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The Fundamental Right of Marriage in the Constitutions of European Countries

- **ABSTRACT:** *This study aims to present an overview the position of marriage in the constitutions of European countries. First, the origin of marriage as a fundamental right is looked at from a historical perspective, leading to different supranational instruments' declarations. Subsequently, different approaches of the constitutions of European countries are scrutinised and classified depending on what protection, if any, is given to marriage. The spectrum spreads from defining marriage as protected by declaring it as a fundamental right to the lack of constitutional mention. For this broad overview, the scope of this work is based on the fact that all of these countries are parties to the Council of Europe, and the Rome Convention of 1950. Finally, a short exploration of some of the countries' constitutional jurisprudence is carried out regarding the most controversial topics concerning the fundamental right to marriage.*
- **KEYWORDS:** marriage, constitution, comparative law, Europe, fundamental right of marriage, same-sex marriage, traditional marriage.

1. Marriage as a fundamental right

The fundamental right of marriage implies a number of things: it contains the freedom to voluntarily decide whether to contract a marriage, to a certain extent who to marry, that no one sex is privileged over the rights of the other and that the duties of spouses are equal, and finally the role of marriage in forming a family, thereby creating the building block of society; these values are to be protected by the state.

Auspiciously, equality of the sexes has gained recognition on a normative level and increasingly in societies over the last two centuries,² and the protection of equal

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2 Pylkkänen, 2007, p. 294.



rights and anti-discrimination measures play a pivotal role in the social change that is reflected in the equal rights and responsibilities of spouses. Nonetheless, family models are determined by sexes. Gender roles in the family, to a certain degree, are not originally rooted in sexism but derive from the natural differences and biological³ roles of reproduction and nurture: babies, if possible, need their mothers in the first phase of their lives. Consequently, in most social security systems, mothers may go on maternity leave, although sometimes fathers are granted these rights as well.⁴ It is unclear why it is detrimental if mothers are given a preference to nurture children in order to stop dropping birth rates. Such intentions are not sexist, nor did they originate in Christianity; they are simply a matter of society's interest if it is done in the best interest of the child. Notably, the Hungarian Constitutional Court has pointed out that *"Equality of man and woman is only reasonable until natural differences between man and woman are acknowledged and equality is realised with recognition to this".*⁵

The criterion of different sexes for marriage has become the most debated question concerning marriage in the last 20 years.⁶ There seems to be a division between the so-called conservative and liberal perceptions of the law. While there is much interest about the crises of marriage and family—high divorce rates, lack of commitment and breaking up of intact families—it is curious that such a large portion of scholarly discourse is occupied by the dispute connected to a rather limited minority of society. This is not to say that minority rights are not important, but the disproportionality is conspicuous.

This is all the more surprising as the concept of matrimony as known for centuries and it being a fundamental right seemed to be beyond a shadow of doubt. In fact, such private rights proclaimed as fundamental liberties are rather recent;⁷ however, the history of civil marriage dates back to the first generation of human rights. Secular marriage, a building stone of civil society, has been with us since the *Code civil* of Napoleon. As a legal option continuing a long tradition, including that of ancient Rome and the regulation of the church, it has been characterised by its heterosexuality. The right to marry and to form a family as a fundamental right has been declared in a number of international conventions from the middle of the 20th century. Article 16 of the United Nations Universal Declaration of Human Rights⁸ and Article 23 of the

3 Cole and Cole, 2006, p. 58.

4 Pylkkänen, 2007, p. 292.

5 14/1995 (III.13.) AB Decision, ABH 1995, 82, 84.

6 Szeibert, 2013, p. 38.

7 Lenkovics, 2006, p. 117.

8 (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

International Covenant on Civil and Political Rights⁹ phrases this right as one that enables men and women to get married and form a family, and that their right to do so has to be guaranteed by the state. Other aspects highlighted by these declarations are those of free will, the consent of the parties to enter the relationship, being of full marriageable age, and equality of the spouses regarding rights and responsibilities of the marital relationship. This nature of the law regarding fundamental rights and institutional protection implies that marriage has an overriding role and importance beyond the fundamental right to private life and individual dignity. Furthermore, this is strengthened as a social right in the International Covenant on Economic, Social and Cultural Rights or European Social Charter.

The explicit reference to the two sexes is not a mere coincidence; instead, the choice of words is deliberate. A number of fundamental rights, such as the right to life, right to vote, freedom of conscience and right to privacy, are individual rights, that is, they entitle individuals. However, other fundamental rights are collective rights: they entitle the individual but can only be practiced together with others—for example, freedom of assembly and freedom of association logically cannot be exercised alone. It functions in communities with others, and without another individual's exercise of the same right it is incomprehensible. In this respect, the fundamental right of marriage is a special right; nobody can be married alone, as it has to be two individuals' decision to exercise the right to marriage together. This mutual complementarity follows from the nature of marriage; spouses are married relative to each other, and they are husbands and wives in relation to one another. In this sense, it is artificial to interpret the explicit individual rights of men and women in marriage, rather than in relation to each other.¹⁰

Similar in its conceptualisations to a European perspective, this right has been declared in the European Convention of Human Rights and the Fundamental Charter of the European Union half a century apart.

The cause of the recent turbulence in the definition and redefinition of marriage at the time of the formation of these earlier treaties was not a question at all. That is to say, the heterosexuality of the marital relationship was beyond question and was considered to be a conceptual principle arising from its essential purpose: complementarity.

9 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

10 Different opinion: Drinóczi and Zeller, 2006, p. 17. We are going to see the controversies of the interpretation of the Spanish Constitution.

A number of constitutions followed the lead and included the fundamental right of marriage ever since.

Comparing human rights tools with the constitutions of European countries, we find that there are numerous similarities in the notion of marriage. However, a striking difference has emerged in the last 20 years concerning the sex of spouses.¹¹ Although historically, matrimony had always been considered the union of a man and a woman, their commitment was pronounced before the community or society and was understood as such in European legal systems as well.

On the one hand, the Convention of Rome¹² in Article 12 declares the right to marriage,¹³ and similarly, the 7th protocol in Article 5 establishes the spouses' equal rights vis-à-vis each other and toward children, even in the event of dissolution. On the other hand, the Charter of Fundamental Rights of the European Union approaches this right cautiously— since it was formulated fifty years later, by which time some EU countries were in the process of contemplating same-sex marriage—not articulating man and woman as parties to the marriage, which right is guaranteed as: *“The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”*.¹⁴

As a point of departure, let us analyse where the human rights declared in conventions are derived from. Those composing these documents never pretended to have given these rights to humanity themselves by formulating and adopting these texts. In other words, these conventions are rather declarative in nature rather than constitutive. The fact that these declarations are formulated is merely a pledge from the States Parties to guarantee these rights. These human rights are derived from human nature and the person's human dignity.¹⁵ A number of these rights are characterised as inherent rights that underline that it is not legal recognition which gives them their validity.

The fundamental right to marriage is featured in a number of conventions, most often together with family life the right to found a family. An interesting phenomenon of legislative counter-movement may be observed in relation to same-sex marriage on both international fundamental rights and the national constitutional level. Early fundamental rights instruments explicitly refer to men and women regarding the right to marriage; perhaps consequently, a large number of national constitutions did not consider this crucial when formulating the laws regarding marriage, as wedlock axiomatically meant the union of man and woman. Recently, a portion of European countries addressed the issue by enacting the requisite of opposite sex in law or even

11 Díaz-Ambrona Bardaji and Hernandez Gil, 2007, p. 41.

12 Convention for the Protection of Human Rights and Fundamental Freedoms (from now on: European Convention on Human Rights), Rome, 4 November 1950, and the Protocol No. 7, 22 November 1984.

13 Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

14 Article 9. of Charter of Fundamental Rights of the European Union (2007/C 303/01).

15 Frivaldszky, 2010, p. 9.

in the constitution.¹⁶ This tendency is also divided geographically or according to historical and cultural overlap. On the other hand, at the supranational level, draftsmen refrain from this criterion: The Fundamental Charter of the European Union, unlike earlier, similar documents, acknowledges the right to matrimony in a general manner according to national laws.

2. Marriage in national constitutions

A number of states declare rights concerning marriage and the family on a constitutional level, while others remain silent about these institutions and regulate them on a statutory level only. In the first group, some constitutions define or narrow the marriage they protect; others generally declare marriage to be a fundamental right, while others formulate support of marriage as the only state objective.

The first group includes, besides Hungary, other central and eastern European countries in addition to Italy, Spain, Germany and Switzerland.¹⁷ A common ground for them is that they either define marriage and family as a fundamental right, constitutional state task, or both.¹⁸

A subcategory is where marriage is protected as a fundamental right. In this regard, there are two classes of countries: one additionally defines marriage as the union of man and woman, and the other generally proclaims marriage of fundamental nature.

The Hungarian Fundamental Law in Article L) paragraph 1 declares the institutional protection— much the same way as in the earlier Constitution— and specifies opposite sex of the spouses among the conceptual elements of marriage. According to the constitution, wedlock is established by a voluntary decision, declaring the freedom to contract a marriage.¹⁹ The Constitution also adds community of life to the elements of marriage, which may be interpreted as the essence of matrimony. Institutional protection generally means restrain on the part of the state, which is amended by social policy acting in the case of marriage and family, as the state has to provide an environment that enhances family life.²⁰ However, the state's obligation does not end at non-intervention and social policy, but it has to establish such a framework for matrimony that fosters its aims and does not create a legal ambiance where other forms

16 Subsequently, in Hungary as the Fundamental Law requires heterosexuality in marriage the Civil Code also made this distinction Act V 2013. 4:5. § (1)

17 For Hungarian translations, see *Nemzeti alkotmányok az Európai Unióban*. Budapest, Wolters Kluwer, 2016. Also Constitute Project has been a great help providing English translations, for more information see: constituteproject.org. However, original texts were used as much as possible.

18 Drinóczi and Zeller, 2006, p. 18.

19 22/1992 (IV. 10.) AB Decision, ABH 1992, 122, 123.

20 Drinóczi and Zeller, 2006, p. 19.

of partnership are more advantageous, or regulated in the same way as the institutional protection of marriage.²¹

The jurisprudence of the Hungarian Constitutional Court²² underlines the institutional protection to the right of marriage, although the Fundamental Law only mentions family and not marriage in the section “Freedom and Responsibility,” which is the fundamental rights segment of the constitution.²³ During the conceptualisation and its resolution, as well as in the experts’ proposal, a more precise, obvious and explicit protection had been suggested for marriage and its relation to family.²⁴ Nevertheless, it is still considered true that the structural position does not necessarily mean that marriage is not a fundamental right.²⁵

The protection of fundamental rights is declared by Article 18 of the Polish Constitution,²⁶ which defines marriage as a covenant of men and women. Article 110 of the Latvian Constitution²⁷ protects marriage as a tie between men and women. The Lithuanian Constitution²⁸ in Article 38 grants recognition to marriages celebrated by the church and requires spouses to be of opposite sex, whereas the protection given to family, besides marriage-based family, includes, according to the Lithuanian Constitutional Court, other forms of family as well.²⁹ First paragraph of Article 41 paragraph 1 of the Slovakian Constitution³⁰ protects marriage for “its own good” but this has been amended in 2014 to define marriage as a union between a man and woman; it also protects marriage and the family and Article 19 private and family life. The Croatian Constitution³¹ requires heterosexuality when protecting marriage in Article 62, however it extends the protection for families to cohabitating partners. Article 46, paragraph 1 of the Bulgarian Constitution³² grants freedom to marriage for men and women, and also establishes that only civil marriage of equal rights is acknowledged by the constitution. In Ukraine, the Constitution³³ not only proclaims the heterosexuality of marriage in Article 51 but also emphasises the equality of the spouses. Likewise, the Constitution of Moldova³⁴ in Article 48, paragraph 2, grants equal rights for parties to

21 “no such protection is given to cohabitation” “ilyen védelmet az élettársi kapcsolatnak nem biztosít” 1097/B/1993. AB Decision, ABH 1996, 456, 464. Article 4 of the Legislation Act (Act No. CXXX. of 2010) also obliges the legislative.

22 4/1990. (III. 4.) AB Decision, ABH 1990, 28, 31.

23 More on the constitution see Drinóczi and Zeller, 2006, p. 20.

24 Varga, 2012, pp. 126–127.

25 Csink and Schanda, 2009, p. 493.

26 Konstytucja Rzeczypospolitej Polskiej 1997, Dziennik Ustaw No. 78, item 483.

27 Satversme, Latvia’s Constitution of 1922, reinstated in 1991.

28 Lietuvos Respublikos Konstitucija, Constitution of the Republic of Lithuania 1992.

29 Resolution No X-1569 of the Seimas of the Republic of Lithuania of 3 June 2008 On the Approval of the State Family Policy Concept, Official gazette, 2008, No. 69-2624.

30 Ústava Slovenskej republiky, the Constitution of the Republic of Slovakia 1992.

31 Ustav Republike Hrvatske, the Constitution of the Republic of Croatia 1990.

32 Konstitutsia na Republika Balgaria, the Constitution of the Republic of Bulgaria 1991.

33 The Constitution of Ukraine 1996.

34 The Constitution of Moldova 1994.

the marriage, which is a free choice for husband and wife. Montenegro's Constitution³⁵ in Article 71 declares the equality of the spouses in a marriage that women and men can enter in free will. In Armenia, the Constitution³⁶ also confirms the freedom and equality for women and men to get married and proclaims that the freedom of marriage may be restricted for protecting morals and health. In Azerbaijan, the Constitution³⁷ declares the right for marriage and provides equal rights for husbands and wives in Article 34 IV. The Constitution of Russia³⁸ has recently been amended to include that a man and woman may be the parties to a marriage. Most peculiar of all is the Spanish Constitution,³⁹ as it explicitly contains a reference to a man and woman as to whom the right of marriage belongs, yet homosexual marriage was introduced in 2005 without changing the Constitution.

The German Grundgesetz in Article 6 paragraph 1 explicitly protects marriage and requires that other family formations not be favoured to marriage.⁴⁰ The Constitution of Greece⁴¹ in Article 21 paragraph 1 affirms the protection of marriage, family, and the child. Article 36 paragraph 1 of the Portuguese Constitution⁴² acknowledges a general protection of the right to marriage, which is understood as cohabitation cannot be treated equally to marriage because that would infringe on the freedom of marriage; this includes the freedom not to marry.⁴³ The Irish Constitution has undergone a substantial change as it provides, in Article 41, not only the protection of family and marriage, but also asserts the conditions for divorce on a constitutional level. Article 53 of the Slovenian Constitution,⁴⁴ besides protecting the family and reaffirming equality in marriage, explicitly calls for legislation of cohabitation. The Italian Constitution⁴⁵ in Article 21 announces that family is based on marriage, and as such, it enjoys protection; nonetheless, the Constitutional Court has interpreted Article 2, the individual's right to expression of personality to include cohabitation.⁴⁶ Article 48 of the Romanian Constitution⁴⁷ acknowledges marriage, besides parental responsibility, as the basis of family, and although there was a proposal to amend this with the requisite of heterosexuality, the referendum was not approved because of low turnout.⁴⁸ The Constitution of Cyprus,⁴⁹ besides providing the right to marriage in Article 22, discusses jurisdictional questions of religious marriage of the Greek Orthodox Church or other religious groups

35 The Constitution of Montenegro 22 October 2007.

36 The Constitution of Armenia July 5, 1995.

37 Azərbaycan konstitusiyası, Constitution of Azerbaijan, 12 November 1995

38 Конституция Российской Федерации, Constitution of the Russian Federation, 12 December 1993

39 Constitución Española 29 de diciembre de 1978. Spanish Constitution Article 32.

40 Perelli-Harris and Sánchez Gassen, 2012, p. 462.

41 Syntagma tis Elladas 1974, the Constitution of Greece.

42 Constituição da República Portuguesa, the Constitution of the Republic of Portugal 1976.

43 De Oliveira, Martins and Vitor, 2015, p. 4.

44 Ustava Republike Slovenije, the Constitution of the Republic of Slovenia 1991.

45 Costituzione della Repubblica Italiana, the Constitution of the Republic of Italy 1 January 1948.

46 Corte Costituzionale del Repubblica Italiana 8 February 1977, n. 556.

47 Republicarea Constituției României, Constitution of the Republic of Romania 1991.

48 More on this: Gherghina, Racu, Giugă, Gavriș, Silagadze and Johnston, 2019, pp. 193–213.

49 Constitution of the Republic of Cyprus 16 August 1960.

in length. In Switzerland's Constitution,⁵⁰ the right to marriage and founding a family are connected in Article 14. The Constitution of Georgia⁵¹ in Article 36, paragraph 1, emphasises equality and free will upon entering marriage. The Constitution of Bosnia and Herzegovina⁵² in Article 3 j) states the right to marriage and to found a family. In Albania, the Constitution⁵³ provides a strong protection of marriage, besides providing the right to matrimony in Article 53.

The Estonian Constitution⁵⁴ maintains that the family is the foundation of society as it provides survival and growth of the nation in Article 27 paragraph 1. This article also affirms the equality of spouses. Similarly, in the Turkish Constitution,⁵⁵ Article 41 states that Turkish society is based on the equality of spouses in addition to family life as a whole. Equally, Andorra⁵⁶ in Article 13 protects the equality of spouses and the right to found a family; the regulation of marriage belongs to the law and civil effects of religious marriage are recognised.

Private and family life is protected in Article 22 of the Belgian Constitution⁵⁷, although the celebration of religious marriage is restricted in Article 21 to occur only after the civil wedding. In the same way, in Luxemburg, the Constitution⁵⁸ declares the priority of civil weddings to religious weddings. Austria⁵⁹ and North Macedonia⁶⁰ are similar in the sense that no other provisions on marriage can be found in their respective constitutions than the fact that legislative power to enact laws on marriage and family is declared.

The last group of states is the one in which no constitutional provision can be found about the right to marriage. In France, the Constitution⁶¹ contains no provision on either marriage or family; furthermore, this holds true for Liechtenstein,⁶² Monaco⁶³ and Finland⁶⁴. The Constitution of Iceland⁶⁵ also remains silent about marriage or family. In the Czech legal system, family, parenthood and marriage are not protected

50 Bundesverfassung der Schweizerischen Eidgenossenschaft, Federal Constitution of the Swiss Confederation 1 January 2000.

51 Sakartvelos K'onstitutsia, Constitution of Georgia, 24 August 1995.

52 Ustav Bosne i Hercegovine, the Constitution of Bosnia and Herzegovina 14 December 1995.

53 Kushtetuta e Republikës së Shqipërisë, Constitution of Albania 21 October 1998.

54 Constitution of Estonia 1992.

55 Türkiye Cumhuriyeti Anayasası, the Constitution of the Republic of Turkey 7 November 1982.

56 Constitució d'Andorra, Constitution of Andorra 14 March 1993.

57 Constitution belge, Constitution of the Kingdom of Belgium 1831.

58 Constitution du Grand-Duché de Luxembourg, Constitution of the Grand-Duchy of Luxembourg 1 January 1842 technically amended but in reality the modern constitutionality dates to 17 October 1868, Loi du 17 octobre 1868 portant révision de la Constitution du 27 novembre 1856

59 Article 10 of Österreichische Bundesverfassung, the Constitution of Austria of 1920, Reinstated in 1945.

60 Article 40 the Constitution of North Macedonia 17 November 1991.

61 Constitution française du 4 octobre 1958.

62 Constitution of Liechtenstein 5 October 1921.

63 Constitution of Monaco 17 December 1962.

64 Suomen perustuslaki, Constitution of Finland 1 March 2000.

65 Constitution of the Republic of Iceland No. 33, 17 June 1944.

at the constitutional level, but special protection is declared in the Civil Code.⁶⁶ Apart from the protection of private and family life, no articles of the Constitution⁶⁷ of Malta deal with marriage, much like the Serbian Constitution.⁶⁸

An interesting constitutional question arises in the Kingdom of the Netherlands. The Dutch Constitution⁶⁹ does not protect any particular form of family or marriage, which is possible between both hetero- and homosexual couples. Even though there are no constitutional provisions concerning marriage, a number of prerogatives are only available for married couples. Since the Netherlands is a constitutional monarchy and the succession to the throne is determined by descent in the case of royal marriage, same-sex marriage is excluded as a same-sex couple cannot produce a royal offspring.⁷⁰ In a similar manner, no provisions on marriage are made in Denmark,⁷¹ Norway,⁷² Sweden⁷³ and the UK; being monarchies, these might produce the same problem. A number of states that are monarchies have restrictions for members of the royal family to the freedom of marriage: Article 28 of the Constitution of the Netherlands, Danish Act of Succession Article 5, Article 36 of the Constitution of Norway, Article 85 of the Constitution of Belgium, Section 57 paragraph 4 of the Spanish Constitution, and the Swedish Act of Succession Article 5. Furthermore, the Swedish Constitution does not provide explicit constitutional protection for marriage to aspire neutrality. Since the 1970s, there has been an agenda to minimise the difference between the treatment of marriage and cohabitation.

In the absence of constitutional protection of marriage, as in the Northern countries, cohabitation is widespread, as there is no legislative agenda to grant preference to matrimony or to encourage individuals to choose it over other forms of partnership.⁷⁴ Moreover, they tend to embrace a broadening approach of marriage that includes same-sex couples; one of the reasons is that there is no constitutional provision to be interpreted, regardless of the deliberations of official interpreting forums of international conventions that they are parties to, which still apply.⁷⁵

However, the role and reasoning of interpreting forums is well worth an analysis, where there are provisions on family and marriage in the constitution. Does the interpretation follow originalism, textualism, or despite the explicit norm, a continuous progressive line of interpretation of the living constitution that perhaps even changes the meaning of family and marriage?

66 Act 89/2012 of the Czech Civil Code 3. § (1) b).

67 *Konstituzzjoni ta' Malta*, the Constitution of Malta 21 September 1964.

68 *Ustav Republike Srbije*, the Constitution of Serbia 2006.

69 *Grondwet voor het Koninkrijk der Nederlanden*, Constitution for the Kingdom of the Netherlands 1815.

70 Antokolskaia and Boele-Woelki, 2002, p. 56.

71 Constitution of the Kingdom of Denmark (1953) and the Act of Succession Act no. 170 of 27 March 1953.

72 *Kongeriget Norges Grundlov* 17 May 1814.

73 The Fundamental Laws and the Riksdag Act. See: <https://www.riksdagen.se/globalassets/07-dokument-lagar/the-constitution-of-sweden-160628.pdf>.

74 154/2008. (XII. 17.) AB Decision, ABK 2008. December, 1655, 1203, 1223.

75 Drinóczy and Zeller, 2006, p. 18.

3. Interpreting constitutions

■ 3.1. Spain

According to law 13/2005 in Spain, the Civil Code has been modified so that it expands the option to contract a marriage to couples of the same sex. The constitutionality of the law was called into question, as the Spanish Constitution had not been changed. Unlike the Charter of Fundamental Rights of the European Union, the wording of the Spanish Constitution explicitly refers to man and woman, and this has not been altered in the course of the modification of the Civil Code.

32. 1. *Men and women have the right to marry with full legal equality.*
 2. *The law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof.*⁷⁶

What could be the reason for not changing the constitution? Obviously, amending the basic law of a country occurs through a special procedure that usually requires a supermajority or referendum, which carries a high political cost. The proposal of the Act that changes the Civil Code argues that same-sex cohabitation is widespread. However, this seems elusive and weak reason to alter marriage so fundamentally. In addition, a rather interesting constitutional question arises: does the protection of the Spanish Constitution include same-sex marriages or is it limited to opposite sex spouses?

First, the argument that the Constitution does not explicitly state that man and woman have the right to marry each other, so it only acknowledges the right to marriage for both sexes, can be rebutted by textual interpretation. As such, if the draftsmen of the Constitution had wanted to declare general citizens' rights to marriage, they would surely have used a more general term and not specified the two sexes. Moreover, this is the wording used in other international documents,⁷⁷ and Article 10.2 of the CE states that fundamental rights and freedoms have to be interpreted according to that of the Universal Declaration of Human Rights and other international conventions to which Spain is a party.⁷⁸

In any case, Act 13/2005 amended article 44 of the Código Civil—"Man and woman has the right to get married according to the regulations of this act"⁷⁹—by adding a second

76 Article 32. CE, also we must highlight how the official English translation diverges from the original text where a singular form is used: "the man and the woman..."

77 See: 10th of December 1948 Universal Declaration of Human Rights Article 16.1, 4th of November 1950 Rome Convention, European Convention on Human Rights Article 12, 8th of December 1966 New York, International Covenant on Civil and Political Rights Article 23.2.

78 Constitución Española 29 de diciembre de 1978. Spanish Constitution (from now on: CE) CE Article 10.2.

79 Código Civil Español Article 44.

paragraph “The same rights and duties follow if marriage is contracted by people of the same or opposite sex.” Naturally, the Act had been challenged by the Constitutional Court for unconstitutionality; nevertheless, in a highly criticised decision, the court has not found unconstitutionality.⁸⁰ Their arguments are investigated as follows.

According to the proposal, the motive for the amendment of the law is that the relationship and cohabitation of couples is the expression of human nature and as such an important channel to the free self-expression that is guaranteed by the Constitution⁸¹ as a precondition to political order and social peace.⁸² The proposal of the Act provides a modest explanation for why same-sex marriage is the means of self-expression by stating that a number of same-sex couples cohabit. *“Opening this gate to self-realization provides the opportunity for those who choose their gender freely and those who are attracted to their own sex to express themselves and for equal rights adapted to the changed life of citizens, the Act intends to satisfy these claims.”*⁸³ Conversely, such strong protection of the relationship is disproportional to the number of people living in these relationships and their social functions.

The freedom to develop personality has been integrated into the Spanish Constitution from the German Basic Law. However, unlike in Germany where it is a “*Grundrecht*” that is a fundamental right, which can be a basis for the claim that this occurrence in Spain is not deemed a fundamental right. The proposal overestimates the importance of this right as it poses it as the foundation for broadening marriage to same-sex couples.⁸⁴

Therefore, two questions must be distinguished: first, whether protection of Article 32 includes same-sex marriages. Textually different sex marriages are the objectives of constitutional protection.

The other is whether heterosexuality is a defining characteristic of marriage. Can sex be a question of capacity that is regulated by law? As such questions are listed in the second paragraph of the article this may be dismissed: it is unlike legal capacity.

The protection of marriage is privileged in the Spanish legal system. Moreover, not only is it safeguarded through the protection of family (Article 39), but a specific constitutional guarantee is assigned to it, contrary to cohabitation. A family based on cohabitation is protected by the Constitution; therefore, cohabitation may be indirectly protected.

■ 3.2. Germany

In Germany, courts faced the question of whether same-sex couples could get married long before legislatures considered changing the law. In 1992, the German courts were asked after a number of registry offices refused requests from homosexual couples to

80 Sentencia 198/2012, de 6 de noviembre de 2012.

81 CE Article 10.1.

82 Exposición de Motivos de la Ley 13/2005, de 1 de julio.

83 Ibid.

84 Verda y Beamonte, 2006, p. 33.

marry. In the case before the city court of Frankfurt am Main, the verdict obliged the registrar to wed the couple. The justification of the judgement claimed that there was no actual piece of law that would explicitly require the spouses to be of opposite sex, nor among reasons for impediment or for void marriage. Thus, according to Article 6 of the German Basic Law, everybody has the right to marriage in conjunction with Article 3 paragraph 3, and no discrimination is possible; therefore, without objective and reasonable justification, there is no way of prohibiting marriage.⁸⁵ Finally, the Provincial Court of Frankfurt repealed this judgement, and the jurisdiction followed this line of thought.

Let us follow the various justifications of the jurisdiction on prohibiting same-sex marriage. The arguments cover a truly wide range of theoretical touchpoints, with hardly any common ground as to what defines marriage. First, it has been claimed that although there is no explicit ban in positive law, being of opposite sex is self-evidently derived from tradition, and therefore there is no need to enact it in law. The fact that the German Basic Law defends marriage means, on the one hand, that the legislator supports it vis-à-vis other forms of companionship. On the other hand, the law includes institutional protection, and thus it may not alter such an institution's fundamental structure. With this in mind, the sex of the spouses becomes a fundamental question.

One such verdict⁸⁶ holds that the interpretation of marriage in Article 6 of the Basic Law as stable relationship between man and woman is not solely a constant understanding of literature and the Constitutional Court, but the everyday use of the word that is in public opinion. This interpretation is independent of the consequences of marriage, and a reinterpretation by the courts would mean constitutional amendment, which is beyond their jurisdiction. The verdict did not discuss where the legislation ought to draw the line for the regulation of the rights of same-sex couples; however, it stated that even though there is no obligation to open marriage for same-sex couples, it remains completely within the legislator's political discretion. In other words, the question of whether marriage involves the same or different sexes is not a legal question but instead a political one.

The German Constitutional Court, the Bundesverfassungsgericht,⁸⁷ concluded that the legislator can preserve the original meaning of marriage, which protects the primary meaning of the union. It has been declared that the marital community ensures the best conditions for children's physical, mental and physiological development.⁸⁸

The Constitutional Court has also established that the notion of marriage is designed by public opinion and social context, therefore it is open to change. However, at the time, no sufficient evidence was found that this definition had been altered so as to include same-sex couples' right to marriage. The Court clarified that such modification is justified neither by the fact that fertility is not a prerequisite for marriage, nor

85 Szentistváni, 2000, pp. 4–5.

86 OLG Köln StAZ 93, 147.

87 BVerfG FamRZ 93, 1419.

88 Bundesverfassungsgerichts (BVerfGE) 76, 1, 51.

that there is an increase in childless marriages and extramarital births. Moreover, families are under constitutional protection, independent of whether they are based in marriage.

These sociological justifications seem to contradict somewhat the following arguments that are also used in the judgements. Constitutional protection of marriage is explained to have always aimed to establish legal security for founding a family. Additionally, it asserted that since no children may be born from the relationship of same-sex people, marriage cannot be expanded to include them.⁸⁹

Paragraph 1 of Article 6 of the GG speaks of protected fundamental rights and it is among the eternity clauses; therefore, it cannot be amended.⁹⁰ However, this seems to contradict the fact that the Court proclaims on a number of occasions that legislation may freely determine the meaning of marriage.⁹¹

Apart from the tangled lines of argumentation, the question arises as to what social change may incline the abolishment of the different sex from the requisites of marriage. Could it be a contributing factor that there are fewer and shorter marriages? No convincing argument has been raised about this hypothetical social change.

It was implied by the introduction of registered life partnerships (*eingetragene Lebenspartnerschaft*) in 2001 that the German Constitution protects traditional marriage and considers the relationship of same-sex couples to be of a different nature, which does not fall under the special protection of Article 6 of the Basic Law, but it is protected under other provisions of the Constitution.⁹² Since the effects are similar in both institutions, the Constitutional Court has evaluated whether the legal consequences of registered life partnerships are proportionate. The legislator has aimed to mark the differences between the two forms of relationship; therefore, adoption was not permitted for homosexual partnerships, for inheritance and taxation purposes they remained single, and no pension rights were guaranteed for widowers. Nonetheless, this verdict established that the Constitution's special protection for marriage does not mean that other forms of partnership cannot be advantaged in the same way.⁹³ Accordingly, the legislation has a wide margin of appreciation, and special protection does not mean unique protection,⁹⁴ nor uniquely special protection.

Consequently, most differences had been erased, and in more recent judgements, the Court emphasised the similarities between the two relationships. Furthermore, it established a constitutional right for homosexual life partnerships in paragraph 1 of both Article 2 and 1 with specified rights of privacy and freedom.⁹⁵ Moreover, according to the Court, differentiating constitutes a discrimination based on sexual orientation, which requires strict scrutiny in line with paragraph 3 of Article 3, which expands

89 See more: Szentistváni, pp. 3–11.

90 Schlüter and Szabó, 2013, p. 222.

91 For example: BverfGE 31, 58, (70).

92 Sanders, 2012, p. 925.

93 Sanders, 2012, p. 926.

94 Toldi, 2005, p. 22.

95 Sanders, 2012, p. 927.

the protection of Article 6 to registered life partnerships. Conversely, the basis of the judgement in 2007 was that the essence of marriage is procreation when it had been affirmed that the social security cover human reproduction technology, and which was given solely to married couples, was not unconstitutional.⁹⁶ Alternatively, in 2009 and 2013, in a number of verdicts, the Court ruled it unconstitutional to differentiate – in cases concerning pension rights, tax benefits and adoption – between married and registered civil partners.⁹⁷

Therefore, it comes as no surprise that in 2017, marriage had been extended to same-sex partners by legislation.

Accordingly, a struggle may be observed on the part of a constitutional court when trying to define marriage or trying to justify the legislator's definition of this fundamental right. The arguments are obscure and often contradictory, and there is an underlying need for change over time that the courts seem to be advocating.

4. Closing thoughts

In conclusion, we have contemplated how different national legal systems interpret and transpose the fundamental right to marriage, which was established in the European Convention of Human Rights. A certain geographical-historical-cultural divide may also be recognised, and although by no means are sharp lines implied, eastern and western states continue to regulate and interpret policies differently. Moreover, a timeline can be drawn between older constitutions that have fewer details about the fundamental right to marriage, and more recent ones, especially in the post-communist countries that, after stabilising their democracies, enacted new constitutions that tend to elaborate more on marriage and thus adopt a more traditional view. Comparatively, a cultural difference emerges in which religion plays an important role, especially in southern Europe. However, neither the former nor the latter is an absolute rule. Another finding is that there is a better chance of a more traditionalist view where the fundamental right of marriage is better unfolded in the constitution that enumerates more building bricks of this fundamental freedom.

⁹⁶ Sanders, 2012, p. 935.

⁹⁷ BVerfG, Order of the First Senate of 07 July 2009 – 1 BvR 1164/07 – paras. (1-127), BVerfG, Beschluss des Ersten Senats vom 18. Juli 2012 – 1 BvL 16/11 – Rn. (1-50), BVerfG, Judgment of the First Senate of 19 February 2013 – 1 BvL 1/11 – paras. (1-110), BVerfG, Beschluss des Zweiten Senats vom 07. Mai 2013 – 2 BvR 909/06 – Rn. (1-151).

Bibliography

- Antokolskaia, M., Boele-Woelki, K. (2002) 'Dutch Family Law in the 21st Century: Trend-Setting and Stragglings behind at the Same Time', *Electronic Journal of Comparative Law*, (6)4, pp. 53–73.
- Cole, M. and Cole, S.R. (2006) *Fejlődéslelektan*. Budapest: Osiris Kiadó.
- Csink, L. and Schanda, B. (2009) 15. § Házasság és család. In: Jakab, A. (ed.) *Az Alkotmány kommentárja I*. Budapest: Századvég, pp. 490–500.
- de Oliveira, G., Martins, R., Vitor, P. (2015) National Report: Portugal [Online]. Available at: <http://ceflonline.net/wp-content/uploads/Portugal-IR.pdf>.
- Díaz-Ambrona Bardaji, M., Hernandez Gil, F. (2007) *Lecciones de Derecho de Familia*. S.A.: Editorial Centro de Estudios Ramón Areces.
- Drinóczi, T., Zeller, J. (2006) 'A házasság és a család alkotmányjogi helyzete', *Jura*, 2006/1, pp. 16–22.
- Frivaldszky, J. (2010) Az emberi jogok természetjogi megalapozásának kortárs problémáiról a legújabb olasz jogfilozófiai irodalom tükrében. In: Orosz, A.L. (ed.) *Emberi jogok a katolikus egyház életében és jogában*. Budapest: L'Harmattan Kiadó, pp. 9–41.
- Gherghina, S., Racu, A., Giugăl, A., Gavriș, A., Silagadze, N., Johnston, R. (2019) 'Non-voting in the 2018 Romanian referendum: the importance of initiators, campaigning and issue saliency', *Political Science*, 71/3, pp. 193–213.
- Heka, L., Jakó, N., Mikes, L., Pongó, T. and Szakály, Zs. (2016) *Nemzeti alkotmányok az Európai Unióban*. Budapest: Wolters Kluwer.
- Lenkovics, B. (2006) Polgári alanyi jogok – alkotmányos alapjogok (Alapvető kérdések az alanyi és az alapjogok körül). In: Sajó, A. (ed.) *Alkotmányosság a magánjogban*. 1st edn. Budapest: CompLex, pp. 107–130.
- Perelli-Harris, B., Sánchez Gassen, N. (2012) 'How Similar Are Cohabitation and Marriage? Legal Approaches to Cohabitation across Western Europe', *Population and Development Review*, 38/3, pp. 435–467.
- Pylkkänen, A. (2007) 'Liberal family law in the making: Nordic and European harmonisation', *Feminist Legal Studies*, 15/3, pp. 289–306.
- Sanders, A. (2012) 'Marriage, Same-sex partnership and the German Constitution'. *German Law Journal*, 13/8, pp. 911–940.
- Schlüter, W., Szabó, H. (2013) 'A német családi jog áttekintése', *Acta Universitatis Szegediensis Forum Acta Juridica et Politica*, 2013/2, pp. 217–269.
- Szeibert, O. (2013) 'Ami a házasság témájából Európát jelenleg leginkább foglalkoztatja: az azonos nemű partnerek házassága', *Családi jog*, 2013/1, pp. 38–44.
- Szentistváni, R. (2000) Azonos neműek párkapcsolatai, *Közjegyzők Közlönye*, 2000/12, pp. 3–11.
- Toldi, J. (2005) 'Az élettársi kapcsolat értékelése a német Alkotmányban', *Közjegyzők közlönye*, 2005/7–8, pp. 21–25.
- Varga, Zs.A. (2012) 'A házasságra és a családra vonatkozó rendelkezések változása az alkotmányozás során', *Iustum aequum salutare*, 2012/2, pp. 126–127.

- Verda y Beamonte, J. R. (2006) El libre desarrollo de la personalidad como principio inspirador de la Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio. In: Verda y Beamonte, J. R. (ed.) *Comentarios a las Reformas de Derecho de Familia de 2005*. SA: Editorial Aranzadi, pp. 29–53.