model to the one submitted by the Esquerra Republicana party of Catalonia was the one officialised via an amendment by the Socialist Parliamentary Group in Congress. It proposed setting up a new administrative system dependent on the Ministry of Justice whose operation and management would be handled by the ministry and the local corporations.

<sup>24</sup> See point three *in fine* of Ruling DGI/SGRJ/03/2007 handed down by the Ministry of Labour and Social Affairs. Both the registries of stable couples of the autonomous communities and of the town halls are considered invalid in the application of Royal Decree 240/2007(a norm which implements Directive 2004/38/EC) because these registries cannot prevent simultaneous registrations.

It should be borne in mind that La Rioja and Murcia have not yet regulated common-law couples for the purposes of public law, and that with the exception of Catalonia, Aragon, Navarra, the Basque Country, the Balearic Islands, Galicia and now Valencia, the remaining autonomous communities do not hold civil law competences, and therefore their respective laws are administrative in nature.

The European Union member states that have a public registry as a means of tracking common-law couples are Germany, France, Luxembourg, Slovenia, the United Kingdom, the Czech Republic, Denmark, Sweden and Finland.

## 8. Content of the legal systems

In order to determine the specific content of the legal systems regarding each of the models of couple, we should distinguish between:

- a) The effects during cohabitation.
- b) The effects of the termination of cohabitation *inter vivos*.
- c) The effects of the termination of cohabitation *mortis causa*; within these effects we can distinguish between:
  - *post mortem* effects and
  - succession effects.

### 8.1. The effects during cohabitation

#### 8.1.1. Guiding principle that should guide lawmakers when determining the effects of informal cohabitation while the couple is living together: the principle of minimal intervention

There is a twofold reason for this. As we have already noted, imposing effects of this kind on the cohabitators places them in a legal situation similar to a marriage yet without this intervention being justified by the avoidance of damage or unfair results for the weaker party.

Likewise, informal cohabitation does not generate problems during the time of cohabitation, a reality which has been reflected in the lack of legal conflicts in the cohabitation stage.

Consequently, it is not recommended that any legal system be established to regulate the relationships of the informal cohabitators while they are living together. However, we should also dismiss the establishment of any kind of equivalent legal system to avoid imposing on a couple that has chosen not to contract-in the burden of having to contract-out.

This would basically affect the freedom of the cohabitators to organise their family life in terms of both their personal life and their estates. The limits to organisational freedom lie in the public order, which should be interpreted as the entire set of fundamental rights of the individual (such as the right to equality and the principle of the dignity of the individual). Thus, a pact which established one of the cohabitators' exemption from contributing to the lifting of the family burdens would be null and void.

The agreements must at least be in written form to avoid the legal insecurity entailed in oral agreements, which are particularly dysfunctional in the event of conflict. Therefore, we should avoid regulations like the ones contained in articles 3.1 and 22.2 LUEP, which allow for oral agreements.

The autonomy of the cohabitators' desire should encompass at least the possibility of purchasing assets with the right of survivorship, which would particularly benefit the survivor with few resources. The ruling by the Supreme Court of Justice of Catalonia dated 13 February 2003 recognised the validity of the right of survivorship granted in 1985 for a couple in which one of the members was still married to a previous spouse. The court argued that despite the fact that the institution had historically been circumscribed to marriage, the purpose of the right of survivorship is to protect the family's inheritance, and therefore today it must also encompass unmarried families.

Another kind of effect occurs when the law exceptionally calls on the closest family member of an individual who requires protection. One example of this kind would be the attribution of guardianship in favour of the person with whom the interested party lives (art. 179.1 FC). Other examples include healthcare events in which the person is not competent to either receive information or take decisions (art. 5.3, 5.4, 9.1b and 9.3a of Law 41/2002 dated 14 November 2002, the basic law regulating patient autonomy and rights and obligations regarding clinical information and documentation, and article 7.2 of Law 21/2000 dated 29 December 2000 on the rights to information concerning the patient's health and autonomy, and on clinical documentation<sup>25</sup>).

#### *8.1.2. The effects during the cohabitation of a registered couple*

In this case, this kind of couple has signed an official declaration of couplehood for legal purposes. Lawmakers can (but do not necessarily need to) apply not only the regulations with a family-based logic, but also those with a marriage-based logic. Therefore, it would be acceptable to create an equivalent legal system in the absence of an agreement.

#### *8.2. The effects of a termination in cohabitation inter vivos*

Contrary to the lack of conflict we can note while a couple falling under the regime of informal cohabitation is living together, the termination of informal cohabitation is the time when claims are submitted to the courts.

The purpose of most of these effects is to protect the weaker party in the relationship from an outcome that is considered unfair by law. Given that this

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<sup>25</sup> Article 7

*Exceptions to the requirement for content and granting consent by proxy*

[...]

2. In the following situations, consent may be granted by proxy:

a) When the patient, in the judgement of the physician in charge of care, is not competent to take decisions because he or she is in a physical or psychological state that prevents him or her from taking charge of his or her situation, consent must be granted by the patient's family members or by the individuals linked to him or her.

purpose is shared by registered couples and informal cohabitation, it is coherent that the effects should be applied to both models of couple.

For this reason, it is logical to recognise a potential right to monetary compensation for one of the cohabitators who has worked for the household much more intensely than the other cohabitor, or who has worked in the other member's economic activity without compensation or with insufficient compensation. This monetary compensation would be retroactive to offset the loss in opportunity costs suffered by the cohabitor who devoted himself or herself to the family instead of to the labour market.<sup>26</sup>

It is also logical to recognise for both kinds of couple a potential right to maintenance which is based on the concept of need, yet connecting this concept to the circumstances that have led disfavoured cohabitor's ability to earn income (human capital) to decline due to the previous cohabitation or because he or she has children under his or her care.

One crucial question is whether it is licit to allow the cohabitators to reach an agreement on the regulation of these two potential rights (diminishing or bolstering their contents or the conditions under which they are recognised) and even allowing them to relinquish these rights. These agreements may be granted at a time prior to the appearance of the right (preventative agreements) or at the time when the right arises (reactive or post-cohabitation agreements).

The patrimonial nature of these agreements would justify recognising their validity as a general principle. Saving the emotional, time and economic costs entailed in having the effects of the termination of the relationship already regulated would also help their opportunity, as long as the public order is respected. Specifically:

a) The agreements may not affect the rights of third parties (especially children, but also creditors, both public and private).

b) The agreements must respect the dignity of the individual and his or her fundamental rights, both at the time they are granted and at the time they may be applied. The existence of asymmetrical agreements or one of the cohabitators' ignorance of the assets or significant personal information of the other would be unacceptable, as would any other agreement that would lead one of the cohabitators to an unpredictably onerous situation or even a state of penury. In order to avoid these situations, the agreements must be rendered invalid when between the time they are granted and the time they are to be applied a substantial, sudden and unpredictable change has arisen in the fundamental circumstances which prevailed at the time the agreement was reached.

Law 10/1998 on stable couple unions has no norm that regulates the potential attribution of the family home upon the termination of cohabitation, and therefore upon the termination of the stable union. It would be appropriate to establish clear norms on this issue in order to protect the higher interest of minors and the weaker party in the relationship. These norms would be equivalent to the one contained in article 83 FC.

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<sup>26</sup> Roca (1999: 178 and following) argues this for marriage, not cohabitation.

### 8.3. *The effects of a termination in cohabitation mortis causa: post-mortem effects and succession effects*

Catalan civil law has two sets of norms which can be applied to the surviving member of a relationship.

The first set of norms deals with what are called “*post-mortem*” effects. This set of norms is not very dense and regulates the estate effects of the relationship after it has ceased due to the death of one of its members, as well as the effects of any agreement reached during the existence of the relationship. These effects are activated in favour of the survivor merely through death, regardless of whether the individual favoured by these effects is the heir or legatee or receives any succession benefit.

These effects fall within family law, not estate law. The basic purpose of post-mortem effects is to protect the person of the survivor. We could say that these norms are urgent remedies to address the immediate consequences and needs that the death of the partner or cohabitor causes in the surviving member.

Precisely because the purpose of this kind of norm is to protect the family, they should not be exclusive to marriage. Consequently, these norms must be targeted at both married couples and other couples, regardless of whether they are registered or involved in informal cohabitation.

Specifically, these rights are:

- The right to the household goods or the removal right (art. 35 FC and 18 and 33a LUEP).
- The year of widowhood, which in Catalonia is traditionally called the *any de plor* (“year of mourning”) (art. 36 FC and 18.2 and 33b LUEP).
- The right to subrogation of rent *mortis causa* (art. 16.1b LAU).
- The effects of the termination and liquidation of the economic systems that were contained in an agreement (art. 3 and 22 LUEP).

The second set is made up of norms whose fundamental (though not sole) purpose is to assign ownership to goods, rights and duties as a functional requirement of the economic system. This kind of norm falls not under family law but under estate law. Here, the focal point is no longer the person of the survivor but the estate itself, which requires ownership in order to avoid problems with regard to its processing through the economic-legal system.

This second set of norms (estate law) should not be applied in informal cohabitation established *de facto* without a declaration of intention. There are two reasons why I recommend that it be excluded:

a) As we have seen above, the purpose of this kind of norm is not fundamentally to protect the family but to assign ownership in order to protect the estate’s processing through the legal system.

b) Regulation of the right to succession, and specifically intestate succession, is much denser and more economically oriented than post-mortem effects. We cannot deduce from *de facto* cohabitation the deceased person’s desire to make his or her partner the heir in the event of intestate succession.

Applying the right to succession to cohabitation would in fact require an express declaration prior to death; otherwise, this would entail imposing excessive effects potentially not desired by the deceased person.

The vast majority of European countries that regulate common-law couples systematically follow two constants which share the fact that they recognise intestate succession (Holland and Belgium for both heterosexual and homosexual couples, and Iceland, Denmark, Norway, Sweden, Finland, Germany and the United Kingdom only for same-sex couples):

a) They exclude informal cohabitators from the right to succession in intestate succession owing to the fact that there is no official declaration of couplehood, and therefore it is difficult to assume the deceased person's desire to favour the survivor in such an intense way.

b) They grant the members of a registered couple (as well as the members of a marital couple) the right to intestate succession precisely because of the existence of an official declaration of couplehood, based on which we can presume a desire to favour the survivor in cases of intestate succession.

The only exceptions to these two constants are France, the Czech Republic and Slovenia. French law refuses to grant intestate succession rights in both informal cohabitation and registered couples. At the other end of the spectrum, the Czech Republic and Slovenia grant intestate succession rights to the surviving informal cohabitor.

Law 10/2008 dated 10 July 2008 from the fourth book of the Civil Code of Catalonia, which was recently approved, generally equates the succession rights of survivors with those of marital partners.

I believe that the virtue of this legislative option is that it establishes a single succession system for heterosexual and homosexual couples, given that differential treatment based on sexual orientation (as noted above) is not only not a functional criterion but is also suspect of being discriminatory.

On succession matters, the distinction between heterosexual and homosexual couples has become even less functional since the approval of civil marriage for homosexual couples. This reform abolished the positive discrimination contained in articles 34 LUEP (intestate succession) and 35 LUEP (a kind of widow's share), consisting of granting succession rights to the survivor in a stable homosexual union because this kind of union does not have access to marriage.

Lawmakers have correctly eliminated the criterion of sexual orientation and have applied a single set of succession laws regardless of sexual orientation. Despite this, I think that they have committed a serious error in eliminating the fundamental criterion for distinguishing common-law couples: whether or not there is an official declaration of couplehood.

Failing to distinguish between couples who have expressed their desire to become a stable union and couples who have expressed nothing because they are de facto couples would make it impossible for the laws to give each their own system suited to their own specific needs.

Unfortunately, the confusion between marriage and family, as well as the confusion between marriage and common-law couplehood, hovers over our

legal system and extends to the sphere of estate law via Law 10/2008 dated 10 July 2008 from the fourth book of the Civil Code of Catalonia.

Generally equating the succession rights of informal cohabitators with those of married couples means imposing a marriage-based solution that the deceased person may not have wanted. On the other hand, the need to prove the fact that gives rise to informal cohabitation opens up a vast front of legal insecurity within succession law. Even though demonstrating that a couple has children together is not fraught with difficulties, it is indeed more complex to demonstrate the existence and nature of the couple relationship and its two-year duration.

### **9. Harmonisation? No, thanks**

Some doctrinal sectors, and even an occasional ruling handed down by the Supreme Court (STC dated 21 March 2001), tend to argue in favour of standardising this issue within Spain. They argue that the different autonomous communities' legislative activity regarding common-law couples has led to vastly heterogeneous norms, and that this does not abide by either the principle of equality among all Spaniards (art. 14 SC) or the need to attain basic conditions that guarantee the equality of all Spaniards in the exercise of their constitutional rights and responsibilities (art. 149.1.1 SC).

These positions forget that political autonomy means precisely each autonomous community's ability to make its own policies, and that this capacity is unconditioned (except for respect for the constitution) in terms of the exclusive competences of the Parliament of Catalonia, such as in the case of regulating common-law couples (art. 149.1.8 SC). This means that recognition of the autonomous communities' political autonomy leads intrinsically to regulatory heterogeneity within the legal system. This is constitutional in any system that allows the regional or vertical distribution of power.

In these systems, the principle of equality does not demand uniform legal treatment of citizens' rights and responsibilities in all matters and around the entire state; rather it only requires equality in the fundamental legal positions.

This latter position against standardisation has repeatedly been upheld by the Constitutional Court. One of its clearest rulings on this matter was the tenth legal rationale of STC 37/1987 and the now-famous STC 76/1983, which declared the unconstitutionality of 14 of the 28 precepts of the organic law on the harmonisation of the process of establishing the autonomous communities.

The Spanish state's desire to harmonise the laws on couplehood in the autonomous communities with the competences to enact these laws would not only clash with the constitutionally stated meaning of political autonomy and with the aforementioned principle of equality, it would also contrast with the neglect the state has thus far shown with regard to the institution of the common-law couple.

It should be recalled that the Spanish state is one of the few states in the European Union which has not yet systematically and organically regulated common-law couples, so it has left one of the questions posed by couples in the communities without the right to enact their own laws bereft of a systematic,

coherent solution. This lack of regulation has led to a dispersion of jurisprudential solutions which does not fit the principle of legal security.

As mentioned in the different sections in this study, all of this should be coupled with the fact that the state has not established norms to resolve conflicts among the different laws on couplehood in the autonomous communities, nor has it addressed common-law couples' lack of coverage in the Civil Registry (or an interconnected administrative registry). This lack of legislative activity does not fulfil the obligation that also weighs on the state to promote legal security (art. 9.3 SC) and the responsibility of good faith in the exercise of its competences, as suggested by STC 46/1990. In this context, the state's aim to harmonise the different laws on couplehood in the autonomous communities with competences in civil law is thoroughly incongruous.

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