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Same-Sex Partnerships in Spain: Family, Marriage or Contract?

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A. Introduction

Although the Spanish Parliament has not passed any Act on same-sex relationships, some autonomous communities did so. From this situation two types of problems arise: the first one concerns about the jurisdiction that these autonomous communities have, according to the Constitution, on this matter. The second one refers to the nature that these laws attribute to this kind of relationship. This article deals with the pattern established by the Autonomous Laws to same-sex partnerships, the rights and duties imposed by the law to the cohabitants, and the effects of the breakdown and death. It will conclude considering that the laws recognize same-sex partnerships as families to be protected according to the Article 39 of the Spanish Constitution.

B. The Right to Marry under the Spanish Constitution of 1978

There is a group of rules in the Spanish Constitution of 1978 (the CE)[1] which come under the title of *Rights and Citizens' Duties*, and which recognize a series of rights that bind the state to regulate their fundamental contents. Among these rules is Article 32 of the CE that specifically regulates the right to marry. In the discussion concerning the right of same-sex partners to marry, this norm provides arguments in favour of and against this right. This problem has dominated the solutions found in the prevailing autonomous communities' laws, as will be seen in this article. To put the topic into perspective, it is submitted that in Spain authors discuss two types of problems: first, whether heterosexuality is an indispensable requirement for

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[1] This work is included in the research programme 'Marriage Crisis', directed by the author.

European Journal of Law Reform, Vol. 3, No. 3
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matrimonial systems;[2] and secondly, whether these partnerships may claim the protection that Article 39.1 of the CE provides for the family.[3]

Some authors have highlighted the following paradox: as the institution of marriage becomes more fragile and unstable, more groups wish to enter into it and therefore there is a greater importance placed on the right to marry.[4] A survey concerning the changes which have taken place in recent years in the legislation in Europe proves that a constant de-regulation of marriage exists, and which is partly due to the acceptance of effects for same-sex partnerships which have to date brought about an important change in legal concepts.

The increase in the number of opposite-sex partners living together without being married[5] is now considered a normal situation. Sociologists qualify this phenomenon as the desinstitutionalization of marriage. And although censuses do not reflect the same number of cases as regards same-sex couples, pressure from these communities has led some autonomous parliaments[6] to pass a number of laws, in an attempt to regulate an increasingly common situation. In this work mention will be made of the Catalan Act 10/1998, 15 July, *concerning stable couples' relationships* (hereafter the CatAct);[7] the Aragon Act 6/1999, 26 March, *concerning unmarried stable couples* (hereafter the ArAct) and the Act from Navarra 6/2000, 3 July, *concerning legal equality for stable couples* (hereafter the NavAct).[8]

The author of this article does not believe that the reason for the increase in the

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2 P. Talavera, 'Les Unions Homosexuals en la Llei d'Unions Estables de Parella. Aproximació Crítica' in (2000) 2 *Revista Jurídica de Catalunya* pp. 333–356, at p. 336.

3 See the conclusion of this article.

4 M.A. Glendon, The Transformations of Family Law (Chicago, 1989, 1st ed.) at p. 35.

5 In Spain there are no completely reliable data on the number of cohabitants, though this increment does not seem to appear to be so spectacular, as noted by L. Flaquer, *El Destino de la Familia* (Barcelona, 1998) at p. 85 and p. 161. *The Economist* (26 September 1998, p. 34) placed cohabitation in Spain below 4 per cent in 1994. The population census of 1996 provided a figure for the total number of different types of unmarried couples in Catalonia: 128,309 (*Institut català d'estadística*. EP/96, at p. 34).

6 Apart from the Acts mentioned in text, the Popular Party Group presented a Draft for an Act on the Civil Partnership Contract in Parliament, on 18 September 1997 (BOCG-CD, IV Legislature, 29 September 1997, Serie B, num 117–1, p. 15. These drafts were not passed.

7 For more details on the precedents and discussions of this Act, see M. Martín, 'Comentario a los Artículos. 1 y 19,20 y 21 CatAct' in *Comentaris al Codi de Família, a la llei d'Unions Estables de Parella i a la Llei de Situacions Convivencials d'Ajuda Mútua* (Egea and Ferrer (eds)) (Madrid, 2000) at pp. 1141–1145; M. Garrido, *Derecho de Familia* (Madrid/ Barcelona, 1999) at pp. 80–84, and P. Talavera, 'Les Unions Homosexuals en la Llei d'Unions Estables de Parella. Aproximació Crítica' in (2000) 2 *Revista Jurídica de Catalunya,* at p. 346.

8 While working on this article, the autonomous community of Valencia's Parliament passed a law relating to same-sex partnerships. The Law 1/2001, 6 April, concerning de facto unions. This Law doesn't afford civil effects to these unions, due to the lack of civil jurisdiction of Valencia.

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number of partnerships, including both cohabitation and same-sex partnerships, is due to a decline of the social status of marriage.[9] It is true that marriage no longer identifies a family or a group of families, as in the past,[10] but the right to marry implies that the members of such are exercising their freedom to do so. However, absolute freedom does not exist in the creation of a partnership, because the state is constitutionally bound to regulate the conditions of marriage, with the limitations derived from the protection of fundamental rights.

Consequently we should find out whether marriage in Spain does actually come under the category of a fundamental right. Article 32 of the CE establishes that '*men and women are entitled to marry with full legal equality*', which has generally been interpreted as a constitutional recognition of the right to marry.[11] This Article recognizes:

(1) a personal right whose content is specified in the same text; and
(2) establishes a matter reserved for legal regulation on the conditions to exercise such a right.

Among these conditions is the requirement concerning the sex of those entering into marriage. This is an essential issue[12] since the state must respect the right to marry, as long as the requirements, determined by law, are met. In short, the right to marry is not an absolute right, since its validity is conditioned by the execution of the requirements that the state determines in relation to the capacity and the conditions of both spouses.

In the Spanish Constitution the right to marry stems from the right to freedom and is not considered a fundamental right, although it is constitutionally protected, and has been thus defended by the Constitutional Court. The basic ruling concerning the distinction between marriage and common-law partnerships is the judgement of the Constituciona Court (hereafter the STC) 184/1989, 15 November:

> It is clear that under the 1978 Constitution, marriage and cohabitation are not equivalent realities. Marriage is a social institution guaranteed under the Constitution, and the right of men and women to enter into such is a constitutional right (Article 32.1), whose legal regulation system corresponds to the law under a constitutional mandate (Article 32.2). Nothing like this exists in the *more uxorio* partnership, which is neither a legally guaranteed institution nor an express constitutional right.

The reason for the difference, according to the aforementioned ruling is that:

> The matrimonial bond creates *ope legis* a plurality of rights and obligations for

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[9] M.A. Glendon, The Transformations of Family Law (Chicago, 1989, 1st ed.) at p. 35.
[10] L. Flaquer, *El Destino de la Familia* (Barcelona, 1998) at p. 78.
[11] Although not protected by a civil right action (named '*recurso de amparo*' by the Constitution), since the regulation is included in Section 2 Title 1, it is excluded from the protection awarded to fundamental rights in art. 53 of the CE.
[12] These references are taken from J.L Lacruz, *Elementos de Derecho Civil, IV* (Barcelona, 1997, 4th ed.) at p. 29 et seq.

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> husband and wife which do not necessarily occur between men and women who cohabit outside marriage.

It should not be understood from the above that the legislator is unable to establish specific effects for unmarried couples. This is a matter of policy since the situations are different:

> In consequence, since the right to marry is considered a constitutional right, we may say that the legislator is able to establish differences between married and unmarried couples.[13]

Similar arguments are used in Constitutional Court writ 222/1994, 11 July, in which the request presented by a same-sex partner concerning social security benefits[14] was rejected. The Court stated that:

> Partnerships among same biological sex partners are neither a legally regulated institution, nor is there any constitutional right to such; as opposed to marriage between men and women, which is a constitutional right (Article 32.1) ...

Although:

> ... this does not prevent the legislator from establishing a system whereby same-sex partners can benefit from the full rights and obligations of marriage, as the European Parliament advises.[15]

The Constitutional Court states categorically that to consider *the heterosexual principle 'as a qualifying element of marriage' is fully constitutional* in Spain.

The Constitutional Court's line of argument responds to the constitutional principle whereby the right to freedom is not an absolute right, as none of the fundamental rights are. Therefore, the right to marry, based on the right to freedom, is not absolute either, since the Constitution requires the law to establish the conditions for the validity of such, as long as they are not irrational. Among those conditions is the issue of sex. When those who seek to enter that status belong to the same sex, conflict arises.[16]

The argument about same-sex marriage has had a greater repercussion in the

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[13] See also the Rulings of the Constitutional Court 29/1991, 14 February; 77/1991, 11 April; 222/1992, 11 December, among others. S. Llebaria, 'Glosa Crítica a esta (Nuestra) Nueva Ley de Uniones Estables de Pareja' in (1998) 10 *La Notaría,* at p. 65.

[14] M. Garrido, *Derecho de Familia* (Madrid/Barcelona, 1999) at p. 72

[15] In the same sense, see the judgment of the Suprem Court of 21 October 1992. The opinion of the Constitutional Court is studied by R. Verda, Las Uniones de Hecho a la Luz de la Constitución Española de 1978: estado de la Cuestión en la Legislación Estatal y Autonómica' in (2001) 2 *Actualidad Civil,* at p. 61–67.

[16] There is a sector among Spanish authors that still defines marriage as a 'stable partnership formed by a man and a woman in a full community of life', with a 'natural' aim: procreation. See J.L Lacruz, *Elementos de Derecho Civil, IV* (Barcelona, 1997, 4th ed.) at p. 63. Modern authors, however, eliminate this content and define marriage simply as a 'community of life'. See P. Salvador, 'Comentario al Artículo 44 del Código Civil' in *Comentarios a las Reformas*

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various legislation passed since the 1989 Danish law opened a road that has been used by several countries to introduce a system similar to marriage. The issue has also been debated in our country, mainly after the autonomous communities of Catalonia, Aragon and Navarra passed various laws concerning the effects of this kind of partnership. However, it should be noted that, given the peculiar way in which legislative powers are distributed between the state and the autonomous communities concerning family law, and since powers on marriage formalities belong exclusively to the state, none of these laws regulate so-called *same-sex marriages*, but only basically the private effects these relationships produce.[17]

The problem is discussed mainly in relation to whether or not the right of same-sex partners to marry is recognized in the Spanish Constitution, and whether or not the prevailing Spanish regulation may imply a violation of this right in view of Article 12 of the European Convention of Human Rights (ECHR) and Article 32 of the CE.[18] The Constitutional Court has maintained the constitutionality of the heterosexuality principle[19] for the validity of marriage. This leads to the question of what model will be taken into consideration when regulating these partnerships.

C. Autonomous Communities Regulation of Same-Sex Partnerships

As mentioned above, some of the autonomous communities in Spain have powers to legislate on civil matters.[20]

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del Derecho de Familia, TI (Madrid, 1984) at p. 121 and Y. Gómez, *Familia y Matrimonio en la Constitución Española de 1978* (Madrid, 1990) at p. 192 et seq.

[17] J. Gavidia, 'Uniones Libres y Competencia Legislativa de Ciertas Comunidades Autónomas para Desarrollar su Propio Derecho' in (1999) V *Derecho Civil, La Ley*, at p. 1974.

[18] The European Parliament's Resolution of 8 February 1994 on the equality of rights for gays and lesbians in the European Community reiterated that organization's conviction that all citizens alike have a right to equal treatment, regardless of sexual orientation, asking Member States to put an end to unfair treatment in their laws. This is surely the reason for the current regulation of the Urban Lease Law (*Ley de Arrendamientos Urbanos*) allowing the subrogation in the lease of the home when the tenant dies. Art. 16.1,b) establishes that this right belongs to 'the person who had been living permanently with the tenant in a relationship of affection analogous to marriage, *regardless of sexual orientation'*. From this, it is implied that the same-sex partner is included. For a complete analysis of this matter, see N. Pérez Cánovas, *Homosexualidad, Homosexuales y Uniones Homosexuales en el Derecho Español* (Granada, 1996) at p. 226 et seq.

[19] N. Pérez Cánovas, *Homosexualidad, Homosexuales y Uniones Homosexuales en el Derecho Español* (Granada, 1996) at p. 105 and Y. Gómez, *Familia y Matrimonio en la Constitución Española de 1978* (Madrid, 1990) at p. 189.

[20] Spanish Civil Law, of which family law is a part, is regulated by the Spanish Civil Code. In addition, some autonomous communities can make their own Civil laws, which are ranked

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The constitutional problem lies in assessing whether these autonomous communities with legislative powers, which are not allowed to legislate on forms of marriage, may or may not pass legislation concerning same-sex partnerships.

Article 149, 1–8 of the CE gives the state the exclusive power to legislate on 'private legal relationships relating to the forms of marriage'. This allows us to claim, as a first conclusion, that autonomous communities cannot pass an act that regulates forms of marriage different from the ones established by the state legislation. That is to say, there are no alternatives to marriage to be created. However, this does not prevent the autonomous communities from regulating the effects of this kind of partnership, as these are private effects that can be regulated by autonomous communities. They have nothing to do with forms of marriage, which are totally reserved to national legislative bodies, under the aforementioned Article 149, 1–8 of the CE.[21] But even so, autonomous communities cannot make provisions on the issues which are of practical importance in giving effects to such partnerships, such as, social security pensions, taxes or issues connected with criminal law, because they are also the exclusive competence of the state.[22] However, some communities like Navarra, have competence to regulate certain types of taxes, and others, like Catalonia, can establish certain special regulations.

Where do the boundaries lie concerning the effects of same-sex partnerships for which the autonomous communities are empowered to legislate? They cannot establish a registry system similar to that of marriage, because this issue can only be regulated by the state. They can however set the moment in time when this kind of partnership is able to produce legal effects, establishing objective factors which prove the existence of the partnership.[23]

I. Autonomous Communities' Regulation Systems

Spanish authors highlight the different systems in the treatment of same-sex partnerships:

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alongside the Civil Code. This is the case for the following autonomous communities: Basque Country, Catalonia, Galicia, Navarra, Aragon and Balearic Islands.

[21] The scope of the power to give provisions on civil Law is one of the most controversial issues of present-day jurisprudence in Spain, regarding Private Law. The Constitutional Court has pronounced its view on this matter in the Decision 88/1993, 12 March. See E. Roca, in *Institucions del Dret civil de Catalunya* (Puig and Roca) (1998, 5th ed.) at I, at p. 37 et seq.

[22] The Popular Party Group presented an unconstitutionality action against Law 6/2000, from Navarra, based on the lack of power of this autonomous community as regards marriage; since it equates same-sex partnerships to marriage, thus creating a new kind of marriage, for which only the State has full powers, according to art. 149–1,8 of the CE.

[23] E. Roca, 'Regulation of Same-Sex Partnerships from a Spanish Perspective' in *Making Law for Families* (Maclean (ed.)) (Oxford/Portland, 2000) at pp. 95–115 and p. 96.

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(1) Matrimonial system versus contractual system. Some authors consider that regulations on same-sex relationships should be based on marriage, since the purpose of procreation historically attributed to it has been lost. However, other authors consider that using the system of marriage perverts the concept of marriage itself, and prefer to formalize these relations through a contract. Spanish law follows different systems: Catalonia seems to prefer a contractual system, though only in a formal sense (Article 19 of the CatAct),[24] whereas Navarra clearly chooses a marriage comparison system (Article 1 of the NavAct).
(2) Unity or diversity of unmarried couples. Another problem focuses on the discussion of whether unmarried couples should be treated alike, regardless of the sex of the partners, or whether a different status should be accorded to homosexual and heterosexual couples. Catalonia opts for the diversity system, establishing different regulations and different effects.[25] In contrast, both Aragon and Navarra regulate all unmarried couples in the same manner.
(3) Formal system or *de facto* system. A *de facto* pattern stems from a situation of cohabitation for which legal effects are recognized, while in the formal system legal effects derive from the fulfilment of formal requirements. The latter is based on a declaration of will by the contracting parties. Catalonia has chosen a formal system for same-sex partners.[26] Both Aragon and Navarra have chosen a *de facto* system.
(4) Compulsory register or public deed. When a legal regulation requires a certain formality, the issue is whether the inscription of the partnership should be made in a register, or if a public deed is enough. Inscription in a register grants the parties a title that legitimizes their situation and is proof of it.[27] The public deed is effective only among the parties that grant it. There is an additional problem for the autonomous communities, since the state is the only one with powers to regulate public registers (Article 149,1,8 CE), which accounts for the public deed (Article 21.1 CatAct).

On this basis, problems have sometimes been solved differently in the various autonomous communities. The right to marry has not been regulated, nor can it be, for it does not come under the powers of the autonomous communities, therefore the discussion on this issue remains open in Spain.

The general principle for the autonomous communities' regulations is that

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[24] P. Talavera, 'Les Unions Homosexuals en la Llei d'Unions Estables de Parella. Aproximació Crítica' in (2000) 2 *Revista Jurídica de Catalunya*, at p. 342.
[25] Ibid. at p. 352. Supporting the Catalan system, J.J. Lopez Burniol, 'La Ley Catalana de Uniones Estables de Pareja' in (1999) 3 *Revista Jurídica de Catalunya,* at p. 644.
[26] M. Martín, 'Comentario a los Artículos. 1 y 19,20 y 21 CatAct' in *Comentaris al Codi de Família, a la llei d'Unions Estables de Parella i a la Llei de Situacions Convivencials d'Ajuda Mútua* (Egea and Ferrer (eds)) (Madrid, 2000) at p. 1146–1147.
[27] M. Garrido, *Derecho de Familia* (Madrid/Barcelona, 1999) at p. 91.

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persons are free to cohabit and regulate the effects of that relationship, with the limitations established by the law. There are certain aspects that cannot be regulated by the couple, and these are:

(1) social security benefits, etc., that belong exclusively to the power of the state, which is the only body that can decide on the convenience of applying systems designed for married couples to different situations;
(2) the relations of the partnership with third parties, whether this be parties they contract with, or minors under the custody of one of the members of the partnership, including adopted minors;
(3) the issues concerning taxes, about which the autonomous communities have reduced areas of power in relation to some of them.

II. Legal Constitution of Same-Sex Partnerships

As has been mentioned, there are various ways to constitute a partnership. The three laws under discussion, however, describe same-sex partnerships with quite the same characteristics. Cohabitation is defined by three elements: same sex of the members of the partnership, stability and marriageability. Also, personal requirements are necessary; without them, the partnership does not have any legal effect. These issues will be presented separately:

(1) Elements of cohabitation: same-sex, stability and marriageability. All the autonomous communities define these unions with the aforementioned elements. The Catalan law says that this concerns 'couples formed by people of the same-sex that cohabit maritally' (Article 19 of the CatAct). Aragon and Navarra Acts contain different descriptions as they follow a unitary system: in Aragon, the Act is applied to people that 'form part of a steady unmarried partnership in which a bond of affection similar to marriage exists' (Article 1 of the ArAct). And Navarra considers a steady couple as 'a free and public partnership, with a relation of affection similar to marriage, regardless of sexual orientation' (Article 2.1 of the NavAct).
    (a) Same-sex. It is necessary that people forming this partnership belong to the same sex. None of these laws solve the problem of transsexuality.[28]
    (b) Marriageability. This means that members of the partnership establish a life as a couple similar to the matrimonial one. Thus relationships of friends who live together, not analogous to married ones, are excluded.[29]
    (c) Stability. If cohabitation is required in order for the same-sex

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[28] E. Roca, *Familia y Cambio Social* (Madrid, 1999) at p. 104 et seq. M. Martin, *supra* note 26, at p. 1216. Recently the Ministry of Justice authorized a marriage with one transsexual partner. See the decisions 8, and 9 January 2001.

[29] M. Garrido, *Derecho de Familia* (Madrid/Barcelona, 1999) at p. 95. M. Martin, *supra* note 26, at p. 1152.

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partnerships to have legal effects, it must be stable. If this requirement is not fulfilled, the partnership has no legal protection. But, what does *stability* entail? Does it mean cohabiting during a minimum period of time? This seems to be a requirement of the Aragon and Navarra Acts, that consider it fulfilled only when marital cohabitation has lasted during a period of two years (Article 3.1 of the ArAct), or one year (Article 2.1 of the NavAct). Stability here means a prolonged and uninterrupted cohabitation.[30]

(2) How to form same-sex partnerships. As has been said, the most profound discrepancy among the three laws resides in the determination in which these partnerships should be constituted so that they have the legal consideration of stable partnerships and, therefore, are worthy of legal benefits.

Both the Aragon and Navarra Acts admit two types of formalities of constitution:

(i) simple prolonged cohabitation during the time period set by the law, in which cas, the partnership has the characteristic of *stability*; and
(ii) to have publicly expressed in a public document the will of constituting a partnership.

Both statutes admit that a public statement (the public deed) or an implied one, expressed through uninterrupted cohabitation during the minimum period established by the law, constitute a partnership with all its legal consequences. This cohabitation can be proved by any means of evidence.

On the other hand, Article 19 of the CatAct only allows the constitution of same-sex partnerships by means of a public deed, which does not in any circumstance exclude the requirement of marital cohabitation. Thus, the Catalan Act requires the factual situation to be confirmed by a formal statement, the public deed, which must contain the declaration of will of the members of the partnership to be included in the system established by the law.[31] Without the public deed with the requirements of Article 19 CatAct, the union does not produce any legal effects in Catalonia.

The difference among the two forms of constitution consists of the fact that if the partnership is formed by a previous prolonged cohabitation, the law recognizes a past situation, while if the partnership is formed by way of a public deed, the law will recognize effects from that moment on, without taking into consideration anything that happened until then. Consequently, in Catalonia previous cohabitation before the public deed is not required.[32]

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[30] S. Llebaria, *Hacia la Familia no Matrimonial* (Barcelona, 1997) at p. 33.

[31] An additional problem resides in ArAct, whose art. 2 creates an administrative registry, where 'all stable unmarried couples' have to register; the Act requires this for administrative purposes, but not for producing legal civil effects, which do not require registry. An administrative registry has been created by the Decree 203/1999, of 2 November.

[32] M. Martin, *supra* note 26, at p. 1217.

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(3) Personal requirements. These laws do coincide in the requirements needed so that a partnership as described before, can be considered valid in law. These personal requirements are very similar to those required by the Civil Code for the validity of marriage.
   (a) Age of consent. Article 20,1,a) of the CatAct, Article 1 of the ArAct and Article 2.2 of the NavAct require the cohabitants to be of full legal age. The Navarra Act also allows those under age who have been emancipated to form these partnerships, which is not admitted in the Catalan and Aragon Acts.[33]
   (b) That the cohabitants are not related to each other. Persons who are united by a bond of consanguinity and siblings can not form this kind of partnership, and it would have no legal effect if they did so (Article 20,1,d) and e) of the CatAct; Article 4,b) and c) of the ArAct and Article 2.1 of the NavAct).
   (c) That there is no previous marital tie. The partnership has no legal effects if one of the members of the couple is tied by a previous matrimonial bond (Article 20.1, b) of the CatAct; Article 4,a) of the ArAct and Article 2.1 of the NavAct).[34] Nor will it be valid if there is a previous stable partnership that has not been dissolved.

   These partnerships can be proved by any means of evidence, but in Catalonia the only admitted means of proof is a public deed (Article 21 of the CatAct).

Therefore, it may be concluded that, apart from the specific details of each autonomous community, in order for the partnership to produce legal effects a statement is required, either express or tacit; stability of cohabitation, and the compliance of the legal requirements. When a couple does not fulfil any one of these requirements, it will be a pure *de facto* couple, with no legal effects.

III. Legal Effects of Same-Sex Partnerships

The effects the three Acts attribute to same-sex partnerships coincide when they are put into practice. The effects of cohabitation do not constitute a matrimonial property regime in the real sense, but only a set of valid rules to solve the conflicts that may arise. The Acts function by substituting the will of the partners, since the legal rules allow the partners to regulate, through an agreement, the 'personal and patrimonial' relations derived from cohabitation, as well as their respective rights and obligations. Article 22 of the CatAct, Article 5.1 of the ArAct and Article 5 of the NavAct only differ in the due legal form of the agreement: while the Catalan Act allows verbal agreement and private or public documents, both the Aragon and

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[33] M. Garrido, *Derecho de Familia* (Madrid/Barcelona, 1999) at p. 96; M. Martin, *supra* note 26, at p. 1218

[34] M. Martin, *supra* note 26, at p. 1218.

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Navarra Acts require the written form of the agreements, with the Aragon Act always requiring a public deed.

Are there any limits to this agreement? The Aragon Act considers null and void any agreement harmful to the parties' dignity, and any agreement contrary to the norms of Aragon Act. And although this is not mentioned in so many words in the Catalan or Navarra Acts, this limit should be considered applicable in both systems, since the constitutional system prevents any agreement contrary to fundamental rights and contrary to imperative norms. A whole different matter will be to determine what norms are imperative, i.e., those that cannot be excluded by the parties in determining the rights and obligations of the cohabitants, a matter in which the set of rules under examination presents some difficulties.

Where there is no agreement, or the agreement is considered null and void, the effects of legal partnerships are as follows:[35]

(1) Maintenance of the house and common expenses generated by cohabitation (Article 22.3 of the CatAct, Article 5.3 of the ArAct and Article 5.3 of the NavAct). When there is no agreement, the contribution may be made in money, proportionally to their respective revenues, or in domestic work. The cohabitants are jointly and severally liable before creditors for domestic supplies (Article 24 of the CatAct, Article 5.4 of the ArAct and Article 7 of the NavAct).

    Included in the category of family expenses are those generated by the maintenance of the children of any of the cohabitants, maintenance for both, expenses to preserve and improve the common house, and medical and health care expenses (Article 23 of the CatAct, Article 5.3 of the ArAct and Article 5.3 of the NavAct).

(2) Cohabitants are under no economic matrimonial property regime. Each partner keeps the property, enjoyment and administration of the assets they had before cohabitation, and that of the assets they acquire during cohabitation (Article 22.2 of the CatAct, Article 5.3 of the ArAct and Article 5.3 of the NavAct).[36]

(3) Maintenance. Cohabitants must provide maintenance to each other (Article 26 of the CatAct and Article 13 of the ArAct; there is no specific regulation in Navarra Act, although it can be deduced from Article 5.3 of the NavAct).

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[35] On this matter, see E. Roca, *Institucions* supra note 21 at pp. 465 et seq.; M. Garrido, *Derecho de Familia* (Madrid/Barcelona, 1999), who refers to it as 'primary patrimonial system of the family groups'. Ibid, at pp. 111 et seq; M. Martin, *supra* note 26, at pp. 1221 et seq.

[36] This is an important issue in both Aragon and Navarra Acts, where married couples are regulated by the matrimonial regime of common goods as regards their patrimonial assets, whereas this is not so important in Catalonia, where married couples are regulated, subsidiarily, in lieu of an agreement between spouses, by a system of separation of assets. That is why, in Catalonia, patrimonial relations of same-sex partnerships are practically the same as married couples.

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(4) When a cohabitant is declared legally incompetent, the other one will be his/her guardian (Articles 25 of the CatAct and Article 12 of the ArAct). Article 9.1 of the NavAct establishes an interesting comparison with marriage, saying that the members of the stable partnership (including same-sex partnerships) 'are considered equivalent to the situation of married couples in the matter of regulations concerning guardianship'.
(5) Joint adoption presents more discrepancies. Catalan Act does not admit them: it omits any reference to it in the regulation of same-sex partnerships. Article 10 of the ArAct establishes that stable heterosexual couples can adopt, therefore excluding same-sex partnerships from this possibility. On the other hand, Article 10 of the NavAct allows adoption by any type of stable partnership, attributing the same rights and obligations of adoptions made by a married couple. This Act also has some provisions on the custody of the common children when there is a breakdown of the partnership, which will, in any event, take into account the best interest of the minors (Article 10 of the NavAct).[37]
(6) Finally, only Article 28 of the CatAct requires consent of the cohabitant who is not the owner for selling the common home and the furniture of common use.

IV. Partnership Breakdown and its Legal Effects

We must examine the causes of the breakdown and the effects it produces separately.

(1) Breakdown causes. The Acts provide the grounds on which these partnerships will be held to have broken down and the effects of breakdown. These grounds can be the death or marriage of one of the cohabitants, unilateral or bilateral breakdown, and lack of cohabitation (Article 30 of the CatAct, Article 6 of the ArAct and Article 4 of the NavAct). However, the main issue here is not related to the grounds for breakdown themselves, because these partnerships depend exclusively on the cohabitants' will, and therefore the breakdown will only depend on their decision.[38] The problem is focused on the effects of breakdown.
(2) The effects of breakdown. Supreme Court decisions related to the breakdown of heterosexual unmarried couples, have always refused to apply marriage or company provisions to these cases by analogy.[39] Extra-marital cohabitation

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[37] R. Verda, Las Uniones de Hecho a la Luz de la Constitución Española de 1978: estado de la Cuestión en la Legislación Estatal y Autonómica' in (2001) 2 *Actualidad Civil*, at p. 67.
[38] M. Ysas, 'Comentario al Art. 30 CatAct' in *Comentaris al Codi de Família, a la llei d'Unions Estables de Parella i a la Llei de Situacions Convivencials d'Ajuda Mútua* (Egea and Ferrer (eds)) (Madrid, 2000) at pp. 1229 et seq.
[39] This is declared in the Supreme Court Decisions 22 July 1993; 30 December 1994; 10 March 1998. R. Bercovitz, Las Parejas de Hecho' in (1992) 1 *Aranzadi Civil* pp.13–27, at p. 21.

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does not rank the same as marriage as an institution, so the latter provisions cannot be applied to the former analogously. On the other hand, company provisions cannot be applied because unmarried couples do not satisfy the condition imposed on any company, namely, *lucrum animus*.[40]

The Catalan Act provisions in this respect are based on a Supreme Court Decision (dated on 11 December 1992) which held that the contribution made by the cohabitant's looking after her partner's welfare was not compulsory, because marriage didn't exist at all, but it recognized that her contribution caused his enrichment and the correlative:

> impoverishment of the plaintiff because no remuneration was paid for her looking after the defendant's social relationships and her performing of domestic duties, in such a way that there is no doubt about the correspondence between the service provided by her and his financial benefit ...

and this is assumed because:

> the legal framework does not specify that extra-marital cohabitation imposes on cohabitants an obligation to give each other support in their social life, professional career and domestic life.[41]

Following this resolution, the autonomous Acts provide some rights to same-sex cohabitants with the aim to avoid unjust enrichment. Cohabitants are provided with two rights when the relationship comes to an end (only in the event that the end is not due to the death of one of the cohabitants). These rights are the right to claim a lump sum payment as financial compensation, and the right to claim an income support.

(a) The financial compensation (Article 31 of the CatAct, Article 7.1 of the ArAct and Article 5.4 of the NavAct). The cohabitant who looked after the house or worked in the business of the other cohabitant without remuneration or being badly paid for that, is entitled to claim financial provision. It is required that this contribution disrupts the balance of the cohabitant's properties by causing an unjust enrichment to one of them. In other words, there must be correspondence between the enrichment of one of the cohabitants and the other's impoverishment.[42]

The compensation will consist of money to be paid on the breakdown as damages claim, unless the parties have previously agreed on different terms. The cohabitant can decide the way to make the financial provision, but in case of disagreement, the courts can make orders. The claim must be made before a year has passed after the breakdown.

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[40] See Supreme Court Decision 18 February 1993.
[41] See Supreme Court Decisions 27 May 1994; 16 December 1996; 10 March 1998.

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(b) Income support (Article 31.2 of the CatAct, Article 7.2 of the ArAct and Article 5.4 of the NavAct). The cohabitant whose potential earning capacity has diminished during cohabitation may claim an income support from the partner, if the claimant can not afford maintenance. Article 7.2 of the ArAct and Article 5.4 of the NavAct all recognize this right when one of the cohabitants needs it, due to the cohabitation having diminished his/her earning capacity, or due to the fact that caring for the common children has prevented or hindered work activities.[43] Article 31.1 of the CatAct admits it when cohabitation has produced an unjust enrichment.

Periodical payments should be terminated after three years. Therefore, there is a compensation for the difficulties in re-entering the labour market that the claimant may experience as a consequence of having lived with the other cohabitant under these circumstances. Sometimes, returning to the job market posses serious problems for cohabitants after the breakdown, and it proves impossible for them to recover their job or to get a new one.

(3) Death of one of the cohabitants.[44] Death of one of the cohabitants is a cause of extinction of the relationship. Based on this, the effects are quite different in the three Spanish Acts.

1. The Catalan Act

The Catalan Act provides same-sex partners with the following rights:

(1) the right to live in the family home during one year after the death of the tenant's unmarried partner. This right includes the tenancy of chattels, fixture and fittings, regardless the succession dispositions (Article 33 of the CatAct).
(2) The right to be a successor of the cohabitant, in case whether the partner dies without leaving a will. The surviving same-sex cohabitant can, therefore, apply for provision in case of intestate succession: he/she shares this position with the deceased's brothers and sisters and can take one-half of the deceased's whole estate (Article 34.1, b) and c) of the CatAct).[45]
(3) If the successors are the deceased's children, parents and grandparents, and

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[42] M. Garrido, *Derecho de Familia* (Madrid/Barcelona, 1999) at p. 322.

[43] It seems quite evident that this last cause will only take place when one of the cohabitants has been taking care of the children of the other cohabitant, although in Navarra joint adoption is allowed, consequently it is possible, if this regulation is considered constitutional.

[44] C. Hernández, 'Una Aproximación a la Ley 10/1998, de 15 de Julio, de Uniones Estables de Pareja de Cataluña' in (1999) 22 *Actualidad Civil*, at p. 618 and E. Ginebra, 'Los Derechos de "*Sucesión Intestada*" Reconocidos a las Parejas Homosexuales en la Ley Catalana 10/1998, de 15 de Julio, *d'Unions Estables de Parella*' in (2000) 33 Actualidad Civil, at pp. 1230–1233.

[45] *Solé,* Comentario al art. 35, in Egea-Ferrer, ibid, p. 1247. *Hernandez,* Ibid, p. 1229, *Hernández,* Ibid, p. 618.

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the partner dies without leaving a will, the surviving same-sex cohabitant is entitled to claim a quarter of the intestate's whole estate, if the claimant is unable to afford maintenance (Article 31.a of the CatAct).[46] The same right is also provided to the surviving cohabitant, if the deceased cohabitant made the will without making a bequest to the partner. (Article 15 of the CatAct).

2. The Aragon Act

The Aragon Act provides the same-sex partner with the right of obtaining the furniture, the work instruments that constitute the dowry of the common habitual house. However, jewellery and objects of extraordinary value are excluded. He or she is also entitled to reside in the same home during one year after the death of the cohabitant (Article 9 of the ArAct).

3. The Navarra Act

The Navarra Act considers the same-sex partner equal to the spouse in the so-called fidelity usufruct. Article 11 of the NavAct modifies Articles 253 and 304 of the Compilation of Navarra and grants the living cohabitants the usufruct of all the goods and rights belonging to the deceased at the moment of death. In this manner, it treats the cohabitant as the spouse for succession effects. This comparison also occurs in Article 304 of the Compilation, that has been modified in order to treat the cohabitant as the spouse as regards the intestate succession occupying the position of heir in the fifth place, as the surviving spouse.

D. Conclusion

Autonomous communities have regulated same-sex partnerships in a rather similar way. Based on the main idea that families are protected constitutionally (Article 39 of the CE), and including the same-sex relationships the category of families, they have established a series of rights and obligations for certain type of partnerships, which, although not equivalent to marriage, recognize a status to these partnerships. European Parliament's Resolution of 8 February 1994 is thus applied. Therefore, unity lies in the recognition of same-sex partnerships and the attribution of effects, regulated quite similarly, though with differences in detail.

The main discrepancy resides in the mode of regulation and there has been a debate concerning the adequate system: either a system based on a family model, or partnerships based on contract. Catalonia formally rejects the idea that these partnerships are families; it regulates same-sex partnerships under a law which is

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[46] J. Solé, 'Comentario a los Artículos 34 y 35 CatAct' in *Comentaris al Codi de Família, a la llei d'Unions Estables de Parella i a la Llei de Situacions Convivencials d'Ajuda Mútua* (Egea and Ferrer (eds)) (Madrid, 2000) at pp. 1240–1246.

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different and independent from the Family Code, following the distinction made by the Constitutional Court, by which marriage is a family institution protected constitutionally whereas 'the union between same-sex persons is not a legally regulated institution, nor is there any constitutional right to form them', as opposed to marriage. This is expressed in the preamble of the 1998 Act. The decision was highly criticized in its day by homosexual and lesbian groups who desired to be considered a type of family.[47] However, it seems to me that the option the Catalan legislator chose is more formal than real because, as I have already maintained,[48] the solutions given by the Catalan Family Code for marriages as regards the primary effects of patrimonial relations are the same ones as those established for same-sex partnerships. Indeed, the obligation to contribute to the expenses generated by cohabitation, the manner of contribution, the joint liability for this type of debts and the consent of the non-owner for the validity of the acts of disposition of the common house coincide in Articles 4–9 of the Family Code and in Articles 22–28 of the CatAct. If the law does not distinguish between both kinds of partnerships, is there any reason for the law to maintain a purely theoretical distinction? That is why the conclusion, mentioned earlier, is that the Catalan Act attributes same-sex partnerships a family status. Family should not be mistaken for marriage and the main defect of the Catalan Act lies in this confusion, which is merely ideological, not practical.[49]

The Aragon Act does not make a pronouncement about the family nature, or otherwise, of these partnerships, although it refers to them as 'same-sex partnerships in a stable marital cohabitation'.

The Navarra Act, on the other hand, is in favour of treating them as marriage, since 'partnerships united with stability in a relation of affection analogous to marriage' can not be negatively discriminated against; so the stated purpose of the Act says that:

> there are in the law several regulations that negatively discriminate against families different from the traditional one, based on marriage, ignoring that the right to marry of Article 32 CE includes the right not to marry, and to choose a

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[47] P. Talavera, 'Les Unions Homosexuals en la Llei d'Unions Estables de Parella. Aproximació Crítica' in (2000) 2 *Revista Jurídica de Catalunya*, at p. 351, notes that there is no relation between not ackowledging the constitutional right to form this kind of partnership, and their inclusion in family law.

[48] E. Roca, 'Regulation of Same-Sex Partnerships from a Spanish Perspective' in *Making Law for Families* (Maclean (ed.)) (Oxford/Portland, 2000) at p. 113.

[49] Scholars have discussed the oportunity of separating the regulation of families in different legal bodies, depending on marriage or *de facto* relationship and have critisized the solution adopted by the Catalan legislation because they consider all types of families to be protected under art. 39 of the CE. See S. Llebaria, 'Glosa Crítica a esta (Nuestra) Nueva Ley de Uniones Estables de Pareja' in (1998) 10 *La Notaría,* at p. 74 and p. 76 and R. Verda, Las Uniones de Hecho a la Luz de la Constitución Española de 1978: estado de la Cuestión en la Legislación Estatal y Autonómica' in (2001) 2 *Actualidad Civil*, at p. 64.

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> different family model, and the exercise of this right should not imply a unfavourable treatment by the law.

The Navarra Act equals partnerships, including same-sex partnerships, to marriage: that is derived from the definition of Article 2.1 of the NavAct, which says that:

> in relation to the application of this Act, a partnership is the free and public union, in a relationship of affection equal to marriage, regardless of sexual orientation, of two persons [...].

As already seen, with regard to succession effects, the same-sex cohabitant is treated similarly to the spouse and also as regards fiscal matters to such an extent that, for example, Article 12, e) of the NavAct considers the *family unit* as 'made up by a stable couple, according to its specific legislation'.

The Spanish trend consists of the use of family systems to resolve the problem of the internal relationship of members of same-sex partnerships. Yet this study must not allow us to forget that there are still certain important problems remaining to be solved in this type of relationship. For example, fiscal problems which, except in the case of Navarra, have not been solved. What is the benefit of a cohabitant inheriting from his ot her deceased companion if he ot she must pay the inheritance tax as if he or she were a stranger?[50] In pursuance of the principle of free will, nobody forbids a person from naming his or her same-sex partner as heir, but the aforementioned must face the payment of high taxes, since the law concerning inheritance tax will not consider the partner as a relative. And what is the benefit for the aforementioned that the same-sex partnership be considered as a type of family if they will not be able to enjoy the same benefits as a spouse, for example, in the case of a widow's pension when the partner passes away?

The conclusion is, therefore, that the autonomous communities' Acts consider same-sex partnerships as a family in their private relationships. The wide concept of a family, protected under Article 39 of the Spanish Constitution, however, has not been applied, since certain social benefits have been omitted from these regulations.

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[50] The Catalan Act's Final Provision imposes on the Catalan Goverment the obligation to regulate the taxes for each of the different types of partnerships, particularly the income tax and the inheritance and donation tax. The Parliament passed the Law 4/2000 establishing measures to implement the Final Provision of the Catalan Act.

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