Chapter 2
And the Story Comes to an End: The Constitutionality of Same-Sex Marriages in Spain

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Abstract In January 2005 the Spanish Government introduced a bill amending the Civil Code to allow same-sex marriage. The bill was approved in July of 2005 with a small majority and the Conservative Popular Party challenged the new Act's constitutionality before the Spanish Constitutional Court. In 2012 the Constitutional Court decided the challenge upholding the constitutionality of the same-sex marriage statute. This chapter presents an overview of the debate on the constitutionality of Act 13/2005. It discusses the constitutional basis for the enactment of the statute as well as the arguments presented to challenge its constitutionality. It also presents a brief comparative analysis between the Spanish decision on same-sex marriage and the decision by the Constitutional Court of Portugal in the same issue.

In March of 2004, the Spanish Socialist Party (PSOE) won the General Elections and established a new majority. In January 2005, the Government introduced a bill amending the Civil Code (CC) to allow same-sex couples[1] to marry. When the Congress approved the bill in a second reading, it became Act 13/2005 of

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[1]The expressions "same-sex marriage" or "gender-neutral marriage" are used indistinctly, acknowledging that the notion of "sex" refers to a biological category whilst "gender" is a social construct. See further SCHUSTER, A.: "Gender and Beyond: Disaggregating Legal Categories" in Schuster (Ed.): *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, Editrice Universitaria Udinese srl, Udine, Italy, (2011), p. 31 and ff.

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July 1st (hereinafter referred as "Act 13/2005" or "the Act").[2] The Bill was passed with 187 votes in favor, 147 against and 4 abstentions. The Conservative Popular Party (PP) presented an appeal against its constitutionality before the Spanish Constitutional Court (TC).[3] The Council of the State,[4] the General Council of the Judiciary (CGPJ)[5] and the Royal Academy of Jurisprudence and Legislation (RAJL)[6] respectively issued reports on the matter. There have been political, legal and social debates with arguments both in favor and against the Act.

The Spanish Constitution (CE) and the principles and values contained in it are the starting point and the basis of Family Law in Spain and, therefore, most of the legal debate has revolved around the constitutionality of the Act.[7] After 7 years, the TC decided the appeal against the constitutionality of Act 13/2005 through STC 198/2012[8] in which the Court rejected the appeal and affirmed the constitutionality of gender-neutral marriages in Spain.

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[2] *Act 13/2005, of 1st July, amending the Civil Code with regards to the right to marry. Boletin Oficial del Estado* (BOE) N. 157, of 2nd July 2005, pp. 23632–23634.

[3] *Appeal against constitutionality nr. 6864-2005, relative to Act 13/2005, of 1st July, amending the Civil Code with regards to the right to marry.* Accepted for consideration by decision of the TC of 25th October 2005. *Boletín Oficial del Estado* (BOE) N. 273 of 25th November 2005, pp. 37313–37313.

[4] *Report of the Council of State n. 2628/2004, of 16th December 2004*, available at http://www.boe.es/buscar/doc.php?id=CE-D-2004-2628. The Council of the State is an advisory body which main duty is issuing reports and opinions on legislative drafts. See further, on the Council of the State, SÁNCHEZ NAVARRO, Á.J.: *Consejo de Estado, función consultiva y reforma constitucional*, Reus, Madrid, (2007).

[5] *Study on the amendment of the Civil Code regarding marriage between persons of same sex, of 26th January 2005*, available at http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Informes/Estudio-sobre-la-reforma-del-Codigo-Civil-en-materia-de-matrimonio-entre-personas-del-mismo-sexo. The General Council of Judiciary is the ruling body of the Judiciary and one of its functions is issuing reports on legislative drafts. This report was particularly against the enactment of the Act 13/2005, based on its possible unconstitutionality and on its "inconvenience," although there was an important number of dissenting votes against the decision of the majority of the CGPJ. See further on the General Council of the Judiciary, its composition and functioning, BALLESTER CARDELL, M.: *El Consejo General del Poder Judicial: su función constitcional y legal*, Consejo General del Poder Judicial, Madrid, (2007).

[6] *Report issued by the Royal Academy of Jurisprudence and Legislation relative to the bill amending the Civil Code with regards to the right to marry, of 14th March 2005,* available in *Anales de la Real Academia de Jurisprudencia y Legislación Núm 35 (2005)* pp. 939–941

[7] See, LÓPEZ AGUILAR, J.F.: "Los criterios constitucionales y políticos inspiradores de la reforma del Derecho Civil en materia matrimonial", *Actualidad Jurídica Aranzadi núm. 655 (digital edition)*, (2005).

[8] *STC 198/2012, of 6th November 2012.* STC is the usual abbreviation to refer to a judgment by the TC, while ATC is the usual abbreviation for a writ. Both abbreviations are hereinafter used in this chapter. The judgments and writs of the Spanish Constitutional Court are available at http://hj.tribunalconstitucional.es/HJ/en.

This chapter presents an overview of the debate on the constitutionality of Act 13/2005 through six different sections: Sect. 2.1 discusses the constitutional basis for the enactment of Act 13/2005; Sect. 2.2 analyzes the challenges to the constitutionality of the Act based on Article 32 CE; Sect. 2.3 examines relevant case law of the TC with regards to the notion of "institutional guarantee" vis a vis subjective rights; Sect. 2.4 focuses on the only occasion prior to STC 198/2012 where the TC discussed the "principle of heterosexuality"[9] in marriage; Sect. 2.5 discusses the debate and solution to the constitutionality of same-sex marriages in Portugal, which was decided 2 years before the Spanish case; Sect. 2.6 analyzes different aspects of STC 198/2012.

2.1 Constitutional Basis of the Debate on Same-Sex Marriage

2.1.1 Equality

Article 14 of the CE contains an Equality Clause that states: "Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance." The principle of equality must be understood in light of Article 9.2 CE, which sets an obligation on the State to promote equality while removing all obstacles that may impede its enjoyment. Article 14 CE also contains an open clause, as other "personal or social conditions or circumstances" may eventually be included within its scope. Sexual orientation is not expressly mentioned. The grounds expressly mentioned are subject to a more strict scrutiny by the TC when they are claimed.[10] Otherwise, the standard of review used by the Court is general scrutiny.[11]

[9]The expressions "principle of heterosexuality" (also "heterosexual principle" or "heterosexual element") and "heterosexuality" to refer to gender diversity in marriage are used by the TC in its case law and, often, by the Spanish legal scholarship. These expressions will also be used in this Chapter, even though they are not totally accurate. The so-called "principle of heterosexuality" refers to marriage conceived as a bilateral relationship where gender diversity is one of its elements, but it does not directly refer to the sexual orientation of the spouses.

[10]See *STC 81/1982, of 21st December 1982* and *STC 128/1987 of 16th of July 1987*.

[11]Some authors like GAVIDIA SÁNCHEZ, have considered sexual orientation within the ground of sex and, hence, included in the expressly mentioned grounds of Article 14 CE. However, discrimination based on sex is clearly different from that based on sexual orientation, and therefore an opposite-sex marriage where both husband and wife have the same rights and obligations seems in accordance with the ground of sex as mentioned in the Article 14 CE. Those, either men or women, who experience an attraction to people of their same sex are the ones affected by a regulation allowing only opposite-sex marriages, because of their sexual orientation. See further GAVIDIA SÁNCHEZ, J.V.: "La libertad de elegir como cónyuge a otra persona del mismo sexo y de optar entre el matrimonio y una unión libre (análisis crítico de la constitucionalidad del matrimonio homosexual y del llamado divorcio express)" in Gavidia Sánchez (Ed.): *La reforma del matrimonio (Leyes 13 y 15/2005)*, Marcial Pons, Madrid, (2007), pp. 25–77.

The TC has never established a set of criteria that should be followed in order to add a new ground to the expressly mentioned by Article 14 and that could trigger a stricter scrutiny by the TC. *Martín Sánchez* has argued that it may be possible to integrate sexual orientation as an expressly mentioned protected ground against discrimination. The argument requires an analysis of Article 14 CE in light of Article 10.2 CE,[12] which establishes that any interpretation of fundamental rights and liberties included in the CE must be done in line with the international treaties and agreements ratified by Spain. Since Spain is a Member State of the EU it is bound by its Treaties. The Treaty of the Functioning of the European Union expressly mentions the ground of sexual orientation as a suspicious ground for discrimination in its Articles 10 and 19.1. Thus, *Martín Sánchez* has argued that sexual orientation could and should be assimilated to the grounds already included in Article 14 CE.

The Charter of Fundamental Rights of the European Union, which currently has the same status as the Treaties, mentions sexual orientation in Article 21. Moreover, even if the European Convention of Human Rights (ECHR) does not include sexual orientation in the wording of its Article 14, the European Court of Human Rights (ECtHR) has reiterated in several occasions that sexual orientation must be considered as if it expressly appeared in the article itself.[13] Nevertheless, even though this interpretation may lead to the inclusion of sexual orientation as an assimilated ground to those expressly mentioned, that does not necessarily lead to the conclusion that there is a constitutional obligation to open marriage to same-sex couples.[14]

If we assume that sexual orientation is subject to strict scrutiny, some criteria must be fulfilled in order to assess whether legislation establishing some kind of differentiation is constitutional or not.[15] These criteria are:

- Comparability of factual situations.
- Existence of a *tertium comparationis*.
- The legislation must pursue a legitimate, objective, proportional and reasonable aim. When strict scrutiny applies, this aim has to be based on a constitutional purpose. Mere compatibility of the aim with the CE is insufficient to consider such differentiation constitutional.[16]

Still, application of these criteria does not automatically impose the legislature a constitutional obligation to open marriage to same-sex couples. It could be argued

[12]MARTÍN SÁNCHEZ, M.: *Matrimonio homosexual y constitución*, Tirant lo Blanc, Valencia, (2008), pp. 90–100.

[13]See, *inter alia*, the cases of the ECtHR: *Salgueiro da Silva Mouta v. Portugal,* of 21 December 1999, para. 28; S.L. v Austria, of 9 January 2003, para. 37; E.B. v. France, of 22 January 2008, paras. 91, 93.

[14]See, *inter alia*, *Schalk and Kopf v. Austria*, of 24 June 2010.

[15]See MARTÍN SÁNCHEZ, M.: *Matrimonio homosexual y constitución*, *op.cit.* pp. 35–100 and FERNÁNDEZ SEGADO, F.: *El Sistema Constitucional Español*, Dykinson, Madrid, (1992), pp. 190–209.

[16]MARTÍN SÁNCHEZ, M.: *Matrimonio homosexual y constitución*, *op.cit.* p. 99.

that there would be no different treatment if factual situations are different and the legislator is simply providing different legal consequences to situations that were originally in a different legal framework.[17]

Following Article 14 CE, it could eventually be argued that legal institutions other than marriage may ensure equality as in the case of introducing legislation on registered partnerships with protections similar to marriage. Opening marriage to same-sex couples, however, is possibly the best way to fulfil the mandate of Article 9.2 CE, which seeks to promote "conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective" and remove "the obstacles which prevent or hinder their full enjoyment." Among the different options open to the legislator, the one which eliminates the most differences is the one that best fulfils Articles 14 and 9.2 CE.

2.1.2 Dignity

Human dignity appears in Article 10.1 CE. Also, Article 11 CE considers dignity as one of the highest values of the legal system.[18] Moreover, dignity is linked to principles of equality and liberty, and all fundamental rights and freedoms included in Title I of the CE. Does the exclusion of same-sex couples from marriage, exclusion based on sexual orientation, contradict the principle of dignity? Some jurisdictions, like South Africa, consider the prohibition of same-sex marriage a contradiction with the value dignity.[19] The CE, however, does not allow a similar inference. Nonetheless, even if an exclusively opposite-sex marriage policy is unlikely unconstitutional on the basis of the principle of dignity,[20] such principle supports the enactment of Act 13/2005, in the same way as explained above with regards to equality.

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[17] See *STC 148/1985* of 25th November and FERNÁNDEZ SEGADO, F.: *El Sistema Constitucional Español*, *op.cit.* pp. 190–209. FERNÁNDEZ SEGADO points out the possibility of "discriminating by no establishing differences", which would occur if the legislature did not establish different legal consequences to different factual situations. This approach has never been followed by the TC.

[18] Following this interpretation, MARTÍN SÁNCHEZ, M.: *Matrimonio homosexual y constitución*, *op.cit.* See also *STC 337/1994,* of 23rd December 1994.

[19] See further, decision of the Constitutional Court of South Africa *Minister of Home Affairs and Another v. Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005*).

[20] For an opposite point of view, see MARTÍN SÁNCHEZ, M.: *Matrimonio homosexual y constitución*, *op.cit.,* pp. 100–111.

2.1.3 Liberty

Article 1.1 CE recognizes the principle of liberty as a high value within the Spanish legal system. Moreover, Article 10.1 CE establishes that the "free development of the personality" is a "foundation of political order and social peace." Some political parties highlighted the importance of the free development of personality during the parliamentary debate of Act 13/2005.[21] Same-sex marriage may be seen as a step towards the fulfilment of the constitutional value of liberty.[22] Even though other options like registered partnerships are possible, the introduction of a gender neutral marriage seems the best way to fulfil both constitutional provisions of Articles 1.1 and 10.1 CE.

2.2 Challenges to the Constitutionality of Act 13/2005: Article 32 CE and Heterosexuality as a Defining Element in Marriage

The first four challenges to the constitutionality of Act 13/2005 came from Spanish judges in charge of civil registries where same-sex couples attempted to get married. According to Article 163 CE, "when a judicial body consider, within a proceeding, that a regulation with legal status, applicable to the proceeding, and upon the validity of which the judgment depends, may be contrary to the Constitution, will bring the matter before the Constitutional Court in the circumstances, manner and subject to the consequences established by law, which shall in no case create a stay."[23] In each case the TC dismissed the constitutionality issue on procedural grounds and did not review the request on the merits.[24]

Later, the PP appealed the constitutionality of Act 13/2005 (hereinafter referred as "Appeal 6864-2005" or " the Appeal"). The Appeal argued that the Act violated several articles of the CE. The key one was Article 32 CE. After 7 years, STC 198/2012 affirmed the constitutionality of the Act.

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[21] See, e.g. *DS Congreso de los Diputados N. 78 of 17th March 2005* available at http://www.congreso.es/public_oficiales/L8/CONG/DS/PL/PL_078.PDF.

[22] In a similar way, GAVIDIA SÁNCHEZ, J.V.: *La libertad de elegir como cónyuge a otra persona del mismo sexo y de optar entre el matrimonio y una unión libre (análisis crítico de la constitucionalidad del matrimonio homosexual y del llamado divorcio express)*, *op.cit.,* pp. 32–37.

[23] This way of challenging the constitutionality of an Act is named *cuestión de inconstitucionalidad*, literally "question of unconstitutionality". See further FERNÁNDEZ SEGADO, F.: *El Sistema Constitucional Español*, *op.cit.* p. 1082 and ff and PÉREZ ROYO, J.: *Curso de Derecho Constitucional*, Marcial Pons, Madrid, (1998), p. 691 and ff.

[24] *ATC 505/2005*, of 13th December 2005, *ATC 508/2005*, of 13th December 2005, *ATC 59/2006*, of 15th February 2006 and *ATC 12/2008*, of 16th January 2008.

Prior to STC 198/2012, the TC had never defined the content of the concept of marriage as contained in the CE. It had, however, referred to the marriage institute, the *de facto* unions and the "guarantee of institute"[25] in previous judgments. As mentioned, the Council of the State, the CGPJ, and the RAJL issued three reports, respectively.

The TC faced three possible positions with regards to the constitutionality of gender-neutral marriages: it is unconstitutional,[26] it is constitutionally possible, or it is constitutionally mandated. The three positions contain different perspectives and nuances.

Appeal 6864-2005 stated that Act 13/2005 did not respect the guarantee of the marriage institute recognized in the Constitution. Article 32 CE establishes the right to marry as follows:

> Men and women have the right to marry with full legal equality.
>
> 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.

There is no definition of marriage in the CE and it does not mention its elements.[27] Rather, it establishes the right to marry and involves an institutional guarantee following Article 53.1 CE: "the rights and liberties recognized in Chapter Two of the present Title are binding for all public authorities. The exercise of such rights and liberties, which shall be protected in accordance with the provisions of Article 161, 1a), may be regulated only by law [understood as acts or statutes passed by parliament] which shall, in any case, respect their *essential content*" (emphasis added). As the CE recognizes marriage as an institutional guarantee, it becomes a constitutional guarantee.

What is the concept of marriage recognized in the CE and how should the essential content that the legislator must respect be understood? The key question is whether the so-called "heterosexual element" or "principle of heterosexuality", that is, gender diversity, is part of the essential content of marriage, by determining the meaning of the terms "man" and "woman" in Article 32 CE.

Article 149.1.8ª CE reserves to the central State (as opposed to the Autonomous Communities) the enactment of rules related to the implementation of legal norms, including those needed for their interpretation. Article 3 of the Spanish Civil Code

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[25]The term "institute" is, broadly, used within the field of private law and "institution", most often, within the field of public law. However, for the purposes of this Chapter, the terms "institute" and "institution" will be used to refer to marriage indistinctly, as well as the expressions "institutional guarantee", "guarantee of institution" or "guarantee of institute."

[26]This was supported by *Appeal 6864-2005* and the *Reports* of the CGPJ and the RAJL.

[27]In the same way: GARCÍA RUBIO, M.P.: "Viejos y nuevos apuntes sobre la constitucionalidad del matrimonio homosexual" in Álvarez González (Ed.): *Estudios de Derecho de Familia y Sucesiones (dimensiones interna e internacional)*, Fundación Asesores Locales, Santiago de Compostela, (2009), pp. 171–197 and ASÚA GONZÁLEZ, C.I.: "El matrimonio hoy: sus perfiles jurídicos ad intra y ad extra", *Teoría y Derecho. Revista de Pensamiento Jurídico*, vol. 2, (2007), pp. 7–27.

(CC) lays down the general rules of interpretation as follows: "Legal norms shall be interpreted according to the proper sense of their words, in relation to the context, historical and legislative background, and social reality of the time when they shall be applied, taking into account their spirit and purpose."[28] These are the grammatical, historical and dynamic criteria.

2.2.1 Grammatical Criterion

Appeal 6864-2005 stressed the relevance of the grammatical interpretation of Article 32 CE according to the "proper sense of its words" of both the expression "man and woman" and the term "marriage."

Article 32 CE is the only article in the Constitutional text where "man" and "woman" are expressly mentioned. Other articles of the CE use terms and expressions such as "everyone has the right to . . . ", "every person", "the citizens", and so on. What is, therefore, the constitutional significance of this express reference to "man" and "woman"?

The appellants agreed with the arguments set forth in the report written by the Council of the State. This report stated that the reference to "man" and "woman" in Article 32 CE had a double purpose: on the one hand, it referred to the full legal equality between a man and a woman. Thus, the provision ensured that the legislature could not pass marriage regulations setting inequalities based on the sex of the spouses that could violate the principle of equality of Article 14 CE. On the other hand, the report of the Council of the State stated, this explicit mention to gender diversity meant that compliance with the equality clause of Article 14 CE in relation to Article 32 CE must start from what is laid down in Article 32.1 CE.[29] The Council of the State in its report, however, reached a different conclusion than the appellants. Whereas the appellants argued that the Act was unconstitutional, the Council of the State supported the interpretation that opposite-sex marriage was the only marriage constitutionally protected. It considered, however, that the legislator

[28]Traditionally, the rules for interpretation of norms have been introduced in the Civil Code, but these rules must comply with the CE, as this is hierarchically superior. However, and even though, the TC is only subject to the CE and the Organic Act of the Constitutional Court (LOTC), these criteria may be used, and are actually used, by the TC. See further BALAGUER CALLEJÓN, M.L.: *Interpretación de la Constitución y ordenamiento jurídico*, Editorial Tecnos, Madrid, (1997), pp. 78–80. See also ALONSO GARCÍA, E.: *La interpretación de la Constitución*, Centro de Estudios Constitucionales, Madrid, (1984), pp. 77–84, where the author is of the opinion that the TC could use and create new criteria for interpretation. Cfr, the *Report of the CGPJ,* p. 23.

[29]In a same way, although with different conclusions, GAVIDIA SÁNCHEZ has supported that the reference to the gender diversity in Article 32 CE is a special rule from the Article 14 CE. Therefore, without this reference to "man" and "woman" an opposite-sex only marriage would be unconstitutional by virtue of the equality clause of the Article 14 CE, see GAVIDIA SÁNCHEZ, J.V.: *La libertad de elegir como cónyuge a otra persona del mismo sexo y de optar entre el matrimonio y una unión libre (análisis crítico de la constitucionalidad del matrimonio homosexual y del llamado divorcio express)*, *op.cit.,* p. 29.

could introduce a gender-neutral marriage. In other words, it concluded that same-sex marriage was a constitutional option for the legislature.

An accurate interpretation of the Act requires reading the paragraph as a whole: "men and women have the right to marry with full legal equality." Before the approval of the CE, and during the Franco dictatorship, married women were clearly discriminated against. Article 32 CE eliminated any possibility of legislation that differentiated on the basis of sex with regards to marriage.

A grammatical interpretation does not conclude that the heterosexual principle is an essential element in marriage as described in Article 32 CE. Furthermore, Article 32 CE does not state at the end "man and woman have the right to marry *with each other.*" Alternatively, it is possible to argue that such reference may have been unnecessary because the Constituent Assembly in 1978 did not contemplate same-sex marriage. That claim, however, involves a historical criterion and not simply a grammatical one.

The Appeal also claimed that a grammatical interpretation of the term "marriage" would lead to the unconstitutionality of same-sex marriage. Appellants pointed out that the reform came to modify the "traditional, constitutional and legal conception of marriage as a union between a man and a woman," giving marriage "a different meaning from the one that it has always had."[30] Additionally, the appellants also stated that "marriage is, in its basic and central core, an institution of a precise outline which responds to the logic of the nature and social needs of our species."[31] They relied on, among others, old legal texts, like the Provisional Act of Civil Marriage of 1870, the Civil Code of 1889 or the Act of Civil Marriage of 1932, and even medieval texts like *Las Siete Partidas* or Las *Decretales,*[32] in order to conclude that *matrimonio* (marriage) came from *matris munium* ("care of the mother") and, therefore, it involved the idea of procreation and the union of a man and a woman.

However, the argument that marriage means a monogamous union between a man and a woman to further procreation may be challenged. First, marriage does not have a universal outline and definition, neither in time, nor in space. This is clear from the introduction of divorce, which challenged the traditional concept of marriage as an indissoluble bond or the existence of polygamous marriages in different countries. Second, marriage was once the only source of family relations and its main function was procreation. Now, Article 39 CE protects the family regardless of the existence of a marriage bond and infertility is no longer a ground for annulment. Moreover, gender neutral marriages already exist in other jurisdictions. *Asúa González* holds that the lack of a precise definition of "marriage" in the Spanish Civil Law is the result, in part, of the deliberate removal of marriage regulations from Civil Law to Canon Law in the pre-constitutional past, when the civil marriage was subsidiary to the canonical marriage.[33] In fact, Article 32 CE,

[30] *Appeal 6864-2005, FJ 1.*

[31] *Ibid.*

[32] *Ibid., FJ 2. Las Decretales* is actually Canon Law.

[33] ASÚA GONZÁLEZ, C.I.: "El matrimonio hoy: sus perfiles jurídicos ad intra y ad extra", *op.cit.* pp. 17–18.

especially in its second paragraph, may be considered a confirmation of the State's jurisdiction in marriage law, against that of Canon Law.[34] In any case, it does not seem accurate to claim a universal concept of marriage.

CGPJ's report also supported sex/gender diversity as essential to the concept of marriage. It enumerated definitions of marriage provided by different scholars, all of them including heterosexuality as a defining element of marriage. The report, however, erred by providing definitions written in the Spanish pre-constitutional period and others that still include indissolubility as an essential element of marriage, even though divorce has been legal in Spain since 1981.[35] The same could apply to the element of heterosexuality, which must be analyzed taking into account the current constitutional context.

The definition of marriage in the Dictionary of the Royal Academy of the Spanish Language (RAE) has also been used to support a grammatical interpretation of marriage as essentially requiring a male and a female. *Martínez de Aguirre* used this argument, in the context of a grammatical interpretation, in order to conclude that heterosexuality was a necessary element of the meaning of the term "marriage" in Spain.[36] The RAE, however, covers the Spanish language in many countries which do not have regulation on same-sex marriages. The RAE does not automatically modify the dictionary's definitions based on changing legislation in a particular country. Nevertheless, in 2012 the RAE added same-sex marriage to its definition of marriage: "In some jurisdictions, the union between two people of the same-sex, established by some rituals or legal formalities, with the aim of establishing a community of life and interests." Furthermore, Spanish is only one of the four languages spoken in Spain, together with Catalan, Galician and Basque. The *Institut d'Estudis Catalans,* the *Real Academia Galega* and the *Euskaltzaindia* have modified the definition of marriage for the Catalan, Galician and Basque languages, respectively, including, in the concept of marriage, that of two persons of the same sex.

Another argument against the value of a concept established by the RAE, following *Gavidia Sánchez*, is that definitions given by the RAE and other language scholars must be deemed irrelevant because they "lack democratic legitimacy."[37] Following this argument, definitions given by an institution like the RAE, which is not part of the structure of the Spanish "social and democratic State, subject to the rule of law" (Article 1.1. CE), should not bound the TC when following the

[34]In a similar way, although to support different arguments, DE PABLO CONTRERAS, P.: "La Constitución y la Ley 13/2005, de 1 de julio, de reforma del Código Civil en materia de derecho a contraer matrimonio" in Martínez de Aguirre Aldaz (Ed.): *Novedades legislativas en materia matrimonial*, Consejo General del Poder Judicial, Madrid, (2008), p. 72.

[35]*Act 30/1981, of 7th July 1981.*

[36]MARTÍNEZ DE AGUIRRE ALDAZ, C. and DE PABLO CONTRERAS, P.: "National Report: Spain", *Journal of Gender, Social Policy and the Law*, vol. 19, 1 (2011), p. 294.

[37]GAVIDIA SÁNCHEZ, J.V.: *La libertad de elegir como cónyuge a otra persona del mismo sexo y de optar entre el matrimonio y una unión libre (análisis crítico de la constitucionalidad del matrimonio homosexual y del llamado divorcio express)*, *op.cit.,* pp. 24–25.

grammatical criterion of interpretation. Accordingly, the expression "proper sense of the words" contained in Article 3 CC must not be understood as referring to the meaning described in a given dictionary drafted by a royal academy of the Spanish language. Such assumption would be an unacceptable limitation to the work of legal interpretation by the TC.

A grammatical analysis clearly concludes that opposite-sex marriages are constitutionally protected. It does not, however, lead to the conclusion that same-sex marriages are constitutionally forbidden. This conclusion does not close the debate on the constitutionality of same-sex marriage. A grammatical "proper sense of the words" analysis is likely the first criterion used to interpret the constitutionality of a statute, but it needs to be contrasted with other criteria, and it is not necessarily the element that will prevail.[38] A grammatical criterion, alone, is not a sufficient element of interpretation.

2.2.2 Historical Criterion

The historical criterion attempts to ascertain the intent of the Constituent Assembly. Appeal 6864-2005 stated that "the Constitution does not allow the public powers to change the sense of the words used by the Constituent [Power]."[39] The appellants argued that the Constituent Assembly of 1978 took the concept of marriage prevalent in 1978 and in the Spanish legal tradition and placed it at a constitutional level, the maximum level on the normative hierarchy. This approach followed an interpretation which reproduced the intention of the Constituent Assembly. Constitutional concepts and institutions would be "frozen in time" unless a constitutional amendment took place. Accordingly, the Appeal rendered Act 13/2005 unconstitutional because it does not respect the essential element and the intention of the Constituent Power.

The history of the Constituent Assembly's discussion, however, shows that in 1978 most of the debate about the meaning of Article 32 CE focused on paragraph two with regards to the possibility of legal divorce, as well as the recognition of canonical marriages.[40] With regards to the first paragraph of Article 32 CE, the discussion was mainly about ensuring equality between husband and wife before and during marriage, and upon its dissolution, and this may explain its wording. Issues related to homosexuality were left to discussions on Criminal Law, with

[38] ALBALADEJO, M., *Derecho Civil I, introducción y parte general*, pp. 150–153.

[39] *Appeal 6864-2005, FJ 1.*

[40] See *DS Congreso de los Diputados N. 72 of 23rd May 1978, pp. 2610 and ff; N. 107 of 11th July 1978, pp. 4073 and ff.* See also *DS Senado N. 45, of 29th August 1978, pp. 2000 and ff*; *N. 61, of 28th September 1978, pp. 3042 and ff.* Reports of the debates of both the Congress and the Senate can be found at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Publicaciones?_piref73_2342619_73_1340041_1340041.next_page=/wc/refrescarLegislatura.

the aim of decriminalizing homosexual sexual practices. It is, thus, clear that the dominant concept of marriage in 1978 Spain included the "heterosexual principle".

The dissolubility/indissolubility of the marital bond, however, was a matter of significant importance during the debates of the Constituent Assembly. Some of the arguments used to avoid including the term "dissolution" in the Constitution were similarly used a quarter of century later as arguments against same-sex marriages. Two amendments were introduced (and finally rejected) during the constitutional debates to leave the term "dissolution" out of the CE.[41] They were introduced by two members of parliament representing the political party *Alianza Popular* (AP).[42]

Opponents to divorce argued that indissolubility was a universal element of marriage. Likewise, appellants argued that the universal character of marriage included heterosexuality. Additionally, opponents of divorce used the "unique" regulation of divorce in the Constitution. For example, *López Bravo y De Castro* claimed the CE would be one of the very few constitutions to include dissolution of marriage in its text. Similarly, Appeal 6864-2005 argued that Spain would be the exception among countries by recognizing same-sex marriages. Opponents of divorce denied the need for dissolution of marriage. In this sense, *Mendizábal Uriarte*, in 1978, pointed out that including the term "dissolution" in the CE was not necessary because marriage was already dissoluble by death. Similarly, appellants argued that a prohibition of same-sex marriage did not discriminate against homosexuals on the basis of sexual orientation. In 2005, the appellants stated that nobody was discriminated against on the grounds of sexual orientation with regards to marriage because homosexuals were allowed to marry, as long as they married someone of their opposite sex.[43] Both opponents of divorce and of same-sex marriage argued that regulating dissolution/same-sex marriage went against a desirable consensus. Furthermore, appellants, like opponents to divorce, used previous legislation to support their definition of marriage. Finally, both opponents of divorce and appellants showed disdain for surveys that favored divorce/same-sex marriage. Therefore, it appears that appellants attempted to breathe new life into failed arguments used by opponents to divorce to challenge dissolubility of marriage almost three decades earlier.

It is self-evident, as the appellants correctly argued, that the historical criterion used to interpret constitutional norms shows that the Constituent Assembly solely contemplated opposite-sex marriage. The historical criterion, however, is only one of many possible criteria to consider. One significant problem with using the historical criterion is that the Constitution becomes a static document unable to adapt not only to social changes but also to terms whose contents may evolve with time.[44]

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[41] *DS Congreso de los Diputados N. 107, of 11th July 1978, pp. 4074 and ff.*

[42] The two members were *López-Bravo y De Castro* and *Mendizábal Uriarte Alianza Popular* changed the name to *Partido Popular* (PP) some years later. It is, therefore, the same party that appealed against the constitutionality of the Act 13/2005.

[43] Also in the *Report of the CGPJ*, p. 19.

[44] BALAGUER CALLEJÓN, M.L.: *Interpretación de la Constitución y ordenamiento jurídico*, *op.cit.* pp. 80–83.

The TC has only used the debates of the Constituent Assembly as an interpretative source in a few cases, and its use has not led to freeze constitutional concepts.[45] Moreover, in some decisions, the TC has considered the Constituent Assembly's debates as a criterion that works better when combined with others.[46] In other cases it has rejected an interpretation according to the intention of the Constituent Assembly because it did not reconcile with the "reality of the time" in which the law currently applied.[47]

Using the historical approach as the main source of constitutional interpretation could lead to absurd results. For example, a new Constituent Assembly could approve a new Constitution with the intention of including same-sex couples within the concept of marriage and, still, keep the same wording as the current Article 32 CE. The intention of the Constitution can be ambiguous because it reflects a compromise between political parties. Furthermore, in the specific case of Spain, the legislature may have left some issues unanswered as a result of the period known as "political transition" from dictatorship to democracy in which the Constituent Assembly drafted the Constitution.[48]

2.2.3 Dynamic (Sociological) Criterion

The Appeal did not discuss the sociological criterion, but article 3.1 CC expressly mentions it.[49] A statutory interpretation can account for the social reality of the time in which laws are applied. It could be argued, however, that the understanding of marriage in 2005, when Act 13/2005 was passed, still included the principle of heterosexuality. In June 2004, however, the Centre of Sociological Research (CIS) conducted a poll in which 66.2 % of Spaniards were in favor of opening marriage to same-sex couples, while 26.5 % were against. The poll also revealed that 69.4 % were in favor of legislation on partnerships, while only 11.6 % were against.[50] The difference between the percentage of people favouring same-sex marriage and favoring a different regulation (i.e. registered partnership) was not significant. Additionally, the decision to Appeal 6864-2005 was issued 7 years after it was

[45] *STC* of 1st November 1981, regarding Commercial Law.

[46] *STC* of 13th February 1981, regarding "freedom of chair" in universities.

[47] *STC* of 20th July 1981, regarding Tax Law. On the use of the historical criterion by the TC, see further ALONSO GARCÍA, E.: *La interpretación de la Constitución*, *op.cit.* pp. 148–153.

[48] As GARCÍA RUBIO pointed out, taking the idea from the Canadian Constitutional Court, the Constitution would be a "living tree", GARCÍA RUBIO, M.P.: *Viejos y nuevos apuntes sobre la constitucionalidad del matrimonio homosexual*, *op.cit.,* p. 180.

[49] It is also central in the Preamble of Act 13/2005.

[50] *Barómetro de Junio. Estudio n° 2568 de junio de 2004, Centro de Investigaciones Sociológicas.*

lodged. In those years, more than 20.000 same-sex marriages were celebrated.[51] The dynamic interpretation requires taking into account the reality of the time in which laws are applied. It requires, therefore, considering the social reality of during the years Act 13/2005 was in force.

In conclusion, only the historical criterion suggests the configuration of marriage in the CE 1978 as including the principle of heterosexuality. By using a dynamic interpretation, the concept of marriage would adapt to the reality of the time in which the Constitution applies, including the reality of the number of same-sex couples who got married, and the acceptance of same-sex marriage by Spaniards. Finally, the grammatical criterion of interpretation is not conclusive of marriage as an essentially heterosexual institution.

2.3 The Constitutional Court and the Development of the Concepts of Constitutional Guarantee and Subjective Right

After the enactment of Act 13/2005, some legal scholars held that the constitutionality of the Act depended on whether Article 32 CE contained a pure subjective right to marry, which meant that the legislator was not allowed to abolish opposite-sex marriage but could be allowed to extend it to same-sex couples, or if it contained guarantee of the institution of marriage, which limited the choices of the legislator.[52] Considering Article 32 CE as a mere subjective right[53] involves that the essential content of marriage is not referred to a constitutionally guaranteed institution, but to the essential content of a fundamental right like the right to marry. A constitutional guarantee over marriage, however, limits the role of the legislator, becoming, in principle, a more conservative solution and bringing the possibility of freezing the Constitution.[54]

In the relationship between fundamental rights and the concept of institutional guarantee it is important to distinguish between the subjective and the objective

[51] From 2005 to 2011, 22.124 same-sex marriages were contracted in Spain, source: National Institute of Statistics, www.ine.es

[52] DÍEZ PICAZO, L.: "En torno al matrimonio entre personas del mismo sexo", (2007) www.indret.com, (last seen: September 2014), pp. 11–12.

[53] ROCA TRÍAS held that there would not be a guarantee of institute, and only a subjective right, as the institutional protection is already secured and such interpretation would be confirmed by the Charter of Fundamental Rights of the EU: ROCA TRÍAS, E.: "La familia y sus formas", *Teoría y Derecho. Revista de Pensamiento Jurídico*, vol. 2, (2007), p. 58. See also RODRÍGUEZ, Á.: "Treinta y dos", *Diario La Ley n° 6643 (digital edition)*, (2007).

[54] See *STC 26/1987*, of 27th February 1987, regarding the "autonomy of the universities". In this judgement, the Court stated that the fundamental right, understood as absolute fundamental right or subjective right, offers more resistance to the legislator, whilst the guarantee of institution is more vulnerable. In the case of marriage it appears to be the opposite, taking into account the second paragraph of Article 32 CE and Article 53.1 CE.

(or institutional) dimensions of fundamental rights, and between the latter and the concept of institutional guarantee. In STC 53/1985,[55] the TC explained the objective dimension of fundamental rights:

> It is not only the negative obligation of the State not to damage the individual nor the institutional sphere protected by fundamental rights, deduced from the obligation of submission of all powers to the Constitution, but also the positive obligation of contributing to the effectiveness of the mentioned rights and values linked to those rights, even when there is no subjective claim from the citizen.

The objective dimension of a fundamental right contrasts with the traditional liberal conception of fundamental rights where the State has a passive duty to protect. The objective dimension obliges the State to act in order to guarantee the exercise of those fundamental rights.

The institutional guarantee differs from this objective (institutional) dimension because the institutional guarantee's main purpose is *keeping* the "master image" of an institution. The objective dimension of a fundamental right demands a *positive action* from the State. The existence of an objective dimension of a fundamental right, however, does not exclude that some rights contain, together with the subjective right, an institutional guarantee.[56] Previously to STC 198/2012, the TC used the concept of institutional guarantee in a confusing way by referring to concepts that do not respond to characteristics of an institution, but rather, respond to the objective dimension of a right, as in STC 12/1982[57] or STC 9/2007.[58] Although at times the differences between objective dimension and institutional guarantee are unclear or mistaken, both fundamental right and institutional guarantee can coexist.[59]

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[55] *STC 53/1985*, of 11th April 1985, *FJ 4th*.

[56] See CIDONCHA MARTÍN, A.: "Garantía institucional, dimensión institucional y derecho fundamental: balance jurisprudencial",(2009), http://espacio.uned.es/fez/eserv.php?pid=bibliuned:TeoriayRealidadConstitucional-2009-23-50050&dsID=PDF, (last seen: September 2014), pp. 149–188.

[57] *STC 12/1982*, of 31st March 1982 dealt with the right to manage and use images and sounds via television, connected to Article 20.1 CE which recognizes "the right to freely express and disseminate thoughts, ideas and opinions trough words, in writing or by any other means of communication." The TC mentioned that the notion of "free public opinion" was a guaranteed institution. However, "free public opinion" responds to the characteristics of the objective dimension of the right in the sense that the State must carry out a positive action in order to ensure such free public opinion.

[58] *STC 9/2007*, of 15th January 2007 dealt also with the notion of "free public opinion." Another example is *STC 254/1993*, of 20th July 1993, with regards to the use of data processing and the protection of honor and personal and family privacy.

[59] In the same way, BAÑO LEÓN pointed out that the notion of subjective right and institutional guarantee intertwine and, both together, become part of the notion of fundamental right, BAÑO LEÓN, J.M.: "La distinción entre derecho fundamental y garantía institucional en la Constitución Española", *Revista Española de Derecho Constitucional*, vol. 24 (septiembre-diciembre), (1988), pp. 169–170.

The TC has held in various occasions that fundamental rights have this double character as subjective rights and institutional guarantees. Two cases illustrate this double character. First, this double character was early confirmed by STC 37/1987,[60] regarding the right to property, stating that:

> It is a recognized right, as it has been established by this Court in STC 111/1983, FJ 8th, from its institutional and individual dimensions, and it constitutes, from the latter point of view, a subjective right which *gives in, in order to become an economic equivalent, when the interest of the community legitimates its expropriation* (emphasis added).

The decision further stated that:

> The social dimension of the private property, as *institution* called to satisfy collective needs, is consistent with the image contemporary society has of the right [to private property] (emphasis added).

This "social function" is part of the objective dimension of a right[61] but it does not exclude that such "social function" can frame the institutional guarantee as well. Moreover, the TC recognized the guarantee of the institution of family[62] and referred to marriage as an institution in the relevant ATC 222/1994[63] which will be analyzed later.

Following *Ramos Chaparro*,[64] the first paragraph of Article 32 CE expresses the aspect of marriage in which liberty and individual autonomy prevail (the subjective right), and the second paragraph describes marriage as an institution. Regardless of whether an institutional guarantee exists in Article 32 CE, the issue of defining what this guarantee involves remains. What is the essential content included in this Article, connected with the guaranteed institution? Is the so-called "principle of heterosexuality"[65] part of the institutional guarantee and, hence, it eliminates the possibility of opening marriage to new realities?

Prior to STC 198/2012, the TC dealt with the terms "essential content" and "constitutional guarantee of institution." Two decisions that discussed these terms are STC 11/1981[66] and STC 32/1981.[67] Neither decision dealt with family law issues. One referred to the right of workers to strike and the other to the guarantee of provincial autonomy within the structure of the territorial State. Both, however, help to an understanding of these terms.

In STC 11/1981,[68] the TC pointed out two ways of defining the "essential content" of a right. The first approach looked at the legal nature of every right:

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[60] *STC 37/1987*, of 26th March 1987, *FJ 2nd*.

[61] See CIDONCHA MARTÍN, A.: "Garantía institucional, dimensión institucional y derecho fundamental: balance jurisprudencial", *op.cit.* (last date seen: September 2014), p. 182 and ff.

[62] See, for all, *STC 203/2000*, of 27th July 2000, *FJ 4th*.

[63] *ATC 222/1994*, of 11th July 1994.

[64] RAMOS CHAPARRO, E.: "Objecciones jurídico-civiles a las reformas del matrimonio", *Actualidad Civil, vol. 10, 1 (digital edition)*, (2005), p. after note 3.

[65] See *supra* note 9.

[66] *STC 11/1981*, of 8th April 1981.

[67] *STC 32/1981*, of 28th July 1981.

[68] *Id.*, supra note 66, *FJ 8th*.

> Those faculties or possibilities of exercising a right necessary for the right to be recognized as belonging to the described type [of rights]. Without them, the right shall not belong to that type any longer and shall become part of another type of rights, losing its nature. Moreover, it must be taken into account the historical moment in every case and the conditions inherent to democratic societies, when dealing with constitutional rights.

The second approach looked at the legally protected interests as a core of subjective rights. Thus, the TC pointed out that the essential content of the right refers to:

> The part of the right which is totally necessary for those legally protected interests (....) to be actually, concretely and effectively protected. Therefore, this essential content is exceeded or not fulfilled when the right is subject to limitations which make it impracticable or more difficult to be exercised than it is reasonable or subject to limitations that divest the right of the necessary protection.

Both approaches complement each other. Framing and defining an essential content requires both approaches. The first approach takes into account the dynamic criterion of interpretation which analyzes the "historical moment" in which a right is exercised and the laws apply. In the above mentioned STC 37/1987[69] regarding the right to property, the TC pointed out that:

> In its double dimension, as institution and subjective right, [property] has experienced such a deep transformation in our century that it can no longer be conceived as a legal concept framed exclusively by the abstract type described in article 348 of the Civil Code ... [therefore] the intention of the appellants of identifying its essential content [of the right to private property] by exclusively focusing on what the Civil Code, back in the nineteenth century, established in its article 348, must be rejected as groundless. Such intention is not taking into account the modulations and changes the institution of private property, in general, and the agrarian property, in particular, have undergone.

Is it applicable to marriage what the TC said about property? Marriage and the concept of family have evolved and it is no longer possible to identify them with those contained in the civil codes of the nineteenth century.[70] This argument undermines the appellants' use of the historical criterion. It will be discussed below if, and how, the TC uses this argument in its STC 198/2012.

Regarding the second approach, it is difficult to understand how Act 13/2005, which involves an extension of the right to marry, may be seen as a limitation of the right itself, since opposite-sex married couples are protected in the same way as before Act 13/2005 was passed.[71] In TC's decision STC 32/1981,[72] which dealt with local autonomy, the Court explained the concept of institutional guarantee by saying that:

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[69] *STC 37/1987*, of 26th March 1987, *FJ 2nd*.

[70] In the same way, VALPUESTA FERNÁNDEZ, R.: "Reflexiones sobre el Derecho de Familia", *Teoría del Derecho. Revista de Pensamiento Jurídico*, vol. 2, (2007), p. 76.

[71] In a similar way, PRATS ALBENTOSA, L.: "La nueva regulación del derecho matrimonial español: bases y principios" in Morales Moreno and Míquel González (Ed.): *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid, n° 10: Derecho, sociedad y familia: cambio y continuidad*, Boletín Oficial del Estado y Universidad Autónoma de Madrid, Madrid, (2006), p. 22.

[72] *STC 32/1981*, of 28th July 1981, *FJ 3rd*.

> The institutional guarantee does not ensure a specific content or a determined sphere of competence, but rather the preservation of an institution in recognizable terms according to the image that the social conscience has [of that institution] in each time and place. Such guarantee is unknown when the institution is limited in a way that is basically deprived of its possibilities of real existence as institution, becoming a simple name.

Thus, three elements must be met in an institutional guarantee: (a) the institution has a core the legislator must respect, (b) that core is not determined, but rather it connects to the image the social conscience has of it in a particular point in space and time, and (c) it must not be reduced to a simple name. The first element accounts for the historical interpretation, and therefore the "core" responds to a fixed content established in 1978, and it relates to a certain idea of "freezing" such "core". The second element, however, contrasts with the first element suggesting that the content is not expressly fixed and it needs to be recognized in a given time and place by the social conscience. Like in STC 11/1981 and STC 37/1987, the TC referred to the reality of the time (and place) and, therefore, such reality must be taken into account.

The definition of guarantee clarifies that the essential content of the institution is not respected when the legislature changes it to the point of making it unrecognizable. At the same time, however, the essential content is not respected if the legislature does not allow the institution to adapt to changes, becoming unrecognizable by the current social conscience.

The third element mandates that the legislature may not reduce the institution to a simple name. It could be argued that the creation of a new legal institute such as a registered partnership reduces marriage to a simple name, as there would be two institutions with same or similar content and functions. The name "marriage," however, has a symbolic power that "registered partnership" does not have.[73]

2.4 Same-Sex Couples and Marriage According to the Constitutional Court Prior to STC 198/2012

Before STC 198/2012 on the constitutionality of Act 13/2005, the TC only briefly referred to the "heterosexual principle" in marriage in a brief writ in 1994, ATC 222/1994.[74] In that case writ, the survivor partner of a same-sex cohabiting couple, requested a widower's pension. The claimant argued that his situation was different from opposite-sex cohabitants because same-sex couples were not allowed to marry and this would involve indirect discrimination. The TC, however, dismissed the claim by pointing out that:

[73] ASÚA GONZÁLEZ refered to it as the "fight for the name." Indeed, it was one of the key factors (together with the adoption) at the centre of discussion from those positions opposed to same-sex marriage, see ASÚA GONZÁLEZ, C.I.: "El matrimonio hoy: sus perfiles jurídicos ad intra y ad extra", *op.cit.,* p. 14.

[74] *ATC 222/1994*, of 11th July 1994.

> The union between two persons of the same sex is not a legally regulated institution, and there is no constitutional right to its establishment, unlike marriage between a man and a woman, which is a constitutional right (article 32.1 CE) that generates, *ope legis*, a multiplicity of rights and duties (STC 184/90).[75]

From that perspective, the TC concluded that:

> The full constitutionality of the heterosexual principle must be admitted as qualifier of the matrimonial bond, as it is stated in our Civil Code. The Public Powers might allow a privileged treatment to the family union of a man and a woman compared to a same-sex union. However, the legislator can create a system in order to provide homosexual partners with full rights and benefits of marriage, as the European Parliament advocates.[76]

The TC did not recognize a constitutional obligation to open marriage to same-sex couples. Nonetheless, it pointed out that the legislature may create a system that provides full rights and benefits of marriage, following the European Parliament's (EP) Resolution. As the EP referred to both registered partnerships and marriage, it could be interpreted that the TC, in this writ, was allowing legislators the freedom to introduce same-sex marriage or registered partnerships.

Following ATC 222/1994, the role of the heterosexual principle appeared fully constitutional to define marriage in a given place and time (that is, Spain and 1994). The TC, however, did not refer to it as an essential element of marriage. ATC 222/1994 disregarded the argument that same-sex couples were suffering indirect discrimination and it stated that the legislator had broad freedom to frame the Social Security System in favor of the "familial bond."[77] By referring to the family based on traditional opposite-sex marriage as "familial bond," the TC differed from previous decisions. For example, in STC 222/1992[78] the Court stated that the CE did not identify and limit family to the family based on marriage. Indeed, marriage and family are regulated in the CE in different chapters (marriage in Chapter II on "Rights and Liberties" and family in Chapter III on "Principles governing Economic and Social Policy"). Article 39 CE and the TC case law, which has extended some protection given to marriage to those couples under cohabitation demonstrate that every marriage involves a family but not every family is based on marriage.

Finally, ATC 222/1994 referred to the Civil Code to conclude that requiring heterosexuality as a qualifier for marriage was constitutional. But this statement

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[75] Id. *FJ 2nd*.

[76] The TC referred to the *Resolution on equal rights for homosexuals and lesbians in the EC, A3-0028/94*.

[77] The TC has been reluctant to extend rights with regards to Social Security to cohabitants in previous case law, *inter alia*, *STC 184/1990* and *STC 66/1994*. The solution given by the TC in *ATC 222/1994* seems consistent with these previous judgments which dealt with opposite-sex cohabitation. However, the TC recognized cohabitants for the purposes of subrogation in rental contracts (*inter alia*, *STC 222/1992* and *STC 47/1993*). This has been criticized as it seems that the TC has a different perspective depending on if the case has a negative impact on the public budget, see PÉREZ VILLALOBOS, M.C.: *Las leyes autonómicas reguladoras de las parejas de hecho*, Editorial Civitas, Madrid, (2008), p. 145. It is unclear whether the solution would have been the same if the case of ATC 222/1994 dealt with rental contracts instead of a pension from the Social Security system.

[78] *STC 222/1992*, of 12th December 1992.

may be seen as an inversion of the normative hierarchy, by using the CC to define constitutional concepts. In sum, ATC 222/1994 held that the principle of heterosexuality was constitutional but it did not conclude that passing gender neutral marriage legislation would be unconstitutional. In fact, ATC 222/1994 underlined that legislators had broader options. One could reasonably say that this decision left open the possibility of later declaring a same-sex marriage statute constitutionally forbidden, constitutionally mandated or constitutionally possible. Nonetheless, ATC 222/1994 seemed to follow the last option by stating that although opposite-sex marriage was constitutionally guaranteed, the legislature had a broad margin of action.

2.5 Lessons from Portugal: Acórdãos 359/2009 and 121/2010

Portugal introduced same-sex marriages in 2010. Some months later, its Constitutional Court (TCRP) decided on the constitutionality of the statute. Although Portugal approved gender-neutral marriage legislation 5 years later than Spain, its Constitutional Court acted faster. An overview of the Portuguese case may help to gain a better understanding of the Spanish situation and to outline similarities and differences between the Portuguese decision and STC 198/2012.

Portugal legalized same-sex cohabitation through Act 7/2001,[79] amending Act 135/1999.[80] Those acts provided few rights.[81] In 2010, however, the Portuguese Congress passed Act 9/2010,[82] legalizing same-sex marriage, but excluding same-sex married couples from adoption.[83]

The Portuguese Constitution (CRP) refers to marriage and family in its Article 36:

> Everyone has the right to form a family and to marry under conditions of full equality.
>
> The law shall regulate the requisites for and the effects of marriage and its dissolution by death or divorce, regardless of the form in which it was entered into.

[79] *Act 7/2001, of 11th May, protecting de facto unions.*

[80] *Act 135/1999, of 28th August, protecting de facto unions.*

[81] On *de facto* unions in Portugal, see DE OLIVEIRA, G. and PEREIRA COELHO, F.: *Curso de Direito de Familia, vol. 1*, Coimbra Editora, Coimbra, (2008), pp. 52–93, MARTINS, R.: "Same-Sex Partnerships in Portugal. From De Facto to De Jure?", *Utrecht Law Review*, vol. 4, 2 (2008); LORENZO VILLAVERDE, J.M.: "Las uniones de hecho (del mismo y de distinto sexo) y su consideración como familia en Portugal: una visión a la luz del art 36 de la Constitución de la República Portuguesa", *Derecho de Familia. Abeledo Perrot*, vol. 48, (2011).

[82] *Act 9/2010, of 31st May, allowing civil marriage between persons of the same sex.*

[83] RAPOSO named this restriction a "castrated marriage", see RAPOSO, V.L.: "Crónica de um casamento anunciado (o casamento entre pessoas do mesmo sexo)", *Revista do Ministério Público*, vol. Oct-Dec 2009, 120 (2009), pp. 188–189.

Additionally, Constitutional Act 1/2004[84] expressly established sexual orientation as a prohibited ground for discrimination, based on the Equality Clause of Article 13 CRP.

The relevant articles of the Portuguese Civil Code (CCRP), prior to the enactment of Act 9/2010, stated the following:

> Article 1577: Marriage is a contract celebrated between two persons of the opposite sex who seek to form a family by a full community of life, according to the provisions of this Code.
>
> Article 1628: It is legally inexistent .... e) the marriage entered into by two persons of same sex.

Act 9/2010 repealed the requirement of opposite sex in Article 1577 CCRP and eliminated the legal inexistence of marriage as laid down in Article 1628 e) CCRP.

Before the enactment of Act 9/2010, the TCRP had already discussed same-sex marriages. *Acordão*[85] 359/2009[86] referred to a female same-sex couple whose marriage application was rejected. After unsuccessfully appealing, the case reached the TCRP. The issue was whether Articles 1577 and 1628 e) CCRP were unconstitutional. The couple argued that the concept of marriage in the Portuguese Civil Code could not be understood as a historically received concept of marriage because it would result in an inversion of the normative hierarchy with the Civil Code defining constitutional concepts. Moreover, that definition of marriage denied same-sex couples access to a legal institution that was perceived as a "symbolic good." The couple argued that since marriage represented a "symbolic good," any legislation allowing same-sex couples to enter into a registration scheme different from marriage would not be enough to guarantee equality.

The TCRP in *Acordão* 359/2009 rejected the appeal but pointed out some relevant arguments. The decision stated that the concept of marriage at the time of the approval of the CRP (1976) included the heterosexual principle.[87] It recognized, however, that requirements and legal effects of marriage were subject to change by legislation. The TCRP also stated that the inclusion of sexual orientation in the Equality Clause of Article 13 CRP did not impose an obligation to regulate same-sex marriages.[88] At the same time, the Court declared that constitutional guarantees

[84] *Constitutional Act 1/2004, of 24th July, sixth constitutional review.*

[85] I will keep the term *Acordão* in Portuguese to refer to the judgements of the TCRP. The judgments of the Portuguese Constitutional Court are available at http://www.tribunalconstitucional.pt/tc/acordaos/.

[86] *Acordão 359/2009*, of 9th July 2009.

[87] *Ibid., Fundamento 10.*

[88] *Ibid.* The TCRP referred to the opinion of the constitutionalists GOMES CANOTILHO, J.J. and MOREIRA, V.: *Constituição da República Portuguesa, anotada: artigos 1° a 107°, vol. 1*, Coimbra Editora, Coimbra (2007), p. 568 and MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, Wolters Kluwer Portugal, Coimbra Editora, Coimbra, (2010), p. 820.

did not "freeze" in time constitutional concepts.[89] It further asserted that unmarried same-sex couples could also become a family even if not married.[90] In the end, the Court concluded that it was the role of the legislature, and not of the TCRP, to adapt marriage regulation to every historical moment.[91]

Similarly to Spain, it is possible to identify three positions supported by similar arguments: those who supported same-sex marriage as a constitutional obligation,[92] those who supported the position that same-sex marriage was constitutionally forbidden,[93] and those who supported the position that it was constitutionally possible.[94]

[89] *Ibid.*

[90] *Ibid., Fundamento 15.*

[91] *Ibid., Fundamentos 11 and 12.*

[92] See, *inter alia*, PAMPLONA CÔRTE-REAL, C.: "Da inconstitucionalidade do Código Civil – artigos 1577°, 1628°, alínea e), e disposições conexas – ao vedar o acceso ao instutito do casamento a casais do mesmo sexo" in Pamplona Côrte-Real, Moreira and Duarte D'almeida (Ed.): *O casamento entre pessoas do mesmo sexo: Três pareceres sobre a inconstitucionalidade dos artigos 1577° e 1628° alínea e) do Código Civil*, Edições Almedina SA, Coimbra, (2008); MOREIRA, I.: "Da inconstitucionalidade das normas resultantes da leitura conjugada do artigo 1577° do Código Civil e da alínea e) do artigo 1628° do mesmo Código, nos termos das quais duas pessoas do mesmo sexo não podem contrair casamento e, se o fizerem, é o mesmo tido por inexistente" in ibid. (Ed.),; DUARTE D'ALMEIDA, L.: "Casamento Civil e <sexo diferente>: Sobre a inconstitucionalidade das normas expressas pelos artigos 1577°, e 1628°, alínea e), do Código Civil" in ibid. (Ed.),; MÚRIAS, P.: "Un símbolo como bem juridicamente protegido – parecer", (2008) http://muriasjuridico.no.sapo.pt/PMuriasParecerCPMS.pdf, (last date seen: November 2013).

[93] See, *inter alia*, BARROSO, I.M.: "Casamento civil entre pessoas do mesmo sexo: um <<direito fundamental>> á medida da lei ordinária?", *Lex Familiae – Revista Portuguesa de Direito da Familia*, vol. 7, 13 (2010), pp. 57–82, DE OLIVEIRA, G. and PEREIRA COELHO, F.: *Curso de Direito de Familia, vol. 1*, *op.cit.* p. 203 and ff; SANTOS, D.: *Mudam-se os tempos, mudam-se os casamentos? O casamento entre pessoas do mesmo sexo e o Direito português*, Coimbra Editora, Coimbra, (2009), pp. 342 and ff, specially. However, DE OLIVEIRA, in DE OLIVEIRA, G.: "Portugal! Um país de contrastes" in Costa (Ed.): *Metamorfosi del matrimonio e altre forme di convivenza affetiva*, Libreria Bonomo Editrice, Bologna, (2007), p. 181, stated that there is no obstacle for opening marriage to same-sex couples.

[94] See RAPOSO, V.L.: "Crónica de um casamento anunciado (o casamento entre pessoas do mesmo sexo)", *op.cit.* p. 179 and ff. This author rejected that the CRP established a prohibition on same-sex marriages. She mentioned that it could eventually be possible to name it differently (that is, creating a registration scheme for same-sex partnerships, see p. 179), but she was of the opinion that, taking into account a dynamic interpretation of the CRP, if not now, same-sex marriage could become constitutionally obliged in the future (p. 182) and supported same-sex marriage versus registered partnership (pp. 186 and ff.). See also GOMES CANOTILHO, J.J. and MOREIRA, V.: *Constituição da República Portuguesa, anotada: artigos 1° a 107°, vol. 1*, *op.cit.* pp. 567–568, MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.,* pp. 811 and 819–821.

The historical interpretation was discussed among the legal scholarship.[95] This interpretation connected with the guarantee of the institution of marriage contained in the CRP and its essential content, which must be respected.[96] Some scholars considered sex/gender diversity as part of the essential content of the marriage institution.[97] Under that interpretation same-sex marriage had to be unconstitutional because it violated a constitutional guarantee. Other scholars claimed that the "heterosexual element" in marriage was not essential.[98] From this perspective, legislators had the option (or even the obligation) to open up marriage to same-sex couples. This argument followed a dynamic interpretation.[99] Some legal scholars

[95]GOMES CANOTILHO, J.J. and MOREIRA, V.: *Constituição da República Portuguesa, anotada: artigos 1° a 107°, vol. 1*, *op.cit.,* pp. 567–568, MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.,* p. 811 and 819.

[96]See GOMES CANOTILHO, J.J. and MOREIRA, V.: *Constituição da República Portuguesa, anotada: artigos 1° a 107°, vol. 1*, *op.cit.,* p. 561; MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.,* p. 819; DE OLIVEIRA, G. and PEREIRA COELHO, F.: *Curso de Direito de Familia, vol. 1*, *op.cit.,* pp. 112–114 In a different way, MURIAS considered the theory of the guarantee of institute (or institution) groundless, see MÚRIAS, P.: "Un símbolo como bem juridicamente protegido – parecer", *op.cit.* (last date seen: November 2013), p. 16 and ff.

[97]*Inter alia*, BARROSO, I.M.: "Casamento civil entre pessoas do mesmo sexo: um <<direito fundamental>> á medida da lei ordinária?", *op.cit.* p. 65; SANTOS, D.: *Mudam-se os tempos, mudam-se os casamentos? O casamento entre pessoas do mesmo sexo e o Direito português*, *op.cit.,* pp. 303–306 and 342 and ff; MACHADO, J.E.M.: "A (in)definição do casamento no Estado constitucional: Fundamentos meta-constitucionais e deliberação democrática" in De Oliveira, Machado and Martins (Ed.): *Família, consciência, secularismo e religião*, Wolters Kluwer Portugal, Coimbra Editora, Coimbra, (2010), p. 65.

[98]See GOMES CANOTILHO, J.J. and MOREIRA, V.: *Constituição da República Portuguesa, anotada: artigos 1° a 107°, vol. 1*, *op.cit.,* pp. 567–568; MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.,* pp. 819–821; PAMPLONA CÔRTE-REAL, C.: *Da inconstitucionalidade do Código Civil – artigos 1577°, 1628°, alínea e), e disposições conexas – ao vedar o acceso ao instutito do casamento a casais do mesmo sexo*, *op.cit.* pp. 21–22; RAPOSO, V.L.: "Crónica de um casamento anunciado (o casamento entre pessoas do mesmo sexo)", *op.cit.,* pp. 182–183.

[99]The possibility or convenience of a dynamic interpretation, in order to give the legislator the option (or in order to impose the obligation) of opening up marriage to same-sex couples, has been present in the debate among the legal scholarship, *inter alia*: MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.,* p. 815; DE OLIVEIRA, G.: *Portugal! Um país de contrastes*, *op.cit.* p. 181; PAMPLONA CÔRTE-REAL, C.: *Da inconstitucionalidade do Código Civil – artigos 1577°, 1628°, alínea e), e disposições conexas – ao vedar o acceso ao instutito do casamento a casais do mesmo sexo*, *op.cit.* p. 24; MOREIRA, I.: "Da inconstitucionalidade das normas resultantes da leitura conjugada do artigo 1577° do Código Civil e da alínea e) do artigo 1628° do mesmo Código, nos termos das quais duas pessoas do mesmo sexo não podem contrair casamento e, se o fizerem, é o mesmo tido por inexistente" in ibid. (Ed.), p. 37; RAPOSO, V.L.: "Crónica de um casamento anunciado (o casamento entre pessoas do mesmo sexo)", *op.cit.,* p. 181. On the other hand, BARROSO denied a dynamic interpretation not only with regards to the CRP but also with regards to the Universal Declaration of Human Rights which could eventually be used to interpret article 36 CRP, taking

argued that an interpretation that sticks to the historical concept of marriage prior to the approval of the CRP involved an inversion of the normative hierarchy by giving priority to civil legislation (particularly former Articles 1577 and 1628 e) CCRP) over the CRP.[100] It was also pointed out that procreation was not an essential element of marriage,[101] becoming the heterosexual element irrelevant.[102] Some opponents to same-sex marriage also mentioned the Judeo-Christian tradition.[103] Additionally, the symbolism of marriage (as opposed to any other alternatives to regulate same-sex couples, such as registered partnerships or civil unions)[104] was relevant not only in scholarly discussions but in political debates as well.[105]

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into account article 16.2 CRP, see BARROSO, I.M.: "Casamento civil entre pessoas do mesmo sexo: um <<direito fundamental>> á medida da lei ordinária?", *op.cit.,* p. 63.

[100]PAMPLONA CÔRTE-REAL, C.: *Da inconstitucionalidade do Código Civil – artigos 1577°, 1628°, alínea e), e disposições conexas – ao vedar o acceso ao instutito do casamento a casais do mesmo sexo*, *op.cit.* p. 23; MOREIRA, I.: "Da inconstitucionalidade das normas resultantes da leitura conjugada do artigo 1577° do Código Civil e da alínea e) do artigo 1628° do mesmo Código, nos termos das quais duas pessoas do mesmo sexo não podem contrair casamento e, se o fizerem, é o mesmo tido por inexistente" in ibid. (Ed.), p. 35. However, BARROSO used the argument of the normative hierarchy in a different way: he pointed out that opening up marriage to same-sex couples in the CCRP and then interpreting Article 36 CRP in the light of such amendment would be an inversion of the normative hierarchy, see BARROSO, I.M.: "Casamento civil entre pessoas do mesmo sexo: um <<direito fundamental>> á medida da lei ordinária?", *op.cit.,* p. 68 and 80.

[101]DE OLIVEIRA, G.: *Portugal! Um país de contrastes*, *op.cit.,* p. 181; GOMES CANOTILHO, J.J. and MOREIRA, V.: *Constituição da República Portuguesa, anotada: artigos 1° a 107°, vol. 1*, *op.cit.* p. 567; MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.* p. 809; RAPOSO, V.L.: "Crónica de um casamento anunciado (o casamento entre pessoas do mesmo sexo)", *op.cit.* p. 176; MOREIRA, I.: *Da inconstitucionalidade das normas resultantes da leitura conjugada do artigo 1577° do Código Civil e da alínea e) do artigo 1628° do mesmo Código, nos termos das quais duas pessoas do mesmo sexo não podem contrair casamento e, se o fizerem, é o mesmo tido por inexistente*, *op.cit.* pp. 50–52; DUARTE D'ALMEIDA, L.: "Casamento Civil e <sexo diferente>: Sobre a inconstitucionalidade das normas expressas pelos artigos 1577°, e 1628°, alínea e), do Código Civil" in ibid. (Ed.), pp. 68–69.

[102]However, DUARTE SANTOS, denying the constitutionality of same-sex marriages, considers that, even though procreation is not necessarily essential, marriage is "potentially procreative", see SANTOS, D.: *Mudam-se os tempos, mudam-se os casamentos? O casamento entre pessoas do mesmo sexo e o Direito português*, *op.cit.,* p. 327 and ff.

[103]MACHADO, J.E.M.: *A (in)definição do casamento no Estado constitucional: Fundamentos meta-constitucionais e deliberação democrática*, *op.cit.,* p. 9 and ff.

[104]MÚRIAS, P.: "Un símbolo como bem juridicamente protegido – parecer", *op.cit.* (last date seen: September 2014), p. 28; DUARTE D'ALMEIDA, L.: *Casamento Civil e <sexo diferente>: Sobre a inconstitucionalidade das normas expressas pelos artigos 1577°, e 1628°, alínea e), do Código Civil*, *op.cit.* p. 59. However, DUARTE SANTOS, even admitting the power of such symbolism, gave more weight to the idea of marriage as potentially procreative, see SANTOS, D.: *Mudam-se os tempos, mudam-se os casamentos? O casamento entre pessoas do mesmo sexo e o Direito português*, *op.cit.* p. 326 and 328 and ff.

[105]For a summary of the political debate and initiatives in Portugal, see SANTOS, D.: *Mudam-se os tempos, mudam-se os casamentos? O casamento entre pessoas do mesmo sexo e o Direito português*, *op.cit.,* p. 72 and ff.

Once Act 9/2010 was approved, the Portuguese President lodged an appeal against the constitutionality of the new legislation. The TCRP, in its *Acordão* 121/2010[106] followed a similar line of argument as in *Acordão* 359/2009. The Court provided some relevant arguments that complement its previous decisions:

- In 1976 the legislature did not discuss same-sex marriages. It was an unknown political and legal issue.[107]
- The CRP contains an institutional guarantee of marriage but such institutional guarantee could not become more important than the fundamental right.[108]
- The Universal Declaration of Human Rights could not be used to provide a restrictive interpretation of the Constitution, as a broader protection should be favored.[109]
- The legislature must take into account the social reality (dynamic interpretation).[110]
- Sex/gender diversity was not within the essential content of marriage.[111]

2.6 The Spanish Constitutional Court and Its Long Awaited Decision STC 198/2012

Seven years after the enactment of Act 13/2005, the TC decided appeal 6854-2005.[112] The decision was long awaited and the demand from LGBT groups and social and political forces supporting the Act urging for a final decision increased. The situation of thousands of same-sex married couples was uncertain and some feared the TC would find the Act unconstitutional. After the general elections of 2011, a change in the government from the centre-left PSOE to the conservative PP took place. The new government, supported by the party which challenged the constitutionality of the Act, decided to wait for the decision of the TC before considering actions on the matter. Finally, the TC issued STC 198/2012 of 6th November, declaring the Act constitutional. The decision was not unanimous, with eight votes in favor and three dissenting votes.[113]

[106] *Acordão 121/2010,* of 8th April.

[107] *Ibid., Fundamento 18.*

[108] *Ibid., Fundamento 19.*

[109] *Ibid., Fundamento 20.*

[110] *Ibid., Fundamento 22.*

[111] *Ibid.*

[112] Unfortunately, 7 years is within the average time the TC takes to deliver a decision, http://politica.elpais.com/politica/2012/04/01/actualidad/1333311471_924226.html (last accessed: September 2014).

[113] In favor: magistrates Pascual Sala Sánchez (President), Pablo Pérez Tremps, Adela Asúa Batarrita, Luis Ignacio Ortega Alvarez, Francisco Pérez de los Cobos Orihuel, Encarnación Roca

The decision focused on the possible violation of Article 32 CE. The other provisions of the CE claimed by the appellants to support the unconstitutionality of the Act were disregarded by the Court, since a violation of Article 32 CE would lead to the violation of the remaining provisions. With regards to these provisions, however, it is noteworthy mentioning two considerations by the TC. First, the Court, based on previous case law, rejected the idea of "discrimination by no differentiation" derived from the Equality Clause of Article 14 CE.[114] There is "no subjective right to unequal legal treatment,"[115] even if affirmative action is constitutionally possible. Second, regarding Article 39 CE, the TC noted that marriage and family were "two different constitutional goods."[116] Thus, the TC, did not identify family with the one which has its origin in marriage nor with the one which main purpose is procreation. By separating family from marriage and procreation the constitutional notion of family covered a plurality of family models, from marriages with no offspring to single parents and also *de facto* unions,[117] with or without children. Additionally, the ECHR applies to Spain and the European Court of Human Rights has stated that same-sex couples are covered by the right to family life of Article 8 ECHR.[118] In STC 198/2012 the TC referred to Article 10.2 CE which mandates that "principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."

When discussing if Act 13/2005 violated the constitutional provision on marriage of Article 32 CE, the TC stated that this provision contained both a fundamental right to marry and an institutional guarantee.[119] How did the Court discuss the institutional guarantee of marriage in STC 198/2012? The Court acknowledged that

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Trías and Fernando Valdés Dal-Ré; dissenting votes: magistrates Ramón Rodríguez Arribas, Andrés Ollero Tassara and Juan José González Rivas; concurrent vote: magistrate Manuel Aragón Reyes. Magistrate Francisco José Hernando Santiago was challenged because he participated in the preparation of the report issued by the CGPJ and did not take part in this decision. There is a publicly known distinction between so-called "progressive" and "conservative" magistrates, depending on whether their appointment was suggested by the conservative PP or the centre-left PSOE. The three dissenting votes correspond to magistrates known as "conservative". The magistrate Francisco José Hernando Santiago, who did not participate, is also known as "conservative". Such unofficial distinction between the members of the TC highlights the significance of political influence in the Court.

[114] *STC 198/2012, FJ 3rd*. See *supra* note 17.

[115] *Ibid.*

[116] *Ibid. FJ 5th.* See *supra* Sect. 2.4 "Same-Sex Couples and Marriage According to the Constitutional Court prior to STC 198/2012".

[117] See, *inter alia*, *STC 222/1992 of 11th December 1992, FJ 4th and 5th; STC 116/1999, of 17th June 1999, FJ 13th; STC 19/2012 of 15th February 2012, FJ 5th.*

[118] See, *inter alia, Schalk and Kopf v. Austria*, *24th June 2010.*

[119] *STC 198/2012, FJ 7th*. See *supra* Sect. 2.3 "The Constitutional Court and the Development of the Concepts of Constitutional Guarantee and Subjective Right".

the notion of marriage in 1978, when the Constitution was approved, entailed the union between a man and a woman. It also pointed out, however, that a literal interpretation of Article 32 CE did "not entail that [the Constituent Assembly] excluded [the possibility of allowing same-sex couples to marry]."[120] Nonetheless, according to the TC, a purely grammatical or historical interpretation of the constitutional text was not accurate. It stated that it was necessary to use a dynamic interpretation of the institutional guarantee of marriage because Law is "a social phenomenon linked to the reality where it develops," and it is connected to the notion of "legal culture".[121] According to the TC, legal culture could not be understood from a purely literal, systematic or original interpretation. It required the use of other factors as well, such as the social reality, the opinion of legal scholars and advisory bodies, the law of socio-culturally similar jurisdictions, and the case law of international courts as well as opinions and reports issued by international bodies.[122]

The rule of interpretation set forth in Article 10.2 CE was understood in STC 198/2012 as an evolutionary or dynamic rule of interpretation.[123] When discussing whether the guarantee of marriage had been respected, that is, if the "master image" of the marriage institution had been kept when Act 13/2005 was introduced,[124] the Court relied on case law by the ECtHR and on EU Law. Thus, the Court acknowledged that the implementation of same-sex marriages is neither obliged nor forbidden by the ECHR and EU Law but that a broad margin of appreciation is given to their Member States. The Court also relied on comparative law, legal scholarship and social reality to conclude that the legal image of marriage is not unrecognized in the current Spanish social reality and Article 32 CE provides a margin broad enough to include same-sex couples.[125] The Court, in sum, declared the total accordance of Act 13/2005 with the constitutionally guaranteed marriage institution. The constitutionality of a registration scheme for same-sex couples, however, was not excluded. Therefore, STC 198/2012 considered same-sex marriages constitutionally possible but not a constitutional obligation.

This decision is also important because the TC for the first time provided a definition of marriage as a "community of affection which generates a bond of mutual aid between two persons who are equal within this institution and who freely decide to join a common project of family life by giving their consent and

[120] *Ibid., FJ 8th.*

[121] *Ibid., FJ 9th.*

[122] *Ibid.*

[123] *Ibid.*

[124] See Sect. 2.3, "The Constitutional Court and the Development of the Concepts of Guarantee and Subjective Right".

[125] Following the definition of guarantee of institution given in *STC 32/1981,* of 28th July, *FJ 3rd.* See *supra* Sect. 2.3, "The Constitutional Court and the Development of the Concepts of Guarantee and Subjective Right".

expressing it expressly according to the established formalities."[126] The TC did not define marriage as containing gender/sex diversity but it stressed the importance of affection, equality between members of the couple (monogamy is, thus, a defining element) and free will of the spouses. It is, therefore, a definition in accordance with the Equality Clause of Article 14 CE and the free development of personality of Article 10.1 CE.

The decision gave an opportunity to the TC to analyze the notion of "essential content" of a subjective right with regards to the right to marry of Article 32 CE, using the approach taken in its 1981 decision STC 11/1981 as the starting point.[127] The Court ascertained some elements of this essential content: (a) full legal equality between spouses; (b) need of mutual consent to marry; and (c) freedom not to marry.[128] As the Court stated, this notion gave and gives a broad margin to the legislature to both regulate the formalities of marriage, age, legal capacity, rights and duties, etc. as established by Paragraph 2 of Article 32 CE, and to regulate other types of unions, which means that the option of a registration scheme is constitutionally possible.[129]

The decision made reference to ATC 222/1994,[130] which stated that the so-called "principle of heterosexuality" was fully constitutional. This time the Court clarified that ATC 222/1994 could not be understood as a constitutional prohibition to introduce gender-neutral marriage legislation but it only meant that an exclusively opposite-sex marriage regime was constitutional.

In STC 198/2012, the Court also identified the objective dimension of the right to marry with the institutional guarantee of marriage.[131] It focused, therefore, on the subjective right to ascertain whether the essential content of marriage had been respected by Act 13/2005. The TC concluded that the subjective right to marry for opposite-sex couples had not been subject to any type of limitation as a consequence of the enactment of Act 13/2005 and had not been denaturalized because of it.[132]

Despite the TC's statement that it was not its role to judge the opportunity or convenience of enacting Act 13/2005, but only to determine the constitutionality of such Act, the Court seemed to welcome the new legislation as positive. It stated that the legislation was based on dignity and free development of personality. This assessment was criticized by the concurrent vote of Magistrate Manuel Aragón Reyes. He pointed out that it was not the role of the TC to assess if the choice

[126] *STC 198/2012, FJ 9th.*

[127] See *supra* Sect. 2.3, "The Constitutional Court and the Development of the Concepts of Guarantee and Subjective Right".

[128] *STC 198/2012, FJ 10th.*

[129] *Ibid.*

[130] See *supra* Sect. 2.4. "Same-Sex Couples and Marriage According to the Constitutional Court prior to STC 198/2012".

[131] *STC 198/2012, FJ 10th.*

[132] *Ibid.*

made by the legislature was convenient or timely.[133] Magistrate Aragón Reyes also disagreed with the dynamic interpretation used by the majority vote, stating that the TC could not become a "permanent constituent power."[134] He pointed out that, following a historical interpretation, the Constituent of 1978 excluded same-sex marriages. Magistrate Aragón Reyes, however, agreed that the principle of heterosexuality was no longer an essential element of the guarantee of marriage based on the current social conscience and legal culture of Spain.[135]

The main arguments of the three dissenting votes can be summarized as follows: (a) marriage is an institution that pre-dated the Spanish Constitution;[136] (b) following a historical interpretation, same-sex marriage had been excluded by the Constituent Assembly; (c) they rejected that the rule of interpretation set forth in Article 10.2 CE, with regards to international human rights treaties led to the constitutionality of Act 13/2005;[137] (d) marriage has an essential purpose which same-sex marriage does not respect;[138] (e) they rejected a dynamic interpretation of Article 32 CE and stated that the introduction of same-sex marriages would have required a constitutional reform;[139] f) the legislature could protect same-sex couples through other legal regimes different from marriage.

[133] *STC 198/2012, concurrent vote Magistrate Manuel Aragón Reyes, FJ 1st.*

[134] *Ibid. FJ 2nd.*

[135] Although Aragón Reyes rejected the dynamic interpretation of the guarantee, he considered the essential content of the guarantee as "historically changeable" and, hence, a certain idea of evolution to keep the image of the guarantee of institution recognizable for the social conscience is present. *STC 198/2012, concurrent vote of Magistrate Aragón Reyes, FJ 2nd.*

[136] Magistrates Ollero Tassara mentioned that marriage is an "anthropological" reality. *STC 198/2012, dissenting vote of Magistrate Ollero Tassara, FJ 5th.*

[137] Magistrates González Rivas and Ollero Tassara referred to this point. González Rivas pointed out that the broad margin left by international courts meant that the Court was not obliged to introduce same-sex marriage and, in connection with the wording of the Constitution, same-sex marriage was excluded. *STC 198/2012, dissenting vote of Magistrate González Rivas, FJ 3rd.* Ollero Tassara stressed that Constitutional case law cannot be dependent on "foreign decisions." *STC 198/2012, dissenting vote of Magistrate Ollero Tassara, FJ 6th.*

[138] Rodríguez Arribas talked about marriage as a "sexual union which natural purpose is the perpetuation of human species." *STC 198/2012, dissenting vote of Magistrate Rodríguez Arribas, FJ 1st*. Ollero Tassara embraced the idea of a "social function" of marriage which, although he did not explicitly mention it, seems to refer to procreation as well. *STC 198/2012, dissenting vote of Magistrate Ollero Tassara, FJ 2nd and 3rd.* Similarly, González Rivas, without expressly mentioning procreation, referred to the "essential purpose" of marriage. *STC 198/2012, dissenting vote of Magistrate González Rivas, FJ 4th.* "after" well."

[139] Ollero Tassara pointed out that the TC should be prevented from becoming a "third chamber" (together with the Congress and the Senate). *STC 198/2012, dissenting vote of Magistrate Ollero Tassara, FJ 1st.*

2.7 Conclusion

The Spanish Constitutional Court took 7 years to decide on the constitutionality of Act 13/2005. STC 198/2012 shows that the TC used similar arguments to those used by the Portuguese Constitutional Court 2 years before, when deciding on the same issue. The TC had previously discussed marriage in relation to same-sex unions in 1994 (ATC 222/1994). STC 198/2012 did not contradict its previous decision and, at the same time, it declared same-sex marriage constitutional.

As mentioned above,[140] prior to the TC's decision many scholars discussed that the decision on the constitutionality of same-sex marriages in Spain would depend on whether the TC would decide that Article 32 CE contained a mere subjective right to marry or if it was an institutional guarantee of marriage, which would limit the role of the legislature. STC 198/2012 stated that Article 32 included both a constitutional right and an institutional guarantee. This approach is exactly the same as the one adopted by the Portuguese Constitutional Tribunal in its *Acordão* 359/2009 and, more importantly, in its *Acordão* 121/2010. According to the Portuguese Court, Article 36 CRP had such double character, as a guarantee and as a fundamental right. Therefore, both courts put the focus on the interpretation of the guarantee of the institution and on what its essential content entails.

Both courts rejected the identification between family and marriage and declared that family was a broader concept than marriage. This perspective meant that, in accordance with the European Court of Human Rights, same-sex unmarried couples could constitute a family regardless of whether they were allowed to marry or not. It also involved a reaffirmation that marriage is not linked to procreation. The procreation argument, however, was present in the dissenting votes to STC 198/2012, either implicitly, as in the case of Magistrates González Rivas and Ollero Tassara, or explicitly, in the dissenting vote of Magistrate Rodríguez Arribas.[141] Contrary to these statements, marriage is a socially constructed institution and there is no legal basis, neither in the CE nor in the CC, to conclude that procreation is a purpose of marriage.[142]

Both the TC and the TCRP rejected a constitutional interpretation based solely on the historical criterion. The TC also stated that, although the Constituent Assembly of 1978 understood marriage as a union between a man and a woman, it did expressly exclude a gender-neutral legislation. Likewise, the TCRP, in its *Acordão* 121/2010, considered same-sex marriages in 1976 (when the CRP was approved) a legally and politically unknown issue. However, the concurrent vote of Magistrate Aragón Reyes in the Spanish decision underlined that the Constituent Assembly and the legal culture in 1978 understood marriage as made up of opposite-sex

[140] See *supra* Sect. 2.3. "The Constitutional Court and the Development of the Concepts of Constitutional Guarantee and Subjective Right".

[141] See *supra* note 138.

[142] See *supra* Sect. 2.2. "Challenges to the Constitutionality of Act 13/2005: Article 32 CE and heterosexuality as a defining element in marriage".

couples. Both approaches can be combined nonetheless. A purely historical criterion suggests that the Constituent Assembly, in the context of 1978, understood marriage as a heterosexual union but, as an unknown issue at the time, it did not expressly exclude same-sex couples in the wording of the CE. However, this lack of express reference to same-sex couples involves a grammatical criterion of interpretation and not a purely historical one. The three dissenting votes considered marriage as an institution pre-existent to the approval of the CE which was simply received by the constitutional text.[143] Although not expressly mentioned in STC 198/2012, the TC implicitly rejected this argument which would involve an acceptance of pre-constitutional definitions of constitutional concepts instead of an understanding of the CE as a starting point in itself.

The Spanish decision did not seem to clearly distinguish between the historical and the grammatical criteria of interpretation and they appear to be mixed or blurred at times. Regarding the grammatical interpretation, the judgment simply mentioned that "Article 32 CE only identifies the holders of the right to marry and not who they may marry with although, we must emphasize, a systematic approach makes it clear that it is not possible to conclude that there was a will to extend the right to same-sex unions in 1978."[144] However, as two different criteria of interpretation, the grammatical criterion should have been treated more thoroughly. Even if an analysis of the Constituent Assembly's discussions suggests that the concept of marriage for the Constituent Assembly was that of opposite-sex couples, a grammatical interpretation of Article 32.1 CE on marriage may bring a different conclusion. The mere reference to "man" and "woman" does not conclude that Article 32 CE prohibited same-sex marriages but rather that it was forbidden to discriminate against on the basis of sex when entering into marriage, during marriage and upon its dissolution. Consequently, though related, both criteria deserve a separate analysis.

The TC gave strong consideration to a dynamic interpretation of the guarantee of the institution of marriage. The Court relied on previous decisions and it was consistent with its previous approach to the understanding of the concept of constitutional guarantee.[145] The guarantee must, thus, be recognized in accordance to the image the social conscience has of it in each time and place.[146] A dynamic interpretation of the institutional guarantee allows it to be recognizable in each time

[143] This approach has as a consequence a coincidence between the concept of marriage in the CE and in the CC. Supporters of this coincidence of concepts have been, *inter alia*, CAÑAMARES ARRIBAS, S.: *El matrimonio homosexual en derecho español y comparado*, Iustel, Madrid, (2007), p. 132 and MARTÍNEZ DE AGUIRRE ALDAZ, C. and DE PABLO CONTRERAS, P.: *Constitución, derecho al matrimonio y uniones entre personas del mismo sexo*, Rialp, Madrid, (2007), pp. 76–80. This is also the position of the CGPJ in its Report of 26th January 2005, pp. 42–43.

[144] *STC 198/2012, FJ 8th.*

[145] See *supra* Sect. 2.3. "The Constitutional Court and the Development of the Concepts of Constitutional Guarantee and Subjective Right".

[146] As defined in *STC 32/1981*. See *supra* Sect. 2.3. "The Constitutional Court and the Development of the Concepts of Constitutional Guarantee and Subjective Right".

and place. This understanding of institutional guarantees is the same as the one adopted by the TCRP in both *Acordão* 359/2009 and *Acordão* 121/2010 where it also supported a dynamic approach to the concept of institutional guarantees in order to avoid "freezing" them in time. This approach was criticized by the dissenting votes to STC 198/2012 that demanded the need of a constitutional amendment to include same-sex couples within the institutional guarantee of marriage. Otherwise, the argument went, there would be a "constitutional mutation" without following the regulated procedure for its amendment.[147] This argument, however, must be disregarded in the context of previous definitions of the constitutional guarantee in the TC case law. If we understand that the guarantee must keep the image of the institution in a given *time* and *place*, it is not difficult to conclude that freezing the institutional guarantee in time, with the consequence of losing its "image" in current society, would involve a violation of such guarantee and a mutation in itself. Additionally, STC 198/2012 connected the dynamic interpretation of Article 32 CE with the rule of Article 10.2 CE in order to interpret rights according to international treaties ratified by Spain. By connecting a dynamic interpretation of the institutional guarantee with Article 10.2 CE, the TC understands that any future interpretation of Article 12 of the European Convention of Human Rights by the European Court of Human Rights that would include same-sex couples would influence the interpretation of Article 32 CE in the future.

The TC assessed the introduction of same-sex marriage as a step forward in the guarantee of dignity and free development of personality in order to achieve the full effectiveness of fundamental rights.[148] A model that eliminates more differences between opposite and same-sex couples, in this case, the introduction of a gender-neutral marriage law, seems to be the one that better fulfills Articles 14, 9.2, 10.1, 11, 1.1 and 10.1 CE. Thus, the principle of heterosexuality contained in the marriage regulation in the CC before Act 13/2005 was constitutional but it did not prevent the legislature from opening it up to homosexual relationships.[149] Both the Spanish and Portuguese Courts agreed that the decision on how to legally recognize same-sex couples was in the hands of the legislature. There are, however, some differences between the Spanish and the Portuguese decisions:

[147] *STC 198/2012, dissenting votes of: Magistrate Rodríguez Arribas, FJ 2nd; Magistrate Ollero Tassara, FJ 5th; Magistrate González Rivas, FJ 6th.*

[148] *STC 198/2012, FJ 11th.*

[149] Among the legal scholars supporting same-sex marriage as constitutionally possible prior to Act 13/2005. See DE AMUNÁTEGUI RODRÍGUEZ, C.: "Argumentos a favor de la posible constitucionalidad del matrimonio entre personas del mismo sexo", *Revista General de Legislación y Jurisprudencia*, 3 (2005), p. 32 and GAVIDIA SÁNCHEZ, J.V.: "Uniones homosexuales y concepto constitucional de matrimonio", *Revista Española de Derecho Constitucional*, vol. 61, (2001), p. 50. For an opposite opinion, MARTÍNEZ DE AGUIRRE ALDAZ, C. and DE PABLO CONTRERAS, P.: *Constitución, derecho al matrimonio y uniones entre personas del mismo sexo*, *op.cit.,* pp. 76–80.

First, The Portuguese Equality Clause of Article 13.2 CRP contains, since Constitutional Act 1/2004, a reference to sexual orientation which does not expressly exist in the case of the CE. The mention to sexual orientation, however, did not entail the automatic constitutionality of regulations on same-sex couples in Portugal.[150] At the same time, the fact that sexual orientation is not expressly mentioned as a ground in Article 14 CE does not mean that it is allowed to discriminate on the basis of sexual orientation in Spain either.

Second, Article 36.1 of the Portuguese Constitution mentions that "everyone has the right to form a family and to marry under conditions of full equality," whilst the Spanish Constitution expressly refers to "man" and "woman." In spite of this different wording, in Portugal some scholars had suggested that the reference to "everyone" had to be understood as limited to "man" and "woman," in light of Article 16.2 CRP and the Universal Declaration of Human Rights.[151] Similarly, the interpretation of the Spanish provision on marriage also triggered heated debate. In Spain and Portugal some legal scholars argued that the constitutional marriage provisions had the purpose of avoiding the discriminations on the grounds of sex that existed in the pre-democratic periods in both countries (in the case of Portugal, the *Estado Novo*).[152] As mentioned by the Portuguese Court the issue of same-sex marriages was, simply, unknown at the time of the approval of the Constitution.[153]

Third, the question of normative hierarchy was not as deeply debated in Spain as it was in Portugal, not even among legal scholars. In both jurisdictions, however, it was stated that the starting point to an understanding of the concept of marriage is the constitutional text and not the civil legislation. In Spain, before the approval of Act 13/2005, there was no provision in the CC similar to Articles 1577 and 1628 e) of the Portuguese Civil Code. Thus, some authors had even argued that same-sex marriages were not forbidden in Spain, even before 2005, especially since Act 30/1981 of 7th July, which had abolished impotence as an impediment to marriage.[154]

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[150]In this sense, the TCRP in *Acordão 359/2009*, p. 10. See also MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.,* p. 819 and GOMES CANOTILHO, J.J. and MOREIRA, V.: *Constituição da República Portuguesa, anotada: artigos 1° a 107°, vol. 1*, *op.cit.,* p. 568. In a similar way, the inclusion of sexual orientation in the Swedish Constitution (the other constitution of a European country which expressly mentions it) was not conclusive of an obligation of opening marriage to same-sex couples (I wish to thank CAROLINE SÖRGJERD for enlightening me in the Swedish case).

[151]See BARROSO, I.M.: "Casamento civil entre pessoas do mesmo sexo: um <<direito fundamental>> á medida da lei ordinária?", *op.cit.,* pp. 61–62. He also denied a dynamic interpretation of Article 16.1 of the Universal Declaration of Human Rights.

[152]MIRANDA, J. and MEDEIROS, R.: *Constituição Portuguesa Anotada, Tomo I: Introdução Geral, Preâmbulo, artigos 1° a 79°*, *op.cit.,* pp. 824–825.

[153]*Acordão 121/2010. Fundamentação 18.*

[154]PRATS ALBENTOSA, L.: *La nueva regulación del derecho matrimonial español: bases y principios*, *op.cit.,* p. 19. It is relevant, because of the time and the context in which those comments

In sum, both the Spanish and the Portuguese decisions shared a similar reasoning. The Belgian *Cour d'arbitrage* was another court of a European country that had to decide on the constitutionality of same-sex marriages after legislation was introduced in its country.[155] The Belgian Court also concluded in the way of considering same-sex marriage not only constitutional according to the Belgian Constitution but also perfectly compatible with the ECHR and the United Nations International Covenant on Civil and Political Rights, which expressly mentions "man" and "woman" in its Articles 12 and 23.2.

Some final ideas are worth mentioning in relation to the decision of the TC on Act 13/2005. When the constitutionality of an act is challenged, the act usually remains in force until the TC decides on the matter. During the 7 years the appeal was pending, many same-sex couples married, and rights and obligations arose from those marriages. A judgment declaring Act 13/2005 unconstitutional would have created a "legal chaos" in relation to the couples already married.

The solution provided by STC 198/2012 may lead to a problem of legal uncertainty. If same-sex marriage is constitutionally possible but it is not constitutionally mandated, and not included within the constitutional guarantee of marriage, it could mean that the legislature, under a new parliamentary majority, could eventually proceed to repeal Act 13/2005. Although the conservative majority of the PP stated that gender-neutral marriage legislation would remain in force, nothing prevents the possibility of repeal. If we take, however, a dynamic interpretation of the constitutional concepts and the institutional guarantee of marriage, along with a constitutional interpretation that includes the international human rights treaties ratified by Spain (Article 10.2 CE), what was permitted before could eventually become constitutionally mandated.[156] This is a possibility that should not be disregarded, if not now, in a near future.

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were made, the opinion of PERE RALUY, judge in charge of the Civil Registry of Barcelona in 1977, just 2 years after the death of General Franco, with the Francoist Civil Code still in force. In an interview, PERE RALUY pointed out that the Civil Code in force did not expressly prevent same-sex couples from marrying as the gender diversity was not expressly demanded anywhere in the Code. Interview with PERE RALUY in DOMINGO LORÉN, V.: *Los homosexuales frente a la ley. Los juristas opinan*, Plaza y Janés S.A., Barcelona, (1977), pp. 138–144.

[155] *Arrêt n° 159/2004,* of 20th October 2004.

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