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Homosexual Families: Adoption and Foster Care

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Abstract

The concept of the family as conceived since the Second World War, has changed dramatically. It is not my intention to question the excellence of these changes, but reality is stubborn and continues to point out to legislators that laws do not reflect reality; and even when they do, changes take place so quickly that regulations cannot keep up with reality for long.

The subject of my paper must focus on two related issues: adoption by homosexual couples and custody of children that two people of the same sex who are living together may have. There are two principles involved: first, the best interest of children, always mentioned as the basis of court rulings, although its precise content is never fully developed. Secondly, a hypothetical right to adopt, which is an argument constantly used by homosexual groups. These the two main principles will be used as the basis of this paper.

Keywords: homosexual families, adoption, foster care, custody, child's best interest

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Homosexual Families: Adoption and Foster Care

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The concept of the family as it had been conceived since the Second World War has changed dramatically. It is not my intention to question the value of these changes, but reality is stubborn and continues to indicate to legislators that laws do not reflect reality; and even when they do, changes take place so quickly that regulations cannot keep up with reality for long.

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I. ADOPTION

Access for same-sex couples to joint adoption is not very clear. Those who oppose the idea always use the argument of the minor's interest, while those in favour of it present reports and further documents that attempt to prove the positive points of this solution. This has led to states becoming reluctant to accept minors being adopted jointly by two people forming a couple, whether married or not, when these are same-sex couples. Even countries which openly accept marriage-like solutions to regulate cohabitation, have been resistant to accepting joint adoption, as is the Danish case[1].

The Dutch regulations have simultaneously amended the rules regulating adoption so that same-sex married couples could jointly adopt in pursuance with the

rules regulating adoption in that country, and the same is applicable to unmarried people who can prove they have lived together for three years prior to applying for adoption[2]. Yet this is not the case in Belgium[3].

The United Kingdom differs slightly from European countries, which have linked the recognition of the right of same-sex couples to marry and the recognition of these couples' the right to adopt. Marriage in the UK still refers to an exclusively heterosexual partnership[4]. In contrast, section 144(4) of the *Adoption Act* 2002, when interpreting the meaning of the term *couple* being able to adopt, includes married couples and two persons of opposite sexes or the same sex living as a couple in a stable family relationship[5]. Most authors consider that the aim of this reform was to provide security for those being adopted, rather than looking into the relationship shared by those adopting. This is confirmed by the lack of definition in English law concerning what should be considered a family by their legal system, so the courts are free to interpret the meaning of the term *family*[6] in accordance with the most widely accepted opinions when the interpretation takes place.

In Spain, the system of distributing power between the Autonomous Communities implies that some are not able to pass laws on adoption, unlike the issue of protecting minors, as we shall see. Navarre was the first autonomous community accepting the possibility of unmarried stable couples, regardless of the members' sexual tendency, adopting "jointly and with the same rights and obligations as couples joined in marriage" (art. 8 of Act 6/2000, 3 July)[7]. The Basque Act, article 8, also allows "the members of partnerships formed by two people of the same sex", "to jointly adopt, with equal rights and obligations as those couples formed by people of opposite sexes and married couples". In 2004 Aragon amended its 1999 law regulating partnerships by establishing in article 10 that "stable unmarried couples may jointly adopt"[8]. The Catalan Act 13/2005, 8 April, amended the Family Code (FC), the Successions Code and the Partnership Act (LUEP), with article 115.2 FC being drafted as follows: "Adoption will only be allowed by more than one person in the case of spouses or stable couples"; whereby the expression "couples formed by a man and woman" was removed, which had previously been included in the wording of art. 115 FC and therefore, article 6 LUEP was abolished, which only allowed joint adoption for heterosexual partnerships. Finally, article 11 of Act 1/2005 16 May on *Partnerships in the Autonomous Community of Cantabria*, states that "a partnership may take in and adopt, with the same rights and obligations as married couples in pursuance of the applicable

legislation" and these couples may be "of the same sex or different sexes" (art. 1.2 Act 1/2005).

However, it should be said that this issue is dealt with totally differently in the Civil Code, where there is a distinction between joint adoption by married people of the same sex and adoption by partners. Act 13/2005, 1 July, referring to the right of same-sex couples to marry, also amends article 175.4 CC in establishing that "nobody may be adopted by more than one person, except when the adoption is made jointly and successively by both spouses". This allows joint adoption for married same-sex couples; however, supplementary regulation No 3 of Act 21/1987, 11 November, also accepts joint adoption through the Civil Code "by a man and woman forming a permanent partnership in a relationship similar to that of a married couple", so partnerships under the Civil Code may only adopt when formed by people of different sexes, not by people of the same sex. Was this left out accidentally or on purpose? We shall see what the future partnership law has to say, if and when it is passed.

The fundamental issue is whether the right to adopt exists in the way supported by those calling for it. Some believe that everyone is entitled to adopt and that failure to recognize this is discriminatory. So, although not particularly accurately from a legal viewpoint, they see a link between the right to marry and the right to adopt, which is thought to derive directly from the former, but which is not exactly true, though this does not imply that I am against the expectations of same-sex couples as regards adoption.

In principle, the filiation systems which govern in all European countries basically aim to protect a group of people, generally minors, who due to their lack of maturity, are unable to decide for themselves. Therefore, parental care and custody has been designed in a functional way, since its aim is to act in the family's interest, so its fundamental nature as an obligation and not a right has been stressed[9]. Thus, the terminology used in European law, based on the English language, is significant: the term *parental responsibility* represents a deliberate change which favours the removal of the traditional Anglo Saxon idea that parents have rights over their children[10]. This same function must be applied to adoption, since it is based on the interest of the adopted child and not the interest of those adopting and so the requirement in the Dutch code, which allows adoption when the child cannot expect anything from his or her biological parents, is highly significant.

In accordance with this principle, it must be considered that no general right to adopt exists and nobody, whether it be a married couple or otherwise, a single person or two people of the same sex, whether married or otherwise, has the right to adopt a minor, but rather the opposite, it is the minor who has the right to be protected as part of his or her fundamental rights together with his or her social and personal development by the person(s) best suited to do this[11]. In this sense one must interpret the decision made by the European Court of Human Rights, 26 February 2002 (ECHR 2002/10), in the widely quoted *Fretté v France.* A French citizen brought a lawsuit against the French State since he considered he had been discriminated against due to his sexual tendency in his application for suitability for adoption; the claimant believed his request had been turned down by the French authorities because of his homosexuality and therefore stated that the decision to exclude him from adoption was arbitrary, since it violated his rights to private and family life guaranteed by art. 8 of the European Charter of Human Rights. The European Court emphasised, firstly, that there was no consensus among European countries regarding the suitability or otherwise of accepting adoption made by homosexuals; and stated the following:

> "the total absence of consensus concerning whether a single homosexual should be allowed to adopt a child must lead to States being recognised as having a wide margin of interpretation, and according to case law, this Court's role is not to substitute national authorities to univocally resolve such a sensitive controversy and impose one solution only".

The ECHR adds:

> "it is important to note that there is no common denominator in this area. Although most signatory States do not provide explicitly for the exclusion of homosexuals from adoption when it is also open to single parents, it would be to no avail to search for uniform principles in the legal system in the signatory states on these social issues, upon which may reasonably govern wide ranging differences of opinion in a democratic State",

which is a discussion not far removed from, and in fact quite close to, the minor's interest since, according to this decision,

> "adopting is 'offering a family to a child and not a child to a family' and the State must take great care so that the people chosen as adoptive parents are ones who fulfil, in all areas, the most favourable conditions possible for care".

In accordance with these arguments, the European Court turned down the request made by the French citizen[12].

a) *Joint adoption.* The discussion regarding access to adoption is based not on the rights of hypothetical adoptive parents of the same sex, but on the principle of protecting minors; so potential homosexual adoptive parents are in the same situation as any citizen wishing to adopt. Therefore, in legal texts two groups of authors may be found who present different arguments: i) firstly, those who consider that the interest of the minor is completely protected whoever the adoptive parents may be and, therefore, accept adoption by homosexuals either individually or jointly, and ii) secondly, those authors who do not make any direct statements, but refer to the procedures to select adoptive parents.

In the first group we may find decisions from certain U.S. states which, based on the fact that there are fewer restrictions on gays and lesbians adopting than those generally found in Europe, have justified their decisions for accepting adoption on the principle of the *best interest of the child*[13]. The arguments which lead to decisions of this nature are based, therefore, on the principle of the interest of the minor considered to be fully protected through adoption itself, regardless of the sex of the adoptive parents. In opposition to these arguments are those who state that they regard this type of adoption to be contrary to the principle of the interest of minors, who should be able to grow up in a suitable family environment with two role models, one male (father) and one female (mother)[14]. The same argument, i.e. the interest of the minor, is used therefore to reach totally opposite conclusions. One method to overcome these different interpretations of the same principle is posed by other authors who, after showing that the right to adoption does not actually exist individually, consider that there is no de facto or legal impediment to declaring a same-sex couple suitable for adoption and, consequently, there is no legal impediment for them to be included in the procedures laid down by law to determine suitability for adoption[15], as adoption is not a right for those applying to adopt and far less a consequence of marriage and recognition of the right to marry, but actually depends on the necessary declaration of suitability to adopt and this is a slow, complex process in which the skills to decide who is and who is not suitable are not decided by jurists, but by those who are technically qualified to verify that the personal, economic and social background, etc., of the applicants are the most suitable for adoption. In short, to comply with the aim of protecting the child's best interest. The administration in charge of protecting minors may not consider any other criterion than the qualifications of those applying for adoption.

This is the most suitable method if one wishes to combine the principle of non discrimination due to sexual tendency[16] and the principle of protection of minors. However, the methodology used in reforming the Spanish Civil Code and the Catalan Family Code is quite different regarding this point.

1. In the last Spanish Civil Code reform, made through Act 13/2005, the possibility of joint adoption by a married couple formed by people of the same sex is clearly linked to the recognition of the right to marry. The preamble of Act 13/2005 mentions the resolution passed by the European Parliament on 8 February 1994[17],

> [...] in which it specifically requests the European Commission to submit a proposal of recommendation in order to end the ban on marriage between people of the same sex, and to *guarantee the full rights and benefits of marriage"* (my italics).

According to this principle, the Act modifies article 175.4 CC, which had already accepted joint adoption for husbands and wifes. As this term has now been substituted by "*spouses"*, it now turns out that spouses of the same sex may also adopt. It is obvious that art. 176.1 CC has not been amended, which requires the judicial resolution approving the adoption to always be based on "*the interests of those being adopted*", so although the spouses are qualified to jointly adopt, a specific adoption will only become effective if it complies with this essential criterion. But as I mentioned earlier, the Civil Code simply describes married couples formed by persons of the same sex as potential adoptive parents. Yet it excludes the possibility of non-married people in these conditions jointly adopting: we must resort to the dossier on individual adoption included by reference in art. 175.4 CC, although this regulation allows children to be adopted by the father's/mother's new spouse, it is, the step-parent, if they were adopted prior to marrying. The conclusion should be that art. 175.4 CC does not accept joint adoption by same-sex partnerships (non married), although this is accepted when the adoptive parents are a heterosexual couple, under the conditions provided for in the additional regulation 3ª of Act 21/1987, which reformed adoption in the Civil Code.

2. The issue has been approached differently in Catalonia. Marriage reform has led Catalonia to also accept that same-sex spouses may jointly adopt. Yet it is Act 3/2005, modifying the Family Code and other laws referring to adoption, that goes even further than the Civil Code and accepts joint adoption when the adoptive parents are spouses, which includes all married couples, and also for "[...] *couples living in a stable relationship*". Until that point, Catalonia had accepted that stable non-married

heterosexual couples could adopt, in pursuance of the regulations in articles 115.2 CF and 6 LUEP, yet as the same regulation was not established for homosexual couples, it was understood that these couples would not be allowed to jointly adopt and this was regardless of whether they were partnerships or stable couples formed in accordance with LUEP[18].

To justify the regulation made in Act 3/2005, the preface highlights the nature of adoption as an institution protecting minors, while explaining the method used by the various Catalan laws regarding adoption and states: "[...] that is, above all the protection and interests of minors must prevail" and so "[...] one may state that nowadays adoption can be fully understood only within the framework of measures protecting abandoned minors". It then states categorically that "[...]nobody has, automatically, the right to adopt, but there are persons or families suitable for adoption", so the law only treats homosexuals living together as *more uxorio* compared to heterosexual partnerships "[...] and these are recognised as having the right to be assessed as potential adoptive parents"[19].

Therefore, Catalan law, by accepting a situation not currently included in the Civil Code, must justify this in the interest of the minor, which is the basic aim of the legal institution of adoption, regarded in Catalan family law as the final step towards protecting minors, which the Administration must carry out in pursuance of art. 6 Act 8/1995, and only when it is not possible to return children to or keep them in the biological family. It is therefore logical that protection has nothing to do with the applicants for adoption's sexual tendency, although the preface places great emphasis on the statement that the right to adopt does not exist. So, by placing homosexual and heterosexual partnerships on the same level, the law only entitles them be considered, in the successive procedures, potential adoptive parents. So the judicial authority, when examining applications case by case, will have to decide whether the specific proposal covers the minor's interest or not, as ordered by art. 119 FC.

Thus, it must be said that taking the interest of the minor as a basic principle of adoption explains why all adoptive parents will have to undergo the same procedures and fulfil the same requirements demanded when adopting minors and it will therefore be necessary for the applicants to be declared generally suitable for adoption and for each specific adoption.

b) Adoption by a single person. In comparative law, there are countries which do not accept adoption by a single person, as are currently the cases in Italian or French

law following the 1996 reform[20]. Spanish law has always recognised the right of a single person to adopt and this also happens in Catalonia providing, of course, the adoptive parent is declared suitable. The new legislation in matters of adoption has not changed this situation.

c) *Step-parent adoption.* Adopting a spouse's child is used in many countries as a solution to overcome problems of interfamily relationships with marriages involving a person previously married with children whose marriage has been dissolved by death or divorce. It is also a solution in cases where the person marrying already has a child, either biological or adopted prior to marrying. Legislative policies tend to favour this solution as a way of "normalising" cohabitation, which may pose many kinds of problems[21]. When this involves a same-sex couple, the same policy has ended up accepting the possibility of successive adoption. So, although in the first European laws to regulate same-sex partnership registers, joint adoption and later joint care and custody were excluded, the Danish, Icelandic and Norwegian laws have been amended to the extent that one member of the partnership, the one not contributing children to the relationship, may adopt the other member's child and this is regardless of whether they are allowed to jointly adopt or not. The Netherlands clearly accepts adoption of the spouse's children[22]. This is therefore a successive adoption in which normally, though not necessarily, two filiations will be superimposed: i) the one already legally constituted by one of the parents, and ii) the one stemming from successive adoption. The so-called "Nordic model" has ended up accepting this kind of adoption and so have a number of courts in the United States[23].

Art. 175.4 CC clearly accepts successive adoptions when it establishes that "marriage entered into following adoption allows one spouse to adopt the children of the other"; yet it is obvious that this possibility is not only foreseen for the spouse's adopted children prior to marriage, but also for children born in and out of wedlock existing at the time of marriage. In short, this possibility does not exist for partnerships, whatever the sex of the members.

Spain's Autonomous Communities have not provided special regulations for this situation and simply recognise the right to joint adoption with the same requirements and regulations concerning any adoption, such as, for example, in art. 8 of Navarra Act 6/2000. Only Catalonia (art. 117, 1*a* CF) and the Basque Country (art. 8.2 of Act 2/2003) directly provide for the possibility that one partner may adopt the previously

adopted or biological child of the other partner. I wish to remind you that these cases are situations of partnership and not marriage.

The first case in Spain concerning the adoption of a same-sex partner's children took place by applying the Navarre Act. A woman requested permission to adopt her partner's daughters, with whom she had formed a stable partnership, in accordance with the requirements in the regional Act 6/2000. It should be pointed out that art. 8 of this Act did not specifically provide for such a case. The decree issued by the Lower Court No 3 in Pamplona, 22 January 2004 (AC 2004\164) referring to this subject, argues that:

> "[...] if Navarre's legislator allows joint adoption for same-sex couples, it will be difficult to find any sense in excluding adoption by the adoptive father's or mother's partner of the latter's child(ren), or for the female partner of the biological mother of the child(ren) of the latter, in such cases of prior individual maternity or paternity when in order to have access to this, common legislation allows such regardless of sexual tendency or cohabitation with same-sex partners".

It must be considered that Navarran law does not specifically provide for the possibility of successive adoption by the mother's new partner and that is why the decree sets out its arguments in this way.

Further decisions made in the courts of Navarre and the Basque Country have used similar arguments to authorize adoption by the female partner of a biological mother. So, the decree issued by the same court No 3 in Pamplona on 26 January 2005 (AC 2005\180) accepted the adoption of the young biological son of one of the female partners, born using artificial insemination. It is said that even though the law of Navarre does not specifically provide for cases such as this, constant case law has been accumulated comparing married couples to unmarried heterosexual couples as regards joint adoption and adoption by one member of the couple of the children of the other, a solution reached through an interpretation making the supplementary third regulation of Act 21/1987 applicable, so this has also been applied to same-sex couples as regards the other partner's children, whether biological or adopted. On this basis, the determining factor in each case is whether this adoption is convenient in the interests of the child:

> "[…]therefore based on the possibility of applying the current regulation, which allows adoption by the female partner in a stable partnership of her partner's biological child, a favourable resolution must be based on whether, in this particular case, the adoption protects the interest of the minor, which bears some relationship to the stability of the couple formed by the biological mother and the applicant, the capacity and skills of the applicant to look after, bring up and care for the child, the

reasons which lead her to request adoption, and the child's circumstances and in particular his relationship with the adoptive parent and the time both have shared a situation similar to a father-son relationship, which is assessable in all applications for adoption, both those made by couples and those made by persons who adopt alone".

The decree issued by the Lower Court of Gernika on 21 February 2005 (AC 2005\365) also accepted adoption of the female partner's children, with whom she had lived in partnership in pursuance of the rules of Basque Country Act 2/2003 and after proposing several arguments on equality and the concept of family referred to in art. 39 of the Spanish Constitution, ended up accepting adoption by applying art. 8.1 of the aforementioned Basque Act[24].

d) *The effects of adoption, in particular as regards surnames.* In all cases of adoption, both jointly and those made by the partner of the biological parent, the effects are those normally applied in all adoptions, i.e., the adopted minor shall bear the surnames of the two legal parents, i.e. the biological and adoptive parent, both shall have care and custody, have the obligation to provide maintenance, etc.

Deciding on the order of the surnames poses more problems. Act 13/2005 amends art. 53 LCR which after the reform states: "people are given names and surnames, corresponding to both parents, which the Act protects before all". In their eagerness to avoid discrimination, the Act does not decide on the order of surnames, which is currently not laid down in art. 109 CC or art. 53 LRC, with the resulting paradox that art. 109 CC refers to "what is laid down by law" as regards deciding on the order, when the parents have not decided anything regarding this, with which we are left without the supplementary regulation so far exis ting in art. 53 LRC.

Art. 128 FC provides more accuracy, in the amendment by Act 3/2005. It distinguishes between cases of joint adoption and individual adoption; in joint adoption, surnames are determined by agreement of the adoptive parents and if there is no agreement, a judge shall decide during the adoption procedure; when adopting a same-sex partner's child, those involved shall establish the order of the surnames by mutual agreement and if there is no agreement, the judge will also decide during the adoption procedure[25].

II. CARE AND CUSTODY OF CHILDREN

Here we have a different problem: ascertaining whether a homosexual person has the same rights as any other parent as regards their children, born in wedlock or otherwise. In Europe the problem was posed by the case decided by the European Court of Human Rights on 21 December 1999, known as *Salgueiro da Silva Mouta v Portugal.* This case concerned a Portuguese citizen, Mr. Salgueiro, who was married and had a daughter; the marriage broke up as a consequence of his declared homosexuality and divorce ensued. Although the spouses agreed on the conditions of how to exercise care and custody and visiting rights for the father to see his daughter, a long series of disagreements arose between the parents which ended in a lawsuit brought by the mother requesting a review of the terms of the agreement referring to the father's visiting rights on the grounds that his sexual conduct could lead to serious moral harm to the daughter. The Portuguese courts accepted the mother's claims on the understanding that reducing the father's visiting rights was more convenient for the daughter's interest. Having appealed against this decision before the Court of Human Rights, the latter stated that the arguments used by the Lisbon Court in the decision regarding the mother's sole right to custody had essentially been made on consideration of the father's homosexuality and these arguments were not a simple *obiter dictum*, but had been the decisive factor when the Portuguese Court made its decision. Therefore, as the decision was based on the defendant's sexual tendency, this could not be upheld in accordance with the European Charter of Fundamental Rights and, as a result, Mr. Salgueiro was deemed to be right. Those commenting on this decision see the European Court as having only decided on the basis of the father's individual rights and failing to state its opinion on the thornier problem, i.e., determining whether there was any family relationship between the homosexual father, his partner and the daughter as regards protection in accordance with art. 8 of the European Charter, which protects private and family life[26].

Care and custody of children has always been an underlying problem to be resolved in all legal systems that have decided to regulate same-sex couples. In some cases, the conferral of care and custody of children has been argued when parents have divorced as a consequence of the declared homosexuality of one of the members of the marriage, as occurred with *Salgueiro.* The reasons for conferring care and custody of children upon the mother or father are based on the possible influence that life with a homosexual parent may have in terms of the child's sexuality and the social rejection of

homosexuality, as is clear from the Lisbon High Court's decision; the child's possible stigmatisation by her school friends, relatives, neighbours, etc., is also alleged. Even in cases where judges do not make any direct comments on the morality of homosexuality, underlying reasons can be found that lead us to consider that the decision was not unbiased. But this is not the current trend[27].

In England, two decisions dating from 1991 led to changes in the general scheme of things, and accepted that the child's interest may be equally protected regardless of the mother's sexual orientation, so if we place both the child's interest and the mother's lesbianism on the same scales, preference must be given to the former[28]. Douglas cites *G v F (Contact and Shared Residence: Applications for Leave),* in which the claimant had been extensively involved in caring for her lesbian partner's child while the relationship lasted, and the courts acknowledged that she was entitled to shared *parental responsibility* with the mother[29]. A similar case to *Salgueiro* occurred in Cordoba, Argentina, where, in a decree from 5th August 2003, the judge considered that care and custody conferred on a homosexual father was not harmful to his children[30]

In Spain similar cases have been presented and resolved, although direct references to a parent's homosexuality are not made in case law when accepting or refusing the request for care and custody. A ruling handed down at the Court of Appeal of Barcelona on 23 May 2000, in a case referring to care and custody states:

> "[...] one must note that, although the husband's homosexual tendency was admitted, [...] this does not constitute per se, as this Court has resolved previously in cases of mothers' lesbianism, sufficient cause or reason to restrict contact with their offspring, since all people are free to have certain sexual tendencies, as long as these do not pose any danger or imminent harm to the children's interests, who must be cared for to the fullest extent" as laid down by the Civil Code, "[...] shall not bring about cases of suspension of or limitations on contacts between parents and their children"[31].

Also, visiting rights have always been accepted regardless of the parents' sexual tendency. An odd case arose from the decision made at the Court of Appeal of Sta. Cruz de Tenerife, on 6 May 2002, which gave a woman the right to contact with her partner's adopted daughter following the break-up of their partnership; this was not about deciding on custody, but allowing minors access to contacts with relatives as permitted in pursuance of art. 160 CC and also art. 31 LUEP, following the reform made by Act

3/2005. The general rule is that Spanish judges basically make their decisions in consideration of the interest of the minor, which has nothing to do with the sexual tendency of his or her parents. What is more, in the recent reform in Catalonia, custody is granted to the same-sex partner who lives with a minor (art. 179.1 FC) or also art. 31 LUEP which specifically acknowledges that when there are shared children, the moment the parents no longer live together[32], they may reach an agreement on what they deem to be most convenient as regards visiting arrangements and contact with their children and, in the event of disagreement, the judge will decide in the children's interest. It is highly likely that the basis of these decisions can be found in the long-standing tradition of considering care and custody to be a parental duty which must always be carried out in the children's interest and has never been considered a parental right. A ruling from the Supreme Court dating back to 24 June 1929, marked a milestone in the concept of parental responsibility, and from then on a somewhat functional method has been applied, since the duties of caring for and bringing up one's children must be considered an obligation and not a right, as finally accepted by art. 39.3 of the Spanish Constitution when it sets out that "parents must provide full care for their children", regardless of the basis of filiations[33].

Some Autonomous Communities have used their authority concerning the protection of minors to establish rules affecting same-sex partnerships, leaving to one side the authority exercised by some regarding joint adoption. So, as not all Autonomous Communities have authority regarding civil matters, they have used other ways to use their authority to widen the protection of minors in same-sex partnerships. In this sense, art. 8 of the Asturias Act (4/2002, 23 May) sets out that "members of a stable partnership may take in minors jointly"; art. 9 of the Andalusia Partnership Act (5/2002, 16 September) also includes this possibility, specifically establishing that: "a) members of partnerships may jointly begin, before the Administration of the Andalusia Autonomous Communities government, procedures to temporarily or permanently take children in care", and b) "under no circumstances may the opinion or sexual tendency of the members be used as a discriminating factor". The Extremadura Act (Act 5/2003, 20 March), in art. 8 also accepts this possibility when it states that "bearing in mind that children's welfare comes under the authority of the Extremadura government, in addition to those matters pertaining to the care, custody and adoption of minors, the members of a partnership may jointly take minors in with the same rights and

obligations as couples joined in marriage". Art. 7 of the Basque Country Act (Act 2/2003, 7 May) also accepts the possibility that "the members of the partnership" may "jointly formalize the care and custody of minors with the same rights and obligations as couples joined in marriage". And lastly, art. 11.1 of the Cantabria Act (1/2005, 16 May) sets out that "partnerships may take in and adopt with the same rights and obligations as couples joined in marriage, in pursuance of applicable legislation".

Thus, from all this it may be deduced that in matters concerning the protection of minors, same-sex couples have not been discriminated against in relation to taking in unprotected minors, since the only criteria to be taken into consideration to confer care and custody are the interest of the minor and the aptitude or suitability of the couple for each specific case. However, in this area we are faced with partnerships and we may be deviating from the initial core and purpose of this article.

To summarize, we should consider two possible situations: i) When the couple is married, the issues are limited to the adoption, care and custody of the children that one of the members of the partnership may have from previous relations or guardianship. It is obvious that when joint adoption is allowed, both will have powers of guardianship and the inherent rights and obligations that this entails; the same will occur when one of the members of the partnership adopts the other's children. And there is no inconvenience of guardianship being exercised by one of the members of the partnership when the biological parent dies or is declared legally incompetent; this rule is included in art. 179 FC, and is in line with the reform of the Civil Code, although it has nothing to do with it. As a consequence, this rule must be applied to the Civil Code following the reform of 2005.

ii) The other issue basically affects same-sex partnerships to which the aforementioned Autonomous Communities' laws refer. And it is here where the issues again refer to parents' legal authority when joint adoption is accepted, conferring guardianship and protection of minors by means of the institution of foster care. Focusing on the Catalonia regulations, the problem is not so complex either, since by accepting joint adoption by same-sex couples, the usual consequence must be to confer joint legal authority and the same occurs when it involves successive adoptions. Guardianship is also provided as a consequence of the 2005 reform, by eliminating the term "person of a different sex" from art. 179,1*a* and *c* FC; therefore, guardianship may be deferred to the live-in partner of the same sex in the event of the parent dying or

being declared legally incompetent. And as regards foster care for minors, Catalonian laws does not refer to the sexual tendency of the foster parent at all, which may not be taken into consideration in the criteria used to determine whether a person is suitable or not to exercise the duty of fostering; it should be remembered that only the interest of the minor and the suitability of the applicant to exercise guardianship of the minor in need of care should be taken into account when deciding on what is most convenient. The sexual tendency of those adopting must not, and in fact, does not interfere with the competent Administration's decision-making process regarding matters of protecting minors.

By acknowledging homosexual parents' entitlement to the guardianship of minors, the consequences are no different from those involving heterosexual couples: they must accept obligations derived from guardianship, such as education, life as a family, etc; they must provide subsequent maintenance and normal inheritance rules apply.

CONCLUSION.

Access to marriage for same-sex couples implies an essential change in the conception of the family held until now. Yet these substantial changes cannot alter the conception that has existed so far as regards the protection of minors, whose interest may not be affected by the parents' sexual tendency.

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NOTES:

[1] Further information on the arguments and reasons of Danish legislation may be consulted in Bradley, 1996, p 45-54 and 151-163.

[2] Vlaardingerbroek, 2004, p. 965, González Beilfuss, 2004, p. 38.

[3] In Belgium same-sex marriage has not been considered equal to traditional marriage when referring to adoption. Renchon points out that except for issues referring to filiation, the equality is absolute, since the Belgian lawmaker has deliberately ruled out this possibility, and also excludes adoption by the spouse of the children of the other (Ob. Cit. P. 460). Other countries have opted for different solutions.

[4] I do not intend to discuss the right to marry, currently being hotly debated in the United Kingdom as a consequence of *Goodwin v UK* and *L v UK*, resolved by the European Court of Human Rights on 11 July 2003, although these were claims filed by transsexuals and not homosexuals. See Douglas, 2004, p. 35.

[5] "Two people (whether of different sexes or the same sex) living as partners in an enduring family relationship".

[6] Douglas, 2004, p. 53.

[7] Regarding the difficulties posed by the interpretation of this rule, see Gavidia, 2001, http://www.laley.net:2302/bin/gate.exe and Nanclares, BIB 2001\728.

[8] By Act 2/1004, 3 May, amending Act 6/1999, dated 23-3-1999.

[9] Roca-Miralles, 2003, p. 139. The last rulings of the Supreme Court decided in the same way. See Rulings from 11 and 21 November 2005.

[10] Douglas 2004, p. 57.

[11] Talavera 2001, p. 245

[12] See the comment to Wintemute 2001, p. 725 and Rubellin-Devichi, 2001, p. 427 and the authors quoted.

[13] Harvard Law Review 2003, p. 2020.

[14] Quesada, 2004, p. 290 includes the arguments in favour and against adoption by same-sex couples. From the pedagogical and psychological viewpoint, see Murray, 2004, *in totum.* The "Consejo General del Poder Judicial (General Council of Judicial Power), in the report quoted in the bibliography (p. 269 and 270) is totally against the possibility of adoption: "Adoption is designed for the benefit of the adopted child and neither those adopted or adopting as an institution can be a tool to legitimise or normalise homosexual relationships", so **"the exclusion of joint adoption by homosexuals must be upheld not due to a negative assessment of relationships between homosexuals (in the same way as the convenience of upholding the ban on two brothers or two friends adopting does not involve a negative assessment of fraternity or friendship), but above all as it is contrary to the very structure and nature of the ties created by adoption, and on the other hand, also contrary to the interest of the adopted person, which presides over the adoption".**

[15] Talavera, 2001, p. 245.

[16] As Act 13/2005 amending the Civil Code argues, when its preamble states that "the option reflected in this Act has constitutional grounds which must be considered by the legislator. Thus, effectively promoting citizens' free development of personality (arts. 9.2 and 10.1 of the Constitution), preserving freedom as regards the forms of cohabitation (article. 1.1 of the Constitution) and restoring a real framework of equality regarding the enjoyment of one's rights with no discrimination whatsoever due to sex, opinion or any other personal or social contradiction (article. 14 of the Constitution) are constitutionally consecrated values, which must be reflected in the regulation of the rules outlining the citizen's status in a free, plural and open society".

[17] Missing from the Explanation behind the Amendment Act of the Civil Code is reference to the Resolution of the European Parliament of 4 September 2003, concerning the situation of fundamental rights in the EU, reiterating the Resolution of 8 February 1994, which is quoted.

[18] See the comment by Pereda Gamez to the article 6 LUEP, 2000, p. 1175.

[19] The preface adds "this allows a member of a same-sex couple to adopt the children of the other, as both jointly adopt minors who are not their own, i.e., they have no ties whatsoever with the adoptive partner. In the first case they attempt to legalise a de facto situation in which the child has two mothers or fathers, i.e., adoption is considered, potentially, as the best way to recognise the tie existing between the minor and the adoptive parent and, at the same time, as a suitable tool to promote, in his own interest, responsibilities and legal rights, and to resolve, in the framework of the family, any type of problem which may later arise concerning the minor. So the law allows legal cover to an emotional situation: namely that of children with two mothers or fathers. In cases of joint adoption, the law is based on the principle that the best interest of the child usually implies that they live in a suitable household as soon as possible, so that they spend the least possible time in a children's home".

[20] Article 294 Italian Code. Sesta, 2003, p. 501 states that Italian law requires the adoptive parents to be married, in order to guarantee the child's integration in a stable family, so adoption is based on the model of the biological family. Since the 1996 amendment, article. 343.1 of the French Civil Code allows single persons to adopt as long as he or she is over 28 years old: Cornu, 2001, p. 426.

[21] Roca Trias , 2005, p. 226. See also GARRIGA, M., 2005, p. 9 and sbsq.

[22] Another hotly debated issue refers to determining filiation in cases of lesbian couples, in which one of them has a child through artificial insemination from an anonymous donor. The law does not allow filiation of one woman's children to be automatically conferred on the female partner, but does allow the mother's partner to request adoption under the same circumstances already mentioned, bearing in mind that for the explanation dossier of the Amendment Act, this is one of the situations in which the child cannot expect anything from his biological father, since as it as an anonymous donation, filiation will never be determined.

[23] In America this type of adoption is usually favoured, normally with a break in ties with the original family. See Harvard Law Review, 2003, p. 2052.

[24] The HEGOAK website reports on another decision from Court no. 5 in Bilbao ruling in the same way transcribed in the paper: http://www.hegoak.com/actu/actu-nl.html, read on 31August 2005.

[25] The Consultative Council's opinion on this draft law includes some interesting statements on the concept of family and the problems of constitutionality of adoption for homosexual partnerships: In this opinion, the Consultative Council of Catalonia considers the regulation put forward by the regional Government as completely constitutional after it was passed as Act 3/2005 in the Parliament of Catalonia. Specifically and as far as this paper is concerned, the Consultative Council says " Thus, after analysing article 39 of the Constitution, it was seen that in the preceding pages the constitution's rules regarding different sections in this article are ample enough to adapt to the new types of family relationships without causing unconstitutionality, and the main criteria established therein refer, as regards its development and application, to the law passed by the competent parliament and its development regulations". It adds that [...] "As a result, the Draft law's rules about extending the capacity of persons allowed to adopt do not pose any problems of

unconstitutionality or oppose statutory issues. This is the case of most of the amended provisions which derive from the term "of a different sex" to end as "the person who lives in a partnership" or other similar terms in the amended articles. That is why, of all the amended provisions which respond to this aim, specific mention shall be made hereinafter". Report requested by the Parliament of Catalonia, regarding the Opinion stated by the Committee of Justice, Law and Public Security on the Draft law on the Amendment Act 9/1998, 15 July, of the Family Code, Act 10/1998, 15 July, on stable partnerships and Act 40/1991, 30 December, on the Successions Code, on matters of adoption and care and custody, and the amendment reserved to defend this in the Plenary Session. Seen at http://www. cconsultiu.es/db/cconsultiu/cercador.dictamen?p_from=28p.

[26] Thus Sanz Caballero, 2003, BIB 3003\910 says that the Court "[...] placed in the tight spot of having to say where it stands on the issue of whether there was a family relationship or not in the life shared between a father, his daughter and the father's male partner, preferred to avoid the issue and only referred to the family life which, of course, did exist between the father and daughter". And Wintermute, 2001, p. 719 makes a comparison with a case on Jehovah's Witnesses, so according to this author, the European Court makes an implicit analogy between freedom from discrimination based on religion and freedom from discrimination based on sexual tendency.

[27] Shared custody is another solution which may be used to resolve the cases where paternity/maternity or adoption cannot be conferred, so in the Netherlands any child born into a lesbian marriage since the 2001 Act has two liable adults: the mother and her spouse or registered partner. She is not regarded as the "the father" or a second "mother", but displays what is called *parental responsibility* over the child and is compelled to contribute to the child's maintenance and education. See Vlaadingerbroek, 2004, p. 967.

[28] These are *B v B [Minor] (Custody, Care and Control)* [1991]1 FLR 402, 6 July 1991 y C *v. C. (A minor) (Custody: Appeal)* [1991]1 FLR 233, 24 August 1991. For further comment on these cases see Standley (1992), p. 134

[29] Douglas (2004), p. 63

[30] I am grateful to Gabriel Tavip, Family Law professor at the University of Córdoba, Argentina, for informing me about this resolution. As regards the arguments which are the basis of the resolution, the decree says: "in this difficult, thorny subject brought so incidentally into consideration, one cannot fail to point out the underlying intolerance and hostility society projects on people who make a choice about their sexual preferences which differs from the expected one, and when one speaks of homosexuality one does not talk about a human behaviour, but rather this categorization attempts dangerously to make a "diagnosis" of it; mistakenly transferring the main point of the discussion to whether being homosexual is good or bad, whether it is beneficial or harmful, when actually the concern of the judge must be focused on ascertaining if the parents, whatever their sexual preferences are, meet the necessary requirements to adequately carry out and fulfil the parental role and attempt to unravel what is the best for the child", "[...] Therefore attention can not and must not be focused on the parent's 'unconventional' sexual preferences, since this does not constitute *per se* a factor which establishes the lack of suitability in the parent's role. As regards the care and custody of children the key element is to investigate whether one parent or the other is or could be a good parent, disregarding their sexual condition, otherwise it could imply ungrounded speculations, which would become a source of unacceptable discrimination in our days [...]". The decree ended by rejecting the mother's claim since she had not managed to prove that there was any harm to the child since, as the judge stated, the really important matter is to determine where the best interest of the minor lies in every case.

[31] See http://www.seuvirtual.net/revistajuridica/index/index/SentIV_00

[32] So named according to article 132.2 FC following the amendment of 2005. It establishes that "if the persons upon whom the children's care and custody have been conferred are same-sex couples, they are called mothers if they are women, and fathers if they are men".

[33] Similarly, many other rulings issued by the Supreme Court have pointed out that care and custody is a function which is performed in the child's interest, which basically involves duties for parents and that judicial measures must always be taken bearing in mind the best interest of the child, so taking away the patria potestas of a parent can only be done bearing in mind this interest. See rulings from 27 January 1998 (RJ 1998\25), 5 March 1998 (RJ 1998\1495), stating that the judge has a discretionary power to ascertain the child's best interest in each case; 24 April 2000 (RJ 2000\2982), 9 July 2002 (RJ 2002\5905) and 11 November 2005 (RJ 2005\9476) and 21 November 2005 (RJ 2005\7734).

ABREVIATIONS

AC: Rulings data bases Aranzadi (rulings of Courts of Appeal)
CC: Spanish Civil Code

ECHR: European Court of Human Rights
FC: Catalan Family Code
LUEP: Catalan Law of Stable Partnerships
LRC: Spanish Law of Civil Registry.
RJ: Ruling Data bases Aranzadi (rulings of the Supreme Court).
RJC. Revista Jurídica de Catalunya