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Succession Rights and Unmarried Couples in Spanish Law

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Abstract

This study will explore succession issues in the context of the legal treatment of unmarried couples. In Spain, this question does not have a uniform answer. Autonomous Communities with competence in civil issues have regulated unmarried cohabitation and the tendency in this regulation has been a considerable assimilation to marriage. In fact in six of these Communities, in matters of inheritance the positions of the surviving partner and spouse have been assimilated. The majority of regional laws regarding couples have, however, been affected by the Constitutional Court Judgment 93/2013, 23 April, which calls for a system of explicit acceptance of the legal status which establishes patrimonial consequences *inter vivos* and *mortis causa* between partners. In State civil law, specific regulation does not exist and most of claims to succession rights have not been accepted. This article addresses the possible role of analogy in terms of the recognition of succession rights in the absence of regulation. Previously, however, the focus has been on the difference between succession rights and claims from the surviving partner based on the liquidation of the resulting situation while living. At the end of the article, we will reflect on the appropriateness of establishing a legal status for cohabitation in Spain.

Key words

Inheritance rights; Unmarried couples; Legislative diversity

Resumen

En este estudio la cuestión sucesoria se aborda en el contexto más general del tratamiento legal de las parejas no matrimoniales. En España el tema no recibe un tratamiento uniforme. Las Comunidades Autónomas con competencia civil han regulado las convivencias no matrimoniales y la tendencia ha sido la de una

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considerable asimilación al matrimonio. De hecho, en seis de esas Comunidades en el terreno hereditario se han asimilado las posiciones del cónyuge y conviviente supérstites. Sin embargo, la mayoría de las leyes autonómicas sobre parejas no matrimoniales resultan afectadas por la Sentencia del Tribunal Constitucional 93/2013 de 23 de abril, que viene a exigir, para que puedan aplicarse, la previa aceptación de las normas que establezcan efectos patrimoniales *inter vivos* y *mortis causa* entre los miembros de la pareja. Por su parte, en el ámbito del Derecho Civil del Estado no existe regulación específica y la mayor parte de las reclamaciones sucesorias han resultado desestimadas. En el artículo se aborda el posible papel de la analogía de cara al reconocimiento de derechos sucesorios en un contexto de falta de regulación. Previamente se incide en la diferencia entre derechos sucesorios y reclamaciones posteriores al fallecimiento del conviviente basadas en la liquidación de la situación existente durante la relación de pareja. Para finalizar, se reflexiona sobre la conveniencia o no de establecer en España un estatus legal de la cohabitación.

Palabras clave

Derechos hereditarios; parejas no matrimoniales; diversidad legislativa

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1. Introduction: general ideas on the legal effects of unmarried couples in the Spanish context of legislative diversity

I. - Any presentation and analysis of the legal patrimonial consequences of unmarried cohabitation, and thus their consequences on succession, should be undertaken taking into account Constitutional Court Judgment 93/2013, 23 April[1]. As we will see this judgment radically changes the Spanish legal landscape regarding the legal status of unmarried couples and, thus, their legal status in terms of succession. But to understand these changes, mention should be made, in outline form, to the complex (diverse) Spanish legislative system in civil matters and particularly in the legal treatment of unmarried couples.

II. - Diversity constitutes part of the essence of Spanish civil law. As opposed to what happened in other countries, civil codification (1889) did not imply uniformity, and hence specific laws, fundamentally in the area of inheritance and matrimonial property laws, continued in force in different territories. The Constitution of 1978, which organized Spain into Autonomous Communities with their own executive and legislative power, respected civil diversity and established civil law as a shared competence between the State and the Autonomous Communities in whose territory at that moment (when the Constitution was put into effect) ruled their own civil laws (art. 149.1.8ª EC). In the remaining State areas that coincide with the Autonomous Communities without competence on civil matters, inheritance and matrimonial property are regulated by the Civil Code (that is State civil law).

There are seven Autonomous Communities whose competence is more or less extensive in civil matters (Galicia, the Basque Country, Navarra, Aragon, Catalonia, the Balearic Islands and Valencia). They have regulated patrimonial consequences of unmarried couples[2], and the overall tendency has been that of considerable assimilation to marriage (as regulated in each Autonomous Community)[3]. In fact, as we will see, in six of these Communities (except for Aragon), in matters of inheritance, the positions of the surviving partner and spouse have been assimilated.

Nevertheless in the area of State civil law (the territory of Autonomous Communities without civil competence), there is no legislation about patrimonial consequences for unmarried couples[4]. Without a doubt, the counter position of the criteria between the Autonomous Communities and the State attract attention, but it is true that it is not easy to give just one explanation for the different outlooks.

In the behavior of Autonomous Communities, various reasons have converged, a few being: a) that the first regional laws on unmarried couples were enacted when, in Spain, same sex couples had no marriage or adoption rights (meaning that in

[1] Official State Gazette (BOE), 123, 23 May 2013.

[2] Additional provision of the Galician Parliamentary Law 2/2006, 14 June, of the Galician Civil Law; Basque Parliamentary Law 2/2003, 7 May, on civil unions; Parliamentary Law of Navarra 6/2000, 3 July, for the legal equality of steady couples; arts. 303 ff. of the Aragon Civil Code Law, approved by the Legislative Decree 1/2011, 22 March; Balearic Parliamentary Law 18/2001, 19 December, on steady couples; arts. 234-1 ff; Catalonian Parliamentary Law 25/2010, 29 July, from the 2nd book of the Catalonian Civil Code; Valencia Parliamentary Law 5/2012, 15 October on Formalized Civil Unions.

[3] In Autonomous Communities with civil competence, the content of marriage is regulated by that Communities' law. However, the form of marriage (deciding when two people are married) is the sole responsibility of the State (art. 149.1.8 ª EC). It is understood that this competence includes not only purely formal aspects (in what form or forms spouses manifest their consent) but also capacity requirements (and, in general, the system of marital impediments) and dissolution of marriage (divorce).

[4] It is true that some Autonomous Communities without competence for civil issues have partner laws that aside from regulating public law issues (taxation, social benefits) also cover questions related to private (for example, rupture compensation). However, these laws are clearly unconstitutional because these communities lack competence for civil matters (Amunátegui 2004, p. 529; García Rubio 2006, p. 120) and the Constitutional Court ruled in this sense in Judgment 81/2013, 11 April regarding the Law of Assembly of Madrid 11/2001, 19 December, on civil unions (BOE, 112, 10 May, 2013). In any case, none of them address inheritance issues.

this they found reasons that clearly justified institutionalization and assimilation)[5]; b) that in some cases these laws could represent an act of progressive reaffirmation (appealing to the non-discrimination and free development of personality principles, to the transformation of family models and to family protection) against conservative State or regional governments; c) that among Autonomous Communities there was a certain *contagious effect* that led even conservative parties to support the institutionalization of unmarried couples.

The aforementioned contributes to explaining regional legislative action, but what is the lack of State legislation due to? Some legislative initiatives with distinct content and range have existed, but none of them have been effective (see also Pinto 2008, p. 30 ff.).

To explain this lack of regulation in State civil law we cannot give just one justification, but I think that a few reasons can be pointed out: a) the introduction in 2005 of the possibility for same sex couples to marry[6]; b) that, as we will see, in technical and academic areas there is an open debate about whether or not to regulate content and how to do it and to what extent; c) thus far, case law has provided a legal response for those who live together and are unmarried (although as we will later see, inheritance is precisely an area where this does not occur).

III. - The difference that marks the existence of law and the tendency to assimilate marital effects in the Autonomous Communities with civil competence, determines that, within this article, the situation of succession rights in these Communities and in the rest of the country will be addressed separately. As aforementioned, the Constitutional Court Judgment directly affects on the legal status of cohabitation. Thus we will analyze both its impact on regulation in the Autonomous Communities and its possible transcendence in a situation of regulatory lack (in the territory of the State civil law). Lastly, we will reflect on the appropriateness of establishing a legal status for cohabitation in Spain.

2. Succession rights of unmarried couples in Autonomous Communities with civil competence

2.1. The situation prior to Constitutional Court Judgment 93/2013, 23 April

I. - Constitutional Court Judgment 93/2013, 23 April has referred to Law of Navarra 6/2000, 3 July, for the legal equality of steady couples and has declared it unconstitutional in terms of the recognition of the succession rights of the members of a couple among other aspects. Even though, as we have said, the judgment also affects the majority of legislation regarding unmarried couples, it has only formally declared unconstitutional the articles of the Navarra Law. As such, in the following lines, when referring to succession rights in Navarra, we will use the past tense; while in other cases, we will use the present.

II. – As a general rule, in the various Spanish legal systems (as we will also see in the Civil Code) *succession* rights of the spouse or partner refers: a) to their position in the order of intestate succession; b) to the rights (generally usufruct) that the law attributes them either in testate and contractual succession (and that they act

[5] In fact, the first law on couples (Catalonian Parliament Law 10/1998, 15 July on Steady Couple Unions) treated heterosexual and same-sex couples differently, and same-sex couples received more extensive regulation. Today this law is repealed, and also in Catalonian law the same legal treatment towards all unmarried couples is provided.

[6] Law 13/ 2005, from 1 July, that modifies the Civil Code on matters concerning the right to marry. This law was the object for an appeal for unconstitutionality that, although not exclusively, revolved around the idea of art. 32 of the Spanish Constitution, when recognizing the right to marry with full legal equality, it is referring a *man and woman*. However, the Constitutional Court sentencing 198/2012 6 November, has declared full constitutionality of the reform. Regarding the socio-demographic characterization of homosexual unions (both marital and non-marital) in Spain, consult Cortina and Cabré (2010).

as a boundary to the will of the deceased)[7] or in intestate succession (if there are descendants or ascendants). A constant, moreover, is that the succession rights of the spouse or partner are independent of the marital property regime.

Of course, the deceased may want to attribute in a will (or an inheritance agreement when allowed) more participation in the estate, but only if the forced share of descendants and ascendants does not represent an obstacle.

As will be pointed out, different regional laws cover different unmarried couple models. For some laws certain facts are conclusive enough (time living together, children born while living together), while others require official registry. Even in some instances, this registration is followed by a declaration of acceptance of the legislation on marriage.

The following will demonstrate the types of couples that each law targets and a brief description of the content found in the succession rights of surviving spouses and partners.

III. - In Navarra, law attributed the same inheritance rights to married and unmarried couples (art. 11 from the Parliamentary Law of Navarra 6/2000, 3 July, for the legal equality of steady couples –LPEN- and laws 253 and 304 from the Regional Civil Law of Navarra or *Fuero Nuevo*- FN-). To do this, unmarried partners had to live together for at least one entire and uninterrupted year or have common descendants (in which case living together is enough) or have expressed their consent to form a couple in a public document (art. 2 LPEN).

Regarding *mortis causa* effects*,* the spouse or partner had the following rights: a) in testate and intestate succession the *fidelity usufruct*, (a kind of universal usufruct maintained as long as the surviving partner does not marry or begin a new and steady relationship); b) in intestate succession, he or she was appointed as a legal heir in absence of descendants, siblings (and their descendants) and ascendants.

IV. - In Catalonia, an unmarried partner is entitled to the same succession rights as a widowed spouse[8] (arts. 442-3 ff. and 452-1 ff. from the Catalonian Parliamentary Law10/2008, 10 July, from the 4th book of the Catalonian Civil Code). For this, the time spent living together must last more than two uninterrupted years or they must have had a child in common while living together or they can formally legalize the relationship with a notarial instrument (art. 234-1 from the Catalonian Parliamentary Law 25/2010, 29 July, from the 2nd book from the Catalonian Civil Code).

The position on the inheritance[9] of a surviving spouse and partner is the following: a) in intestate succession (if there are descendants), there exists a right to universal usufruct, and in testate succession, there exists the right up to a quarter of the estate in full ownership; b) in intestate succession, they are appointed as legal heir if there are no descendants.

V. - In the Basque Country, according to the Basque civil law an unmarried couple falls under the same succession regimen that rules marriage, as long as they are listed in the Basque Country Civil Union Registry (arts. 3 and 9 and first additional provision from the Basque Parliamentary Law 2/2003, 7 May, legislation on civil unions –LPHPV-).

[7] A general overview of limits on the freedom to dispose *mortis causa* in the Autonomous Communities and in the Spanish Civil Code can be obtained in Cámara (2011, pp. 271 ff).

[8] Nevertheless, partners can exclude the legal effect through an *opt-out* agreement (arts. 234-5 and 234-6 from Catalonian Parliamentary Law 25/2010, 29 July, from the 2nd book of the Catalonian Civil Code).

[9] As a non-inheritance legal right (arts. 231-30, 231-31 and 234-14 Law 25/2010, 29 July, from the 2nd book of the Catalonian Civil Code), the surviving spouse or partner have the right to the common house furnishings and, if they do not hold the title to universal usufruct, they also have the right to what is called a *widow's year,* (continue to live in the house and be covered by the family estate for up to a year after death unless they marry or live with a new partner).

Nevertheless, Basque civil law is not uniform and cannot be applied to the whole Basque Autonomous Community. This makes legal treatment of marriage (and of unmarried couples) diverse according to the area. Even in important areas within the Basque Country, the legal approach to marriage can be questioned. Below is an example of legislative confusion and disorder that is difficult to understand and match.

In the Basque territory where Biscayan civil law is applied, in the field of succession, the surviving spouse or partner are entitled to the following rights (arts. 58 and 69 from the Law 3/1992, from the Basque Country Civil Law-LDCPV-): a) the right to usufruct (both in voluntary succession – existing will or an inheritance agreement- and in intestate succession), over half of the estate if there are descendants or ascendants or, in other cases, over two thirds; b) the entire estate in the absence of descendants or ascendants as long as the deceased has no will or inheritance contract[10].

In the small part of the Basque territory where Ayala civil law is applied, concerning inheritance: a) the principle is the freedom to dispose *mortis causa*, and hence, just as what happens to descendants or ascendants, the surviving spouse or partner does not have any legal rights (art. 134 LDCPV); b) in the absence of descendants or ascendants, the spouse will receive all the estate if the deceased has no will, and, although disputable, some argue (Brancós 2005, p. 1001; Espada 2007, p. 266) that partners should have the same rights (art. 1.6 LDCPV, 943 CC, and first additional prevision LPHPV).

In the rest of the Basque territory, there are no specific laws dictating succession rights of a spouse (and hence of a partner). As a result, the laws laid out in the Spanish civil law are those that govern marriage. There are some authors (Brancós 2005, p. 1001; Espada 2007, pp. 266, 436, 437) who defend applying the same regime to unmarried couples. In my opinion, however, the correct interpretation[11] would be to sustain that, in this part of the Basque Country as to succession rights, unmarried couples should have the same legal treatment as that of an unmarried couple under State civil law.

VI. - In Galicia, unmarried couples are governed by the rules on succession that are applied to marriage, but this depends on whether or not the couple is listed in a registry (Galician Civil Union Registry) expressing their willingness to adopt the effects of marriage (additional provision from Galician Parliamentary Law 2/2006, 14 June -LDCG-).

In the field of inheritance[12], the rights of a spouse or partner consists of (arts. 243 ff. and 267 LDCG): a) the right to usufruct, whether it be in testate (or contractual) succession or in intestate succession, over a quarter of the estate if the descendants of the deceased are involved in the succession, or in other cases over half of the estate; b) the entire estate, in the absence of descendants or ascendants, if the deceased has neither a will nor an inheritance contract.

VII. - In the Balearic Islands, unmarried couples are governed by the same rules on succession that are applied to married couples assuming that they are listed in the Balearic Island Registry of Steady Couples (arts. 1 and 13 from the Balearic Parliamentary Law 18/2001,19 December, on steady couples –LPH).

[10] With limits derived from an institution named *troncalidad* that forces the testator to attribute certain real property to specific relatives (arts. 17 ff. LDCPV)

[11] Art. 9 LPHPV only equates the succession rights of married and unmarried couples in the sphere defined by Law 3/1992, from the Basque Country Civil Law.

[12] Without it being an inheritance right, the surviving spouse or partner is entitled to common household furnishings, excluding those of great value (arts. 1.6 Galician Parliamentary Law 2/2006 and 1321 CC).

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However, the inheritance rights[13] of a spouse or a partner are different according to their geographical area.

In Mallorca and Menorca, the rights of a spouse or partner consist of (arts. 43, 45 and 65 from the Balearic Island Civil Law Compilation -CDCB-): a) the right to usufruct (both in voluntary succession - will or an inheritance contract- and in intestate succession) over half of the estate if there are descendants, over two thirds if there are parents or the whole estate (universal usufruct) in remaining cases; b) in intestate succession he or she will be the heir in the absence of descendants and ascendants.

In Ibiza and Formentera, a surviving spouse or partner have the following rights (art. 84 CDCB): a) the right to usufruct in intestate succession, of over half of the estate if there are descendants or over two-thirds in the case of ascendants; b) in intestate succession he or she will be the heir in the absence of descendants and ascendants.

VIII. – According to the Valencia Parliamentary Law 5/2012, 15 October on Formalized Civil Unions (arts. 3 and 14), in the Community of Valencia -LPHFV- an unmarried couple that is listed in the Community of Valencia Formalized Civil Union Registry retains the same inheritance position as a married couple. However, the Community of Valencia does not have its own succession laws meaning that State inheritance laws (Civil Code) are applied both to married as well as unmarried couples.

It should be noted, nevertheless, that art. 14 LPHFV (which recognizes the succession rights of unmarried couples) has been suspended. The constitutionality of Law 5/2012, 15 October on Formalized Civil Unions has been appealed[14] on the grounds of a lack of competence of the Autonomous Community of Valencia to legislate the matter. The appeal has been admitted, and even though the entire law was initially suspended (art. 161.2 EC), only the suspension of art. 14 has been upheld.

IX. - Aragon is the only Autonomous Community with competence on civil topics in which a legal assimilation between the inheritance position of a married or unmarried couple does not exist. The surviving spouse (arts. 283 ff. and 517 from the Aragon Civil Code of Law, approved by the Legislative Decree 1/2011, 22 March –CDFA) has the right to *widowed usufruct* (universal usufruct), and in intestate succession, he or she occupies a third place after descendants and ascendants. However, the surviving partner is not appointed in intestate succession and, aside from what the deceased can attribute in a will or an inheritance contract (respecting the descendants' forced share), he or she only has the right to (and it is not easy to say if this is actually an inheritance right) the family household furnishings and to reside in the living quarters during one year (art. 311 CDFA). For this to happen, the couple must have lived together during an uninterrupted period of two years or have manifested in a public document their will to be a couple (art. 305 CDFA).

The position of the surviving partner is especially weak because, although the law establishes the possibility to solicit compensation based on considerations of unjust enrichment (art. 310 CDFA), this possibility only exists if the couple breaks up while alive.

X. - Any legal delimitation requires that some couples remain outside this delimitation. What happens in the Autonomous Communities that assimilate the succession rights of married and unmarried couples, with couples who do not enter into the sphere of regional law?

[13] In favor of the surviving partner there is a non inheritance right to common household furnishings (art. 12 LPH), which oddly enough is not always given in favor of a surviving spouse (art. 3.3 from the Balearic Island Civil Law Compilation-CDCB-)
[14] Appeal of unconstitutionality 4522/2013 (BOE, 298, 13 December 2013).

As we shall see, in order to use analogy application of law, it is necessary that the situation coincide with a legal gap, and this cannot exist when the legislator has regulated one possible situation while voluntarily leaving another without regulation. This is what seems to have happened with non-institutionalized unmarried couples in the Autonomous Communities to which we have referred. As such, we must conclude that, in these Autonomous Communities, true *de facto* couples would not have succession rights.

2.2. The effect of Constitutional Court Judgment 93/2013, 23 April

2.2.1. The common thread of the judgment: the fundamental right to free development of personality versus the establishment of a legal status

As previously noted, Parliamentary Law of Navarra 6/2000, 3 July, for the legal equality of steady couples, established a model based on conclusive facts. The Law required partners to live together for at least one entire and uninterrupted year or have common descendants (in which case living together is enough) or have expressed their consent to form a couple in a public document (art. 2).

The debate between liberty and the establishment of a legal status for cohabitation (which is applicable without express consent to establish a couple) has also occurred in Spain. As a result, it is not surprising that, when an appeal of unconstitutionality was lodged against the Navarra law, one of the arguments was that it violated the fundamental right to free development of personality (art. 10.1 EC). The appeal cited other reasons, which were also analyzed in the judgment; however, as noted in the title of this section, the common thread was the fundamental right to free development of personality.

In its decision, the Constitutional Court does indeed consider the establishment of a legal regime with rights and obligations for a merely *de facto* situation (for a couple who has not expressly consented to formal constitution as a couple) incompatible with the free development of personality. The Court does not, however, limit itself to this observation, but also demands that, in order to apply a legal status, the members of the couple must accept these legal effects. As a result, it also considers the application of these legal effects on partners, who have expressed their consent to form a couple in a public document, unconstitutional:

> "The problem, therefore, lies in the limits which the very essence of a civil union impose on the legislator when subordinating the recognition of such a union to certain conditions or attributing to it certain legal consequences. The principal limit which the legislator runs into is, obviously, the very freedom of the members of the couple and their private autonomy. As such, a detailed regulation, regarding both the personal and patrimonial effects to be attributed to this union, may clash with the cited freedom if these effects, which the partners have aimed to avoid by virtue of their free decision and constitutional protection to choose to not marry, are imposed on the members of the couple. Thus, the legal status which the legislator may establish in this respect must be eminently non-mandatory and not mandatory; otherwise it may risk violating the freedom enshrined in art. 10.1 EC. Consequently, only those legal effects, whose force is conditioned by their previous assumption by both members of the couple, will be considered to respect personal freedom." (Grounds of the Judgment 8).

The reasoning above contains a confusing idea with regard to mandatory and non-mandatory rules (Martín Casals 2013, 30 ff.). Yet here we will leave this aspect to one side and concentrate on the core of the judgment: the fact that in order to apply a legal status, not only must the partners give their consent to form a couple, but also accept the legal effects.

In my opinion, in the Spanish socio-legal context, from a constitutional law point of view, it is fair to require the specific consent of both partners to form a couple in order to apply a specific legal status with rights and obligations (Pantaleón 1998, p. 77; Gavidia 1998, p. 126). It is debatable if the fundamental right to free

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development of one's personality would be assured through an *opt*-out system (the establishment of a status which would be applied to partners as long as they do not express their desire to the contrary). As previously noted, this is the system operating in Catalonia[15]. I think, however, it would be highly incongruous to maintain within the same legal system an *opt-out* regimen for cohabitation while, in the life partnership called marriage, *ad hoc* consent is unavoidable[16].

It's true that the fundamental right to free development of personality is not absolute. It may be limited by other fundamental rights as recognized by the cited judgment. Furthermore, though not mentioned in the judgment (Martín Casals 2013, pp. 23 ff.)[17], this right must be delimited (defined in its content) in view of other constitutional principles such as protection of the family (art. 39 EC). The protection that the Constitution provides for the family institution (art. 39 EC) is not limited to a matrimonial family[18]. Nevertheless, if we take the legal rules that govern the content and consequences of marriage as an example, there is not a clear understanding of which of them are derived from the constitutional principle of family protection and not from the preferences of the legislator. In fact up to now, the Constitutional Court has not invoked the constitutional protection of the family in matters involving patrimonial relations and consequences *inter vivos* or *mortis causa* between the partners[19]. It could be said that the *protection of the family* should inspire regulation that protects the weakest part of the relationship and prevents situations of structural helplessness, weakness and helplessness, situations which occur most often among women. So far it has been women who have filed almost all of the legal claims following the breakdown of cohabitation. Typically, women have dedicated more effort to taking care of the family and men have accumulated more wealth. Women also file more claims linked to the death of a partner for longevity reasons. However, though we are far from real equality, in Spain the legal and social situation of women does not coincide, with a few exceptions, to that of a seduced or unprotected woman facing the will of a man. Therefore I agree that (Pantaleón 1998, p. 71; Amunátegui 2002, p. 47) there is no need to defend general regulation on the patrimonial consequences of cohabitation as a reasonable and necessary protection policy for the structurally weak side of the relationship[20].

Nevertheless, it is surprising, and in my opinion mistaken and unjustified, that the Constitutional Court considers the fact, that the partners must manifest their desire to enjoy the legal status set out by the legislator, a constitutional imperative. Such a system of enhanced protection (which we could call *double consent*[21]) is unreasonable. It is certainly not a requirement of the fundamental right to the free development of personality (Martín Casals 2013, p. 20); it is, however, also difficult to reconcile with the definition of legal institutionalization (Coca 2014, p. 46). When the legislator regulates a human behavior, attributing legal effects (which, in general, refer to rights and obligations), these effects do not necessarily depend on

[15] See note 8.
[16] In this sense, it is said that the right to marry as recognized in the Constitution (art. 32) also implies the right to not marry (Ferreres 1994, pp. 163 ff., Martín Casals 1995, p. 1714, Pantaleón 1998, p. 77, Gavidia 1998, p. 126).
[17] In fact this author considers that this idea is implicitly refused in the judgment.
[18] Constitutional Court Judgments 222/1992, 11 December (BOE, 16, 19 January 1993), 47/1993, 8 February (BOE, 60, 11 Mars 1993) and 116/1999, 17 June (BOE, 162, 8 July 1999).
[19] For instance the aforementioned Constitutional Court Judgment 222/1992, 11 December considered the different treatment of unmarried couples on the subject of the substitution of urban rental when a partner dies unconstitutional.
[20] The focus should not be lost, however, in the case of immigration. Specifically, and in regards to Latin-American women, some studies have shown that while the educational level of women in Spain does not significantly affect the probability of living together, it is important for Latin-American women; which is related to that in the countries of origin, *consensual unions continue to be based on disadvantaged groups, and only recently has this moved on to more educated social levels* (Cortina *et al*. 2010, p. 81).
[21] Double, in the sense that consent to form a couple is not enough; of course, if the partners express consent accepting the legal effects, consent of formation should be implicit.

whether the subjects accept them specifically. For instance, when two people marry they do not have to *additionally* expressly accept the legal status accorded to marriage: art. 58 CC). As MARTÍN (2013) concludes, the Constitutional Court may have created a new fundamental right to living together "anomically": the right not to be bound by a legal norm[22] unless the partners expressly accept its application.

2.2.2. The impact on the other regional laws

The impact of Constitutional Court Judgment 93/2013, 23 April, 2013 on the other regional regulations on unmarried couples can be easily summarized: at this moment, most of them are partially unconstitutional.

As previously mentioned, different regional laws outline different requirements for the application of the legal status for which they provide. These can be classified into three general models: a) that which considers certain conclusive facts such as the period of cohabitation or the existence of offspring during said cohabitation to be sufficient (Navarra or Catalonia); b) that which requires express consent to form the couple (this is the registration model in Registries in the Basque Country, the Balearic Islands and Valencia); b) that which requires that, in addition to the express consent to form the couple, there be an express desire to receive the given legal status (this is the model in Galicia, which, in addition to registration in the Registry, requires the couple to consent to the application of the same status as marriage)[23].

Given that it is as a constitutional imperative that the legislator may only establish patrimonial consequences (among others succession rights) for unmarried couples if such consequences have been *expressly* accepted, there is only one regional law (Galicia) which meets that requirement. Therefore, as previously noted, in the other laws the establishment of succession rights (and, in general, rights and obligations between the partners) is unconstitutional.

It is foreseeable that the Autonomous Communities which have regulated the patrimonial consequences of the cohabitation of unmarried couples will adapt their legislation and require both the formal consent for the constitution of the couple (the Communities that do not already do so) and the acceptance of the legal effects. It is not foreseeable that the Autonomous Communities cease to regulate this *legal product*. Even though regulating one type of life partnership by requiring consent for its formation clearly reveals its parallel with marriage and the absurdity of such duplication. However, we will return to this point later.

3. The succession rights of surviving partners in a context that lacks regulation (in State civil law)

3.1. Non-succession claims in the case of death

Contrary to conflicts during life, in the area of succession one cannot appeal to the mechanisms of the law of obligations (unjust enrichment, partnership agreements, community property, profit-sharing, etc.).

However, it can be stated that after the death of a partner there can be patrimonial attribution for the survivor that is not considered in succession rights. This is how it will transpire in cases where the relationship ends by death and the claim is based on the patrimonial relations established when living (analogical application of matrimonial property rules, existence of a community or partnership, unjust

[22] Except, of course, the possible effects of general legal institutions especially those of the law of obligations.
[23] In the Basque Country some *inter vivos* effects depend on their acceptance by the couple (art. 6 from the Basque Parliamentary Law 2/2003, 7 May, legislation on civil unions).

enrichment, etc.)[24]. One thing is the liquidation of the resulting situation while living; another is the succession rights on the deceased's estate after liquidation.

A sample of liquidation of the resulting situation while living can be seen in the case resulting in Supreme Court Judgment, 17 June 2003[25]. The surviving partner sued the intestate heir of her partner (a sister) demanding: a) as principal claim, compensation for the total value of the estate of the deceased; b) as secondary claim, compensation of an amount which would afford her the maintenance of her prior standard of living. The main claim was made on the grounds of art. 1902 CC (extra contractual liability) and the secondary on the analogical application of art. 97 CC (compensating pension in the case of separation or divorce). The lower court's ruling granted compensation equivalent to seventy-five percent of the value of the estate. The Provincial Court rejected all claims. The Supreme Court, deeming there to have been unjust enrichment (the plaintiff had taken care of the home for more than fifty years), recognized the right of the surviving partner to receive an amount equivalent to a quarter of the deceased's estate.

Supreme Court Judgment, 23 November 2004 serves as another example of this situation[26]. The surviving partner sued the deceased's heirs (children) demanding: a) that the existence of community property with the deceased be recognized; b) secondarily, compensation for unjust enrichment, valued at half of the deceased's estate. The first two courts rejected all claims, but the Supreme Court recognized the right to compensation for unjust enrichment equivalent to a third of the total wealth.

There is a risk that claims based on patrimonial relations established when living as a means of compensation for the lack of succession rights could be accepted. For this reason, evidence of titles *inter vivos* must be required. We should not, however, reject the application of certain mechanisms of the law of obligations with the argument that this application would imply the recognition of succession rights.

The mistaken idea, that recognizing the right to the deceased's estate is the same as a succession right, can be seen in Supreme Court Judgment, 6 May 2011[27]. It is true that the mistake was already present in the statement of claim, but this conceptual error should have been clarified in the resolution of the case. The surviving partner demanded the recognition of succession rights, but specifically sought: a) in the main claim, half of the deceased's assets under the argument of the existence of community property; b) secondarily, alleging unjust enrichment, an amount no less than thirty percent of the deceased partner's estate. The first two courts recognized the right to a sum for unjust enrichment. The Supreme Court upheld this opinion but also stated that the surviving partner could not take part in the deceased's estate "because that would amount to seeking a succession right for he who lacks this right given the nature of the cohabitation". However, as aforementioned, one thing is the liquidation of the resulting situation while living, and another is succession rights. Thus, the argument for refusing half of the estate should have been the inexistence of a community property or a partnership agreement.

Some regional laws on unmarried couples limit the possibility to seek compensation for ending the relationship due to ruptures that occur while alive[28] (however, there will certainly be succession rights), whilst in others[29], while still maintaining succession rights, the possibility to solicit compensation is also indicated in extinction due to death. If such compensation is related to unjust enrichment,

[24] A study of case law can be found in Espada (2007, pp. 288 ff.) and in Amunátegui (2008, pp. 57 ff.).
[25] RJ 2003, 4605.
[26] RJ 2004, 7385.
[27] RJ 2011, 3843.
[28] In the Balearic Islands (art. 9 from the Law 18/2001,19 December, on steady couples).
[29] In Catalonia (art. 234.9 from the Law 25/2010, 29 July, from the 2nd book of the Catalonian Civil Code).

family work, excessive contribution to marital responsibilities, etc., the most correct option is the latter.

The eventual compensation for the death of a partner also falls outside the lines of inheritance. In this case, the moral and patrimonial damages of the surviving partner are indemnified, and the relationship of affection and patrimonial consequences of losing the partner should be held in mind[30]. The lack of inheritance characteristics in the value of the life insurance when the beneficiary is the partner is obvious.

3.2. Succession rights

True inheritance problems are associated with: a) the position of the surviving partner in an intestate succession; b) with his/her possible forced share (in testate and intestate succession).

In intestate succession, the spouse is appointed when there are no descendants or ascendants (art. 944 CC). The forced share of the spouse (in testate and intestate succession) consists of the usufruct over a third of the estate if there are descendants and over a half of the estate when ascendants are involved (arts. 834 y 837 CC). If in testate succession other subjects are involved, the usufruct will be over two thirds of the estate (art. 839 CC).

Typical intestate succession conflicts could be both the position of surviving partner when the deceased dies without any descendants or ascendants (and he or she intends to inherit before collateral relatives), and his or her possible forced share right if there are descendants or ascendants. In testate succession, the claim would be about the forced share (established for the widowed spouse) not attributed by the testator[31].

How are these conflicts resolved? Courts do not generally hear cases regarding the succession rights of a surviving partner in cases of testate succession[32]. This is possibly due to the fact that, when a will is made, the testator usually takes their partner into account, or perhaps, when this does not occur, the wishes of the testator are respected. In cases of intestate succession, however, the lack of recognition of succession rights may be perceived as an unjust consequence of the lack of foresight of the deceased.

These problems have only[33] been solved by provincial courts and generally receive a negative response. The arguments have been simple and have limited themselves to the rejection of the analogical application of rules related to inheritance rights of a spouse[34]. However, on very few occasions, succession rights have been recognized by alluding to the protection of a harmed partner[35] or directly granting

[30] In the event of death due to motor vehicle accidents, members of *the facto unions* are expressly recognized as beneficiaries (Eighth addition provision of Law 30/1995, 8 November).
[31] Questioning the attribution of the testator in favor of his partner because it affects other heirs could undoubtedly happen: the forced share of the ascendants is a third of the estate if there is a spouse, but this could be half if there is no spouse (art. 809 CC).
[32] Alicante Provincial Court Judgment, 15 February 2005 (JUR 2005, 109626).
[33] In the previous section, we referred to Supreme Court Judgment, 6 May 2011 (RJ 2011, 3843). Despite the fact that the suit claimed succession rights, in reality the claim was based on the existence of community property and on unjust enrichment.
[34] Tarragona Provincial Court Judgment, 3 February 2000 (AC 2000, 853); Valladolid Provincial Court Judgment, 6 November 2001 (JUR 2002, 19285); Seville Provincial Court Judgment, 18 January 2002 (AC 2005,1073); Granada Provincial Court Judgment, 2 February 2004 (JUR 2004, 107132); Alicante Provincial Court Judgment, 15 February 2005 (JUR 2005, 109626); Madrid Provincial Court Judgment, 12 May 2005 (AC 2005, 1073). For all of the sentences pointed out here, consult ESPADA 2007, 309 ff. and 372 ff.
[35] Alicante Provincial Court Committal , 24 July 2002 (cited by Espada 2007, p. 311).

the same rights to the surviving partner that would be granted if marital ties existed[36].

It is worth noting that, in the last few years, there have not been many judgments regarding claims for succession rights, filed by unmarried partners, handed down by provincial courts. This is possibly due to both the recognition of these rights by Autonomous Community legislation and a greater tendency, within the sphere of the Civil Code, to grant succession rights through a will[37]. However, it is also probable that this lack of judgments is due to the fact that, in the case of death, the surviving partner has opted to not seek succession rights and only seek compensation for unjust enrichment. As we have seen, the two paths are not mutually exclusive, but it would seem that the plaintiffs have chosen to follow the less contentious of the two.

According to our system of sources of law, the only mechanism for the application of the laws governing marriage to unmarried couples would be analogy. Should analogical application be rejected as a possibility? As we will see, I believe, that in light of Constitutional Court Judgment 93/2013, we should discard the analogical application of laws governing marriage which establish rights and obligations for spouses.

In some cases, the Supreme Court has used the analogical application of certain laws governing marriage[38] though it has, in recent years, expressed a clear rejection of analogy[39].

The rejection of analogy could be based on the idea that there is no legal gap and that the legislator only wants to concede inheritance rights to a spouse. Deciding whether or not there is a legal gap is not easy and do not believe that, up to now, the question has received a forceful response. The denial of a legal gap may be based on the fact that the State has abstained from regulating this area while Autonomous Communities with civil competence have done so, or on the fact that various legislative initiatives have not been successful[40]. The acceptance of such a gap should be based on the notion that the regulatory silence is due to legislative indecision in this respect (Espada 2007, p. 318); it is true, however, that now that the Constitutional Court has laid the conditions for legislative intervention, the omission should be understood as intentional in not attributing legal effects.

The Constitutional Court judgment also affects the other requirement for analogical application: *identity of relation* (in this *case* between married and unmarried couples).

A usual argument to deny analogical application of laws governing marriage is that married and unmarried couples are different[41] (which would imply the general lack of an identity of relation). The best argument to defend the identity of relation between marriage and cohabitation would, undoubtedly, be that both cases deal

[36] Badajoz Provincial Court Judgment, 29 January 2003 (AC 2003, 164). This covered an intestate succession and, oddly enough, the surviving partner received a usufruct quota (considering that the deceased's heir was his brother) when as a spouse, what should have been granted was the entire estate. Malaga Provincial Court Judgment, 12 December 1999 (AC 1999, 2595), recognized the right of the surviving partner to a forced share right in intestate succession but the heir (the mother of the deceased) was in agreement.

[37] In a survey completed by notaries (Rebolledo 2010, p. 30) they explain that one of the reasons to make a will is to guarantee the position of the surviving partner.

[38] For instance, Supreme Court Judgments, 5 July 2001 (RJ 2001, 4991) and 16 July 2002 (RJ 2002, 6246) applied art. 97 CC, which establishes the right to a compensating pension for the imbalance of economic position during marriage and what would happen after separation or divorce, to unmarried couples.

[39] For instance, Supreme Court Judgments, 8 May 2008 (RJ 2008, 2833) and 16 June 2011 (RJ 2011, 4246)

[40] Regarding these initiatives, see Pinto (2008, pp. 30 ff).

[41] For instance, Supreme Court Judgments, 12 September 2005 (2005, 7148) and 7 July 2010 (RJ 2010, 3904).

with a *life community*[42]. This line of argumentation would justify the analogical application of laws governing marriage (which are, undoubtedly, options for the legislator due to the existence of a *life community*). Yet, this would re-create an institution without consent and would be unconstitutional in accordance with Constitutional Court Judgment 93/2013. What the legislator is forbidden to do (establishing patrimonial consequences without consent) is also forbidden to analogy.

When the existence of a legal loophole was sustainable, there were sound arguments for defending analogy application of laws relative to the order of intestate succession[43] (art. 944 CC). In intestate succession, the *ratio legis* of the appointing of certain people is the legislator's interpretation of the presumed will of the deceased, and it is very reasonable to consider that, before collateral relatives, the deceased would prefer that someone with whom he or she had shared a life would inherit their estate. Nevertheless, as we have said, now we must interpret the silence of the legislator as the intention to not regulate this area, thereby blocking any possibility for considerations based on identity of relation.

4. Should the patrimonial consequences (*inter vivos* and *mortis causa*) of unmarried couples be legislated in Spain?

I. - In view of the conditions laid out by Constitutional Court Judgment 93/2013, I believe that, in Spain, a legal status for cohabitation should not be established. The absence of specific regulation does not prevent such conflicts from being settled by appealing to general legal institutions like unjust enrichment, community property, partnership, etc. Moreover, this regulatory lack is not an obstacle to the partners in regulating their patrimonial relations through agreements and carrying out inheritance allocation through wills or inheritance agreements (where permitted).

Now that persons of the same sex can marry (in my opinion, the most equal and legally sound solution), I do not believe that there is any worthwhile reason to create a legal institution whose constitution requires *ad hoc* consent and which is different from marriage (Coca 2014, p. 34). To illustrate this view, it is useful to reflect on the *legal content of marriage*[44]. From a general point of view on Spanish law (keeping in mind both the legislation in the Civil Code and regional civil laws) we could highlight the following:

- Patrimonial regulation (*inter vivos*) is focused on the following aspects: contribution towards family expenses; family housing arrangement; liability for debts incurred for household upkeep; participation, or lack thereof, in the other spouse's earnings, and economic consequences if the relationship is

[42] This idea, referring to analogy application for succession rights, in Espada (2007, p. 323). With this in mind, Miquel (2007, p. 38), refers to opposition to analogical application of laws governing marriage: "*The denial of analogy that many paradoxically support in liberty, rather is due to the intolerant resolve to oppose other forms of relationships that are not religious or civil marriage, that until recently were categorized as illicit*".

[43] The approach dealing with forced share both in testate and intestate succession was quite different. These legal rights imply a limitation to the testator's freedom (in testate succession) or how intestate heirs (descendants or ascendants) are affected. A shared perspective identifies the justification of the surviving spouse's forced share in the Civil Code in the marital duties (whether it be compensation for those duties or the extension of mutual aid obligation). And from this point of view there was no identity of relation because these duties do not exist (Gallego 1995, p. 331; Amunátegui 2002, p. 276). Thus, only by recognizing that the forced share of the surviving spouse is based on the existence of a life community (Espada 2007, p. 386) could the existence of identity of relation be maintained.

[44] This content refers to the effects regarding spouses and has nothing to do with their children. The legal separation between marriage and parentage arises when children are subject to the same legal treatment regardless of the marital or non-marital status of their parents. This arose in Spain as a direct result of the Constitution (entered into force on 20 December, 1978) whose art. 14 establishes the principle of equality and non-discrimination based on birth and gender, among other issues. This made a good part of family law (and inheritance law, to the extent that it was based on discrimination) unconstitutional. The effects of the principle of equality were immediately applied, but reform of the Civil Code took place in 1981 (Laws 22/1981 from 13 May and 30/1981 from 7 July).

dissolved (compensation for loss of economic standing, an excess in contributions towards family responsibilities, frustration of professional expectations, etc.). To all of the above, and discussing whether or not it relates to personal (because it is derived from the duty of mutual help-art.68 CC-) or patrimonial matters, the obligation for maintenance can be added.

- On personal aspects, a general formulation of duties has been established (respect, assistance, mutual aid, fidelity, obligation to act in the family's interest, sharing domestic chores: arts. 67 and 68 CC, 231-2 from the Catalonian Civil Code). But those duties (except for maintenance duties) are not enforceable[45] and not fulfilling them could only[46] provoke disinheritance (art. 855 CC). On the other hand, our divorce system (arts. 81 and 86 CC) does not require cause (nor demand a previous period of separation) and neither does culpability have any relevance in patrimonial consequences resulting from separation or divorce nor do we have to reiterate that it is not gender specific.
- Regarding the question of inheritance, marriage is kept in mind primarily in order to grant the surviving partner forced share or assimilated rights (in the majority of systems the forced share of some parties in the succession of the deceased has been established) or for being appointed as a legal heir (in the absence of determined relatives) in intestate succession.

So, in proposing regulation of a couple, other than that of a marriage, which of the previously mentioned aspects should be regulated?

Taking for granted that personal duties that do not provide material support should not be regulated, the truth is that nowadays this can also be futile in marriage and fundamentally evokes the notion of an *ideal* family life that is purely a social construct.

What, then, happens with the other issues presented? These issues are those which the courts have to deal with. They are also the ones that are tackled in Autonomous Communities with civil competence, and the truth is that from the position of offering guidelines to resolve conflicts, I see no reason for regulating some and not others[47] unless the sole purpose is to scare off the *ghost* of similarity to marriage.

On the other hand, for most areas there will probably be no reason for establishing a legal approach that differs from the one to marriage. In laws where a supplementary marital regime is community property (as in the Civil Code), it could be decided that for an unmarried couple this regime could be, in absence of an agreement, a separation regime. However, a separation regime is not less matrimonial than a community one. In fact, in many countries, and in many Spanish civil laws, the supplementary legal regime is that of separation.

Thus, it can be said that once the personal *legal link* is weakened (through freely sought divorce and some irrelevant personal duties) and marriage is virtually only regulated in patrimonial aspects (those necessarily implied in a life partnership), any institutionalized model should basically have the same content. This is exactly

[45] Nor can it be confirmed if the exclusion *ab initio* is relevant in terms of the validity of consent. Or rather is it that they are going to defend that a marriage is null because fidelity, collaboration, etc. are excluded?

[46] Unless, of course, not fulfilling these duties supposes behaviours categorized in the Penal Code or that have caused damages that could be indemnified according to tort law.

[47] The idea to combine partner protection and liberty (Martín Casals 2005, Espada 2007, p. 110) is a general formula that appears suggestive, but does not offer enough orientation. Naturally, I do not find the standing on the *most problematic* issues satisfactory. Problems, also in marriage, arise during separation, but any legislation on patrimonial consequences when separating should be based on at least some assumption on what rules govern couples (participation or lack thereof in earnings, contribution to family responsibilities, maintenance obligation, etc.) and from a legal point of view, it would be helpful if the legislator explicitly stated them.

the reason that makes it unreasonable to regulate a parallel model which requires consent.

The previous observations do not aim to defend marriage against other figures. Marriage as an institution does not have a *moral superiority*[48]*,* and that which deals with a constitutionally guaranteed institution (art. 32 EC) only hampers giving a more beneficial treatment to other relationships[49]. What happens is that, upon doing away with institutionalization, regardless of the name of the institution, we find the content that currently defines marriage in Spanish law.

Nevertheless, as we have said, it is foreseeable that the Autonomous Communities with civil competence will adapt their legislation to the requirements of the Constitutional Court. They are not likely to easily accept a reduction in their legislation, nor are they likely to forgo regulating an area so closely linked to values and ideas such as: non-discrimination, transformation of family models and family protection[50].

II. - It is true that this paints a different panorama for the two different levels of legal treatment of unmarried couples. On the one hand, there is what we could call an *external ring* of institutionalization. It includes laws (from public and private law), which deal with various aspects of unmarried cohabitation but do not regulate them internally[51]. While on the other, we find what could be considered the *core* of institutionalization. This level corresponds to laws related to patrimonial relations and consequences *inter vivos* and *mortis causa* between the partners in a couple[52]. We have, of course, been speaking of this second level[53].

III. - One last reflection which reveals the contingent or *relative* nature of the views which may exist with regard to the role of the legislator in the couple's relationship.

[48] Not moral inferiority either: regardless of the marriage form (civil or religious), the marital institution is regulated by secular and democratic political powers (state parliament or regional parliaments), with very *weak* personal duties and based on the principle of equality between both spouses; such that we can no longer talk about a legal model (inspired by religion, based on inequality, or in that which the law interferes with the feelings and attitude of individuals) that justifies other *legal products* that maintain the free development of personality (guaranteed in art. 10.1 EC). On the other hand, the concept that the patterns of behavior (distribution of responsibilities, roles, etc.) vary according to the existence or absence of marriage still needs to be explained (see González *et al*. 2010).

[49] Certainly, although divorce is freely accessible, the necessity to dissolve marriage could always be argued to be the one of the most damaging elements in a marriage compared to cohabitation, but even this difference is attenuated according to how relevant the *de facto* separation of a marriage is for not producing determined outcomes (like what happens today in succession issues).

[50] In our geographical coordinates, unmarried couples have appeared in the context of the loss of social control over individual projects in a couple's life, accepting that partner relationships can lose their importance when love disappears and due to this have to be solvable (Meil 2006, pp. 96, 99). But nowadays these are also the principles informing marriage, and current Spanish legislation is a good example of this. One could think that marriage is the state and society interfering with a couple (Meil 2006, p. 99), and it most certainly is. However, what happens is that the same occurs with a regulated unmarried couple, and what is paradoxical is that many population sectors perceive the lack of state intervention as a deficiency or an example of discrimination.

[51] On this topic, consult: García Rubio (2006, p. 116), Murillo (2006, pp. 396 ff.) and Espada (2007, p. 105). In the area of private law the following can be emphasized: the Second Additional Provision to the Law 21/1987, 11 November, which allows unmarried heterosexual couples to adopt or art. 16.1 b) of the Law on Urban Rentals, that in the event of the death of the renter, the partner who fulfils certain requirements can substitute them in the lease. In the public sphere, the most notable effect is the possibility (recognized in art. 173. 2 of the General Social Security Law) to obtain a widow's pension for the surviving partner; this however, deals with a restrictive regulation that has been the object of criticism (Lamarca and Alascio 2007).

[52] We speak of patrimonial effects because they are the most relevant. In the personal sphere, Constitutional Court Judgment 93/2013 declared art. 9 from the Parliamentary Law of Navarra 6/2000, 3 July, for the legal equality of steady couples, unconstitutional. In this article, partners and spouses shall be equated in relation to all laws regarding guardianship, curatorship, declaration of incapacity, etc.

[53] Constitutional Court Judgment 93/2013, however, declared the equating of partners and spouses in some laws of public law unconstitutional. Specifically, equating certain fiscal effects laid out in art. 12.1 from the Parliamentary Law of Navarra 6/2000, 3 July, for the legal equality of steady couples.

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This low legal profile can only be maintained while non-institutionalized cohabitation does not constitute a majority alternative to the institutionalized form[54]. If most couples did not marry (or were not formally constituted under Autonomous Community law), the legislator would surely have to take action and establish a legal framework forgoing the relevance of consent. Thus, the right to free development of personality would, undoubtedly, become much more nuanced.

Conclusion

The subject of unmarried couples' succession rights can be found within the broader context of the debate on the most appropriate legal treatment towards this type of partnership. As in other countries, this debate revolves around the role of the State in regulating the relationship of the couple and the relevance of consent in deriving the patrimonial consequences (among them, succession consequences) of cohabitation. Nevertheless, conclusions in this respect are not universal. Even in similar societies, legislative policy options may differ. Spain is a good example of this diversity in legislative intervention (the lack of regulation in State civil law and regulation in Autonomous Communities with civil competence) such as in the role of consent (some Autonomous Communities have chosen to regulate a type of registered partnership and others recognize the existence of a partnership through conclusive facts).

With regard to succession issues, most Autonomous Community laws have equated cohabitation with marriage. However, Constitutional Court Judgment 93/2013, 23 April, deems that the principle of unhindered development of personality to have been violated (art. 10.1EC) if patrimonial consequences (*inter vivos* or *mortis causa*) are legally established when the partners have not expressed consent to receive the application of legal regulation. Hence, at the moment in the large majority of cases, the recognition of the succession rights of partners is unconstitutional.

The requisite of acceptance of the legal effects is absurd and difficult to reconcile with the meaning of legal institutionalization, but the requisite of consent for the constitution for legislative intervention makes sense in the present Spanish socio-legal context. However, now that persons of the same sex are allowed to marry and in light of the current content of marriage in Spanish law, the requisite of consent for constitution makes regulation of an *alternative* partnership unnecessary. It is foreseeable that Autonomous Communities will preserve their models, adapting them to the requirement of *double consent*. Nevertheless, the most desirable scenario in Spain would be legislative abstention, that conflicts be resolved in light of agreements between partners and the general institutions of the law of obligations.

In a context which lacks regulation, the only way to recognize succession rights (there may be other claims resulting from the death of a partner, based on the patrimonial relations when living) of the surviving partner would be the analogical application of the laws governing marriage. The jurisprudence rejects analogy and tends to dismiss claims involving succession on the grounds of the difference between marriage and cohabitation. Prior to Constitutional Court Judgment 93/2013, 23 April, we could have held that, with regard to the order of intestate succession, analogical application was an appropriate tool: both the existence of a legal gap and identity of relation (the presumed will of the deceased) between that

[54] We do not have recent statistics. In the year 2004, the National Statistics Institute (INE), using data from 2001, published that there were 563,723 unmarried couples compared to 8.9 million married couples (http://www.ine.es/revistas/cifraine/0604.pdf). These figures have, without a doubt (as shows the evolution of non-marital fertility (Domínguez and Castro 2013, p. 426)), increased. We must take into account, however, that our case is concerned more with the non-institutionalized couples (understood as those to whom a legal status, which regulates their patrimonial consequences *inter vivos* and *mortis causa,* is not applied) than unmarried couples in general terms.

which is regulated and that which is not were defensible. Following this judgment, however, the silence of the legislator must be interpreted as the intention to not regulate this area, thereby blocking any possibility for considerations based on identity of relation.

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