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ABSTRACT

On June 26, 2015, the U.S. Supreme Court ruled in favor of the recognition of same-sex marriage in Obergefell v. Hodges. *Three years earlier, the Spanish Constitutional Court did the same in its ruling 198/2012 on November 6, 2012. In both countries, these rulings have been a very important step (but maybe not the final one) in the evolution of legal marriage towards its deconstruction. This paper deals with the main trends of the evolution of legal marriage and of Family Law in the recent decades. The author of this paper proposes to shift the focus of Family Law towards children in order to recover the core meaning of marriage.*

I. THE EVOLUTION OF FAMILY LAW: MAJOR TRENDS[1]

Family Law has experienced significant changes in the last few decades. These changes have affected not only marginal issues but also the core of Family Law: marriage, filiation, and parenting. On the other hand, these changes are not only legal ones; the social perception of marriage and family and the social construction of family relationships have sharply changed as well. In short, families have changed, ideas about family and family relationships have changed, public policies related to families have changed, and the laws concerning families have also changed.

All those changes followed, but at the same time built, a general trend towards subjectivisation from two points of view: the individual and the State. This process of subjectivisation has resulted in two

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1. The ideas and approaches in this section come from CARLOS MARTÍNEZ DE AGUIRRE, DIAGNÓSTICO SOBRE EL DERECHO DE FAMILIA [DIAGNOSIS OF FAMILY LAW] [hereinafter DIAGNÓSTICO] *passim* (1996). This work deals more extensively with the topics condensed in these pages and includes further citations to authorities. For a view on a shorter update, see C. Martínez de Aguirre, *Familia, Sociedad y Derecho* [*Family, Society and Law*] *in* CURSO DE DERECHO CIVIL IV: DERECHO DE FAMILIA [HANDBOOK ON CIVIL LAW IV: FAMILY LAW] 287 (C. Martínez de Aguirre ed., 4th ed. 2013).

consequences: 1) family, marriage, and parenting are no longer considered as basic natural realities that are fundamental for society, whose meaning and content are tied to human nature and whose legal regulation, in their core aspects, must respect that meaning and that content, and 2) family, marriage, and parenting are subject to human will, with the understanding that "human will" is the will of every individual and the will of society as a whole. It follows that both individuals and societies are allowed to assign any meaning they want to the words "marriage," "family," and "parenting." This long process has been accelerating in recent years.

Many factors have influenced this subjectivisation. For example, there is the idea that marriage is nothing but a contract and is no longer considered as a social institution based in the free will of the spouses. Similarly, the relevance of romantic love is increasing as the only ethical foundation for marriage, with the logical consequence that when romantic love fails, marriage must end, so divorce must be granted by law.

The importance of medical and biological advances related to human reproduction (for example, chemical and mechanical contraceptive means, that allow sex without reproduction, and assisted reproductive technologies, which allow reproduction without sex) has to be underlined too. As a consequence, in the same way that people can choose to get married or not, or to have sex or not, they can choose to have sex without having children, or to have children without having sex. Furthermore, all those choices are made irrespective of marriage; being married (or not) has increasingly less legal importance, both for adults and children. The final result of this trend is the widespread idea of the domination of human will (or rather, individual will) over marriage, sex, and procreation.

We can add to this quick outline the current surgical techniques for gender reassignment, the complementary hormonal treatment for transgender individuals, which seem to transform a man into a woman or *vice versa*, and the laws relating to gender reassignment, even with neither surgical nor hormonal treatment.[2] As a consequence, a man seems to be able to become a woman and a woman seems able to become a man, at least from a legal point of view. However, allow me to add that the odd cases in which a woman legally becomes a man and, after she becomes pregnant—apparently, from the legal point of

2. *E.g.*, Act 3/2007 (a Spanish law on relating the rectification of civil registry entries relating to a person's gender) (B.O.E. 2007, 5585) (Spain).

view, a pregnant man—,[3] show that he/she has never stopped being a woman because a woman is the human being that can become a mother). In this way, humankind appears to be able to master sexuality, not only by relating to its consequences but also regarding the belonging to one or another gender.

A parallel phenomenon has taken place, resulting in marriage and family being placed under the power of the State. One could recognize two phases within this process. First, the State legally recognized marriage (and family) as a natural and fundamental group. Marriage was considered the basis of society, thereby deserving protection and support. In this phase, mainly technical or peripheral aspects of marriage and family were regulated, and their meaning and basic structure were still preserved. Secondly, the State claims the right to decide the meaning and content of the terms "marriage" and "family." It follows that the very concepts of marriage and family would hinge upon the meaning the State decides to give them.

The result of this process is a public approach towards marriage and family characterized by "neutrality" and "pluralism." The recognition of the power of individuals to organize their affective and sexual life, together with the ideological pluralism of western societies, necessarily leads to a high social number of models of organizing sexual and affective relations, all of them claiming to be "family models" and many of them looking forward to being considered (and being legally named) "marriage." [4]

All these changes have legal consequences. As Professor Glendon pointed out many years ago, "[w]here general ideas about the conduct of family life are expressed in the law, they are bland and 'neutral,' capacious enough to embrace a variety of attitudes and life styles."[5] After this evolution, briefly summarized above, the State and society does not have a clear set of ideas and values related to the way in which citizens should organize their sex, marriage, and family relationships. In turn, some have already underlined that "*le Droit se dé-*

3. *See*, for example, Guy Trebay, *He's Pregnant. You're Speechless.*, N.Y. TIMES (June 22, 2008), http://www.nytimes.com/2008/06/22/fashion/22pregnant.html?, for the well-known case of Thomas Beatie.

4. For instance, this has been the case for same-sex relationships (claiming for same-sex marriage), and this is the case for the so-called polyamorous relationships (claiming for group marriage, or polymarriage). *What is the Purpose of a Marriage*, POLY FAMILIES, http:// www.polyfamilies.com/polymarriage.html (last visited Mar. 9, 2016).

5. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 145 (1989).

sengage du mariage et de la famille,"[6] meaning the Law is no longer committed to marriage and family.

The following section deals with the concept of deconstruction of marriage, which is an example of this evolution.

II. THE DECONSTRUCTION OF MARRIAGE

Marriage, as a legal institution, has also experienced a sharp process of deconstruction in western countries in the last decades. Many of the characteristic features of marriage from a legal point of view (for example, stability, heterosexuality, duties of the spouses) have progressively lost relevance, and some have even been erased from the law.[7] This process is currently taking place in Spanish Law, where marriage has shifted from being considered more than a contract to less than any contract.[8] On the other hand, the evolution of marriage as a social institution has been much slower than the legal one.

At the beginning of its legal deconstruction process, marriage was characterized in Spain, as in most western countries, by several features that were considered essential to it. First, it was an institution characterized by the existence of a legal bond between the spouses,[9] and of a set of duties, known as the marital duties, that built a real community of life between the spouses. Second, it was also characterized by its legal stability, and this legal stability came either from indissolubility or from a very restricted dissolubility. For example, divorce was only permitted on the few grounds established by law, typically by fault. Third, it was a union of a man and a woman—only one man with only one woman (heterosexual and monogamous). Fourth, it implied the mutual sexual availability of the spouses and

6. B. Barthelet, *Quand le droit civil se désengage de la famille* [*When Law is no more committed to the Family*], *in* POLÍTICAS DE LA FAMILIA: PERSPECTIVAS JURIDICAS Y DE SERVICIOS SOCIALES EN DIFERENTES PAISES [FAMILY POLICIES: LEGAL PERSPECTIVES AND PERSPECTIVES ON SOCIAL SERVICES IN DIFFERENT COUNTRIES] 378 (1993).

7. *See generally* C. Martínez de Aguirre, *El matrimonio deconstruido [Deconstructed Marriage]*, *in* G. GARCÍA CANTERO ET AL., EL MATRIMONIO: ¿CONTRATO-BASURA O BIEN SOCIAL? [MARRIAGE: WORTHLESS CONTRACT OR PUBLIC GOOD?] 95–102 (2008).

8. *See* C. Martínez de Aguirre, *Family Law in Spain: Contractualisation or Individualisation?*, *in* CONTRACTUALISATION OF FAMILY LAW - GLOBAL PERSPECTIVES 306–08 (Frederik Swennen ed., 2015).

9. The notion of marriage as a legal bond comes from canon law, in ancient Roman law, marriage was only a *de facto* situation, with legal consequences. *See e.g.*, ALVARO D'ORS, DERECHO PRIVADO ROMANO [PRIVATE ROMAN LAW] 284 (1986). *See also* Pedro de Pablo, *El matrimonio y el Derecho civil [Marriage and Law] in* CURSO DE DERECHO CIVIL IV: DERECHO DE FAMILIA [HANDBOOK ON CIVIL LAW IV: FAMILY LAW], *supra* note 1, at 54–57.

was linked to human procreation. Thus, the main features of marriage one could depict were stability, heterosexuality (man and woman) and sexual content, both linked to procreation, unity (only one man and one woman), and a community of life, legally expressed in the duties of marriage.[10]

The following sections describe the changes these features have undergone under current Spanish Law, as well as under the laws of many western countries.

A. Marital Duties

According to the Spanish Civil Code ("SCC"), spouses are obliged to live together, to be faithful to one another, to come to one another's aid, to respect and assist each other, and to act in the family interest.[11] These are the legal duties of marriage, and the legal notion of marriage in Spanish Law arises from these duties. Indeed, the fulfillment of the obligations for a lifetime seems to be a real community of life. After the reform of Spanish marriage law in 2005,[12] the marital duties have become non-binding obligations, that is to say, obligations that do not oblige, at least from a legal standpoint. As the law stands in the Spanish legal regime, marital duties have virtually

10. These main features of the "western model of marriage" (this expression comes from RAFAEL NAVARRO-VALLS, MATRIMONIO Y DERECHO [MARRIAGE AND THE LAW] 7 (1995), come from canon law, which is the "classic law" relating marriage, D'ORS, *supra* note 9 at 285, and were received in civil law for centuries. For a brief summary of these features in JOSE CASTÁN TOBEÑAS, DERECHO CIVIL ESPAÑOL, COMÚN Y FORAL 5.I [SPANISH CIVIL LAW, GENERAL AND REGIONAL], 129–135 (12th. ed., 1995). For a discussion about the appearance and consolidation of this model, its characteristics, and its influence on the laws of western Countries, see generally, HANS HATTENHAUER, CONCEPTOS FUNDAMENTALES DEL DERECHO CIVIL [FUNDAMENTAL CONCEPTS OF CIVIL LAW] 131–153 (1987); NAVARRO-VALLS, *supra;* and JEAN GAUDEMET, EL MATRIMONIO EN OCCIDENTE [MARRIAGE IN WESTERN COUNTRIES] (1993).

11. Civil Code art. 67 (Spain) ."The spouses must respect and assist each other and act in the family interest." Article 68 Spanish Civil Code: "The spouses are obliged to live together, to be faithful to one another and to come to one anothers' [sic] aid. They must, furthermore, share domestic responsibilities and the care and attendance of parents and descendants and other dependents in their charge." The English translation of the Spanish Civil Code is available here: *Spanish Civil Code*, COLECCIÓN: TRADUCCIONES DEL DERECHO ESPAÑOL [COLLECTION:TRANSLATIONS OF SPANISH LAW], http://www.mjusticia.gob.es/cs/ Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/ traducciones-derecho-espanol (last visited Jan. 28, 2016). Hereinafter, translations of the Spanish Civil Code come from this source, except when the articles have been modified after the date of this translation.

12. Ley 13/2005 por la que se Modifica el Código Civil en Materia de Derecho a Contraer Matrimonio (B.O.E. 2005, 157, July 2) (Spain) (same-sex marriage act); Ley 13/2005 por la que se Modifican el Código Civil y la Ley de Enjuiciamiento Civil en Materia de Separación y Divorcio (B.O.E. 2005, 163, July 9) (Spain) (divorce on demand act).

no legal significance. Their breach does not have any legal consequence whatsoever. There is only one exception, which is the duty to provide financial assistance. On account of its economic content, no legal remedies are granted to the aggrieved spouse, and there are no relevant legal sanctions on the "breaching" spouse. On the other hand, either spouse can terminate these "duties" by means of divorce, which ultimately depends only on his or her will. Therefore, an obligation whose breach does not have any legal consequence and whose termination depends on the mere will of the obligated person is no longer an obligation.[13]

B. Stability

Stability has also disappeared after the introduction of divorce "on demand." According to the SCC, divorce will be granted by the Judge at the request of both spouses or only of one of them, provided this request is made after the lapse of three months from the wedding. Neither a specific ground for divorce nor an agreement between the spouses is needed to obtain the divorce.[14] The mere groundless will of one of the spouses is enough. The Judge is not allowed to reject the request of divorce, provided the request fulfills the formal legal requirements. The Spanish legislature turned another screw towards the facilitation of divorce this very summer when it

13. *See generally* C. Martínez de Aguirre, *El Nuevo Matrimonio Civil [The New Civil Marriage]*, *in* NOVEDADES LEGISLATIVAS EN MATERIA MATRIMONIAL [LEGISLATIVE NOVELTIES IN MATTERS OF MARRIAGE] 13 (C. Martínez de Aguirre ed., 2008).

14. Civil Code art. 86 (Spain) ("Divorce shall be decreed by the court, whatever the form of performance of the marriage, at the request of one of the spouses, of both or of one with the consent of the other, when the requirements and circumstances of article 81 are met.");
Civil Code art. 81 (Spain) ("Legal separation shall be decreed when there are non-emancipated minors or persons with amended legal capacity such that they depend on their parents, however the marriage celebration was performed: First, [a]t the request of both spouses or of one with the consent of the other, after the lapse of three months from the performance of the marriage. The claimant must necessarily attach the proposal of settlement agreement, in accordance with article 90 of this Code. Second, [a]t the request of one of the spouses, after the lapse of three months from the performance of the marriage. The lapse of this period shall not be required to file the claim when there is evidence of the existence of risk to the life, physical integrity, freedom, moral integrity or sexual liberty and integrity of the spouse filing the claim or the children in common or any member of the marriage. The claim shall attach a reasoned proposal of the measures which are to regulate the effects of the separation." The first paragraph has been modified by the Act 15/2015, of 2 July (B.O.E. 2015, 158, July 3). The English translation is available at http://www.mjusticia.gob.es/cs/Satellite/Portal/ 1292427606861? blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DLaw_15_2015__on_non-contentious_proceedings_%28Ley_ de_ Jurisdiccion_Voluntaria%29.PDF.

passed a bill that eliminated the need for a judicial decision granting divorce; if there is an agreement between the spouses, and children are not involved, a notarial deed is enough to get the divorce.[15]

This divorce "on demand," as it is regulated in Spanish Law, has changed both the meaning and legal nature of marriage. It used to be said that marriage was a contract because the will of both spouses, husband and wife, was necessary to get married. In addition, marriage used to be considered more than a contract, due to a legal framework that created boundaries to the will of the spouses, mainly regarding the basic structure and the dissolution of marriage. However, now one could reasonably conclude that, from a legal point of view, marriage has become less than any other contract. This follows from its newly non-binding nature as well as from the fact that every spouse can freely decide to put an end to the marriage at any time, his or her will being sufficient. With this legal regulation, marriage has been, so to speak, de-contractualized.

C. Heterosexuality and Procreation

In Spanish Law, since the reform of the Civil Code of 2005, marriage is no longer a union between a man and a woman. Pursuant to its Article 44, "[m]arriage shall have the same requirements and effects when both prospective spouses are of the same or different gen-

15. Civil Code art. 87 (Spain): ("The spouses may also agree their divorce via mutual agreement by way of binding agreement before the clerk of the court or in public deeds before the notary, in the manner and with the content regulated in article 82, fulfilling the same requirements and details required within said article. Diplomatic or consular functionaries may not authorise public deeds of divorce while performing their notarial functions."); Civil Code art. 82 (Spain): ("1. The spouses may mutually agree their separation after three months has transpired since the celebration of their marriage, by way of a binding agreement before the clerk of the court or in public deeds before a notary, in which, as well as expressing their unequivocal desire to separate, they must detail the measures to be taken to regulate the effects arising from the separation, in accordance with the stipulations of article 90. Diplomatic or consular officials may not authorise public deeds of separation while performing their notarial functions. The spouses must personally intervene in the proceedings to provide their consent before the clerk of the court or the notary, without prejudice to the fact they must be represented by a practising barrister. Equally, children of age or emancipated minors must grant their consent before the clerk of the court or the notary with respect to any measures that affect them due to lack of own income or living in the family home. The stipulations of this article shall not be applicable if there are children not yet of age or not emancipated, or with legally amended capacity, through which they depend on their parents." The English translation is available at http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427606861?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DLaw_15_2015__on_non-contentious_proceedings_%28Ley_de_Jurisdiccion_Voluntaria%29.PDF).

ders." Thus, heterosexuality has disappeared from the equation, and, by the same token, marriage is no longer linked to procreation, since same-sex couples are sterile due to the internal structure of the relationship. Indeed, children are never conceived from sexual intercourse between two men or between two women. In contrast, children are conceived from sexual intercourse between a man and a woman. So, same-sex couples have a non-procreative structure, while opposite-sex couples have a procreative structure. Same-sex couples are sterile not because a pathology of the relationship, but on account of the very structure of this relationship. From a social point of view, this is a very relevant difference between same-sex and opposite-sex couples.

D. Conclusion: Not the Rules, but the Game Has Changed

With all these legal changes, Spanish Law has performed a real deconstruction of legal marriage: stability, heterosexuality, procreation, and the content of marriage as a real community of life, expressed in the marital duties, have been disbanded. The result of this process of deconstruction is a concept of marriage and family in which the individual will of its members is far more important than the common "family interest." Consequently, there is no "family interest" other than the individual interest of each member of the group. Marriage and family have become no more than a mere instrument for the achievement of the individual and isolated happiness of its members and the free development of their personalities.

The result is also that legal marriage is increasingly becoming only a name and some legal or social formalities, an empty shell and a legal inertia. Every individual can fill this empty shell with his or her preferred content, supposedly designed to make him or her happy. This creates the assumption that if one of the spouses is not happy, he or she is allowed to change the persons, the content, or the very model of his or her family relationships. This approach is consistent with the notion of marriage as an intimate association between two persons, a two-person intimate union unlike any other in its importance to the committed individuals, as the U.S. Supreme Court stated in *Obergefell v. Hodges*, 576 S. Ct. 135 (2015).

To sum up the evolution of legal marriage, it is not the rule, but the game itself that has changed.

III. WHERE IS FAMILY LAW GOING? FROM THE "NORTH POLE EXPLORER" PARADOX TO THE SIGN ON THE BENCH

After this short excursion into marriage, we can go back to Family Law as a whole and to the changes it has experienced in the last decades from the point of view of the consequences of these developments.

A. The North Pole Explorer Paradox

All the legal changes experienced by marriage and family are supposed to be made in order to achieve better family relationships. Our time has witnessed an impressive effort to identify the best model related to sex, marriage, and family relationships. Governments, groups, and individuals have devoted a great deal of time and effort into looking for the improvement of family life. Hence, in many countries there are Ministries of Family, or other similar bodies.[16] Further, there are also public organizations oriented towards family, which try to improve the living conditions of the families. National, regional, and local plans of support to the families have also been set in motion. Moreover, marriage counselors, parenting schools, and family enrichment courses that promote skills for the optimal development of family life are also available. Hundreds of books and websites about how to improve family life, how to have a successful family, or how to build a happy family with happy members have been written. However, in light of all these obvious efforts to enhance the

16. *See, e.g.*, BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND [Federal Ministry of Family, Senior, Women and Youth], http://www.bmfsfj.de, (last visited Feb. 29, 2016)(Germany), *Ministère des familles, de l'enfance et des droits des femmes* [Ministry of Family, Children and Women's Rights], GOUVERNEMENT.FR [GOVERNMENT OF FRANCE], http://www.gouvernement.fr/ministre/laurence-rossignol (last visited Feb. 29, 2016); *Dipartimento per le Politiche della Famiglia* [Department for Family Policy], GOVERNO ITALIANO [ITALIAN GOVERNMENT], http://www.politichefamiglia.it (last visited Feb. 29, 2016); *Dirección General de Servicios para la Familia y la Infancia* [General Directorate of Services for Family and Childhood], MINISTERIO DE SANIDAD, SERVICIOS SOCIALES E IGUALDAD [MINISTRY OF HEALTH, SOCIAL SCIENCES, AND EQUALITY] http://www.msssi.gob.es/organizacion/ ministerio/organizacion/SEssi/dgsfiF.htm (last visited Feb. 29, 2016)(Spain); *Child and Family Agency*, DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS, http://www.dcya.gov.ie/ viewdoc.asp?fn=%2Fdocuments%2Fchid FamilySupportAgency%2FOverview2014.htm&mn= chif&nID=1 (last visited Feb. 29, 2016)(Ireland). For an example outside of Europe, see *Ministerio de la Familia, Adolescencia y Niñez* [MINISTRY OF FAMILY, YOUTH AND CHILDHOOD], www. mifamilia.gob.ni/ (last visited March 15, 2016)(Nicaragua); MINISTÉRIO DA FAMÍLIA E PROMOÇÃO DA MULHER [MINISTRY OF FAMILY AND WOMEN ADVANCEMENT], http://www. minfamu. gov.ao (last visited Feb. 29, 2016)(Angola).

family, it is striking to witness the sharp decrease of the quality standards linked to family life that is currently taking place: the decline in the number of marriages,[17] and in the number of children growing in a stable family;[18] the increase of family break-ups;[19] the decrease of the fertility rate;[20] the increasing rate of births out of wedlock;[21] the rates of suicide among children and youth;[22] the rate of psychopathologies due to causes linked to the problems of family life;[23] and so on.

This shocking paradox has been accurately explained by Professor Viladrich, with the "fable of the North Pole Explorer."[24] Imagine an

17. *See, e.g.*, *Key Facts on Committed Relationships*, ONE PLUS ONE, http://www. one plusone.org. uk/content_topic/committed-relationships/key-data/ (last visited Feb. 29,, 2016); *See also*, Lois M. Collins, *U.S. Marriage Rate Hits New Low and May Continue to Decline*, DESERET NEWS (May 20, 2015), http://national.deseretnews.com/article/4535/us-marriage-rate-hits-new-low-and-may-continue-to-decline.html; *Los matrimonios en España se reducen casi a la mitad en los últimos 35 años* [Marriages in Spain Have Reduced by Half in the Last 35 Years], EL MUNDO [THE WORLD] (Mar. 15, 2015, 3:19 PM), http://www.elmundo.es/elmundo/ 2013 /03/ 15/espana/1363356355.html.

18. *See, e.g.*, *Family Structure*, CHILD TRENDS DATABANK, http://www.childtrends.org / ?indicators=family-structure (last visited Mar. 9, 2016). *Fewer Than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RESEARCH CENTER (Dec. 22, 2014), http://www. pewresearch. org/ fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/.

19. *See e.g.*, *Factsheet: Seperation and Divorce*, RELATE, http://www.relate.org.uk/files/ relate/separation-divorce-factsheet-jan2014.pdf (last visited Feb. 29, 2016); *see also Marriage and Divorce Statistics*, EUROPEAN UNION, http://ec.europa.eu/eurostat/statistics-explained/ index.php/ Marriage_and_divorce_statistics#Fewer_marriages.2C_more_divorces (last updated June 2015).

20. *See e.g.*, *The Decline in U.S. Fertility*, POPULATION REFERENCE BUREAU, http:// www. prb.org/Publications/Datasheets/2014/2014-world-population-data-sheet/us-fertility-decline-factsheet.aspx (last updated Dec. 2014). *See also Fertility Statistics*, EUROPEAN UNION, http:// ec.europa.eu/eurostat/statistics-explained/index.php/Fertility_statistics (last updated June 2015).

21. *See, e.g.*, Carl Haub, *Rising Trend of Births Outside Marriage*, POPULATION REFERENCE BUREAU, http://www.prb.org/Publications/Articles/2013/nonmarital-births.aspx (last updated Apr. 2015). *But see* Gretchen Livingston & Anna Brown, *Birth Rate for Unmarried Women Declining for the First Time in Decades*, PEW RESEARCH (Aug. 13, 2014), http:// www. pewresearch.org/fact-tank/2014/08/13/birth-rate-for-unmarried-women-declining-for-first-time-in-decades/; *Marriage and Divorce Statistics*, *supra* note 19.

22. *See Suicide Among Youth*, CENTERS FOR DISEASE CONTROL AND PREVENTION http://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/suicideyouth.html (last updated Aug. 1, 2013).

23. *See, e.g.*, Roald C. Kessler et al., *Childhood Adversities and Adult Psychopathology in the WHO World Mental Health Surveys*, 197 BRIT. J. PSYCHIATRY 378, 378–85 (2010), *available at* http://bjp.rcpsych.org/content/197/5/378; Brian M. D'Onofrio, *Consequences of Separation/ Divorce for Children*, ENCYCLOPEDIA ON EARLY CHILDHOOD DEVELOPMENT (June 2011), http://www.child-encyclopedia.com/divorce-and-separation/according-experts /cons equences-separationdivorce-children.

24. PEDRO-JUAN VILADRICH, AGONÍA DEL MATRIMONIO LEGAL: UNA INTRODUCCIÓN A LOS ELEMENTOS CONCEPTUALES BÁSICOS DEL MATRIMONIO [THE AGONY OF

explorer wants to reach the North Pole driving his dogsled. On the first day, before beginning his journey, the explorer checks the direction with his compass and begins to move at a high speed on a snowy frozen ground towards the north. He stops every three hours and verifies the direction of his trip with the compass. Each and every time, after reassuring himself that he is heading north, he notices that he is further from the North Pole than he was at the beginning of the day. At the end of the day—after twelve hours of exhausting effort during which he has continually travelled north—he is further from the North Pole than he was in the morning. How is this possible? To solve this paradox, one has to adopt a different perspective. From a birds-eye-view, we would be able to notice that the explorer is making his journey on a very huge iceberg, which is going to the south faster than he is able to go to the north in his dogsled. The conclusion of Professor Viladrich, as well as my conclusion, is that to better understand the reasons for this crisis of the family, and for Family Law, we have to gain perspective; all the social and public efforts relating to family life are based on incorrect assumptions about family and human relations. We are devoting substantial efforts to peripheral family issues, but we are failing in the way we, as a society, are dealing with the core aspects of family life. It is therefore imperative to completely rethink the way our western societies are dealing with sex, marriage, and family.

B. The Sign on the Bench, and the Recovery of the Main Purpose of Family Law

In my opinion, for this debate to be useful, we must adopt a teleological point of view. In other words, the focus should be on the foundational question of Family Law: why do society and law take care of sex, marriage, and family? To clarify this idea, it might be appropriate to think about benches and signs. Imagine a bench, on which there is a sign that reads "do not sit." We may ask ourselves what to do—leave the sign on the bench, remove it, remove both the sign and the bench, or put a similar sign on every bench. To find the best answer, we first need to know why that sign is on the bench and what that sign is on the bench for. We can then figure out the various answers. If the sign was put there when the bench was painted so that

LEGAL MARRIAGE: AN INTRODUCTION TO THE BASIC CONCEPTUAL ELEMENTS OF MARRIAGE] 20 (2d ed. 1989).

nobody got stained when sitting on it, the reasonable thing is to remove the sign once the paint is dry. If it was put there because the bench is in such disrepair that it could cause accidents if people sit down, then either the bench should be repaired and the sign removed, or both bench and sign should be removed. If the sign was put there because the bench has historical or artistic value and needs to be preserved, then the sign and the bench should remain, and an identical sign should be put on all the benches with the same value.

Something similar occurs with Family Law, and more specifically with the relationship among the different family models. What should we, the law and society, do with family? Should all those new models be regulated by the same rules as marriage? Should marriage be directly abolished? Should we change the main content and regulation of marriage, thus making it unrecognizable? Should we establish different regulations for each one of those family models or even stop regulating some of them? These questions are going to be briefly addressed hereafter, using marriage as an example.

The "modern" approach to family and Family Law seems to be based on love and cohabitation.[25] It follows that the law and society as a whole would be concerned with family because it is a relationship that involves love because it is a situation of cohabitation or, above all, because it is a situation of cohabitation that involves love. "The idea of two people loving each other and living together [would seem to] be enough for the law."[26] This approach was applied to marriage first to eliminate the legal differences between married and unmarried couples, then to regulate same-sex couples, and finally to admit same-sex marriage. This process has taken place within about two decades. Today, this approach is also applied to the relationship between parents and children. Parenthood no longer seems to depend on biological filiation but on love and cohabitation between an adult and one or several children that this adult is taking care of.[27] That is

25. Spanish Law often uses the expression "*convivientes unidos por una relación de afectividad análoga a la conyugal*", meaning (partners joined in a sentimental relationship analogous to marriage). For information about the real meaning of this expression, see Carlos Martínez de Aguirre Aldaz, *Nuevos modelos de familia: la respuesta legal* [New Family Models: The Legal Answer], 64 REVISTA ESPAÑOLA DE DERECHO CANÓNICO [SPANISH REV. OF CANON L.], 703, 713 (2007).

26. *See* Carlos Martínez de Aguirre, *Is "Living Together, Loving Each Other" Enough for Law?: Reflections on Some "Brave New Families,"*; 3 INT'L J. JURISPRUDENCE FAM. 37, 43 (2012).

27. For information about the decline of blood ties in recent Family Law, see George. W. Dent, Jr., *Families We Choose?: Visions of a World Without Blood Ties*, 2 INT'L J. JURISPRUDENCE FAM. 13, 14–20 (2011).

the reason we are beginning, with the help of the new reproductive technologies, to discuss legal tri-parentality or pluri-parentality, in cases in which a new spouse shares child rearing responsibilities with the child's biological parents.[28] Or, in the case of two lesbian mothers and a gay father, who provided the sperm and wants to have a legal relationship with the child. Many legal conflicts arise from these situations, and there have been several striking cases before the courts of the United Kingdom.[29] This is the reason we are now dealing with same-sex adoption.[30]

This paper does not provide an in-depth analysis of vertical and horizontal angles of family relations. The horizontal aspect, based on love and cohabitation, does not solve the problem of brothers or friends who live together and love each other, as brothers or friends do: there is love and there is cohabitation, but it does not seem to be enough for the law. Of course, there is a material difference between brothers or friends and partners: sex. Unmarried couples have sexual intercourse, and brothers or friends do not. Why is having sex relevant to society, and hence to law? I think that the answer is children. Children (new citizens) usually come from sexual relations between their biological parents, and this is clearly in the interest of society. At this juncture, it is also clear that the social importance of heterosexual couples is far superior to that of same-sex ones. Society is more interested in heterosexual couples, largely because citizens are born as a result of the internal dynamics of the relation itself (i.e., as a result of the sexual intercourse between the man and the woman composing the couple), and no citizens are born as a result of sexual intercourse between same-sex couples.

The family is a human group of primary social interest, due to its roles in relation to society. From a social point of view, family is connected with the survival of society to the extent it results in the birth

28. *See* Mary Welstead, *The Battle for Parenthood: nLesbian Mothers and Biological Fathers*, 2014 INT'L SURV. FAM. L. 97 (2014).

29. *See* Sylvie Cadolle, *Allons-nous vers une pluriparentalité ? L'exemple des configurations familiales recomposées* [*Are we heading to pluri-parentality? The Example of Stepfamilies*], 4 RECHERCHES FAMILIALES [FAM. RES.] 13 (2007), *available at* www.cairn.info/revue-recherches-familiales-2007-1-page-13.htm (Fr.).

30. Carlos Martínez de Aguirre Aldaz, *La Adopción Conjunta por Matrimonios Homosexuales: El Efecto Indirecto (pero Querido) de una Reforma Matrimonial* [*Joint Adoption by Same-Sex Married Couples: The Indirect (but Wanted) Effect of a Marriage Reform*], 91 REVISTA DE DERECHO PRIVADO 3[REV. PRIVATE L.] (2007); Carlos Martínez de Aguirre, *The Principle of Verisimilitude of Artificial Filiation Links: Biology as a Model for the Law of Parent and Child*, 2 INT'L J. JURIS. FAM. 315, 330 (2011) [hereinafter *The Principle of Verisimilitude*].

of new citizens, offers an adequate framework for their integral development as human beings, and facilitates their harmonic integration into society. These are the strategic functions of family from a social point of view, which are better fulfilled by heterosexual couples.[31]

On the other hand, the process of integral maturing of human beings goes far beyond the purely biological aspects; it also includes the development of their intellectual, volitional, and emotional potentialities. As such, family units have a mission to provide an adequate framework within which such a process of humanization and socialization can be developed. This process is linked to family stability (i.e. the union of the father and the mother) that can guarantee that the process is going to take place in the most appropriate way.[32]

Thus, the strategic family functions—which are the reason why society and the law look after this institution—are linked to heterosexuality and to stability. The stable heterosexual family model seems to best carry out the strategic functions of the family, and, therefore, it is the model that is most consistent with the reasons for the law's and society's interest in and regulation of that kind of relationship. The recovery of Family Law presupposes the recovery (or the keeping) of the heterosexuality and the stability of marriage. And this applies mainly to the debate about no fault divorce (also known as "groundless divorce" or "divorce on demand" in Spain) and same-sex marriage.

In the debate about same-sex marriage, the issue at stake is not the dignity of gay and lesbian people, whose dignity does not depend on the possibility of getting married to a man or a woman of their same sex; their dignity only depends on the fact that he is a man, and she is a woman. The issue is the meaning of marriage as such. As Justice Cordy said in his dissenting opinion in *Goodridge v. Department of Public Health*,

> [T]he Court has transmuted the "right" to marry into a right to change the institution of marriage itself . . . . only by assuming that "marriage" includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the "right" of same-sex couples to "marry."[33]

31. *See* Martínez de Aguirre, *supra* note 26, at 47.

32. *Id.* at 48.

33. Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 984 (Mass. 2003) (Cordy, J., dissenting).

From these conclusions, one could argue that the solution to the problem of family and Family Law is clear but not easy to implement. We have to regain perspective and proceed to a global rethinking of Family Law, from a teleological point of view. Changing the direction of an iceberg, especially if it is a huge one, is not an easy task. But, in my opinion, if we really want to keep playing the marriage and family game, and not just keep the name of the game, we must change the iceberg's direction. Ideas have consequences. Maybe the best way is to focus on children and to rebuild Family Law from a child-focused perspective. This relates not only to the education of the children already born (in other words, the "parenting" perspective) but also, in large part, to the "child production and education units," which are the families.

IV. DAFFY DUCK'S PLANE AND THE RECONSTRUCTION OF MARRIAGE

As shown above, marriage has lost a good part of its content (of its pieces) as a result of the recent evolution in most western countries. However, a piece of the original notion of marriage still remains: unity (a relationship between only two persons). Both the Spanish Constitutional Court in its ruling 198/2012 on November 6,[34] and the U.S. Supreme Court in *Obergefell v. Hodges* continuously mentioned the fact that marriage is formed by a couple. Quoting *Obergefell*, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[35]

This remaining piece—unity—is not the result of a given plan. The rationale behind these changes is not a marriage design. Rather, it is a consequence of the legal inertia mentioned above.[36] Now, allow me to use a personal experience. I remember, when I was a kid, a cartoon movie in which Daffy Duck was flying a plane, and the pieces of

34. The ruling is available in Spanish at https://www.boe.es/boe/dias/2012/11/28/pdfs/BOE-A-2012-14602.pdf (last visited March 15).

35. Obergefell v. Hodges, 135 S.Ct. 2584, 2589 (2015).

36. Indeed, as Chief Justice Roberts stated in his dissenting opinion to *Obergefell*, there is not any rationale in the majority opinion relating unity of marriage to only two persons. Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. *Id.* at 2621.

the plane were being dropped one by one. At the end, Daffy Duck was flying a plane in which the only remaining pieces were the propeller, the seat, the joystick, and a landing wheel. This particular "plane" was not the result of a rational design, and the only reason why the propeller was there was because it had not been dropped yet. In my view, the same thing has happened to marriage; many important pieces, such as stability, heterosexuality, procreation, and community of life legally expressed in marital duties, have been dropped, and unity (the couple) is still there simply because it has not been dropped yet, not because of a rational design. On the other hand, we were able to recognize the plane because of the propeller. The propeller led us to think that it was still a plane. Do we have such a "propeller" in marriage? In my opinion we have it: unity, a relationship between only two persons, might play this role. Every one of these pieces could have played that role, as every one of them is useful to show the reason why society and law are interested in marriage and family. Since what we have left is unity, at least for the time being (I am thinking of polyamory.[37]), we have to work with unity.

A change of perspective might be useful, moving the cursor from "couple" to "children." Family Law is not only about couples; it is about children as well. I would even dare to say that it is mainly about children (sons and daughters). Family Law from the perspective of the son or daughter will be displayed hereafter.

The point of departure could thus be that where there is a child, there is a couple—one man (the father) and one woman (the mother)—linked to the child by the biological and, at the same time, legal bond of filiation.[38] To state it otherwise, every child comes from one man and one woman (and usually from the sexual intercourse between this man and this woman). That is why, in my opinion, filiation is the basic founding relationship in Family Law. In natural filiation (apart from reproductive technologies), every son or daughter is the outcome of a couple, but not of every couple—specifically of a couple consisting of a man and a woman. Thus, Family Law is about couples because Family Law is about children (primarily, sons and daughters). From this point of view, one of the main social aims of

37. *See, e.g.*, THE POLYAMORY SOCIETY, http://www.polyamorysociety.org (last visited Feb. 26, 2016). *See also* Carolyn Moynihan, *Polyamorists Build Their Movement*, CONJUGALITY: A BLOG ON THE FUTURE OF MARRIAGE (Dec. 17, 2015), http://www.mercatornet.com/ conjugality/ view/polyamorists-build-their-movement/17361.

38. *See generally The Principle of Verisimilitude*, *supra* note 30, at 315.

marriage is uniting the father to his children. As ancient Roman lawyers used to say, *mater semper certa est, pater vero is est quem nuptiae demostrant* (the mother is always certain, the father is he whom the marriage indicates as such).[39] It follows from this that Family Law is about (first) having and (second) raising children and not only about raising children.

This is neither the product of the will of mankind nor the fruit of the social environment or history (as if cultural evolution or a conscious decision of mankind had chosen this particular system of reproduction); this has been given to us by nature. However, human beings are not very original in this point. The same pattern can be found in thousands of animal species. For example, regarding elephants, it would be very difficult to justify that a cultural evolution or heterosexist prejudice has led them to differentiate between male and female elephants, and thus to sexual reproduction. At this level, the distinction is natural, and it is related to procreation. Hence, from this point of view, being a man means being a potential father (the human being that can be a father), and being a woman means being a potential mother (the human being that can be a mother). From the perspective provided by the presence of a son or a daughter, there is only a generating couple, and this couple consists of one man (the father) and one woman (the mother).

I would like to emphasize that even after the 2005 Spanish legal reform and the efforts of the Spanish legislators to disconnect marriage from procreation, the Spanish Civil Code keeps attesting the legal link between marriage and procreation, as well as the relevance of heterosexuality in legal marriage. This can be found in the provisions that regulate the presumption of paternity of the husband (articles 116 and 117 SCC).[40] These articles of the Spanish Civil Code

39. "This is for the reason that the mother is always certain, although she may have been given to promiscuous intercourse; but the father is he whom the marriage indicates as such." Dig.2.4.5 (Paulus, on the Edict, Book 4).

40. Civil Code art. 116 (Spain): ("Children born after the marriage is performed and before three hundred days after the dissolution thereof, or after the legal or de facto separation of the spouses, shall be presumed to be children of the husband."); Article 117 of the Spanish Civil Code states:

> "If the child should be born within 180 days following performance of the marriage, the husband may destroy the presumption by declaring otherwise in a public instrument executed within six months of his becoming aware of the birth. The cases where he should have expressly or implicitly acknowledged his paternity, or should have been aware of the woman's pregnancy prior to performing the marriage shall be excepted from the foregoing, save when, in the latter case, such declaration in a pub-

keep talking about "husband" and "wife," and not merely spouses (as many of the articles of the Spanish Civil Code relating to marriage do in order to include same-sex spouses). This is the end result of a conscious decision of the legislator, who explains the rationale behind this choice in the Preamble to the Act 13/2005 with the following words: "the reference to the couple composed of husband and wife remains in . . . the Civil Code, given that the de facto assumptions that these articles refer to can only occur in the case of heterosexual marriages."[41] Thus, there is a relevant legal difference between opposite-sex marriages and same-sex marriages in Spanish Law, and this difference has to do with children (sons and daughters), who are the, so to speak, teleological element of Family Law.

In this case, the legal affirmation of the equality between same-sex and opposite-sex marriages needs to be adapted to the reality of the situation using the sole argument of the evidence of the situation itself. Only when there is procreation and therefore heterosexuality (procreation coming from the sexual intercourse between one man and one woman) can it be logical to establish that the husband is the father of the child his wife has given birth to. This presumption is based on solid biological facts (that children are the ordinary outcome of the sexual intercourse between men and women) and cannot remain without it. This presumption of paternity is not applicable to same-sex unions because the sexual intercourse between two men or two women never produces a child. That is why the Spanish 2005 reform had no choice but to reserve the application of the presumption of paternity to marriages between a man and a woman. It follows that the presumption of paternity continues to recognize the connection between marriage, heterosexuality, and procreation in current Spanish Law.[42] Once again, children make a difference.

The real deconstruction of Family Law began with the legal detachment between marriage and procreation. In Spanish Law, this happened in 1981, when the legal impediment of sexual impotence disappeared from the law. However, even after that reform, legal marriage kept its procreative structure of man and woman, the only

lic instrument should have been executed, with the consent of both spouses, prior to the marriage or subsequently thereto, within six months following the birth of the child.".

41. Preamble to the Act 13/2005, *II § 2°*, (B.O.E. 2005, 157, July 2)(Spain)(The translation into English comes from the author).

42. de Pablo Contreras, *supra* note 9, at 76.

structure that can lead to children. In 2005, this detachment became complete with same-sex marriage. At that point in time, legal marriage lost even its procreative structure. Therefore, reconstruction of legal marriage involves the recovery of the link between marriage and procreation. At least one of the means, if not *the* means, to recover it could be to have Family Law focused on children. This is because an ordinary child (son or daughter) means a couple consisting of a man and a woman (heterosexuality). Furthermore, having a child means a couple with only one man and one woman because the child has only one father and only one mother, and it means a stable couple, too, because there is a need of stability for his or her education.

In my opinion, a way to reconstruct marriage and Family Law could be focusing Family Law on children as its basic, teleological element. As explained above, children lead to the couple formed by one man and one woman, and this formation of family consisting of a child, father, and mother is the foundational cell of Family Law.