

“Recognition in Spain of parentage created by surrogate
motherhood”,

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Publicado en *Yearbook of Private International Law*, vol. 12, 2010, pp.
619-637

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Trabajo depositado en el archivo institucional *E-Prints Complutense*
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SPAIN

RECOGNITION OF SURROGATE MOTHERHOOD: DGRN OF 5 OCTOBER 2010

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I. Introductory remarks

A. The amendment of the Spanish Civil Code

In light of the repercussions it may have in international situations, opening-up civil marriage to same-sex couples by amending the Spanish Civil code (Cc)¹ is perhaps one of the most remarkable changes in the Spanish legal system. This reform has been justified as an adaptation to Spanish social reality and² is based on the constitutional principles of free development of personality (arts. 9.2 and 10.1 of the Spanish Constitution –CE–), preservation of freedom concerning the forms of cohabitation (art. 1.1 CE), and non-discrimination (art. 14 CE). Nevertheless, it has been confined to substantial issues. However, the lack of an *ad hoc* treatment of Private International Law (PIL) same-gender marriage issues should not be seen as oblivion or “idleness” by the Spanish legislator.³ It should be seen as the logical consequence of the legislator’s intent to ignore any difference between same-sex and different-sex marriages under Spanish law.⁴ Therefore, in international situations, the

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¹ Law N. 13/2005 of 1st July, amending the Spanish Civil Code concerning the right to celebrate a marriage, *BOE* n. 157, 2 July 2005.

² Even though the reform has been contested by some social groups, lead by the Spanish Catholic Church, it does have the support of the majority of society: one may not ignore that it is the result of the implementation of an electoral promise.

³ See in this sense CALVO CARAVACA A.L./CARRASCOSA GONZÁLEZ J., “Matrimonio entre personas del mismo sexo y Derecho internacional privado español”, *Diario La Ley* n. 6319, 2 January 2006.

⁴ The impossibility of celebrating same-sex marriages in other countries is not, in my opinion, a valid reason for PIL rules to uphold the difference. On the one hand, the same-gender couples’ right to marry can be considered an “emerging civil right”: MARTIN J., “English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England”, *Cornell Int.L.J.* 1994, 419-446, at 432-438. Actually, the recent opening-up of same-sex marriages in South Africa (15 November 2006) could confirm a trend towards the generalization of these marriages worldwide. On the other hand, even if it is true that there is a risk of conformation of limping relationships, first, this is not a reason to hinder the exercising of a right, and second, many foreign legal systems that do not regulate same-sex marriages do give legal effects to

problems that almost immediately arise concerning the authorization of same-sex marriages reveal a failure in the existing rules to give every situation a suitable solution. Thus, the real issue is whether the Spanish PIL rules concerning (any) marriage are in need of revision.⁵

The above-mentioned problems refer to the law(s) applicable to the authorization of same-sex marriages, where (at least) one of the intended spouses is a national of a State that does not recognize same-sex marriages. While many media outlets hailed the celebration of same-sex marriages both between Spanish citizens and between Spanish citizens and foreign nationals, some civil registrars questioned the Constitutional Court about amended article (44 Cc)'s constitutionality.⁶ In addition, other registrars have denied the authorization through application of article 9.1 Cc, which refers "matters of capacity and civil state" to personal (national) law.⁷

B. The reaction of the DGRN to PIL issues concerning same-sex marriages

The DGRN, the administrative body dependent on the Ministry of Justice and entrusted with "all the issues related to the Civil Register",⁸ was swift to react⁹. In the very same month that the new regulation became effective, it made use of its advisory function by the means of a "Resolución-Circular".¹⁰ This decision, which is a source of law,¹¹ eliminates the difficulties by declaring that Spanish law is applicable to the authorization of same-sex marriages, regardless of the spouses-to-be's nationality. The DGRN concluded that permission to marry should be given when there is a Spanish civil registrar competent to decide on the authorization of a marriage¹² and the

foreign same-sex marriages by the means of their "conversion" into civil partnerships: see e.g. in England K. McK. Norrie "Recognition of Foreign Relationships Under the Civil Partnership Act 2004", *Journal of Private International Law* April 2006, 137-167, at 161-165. Thus, it is true that the uneven recognition of same-sex marriages within the European Union shows a lack of uniform values that threatens the possibility of unification of Private International Family Law and gives rise to many problems in relation to the application of institutional acts (SÁNCHEZ LORENZO S., "Direction général des Registres et du Notariat du 24 janvier 2005", *Rev. crit.* 2005, 618-627, at 619 and 626-627); but the outcome of this situation is perhaps a matter of time.

⁵ QUIÑONES ESCÁMEZ A., "Límites a la celebración en España de matrimonios internacionales del mismo sexo", *Revista Jurídica de Catalunya* 2005, 1171-1187, at 1186; ÁLVAREZ GONZÁLEZ S., "Matrimonio entre personas del mismo sexo y doctrina de la DGRN: una lectura más (crítica)", *Diario La Ley*, n. 6629, 15 January 2007, 1-3.

⁶ Leave was not granted to the questions on the grounds that civil registrars are not entitled by the law to submit questions to the Constitutional Court: See *Autos* 505/2005 and 508/2005, both 13 December 2005, and *Auto* 59/2006 of 15 February 2006 (<http://www.tribunalconstitucional.es>). The Constitutional Court has, however, granted leave to the question submitted by the PP (*Partido Popular*), main party in the opposition.

⁷ See QUIÑONES ESCÁMEZ A., "Circulaire de la DGRN du 29 juillet 2005, sur les mariages civils entre personnes du même sexe", *Rev. crit.* 2006, 855-858.

⁸ Art. 9 Law of the Civil register, of 8 June 1957 (*Ley del Registro civil*), *BOE* n. 151, 10 June 1957.

⁹ The promptness of the response is, in fact, one of its most remarkable virtues: See ÁLVAREZ GONZÁLEZ S., (note 5) at 1, and id., "Resolución-Circular de la DGRN 29 de julio de 2005, sobre matrimonios civiles entre personas del mismo sexo", *Revista Española de Derecho Internacional* 2005, 1007-1012, at 1008.

¹⁰ Issued to give a response to the consultation of the civil registrars that raised doubts about the possibility of authorising same-sex marriages.

¹¹ For it is legally binding both for civil registrars and jurisdictional courts, as long as it is not contrary to any hierarchically superior –or equal, but subsequent– legal rule: See PERÉ RALUY J., *Derecho del Registro Civil*, t. I, Madrid 1962, at 52.

¹² As the *Resolución-Circular* itself points out, municipal civil registrars may authorise a marriage when one of the spouses-to-be is domiciled in Spain. Consular civil registrars have a

ceremony complies with the formal requirements established by the Spanish Civil code.¹³ Such an outcome (application of Spanish law) could be, in my belief, the correct one, but it has been attained without a proper line of argument.¹⁴

Indeed, the solution of the problem depends upon the qualification of the gender requirement. If it is considered to be a matter of “capacity” and if the law applicable to “capacity to marry” is established by article 9.1 Cc –as asserted by the *DGRN* in the beginning of its decision–¹⁵ one ought to agree on the necessity to of answering the following two –rather than three–¹⁶ questions: (1) are foreign laws that prohibit same-sex marriages compatible with Spanish international public policy; and, (2) as long as the application of article 9.1 Cc may treat same-sex couples differently, is it in line with the Spanish Constitution. However, if the gender requirement is classified as a part of the content of marriage, then the only relevant issue is the law applicable to content of marriage. The *DGRN* ends its resolution by asserting that the gender requirement *is* a matter of the content of marriage, subject to Spanish substantive provisions. Nevertheless, in reaching this conclusion it devotes many lines to defending the availability of an exception under international public policy, and against both the application of a foreign law that does not grant same-sex partners the right to marry¹⁷ and the proposition that article 9.1 Cc is compatible with the Spanish Constitution.

Objections could be made to the treatment given to both issues,¹⁸ as well as against some other assertions that are found throughout the decision,¹⁹ but the space of this comment is limited. Therefore, I will confine my discussion to the proper qualification of the gender requirement (section II.A) and to the corresponding applicable law (section II.B), paying special attention to the arguments of the *DGRN*.

competence if (1) one of the future spouses is Spanish; (2) neither of them is a national of the receiving country; and (3) at least one of them is domiciled within the consular district of the authority.

¹³ Once authorised by the civil registrar, the wedding ceremony can take place either before the same authorising registrar or before any other competent authority (civil or religious) in Spain (municipal marriage) or in a foreign country (consular marriage). In this last case, it is a must that the receiving country does not prohibit the celebration of foreign consular marriages within its territory. See OREJUDO PRIETO DE LOS MOZOS P., *La celebración y el reconocimiento de la validez del matrimonio en el Derecho internacional privado español*, Navarra 2002, at 166-171.

¹⁴ See also ÁLVAREZ GONZÁLEZ S. (note 5), SÁNCHEZ LORENZO S. (note 4), ARENAS GARCÍA R, “La doctrina reciente de la DGRN en materia de celebración del matrimonio en los supuestos internacionales”, *Anuario Español de Derecho internacional privado* 2005, 351-371 at 368.

¹⁵ However, see *infra*.

¹⁶ There is still a third question for the *DGRN*: “Is the requirement of gender to be considered an objective requirement, rather than a subjective one?” This question, erroneously presented by the *DGRN* in the framework of the problems that arise concerning the application of article 9.1 Cc, should logically be the first one to be answered.

¹⁷ The *DGRN* draws an analogy between the application of the exception when the civil registrar authorises a same-sex marriage and when the authorisation is requested by a transsexual –male to female– foreigner to marry a Spanish man: see some extracts of the decision in *Rev. crit.* 2005, 614-618 and the comments by SÁNCHEZ LORENZO S. (note 4).

¹⁸ Especially to the second one: If article 9.1 Cc is the rule applicable to the capacity to marry, one may invoke the convincing arguments concerning the lack of harmony between the constitutional principle of equality and (Italian similar) PIL provisions relating to the celebration of marriage given by ROMANO G.P., in “Is Multilateral Conflict Rule on Capacity to Marry in Line With The Italian Constitution?”, this *Yearbook* 2005, 205-237.

¹⁹ See, for instance, the arguments against the interpretation of the *DGRN* upholding the “reenvoi” to a foreign law by ÁLVAREZ GONZÁLEZ S. (note 5) at 2; SÁNCHEZ LORENZO S. (note 4) at 622.

II. Celebration of same-sex marriages in PIL situations: a critical revision of the doctrine of the *DGRN*

A. The qualification of gender requirement

According to the traditional conception in Spanish PIL literature, there are two categorical requirements for a valid marriage: substance” (i.e. capacity and consent) and form.²⁰ Thus, under this view marriage is the only legal relationship that “lacks” content.²¹ While the reason for such an anomalous treatment may be debated, the fact is that marriage can no longer be considered a “natural institution.”²² The celebration of a marriage entails the acceptance of certain rights and duties that are set by the law according to the particular view of the institution’s socio-political and economic function. Each national legal system regulates the content of marriage in a different way; therefore, a universal conception of marriage no longer exists. For a marriage to be valid, the potential spouses must fulfil the requirements of capacity to consent, follow the formalities, and accept the specific rights and duties established by a certain legal order. As a result, it is necessary to renew the said traditional conception of marriage when considering that marriage is, as any other legal institution, subject to requirements of capacity, form, and content.²³

If this is so, it is also crucial to rearrange the qualifications given to certain requirements under the traditional conception. For instance, among the subjective requirements set by the law, there are some that have traditionally been considered pertaining to the “capacity to marry” because they are directly related to the individuals. However, it is possible to distinguish between certain requirements that have previously been grouped together under capacity. Those that are linked to the capacity to consent, which are mainly directed at the protection of the spouses-to-be (e.g. age and full mental capacity), can be differentiated from those that are connected to the rights and duties of marriage (which try to protect the institution).²⁴ Thus, the content of marriage is made up of both the rights and duties of the spouses and some subjective requirements that the couple must (or do not have to) meet to get married. As the *DGRN* recognizes, the gender requirement is one of these subjective considerations.²⁵ Certainly, the opening up of marriage to same-sex partners is a matter of the conception of marriage. The amendment to the Spanish Civil code has entailed a legal adaptation of this notion, in harmony with the evolution of Spanish society’s idea of the function of marriage. In fact, there are very few detractors of the reform that do not refer to the “classical concept” of the institution in order to justify both their rejection of

²⁰ See e.g., in this same context, ABARCA JUNCO A.P./GÓMEZ JENE M., “Breves notas sobre la Resolución-Circular de 29 de julio de 2005, de la Dirección General de los Registros y del Notariado, sobre matrimonios civiles entre personas del mismo sexo”, *Revista Electrónica de Estudios Internacionales* 2006 (www.reei.org), at 1.

²¹ So ARENAS GARCÍA R., (note 14) at 354-357.

²² *Ibidem* at 354-355 draws attention to the influence of Canon marriage.

²³ *Ibidem*.

²⁴ *Ibidem*. The possibility of celebrating a polygamous marriage (or not) could also be considered a matter of content, as it depends on the conception of the institution too. See *id.*, *Crisis matrimoniales internacionales. Nulidad matrimonial, separación y divorcio en el nuevo Derecho internacional privado español*, Santiago de Compostela 2004, at 202.

²⁵ ARENAS GARCÍA R. (note 24) at 202 had already pointed out at this qualification. SÁNCHEZ LORENZO S. (note 4) at 624-625 does agree; and QUIÑONES ESCÁMEZ A. (note 5) at 1179-1180 suggests that the law amending the Civil code could be regarded as an imperative law, but as a result of the consideration of the *actor regit actum* principle, which leads to the application of the *lex auctoritatis*, and not as an exception to the conflict of law rule. See also *id.* (note 7) at 856-857.

same-sex marriages and their preference for the regulation of same-sex couples under the institution of partnership²⁶.

B. The law applicable to content of marriage

To the extent that the possibility of celebrating a marriage between two people of the same sex can be considered a matter of content, a question of law issue arises when Spanish authorities celebrate these marriages in international situations. The Spanish PIL gives no express answer to the determination of applicable law (*lex matrimonii*). The *DGRN* declares Spanish law to be applicable by appealing to different arguments, none of which are sufficiently founded²⁷.

In the absence of a specific conflict of law rule, one may be tempted to uphold the analogical application of article 9.1 Cc, for it aims at regulating the law applicable to “capacity and *civil state*.” Certainly, the concept of “civil state” covers all the fundamental facts that are related to the persona, such as birth, death, name, sex,²⁸ age, filiation, and marriage. Nevertheless, there are at least three good reasons to reject this solution.

First, even if it is true that this provision sets a general rule in Spanish PIL, it is subject to many exceptions, one of which is precisely the solemnisation of marriage. In fact, if article 9.1 Cc were applied to the content of marriage, it would be the only requirement subject to this rule. The only conflict of law rule expressly set in Spanish PIL dealing with the celebration of a marriage before Spanish authorities is article 49 Cc, which regulates form. And even if the law applicable to capacity *to marry* could be subject to the general conflict of law rule on capacity,²⁹ in practice the authorities generally apply Spanish law.³⁰

Second, *lex auctoritatis* must be applied to the rights and duties of the spouses.³¹ Therefore, applying any other law to the subjective requirements of marriage which are directly linked to the spouses’ inherent rights and duties, would entail an utterly inconvenient division of the marriage content law.

Finally, and most importantly, if marriage lacks a universal configuration and each authority can apply but a single law to determine *what* marriage is being

²⁶ See e.g. ABARCA JUNCO A.P./GÓMEZ JENE M. (note 20) at 4. It is the view held by the Spanish *Consejo de Estado* in its Opinion (*Dictamen*) of 15 December 2004.

²⁷ The *DGRN* refers to the analogy with same-gender partnership, to the *forum- ius* correlation, to *favor matrimonii* and to some fundamental rights, without any further explanation.

²⁸ Therefore, sex is subject to personal law according to art. 9.1 Cc, but just as far as its determination concerns. Once the sex of the spouse-to-be is established by the means of the application of her or his national law (as far as this law does not violate Spanish international public policy: see Res. *DGRN* of 24 January 2005, and the “Note” by SÁNCHEZ LORENZO S., note 4) the recognition of his or her right to marry another person of a different or the same sex is related to the content of marriage and, therefore, it is to be regulated by the law according to which the marriage is to be celebrated, i.e., the *lex matrimonii*.

²⁹ Such is the view of the *DGRN*, coincident to the opinion of the great majority of Spanish authors. The *DGRN* asserts that “there is no room to doubt which law is applicable to the capacity to marry”, but most of the arguments set to base this statement could easily be refuted. For instance, it is clear that when art. 9 of the Charter of Fundamental Rights of the European Union (*OJ C 364*, 18 December 2000) establishes that “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”, it is performing a remission to State laws for the regulation of marriage, and not setting a conflict of law rule, as the *DGRN* suggests.

³⁰ OREJUDO PRIETO DE LOS MOZOS P. (note 13), at 84-90; FERNÁNDEZ ROZAS J.C./SÁNCHEZ LORENZO S., *Derecho internacional privado*, 3rd ed., Madrid 2004, at 435.

³¹ See OREJUDO PRIETO DE LOS MOZOS P., “Tratamiento registral de los matrimonios de complacencia: lectura crítica de la Instrucción de la Dirección General de los Registros y del Notariado de 31 de enero de 2006”, *Diario La Ley* n. 6542, 5 September 2006, 1-8, *passim*.

celebrated, that law can only be its own law. There must be a single *lex matrimonii* regulating the content of marriage and that law is the *lex auctoritatis*. Whenever a marriage is celebrated before a Spanish authority, it is a matter of Spanish law to decide which are the rights and duties the spouses accept and, accordingly, whether or not marriage is open to same-sex couples.

III. Conclusion

The problems that have arisen concerning the celebration of same-gender marriages before Spanish authorities reveal the convenience of revising the Spanish PIL marriage rules. The absence of an express conflict of law rule regulating either the capacity to marry or the content of marriage creates a legal uncertainty that the decisions of the *DGRN* -due to their lack of argument- only partially resolve. In order to remedy this ambiguity, it is necessary to enact specific conflict of law rules which declare Spanish law applicable to both types of requirements. Therefore the law should cover the capacity to marry, as a matter of simplification,³² and the content of marriage, as a matter of necessity. Thus, as far as celebrating marriages before Spanish authorities is concerned, Spanish law would apply to every requirement. By doing so, the conflict of law rules would have two positive effects. First, they would reflect the present widespread practice that entails the application of the *lex fori* to the constitution of legal relationships related to civil status, as a means of both granting the individuals that have a certain linkage to the legal system the right to access to the institutions recognized by that system. And second, they would promote the harmony of solutions by avoiding a conflict of status.³³

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³² Even if I have reconsidered the qualification that is to be given to each of the requirements set by the law to celebrate a marriage (I used to follow the classical distinction, and so I did not consider the lack of a proper distinction between capacity, form and content), I still think that capacity to marry is mainly regulated by rules that reflect a public interest, which hinders the application of more permissive foreign rules, and that foreign rules that regulate capacity to marry in a more restrictive way should not be applied, for they would impair the creation of a legal relationship where Spanish rules would grant the right to create it (bearing in mind that Spanish authorities are competent to participate in its creation). See OREJUDO PRIETO DE LOS MOZOS P. (note 13) at 57 ss.

³³ See both in ROMANO G., “La bilatéralité éclipse par l’autorité. Développements récents en matière d’état des personnes”, *Rev. crit.* 2006, 457-519.