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Albert Camus, a personal profile

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Abstract

In this work, Professor Octavi Fullat (1928) offers us a profile of Albert Camus, the author he discovered on a trip to Paris and on whom he wrote his doctoral thesis, which he defended at the University of Barcelona in 1961. This is a personal memoir in which the author surveys his early years while making the character of Camus a primary reference in his intellectual universe.

Key words: Philosophy of education, Camus, Fullat, existentialism

In 1956, I earned my Bachelor's in Philosophy and Letters with a specialisation in Philosophy from the University of Barcelona after having passed the three end-of-degree eliminatory exams. At that time, it was a five-year degree.

There were fourteen of us graduating, and only half of us managed to successfully complete the three eliminatory exams in the first round in June. Where should we celebrate it? In Plaça Reial, of course, with a beer. It was not a time of plenty. Nor is today, even though the absentminded don't realise it.

However, we did take a bonus: we went barrelling ahead. How? A night-time excursion to the Bertí cliffs. We took the train as far as Aiguafreda and then camped in a tent. All seven of us went, a mix of boys and girls. We admired the Montseny massif on the other side of the Congost River. Round the fire at night, dinner and chatting as we recalled the fun times in the years we had spent together at the university. Joan Claret in particular had us in stitches as he imitated our professors.

I told my parents the great news that I had earned my Bachelor's. I had gone to their house on Rambla de Poble Nou to have dessert after the Sunday dinner with the Piarists at number 277 Diputació Street. Congratulations and back-slapping.

Then my father got serious and urged me thus:

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- Now your doctorate.
- I need to take a bit of a breather.
- No way. Next year you'll start your doctoral courses.

I asked for a respite because I had earned my degree while simultaneously working as a baccalaureate teacher with the Piarists. I had taken the exams in two courses every June and left the other three for September. So in five years I had had no vacation. He, the son of farmers from Alforja, got his teaching degree paid for. Afterwards, he worked to pay for a degree in the exact sciences, and then medicine, which ended with a doctorate in that medicine. He was only able to earn his PhD in Madrid, the state capital. I swallowed his order, uttered with such resoluteness. There was no turning back. On the other hand, I could refuse to obey him; I was a Piarist and was not dependent on him. But I did as ordered. And it went off well. If I had put it off for later, I would not be what I am today. Effort and discipline are major anthropological values. The "mores" of our days, in contrast, have enshrined the simpletons and idle loafers.

Two more years of university studies. Once I finished them I was faced with the task of a doctoral thesis. What subject should I study? It dawned on me to ask Dr Joan Tusquets, a professor in the recently-launched degree in Education.

- Why don't you do a thesis on something related to animal psychology?
- OK – I responded, unconvinced.

I asked my Piarist superiors for permission to go to Paris for a week in order to browse through the bookshops and contact Sorbonne professors should the occasion arise. There was no Internet. Permission granted.

On the second day of my sojourn in Paris, after walking down boulevard Saint-Michel, when I arrived at the square of the Sorbonne I discovered the PUF (Presses Universitaires de France) bookshop. I went in. A little book published by Gallimard caught my eyes: *L'Étranger* (1942) by some author named Albert Camus, about whom I knew nothing. General Franco had banned him in Spain. You know how dictators are. The communist Stalin had done the same in the Soviet Union.

Oh lord, what a night! I devoured the text hardly coming up for air. What a blow to my spirit! The edifice I had been built was shattered with the merciless axe that splintered a night that was supposed to be mild. One thing became crystal clear: neither animal psychology nor other boring nonsense. The subject of my doctoral thesis would be Albert Camus. Later I would figure out what tack to take.

The following morning I bought *Noces* (1939), *Le mythe de Sisyphe* (1942) and *Calígula* (1944). I also purchased the first volume of Charles Moeller's *Littérature du XX siècle et christianism*, where he examined Camus under the title of *Silence de Dieu*. The title of the first chapter read: "Albert Camus ou l'honnêteté désespérée". But who in Barcelona could supervise my

thesis on a banned author? I thought about one of my professors, Dr Joaquim Carreras Artau, who had taught us the history of contemporary philosophy. He accepted but confessed that he had never read my author. So then I spoke to him about Moeller's book.

- I know what we could do, he suggested.
- What?
- Professor Moeller could advise you and I would accept his decisions.
- Fine.

Charles Moeller was a professor at the Université Catholique in Louvain (Leuven in Flemish) in Belgium. This was a guarantee of respect for Catholic dogma. And thus began a long journey for my restless, alarmed intellect.

Four and a half years later I would submit my doctoral thesis, which examined the possibilities of an atheistic ethics according to the literary output of Albert Camus. Camus himself gave me the gift of his books through his secretary in his office at the Gallimard publishing headquarters in Paris. I continued to teach classes on philosophy and the history of art and culture in the baccalaureate programme to earn a living. But this did not detract from my almost irascible dedication to my thesis. Not only did I devour everything Camus had written, I also wanted to study his own readings. Only in this way could I understand what might penetrate the author's interior. There were no Sundays, no Christmases, no Easter weeks nor summer vacations. Only studying and more studying. In the country home my father owned half an hour from the village of Alforja (Tarragona), I closed myself up with books every summer to make headway. Since there was no electricity, I worked from the first light until sunset. Nor did we have running water. No matter: we had the watering ponds.

Fear started to surge in my soul when confronted with a human history drenched in the absurd and lacking any possible redemption.

After killing an Arab and imprisoned, Mersault receives a visit from Marie, his lover. She asks him if he loves her, and Mersault, the main character of *L'Étranger*, answers: "Je lui ai dit que cela ne voulait rien dire, mais qu'il me semblait que non".

I hereby warn that I sometimes am going to cite Camus in French and other times in translation. That's how I keep myself entertained.

Mersault's trial after he murdered the Arab is a Kafkaesque process which convinces him of his death. He rebelled against fate, against the world and against God, who is deaf:

> *"Pour que tout soit consommé, pour que je me sente moins seul, il me restait à souhaiter qu'il y ait beaucoup de spectateurs le jour de mon exécution et qu'ils m'accueillent avec de cris de haine".*

Le Mythe de Sisyphe (1942) opens solemnly with a formula which at the time left me frozen: "Il n'y a qu'un problème philosophique vraiment sérieux: c'est le suicide".

Does human life have meaning? This is the major challenge. Still, despite being corrupted and absurd, life is worth living. Kierkegaard, Shestov and Husserl pretend to have eliminated absurdity, but Camus ventures out in other directions: "La vie sera d'autant mieux vécue qu'elle n'aura pas de sens".

So how do to it? To begin with: "Il faut imaginer Sisyphe heureux".

We only have the present and we must dive into it no matter how incomprehensible it may be. The epigraph that Camus himself placed at the beginning of this work reproduces a text by the lyric poet Pindar (died 438 BC):

> *"Oh, my soul, do not aspire to immortal life but exhaust the limits of the possible".* (Epinikia or Victory Odes; Pythian iii)

Paul Valéry's *Le cimetière marin* (1920) was inspired by the same philosophy. This poem set in the Sète cemetery meditates lyrically on life and death, light and consciousness, regarding the absolute and being, and concludes with an invitation to pare life down into the simple act of transit. Consciousness and rebellion, says Camus, are man's only freedom; and therein also lie his grandeur. Sisyphus, the absurd hero, overcomes his fate by finding joy in futile effort. Sophocles, in his *Oidipous tyrannos (Oedipus Rex)* from 430 BC, along with the Dostoyevsky (1821-1881) character, Kirilov, declare it outright: *everything is fine*. Waiting for another world is the job of the fearful and the timid.

Throwing out the absurd? I wasn't then, nor am I now, up to it. Still, the extravagance and illogic of human existence came to penetrate me deeply. What to do with God and his incarnation? The affliction gradually got the best of me.

The play *Caligula* (1944) only rubbed salt into the wound. The world is hostilely opaque. The Roman emperor never manages to go beyond absurdity:

> *"Les hommes meurent et ils ne sont pas heureux…*
>
> *Qu'il est dur, qu'il est amer de devenir un homme!…*
>
> *Vous avez fini par comprendre qu'il n'est pas nécessaire d'avoir fait quelque chose pour mourir…*
>
> *On est toujours libre aux dépens de quelqu'un…*
>
> *Il n'y a qu'une façon de s'égaler aux dieux: il suffit d'être aussi cruel qu'eux."*

Ivan Kalyayev from *Les justes* (1946) represents the hero who tries to give justice a chance to eliminate the entrenched chaos. But when the terrorist poet has to actually kill human beings (children), instead of accomplishing his goal

with an idea, the act of justice becomes impossible: "Pour une cité lointaine, dont je ne suis pas sûr, je n'irai pas frapper le visage de mes frères".

Kalyayev wants to wield justice, not be a murderer. However, he cannot bring justice without committing injustices. Killing a life for the love of life: how absurd! The entire story relies on collective blindness; it gravitates around incongruence.

Le malentendu (1944) returns to the theme of the absurd. The world is made in such a way that human beings are convinced that they will never be given what they deserve. Heidegger's category of *Geworfenheit* ("thrownness") helped me to deal with this insipid work. *Dasein* is made up of the "here-despite-it". Moving headlong towards death as long as we exist. In *La peste*, Camus diabolically states it: "Nous ne pouvons pas faire un geste en ce monde sans risquer de faire mourir".

We are guilty despite ourselves. Freud claimed that precisely through guilt we accept that we consist of desire; however we are as guilty when we desire as when we renounce desire. Camus repeats it:

> *"There is only one way to equal the gods: be as cruel as they are"*. (Caligula)
>
> *"We shall be guilty forever. This night is heavy, heavy as all of human suffering*". (Caligula)

But God? What about God? To God:

> *"The objection will be raised of evil and of the paradox of an all-powerful and malevolent, or benevolent and sterile, God"*. (L'Homme révolté)

But good or evil, powerful or impotent, might God really exist?

> *"Man is thrown on an earth whose splendour and light speak to him without respite of a God that does not exist"*. (Noces)

So what is left of our life?

> *"The plague is life, and that is all"*. (La Chute)

Jean-Paul Sartre reaches the pessimistic consequences of such an anthropological vision:

> *"There are equal reasons for loving men as for hating them".* (La Nausée)

He discovered the metaphysical underpinning of this thesis in Heidegger, who claims that being and nothingness are one and the same.

My thesis advanced tortuously. God became to me the number one evil-doer.

If there was still an urge to be good, one had to wonder like Tarrou:

> *"Peut-on être un saint sans Dieu?"* (La Peste)

Obviously it is always possible to be a blessed idiot, giving oneself to others just because, willy-nilly. Btu this was not in my nature, so the faltering, the vacillation persisted. Nor did I accept that God would become the private recourse of beings deprived of a future.

What is more:

> *"Who could say that an eternity of delight could compensate for an instant of human suffering?"* (La Peste)

At that time I was reading Heidegger's *Beiträge zur Philosophie* (Contributions to Philosophy). *Dasein* needs no windows to the outside; it consists of living outside itself; it is nothing more than openness. Things make themselves present to us; we give them presence. Camus' absurdity disappears in such a way even though the price to pay is exorbitant: it costs as much as losing the very act of consciousness, of shedding the conscious self to become *something* instead of *someone*. In contrast, to Camus:

> *"If I were a tree, I would not be absurd. The absurd emerges from my lucid reason, from my consciousness that sets me in opposition to all of creation".* (The Myth of Sisyphus)

I stuck with Camus. He was more direct, more mine. I studied him via Freud's text *Jenseits des Lustprinzips* (1920) or *Beyond the Pleasure Principle*. Death drive or *Todestriebe*. We are aggressive towards our inside and also towards the outside... masochism and sadism. Absurd, absurd no matter how you look at us; we are disconcerting realities. In life we have no conclusions to argumentation: we only dangle from decisions. Said Heidegger in *Being and Time*, in *What is Metaphysics?* and in *Nietzsche I-II*, being is nothingness, the nothingness of being. For this reason, *Dasein* is defined by *Sorge*, care and concern; *Sorge* elucidates temporality and finiteness. History is not an education targeted at something but a multiplicity of durations intertwined with

each other. All we needed was today's unbridled and suicidal consumerism to fill to overflowing the anthropological absurdity in which I was imprisoned.

Studying Camus' oeuvre had led me to a dead-end: existence is absurd, demented. I wrote to Professor Charles Moeller in Lovain. His response was encouraging. So I went there, with the due permission of my Piarist superiors.

I spent two days in Paris. Years later I bought *Le Cahier bleu et le Cahier brun* at the Gallimard bookshop, along with Ludwig Wittgenstein's *Investigations philosophiques*, books which later helped me to digest Camus. Plays with words like a game of chess, but language is different from chess in that it is applied to reality, while chess is applied to nothing. In order to carry on with my study of hermeneutics in Camus' books, I sought Popper, specifically his book *Conjectures et Réfutations* (1986, in the French edition by Payot). Language marks the division between man and animal, my apologies to the zoophiles out there. Animal language only serves an *expressive function* – it expresses psychological states – and a *stimulating function* – it prompts reactions. But human language also serves a *descriptive function* and an *argumentative function*.

However, in 1958 when I went to Belgium to meet with Moeller, I had not yet examined the linguistic perspective. I quit Paris and travelled by train to Brussels, which at that time was hosting the Exposition Universelle. I toured it and took another train to Louvain, where the professor met me at the Université Catholique. Later, in 1968 that university would be divided into Flemish- and French-speaking faculties; between 1972 and 1979 the latter faculties were moved to the Walloon Brabant, the home of Louvain-la-Neueve, but back in 1958 Charles Moeller welcomed me at the old university where the voice of Cardinal Désiré Mercier (1851-1926), who had been a professor of neo-Thomist philosophy there, still echoed.

I camped out accompanied by a lack of money. The first day, Moeller invited me to a nourishing repast at a *brasserie* near the university. I remember that the hearty dish I ate, plus the beer, went to my head, rendering my brain rather unfit to discuss the topic of my thesis.

I had hardly eaten a single warm meal since leaving Barcelona. Instead, I settled for what I had packed, tins of sardines and tuna, and I bought bread, milk and fruit along the way. I felt unwell.

- Camus – Moeller told me – certainly found the absurd, but don't lose sight of the fact that there is also the quest for the Mystery, even though he doesn't realise it.
- In what text, for example? — I objected.
- *Il peut y avoir de la honte à être heureux tout seul*. You'll find it in *La Peste* coming from the mouths of both Rieux and Rambert.

We spent two days engaged in extremely useful conversations for my purposes. I decided to uncover Camus' hidden intentions regarding the Mystery, the Greek *mysterion*, which is what can be neither seen nor heard, what is inaccessible to reason.

- I would like to be able to talk to Camus — I hinted.
- I'll set it up and arrange a meeting — he answered.

Back in Barcelona I felt comforted. Moeller, a cultivated man with a penetrating yet stable spirit, had spurred me on. Even his body displayed solidity and vigour.

Camus' mother, Catalina Sintes, was of Mallorcan extraction. This made him more familiar to me. Albert had been born in Mondovi, a town in Algeria, on the 7th of November 1913 during the time of French colonisation. Before being a French domain, Algerian lands had been under Ottoman rule. The French period lasted from 1830 until 1962, when Ben Bella earned independence for his people.

My author's father, Lucien Camus, died in the Battle of the Marne in 1914 in World War I (1914-1918). He hailed from a family from Alsace. So Albert barely knew his father, who had been a worker at a vineyard. His mother, however, earned the daily bread as a housekeeper. She was almost totally deaf and did not speak.

> *"Je n'ai pas appris la liberté dans Marx. Il est vrai: je l'ai apprise dans la misère"*. (Actuelles I)

Camus was born into poverty and lived in a two-room apartment. How did he manage to get educated? Since he was a war orphan, he was awarded a scholarship which enabled him to pursue secondary school and higher education.

Albert Camus' absurdity has entered my existential biography, yet it has remained bound by the inquiry into the Mystery, an inquiry which, as Moeller led me to believe, underlies much of Camus' output.

Human beings have aspired to being God. Sartre wrote that man is the useless passion of becoming god. Christianity speaks about the divinisation of the believer: the incarnation of the Son, redemption, grace, sacraments, the post-mortem vision of God.

How should we understand God? In the 20th century, the Jewish author Levinas (1905-1995) addressed this question so insightfully (*De Dieu qui vient à l'idée*, 1993) that it cannot be confused with either the ass's braying of the masses who believe in him nor with the roar, the mule's bellow, of the atheistic rabble. God lacks presence given that his sanctity separates him absolutely from our knowledge. His transcendence is so radical that it ends up in absence. God is neither substance nor concept; therefore, he cannot be perceived either at the end of an argument or in the content of an impossible revelation. God, in consequence, is nothingness. He exists beyond the immanence of the available presences. Sanctity, separation, serious, all-encompassing, absolute transcendence. Later the teacher Eckhart helped me to understand Levinas.

A person's religious feelings? They are his own business. Like the fellow who likes hot chocolate with pastries, while others prefer juicy, peppery escargots; others like socialism, while there is no dearth of those who adore capitalism. There are no dogmas regarding tastes; it is self-service for everyone.

In Judaism sanctity consists of separation. It only befits YHWH, the different, the pure, separate from the world, from the perceptible, from the conceptualisable. Therefore, He lacks definition. God is holy. Not a rosebush, nor a grub, not a brain, nor an image, nor an idea, nor a spirit, nor even a being, not even Being. So what is left? Nothingness. Nothing of anything that is ours.

Albert Camus is restless. He seeks what cannot be found.

> *"Nous ne sommes pas de ce monde, nous sommes des justes. Il y a une chaleur qui n'est pas pour nous"*. (Les Justes)

In the same play Kalyayev, or Yanek, has died in order to pay for the crime of having murdered the tyrant, the Grand Duke of Moscow. His beloved Dora exclaims: "Yanek est mort… Il doit rire maintenant. Il doit rire, la face contre terre".

Why laugh? Because he has eliminated the despot and then has paid with his own life for his act of justice that led him to kill a human being. A thirst for justice. The Mystery is not incarnate; it remains furtive and clandestine. Laughing is now useless, gratuitous. Has Yanek failed?

In the plague that besieged the city of Oran (*La Peste*, 1947), Camus found the allegory of Nazism, of Stalinism, of racism and, we could add, of AIDS. It is necessary to struggle against the plague. Why? Camus is distant from the historic religious phenomenon but has an intense feeling of the holy. This should be interpreted, in my opinion, as his concern with what is holy and its relationship with behaviour (*L'homme révolté*, p. 35).

In the preface to the American edition of *L'Étranger* he claims that Mersault is the only Christ we deserve. He thus poses the meaning of *Mysterion*. Etymologically, this Greek word means "to close eyes and mouth"; therefore, it is a matter of a secret, hidden reality. Mysteries of Eleusis, of Serapis, of Mitra. There is no direct knowledge of the Mystery; one gradually approaches it without ever grasping it. The Mystery announced by Paul of Tarsus in his first letter to the faithful in the city of Corinth, where he had founded a Christian community between the years 49 and 51, fits with the Hellenistic concept of *mysterion*. The letter was sent in the year 54 from the city of Ephesus. The first nine verses of the first chapter of the epistle introduce the mystery of Jesus Christ, a mystery which is not limited to perfecting knowledge but instead to exceeding it for a higher order.

In *Autrement qu'être ou au-delà de l'essence* (1974), Emmanuel Levinas notes the mysterious, what is shown without being shown, what remains merely hinted at enigmatically via traces. The notion of *événement* developed by Deleuze in *Logique du Sens* (1969) also examines the *mysterion* because the *événement* marks a caesura, a break, in the temporal discourse, leading to an interval in what is known and natural. We thus draw closer to Heidegger's

Göttliche, divine, in *Beitrtäge zur Philosophie* (1989), in *Besinnung* (1997) and in *Approches de Hölderlin* (1962, in the French version). Even *Entgötterung*, characteristic of our undivine times, can be interpreted as a way of positing the divine beyond the Judeo-Christian interpretation in which God is cause and underpinning. This is how Levinas refers to *enigme* in *En découvrent l'existence avec Husserl et Heidegger* (1949 and 1979): transcendence is not phenomenal but is heralded in phenomena as an imprint which, however, is not captured by the same phenomena.

These reflections came after my earliest readings of Camus, but he was the one who set me along the pathway of the Mystery, of that which is impossible for human beings.

> *"Since the night when I heard the call, I really was called, I had to answer or at least look for the answer".* (La Chute)

Clamence has asked himself the ethical question: Can man move forward with morals? Are morals possible without reference to God? Can an atheistic morality exceed the plane of customs or convulsive tics?

In *Lettres à un ami allemand* I discovered a sentence that forced me to ponder this. It was the following:

> *"You have concluded from all this that man is negligible…*
>
> *I saw no argument to answer you except a fierce love of justice".*

In the same book by Camus I found a text which linked up with the previous one:

> *"What is man? …*
>
> *Man is that force which ultimately cancels all tyrants and gods".*

In *Les Justes*, Camus once again reveals the quest for the mystery, the inquiry into reality that begins from the solely zoological world, the reality that is human. Anankov exclaims: "Hundreds of our brothers have died so that you know that all is not permissible."

Throughout my readings of Camus I detected a landscape where light was the outward appearance of what is mysterious and holy:

> *"Misery prevented me from believing that all was well under the sun and in history, but the sun taught me that history wasn't everything".* (L'Envers et l'Endroit)

The concept of epistemological transcendence, not ontological transcendence as Sartre understood it in his conception of phenomenology, helped me to understand Camus' effort in his quest for the *mysterion*. Sartre wrote in *L'Être et le néant*: "La conscience est conscience 'de' quelque chose: cela signifie que la transcendance est structure constitutive de la conscience".

The act of consciousness is not only the vision of something that is precisely not located inside this act; it goes even further, towards what consciousness will never be. Human consciousness is a *lack of*, it is a *desire to* be. In this way, I find Camus' formula clarifying: "S'il est vrai que nous naissons dans l'Histoire, nous mourrons en dehors d'elle".

Years later, Levinas assuaged me in his notion of *trace*, a notion that could illuminate more than one Camus text. The infinite is heralded as a *trace*, a footstep, in phenomenality grounded upon upsetting it. The trace is the rupture of the order of the world; it is a preterit that has never been present; it is an immemorial past. In the lecture Camus delivered in Uppsala, Sweden on the 14th of December 1957, he uttered words that inexorably referred to the holy, to the Mystery. They are the following:

> *"Le monde n'est rien et le monde est tout, voilà le double et inlassable cri… cri qui…réveille…l'image fugitive et insistante d'une réalité que nous reconnaissons sans jamais l'avoir rencontrée"*.

Today I read these sentences by Camus in light of Levinas' *Humanisme de l'autre homme* (1973). The Other or the Infinite are not substances that pre-exist in the visage, which, incidentally, is not a phenomenon; it is only a symbol of the vulnerability of one that exists, towards the unapproachable *mysterion*, moving towards the secret that cannot be revealed, cannot become visible. The Mystery is nothingness, nothing of anything we have.

Art viewed as fatigue for contemplating *Kallos, Pulchritudo, Bellezza, Schönheit, Beauty*, understood as words that signal a metaphysical sphere, art understood thus is another pathway that humans have set out to tip-toe closer to the Mystery. This Art of Immortal Beauty pointed towards the Perfect Unreal: this is now Malraux conceived of it in *La Tête d'Obsidienne* (1974). In this supposition, that of Impossible Beauty, I shall borrow Bergson's words when he writes:

> *"A quoi vise l'art, sinon à nous montrer… des choses qui ne frappaient nos sens et notre conscience?"* (La Pensée et le mouvant, 1934)

This way of conceiving art helped me to understand *Antigone*. The victory over fate is what characterises art as a demiurge; Malraux saw it thus in *Les voix du silence* (1951).

In *L'État de Siège* (1948), Camus told me: "I have experienced nihilism, contradiction… But I have also saluted the power of creation and the honour of living."

Why did he rebel? What reality sustained his protest? His literary art is a quest.

> *"The right way is one that leads to life, to the sun. It can't be cold forever".* (Les Justes, 1950)

And in *La Peste* (1947): "He recognised that he was afraid... Even he needed human warmth."

As I noted above, I was writing my thesis during the three summer months holed up in a country house that my father owned in his hometown of Alforja. The estate had four hectares of hazelnut, olive and almond trees. My sister Maria typed the text for me. Camus haunted me. I engaged with him in a merciless one-on-one. He seriously marred the *Weltanschauung* in which I had been inculcated since nursery school. Immersed in the condensed nights and sunrises and sunsets that turned on and off the light in my space, I grasped texts like this one from *L'envers et l'endroit* (1937):

> *"Ce monde de pauvreté et de lumière...*
>
> *La misère m'empêcha de croire que tout est bien sous le soleil et dans l'histoire; le soleil m'apprit que l'histoire n'est pas tout".*

Nights of absurdity, but also a sun that sought something more.

Later, after having worked as a professor at the Collège de France, Claude Lévi-Strauss taught me how to read Camus another way. In *Anthropologie structurale Deux* (1973), I learned to read history not as linear progress which encompasses humanity as a whole but as stories that reflect human diversity, a diversity that objectifies the impossibility of a single form of humanity having the ability to fulfil all the anthropological powers. Between sunset and sunrise, I learned that *Rede* – speaking – is not an easy job; the goal is not to speak without saying anything but to remain silent in order to be able to say something. After all, science does not come from a prior universal doubt but from a newer, relentless doubt. I take pleasure in Heidegger, who understands *Dasein* as both an appellant and a call to the interior of the *Gewissen* – consciousness – as well as to *Sein und Zeit* (1927).

Freedom to rebel against the Absurd. In *Phénomenologie de la perception* (1945), Merleau-Ponty defines freedom as "le pouvoir de garder à l'égard de toute situation de fait une faculté de recul".

So we can personally accept a situation which has arisen; to the contrary there is only inertia and repetition. With this freedom, one can grapple with this text by Camus:

> *"Rebellion... demands order in the midst of chaos and unity at the very heart of what flees and disappears".* (L'Homme Révolté, 1951)

In the epigraph of the quatriènne lettre in his work *Lettres à un ami allemand* (1945), we read:

> *"L'homme est périssable. Il se peut; mais périssons en résistant, et si le néant nous est réservé, ne faisons pas que ce soit une justice!"*

Only the holy can give rise to such boldness, such exigent yearnings. It is not the fragile, evanescent desire, always to be reconstructed, which Lacan refers to in *Écrits* (1966); rather it is Levinas' *Désir in Totalité et infini* (1961). This thinker distinguishes between *need*, which seeks consummation, and *desire*, which is a relation beyond the horizon of the world, yet a yearning which will never be satisfied. If we embraced satisfaction, we would become gods. This was the temptation to which Adam and Eve succumbed in the mythical story in Genesis.

Alerted by Camus' quest for the Mystery, for the holy, one evening I received a huge blow from my author at my country house in Alforja. That day I had finished reading *La Chute* (1956), believing that unforgiveable *guilt* was an anthropological categorical question which opened the doorway to the Other. However, the last word, an adverb – *Heureusement!* ("Fortunately") – plummeted me into disconsolate disappointment. The night was pitiable, even lamentable.

The main character decided not to save the girl who was crying for help in the waters of the Seine. It was night-time and he saw no one. He was guilty of a death.

> *"O young girl, throw yourself into the water once again so that I may have a second chance to save both of us... What imprudence! Suppose someone actually took our word for it? ... The water is so cold! ... It's too late now. It will always be too late. Fortunately!"*

However, this pessimism is constantly pricked by a certain hope, as noted in this text from *L'Homme Révolté* (1951): "Comment vivre sans la grâce, c'est le problème qui domine le XXe siècle".

We get an answer in the same essay, even though it is ambiguous. It is the following: "La vraie générosité envers l'avenir consiste à tout donner au présent".

This could be interpreted as pouring oneself wholeheartedly into the instant, setting aside both religious utopia and revolutionary utopia – Marxism and anarchism; alternatively, the sentence could be understood as freeing oneself from the present for a thrilling intrahistoric future. In this second supposition, we could find aid from Levinas' concept of *autrui* or *visage*. Back then I tended toward the second alternative, viewing Camus' entire output as a call that must be answered.

My author's oeuvre is more insinuating when read through the prism of Merlau-Ponty's notion of *parole parlante* as elaborated in both

Phénomenologie de la perception (1945) and *Le Visible et l'invisible* (1964). The *parole parlante* transcends the universe of already settled meanings and seeks meanings in its nascent state, which objectivise *un certain* silence in words.

On the 13th of December 1957, after receiving the Nobel Prize, Camus answered a young Algerian who questioned his behaviour in this way: "Je crois à la justice, mais je défendrait ma mère avant la justice".

We can perceive the mother, but not universal, perfect justice. However, we must understand the following quote:

> *"I continue to believe that this world does not have any superior meaning. But I know one thing in it that has meaning and that is man. This world has at least the truth of mankind".*

The day came when I had to defend my doctoral thesis. It took place in a makeshift room in the Rectorate in Plaça de la Universitat. The year was 1961. Springtime was in full bloom. The sun accompanied me, as did my sister Maria. In those days of ashy leadenness, permission to read the thesis came from the state capital. It took a long time coming. After all, Camus was a banned author. Finally it was granted thanks to Professor Joaquim Carreras Artau's machinations in the Ministry of Education, where he was respected.

The jury was made up of Professors Joaquim Carreras Artau, Jaume Bofill, José Alcorta, José Maria Valverde and Joan Tusquets. Of all of them, only Valderde was familiar with Camus. The other four limited themselves to posing me relevant philosophical problems.

Camus made two mistakes in his life. In June 1934 he married; two years later he broke the promise. In 1940 he wedded Francine Faure; this marriage lasted. In late 1934 he joined the communist party; in 1937 he left it. I have made more mistakes in my life. And anyway there are the Cathars, the pure, the communists and their successors; they never make mistakes: they are infallible, perfect.

Rummaging through my memory overflowing with biographical life, now buried, I unmask a third core of Albert Camus' encroachment into my conclusive thinking, that is, my terminal, definitive thinking, I venture to say. I am not allowed to take considerable leaps since I cannot hit the road. For me, only a few metres are missing to reach the threshold after which only luxuriant, solid shadow prevails.

> *"Accomplir une vérité qui est celle du soleil et sera aussi celle de ma mort".* (Noces, 1939)

Love of the body, of life, of nature. The rest: death and ruin. In life, Camus said *oui, un oui définitif... Se nourrir de l'intensité du moment*. In *Actuelles-I*, he reinforced it as follows: "I was born poor, beneath a happy sky, into a natural world with which one feels harmony."

I had written my doctoral thesis on Camus over the course of three summers, three months long each, in a poor, cramped country house with no electricity. His texts readily penetrated me. I drank them in naturally. And the countryside – the sun, the birds, the rain, the wind – embraced me without fatiguing me. They were the summers of 1958, 1959 and 1960.

> *"This amorous understanding between earth and man. Ah! This pact would convert me if it were not already my religion".*

They were three summers that were, however, informed by the three years I spent there during the Spanish Civil War, my three years in the belly of that same rustic house equally surrounded by hazelnut, olive and almond trees. The Civil War with its four seasons: every year, back then, I married nature. My eighth, ninth and tenth years were christened in the same endothymic setting by the sun, the water, the cold, the heat, the birds, the foxes, the wine that is impetuous in my village, the *seré*. The village was half an hour from the country house. My "body-soul" already awaited Camus, and the encounter would take place in Paris years later.

The three-year baptism relived during the summer months while I wrote my thesis should be understood based on Russell's concept of sense-data in Knowledge by *Acquaintance and Knowledge by Description* (1911). The things we perceive do not dovetail with the things that exist beyond their perception. We cannot confuse perception with the physical object perceived; that would be ingenuous. Yet regardless:

> *"Hors du soleil, des baisers et des parfums sauvages, tout me paraît futile".* (Noces, 1939)

After all, as Lévi-Strauss wrote in *Anthropologie structurale Deux* (1973), humanity itself is nothing other than a *possibilité* of nature. We need not do anything else: "Accomplir une vérité que est celle du soleil" (Noces, 1938 and 1947).

This sensibility was handed down to us from the Greek poet Aiskylos (Aeschylus), who lived between 525 and 456 BC. He left it written: *pontiôn kumatôn anérthmon gélasma* ("the unnameable smile of the sea"; may it apply to the political pedants in Spain who have stripped education of its Greek habit).

Already a Piarist, in 1953 I had organised scouting in the schools of Catalonia, convinced of the edifying value of nature. With a group of boys I ascended to the peak of Aneto, 3,404 metres tall. We camped in the valley. Air, snow, white clouds and also dark clouds threatening storms:

> *"I woke up with the stars in my face. Sounds of the countryside were drifting in. Smells of night, earth and salt air were cooling my temples. The wondrous peace of that sleeping summer flowed through me like a tide".* (L'Étranger, 1942)

At this point it seems appropriate to refer to the concept of chair that Merleau-Ponty develops in his book *Le Visible et l'invisible* (1964), where *chair* is defined as the unit of being which is simultaneously *voyant-visible*. I shall not pursue this vein because of my Camusian hermeneutics, although I am convinced that it would yield fruit.

> *"Il n'y a pas de honte à être heureux. Mais aujourd'hui l'imbécile est roi, et j'appelle imbécile celui qui a peur de jouir".* (Noces, 1938 and 1947)

Like it or not, years later I read this notion through the prismo of Freud's *Liebe*. *Eros* is the name for the sexual instinct that feeds life, in opposition to *Thanatos*; *Eros* keeps everything alive in cohesion. In Freud's text, there is polysemy around this idea; still, we could say that the Latin word *libido* would point toward the sexual dimension whereas the Greek word *Eros* would signal the instinctive space – *Trieb* in German, while the term *Liebe* would indicate the psychological sphere. Still, there persists in Freud a polysemic terminology throughout his intellectual evolution. In Lacan, however, the *principe de plaisir* is defined more confidently and is never confused with the *sensation de plaisir*; the pleasure principle holds that the mind tends to avoid what is unpleasant or painful, instead seeking fruition.

> *"We think that happiness is the greatest of conquests; it is acting against the fate that has been imposed upon us".* (Lettres à un ami allemand, 1948)

I interpreted this quote by Camus according to the Freudian concepts of *Lebenstrieb* and *Todestrieb*, which somehow echo the notions of the Greek philosopher Empedocles (483-424 BC) on *philia* and *neikos*.

In Greek mythology, *Eros* is the god of love, the deity that ensures both the continuation of the species and the internal cohesion of the *kosmos*. Both the *Kama Sutra* (3rd century) by the Brahmin Vatsyayana and Ovid's *Ars amandi* (1st century) stressed the value of love; however, only the *Kama Sutra* grants love the purpose of cosmic balance. We can also read Publius Ovidius, who discusses how to captivate the coveted woman as a specific case of the order of everything: "I used to wait patiently until Saturday to hold Marie's body in my arms" (L'Étranger, 1940, 1942).

Love is desire, and Freud captures this with *Traumdeutung*. What we have dreamt about is an unconscious psychological formation which can be interpreted as the veiled realisation of a thwarted desire. Dreams do not consist of nocturnal evasions or cerebral wanderings or supernatural revelations; they are nothing other than the nocturnal workings of our dreaming desire. Loving means yearning.

The last verse which French poet Paul Valéry (1871-1945) uses to close his poem *Cimetière marin* (Charmes, 1922) reads as follows: "Le vent se lève, il faut tenter de vivre".

Despite oblivion, we have to have the courage to live. The poem is set in the cemetery in the village of Sète, near Montpellier, a cemetery constantly bathed by the Mediterranean Sea. It is a meditation on life and death. Valéry was buried in this cemetery; I visited it years ago with my sister Maria. Camus made himself present to me there. At this moment, the heartrending memory evokes Montjuïc cemetery, where what remains of Maria rots in a communal grave. She no longer has the *tenter de vivre*.

Camus' theme of the pleasure of living should be viewed through the prism of Freudian *Tiefenpsychologie*, but I am out of time. The *Ödipuskomplex*, with its conflictive mix of tender feelings towards the mother and hostile feelings towards the father, could be a stimulating point of departure.

The "life-death" or "pleasure-pain" struggle led Camus to measure and containment, not to frenzy or debauchery. *Sophrosyne* in Camus, but never *hubris*, excess.

Albert Camus is buried in Lourmarin, a village in Vaucluse at the foot of the Liberon Mountains. I spent three Christmases there, in the Le Moulin de Lourmarin hotel, which had a fine restaurant. I was clearly interested in the place, but the appeal was Camus' tomb, the holy site which was located fifteen minutes away on foot. Camus lived near Lourmarin in the summers of 1946, 1947 and 1948. In November 1958, he bought a house in the village with the money he had gotten from the Nobel Prize on the 17th of October 1957. On one of the three Christmases I spent there, I peeked into the home from the outside. I was debating whether or not to knock on the door when the daughter of the house left it accompanied by a large dog. I desisted upon seeing the tough mien of the woman and the dog, which did not presage fortuitous encounters.

In *Noces*, Camus provided a motive for freeing himself from the lands of the French *Midi*: "What should I do with a truth that should not rot? It would not be in my measure." What future awaits the human being? "L'homme sans autre avenir que lui même".

Noces, a work published in Algiers in 1939, includes four essays that reveal a love of life; that is, the beauty of bodies and the exuberance of nature. Both Greek philosophy and Latin culture and the permanence of the Mediterranean ensured Camus that the world is open and gives itself to us. Nuptials, thus, with the earth and the sea, following Nietzsche's lesson. Human beings are delivered to themselves against all metaphysical prejudices. This is the lesson of *Noces*. Sensations place us in contact with virginal freshness. Pleasure is the supreme passion. Ultimately, as Merleau- Ponty claimed in *Phénomenologie de la perception* (1945): "le corps fait le temps au lieu de le subir". For this reason, Camus writes in *L'Étranger* (1942): "It is too hard to bear my love. Therefore, I cannot bear the pain of the world."

Measure, moderation, containment, caution. The messiahs and redeemers hang from a cross. They think they are divine but they end up dead. Human beings are not gods. The Delphic *Gnothi seauton*: know your limits and do not pretend to be on par with the gods. The last part of *L'homme révolté* (1951), entitled *La pensé du midi*, shows that philosophy should lead to a

philosophie des limites. This philosophical endeavour bears the tension between the irrational and the rational, politics and morality, violence and meekness, justice and freedom. I set forth these ideas at the University of Gröningen in Holland, invited by Professor Delfgaauw, in 1966. It was one way of unveiling the first fruits of my doctoral thesis. I distinctly recall telling them that Camus particularly affected them because the faculty was primarily Protestant. My words were these:

> *"S'il y a un péché contre la vie ce n'est peut-être pas tant d'en désespérer que d'espérer une autre vie"*. (Noces, 1939)

Albert Camus died on the 4th of January 1960, in an automobile accident in Villeblevin, near Montereau. Michel Gallimard, his editor, was driving. Before departing myself for the cemetery, I am planning to greet him one last time in his tomb in Lourmarin.

In the study he performed on my three autobiographical volumes, Professor Conrad Vilanou from the University of Barcelona referred explicitly to Camus' influence on my written output. I had never reflected on that before. Vilanou's text, which is both penetrating and well-documented, led me to write these pages. I am grateful to him for his insight[1].

To close this chapter, as a kind of postscript I would like to underscore the fact that Camus has even influenced my literary style, just as Camus acknowledged about his own style: "Gide a régné sur ma jeunesse ou pour être exact, la conjonction Malraux-Gide".

That night in Paris when I opened the book to the beginning of *L'Étranger* still impacts me today: "Mother died today. Or maybe yesterday; I can't be sure."

A bare yet intense style. I would love to master it, although I have never gone beyond being a mere apprentice.

[1] "La trilogia autobiogràfica del professor Octavi Fullat: quan la confessió esdevé memòria pedagògica", *Revista Catalana de Pedagogia*, vol. 7, 2009-2010, pp. 503-570. [Note by the editor of *Temps d'Educació*].

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Ethology of fear: Responses, actions, universes

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Abstract

In this paper we describe the motivational-behavioural system of fear from an ethological point of view. Fear behaviour is primarily considered reactive, that is, dependent upon past events, so its manifestations should be classified as responses rather than actions. The behavioural outcomes of fear which are closer to actions are those involved in defensive aggression and in deceit targeted at predators or rivals. We also analyse the perceptual worlds around fear and relate them to two important polarities of animal adaptation, namely fear-security and fear-aggression. Both animal expressive patterns and intentional actions often reflect the conflict between these opposites, and decisions in the face of danger are based on a balance between the cost and benefit and the adaptive value of behaviour in its ecological context.

Key words: ethology of fear, fear behaviour, defensive aggression, fear and security, animal deceit, perception of danger, fear adaptive value

"... fear, the only measuring
device that consciousness has;
the lack of another thing is
what makes it something..."
Juan Benet, *Volverás a región*

1. Fear on the flow of animal behaviour

We use "fear" to denote a state of motivation which, like others, is activated by specific stimuli and is manifested via observable physiological and behavioural changes. The stimuli inform the animal or its family group about dangerous or risky situations. For this reason, the most common behaviours that express or manage fear are avoidance or defence, as we shall outline below. Yet it is difficult to examine the experience of fear in animals firsthand, although when emotions are involved we feel it more directly. This holds true in mammals –

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especially primates – and perhaps in some birds. The use of the term "fear" applied to a crocodile, a frog or a shark is not as convincing, and it is even less so when applied to a fly or a worm. These animals are very different to us. But if instead of inferring an animal's experience of fear based on our own experience we do it based on how they respond to situations that entail danger and risk to their survival, then it is a reasonable hypothesis to conjecture that practically any metazoan with a brain can experience fear, regardless of how it is represented or experienced, since fear and its behaviours are, as we shall see, fully adaptive. Survival would be unlikely without fear, just like without pain, because beings would lack a system of control over the threats around them. Yet there is no doubt that phylogenetic proximity helps us to infer how both fear and pain are experienced, so we can intuit the fear of a dog or a chimpanzee better than that of a fish. In any event, a comparison of the brain centres responsible for fear in different species and in different zoological groups reveals similarities and furnishes indices whose psychological contents may correspond to states of fear in the perspective of each animal (Rodgers et al, 1997).

Following a core tradition in ethology, this article shall focus on the behaviours of fear, even though logically they will lead us to the stimuli and environmental circumstances that activate it, as well as the purposes they serve. We shall strive to situate fear within the framework of animal-environment relations, and within a temporal context as well, specifically the past-future axis in which each response or action falls. We hold that fear is a motivational-behavioural system that looks more toward the past than the future in different time scales, a negative or reactive system, though unquestionably an adaptive one as well in that even though we can say that any behaviour depends on the past, either near or distant, we can add that in fear this dependence is more complete.

In order to set up the frame over which to weave our arguments, we shall use a metatheoretical schema which comes from pragmatics and which we have used on other occasions (Riba, 1992; 2000). First of all, on a semiotic note, any representation or sign for an observer refers first to an object, deed or referent and next to a rule of interpretation or interpreter. If we project this triangular relationship onto the interaction sequences between organism and environment, and therefore onto chronological time, we make this schema dovetail with another which is clearly nestled at the heart of biological and psychological (and thus, ethological) thinking: Any behaviour *C* (a sign for the observer) can be interpreted in two ways, as a *reaction* or *response R* to a preceding event or an object *O*, in a phase that looks toward the *past* and reflects *causal* relationships; or as action *A* aimed at targets, effects or consequences on the environment projected toward the *future*, in a phase that corresponds to *functional* relationships (what is the behaviour for?) or, if you will, teleological relationships. In this latter case, ethology, aided by philosophy, dares to introduce the idea of intentionality, even though it defines it as operationally as possible and distinguishes degrees of intentionality according to the complexity of each animal's central nervous system (Dennett, 1983). This second facet is also the one that allows the observer to reach interpretation *I* by connecting an environmental state that affects the organism with the behaviour that it actively adopts to achieve a goal. Therefore,

$$O \leftarrow R \,/\, A \rightarrow I$$

in which O ← R is the reactive or passive phase and A → I the active phase or the one targeted at the goal. Here, the arrows represent the direction of the interpretation, which is retrospective on the left half and prospective on the right half, although this direction is more psychological than temporal. In the first of these phases, the signs (a smell, a footprint, the snap of broken branches) dominate, whereas in the second half symbols dominate as signs oriented toward the future (a threatening gesture; see Thom, 1980).

In order to situate fear in the context of past-future interpretation, we shall apply this prototypical situation of danger to the predator-prey dynamic. Fear is essentially fear of the predator within interspecies competition, even though it can also arise with a rival from the same species when vying for resources (food, water, males, females, refuges, etc.) or when faced with large-scale phenomena in the physical environment, such as thunder, flooding or fire. Therefore, let us assume that a leopard detects a possible prey and stands still lying in wait. He stalks the prey, leaps and captures it, and then devours it. In this sequence, a reaction-action sequence would look like this:

Prey (detected) ← Wait / Approach → Capture, ingestion

The perception of the prey leads to immobility and waiting; after that, the sequence progresses actively towards the satisfaction of hunger and the return to homeostasis. Once it has located the prey, the predator stalks it, approaches it and appropriates it. It displays appetitive behaviours that seek to fill a void. Naturally, *the opposite is not true*. The prey does not seek the predator – at least in animals! – not even to flee from it. This obvious asymmetry reveals important aspects in the adaptive function of fear and in the selective pressure that it must have exerted throughout evolution. At first glance, the majority of fear behaviours are totally reactive or aversive, such as the vocalisation of terror, fur standing on end or quick flight. If these behaviours seek anything it is precisely distance and avoidance, and only as a last resort do they morph into an attack, but always a *counterattack*. The signs and behaviours of fear are preferably located in that phase of environment-organism relationship in which the latter is fundamentally passive, always at the mercy of the events around it.

2. The alarm systems of birds and the reactive nature of fear

We shall try to perform a more in-depth analysis of the asymmetry we have just noticed and to further define it. To do this, we shall superimpose this interpretative schema used in the previous section over alarm systems which socially regulate responses adapted to fear. We shall use several examples that are familiar to ethological readers, especially the two calls that many palearctic forest birds (blackbirds, robin redbreasts, chaffinches, tits, etc.) use to warn about the presence of predators (Thorpe, 1972). *The long call* displays a very narrow-band frequency and a relatively long duration. It follows detection of small “celestial” aerial predators, that is, ones outlined against the sky, perhaps

birds of prey like the falcon. The consequence of a long call on the social environment, and even on bird species other than the caller's own, is immobilisation, silence and concealment. *The short call* shows a very wide-band frequency and responds to the presence of an aerial predator inside the forest, perhaps an eagle owl or a common owl. The effect of this call is collective agitated behaviour, a disorderly, wavering (forward and backward) flight around the predator which ethologists have called "mobbing". Therefore, we have:

Falcon ← Long call → Immobilisation, concealment

Owl ← Short call → Mobbing

We could believe that each of these calls can be interpreted as alarm behaviour in either the reactive or active phase, as in the example of the leopard. However, the fact that evolution has conducted these responses towards the purpose of alerting fellow birds does not necessarily mean that the calls have a social function but that *the potential recipients must be capable of processing them correctly*. There is an old controversy regarding whether this kind of behaviour is simply an expressive response (which reveals the animal's internal state) or whether it also has a communicative value because the emitter's goal is to somehow modify the behaviour of the potential recipients. Simply put, it is clear that these alarm vocalisations are functional in that they trigger adapted responses, but it is not clear whether they are proactive, "intentional" and more than simply an individual manifestation of fear. In short, there is doubt as to whether they are selfish or altruistic behaviours. We shall return to this point later.

Now, apart from this somewhat byzantine controversy (with resolutions linked to the cognitive competence of each species studied), we should focus our attention on the kind of behaviours activated by the alarm calls. In the case of the falcon, immobilisation, silence and concealment are behaviours with "zero" value or a negative valence, since they consist of erasing the individual from the scene where it lives; these behaviours reveal a strict function of erasure and show no indication of consummation of action. Nor do they imply attainment or appropriation of a goal by the emitter of the call. We could extend this argumentation beyond the example of the alarm call towards other "zero" defensive or avoidance behaviours, such as the chameleon's or octopus' camouflage, which also makes the animal disappear from its setting.

We could claim that mobbing does entail a positive social action transferred to the phase of social consequences. However, ethologists have doubts regarding this behaviour similar to the doubts explained above (Berlyne, 1960: 122 – 123; see below). In terms of its effects, does mobbing grant fear a positive vector of intentionality in that it implies an attack on the predator, or is it a simple ceremony aimed at triggering bewilderment and confusion? Its function is most likely not so much to attack the predator but to prevent it from taking decisions on capturing individual prey in the midst of the whirl of birds.

One fact that poses serious doubts regarding the intentionality of the altruism of the alarm calls is that many birds make identical or similar calls

when suffering, an instant before being trapped by the predator or once they have already been captured by it. We would have to assume, for example, that the thrush about to perish in the claws of a falcon whistles to warn its fellow thrushes. Even though these agony calls are clearly functional and do alert other birds (to such an extent that these recorded calls are played on farms to fend off unwanted eating of the crops), we have already said that producing them does not require a prior representation of social goals. Instead, they are responses to pain, stress and fear, and consequently they do not even warrant the label "selfish". However, some hypotheses suggest that these calls can be selfish in the sense of promoting the interference of another predator and generating a conflict that is beneficial to the prey, which could be freed, or in the sense of gaining and enlisting the aid of nearby members of the victim's own species (Högsted, 1983; Møller & Nielsen, 2010). This latter possibility, which is difficult to prove in birds, would be more acceptable in social mammals, especially when the captured prey is young.

3. Alarm systems of vervet monkeys and the possibilities of fear

The question of whether the social transmission of fear can be understood in the context of selfishness or altruism often appears in another light when we consider species with a more complex social organisation and higher cognitive competences. A species of African *Cercopithecidae*, the vervet monkey (*Cercopithecus aethiops*), has become the star of ethological research in the past 30 years thanks to a series of studies which have revealed that it has a sophisticated alarm system which implies a fine-tuned analysis of its ecological niche and enables referential communication (Seyfarth, 1982; Seyfarth and Cheney, 1982; Seyfarth, Cheney and Marler, 1980). For vervet monkeys, the three categories of predators are the leopard (as the main representative of terrestrial predators), the eagle (as a representative of aerial predators) and the African viper (as a representative of venomous, lethal snakes). Detection of each of these predators arouses a spectrographically different vocalisation, which in turn triggers an equally different and clearly functional social response. Thus, after the "leopard" vocalisation, we can note a rapid ascent into the *highest* branches of the trees in the quest for a safe haven; after the "eagle" vocalisation we see the opposite response, a quick descent from the trees to land on the ground; and after the "viper" vocalisation the actions triggered include looking at the ground and jumping backward. Obviously, these behaviours, just like the ones mentioned in the previous section, entail avoidance or flight, but if we examine the social use of the corresponding vocalisations we capture variations that merit further examination. For example, the "leopard" alarm is mainly issued by adult males, who, however, rarely issue the other two calls, which are largely attributed to the females and young individuals. Therefore, the males have a higher response threshold in the perception of risk, given that a leopard implies a more dire risk, or one that is more difficult to avoid, than an eagle or a snake. What is more, females with young become "alarmed" more easily than the females without young in their care. All of this perhaps enables us to deduce a kind of altruistic social intentionality in these calls in that they serve the group and are not merely the emotional expression of the individual issuing them.

4. Flight and the search for refuge

Let us now abandon alarm systems, which for the end recipients of the message are nothing more than indirect contact with the danger, and instead let us focus on those behaviours that involve the actor's proximity to the material threat (such as behaviours when faced with a predator or a belligerent rival). Now, after exhibiting its expressive response of panic, instead of hiding or disappearing, the animal may simply decide to flee. And flight is a negative conduct in the same way that immobility or concealment were and is, in fact, a variation on the latter.

However, we must recognise that escaping does not always mean throwing oneself into the void; it does not always or only entail increasing the distance from the danger. Flight is often not towards nothing but instead towards the refuge of the nest or den, towards the progenitors, the family group, the shoal or school of fish, the flock of birds, the herd. The fish that becomes separated from the school flees back to its fellow fish at the first sign of danger; when they spot a falcon, starlings group together to present a solid front of indistinct bodies; the tiny baboon that has been alerted to some ominous presence returns frightened to the congress from which it had been separated. The threatened animal which fearfully merges with its group not only feels more protected but also substantially lowers the uncertainty of expectations and decision-making: from this moment on, wrapped in the motivational or emotional tone of the group, the behavioural routes are simplified and decisions do not have to be taken individually (Delgado and Aylett, 2007). It must not be by chance that a brain centre responsible for evaluating uncertainty is the amygdala, the same one that is profoundly involved in activating and processing fear (Rosen and Donley, 2006).

In mammals and birds like *Psittacidae* (parrots, lorikeets, parakeets), this kind of phenomenon has suggested deep-seated ties between fear and security through attachment, in an avenue of research that has had enormous influence on evolutionary and clinical psychology through figures like Bowlby and Ainsworth (Ainsworth & Bowlby, 1991; Bretherton, 1992). These ties, which in mammals also depend upon nursing, are clearly crucial to the development of the individual and in particular to the fine-tuning of their adaptation. And one decisive argument in favour of the mutual dependence of fear and security lies in the fact that some of the behaviours involved in both fear and security are shared (Stevenson and Hinde, 1991). Furthermore, it is not difficult to find examples of the adaptive fine-tuning of both systems. One example would be the vocalisations and calls for help that many bird and mammal young use when they perceive a significant decline in their security, when they become separated from their parents or isolated: in the fear-security continuum, the fact that these vocalisations are codified with remarkable precision (in that their duration rises and the initial high frequencies vanish as the fear intensifies) clearly reflects their high adaptive value (Salzen, 1979).

Therefore, the quest for refuge and security could be judged as appetitive behaviour given that it is consummated at the moment the animal rejoins the protective social environment and gains contact with the mother, the parents or the group. Here we can see a certain appropriation of the body or bodies to which they flock, similar to trophic or sexual behaviour. Still, once again it is true that in these circumstances, the animal which returns to the reference

group does so spurred by a situation imposed by the environs, not by their own decision, not by spontaneously setting their own goals.

5. Aggression against the predator or social rival

Harlow said that fear is avoidance and flight, while aggression is approximation and attack (1980). We would venture to shade this statement by claiming that fear is avoidance and flight until it enters its agonistic phase once a certain level of intensity has been reached and with certain parameters. At that point, fear and aggression are articulated (Chance, 1980), just as frustration and aggression are articulated, following the homologous model familiar to psychologists (Gray, 1987: 201 forward). The animal in danger prolongs the behavioural chain towards agonistic albeit defensive goals, such that its first responses to fear transform into true opposition actions or attack on the predator. It is true that sometimes these actions are more reactions driven by the autonomic nervous system, such as the skunk's reaction in situations of stress in which it vacates its anal glands and spreads a foul smell (Pruitt and Burghardt, 1977). However, defensive attack actions usually place the frightened animal at the lower limit of their passivity, at the boundary in which fleeing or disappearing is no longer enough or possible and they must do something else instead to survive.

A significant amount of animal aggression is defensive, without necessarily being submissive (Ursin, 1985). Consequently, this kind of aggression is also reactive, the outcome of panic or stress (Archer, 1988, chapters 3 and 4). However, it is well known that the prey's or the cornered animal's defensive reaction to the predator, though more intense than its rival precisely because it is more desperate (if the predator fails, it does not eat; if the prey fails, it dies), only occurs in extreme situations and when there is no other way out; the majority of times it tends to be the threatened animal's last resort. In both the predator-prey dynamic and in a confrontation with a social rival (in the ritual combats between males during reproductive season, and in disputes over food or shelter), aggression tends to be counterbalanced, and often cancelled out, by fear. This balance has an expressive chain which has been amply studied in the faces of mammals, in the muscle configurations which are appropriate for translating this articulation of fear and aggression. In Lorenz's oft-cited classification of the facial expressions of canids (1971, p. 114), the distinctive features can be found in: 1) the ears, with a variation of 90 degrees from horizontal to totally erect; and b) the mouth, open with the fangs bared or totally closed. Combinations of intermediate values in this range of variation yield a total of nine expressions with different meanings regarding the animal's degree of motivation, and therefore regarding the likelihood of attack or flight and surrender. There are other similar systematisations of the expressions of other mammals (Hinde, 1970: 383 - 384).

With regard to the possibility of surrender, we should bear in mind that it only makes adaptive sense in struggles between animals of the same species. The sheep cannot surrender to the wolf, but a wolf can surrender to another wolf. In this context, once they have given up aggression, the majority of vertebrates have useful appeasement behaviours which do indeed imply submission and which, incidentally, are an alternative way of handling fear. Another extremely important alternative in intraspecies competition is the communicative behaviours which ethologists label "displacement", assigning

them a very different meaning than this term has in psychoanalysis. In ethology, displacements are ritual movements that replace or reorient the action, through which the animal conveys to its opponent its doubts as to whether it should flee or attack, whether it should remain in the fray or abandon it. For example, in many passeriform birds, as well as in roosters, it can be observed that in scenarios of social conflict the animals display actions that are apparently out of context, that is, that involve neither attack nor defence or flight. One example would be fluffing their feathers or pecking at the ground (even though there is not a grain of feed). At that time, the individual is neither dominant nor submissive; rather it is expressing a balance between behavioural tendencies of approximation and distance in motivational coordinates somewhere between fear, or frustration, and aggression (see Hinde, op. cit.: 406).

Still, if the animal in danger of being devoured or injured cannot flee, hide or surrender, nor can it be compliant with the adversary, it may show threatening signs, and if they have no effect, it may attack – or counterattack – as a last-ditch option. However, logically, not all animals will do this but only those with motivational-behavioural systems which enable them to do it in congruence with their adaptation pattern: a rat or a dog would do it, but a rabbit or an antelope would not. In short, the animal that counterattacks shows a more oriented behaviour than the one that is resigned to fleeing or vanishing, and in consequence we can attribute an added intentionality to their action, even if it is totally selfish and aimed at individual survival. Once again, this intentionality is essentially understood in the operational realm: the action is targeted at a goal and ceases when this goal has been attained, in the event of success – such as when the predator quits the battlefield.

6. Deceit of predators or rivals

The defensive strategy is quite different when the goal set by the threatened animal is not to aggressively stop the predator or rival but to deceive it. One anatomic resource for achieving this objective is the well-known mechanism of preventing or deflecting the attack by protections in the guise of spikes, shells, carapaces and stinging appendages. The animal (hedgehog, porcupine, tortoise, etc.) only has to adopt the best posture to activate these defences, a posture that often coincides with foetal position or a ball, meaning that this behaviour nothing more than a totally passive adaptation to the threat. We can see a further degree of intentionality in bluffing, behaviours when faced with a rival aimed at simulating bulk or extreme aggressiveness far beyond the possibilities of the animal simulating them. Bluffing tends to prompt an apparent increase in the animal's size, or it attempts to intimidate the other by raising the hair on end, ruffling the feathers, producing strident calls, inflating the dewlaps, erecting the crest or appendages, etc. Despite the fact that these behaviours are visibly oriented at threatening the rival, they are controlled by the autonomic nervous system and have a major automatic or reactive component that is highly visible in reptiles and birds.

However, if the deceit is active or the action is clearly targeted at deflecting or suspending the predator's attention, the proactive orientation of the behaviour does become clear at some point, even though it may once again suggest a purely selfish functionality. This is the case of animals that simulate death when faced with a predator, like some weevils, like the oyster toadfish

(*Opsanus*), which when faced with a predator issues a kind of cry, pales and seems to suffocate, and like the opossum which becomes totally immobile, retracts the lips and emits a foul-smelling liquid as if it were already in a state of putrefaction (Franco, 1969). Sometimes, however, the simulation of death ends as the predator is about to touch the animal feigning death, when the latter leaps up at the last second (such as mice with snakes, or some lizards).

In contrast, the deceit used to save the young is difficult to interpret in any terms other than family altruism. This kind of deceit is also executed based on complex actions developed on the ground. Surely the best-known example is the simulation of an injured wing (Heinroth, 1979), which can be seen in quails, feral chickens and river birds, and, if analysed carefully, the American piping plover (*Charadrius melodus*; Ristau, 1991). When they realise the proximity of a predator, both the male and female piping plover abandon the nest with eggs or chicks and walk dragging their wing, attracting the predator behind them and deflecting attention away from their chicks. In this case, we can easily recognise a vector of directionality or functional intentionality in the planning and execution of this action, an intense enough vector to separate the parents from the young and to risk the former's life far from the nest. The component of altruism in the sense of preserving the family genes is quite obvious in this case.

Examples of altruism like this one would unquestionably signal the upper limits of the proactive capacity of fear, the boundaries of its projection into the future in the planning of behaviour. However, in these examples, as well as in the examples of defensive aggression, we can sense that the action comes in the wake of contingent and often unpredictable events. Basically, fear motivates the animal from the past to the future, from the past of the species, from the ontogenetic past of the individual, from the most immediate past that materialises in responses and actions. Even when it is used to prevent and avoid future dangers, fear sets its negative goals, the presences it wants to save, based not on the experience in the here and now but on memory; it seeks not to appropriate anything but instead to avoid and reject something.

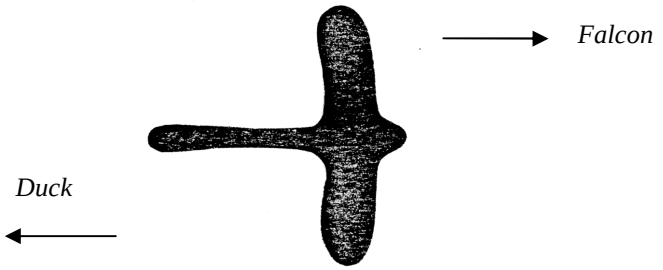
7. The perceptive universe of fear

Each animal lives in the perceptive universe unique to its species, a world that includes both potential environmental perceptions (according to the peripheral and central nervous systems) and the kinaesthetic information that its actions send it through its proprioception. We call this universe its *Umwelt* following the historic contribution of Jakob von Uexküll (1934/1965). Thus far we have grounded our analysis on animals' observable behaviour, and we have been cautious when referring to the cognitive facet of a given behaviour. However, even though we cannot access the animal's mind or experience, we can relate the patterns of environmental events, at the beginning or end of the chain of behaviours, with the responses or actions which the animal executes; we psychologists and ethologists have always done this. Consequently, we have several options when characterising the forms and environmental patterns that promote or incite certain behaviours. We cannot experience the world as the animal does, but we can create models of their representation of this world.

There is no doubt that fear is under genetic control and that the core responses that express and regulate it are innate (Gray, op. cit.). The objects of

fear, the environmental stimuli and patterns that trigger it, are maximally laden when they correspond to innate schema or stimuli-sign (according to the ethological nomenclature); they are powerful attractors which evolution has selected and which absorb the animal's attention and responses from its very birth or after a longer or shorter maturation period. The conditioned responses to these contingent stimuli which have been associated with innate stimuli are a subset of the set of responses that the latter activate. René Thom has formalised this logically and topologically (1980). In vervet monkeys, the indicators that anticipate the presence of a snake – the alarm signal which must be partly learned (Seyfarth and Cheney, 1982), the friction on the dry leaves that warns as to its presence, the leap backward of a fellow monkey that has seen the snake first – induce responses that will be part of the repertoire with which the monkey will handle the direct, close-up view of the snake. The learning of the behaviour of fear lies totally in the animal's innate programming. It should be borne in mind that the ability to detect and respond to dangerous situations is crucial to the survival of the individual and its genus, so it cannot be dependent upon early learning since this would not guarantee adaptation to the danger quickly and widely enough (Ackerl, Atzmueller and Grammer, 2002). Naturally, learning ends up fine-tuning the fear system to fit the particular circumstances that arise in the individual's environment and spreads the avoidance function to those gaps in space and time that the animal's innate programming does not reach.

The innate schemas are primitive visual, acoustic and olfactory forms which inoculate fear automatically and tend to show a very simple structure. One classic example of these forms is the visual channel of the "duck-falcon" pattern, which is illustrated below. If the silhouette moves to from left to right over a group of *Gallinacea* or *Anatidae*, the animals scatter in bewilderment upon perceiving the outline of a falcon or a small bird of prey gliding over them; however, if the movement is in the opposite direction they are calm because they perceive the image of a flying swan or duck.



Based on phenomena like this, the ethologist has to reconstruct the structure perceived by the animal and come up with a model, which will always be a construct which needs to be validated. Fortunately for the animals, these mechanisms triggered are automatic, quick and relatively safe, and they prepare it properly for the risk. In jest, the animal in danger and permeated by fear does not wonder whether it is facing a noumena or phenomena. Here, a convinced referentialism, a metaphysical realism situated and justified within each animal species' *Umwelt*, is apt. When frightened, the animal is frightened by

something: there always has to be a referent. Therefore, the meaning of fear cannot be resolved in a logical or structural approach to the events or situations that trigger it (Thom, 1980: 1985: 157 - 161). Beyond culture and language, at the core of natural law it is not valid to speak about the flight of meanings and infinite webs of reference. To the contrary, the meanings of fear are profoundly rooted in specific places in the phylogenetic and ontogenetic memory, and in the behaviours linked to this fear. A leopard is a leopard, something that could devour us, and it has a spatiotemporal location in the here and now. Neither the perception of the leopard nor the behaviours that strive to avoid it are too far from this primitive affirmation.

8. Fear as adaptation

Fear, its experience and the behaviours that control it, has become embedded in organisms over the course of evolution because it is useful and yields more benefits than costs: it is adaptive. In the majority of circumstances, a lack of fear is not adaptive because it exposes the animal to excessive risk without rewards, except in the cases we have examined above in which the animal defends itself in desperation or protects its young without evaluating the risks. Incidentally, fear of imaginary dangers is not adaptive either in that the demand for energy expended is not compensated (Marks and Nesse, 1994; Kennair, 2007).

Having said this, not all responses to fear and not all actions derived from this response have the same adaptive value. For example, there are debates as to whether mobbing has much adaptive value in that it rarely leads the predator to fly away and instead places the birds involved in the mobbing at risk; ultimately, based on the typical vacillating flight pattern, it could be understood as a result of the conflict between approach and avoidance (Berlyne, ibid.). Feigning an injured wing entails its own uncertainties, but it seems to be adaptive because it is the least harmful solution. To the contrary, in other cases the behaviour reveals an extreme level of adaption. The long and short calls of birds which we examined in the beginning of this article show precise adaptation of their acoustic structure to the circumstances in which they are emitted. While the alert to falcons selfishly requires that the emitters' location not be found in congruence with the immobilisation response it arouses, what follows the detection of an eagle owl or a common owl does not entail this requirement, since the response it triggers is the bold manifestation of the prey in the eyes of the predator. In line with this contrast, the long calls show a narrow-band frequency which makes it difficult to pinpoint the source by preventing the comparison of phases from one ear to the other, while the short calls show a very wide-band frequency, since preventing the predator from locating the emitter no longer brings an adaptive advantage (Thorpe, op. cit).

The adaptation value of fear is not only revealed in each particular behaviour but especially in the web of relations among the different motivation and behaviour systems. Many years ago, Churchman and Ackoff (1950) sketched the general framework of an organism's adaptation via a simple yet understandable classification. Theoretically, adaptation functions can be defined based on the problems with which the environment challenges each animal of each species; problems such as how and what to eat, where to drink, where to take refuge, where to keep their offspring safe and how to safeguard their own survival.

1) On the first level, the most precarious or primitive one, the animal has one or few solutions for all the problems the environment can pose.
2) On the second level, the animal has a solution for each problem it must deal with in biunivocal correspondence.
3) On the third level, the most highly evolved, the animal has more than one solution for each problem it may face and chooses the best one according to the characteristics of the problem.

Since we have listed many useful behaviours for managing fear and its circumstances, we might believe that the majority of examples we have cited are situated at the third level. However, it is clear that not all the behaviours mentioned are available to every species. It is absurd to imagine that a mouse can use the recourse of defensive aggression against a cat, although a rat could. A gazelle will not resort to immobilisation to flee from a lion, nor will it try to defend itself against the feline. In any event, the number of behavioural resources available is proportional to the complexity of the species' nervous system and to the plasticity of its fit within its environment. In known mammal repertoires, this number is surprisingly high (see, for example, a rat's defensive resources in Rodgers et al, 1997).

Within its sphere of activity, the animal has a variable perception of risk arising from its experience. Fear prevents it from going certain places where it knows that predators are more likely to be, and, in compensation, confidence leads it to circulate along routes which it knows to be relatively safe. We could talk about a veritable landscape of fear according to the gradient of risk that each individual senses in its environment (Laundré, Hernández and Ripple, 2010). However, generally speaking, if it comes upon a predator or rival, or vice-versa, if they come upon it, the animal will take on the risk of attacking it when it sees itself as a potential victim and its situation becomes desperate: when cornered, when protecting the den or young, when flight is not an option. Bees fight furiously against wasps invading their hive. Soldier ants precisely exist to protect the anthill from outside attacks. Male bison and other bovids face down virtual predators by circling their females and children, and if needed they will attack a predator that comes too close. The canonical sequence of the decisions taken by metazoans in a dangerous situation would be: concealment or immobility → flight or the quest for refuge → defensive aggression. The animal moves from one stage to the next according to the cost-benefit values and the corresponding estimate of the likelihood of success in each stage depending on the parameters of the situation (distance from and size of the predator, escape routes, proximity of a safe haven, etc.).

In this range of possibilities, we can once again note the tension between fear and aggression revealed in the sphere of mammals' facial expressions. And we have already indicated as well that the dynamic balance between these two poles is clear not only in the realm of predator-prey confrontation but also in intraspecies or social conflicts. However, the framework from which to consider situations of conflict entailing approximation-avoidance is obviously broader than what is delimited by the fear-aggression polarity and indeed has been outlined in detail by both ethology and behaviouralism. In this broader context,

fear must be understood as the engine driving the animal away from a stimulus, situation or another animals, and the novelty or lack of familiarity with these stimuli, situations or animals is often what regulates the distancing function. For this reason, the fearful, fleeing animal is not only balanced with aggression but with the approach of whatever repelled or stopped it through exploratory, trophic, sexual or other appetitive behaviours. The contribution of the modern field of the behaviour ecology lies precisely in devising decision-making models on the aforementioned basis of calculating the cost or benefit, that is, what the animal wins or loses by letting itself fall into the well of fear or emerging from it to face uncertainty or death.

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Families and couples

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Abstract

This article analyses the common-law couple and formulates coherent answers, based on Catalan civil law, that meet the needs posed by this kind of relationship. The confusion between married couples and common-law couples and between marriage and family has triggered the main problems and distortions. The article addresses the regulation of vertical and horizontal couple relationships and assesses the meaning and functions of a regulation on common-law couples in legal systems which have approved same-sex marriage. It also considers the need for different levels of legislative intervention for different models of couple and warns against harmonizing the laws on couplehood in the autonomous communities with the competencies to enact these laws in Spain.

Key words: common-law couple, same-sex couples, Catalan civil law, registered couple, informal cohabitation, family

1. Introduction: Families, marriage and couples from a constitutional standpoint

The purpose of this study is to analyse the phenomenon called the *common-law couple* in order to formulate arguments and proposals capable of providing coherent answers based on Catalan civil law, and to ensure that these answers also meet the needs posed by this kind of relationship.

This analysis will focus on the sphere of private law, despite the fact that common-law couples affect such fundamental issues in public law as the taxation system, the social security system and the public system designed to handle dependency. Any social policy must necessarily take family policies into account because families serve functions (involving custody, finances, care, education, etc.) that are in the public interest and that the public authorities

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would have to provide direct were there no families.[1] For this reason, families must also have public protection (art. 39 SC), which particularly includes the public instruments of collective solidarity which make up the welfare state.

One of the problems of the laws on common-law couples enacted to date[2] is that they have considered the model of marriage both when defining the legal effects of common-law couples and when determining the kind of couple that is protected.

This has led to confusion between married couples and common-law couples and between marriage and family. This latent confusion between these different realities can only trigger significant problems and distortions, as we shall see in this study.

Within today's constitutionalism, there are constitutions that equate families with a specific, traditional conception of family. Perhaps the most paradigmatic case is the Italian constitution.[3]

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[1] In this sense, see the concept of *mixed system* in which the institution of the family participates in Roca (1999: 69-86).

[2] Catalonia (which has legislative competences in civil law): the law dated 15 July on stable couple unions; Aragon (which has legislative competences in civil law): the law dated 26 March on stable unmarried couples; Navarra (which has legislative competences in civil law): the law dated 3 July on the legal equality of stable couples; Castilla-La Mancha (which has no legislative competences in civil law): the law dated 11 July which regulates the creation and system of how the Register of Common-Law Couples of the Autonomous Community Castilla-La Mancha operates; Comunitat Valenciana (which has legislative competences in civil law based on the new Charter of Self-Government, Organic Law 1/2006 dated 10 April 2006): the law dated 6 April which regulates common-law unions; the Balearic Islands (which has legislative competences in civil law): the law dated 19 December on stable couples; Madrid (which has no legislative competences in civil law: administrative law): the law dated 19 December on common-law couples in the Community of Madrid; Asturias (which has no legislative competences in civil law: administrative law): the law dated 23 May on stable couples; Castilla-León (which has no legislative competences in civil law: administrative law): Decree 117/2002 dated 24 October which creates the Register of Common-Law Unions of Castilla-León and regulates their operation; Andalusia (which has no legislative competences in civil law: administrative law): Law 5/2002 dated 16 December 2002 on common-law couples; Canary Islands (which has no legislative competences in civil law: administrative law): Law 5/2003 dated 6 March 2003 regulating common-law couples in the Autonomous Community of the Canary Islands; Extremadura (which has no legislative competences in civil law: administrative law): Law 5/2003 dated 20 March 2003 on common-law couples in the Autonomous Community of Extremadura; Basque Country (which has legislative competences in civil law): Law 2/2003 dated 7 May 2003 which regulates common-law couples; Cantabria (which has no legislative competences in civil law: administrative law): Law 1/2005 dated 16 May 2005 on common-law couples in the Autonomous Community of Cantabria; Galicia (with legislative competences in civil law): third additional provision of Law 2/2006 dated 14 June 2006 and Law 10/2007 dated 28 June 2007 reforming the third additional provision of Law 2/2006.

[3] Article 29 of the Italian constitution states that the family is a natural society grounded in marriage. On the other hand, the same article says that the Republic "recognises" the family, but it does not say what the family is. Italian jurists with progressive leanings find it more difficult to argue that other families exist outside of marriage based on their Constitution. To the contrary, these two constitutional statements in article 29 have allowed more conservative jurists to promote two ideas: first, that the family only exists within marriage, and therefore all other forms of cohabitation remain outside the protection that the state should grant the family; and secondly, that this doctrinal sector posits a natural, pre-state nature of the family, which means that the state has no legitimacy to introduce norms that depart from the traditionally accepted concept of *family* (heterosexual marriage). Art. 29: "La Republica riconosce i diritti degla famiglia come societá naturale fondata sul matrimonio. Il matrimonio e ordenaton sulla

Unlike other constitutions, such as Italy's (art. 29) or Ireland's (art. 41.3), the 1978 Spanish constitution (SC) has never equated the family with marriage. The constitutional regulations of the institutions of marriage (art. 32 SC) and the family (art. 39 SC) are quite different, they are located in different chapters (chapter II and chapter III, respectively) and they are unconnected to each other.

The jurisprudence of the Constitutional Court, based on ruling 222/1992, stipulates that the Constitution imposes no specific legal concept of family, and that its content is totally pre-established and temporally determined forever. The ruling goes on to indicate that in a social, democratic state, the essential elements of the family are the ones that make the family identifiable as an institution within the social consciousness.

For this reason, the laws should identify and refer to the socially defined concept of *family* that is valid in society at any given point in history in order to ensure the social, economic and legal protection of the family that the Constitution imposes upon all public authorities (art. 39 SC). This requires the laws to be pluralistic and to accept the different models of family valid in society, and, in turn, that they be dynamic enough to adapt to what is considered a family at any given time in order to always provide an effective response to the social, economic and legal needs in family matters.

Nor has the jurisprudence of the European Court[4] exclusively equated the notion of family as regulated in article 8 of the European Human Rights Convention (ECHR) with the institution of marriage (art. 12 EHRC). Thus, at least three times[5] the European Court of Human Rights (ECtHR) has established that an unmarried, childless heterosexual couple also has rights that derive from article 8 ECHR (right to family life). With regard to childless same-sex couples, the ECtHR's rulings have not been as clear as in the case of couples of the opposite sex (ruling dated 24 July 2003).

eguaglianza morale e giuridica del coniugi, con i limiti stabiliti della lege a faranzia dell'unitá familiare."

[4] To see the effects and assess the rulings of the ECtHR, see the Constitutional Court Ruling 303/1993 dated 25 October 1993, eighth legal rationale, as well as the Constitutional Court Ruling 245/1991 dated 16 December 1991, third legal rationale. ECtHR rulings not only have direct effects on the affected state, namely the immediate applicability of the ruling, which could entail the obligation to adapt the state legislation to the Convention as interpreted by the ECtHR and the obligation to require the courts to adopt to the new doctrine; the sentences also have an indirect effect on the other states not involved in the case as a consequence of the fact that ECtHR jurisprudence becomes an integral part of the content of the European Convention.

[5] The 30th paragraph of the ruling dated 27 October 1994 states: "30 [...] the notion of 'family life' [...] is not confined solely to marriage-based relationships [...] Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate [...] sufficient constancy to create *de facto* 'family ties'." Another ruling in the same vein is the one dated 26 January 1999. In this case the court stipulated that there was no doubt that family life had existed between a woman and a man who had lived together outside of marriage. Finally, see the ruling dated 18 May 1999: "A couple who have lived together for many years constitute a 'family' for the purposes of Art. 8 [...] and are entitled to its protection notwithstanding the fact that their relationship exists outside marriage."

2. Vertical couple relationships

2.1. Different constitutional treatment between vertical and horizontal relations

The basic point of departure entails distinguishing between the relationships between the members of the couple themselves (or horizontal couple relationships, as some of the doctrine has called this kind of relationship) and the relationships that the members of the couple have with their children, or vertical relationships.

As the Constitutional Court[6] and the ECtHR[7] have reiterated, vertical relationships are subjected to the principle of full equality between children of married couples and children from outside wedlock, so that in both public and private law, the law cannot attribute different rights and responsibilities to children of married couples and children of unmarried couples because different treatment is banned in accordance with an entire series of regulations that affect constitutionality (art. 39.2 and 3 SC, in relation with the more generic art. 14 SC; art. 2.1 and 3.1 of the United Nations Convention on the Rights of the Child dated 20 November 1989; and art. 14 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, and other articles and the jurisprudence derived therefrom).

Consequently, the relationship between the members of common-law couples and their children is fully subjected to the principle of equality and becomes a question which is quite placid today in the realms of both doctrine and jurisprudence and legislation.

In contrast, with regard to horizontal couple relationships, the laws may legitimately introduce different treatment for married and unmarried couples based on the fact that marriage is an institution which has a constitutionally-based institutional nature (art. 32 SC) while common-law couplehood is not. This is the interpretation that the Constitutional Court has used repeatedly.[8]

Upon this foundation, the regulation of horizontal couple relationships within common-law couples has become one of the least placid and most controversial realms within family law. What is more, the phenomenon of common-law couplehood is not homogeneous but instead highly heterogeneous, which means that it would not be reasonable to subject common-law couples to a single legal system, as we shall see below.

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[6] See, among others, Constitutional Court ruling (abbreviated STC) 154/2006 dated 22 May 2006, and the STC 200/2001 dated 4 October 2001, FJ 4t.

[7] See, among others, the European Court of Human Rights ruling dated 13 June 1979 and the one dated 29 November 1991.

[8] See STC 184/1990 dated 19 November 1990, FJ 2nd and 3rd. Despite this, in FJ 2nd of the STC 184/1990, the Constitutional Court holds that all treatments in favour of marriage are legitimate because the right not to marry has to be protected and the family protection called for in article 39 SC must be fulfilled. It was not until STC 222/1992 that the Constitutional Court established a criterion based on which it could predicate which differences are legitimate and which are not. The differences in treatment which are based on an intrinsic element in the institution of marriage must be considered reasonable. In this same vein, see STC 47/1993 dated 8 February 1993 and STC 155/1998 dated 13 July 1998.

2.2. Adoption by same-sex couples: issues in internal law and international law

Without leaving behind the matter of vertical relationships, and after having clarified the full equality between children of married couples and children of unmarried couples, another issue that affects vertical relationships and still arouses controversy is the possibility of same-sex couples adopting.

Whereas a mere ten years ago only the Netherlands (1998) and several states in the United States allowed joint adoption by same-sex couples, or allowed one same-sex partner to adopt the biological or adoptive child of their partner, which is called second-parent adoption, today (2009) more than 31 states or territories accept at least one of these two kinds of adoption.

A constant feature in this process has been that the adoption of a child has almost always been the step prior to the subsequent acceptance of joint adoption by same-sex couples (ruling dated 30 January 1992). This is so because the minor's interest with respect to the father's or mother's partner is much easier to claim because of the existence of affective ties, as we shall see below.

Both joint adoption and second-parent adoption are allowed for same-sex couples in Holland, Belgium, Sweden, Iceland, the United Kingdom, Spain, South Africa, Norway (but only in domestic adoptions), the United States (California, Connecticut, Colorado, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, Washington state and Washington D.C.) and Australia (Western Australian and the capital region).

Second-parent adoption in same-sex couples is only allowed in the following states or territories: Denmark, Germany, Israel, the Australian territories of Tasmania and Victoria, the U.S. states of Pennsylvania and France (after its appeal before the ECtHR).

Catalan laws have also joined this surging legislative trend. Law 3/2005 dated 8 April 2005 paved the way for homosexual couples to jointly adopt a child that was not the biological child of either partner, as well as the chance to individually adopt either the biological or the adoptive child of the other partner. It also placed homosexual couples on equal footing with heterosexual couples in guardianship and care issues. With this reform of the Family Code, Catalonia became the fourth autonomous community that allowed for adoption in same-sex couples, after Navarra (Foral Law 6/2000), the Basque Country (Law 2/2003) and Aragon (Law 6/1999).

I believe that there are significant reasons for retaining this legislative option in the future. The rationale of this option lays in the very nature and identical functions played by the institution of adoption today, namely the defence of the higher interest of the minor over any other consideration.[9]

[9] In Catalonia, just as in most Western countries, adoption has ceased to be a strictly private institution in which the public authorities did not intervene because its sole goal was to cover the unrealised expectations of childless couples. Today, adoption has become a mixed institution which belongs to a more general system whose goal is to protect minors.

The purpose of the system is to protect minors, and therefore their interests are considered to be higher than any others. As a result, the goal that adoption seeks is to create stable affective ties

From this standpoint, there are assumptions in which the law's absolute refusal to allow a gay or lesbian couple to have joint authority over a minor run directly counter to the minor's higher interest. We should distinguish between these two kinds of adoption:

a) Second-parent adoption. Even though this is an individual adoption, its result is joint custody shared by both members of the couple. In these cases, a certificate of suitability is not required.

The law's traditional refusal to accept this kind of adoption denied or ignored the affective ties that may have been established between the minor and his or her parent's partner.

In turn, the death of the parent led his or her partner to be regarded as a simple third party with regard to the minor. This required the guardianship of the minor to be attributed to other family members with whom the minor had never lived, some of whom might be quite advanced in age (such as the grandparents).

If the deceased person was the partner of the minor's parent, he or she had no rights under the laws of succession if the deceased was intestate. To conclude, the potential break-up of the couple created no right to child support for the minor from the other partner, nor did this partner have any right to visitation with the minor.

b) Joint adoption. In these cases, the certificate of suitability issued by the public administration is needed. The authorities' traditional utter refusal to open a joint adoption proceeding for a homosexual couple made it impossible to assess this phenomenon from the outset. In many cases, it required only one member of common-law couples to adopt, which meant that the minor would live in a single-parent family. The result was perverse in terms of the minor's interest because one of the partners in the couple with which the minor had to live had never been screened for their suitability.

Internationally, in addition to the inherent difficulties that may arise from the fact that very few home countries allow same-sex couples to adopt, it has been alleged that this kind of adoption may run into two stumbling blocks when being implemented internationally.

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between the adopters and the minor and to thus ensure that a potential second abandonment is avoided.

In a legal system whose cornerstone is protecting the higher interest of the minor over any other interest, even respect for the interests of the biological and potential or future parents, we have to conclude that not any individual or couple necessarily has the right to adopt; rather that the minors have the right to have the right family or individual parent.

Consequently, the issue of homosexual couples or others adopting minors must be assessed via a discourse that is argued from the perspective of the minors' rights, instead of from the perspective of any individual's supposed right to adopt.

It must be understood that the different laws in Spain's autonomous communities which allow homosexual couples to adopt (Basque Country, Navarra, Aragon and Catalonia) and the amendments to the state Civil Code via Law 13/2005 recognise no one's right to adopt but instead the right for the minor's interest and the suitability of gay and lesbian couples to be taken into consideration through an objective, transparent process.

One of the problems involves adoption by one member of a homosexual couple of the child of the partner who had previously been adopted internationally; this is called a consecutive adoption. It has been argued that consecutive adoption violates the regulations contained in article 21c of the United Nations Convention on the Rights of the Child dated 20 November 1989. International regulations stipulate that infants who are adopted in a different state should have guarantees and norms equivalent to the ones in force in their home state.

This thesis confirms the idea that the judge who has set up this adoption must determine whether homosexual couples are allowed to have guardianship over a minor according to the law of the minor's home state. If not, the adoption cannot be completed.

We believe that the obligation imposed by article 21c of the United Nations Convention on the Rights of the Child does not refer to the result but to the deed or activity itself. That is, what the judges (in this case, Spanish judges) must guarantee is that the rights and guarantees that the host country grants the infant are at least as strong as those granted in the infant's home country.

Likewise, Spanish judges may cite the Spanish international public order when stating why the impossibility for the other partner to adopt the minor may be considered a violation of the minor's higher interest, as we have seen above.

With regard to international joint adoption, it has also been alleged that the subjective sphere of application of the Hague Convention does not cover homosexual couples. It has been argued that article 2.1 of the Convention only refers to married couples and single persons. Despite this, it should be borne in mind that the Hague Convention does not aim to introduce substantial regulations or matters that regulate adoption. The Convention leaves the material regulations to the discretion of the state lawmakers.

What is more, based on the process and proceedings of drawing up the Convention, we can glean that the reference to married couples and single persons only alluded to the most common circumstances of adoption but did not seek to exclude other possibilities.

2.3. Assisted reproduction and filiation

Recently, the third final provision of Law 10/2008 dated 10 July 2008 from the fourth book of the Civil Code of Catalonia was approved. This provision amended articles 92.2 and 97.1 of Law 9/1998 on the Family Code, by allowing the woman or the companion of the future mother who expressly agrees to it to engage in assisted reproduction. Thus, the ties of filiation between the woman or the mother's partner and the child are established from the moment of birth, and both women also share authority over the child from birth. Consequently, in the event of assisted reproduction following this procedure, the child's adoption by the mother's partner or wife is no longer needed in order for her to achieve joint custody of the child.

Even though Law 10/2008 from the fourth book of the Civil Code of Catalonia shall not enter into force until 1 January 2009, the third final provision has already been in force since 11 July of that same year.

2.4. Presumption of maternity or paternity in a same-sex marriage or couple

Today a man is solely allowed to establish biological filiation via marriage (art. 87 Family Code [henceforth FC]) or as a member of a common-law couple (art. 94 FC) with the mother of the child. It is assumed that the child born during marriage or during the couple's cohabitation for a certain length of time is the child of the mother's husband or partner. This assumption of paternity is grounded in a biological truth and must therefore be disproven through overwhelming evidence at a trial.

This situation has been placid in Spain and in comparative law, but now the first cracks in this scheme are beginning to appear. The first clear problem arose in the U.S. state of Vermont. House Bill 847 dated 26 April 2000[10] recognises the establishment of biological filiation for a child born during a civil union regardless of the parents' sexual orientation and outside the sphere of assisted reproduction.

With regard to the other states in the U.S. which have approved civil union laws (New Hampshire in 2007 and New Jersey and Connecticut in 2006), as well as the states that have opened up civil marriage to same-sex couples (Massachusetts and California), there are no explicit exceptions to the generic equivalence that the respective laws have established between different- and same-sex couples. Despite this, in the latter states the equivalence between different- and same-sex couples has been generic and is not defined with regard to the specific issue at hand. The lack of an explicit regulation on the presumption of parenthood in same-sex couples will require jurisprudence to weigh in on this issue. What must be determined is whether this specific realm is comparable to what happens inside a heterosexual relationship, bearing in mind that the birth of a child within same-sex couples always involves the existence of a third person.

In contrast to this, Belgium expressly excluded the presumption of maternity in same-sex marriages. See article 143 of the Belgian Civil Code, which was amended by the law dated 13 February 2003. Other states seem to

[10] The law was the outcome of the obligation to fulfil the ruling issued by the Supreme Court of Vermont on 20 December 1999, which recognised that same-sex couples have the right to the same benefits and the same guarantees as heterosexual married couples:

> § 1204. BENEFITS, PROTECTIONS AND RESPONSIBILITIES OF PARTIES TO A CIVIL UNION
>
> (a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.
>
> [...]
>
> (*f*) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

exclude this presumption implicitly.[11] Both the United Kingdom and the Netherlands are studying the feasibility of extending this presumption to same-sex couples. In any event, this summary may only serve to point out a relevant issue that nonetheless extends beyond the scope of this study.

3. Meaning and functions of a regulation on common-law couples in legal systems which have approved same-sex marriage

There are authors who support the abolition of all systematised legal regulations on common-law couples because they believe that this institution no longer serves any purpose within a legal system that has approved civil marriage for same-sex couples (Law 13/2005).

These authors have no dearth of reasons for asserting that behind the enactment of the laws regulating common-law couples there always existed the legislative desire to provide common-law couples who wanted to marry but could not do so because of a lack of sexual diversity with legal coverage. Perhaps the most paradigmatic case was Catalan Law 10/1998, whose explanatory statement expressly mentioned this circumstance.

3.1. Matters remain the same between married couples and families: two different realities

Despite these considerations, we should stress that the relationships between married couples and families have not changed drastically, and they continue to be two different realities. Therefore, couples who may marry and those who may not (now not only heterosexual couples but also homosexual ones) can exercise their right not to marry yet nonetheless are still a family if there are bonds of solidarity and dependence, as defined by Constitutional Court Ruling (henceforth STC) 2221992.

A regulation of common-law couples would clearly outline the social, economic and legal protection contained in article 39 SC in favour of the family, not of the married couple (art. 32 SC). For this reason, couples who have made no official declaration of couplehood cannot be subjected to a system that is identical or very similar to marriage.

In turn, systematic solutions could be provided to the conflicts that are still arising, which the courts would otherwise be required to resolve without any legislative aid and therefore with disparate solutions, with all the concomitant legal insecurity this entails.

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[11] South Africa may well implicitly exclude this. From the text of the law one could assume that the presumption of maternity by marriage or civil union within a same-sex couple has been excluded. See, at the website <http://www.info.gov.za/gazette/acts/2006/a17-06.pdf>:

Civil Union Act, 2006, section (art.) 13(1)

Legal consequences of civil union [the same-sex couple chooses whether they want to call their bond a marriage or a civil union]

13. (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context [this could be assumed to refer to the presumption of maternity] to a civil union [...].

Likewise, there will always be family models quite distant from the marriage model which will require systematised, homogenous solutions. A regulation on common-law couples could deal with the conflicts that arise in this kind of couple.

3.2. What response has come from comparative law?

The majority of states which have approved civil marriage for homosexual couples[12] have shown a tendency to keep the legislation that regulated common-law couples.

In this sense, in Holland, after allowing same-sex marriage in 2001, three institutions now coexist: marriage, registered couples (the law dated 17 December 1997) and informal cohabitation.[13]

In Belgium, these same three institutions also coexist, but with much less regulation of registered couplehood in terms of content.

In Spain, the central government has not yet systematically regulated common-law couples. To date, none of the autonomous communities which have civil authority in this matter has amended its legislation on common-law couples since same-sex couples were allowed to get marriage.

Nor have there been any changes of this kind in Canada. We should distinguish between the province of Quebec (where marriage, registered couples and cohabitation coexist) and the remaining provinces (where only marriage and informal cohabitation exist).

The approval of marriage between individuals of the same sex has not justified a change in the previous regulations on couplehood in South Africa. This country has maintained the pre-existing regulations on cohabitation. On the other hand, the members of the couple can decide whether their relationship should be called a marriage or a civil union.

The only exception to this legislative trend has been in Norway. Once the law which allowed same-sex marriage entered into force (1 January 2009), the registered couples established prior to that date were allowed to keep their

[12] Holland became the first country in the world that allowed marriage between people of the same sex with the law dated 21 December 2000. With the law dated 30 January 2003, Belgium became the second state to do so. With Law 13/2005, Spain became the third state to open up civil marriage to homosexual couples on 1 July 2005. With the law dated 20 July 2005, Canada became the fourth. South Africa became the fifth with Law 17 from 2006. Finally, Norway became the sixth state to recognise this kind of marriage on 1 January 2009. In the United States, the states of Massachusetts (2004) and California (15 May 2008) have allowed civil marriage in same-sex couples. In reaction to the approval of marriage between same-sex couples in these two states, the federal government enacted the Defence of Marriage Act, which partly emended the Full Faith and Credit Clause with the goal of eliminating any other state's legal duty to recognise a homosexual marriage made in these two states.

[13] The coexistence in Holland of marriage for same-sex couples and the institution of the registered couple has very special features. Registered couples can be married, but Dutch civil marriages can also revert back to registered couplehood, and the latter can be dissolved without any legal intervention via a declaration of the will to do so by both members of the couple. That is, registered couplehood can also become an instrument to achieve consensual divorce. However, it should be noted that there are plans to abolish this latter possibility with a draft law (October 2008) whose purpose is to put an end to this latter kind of reconversion.

status or even convert it to marriage. However, after 1 January 2009 no new registered couples were allowed.

4. The two basic models of common-law couples: the registered couple and informal cohabitation

4.1. Diversity of couples and differentiating criterion

The phenomenon of common-law couplehood is very heterogeneous. The concept of common-law couplehood encompasses an entire range of unions which are substantially different to each other because they have highly disparate purposes and needs. As we shall see below, these differences justify different treatment, because distortions would arise if they were all subjected to a single system.

We should question whether the distinction made in Catalan Law 10/1998 between homosexual and heterosexual couples is still functional and legitimate. On this issue, Catalan laws no longer have the wide range of estimation and configuration which they had in the year when the Law on Stable Unions was enacted (1998), because today any different treatment that might exist between heterosexual and homosexual common-law couples is suspect of discrimination, and significant arguments and purposes must be found to reasonably and objectively justify different treatment, while this differentiation must also be proportional.

Catalan laws' low margin of estimation in this sphere is framed by two new regulatory conditions.

The first condition is that article 40.7 of Catalonia's Charter of Self-Government makes the equality of different stable couple unions a guiding principle in public policies, bearing in mind their characteristics but regardless of their members' sexual orientation. Even though this article does not immediately create any subjective right, it does create a prism through which the entire Catalan legal system can be interpreted, as well as a guideline for lawmakers when determining legislative policies, which must be justified should they depart far from these guidelines.

The second condition that impedes or at least hinders Catalan law from making distinctions between heterosexual and homosexual couples is the jurisprudence of the ECtHR, especially since the ruling dated 24 July 2003.[14] Laws that aim to distinguish between heterosexual and homosexual couples must demonstrate the proportionality of the measure and provide objective, reasonable justifications that seek to achieve a legitimate end.

Once we have noted that the distinction between heterosexual and homosexual couples is not just not functional (especially since approval of Law 13/2005, which opened up civil marriage to homosexual couples) but also

[14] It was declared that articles 8 (family life) and 14 (right to equality) of the Convention were infringed upon by Austrian law because it stipulated different treatment for unmarried heterosexual couples and same-sex couples, in this case with regard to the right to subrogation of rents *mortis causa*. Paragraph 37 states that the differences in treatment based on sexual orientation, just like differences based on race, religion or sex, can only be justified by particularly important reasons. Paragraph 41 states that the measure must be necessary in order to achieve an end that is equally legitimate.

suspect of discrimination, we must determine the criterion by which we may distinguish between the different kinds of couples in order to provide them with the body of laws that best fits their needs and circumstances.

I believe that this solution must entail distinguishing between couples depending on whether or not they have made an official declaration of couplehood.

4.2. Registered couples and informal cohabitation

From this vantage point, we can distinguish between two different kinds of couples:

a) *Registered couples*: This includes couples who have made an official declaration stable couplehood union. This kind of union tends to be aimed at creating a long-term, lifelong partnership, and therefore the members seek and use the means that enables them to do so, such as deeds establishing a stable union, either heterosexual or homosexual. We could note that this kind of couple looks not only at the present but also the future. The members believe that they live as a married couple yet without the mores of marriage.

In this category we can find both heterosexual and homosexual couples who could marry but do not do so for some reason.

b) *Informal cohabitation*: In contrast, this model of couple refers to couples who also share a life together, not for life but for the time being. The affective relationship and solidarities and dependencies entailed in this kind of couple are always experienced from the standpoint of the present.

From this psychological perspective, it makes no sense for the members of this kind of couple to either seek or use the means that the law allows to officially declare their couplehood because the members' sights are always set on the present, not the future.

Sociologically speaking, this model encompasses a plurality of couples: young couples who are in their first relationship and have secured a home, adults who cannot marry because their previous marital relationship has not yet been dissolved, and people who, though they could marry, do not do so as a result of an experience of divorce, widowhood or another kind.

4.3. Comparative law

Particularly in Europe, registered couples reflect the model of registered partnership. Regulations of this kind of couple have undergone extraordinary expansion ever since Denmark chose this model for the first time in June 1989. At first it was a replacement for marriage for same-sex couples who were barred from getting married. Later, there was a certain trend to open registered couplehood up to heterosexual couples as well (Netherlands, Belgium and France). Registered couplehood has effects on the horizontal couple relationship very similar or equivalent to those of marriage. For this latter reason, some doctrines call this model *quasi-marriage*.

Today eleven European states[15] have adopted this model of couplehood whose effects are equivalent to marriage: Denmark, Finland, Iceland, Holland, Norway, the United Kingdom, the Czech Republic, Romania, Sweden, Switzerland and, starting on 1 January 2009, Hungary. This list will soon be lengthened by the addition of Austria, which now has a political agreement along these lines.

Exceptionally, other states have also adopted the institution of registered couplehood, but the effects they assign to the horizontal relationship are substantially lower than those assigned to marriage. This holds true in Germany, France, Luxembourg and Slovenia.[16]

In comparative law and especially in Europe, common-law couplehood reflects the model of informal cohabitation. Even though many countries in Europe do not yet regulate couples under the model of registered couplehood or registered partnership (Bulgaria, Estonia, Croatia, Greece, Ireland, Italy, Cyprus, Latvia, Lithuania, Malta, Poland, Portugal and Slovakia), many of these countries do regulate informal cohabitation, not systematically but via disperse

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[15] Denmark: *Lov om registreret partnerskab* (Law on Registered Couples) dated 7June 1989, no. 372 ("registrerede partnere"; "registered partners").

Finland: *Laki rekisteröidystä parisuhteista* (Law on Registered Couples) dated 9 November 2001, no. 950 ("parisuhteen osapuolet"; "registered partners").

Hungary: Civil Code, art. 685/A, as amended by Law no. 42 from 1996.

Iceland: *Lög um staðfesta samvist* (Law on Confirmed Cohabitation) dated 12 June 1996.

Holland: *Geregistreerd partnerschap* (Law amending the first book of the Civil Code and the Trial Code in relation to the introduction of registered couples) dated 5 July 1997, *Staatsblad,* 1997, no. 324 ("geregistreerde partners"; "registered partners").

Norway: *Lov om registrert partnerskap* (Law on Registered Couples) dated 30 April 1993, no. 40 ("registrerte partnere"; "registered partners").

United Kingdom: *Civil Partnership Act 2004* ("civil partners").

Czech Republic: Law on Common-Law Couples dated 15 March 2006.

Sweden: *Lag om registrerat partnerskap* (Law on Registered Couples) dated 23 June 1994, SFS 1994:1117 ("registrerade partner"; "registered partners").

Switzerland: *Bundesgesetz vom 18 Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (*Partnerschaftsgesetz*), *Bundesblatt*, no. 25 (29 June 2004); *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (Loi sur le partenariat)*, *Feuille Fédérale*, no. 25 (29 June 2004), p. 2935 ("partner/partnerinnen"; "partenaires"; "partners"). Approved via referendum in June 2005 with 58% of the votes in favour. It entered into force on 1 January 2007.

[16] Slovenia: *Registered Partnership Law*, which entered into force 23 July 2006.

Luxembourg: *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats* dated August 2004 ("partenaires"; "partners").

Germany: *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften* (Law to abolish discrimination against same-sex communities: couple life) dated 16 February 2001, *Bundesgesetzblatt*, no. 266 ("Lebenspartner").

France: *Loi no. 99-944, du 15 novembre 1999, relative au pacte civil de solidarité* ("partenaires"; "partners"). This law has also entailed including article 515-8 in the Civil Code: "Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple."

legislation. Examples of systematic[17] regulations include Portugal and Croatia, which require two and three years of cohabitation, respectively. In any event, the level of effects prompted by this kind of couple is substantially lower than what is prompted by the registered couple, with two exceptions: Sweden and Holland,[18] where informal cohabitation has more effects than registered couples in Germany, Belgium and France. Informal cohabitation has often been used as an instrument to equalise same-sex couples and unmarried heterosexual couples.

5. Unity or plurality of systems? Plurality

5.1. Need for different levels of legislative intervention

One of the problems of the couple laws approved to date is the tendency to subject the different kinds of couples to a single legal system. This uniformity in the system has prompted distortions which have sometimes even resulted in the erosion of fundamental rights.

The desire to create a lifelong, long-term partnership expressed by couples who fall within the registered couple model would justify more intense legislative intervention when complying with the constitutional mandate to protect the family (art. 39 SC). This regulation does not necessarily have to be marriage, but it would be the only case in which lawmakers might legitimately extend the effects of marriage to stable unions because the members of these unions have officially declared their desire to live similarly to married couples.

Couples who fall within the model of informal cohabitation tend to show a lack of desire to create a lifelong, long-term partnership. Thus, coupled with the absence of an official declaration of couplehood, this requires minimal legislative intervention in order to ensure that the protection of this kind of family is constitutionally compatible with the sphere of personal freedom that the members of the couple wish to preserve.

For this reason, giving registered couples a system with little content coherent with the profile of informal cohabitation may be felt by the members of the couple to be insufficient. In turn, establishing a regime that is similar to married or registered couplehood for couples who live together informally may be viewed as interference from the legal system.

From a legal standpoint, the model of registered couplehood or registered partnership entered our legal system via law 10/1998 on stable couple unions

[17] Examples of systematic regulation of informal cohabitation:

Croatia: *Zakon o istospolnim zajednicama* (Law on Same-Sex Civil Unions), approved by Parliament on 14 July 2003 and signed by the President on 16 July 2003.

Portugal: *Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto* [2001] 109 (I-A), *Diário da República*, no. 2797 ("uniões de facto"; "de facto unions").

[18] In Sweden, the *Sambolag* (Law on Unregistered Cohabitation) (2003:376) from 2003, which replaced a previous law that dated from 1988, basically recognises rights within the realm of rentals and property. The subjective sphere of application of this law encompasses both heterosexual and same-sex couples. In Holland, there has been increasing recognition of the rights and obligations of unregistered couples since the 1970s. This recognition covers not only areas of private law (basically rentals) but also public law, including social security, income tax, estate taxes, pensions and the migration system.

(abbreviated LUEP) for heterosexual unions (art. 1.1 LUEP). These couples not only have access to the system based on the facts (two years of cohabitation or having a child together), but they also have the opportunity to become a stable union through the granting of a public deed. In contrast, homosexual unions may only formally become a stable couple via a deed (art. 21.1 LUEP).

The model of informal cohabitation entered our legal system only via stable heterosexual unions in which the couple has lived together for two years or has a child together (art. 1.1 LUEP).

5.2. Problems caused by having a single system

Law 10/1998 on stable couple unions, as well as the laws in the autonomous communities which followed Catalonia's legislative option to basically apply a single legal system to both kinds of couples, has created problems.

One of these problems affects couples who fall within the model of informal cohabitation, which in our legal system corresponds exclusively to heterosexual unions via two years of cohabitation or having a child together, as stipulated by Law 10/1998.

The effects that the LUEP attributes to relationships thus established can be viewed as excessive by the members of the couple, who feel that the law imposes on them a legal system very similar to that of marriage without their having made any formal declaration. They may view this situation as interference by the law.

The imposition of effects very similar to those of marriage on a couple that falls within a model of informal cohabitation may mean infringing upon the couple's right not to marry. Article 32.1 of the Spanish Constitution (SC) not only establishes a constitutional institutional guarantee in favour of marriage; it also recognises the right to marry in accordance with the law.

The right to marry (in accordance with the law) is yet another specification of the right to individual freedom (art. 17 SC). Many freedom rights have not only a positive but also a negative side. That is, freedom rights not only protect the right to do something but also the right to refuse to do it without this refusal leading to a direct or indirect sanction by the person refusing.

As a right involving individual freedom, the right to marry has two different facets: 1) a positive facet: the right to marry, which requires the public authority to comply with the obligation to establish by law a system and institutional mechanisms that enable individuals to exercise this right, meaning that the law is forbidden from imposing unreasonable or disproportional impediments to marriage; 2) a negative facet: the right not to marry. This means that the law cannot impose either direct or indirect sanctions on individuals who voluntarily decide not to marry. Yet what is even more important for the issue at hand is that the law cannot impose a legal system that is identical or very similar to the system for married couples on couples that have not expressed their desire to marry. In this latter sense, we believe that the laws on common-law couples that actually impose legal effects very similar to those of marriage simply because a given period of time has elapsed, the couple has had children together or any other criterion are disrespectful of the individuals' right not to marry.

Nor would all the laws that required couples to make an express declaration of exclusion from the effects stipulated by the law be respectful of this right. This kind of legislative solution (the contract-out system) means burdening citizens regarding a right that requires no action to be effectively exercised, as it is simply the negative side of a freedom right. The imposition of this kind of burden could only be justified for rules whose sole purpose is to protect the family per se, not marriage.

Another problem that arises from applying a single legal system to both couples that reflect the tradition model of informal cohabitation and registered couples is that the latter, unlike the former, view the effects derived from their official declaration of couplehood via a formal act as insufficient.

Given the distortions and problems prompted by applying a single legal system to two different models of couple, we only have to recall that the plurality of common-law couples revolves around two basic models which are quite different yet which share the fact that they are couple relationships that generate dependencies and solidarities within their members common to those of a family, which are therefore subjected to legal, economic and social protection (art. 39 SC).

However, this protection must be distinct because each model of family reflects substantially different realities. Specifically, these differences between both models would justify different legal treatment in three different spheres: 1) the subjective sphere, which encompasses both kinds of couple; 2) the system of access to the legal system; and 3) the content of the rights and responsibilities contained in the system.

6. Subjective sphere of application

Which kinds of couples should we regulate and within which of the two models? In this section, we shall study two issues:

1) Couples who cannot marry because one or both members is separated de facto but not legally from a previous marital partner.

2) Civil vicinity.

6.1. Couples who cannot marry because one or both members are not yet divorced from a previous marital partner

In the previous section, we have seen that the diversity of common-law couples can officially be categorised into two models (registered couple and informal cohabitation), that each of these models reflects different circumstances and needs and that therefore different legal treatment should be given to each of the models.

The model of registered couple follows a somewhat marriage-based logic because the members agree to formally declare their desire to create a lifelong partnership. This is logical when the perspective on which registered couplehood is grounded is creating a long-term, lifelong partnership. It might even be logical to define the subjective scope of this kind of couple through regulations similar to those applied to marriage, and therefore to exclude couples who cannot marry from this model.

In contrast, informal cohabitation reflects a family model which is quite distant from the marriage model, as we have seen in the previous section (no formal act has been made to officially declare the members' couplehood, nor do they have the desire to create a long-term, lifelong partnership). Despite this, legal systems use the same marriage rules to define the scope of application of this kind of union.

One of the problems that has been prompted is the exclusion of families whose members may not marry because one or both members still has marital bonds with former partners with whom they are *de facto* separated.

This kind of couple cannot marry because this violates an objective institutional element of marriage (in this case, monogamy). These couples fall within the model of informal cohabitation, and they should be granted the legal system befitting this model.

The fact that this kind of couple cannot marry should not bar them from being protected by a legal system which can protect them as a family. Lawmakers may legitimately issue family-protection norms in favour of this kind of couple. These norms would only partially dovetail with the norms of marriage, those whose goal is to protect the family, but not with the institution of marriage itself.

Excluding heterosexual couples (and, after Law 13/2005, homosexual couples as well) in which one or both members is *de facto* separated from previous marital partner yet not legally divorced from the scope of application creates more problems than systematic legislative regulations would.

A systematised, homogeneous legal response must be provided through which a legally secure solution can be provided to the conflicts that this kind of couple prompts as a result of the termination of the relationship. This can only be undertaken by lawmakers. Otherwise, these conflicts will continue to shift to the courts without receiving standard responses which are coherent with the legal system, which would seriously jeopardise legal security.

Since the approval of law 10/1998 on stable couple unions, which excluded this kind of couple from its subjective scope of application, all the other autonomous communities that have issued laws regulating couples have followed the example of Catalonia and have excluded couples with previous marital bonds from their subjective scope of application.

Beyond couples who cannot marry because one or both members are not yet divorced, there are other unions in which there are bonds of solidarity and dependence between the members (the most common cases in Spain are Koran-sanctioned Islamic polygamous marriages). Neither society nor lawmakers are prepared to recognise this kind of union, which today violates the public order of our legal system.

Despite this, denying a union that was legitimately entered into abroad and valid according to the personal law of its members not only runs counter to the principle of spatial continuity of private international situations but also, more importantly, could give rise to material injustice and vulnerability in the weakest party or parties in this relationship, which is equally incompatible with the standards of our legal system. In this sense, the partial and minimal civil effects that informal cohabitation could provide may be useful in protecting the

weakest party in the relationship, in addition to the family. This would mean attenuated application of our international public order, which is increasingly common. It should be borne in mind that today our laws, as well as the legal system in most European countries, already recognise certain effects in polygamous Islamic marriages.[19]

6.2. The issue of civil vicinity

One of the issues in law 10/1998 on stable couple unions that aroused the most heated controversy and still does today entails limiting the regulation to couples in which at least one of the members has Catalan civil vicinity (art. 1.1 and 20.2 LUEP).

There are still authors who regard this norm as unconstitutional because they believe that this is a conflict rule, and only the state has exclusive competences over conflict rules according to article 149.1.8. SC.

The purpose of the norms contained in articles 1.1 and 20.2 LUEP is not to designate the legal system that should regulate couple relationships but to limit the subjective scope of application of a law (in this case, the LUEP) once the Catalan legal system has been declared applicable via the norms established by the state. Therefore, these are not norms that can displace any legal system but norms that diminish the subjective scope of a law by introducing a required matter; nor are they bilateral or multilateral norms that resolve conflicts among laws. Consequently, the functionality and nature of the norms contained in articles 1.1 and 20.2 LUEP are far from being conflict rules (González, 2004: 110; Jaurena, 2000: 26 and following).

Catalan lawmakers are fully competent to establish the material requirements that circumscribe the subjective scope of application of one of their laws; if these material requirements are not met, it should be applied. It is fully legitimate for Catalan laws to consider shared habitual residence in Catalonia as an insufficient tie to justify applying the LUEP and to require a more intense couple relationship with the laws of Catalonia.

Another issue is the precarious legislative technique used by Catalan law when it requires civil vicinity in Catalonia. Civil vicinity is a personal condition which reflects a person's marital status but is not a territorial criterion.

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[19] 1) Maintenance obligation: The Hague Convention dated 2 October 1973 on the law applicable to maintenance obligations, which was signed and ratified by Spain, stipulates that the second and later spouses will be considered as "spouses" when receiving maintenance and/or a post-divorce compensatory pension. The amount must be determined by the law that regulates maintenance as determined in the Convention.

2) Right to widowhood pension by the different spouses of a polygamous husband: Spanish jurisprudence has recognised this right in numerous rulings. See the ruling by the Higher Court of Justice of Madrid dated 29 July 2002, the ruling by Social Court no. 6 of Barcelona dated 10 October 2001 and the ruling by the Social Court of La Coruña dated 13 July 1998. The legal rulings have chosen to divide the widowhood pension equally among the husband's different spouses.

3) Family reunification: In the Federal Republic of Germany, family reunification is recognised not only for one of the wives but even for a second wife if the latter has children with the husband. In both Spain and France, the right to family reunification is recognised, but only for one of the wives of a polygamous husband.

The criterion of civil vicinity is functional within the civil sphere, but not in public law, which follows a territorial logic. Therefore, it would be more appropriate to condition the aspects of public law (tax law, benefits and public aid, etc.) upon the criterion of habitual residence.

To decide which existing civil laws should be applied to couples in which one of the members does not have Catalan civil vicinity, we should use the norms contained in Chapter VI of the preliminary section of the Spanish Civil Code in accordance with article 16.1 of the same code.

The problem arises when, unlike married couples, common-law couples and the conflicting laws that they may present, both domestic and international, have no specific norms.

In a pluri-legislative state like Catalonia, where six bodies of civil law that regulate common-law couplehood and nine that regulate them from the perspective of civil law all coexist, the lack of norms that provide a systematic response to conflicts posed among these bodies of law has led to vast legal insecurity which has been transferred to the courts.[20]

Ultimately, the problem lies not in the legislative activity of the autonomous communities which, like Catalonia, have issued self-limiting material norms but in the lack of legislative activity by those who have competences but do not exercise them.

The state's failure to enact legislation on this matter is tantamount to its failure by omission to comply with its duty to promote legal security (art. 9.3 SC) and its duty of good faith when exercising its competences, as suggested in STC 46/1990.[21]

7. Systems of access to legal systems

The very nature of each of the models of couplehood predetermines their system of access, and the latter shall determine a specific set of laws for each kind of couple.

7.1 Factual system of access

The model of informal cohabitation, which consists of the concurrence of facts which the lawmaker defines while dismissing the need for a statement of intention expressed via a formal act, will always be necessary in order to encompass family models that are a far cry from marriage whose problems must be resolved legislatively in a homogenous, systematic way. Legislative regulation of this kind of family which falls outside the logic of marriage would avoid the

[20] Ruling of the Provincial Court of Girona dated 2 October 2002 and ruling of the Provincial Court of Navarra dated 12 June 2002.

[21] FJ 4t of STC 46/1990 stipulates: "Certainty with regard to what law should be promoted and sought, and with regard to the interplays and relationships between norms, should not be prompted which leads to the introduction of difficult-to-resolve confusion on the predictability of which law may be applicable [...]." Within the same rationale: "[...] the obligation of all public authorities to abide by the Constitution and the remaining legal system [...] implies a duty of good faith to all of them in the exercise of their own competences such that they do not hinder the exercise of others' competences."

legal insecurity we currently find as a result of the dispersion of solutions handed down by the courts. As we have seen in the previous section, the most paradigmatic case today is couples in which one or both members are only *de facto* separated from their previous spouse but not legally divorced.

In addition to Catalonia, which adopted the model of informal cohabitation for stable heterosexual couples who have lived together for two years or have a child together, there are three other autonomous communities with competences in civil law that have adopted informal cohabitation as one of their models of couple: Aragon, with Law 6/1999 (two years of cohabitation); Navarra, with Foral Law 6/2000 (one year); and finally Valencia, which won back its competences in civil law with its Charter of Self-Government, which was recently approved by Organic Law 1/2006 dated 10 April 2006; Valencia's Law on Couplehood 1/2001 stipulates one year of cohabitation. Despite this, none of these laws has departed from the marriage model when defining its subjective scope of application. We have already discussed the problems entailed in this legislative option owing to the fact that it excludes many couples.

7.2. Formal system of access

The model of registered couple is close to the logic of marriage given that to exist it requires a statement of intention expressed via a formal act. There are three autonomous communities with civil legislative competences that combine the model of informal cohabitation and registered couple: Catalonia, Aragon and Navarra. Only the autonomous communities of the Balearic Islands (Law 18/2001) and the Basque Country (Law 2/2003) accept an express statement filed in an administrative registry as the sole way to establish this kind of couple. In the latter two autonomous communities, this registration has constitutive effects. Requiring an express declaration as the only way of accessing the couple system means leaving the majority of couples unregulated.

7.3. Registration and legal security: civil registry or state-wide administrative registry?

Another important question in legislative policy affecting couples that fall within the model of registered couplehood is the advisability of entering their express statement of intention in a registry.

The model chosen by the Catalan legal system via Law 10/1998 regarding the model of registered couple consists of requiring a public constitutive deed (the only avenue of access for homosexual couples and an optional route for heterosexual couples).

We have to question whether the legislative option taken by Catalan lawmakers has proven functional. There are many factors that indicate that a system through which couples who fall within the registered couple model would have access to a registry would be more operative:

a) Even if the public deed entails the existence of a preventative screening exercised by a specially qualified professional, this screening could not avoid a potential double or multiple registration at the same time, which is

contradictory in a model that follows a somewhat marriage-based logic (ban on double bonds).

b) The constitutive public deed does not guarantee either public notice or existence of the registered couple, nor does it state any agreements that the cohabitators may have reached.

c) Catalonia is the only autonomous community that has accepted a non-marital assumption of parenthood (art. 94 FC). Couples' future access to the registry would encourage the application of this presumption. The current impossibility of couples accessing a registry means that it is difficult to prove how long they have lived together when applying this assumption.

d) We must also take into consideration the needs for legal security of couples established in Catalonia one of whose members is neither a European Union citizen nor a citizen of any of the countries that have joined the Treaty on the European Economic Area.

If the member of the couple from a third country wants to exercise their right to the freedom of movement and temporary or permanent residence, or if they want to meet with their partner, they must fulfil an entire series of requirements. Directive 2004/38/EC of the European Parliament and Council dated 29 April 2004 has conferred a broad margin of discretion on the member states in its implementation.

Entering a couple in a registry can facilitate the proof that the directive and its respective implementations require in order to apply the rights and freedoms contained in it.[22]

[22] Directive 2004/38/EC of the European Parliament and Council, dated 29 April 2004, regulates EU citizens' and their families' right to circulate around and live freely within the territory of the European Union member states.

The other noteworthy innovations of Directive 2004/38/EC that are interesting for our purposes include the fact that this directive represents the first time common-law couples have earned explicit recognition in European Union law.

The inclusion of common-law couples in the subjective scope of application falls under the concept of *registered couple*. In this sense, section *b* of article 2 states that the partner with whom the citizen has engaged in a registered union is considered a family member.

The inclusion of registered unions within the functional concept of *family* as contained in Directive 2004/38/EC has extraordinary effects on the legal status of third-country nationals who are family members with European Union citizens.

For these third-country nationals who are in a partnership with an EU citizen and their partner, the general immigration system may not be applied when fulfilling the requirements of the directive, as well as any requirements that the member states may stipulate through their respective laws of transposition; rather they have the right to be subjected to the much more beneficial system of EU law.

The directive requires the EU member states to extend the right to free movement and residence to the individual partnered with an EU citizen but who is not a national of any member states if three conditions obtain:

a) The union has been officially registered in accordance with the legislation of a member state.

b) The host member state treats registered unions the same as marriages.

c) The couple meets the conditions stipulated in the applicable legislation of the host state.

What registry would fit the requirements? In fact, we already have a registry which can meet the needs of legal security posed by the different laws on common-law couples whose effectiveness has already been proven: the Civil Registry. Therefore, there is no need to create a new registry.

On 23 April 2004, Draft Law 122/000024, submitted by the Parliamentary Group of the Esquerra Republicana party, was admitted for consideration. This draft law called on the state lawmakers, who hold the sole competences regarding the Civil Registry (149.1.8 SC), to implement the constitutional principle of legal security within the sphere of stable unions or common-law couples, which would allow this new institution to have access to the Civil Registry. The effects of this registration would have to be determined by the substantive laws of the autonomous communities.[23]

In order to offset the lack of a registry, all the autonomous communities which have regulated stable unions or common-law couples,[24] with the exception of Catalonia, have chosen to create an administrative couple registry. We can distinguish between two circumstances:

a) The autonomous communities that have chosen a registration model with constitutive effects: Andalusia, Aragon (only for the purposes of public law), Cantabria, the Balearic Islands, Madrid, Galicia, the Basque Country, Extremadura and Valencia.

b) The autonomous communities that have chosen a registration model with declarative effects: Navarra, Castilla-León, Castilla-La Mancha, the Canary Islands and Asturias.

In any event, the host state must facilitate the entry and residence of the member of the couple from a third country if he or she shares a house with the EU citizen, or if he or she can duly demonstrate that the relationship is long-term.

Article 8, section 5, letter *f* of the directive allows the host states to require that proof be submitted of the existence of a stable relationship with the EU citizen.

This possibility has been interpreted by most of the member states as meaning that they can require the couple to be entered in a public registry of a member state.

This holds true of the Spanish regulation that transposed the directive. Article 2*b* of Royal Decree 240/2007 dated 16 February 2007 conditions the application of the EU legal system to the member of the couple who is not a national of an EU member states or one of the states participating in the agreement on the European Economic area upon the fact that the union similar to marriage has been entered in a public registry set up for this purpose. This registry must prevent the possibility of two simultaneous entries within the same state. The Spanish norm also requires proof that the registration has not been cancelled.

[23] This legislative initiative expired as the result of the dissolution of the chambers which took place upon the calling of general elections. An alternative model to the one submitted by the Esquerra Republicana party of Catalonia was the one officialised via an amendment by the Socialist Parliamentary Group in Congress. It proposed setting up a new administrative system dependent on the Ministry of Justice whose operation and management would be handled by the ministry and the local corporations.

[24] See point three *in fine* of Ruling DGI/SGRJ/03/2007 handed down by the Ministry of Labour and Social Affairs. Both the registries of stable couples of the autonomous communities and of the town halls are considered invalid in the application of Royal Decree 240/2007(a norm which implements Directive 2004/38/EC) because these registries cannot prevent simultaneous registrations.

It should be borne in mind that La Rioja and Murcia have not yet regulated common-law couples for the purposes of public law, and that with the exception of Catalonia, Aragon, Navarra, the Basque Country, the Balearic Islands, Galicia and now Valencia, the remaining autonomous communities do not hold civil law competences, and therefore their respective laws are administrative in nature.

The European Union member states that have a public registry as a means of tracking common-law couples are Germany, France, Luxembourg, Slovenia, the United Kingdom, the Czech Republic, Denmark, Sweden and Finland.

8. Content of the legal systems

In order to determine the specific content of the legal systems regarding each of the models of couple, we should distinguish between:

a) The effects during cohabitation.

b) The effects of the termination of cohabitation inter vivos.

c) The effects of the termination of cohabitation mortis causa; within these effects we can distinguish between:

—*post mortem* effects and

— succession effects.

8.1. The effects during cohabitation

8.1.1. Guiding principle that should guide lawmakers when determining the effects of informal cohabitation while the couple is living together: the principle of minimal intervention

There is a twofold reason for this. As we have already noted, imposing effects of this kind on the cohabitators places them in a legal situation similar to a marriage yet without this intervention being justified by the avoidance of damage or unfair results for the weaker party.

Likewise, informal cohabitation does not generate problems during the time of cohabitation, a reality which has been reflected in the lack of legal conflicts in the cohabitation stage.

Consequently, it is not recommended that any legal system be established to regulate the relationships of the informal cohabitators while they are living together. However, we should also dismiss the establishment of any kind of equivalent legal system to avoid imposing on a couple that has chosen not to contract-in the burden of having to contract-out.

This would basically affect the freedom of the cohabitators to organise their family life in terms of both their personal life and their estates. The limits to organisational freedom lie in the public order, which should be interpreted as the entire set of fundamental rights of the individual (such as the right to equality and the principle of the dignity of the individual). Thus, a pact which established one of the cohabitators' exemption from contributing to the lifting of the family burdens would be null and void.

The agreements must at least be in written form to avoid the legal insecurity entailed in oral agreements, which are particularly dysfunctional in the event of conflict. Therefore, we should avoid regulations like the ones contained in articles 3.1 and 22.2 LUEP, which allow for oral agreements.

The autonomy of the cohabitators' desire should encompass at least the possibility of purchasing assets with the right of survivorship, which would particularly benefit the survivor with few resources. The ruling by the Supreme Court of Justice of Catalonia dated 13 February 2003 recognised the validity of the right of survivorship granted in 1985 for a couple in which one of the members was still married to a previous spouse. The court argued that despite the fact that the institution had historically been circumscribed to marriage, the purpose of the right of survivorship is to protect the family's inheritance, and therefore today it must also encompass unmarried families.

Another kind of effect occurs when the law exceptionally calls on the closest family member of an individual who requires protection. One example of this kind would be the attribution of guardianship in favour of the person with whom the interested party lives (art. 179.1 FC). Other examples include healthcare events in which the person is not competent to either receive information or take decisions (art. 5.3, 5.4, 9.1b and 9.3a of Law 41/2002 dated 14 November 2002, the basic law regulating patient autonomy and rights and obligations regarding clinical information and documentation, and article 7.2 of Law 21/2000 dated 29 December 2000 on the rights to information concerning the patient's health and autonomy, and on clinical documentation[25]).

8.1.2. The effects during the cohabitation of a registered couple

In this case, this kind of couple has signed an official declaration of couplehood for legal purposes. Lawmakers can (but do not necessarily need to) apply not only the regulations with a family-based logic, but also those with a marriage-based logic. Therefore, it would be acceptable to create an equivalent legal system in the absence of an agreement.

8.2. The effects of a termination in cohabitation inter vivos

Contrary to the lack of conflict we can note while a couple falling under the regime of informal cohabitation is living together, the termination of informal cohabitation is the time when claims are submitted to the courts.

The purpose of most of these effects is to protect the weaker party in the relationship from an outcome that is considered unfair by law. Given that this

[25] Article 7

Exceptions to the requirement for content and granting consent by proxy

[...]

2. In the following situations, consent may be granted by proxy:

a) When the patient, in the judgement of the physician in charge of care, is not competent to take decisions because he or she is in a physical or psychological state that prevents him or her from taking charge of his or her situation, consent must be granted by the patient's family members or by the individuals linked to him or her.

purpose is shared by registered couples and informal cohabitation, it is coherent that the effects should be applied to both models of couple.

For this reason, it is logical to recognise a potential right to monetary compensation for one of the cohabitators who has worked for the household much more intensely than the other cohabitator, or who has worked in the other member's economic activity without compensation or with insufficient compensation. This monetary compensation would be retroactive to offset the loss in opportunity costs suffered by the cohabitator who devoted himself or herself to the family instead of to the labour market.[26]

It is also logical to recognise for both kinds of couple a potential right to maintenance which is based on the concept of need, yet connecting this concept to the circumstances that have led disfavoured cohabitator's ability to earn income (human capital) to decline due to the previous cohabitation or because he or she has children under his or her care.

One crucial question is whether it is licit to allow the cohabitators to reach an agreement on the regulation of these two potential rights (diminishing or bolstering their contents or the conditions under which they are recognised) and even allowing them to relinquish these rights. These agreements may be granted at a time prior to the appearance of the right (preventative agreements) or at the time when the right arises (reactive or post-cohabitation agreements).

The patrimonial nature of these agreements would justify recognising their validity as a general principle. Saving the emotional, time and economic costs entailed in having the effects of the termination of the relationship already regulated would also help their opportunity, as long as the public order is respected. Specifically:

a) The agreements may not affect the rights of third parties (especially children, but also creditors, both public and private).

b) The agreements must respect the dignity of the individual and his or her fundamental rights, both at the time they are granted and at the time they may be applied. The existence of asymmetrical agreements or one of the cohabitators' ignorance of the assets or significant personal information of the other would be unacceptable, as would any other agreement that would lead one of the cohabitators to an unpredictably onerous situation or even a state of penury. In order to avoid these situations, the agreements must be rendered invalid when between the time they are granted and the time they are to be applied a substantial, sudden and unpredictable change has arisen in the fundamental circumstances which prevailed at the time the agreement was reached.

Law 10/1998 on stable couple unions has no norm that regulates the potential attribution of the family home upon the termination of cohabitation, and therefore upon the termination of the stable union. It would be appropriate to establish clear norms on this issue in order to protect the higher interest of minors and the weaker party in the relationship. These norms would be equivalent to the one contained in article 83 FC.

[26] Roca (1999: 178 and following) argues this for marriage, not cohabitation.

8.3. The effects of a termination in cohabitation mortis causa: *post-mortem effects and succession effects*

Catalan civil law has two sets of norms which can be applied to the surviving member of a relationship.

The first set of norms deals with what are called "*post-mortem*" effects. This set of norms is not very dense and regulates the estate effects of the relationship after it has ceased due to the death of one of its members, as well as the effects of any agreement reached during the existence of the relationship. These effects are activated in favour of the survivor merely through death, regardless of whether the individual favoured by these effects is the heir or legatee or receives any succession benefit.

These effects fall within family law, not estate law. The basic purpose of post-mortem effects is to protect the person of the survivor. We could say that these norms are urgent remedies to address the immediate consequences and needs that the death of the partner or cohabitator causes in the surviving member.

Precisely because the purpose of this kind of norm is to protect the family, they should not be exclusive to marriage. Consequently, these norms must be targeted at both married couples and other couples, regardless of whether they are registered or involved in informal cohabitation.

Specifically, these rights are:

—The right to the household goods or the removal right (art. 35 FC and 18 and 33a LUEP).

— The year of widowhood, which in Catalonia is traditionally called the any de plor ("year of mourning") (art. 36 FC and 18.2 and 33b LUEP).

— The right to subrogation of rent *mortis causa* (art. 16.1b LAU).

— The effects of the termination and liquidation of the economic systems that were contained in an agreement (art. 3 and 22 LUEP).

The second set is made up of norms whose fundamental (though not sole) purpose is to assign ownership to goods, rights and duties as a functional requirement of the economic system. This kind of norm falls not under family law but under estate law. Here, the focal point is no longer the person of the survivor but the estate itself, which requires ownership in order to avoid problems with regard to its processing through the economic-legal system.

This second set of norms (estate law) should not be applied in informal cohabitation established *de facto* without a declaration of intention. There are two reasons why I recommend that it be excluded:

a) As we have seen above, the purpose of this kind of norm is not fundamentally to protect the family but to assign ownership in order to protect the estate's processing through the legal system.

b) Regulation of the right to succession, and specifically intestate succession, is much denser and more economically oriented than post-mortem effects. We cannot deduce from *de facto* cohabitation the deceased person's desire to make his or her partner the heir in the event of intestate succession.

Applying the right to succession to cohabitation would in fact require an express declaration prior to death; otherwise, this would entail imposing excessive effects potentially not desired by the deceased person.

The vast majority of European countries that regulate common-law couples systematically follow two constants which share the fact that they recognise intestate succession (Holland and Belgium for both heterosexual and homosexual couples, and Iceland, Denmark, Norway, Sweden, Finland, Germany and the United Kingdom only for same-sex couples):

a) They exclude informal cohabitators from the right to succession in intestate succession owing to the fact that there is no official declaration of couplehood, and therefore it is difficult to assume the deceased person's desire to favour the survivor in such an intense way.

b) They grant the members of a registered couple (as well as the members of a marital couple) the right to intestate succession precisely because of the existence of an official declaration of couplehood, based on which we can presume a desire to favour the survivor in cases of intestate succession.

The only exceptions to these two constants are France, the Czech Republic and Slovenia. French law refuses to grant intestate succession rights in both informal cohabitation and registered couples. At the other end of the spectrum, the Czech Republic and Slovenia grant intestate succession rights to the surviving informal cohabitator.

Law 10/2008 dated 10 July 2008 from the fourth book of the Civil Code of Catalonia, which was recently approved, generally equates the succession rights of survivors with those of marital partners.

I believe that the virtue of this legislative option is that it establishes a single succession system for heterosexual and homosexual couples, given that differential treatment based on sexual orientation (as noted above) is not only not a functional criterion but is also suspect of being discriminatory.

On succession matters, the distinction between heterosexual and homosexual couples has become even less functional since the approval of civil marriage for homosexual couples. This reform abolished the positive discrimination contained in articles 34 LUEP (intestate succession) and 35 LUEP (a kind of widow's share), consisting of granting succession rights to the survivor in a stable homosexual union because this kind of union does not have access to marriage.

Lawmakers have correctly eliminated the criterion of sexual orientation and have applied a single set of succession laws regardless of sexual orientation. Despite this, I think that they have committed a serious error in eliminating the fundamental criterion for distinguishing common-law couples: whether or not there is an official declaration of couplehood.

Failing to distinguish between couples who have expressed their desire to become a stable union and couples who have expressed nothing because they are de facto couples would make it impossible for the laws to give each their own system suited to their own specific needs.

Unfortunately, the confusion between marriage and family, as well as the confusion between marriage and common-law couplehood, hovers over our

legal system and extends to the sphere of estate law via Law 10/2008 dated 10 July 2008 from the fourth book of the Civil Code of Catalonia.

Generally equating the succession rights of informal cohabitators with those of married couples means imposing a marriage-based solution that the deceased person may not have wanted. On the other hand, the need to prove the fact that gives rise to informal cohabitation opens up a vast front of legal insecurity within succession law. Even though demonstrating that a couple has children together is not fraught with difficulties, it is indeed more complex to demonstrate the existence and nature of the couple relationship and its two-year duration.

9. Harmonisation? No, thanks

Some doctrinal sectors, and even an occasional ruling handed down by the Supreme Court (STC dated 21 March 2001), tend to argue in favour of standardising this issue within Spain. They argue that the different autonomous communities' legislative activity regarding common-law couples has led to vastly heterogeneous norms, and that this does not abide by either the principle of equality among all Spaniards (art. 14 SC) or the need to attain basic conditions that guarantee the equality of all Spaniards in the exercise of their constitutional rights and responsibilities (art. 149.1.1 SC).

These positions forget that political autonomy means precisely each autonomous community's ability to make its own policies, and that this capacity is unconditioned (except for respect for the constitution) in terms of the exclusive competences of the Parliament of Catalonia, such as in the case of regulating common-law couples (art. 149.1.8 SC). This means that recognition of the autonomous communities' political autonomy leads intrinsically to regulatory heterogeneity within the legal system. This is constitutional in any system that allows the regional or vertical distribution of power.

In these systems, the principle of equality does not demand uniform legal treatment of citizens' rights and responsibilities in all matters and around the entire state; rather it only requires equality in the fundamental legal positions.

This latter position against standardisation has repeatedly been upheld by the Constitutional Court. One of its clearest rulings on this matter was the tenth legal rationale of STC 37/1987 and the now-famous STC 76/1983, which declared the unconstitutionality of 14 of the 28 precepts of the organic law on the harmonisation of the process of establishing the autonomous communities.

The Spanish state's desire to harmonise the laws on couplehood in the autonomous communities with the competences to enact these laws would not only clash with the constitutionally stated meaning of political autonomy and with the aforementioned principle of equality, it would also contrast with the neglect the state has thus far shown with regard to the institution of the common-law couple.

It should be recalled that the Spanish state is one of the few states in the European Union which has not yet systematically and organically regulated common-law couples, so it has left one of the questions posed by couples in the communities without the right to enact their own laws bereft of a systematic,

coherent solution. This lack of regulation has led to a dispersion of jurisprudential solutions which does not fit the principle of legal security.

As mentioned in the different sections in this study, all of this should be coupled with the fact that the state has not established norms to resolve conflicts among the different laws on couplehood in the autonomous communities, nor has it addressed common-law couples' lack of coverage in the Civil Registry (or an interconnected administrative registry). This lack of legislative activity does not fulfil the obligation that also weighs on the state to promote legal security (art. 9.3 SC) and the responsibility of good faith in the exercise of its competences, as suggested by STC 46/1990. In this context, the state's aim to harmonise the different laws on couplehood in the autonomous communities with competences in civil law is thoroughly incongruous.

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The effects of Constitutional Court ruling 31/2010 dated 28 June 2010 on the linguistic regime of the Statute of Catalonia

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Abstract

In this article, after identifying the basic objectives of statutory reform in languages, the general characteristics of Constitutional Court in Constitutional Court Ruling 31/2010 and its effects on the statutory linguistic regime are examined. The specific target of critical analysis will be the arguments and interpretative declarations formulated by the Court in relation to the statutory principles of Catalonia's own language and official status and the sectorial linguistic prescriptions that cover the rights and principles related to institutions and public bodies, as well as their staff's ability to use official languages, education and the socioeconomic sphere. The final reflections will include a transversal reading of the ruling, within the necessary context in which it is inscribed, from the perspective of Catalonia's linguistic self-governance.

Key words: languages, official status, statute of autonomy, constitutional jurisdiction

1. Purpose and general characteristics of the ruling

On linguistic matters, within the framework of the Spanish Constitution (SC), the 2006 reform of the Statute of Catalonia (SoC) sought two basic objectives:[1]

> a) First, to consolidate or reinforce the basic principles and elements of the established linguistic regime framed in the 1979 Statute, first by Law 7/1983 on Linguistic Normalisation (LNL) dated 18 April 1983, which was later replaced by Law 1/1998 on Language Policy (LPL) dated 7 January 1998 and elevated to the rank of statute. Thus, it

[1] For further information, see, Pons (2006: 286-294).

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included, among others, the concepts of autochthonous language and official status, citizens' language rights and the school language model.

b) Secondly, to formulate relatively new principles where the evolution in the previous legal framework necessitated a norm with the status of statute – because of its condition as a basic institutional norm in Catalonia and simultaneously a special organic state law – to deal with issues which directly sprang from the Constitution (especially the declaration of the official status of Occitanian and Aranese, the explicit mention of the duty to know Catalan and the autonomous regions' competences on language matters) or to deal with the state institutions (such as language training of staff in administrations that depend on the state, language rights before state-wide constitutional or jurisdictional bodies and the state's involvement in protecting and encouraging the use of Catalan).

Both objectives were contained in a far-reaching regulation on language contained in the new 2006 Statute – in contrast to the summary formulation of the legal-linguistic principles in article 3 of the 1979 Statute[2] – which extended over different sections or chapters, as a systematic option coherent with the cross-cutting nature of language which determines the application of the language prescriptions contained in the different techniques of regulation and guarantee called for in the Statute.[3]

Even though the systematics on language remained intact during the reform proceedings in the Parliament of Catalonia and the Cortes Generales (Spanish Parliament), the text's run through the Congress of Deputies (the lower chamber) led to a modification of the content of approximately half the language precepts.[4] Later, after a positive referendum by the people of Catalonia, the reform of the Statute approved by Organic Law 6/2006, dated 19 July 2006 and in effect since 9 August 2006, was the subject of two appeals alleging general unconstitutionality filed by the Partido Popular and the Defensor del Pueblo (Spanish Ombudsman), through which – though they were not strictly identical[5] – they contested half of its language provisions.

[2] The 1979 Statute also contained references to collaboration with other territories and communities or with the state on language and cultural matters in article 27.4 and additional provision five.

[3] Specifically, language is present in the preliminary section (articles 5, 6, 11 and 12); in the section entitled "On the rights, duties and guiding principles" in Chapter III, "Language Rights and Responsibilities" (articles 32-36), Chapter IV (article 37.1, first clause) and Chapter V, "Guiding Principles" (articles 44 and 50); in section II "On the institutions" (article 65); in section III, "On legal power in Catalonia" (articles 101.3 and 102); and in section V, "On competences" within Chapter II, "Areas of competence" (articles 143, 146.3 and 147.1.a).

[4] See the table in the annexe. The changes in the language regime were the outcome of the amendments submitted by the Socialist Group in the Congress of Deputies (for a detailed analysis of the parliamentary proceedings, see Pons, E., Pla, A. "La llengua en el procés de reforma de l'Estatut d'autonomia de Catalunya (2004-2006)", *Revista de Llengua i Dret,* no. 47, 2007, especially pp. 197 and forward). Given the substantive nature of the changes introduced, the intervention of the General Courts entailed a major curtailment of the initial desire expressed by the Catalan political representatives on this matter.

[5] See table in the annexe. According to article 161.2 EC, neither of the two appeals had the effect of suspending the enforcement of the statutory norm (http://www10.gencat.cat/drep/AppJava/cat/ambits/recerca/desenvolupament/recursos.jsp).

Supreme Court Ruling (henceforth STC) 31/2010 dated 28 June 2010, which ruled on the appeal submitted by the People's Party almost four years later, shows eminently interpretative content on language matters, even though it declares the "...and preferential" clause describing the autochthonous language of article 6.1 SoC null and void.[6] The subsequent ruling dated 16 December 2010, which ruled on the appeal submitted by the Public Defender, refers wholly to the argumentation and decisions of STC 31/2010 with regard to the linguistic contestation, but with the new feature that it does not reproduce the dissenting opinions expressed in the former by four magistrates – one of whom concurs with the judge issuing the second ruling[7] – who wanted to substantially expand the pronouncement of unconstitutionality of the statutory norm on this and other matters.[8]

Before analysing the specific incidence of STC 31-2010 on the statutory linguistic regulations, we should briefly reflect on the general features of this ruling with regard to its purpose and the peculiar expressions that it adopts in the exercise of the jurisdictional function entrusted to the Constitutional Court (henceforth CC).

With regard to the first issue, the critical observations of the first commentators in STC 31/2010 on the degree of debilitation or weakness of the constitutional position of the Statute and its complementary function in defining the model of territorial organisation and, as its corollary, the linguistic model, can be transferrable to linguistic matters – furthermore, with a special rationale.[9] In this important aspect, which conditions the content and scope of the statutory norm, despite mentioning it several times, the CC distances itself from the original ruling in STC 82/1986, FJ 1, where it declared that "article 3.1 and 3.2 of the constitution and the corresponding articles in the respective Statutes are the basis of the regulation of linguistic pluralism with regard to its incidence in the sphere of officialdom in the Spanish constitutional order" (STC 82/1986, FJ 1), thus allowing the Statutes to take on a crucial role in defining and completing Spain's language model. It also unjustifiably omits the doctrine from the most recent STC 247/2007, FJ 15, on the reinforced constitutional power of the statutory lawmakers on linguistic matters, which derived from article 3.2 SC, which entails the "crucial importance that the constitution grants to the Statutes in the legal configuration of the matters regulated in these precepts". This is characterised by two notes: the possibility for the statutory lawmakers to regulate the implementation of this matter to a greater or lesser degree, and the ability to immediately create true subjective language rights (already admitted by the previous STC 82/1986, FJ 2, 3, 5 and 14).

[6] See the table in the annexe, which clearly shows that STC 31/2010 actually entails broader and more general effects on statutory linguistic matters than can be gleaned from its verdict.

[7] The particular votes of the magistrates Vicente Conde Martín de Hijas, Javier Delgado Barrio, Jorge Rodríguez-Zapata Pérez and Ramón Rodríguez Arribas.

[8] Despite this remissive technique used in the STC dated 16 December 2010, the core of the linguistic issue in the appeal submitted by the Public Defender is reflected in the proportional part, which is almost one-third of the total, which focuses on its forerunners and the parties' allegations on this matter.

[9] This fundamental issue is addressed in FJ 3-6 of the ruling. With regard to the inescapable connection between language and the territorial model of Spain, see Aparicio (1997).

Consequently, the first feature that we should highlight from STC 31/2010 is the distorted or biased configuration of the canon of judgements applied to the language provisions, which the special position and constitutional function attributed to the Statutes in this matter by article 3.2 SC is neglected: first, by omitting the specific sense of this reference which, based on the general characteristics that define the specific position of the Statutes in the system of sources, is targeted at guaranteeing the state's intervention in approving and reforming Statutes as a necessary condition for the ultimate binding status for the statutory linguistic determinations, in relation to the territoriality of the official status of the languages other than Spanish (already affirmed in STC 82/1986);[10] and secondly, by the restrictive conception implicit in the scope of the statutory reservation of article 3.2 SC, which seems to be circumscribed now by the authority to declare and specify the effects of the official status of the unique or autochthonous language of the autonomous community, such that is it confused with the scope that the CC previously recognised for the language competences of the autonomous regions' legislative powers.[11]

These considerations lead us to the second of the preliminary questions. Indeed, as a result of the aforementioned deactivation of the special position of the Statute as a linguistic norm, the CC's leeway of discretion was expanded to assess its constitutionality, which enables it to impose an entire series of limits on the statutory lawmaker from the migrated constitutional provisions in this matter (and especially from article 3.1 SC, which monopolises the canon of constitutionality). In this way, the SC tends to situate itself within STC 31/2010 as an almost unconditional interpreter of the constitutional concepts,[12] a position which contrasts with the special deference that the statutory lawmaker used to deserve by virtue of not only the presumption of validity of the laws reinforced by the qualified democratic legitimacy of the Statute as a norm approved by two lawmaking bodies (the Spanish Parliament and the Catalan regional Parliament) and supported by the people, but also the reinforced constitutional authority on language matters. In this sense, a tilt towards the thesis of the ruling can be noted under the influence of the doctrinal sectors from other parts of the state which in the wake of the Catalan reform stressed the perils or risks derived from the *constitutional model* of linguistic pluralism compared to a model of *linguistic territorialisation* grounded upon the concept

[10] Generally speaking, this is the meaning of the Albertí (2010) statutory reservation. Based on this meaning of the reservation, one could uphold the constitutionality of the declaration of official status for Aranese contained in Law 16/1990, on the special system in the Vall d'Aran, given that its effects are circumscribed to the public authorities of Catalonia and Aran (Pons, 2006: 317-318).

[11] The CC's identification of this linguistic competence, based on the general orders to the autonomous regions' public authorities in the first statutes to "guarantee the normal and official use of both languages" (for example, in article 3.3 CCSF) was projected onto the regulation of the "contents inherent in the concept of official status" or the "scope" of its regulation and onto the normalisation of the autochthonous language (see, among others, STC 82/1986, 74/1989, 123/1988, 56/1990 and 87/1997).

[12] One example of this desire expressed by the CC in the ruling is framing itself as an "extended constituent power", an expression which contrasts with the limits that govern its interpretative function of the constitution, as a constituted power, as a text open to numerous interpretations, including, in a qualified fashion, the statutory lawmaking body (Aparicio, 2010).

of *autochthonous language*, contrasting it to *shared, common language* (which is, in fact, nonexistent in the SC), that is, Spanish.[13]

In more specific terms, the legal grounding of STC 31/2010 is characterised by an abundance of interpretative declarations that affect the meaning and scope of the statutory linguistic precepts being ruled upon, with the added particularity that many of this verdict is not shifted to the provisions. The arguments or judgements sustaining the CC's conclusions tend to be brief and apodictic, expressed via the formulation of interpretations and consequences which are presented as definitive, obvious or indisputable. What is more, in an analysis of the language provisions, what often prevails is a preventative kind of argumentation through which the CC poses a hypothetical situation that it regards as contrary to the constitution, but which cannot necessarily be gleaned from the statutory text, and then it goes on to exclude it and formulate its own interpretation. In short, the general features of this ruling on linguistic matters contrast with the rationalising role which – without excluding certain debatable decisions – constitutional jurisprudence had developed in the legal-linguistic debate, and it tends instead to introduce elements of legal insecurity into the job of the lawmaking bodies and legal implementers and to reopen ambiguities on issues that seemed to have enjoyed sufficiently broad political consensus.

2. Autochthonous language as a legal concept

Article 6.1 of the 2006 Catalan Statute defines the concept of *autochthonous language,* which has a longstanding tradition within Catalonia's legal system[14] based on some of its effects provided for in advance by the lawmakers.[15] In this legislation, the notion is deployed threefold in the dimension of collective identity, which is also present in article 5 SoC, by proclaiming the historical rights of Catalonia and the unique position of the Generalitat with regard to language; the guarantee of Catalan's uses in certain institutional spheres; and its connection with the desire to normalise the Catalan language, which is now

[13] See, Solozábal (2000) before the reform and López Castillo (2008) and López Basaguren (2007) after it.

[14] As a legal notion, the term *autochthonous language* comes from the previous Statute dating from 1933, which attempted to remedy some of the limitations imposed by the Republican Courts on the 1932 Statute. Subsequently, the 1979 Statute revived this concept, which stressed it in the first paragraph of article 3, based on which it secured an initial implementation in the 1983 Law on Linguistic Normalisation, which was later expended by the 1998 LPL.

[15] The wording of article 6.1 in the Statute approved as Organic Law 6/2006 is: "Catalonia's own language is Catalan. As such, Catalan is the language of normal and preferential use in Public Administration bodies and in the public media of Catalonia, and is also the language of normal use for teaching and learning in the education system." Because of the incidence of the assessment of the effects of the CC's legal ruling on this precept, it should be noted that the second section of the original wording by the Parliament of Catalonia, approved on 30 September 2005, referred to "the language of everyday and preferential use in the public administrations and media of Catalonia", thus altering two consequences of the notion that the LPL declared as unique with regard to the administrations and institutions of Catalonia (article 2.2.a LPL, in which Catalan is "the language of…", in the sense of the normal, habitual or default language) and in the state administration in Catalonia (for which, in accordance with article 2.2.b LPL, Catalan is the "language preferentially used […] in the form that it determines").

expressed in the demands for the protection and dissemination in Catalan in article 50 SAC.

Even though according to the statutory lawmakers' margin of discretion we should assume the full legitimacy of including a broader regulation of this concept in the SoC, based on the argumentative keys noted,[16] STC 31/2010 maintains the concept of autochthonous language, but it disfigures the characteristic outlines of the Catalan legal-linguistic system by confusing it with the distinct concept of official status and partially voiding it of content.

It is quite symptomatic of the latter that the analysis of article 6.1 SoC (in FJ 14.a) starts by referring to the concept of official status as established by STC 82/1986[17] – which shall be analysed below – although, as a new feature, the CC now draws a consequence – later contradicted, as we shall see, within the same ruling – that affirms the requirement for strict equality in the system of official status of both languages, by saying: "The definition of Catalan as 'the autochthonous language of Catalonia' cannot entail an imbalance in the constitutional regime of co-official status of both languages at the expense of Castilian Spanish" (FJ 14.a).[18]

The CC then subjects the notion of autochthonous language to an interpretative reconstruction which is grounded upon three arguments: the first, dovetailing with allegations from the Attorney General, results in equating it with the "peculiar or primitive language of Catalonia, in contrast to Spanish, a language shared with all the autonomous communities";[19] in the second, the concept is identified with its purpose, adding to the authorising meaning inherent in article 3.2 SC a conditioning or limiting element of discretion of the statutory lawmaker, which can only declare a language that coincides with the history of a region as an official second language;[20] the third pillar, a corollary of

[16] The second interpretative key noted – restriction of the scope of the reservation of article 3.2 SC – becomes important here when article 6.1 SoC is interpreted in the sense that "it must be understood that the statutory lawmaker has only wanted to adhere to the mission that the constitution reserves exclusively for the Statutes, that is, to the qualification of a language as official in the 'respective' autonomous community, as per article 3.2 SC" (FJ 14.a, paragraph three).

[17] See the clear confusion with which this matter is introduced in FJ 14.a): "Beginning with the issue on the autochthonous nature of the Catalan language and the consequences stemming from this, as is required the Statute of Catalonia is the competent norm for attributing to Catalan the legal status of official language of this autonomous community (art. 3.2 SC), shared with Spanish as the official language of the state (art. 3.1 SC)."

[18] The term *co-official status*, created by jurisprudence, encompasses consequences that could potentially weaken the official status of the autochthonous languages of the autonomous communities – which are accentuated within this ruling – inasmuch as it seems to condition it upon the presence of another official language; as a result, Catalan doctrine tends to prefer the term *double official status*.

[19] The constitutional text's silence evidences the ideological burden underlying the descriptions applied by the ruling to the different languages: Catalan as "exclusive" or "characteristic" (Fj 14), compared to Spanish as "shared with all the autonomous communities" (FJ 14) or "the only common language of Spain" (FJ 21).

[20] In accordance with FJ 14.a of the ruling: "In effect, article 3.2 SC does not allow the Statutes to proclaim the official status of any language of Spain other than Spanish [...] The language of Spain liable to being proclaimed official by a Statute is the language of the 'respective' community, that is, the characteristic, historical, exclusive language, in contrast to the language common to all the autonomous communities, and in this sense its own autochthonous

the previous one, is the attribution of the notion of descriptive character of a "reality of normal [the adjective 'normal' is truly protean within this part of the ruling] and habitual use",[21] which is coherent with the CC's desire to partially deactivate the legal effects inherent to the statutory notion.

With regard to the consequences of this jurisprudential reinterpretation of the notion of autochthonous language in article 6.1 SoC, we should note the following: first, the expression *language of normal use* – previously endorsed by STC 46/1991 and 337/1994 – is identified, beyond its previous descriptive nature, as one of the effects of official status which in Catalonia would be shared with Spanish; and secondly, given the difficulty of reconducting it to a descriptive as opposed to prescriptive sense of the reality, the expression *language of preferential use* is declared unconstitutional in the Statute.[22] Immediately, however, the CC discards the potentially more restrictive consequences of this ruling by stating that it does not hinder the continuation of language policies in favour of the Catalan language enacted by lawmakers:

language." (FJ 14.a, paragraph three). "The autochthonous nature of a language of Spain other than Spanish is therefore a necessary constitutional condition for its recognition as an official language by a Statute". (FJ 14.a, paragraph four).

[21] In this sense, the CC states the following: "By declaring Catalan the autochthonous language of Catalonia, it is the language of 'common use' of the public administrations and public media of Catalonia, it fills the role of accrediting the effective concurrence of that constitutional condition in the case of the Catalan language in that the 'normality' of this language is nothing other than the accreditative assumption of a reality which, characterised by the normal, habitual use of Catalan in all orders of social life in the autonomous community of Catalonia, justifies the declaration of this language as official in Catalonia, with all the legal effects and consequences which should be gleaned from this official status and from its concurrence with Spanish based on the constitution and its in setting." (FJ 14, paragraph four, *in fine*).

The potentially harmful effects for the protective language system of the underlying argument in the passage transcribed and translated above should be noted, according to which normality, as a descriptive shift in the extent of the social use of the language, is opposed as an element that may condition advances in the status of the language. Counter to this argument, we should recall that since STC 82/1986, the CC has delinked official status from the reality and social weight of the language, and that the situation of precariousness in the social uses is precisely the condition that justifies specific protective measures for so-called *regional or minority languages*.

[22] The CC's reasoning is as follows: "Unlike the notion of 'normality', the concept of 'preference', by its own nature, transcends the mere description of a linguistic reality and implies the primacy of one language over another within the territory of an autonomous community, in short, imposing the prescription of the priority use of one of them, in this case, Catalan over Spanish, at the expense of the compulsory balance between two equally official languages, neither of which should receive privileged treatment. The definition of Catalan as the autochthonous language of Catalonia cannot justify the statutory imposition of the preferential use of that language to the detriment of Spanish, which is also an official language in the autonomous community, by the public administrations and public media in Catalonia [...] therefore, not accepting this insertion '...and preferential' from article 6.1 SoC as an interpretation in line with the Constitution, it must be declared unconstitutional and therefore null and void." (FJ 14.a, paragraph five).

In the passage transcribed above, we cannot ignore the negative connotations of the language used by the CC when analysing the statutory concept of preference, which is interpreted in terms of "imposition" and "privilege", while these terms do not appear in relation to the single language that the SC imposes (by means of the formulation of the duty for all Spaniards to know Spanish) or privilege (since it is the only one expressly identified by name and it benefits from official status statewide).

> *clearly without prejudice to the appropriateness that the lawmaker may adopt, if applicable, the proper and proportionate language policy measures aimed at correcting historical situations of imbalance in one of the official languages with respect to the other, should they exist, thus rectifying the possible secondary position or neglect of one of them.*

The argument used here, which extends to other parts of the ruling – such as in relation to the statutory proclamation of linguistic rights and responsibilities – consists of negating or strictly delimiting the margin of binding legal configuration of the statutory lawmaker, while also recognising a broader sphere of action for the ordinary lawmaker.[23] In any event, the ambiguous terms and clearly preventative spirit that frame the legitimacy of "language policy measures" in favour of Catalan in FJ 14.a) do not exclude other possible legitimate justifications – apart from the argument of historical imbalance, which while displaying a surprising historical forgetfulness, the ruling captures conditionally – of the measures to defend Catalan, nor do they abstractly precondition what kind of measures – promotional or more constrictive – the public authorities may adopt.[24]

In short, the CC's ruling on the notion of *autochthonous language* shows a restrictive rigour of the statutory system to protect Catalan, which was given somewhat weak baseline arguments and seems more inspired by the desire to protect the position of Spanish in Catalonia. Nevertheless, the notion of *autochthonous language* is still present, as a notion distinct from official status, in the frontispiece of the statutory language regulation without other projections of the concept being questioned by the ruling – such as in the realms of education and local administrations – and without prejudice to the possibility of justifying the measures adopted by the public authorities to protect Catalan from other perspectives – including the status of *regional or minority language* in the terms defined by the European Charter on Regional and Minority Languages.[25]

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[23] If this interpretative operation, which is targeted at degrading the normative value of the Statute, seems difficult to justify in relation to the contents of the Statute not expressly provided for by the constitution (see the criticisms levelled by Carillo [2010] cited in relation to the same argument applied to the regulation of rights, where he describes it as paradoxical that it is argued so assertively by the SC that what both lawmakers do 'is so different'), although it would be even more difficult to justify on language matters given the express authorisation of the statutory lawmaker – state and regional parliaments –as contained in article 3.2 SC.

[24] In the introductory study to the compilation *Drets lingüístics per a tothom. Estudis de dret lingüístic*, A. Milian, states that "the vast majority of democratic language policies that aim to safeguard a language – or to mitigate its assimilation – include requirements and impose, in some cases, the use of at least the protected language (that is, without preventing the simultaneous use of other language) and even limit the use of the dominant language, an issue that is subjected to much more severe legal conditions and is limited to public activities" (2010: 31).

[25] Without wishing to delve too deeply here into Spain's commitments derived from this international treaty, we should recall that in accordance with its article 7.2, "the adoption of special measures in favour of regional or minority languages aimed at promoting the equality of speakers of these languages and the rest of the population or aimed at bearing in mind their particular situation is not considered an act of discrimination against the speakers of more widespread languages".

3. Official status, revisited

Article 6.2 SoC proclaims the official status of Catalan and Spanish in Catalonia and outlines, in equivalent terms for both languages, the basic rights and responsibilities derived from their official status, along with the right not to suffer from discrimination for linguistic reasons.[26] The ban on language-based discrimination is reiterated in article 32 SoC, and this precept, which also encompasses the previously established jurisprudential notion of official status, has not been contested.[27]

On this point, STC 31/2010 is characterised by extracting consequences heretofore unseen within the jurisprudence on the official status of the Spanish language and the duty to know it as contained in article 3.1 SC. In effect, despite formally framing its argument in previous jurisprudence, in accordance with which the constitution

> *enables us to state that a language is official, regardless of its reality and weight as a social phenomenon, when it is recognised by the public authorities as the normal means of communication in and among them and in their relation with the private subjects, with full validity and legal effects* (STC 82/1986, FJ 2),

here the official status of Spanish undergoes a reformulation whose argumentative base lies in the variable use of the notion of *normal use* as a defining element of the concept.[28]

Thus, while we have seen that in FJ 14.a) of the ruling, the "normality" of use was envisioned as a generalisable or shared consequence for all official languages (from which precisely the ban on statutorily declaring the "preferential" use of one of them derived), in FJ 14.b) "normal use" becomes the exclusive prerogative of Spanish, linked by the CC to the duty to know this language. Based on this asymmetrical construction of the official status of languages, it is claimed that the public administrations may use Spanish as a "normal" means of communication with citizens without the latter being able to

[26] According to article 6.2 SoC: "Catalan is the official language of Catalonia. So is Spanish, which is the official language of the Spanish state. Everyone has the right to use both official languages, and the citizens of Catalonia have the right and duty to know them. The public authorities of Catalonia must establish the measures needed to facilitate the exercise of these rights and fulfilment of this duty. According to the provisions of article 32, there can be no discrimination based on the use of either of these two languages."

[27] Article 32 SoC states: "Every person has the right not to be discriminated against on the basis of language. Any legal act performed in either of the two official languages is therefore linguistically fully valid and effective."

[28] The same element of normal use as a definition of official status has yet another different jurisprudential application within the recent Interlocutory 27/2010, dated 25 February 2010, in which it serves to distinguish the status provided for in article 3.2 SC with respect to the possibility of legally regulating certain language uses of citizens, with legal effects, before the public administrations (in relation to article 4.2 of Law 1/1998 on the use and promotion of Bable/Asturian) without the previous statutory declaration of official status.

demand that they use another language, a consequence which is denied for the other official languages.[29]

The CC made this *revisited definition* of the official status of Spanish pivot around such a controversial and legally and socially delicate element as the "duty to know Spanish",[30] and it has ulterior consequences on the interpretation of the scope of the official status of Catalan which, as defined by the statutory lawmakers as parallel to Spanish (articles 6.2 and 32 SoC), is the subject of a corrective reinterpretation by the CC in relation to the consignment of the duty to know Catalan, which was one of the new features of the 2006 reform.

Even though the ruling correctly notes the disjoint between the legitimacy or lack of legitimacy of statutorily introducing a duty to know another of the official languages,[31] the prevailing keys to the arguments in the ruling lead the question to be falsely closed. Thus, after reiterating the constitutional doctrine that connects – via amorphous allusions – the duty to know Spanish with other constitutional provisions – although we could legitimately ask which ones[32] – the CC identifies, as we have noted above, the constitutionalised duty with an authority of "normal use" of Spanish by the public powers, preventing citizens from the possibility of demanding that they use another language, a prerogative which

> *guarantees communication with the public powers without the need to know a second language. With regard to the citizens' duty, this corresponds to the correlative right or authority of the public power, as*

[29] According to the CC: "The constitutional duty to know Spanish, more than an 'individualised and required' (STC 82/1986, FJ 2) duty to know that language, is actually the counterpoint of the public power's authority to use it as a normal means of communication with citizens without their being able to demand that another language be used – outside the cases, now irrelevant, in which the right to defence at trial may be at stake (STC 74/1987, 25 May 1987) – so that the *imperium* acts which are the object of communication regularly implement its legal effects. In the case of official languages other than Spanish, the public powers do not have an equivalent authority [...]". (FJ 4.b, paragraph two).

[30] The constitutional reception of this duty, which stems from article 4 of the Republican constitution of 1931, motivated opposing positions during the constituent debates of 1978 and statutory debates of 1979. The doctrine, with some jurisprudential support (STC 82/1986 and 74/1989), has conceived it for some time as a presumption of knowledge that serves to guarantee official status, but the CC now rejects an integrated interpretation of article 3.1 SC and instead chooses an individualised conception – which is quite debatable in the terms with which it is formulated – of the constitutionalised duty.

[31] According to this position, the basic question is whether the nonexistence of a constitutional duty to know the *co-official* languages in the autonomous communities "means the prohibition on this duty being imposed in a Statute or, to the contrary, whether that option is open to the regional lawmakers and is one which they may legitimately choose" (FJ 14.b, paragraph one). By rejecting the possibility of introducing the duty to know Galician via an ordinary law as an aspect linked to the core of official status, FJ 2 of STC 84/1986 dated 26 June 1986 left the door open to the introduction of a duty via regional laws, but the CC now closes this possibility by drawing an abstraction from article 3.2 CE.

[32] In this case, the argument is not new and STC 82/1986 contained an unspecific allusion to the "duty that is concordant with other constitutional provisions which recognise the existence of a shared language among all Spaniards, whose knowledge may be presumed in any event, regardless of factors of residence or vicinity" (STC 31/2010, FJ 14.b, paragraph one).

> *the administration has no right to address citizens exclusively in Catalan, nor can citizens presume their knowledge of it, and therefore formalise this presumption as a duty of Catalan citizens (FJ 14.b).*

The underlying argument of this new understanding of the duty contained in article 3.1 SC seems paradoxical at least: it is sustained on the affirmation of a "right" or "authority" of the public powers, counter to the general principle that attributes rights to citizens, while the administrations would be the passive subjects which must generally satisfy these rights.

However, the ruling does not contain a declaration of unconstitutionality of the duty to know Catalan; rather it undertakes a restrictive interpretative reconstruction of the meaning and scope of article 6.2 SoC which – although according to the CC the precept admits "*naturally*" – is rather incoherent with its literality and with the very statutory system,[33] by reconducting it to a "specific" and "individualisable" right in the sphere of education and public function, in which the subjects would no longer be "the citizens of Catalonia" (a concept defined by article 7 SoC and also the subject of a restrictive reinterpretation in FJ 11).[34]

In summary, the revisited notion of official status arouses numerous doubts and possible objections, not only because of the internal contradictions in STC 31/2010, in deriving SC prerogatives for Spanish from article 3.1 that are opposed to the equality or parallelism of the official languages that the constitution itself declares, but also because the purported superiority of the official status of Spanish in Catalonia seems to be grounded upon a given ideological understanding – never defined – of the constitutional language model with which there would exist a single necessary official language while reserving secondary or subordinate status to the other official languages. Despite this, the CC's argumentation does not disfigure the notion of official status for languages in terms of its basic conceptual core of validity and the

[33] With regard to students, the duty to know both official languages is not consigned in article 35.2 SOC.

[34] According to the CC: "Art. 6.2 SoC would be unconstitutional and null and void in its pretence of imposing a duty to know Catalan equivalent in meaning to what can be gleaned from the constitutional duty to know Spanish. Despite this, the precept naturally allows a different interpretation in conformance with the constitution, although, as the precept directs a mandate to the public powers of Catalonia so they should adopt 'the measures needed to facilitate... fulfilment of this duty', it is clear that this could only be an 'individualised and required' duty to know Catalan, that is, a duty of a different nature than the duty to know Spanish in accordance with art. 3.1 SC (STC 82/1986, FJ 2). Therefore, here there is no counterpoint whatsoever to the authority of the public power of the Generalitat to exclusively use Catalan in its relations with citizens, which would be improper; rather it is not a generalised duty for all citizens of Catalonia but the imposition of an individual duty that must be fulfilled whose specific place is in the sphere of education, as stems from article 35.2 SoC, and the sphere of special relations that bind the Catalan administration to its civil servants, who are obliged to meet the right to language choice recognised in art. 33.1 SoC". [...] "Here, however, the only thing that matters is that envisioned as a duty of a different nature than the duty which may only encompass Spanish, that is, as a duty that is not legally required of everyone, the duty to know Catalan has its own purpose which justifies it as a mandate and which enables it to be interpreted as in conformance with the constitution" (FJ 14.b) paragraph three).

production of legal effects from the legal acts and communications and notifications (article 32 SoC, not contested, in relation to the interpretation of article 50.5 SoC, analysed below),[35] nor does it question the link between the presumption of knowledge contained in article 6.2 SC and the obligation of the public powers in Catalonia to "establish the measures needed [...] for compliance with this duty" with regard to the two official languages (article 6.2 SoC). Consequently, nor does is subtract legitimacy – nor obviously can it create a *tabula rasa* – from the actions implemented in Catalonia to ensure access to and to spread knowledge of Catalan among its citizenry,[36] with quite far-reaching results which contrast with the current jurisprudential interpretation of article 3.1 SC, which seems aimed at constitutionally protecting the exception of not knowing Catalan by some of the Spanish citizens living there.

4. The interpretation of the sectorial language prescriptions

Apart from article 6 SoC, the core of the statutory language system, STC 31/2010 formulates several interpretative declarations that affect other sectorial language prescriptions. Even though these declarations are conditioned by the restrictive configuration of the judgement parameter and the analysed interpretation of the basic language principles, the legal reasoning behind the ruling adds other arguments which somehow contribute to shading the preceding restrictive statements and provide new interpretative clues as to the statutory linguistic order.

[35] This conclusion is ratified by a parallel reading of the aforementioned Interlocutory 27/2010 dated 25 February 2010 in which the CC admits the production of legal effects in accordance with article 4 of Law 1/1998 dated 23 March 1988 on the use and promotion of Bable/Asturian, on communications between citizens and public administrations in Asturian. This legal recognition is considered admissible without the prior statutory declaration of official status (which contrariwise does exist for Catalan in article 6.2 SoC, with the specification of its effects for article 32 SoC), a concept that in FJ 5 of the ICT is distinguished from the protective system of Asturias in the following terms:

"[...]The aforementioned legal precept does not recognise Babel/Asturian as a 'normal means of communication' within the regional administration, nor is it attributed this condition in the relations that this administration engages in with the private subjects 'with full validity and legal effects', identifying factors of the official status of a given language. In other words, the legal precept does not attribute to citizens the right to choose the procedural language, and instead it limited to imposing upon the administration of the Principality of Asturias the obligation to process written texts that the citizens send to it in Babel/Asturian. If the norm is viewed from another perspective, its main virtue consists of depriving the regional administration from any discretionality when accepting the communications it receives in this language. From the obligation to process these writings we can glean their validity for all administrative purposes, and in particular recognition of their efficacy to paralyse the calculation of deadlines or prescriptions of administrative actions [...]"

[36] The impossibility of establishing the duty to know the official languages other than Spanish was endorsed by a sociological argument at the end of the Franco regime, given the impossibility for much of the population to gain access to knowledge of the language. Today, the *Enquesta d'usos lingüístics de la població 2008* cites percentages of around 95% of the population of Catalonia that understands Catalan (http://www.idescat.cat/).

4.1. Public administrations and institutions

As a privileged sphere of projection of the principles of autochthonous language and double official status, the 2006 SoC includes diverse references to public administrations and institutions, which are judged by STC 31/2010 from three perspectives:

a) Language rights and uses

In accordance with the systematics in the first section in the SoC, Chapter III recognises citizens' right to language choice before "the public institutions, organisations and administrations in Catalonia [...], including the electoral administration in Catalonia, and in general the private entities on which they depend when exercising their public functions" (article 33.1 SoC),[37] which is specified with regard to the administration of justice and certain legal professions (article 33.2 SoC);[38] and Chapter IV regulates language uses of the Catalan administrations and institutions, as the guiding principle (article 50.5 SoC, which literally reproduces article 9 of the 1998 LPL).

Generally speaking, the CC's intervention in this aspect does not question the constitutionality of the statutory language regulation, as long as it affects the public functions implemented by these bodies and institutions,[39] although according to the interpretative bent noted above it does strive to accentuate some of the statutory lawmaker's options and weaken others. In the first sense, the ruling reaffirms the legitimacy of the statutory formulation of language rights as projections of co-official status, whose specification in the 2006 SoC contributed to stressing parallelism in the treatment of all the official languages.[40] In the second sense, we can note a certain blurring of the distinction between the language regime applicable in the local administrations of Catalonia (articles 6.1, 33.1 and 50.5 SoC) and the state administrations in Catalonia (articles 33.1, 2 and 5 SoC), which exemplifies the use of the expression *public power located in Catalonia* (FJ 23, paragraph four). This latter interpretative pattern reflects a certain homogenising bent inherent in the conception of *co-official status* upheld by the CC, which entails a partial legal distortion of autochthonous language as the underpinning of this regulation,

[37] Only questioned regarding the term *citizens*, which is interpreted in FJ 9 and 11 of the ruling.

[38] Article 33.2 SoC: "In their relations with the administration of justice, the Tax Ministry, notary publics and public registries, everyone has the right to use the official language of their choice in all legal, notary and registry actions and to receive all official documentation issued in Catalonia in the language requested, without their having to suffer from undue defencelessness or delays because of the language used; nor may they be required to provide any kind of translation."

[39] This limitation of the effects of the regulation established by articles 33.1 and 50.5 SoC to "public functions" enables the recurring generic allegations grounded upon articles 10.1 (dignity of the person), 38 (freedom of enterprise) and 139.2 SC (market unity) to be disregarded.

[40] The CC frames the favourable ruling on the constitutionality of article 33.2 SoC by the following consideration: "From the declaration of official status, it follows by constitutional imperative and without the need for any regulatory intermediation its condition as official language for all the public powers located in Catalonia, be they state, regional or local, providing citizens the right to use both languages in their interactions with these public institutions (SSTC 134/1997 dated 17 July 1997, FJ 2; and 253/2005 dated 11 October, FJ 10)" (FJ 21, paragraphs five and six).

where the argument of "normal use" is targeted at guaranteeing the position of Spanish in the state administrations in Catalonia.[41]

This argumentative thread takes shape in an interpretation of article 50.5 SoC in line with the constitution: with regard to internal or inter-administrative language uses, the terms of the constitution would allow the normal (or default) use of Catalan to remain intact in that the negative limit established ("without prejudice to being able to also use Spanish with normality") implies not excluding Spanish – as already holds true today – without this leading to any direct positive obligations for the administrations; with regard to external uses or relations with citizens, even though the normal use of Catalan is also allowed, the limit is specified as the ban on this leading to burdens or obligations for citizens who wish to receive communications in Spanish.[42] Even though this last point arouses doubts regarding the feasibility of a practical application of the ruling, it is indeed feasible to explore appropriate administrative solutions (such as through the possibilities offered by electronic communications on the availability of documents in different languages), a job which should also involve the administrations that depend on the state located in Catalonia, which are bound by the double official languages.[43]

Therefore, despite the fact that the ruling's argumentation superimposes a partially different logic than that contained in the statutory regulation, its pronouncements positively reaffirm the binding nature of the right to language choice in all the public administrations and institutions located in Catalonia, and especially those that depend on the state as outlined in article 33.1 and 2 SoC. Likewise, it also preserves the normality of the use of Catalonia derived from article 50.5 SoC by the local administrations "in the framework of the policy to foster and spread Catalan" – terminology which dovetails with the rubric of article 50 SoC.[44]

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[41] In this sense, the STC claims the following: "[...] All official languages are, therefore, – likewise wherever they share this quality with another language of Spain – languages of normal use by and before the public powers. In consequence, so is Spanish by and before the Catalan public administrations, which, as the public state power in Catalonia, cannot show preference for either of the two official languages" (FJ 23, paragraph four).

[42] According to the CC interpretation: "The precept, however, is in conformance with the constitution since it can be interpreted in the sense that, within the policy of encouraging and spreading Catalan, the public entities, institutions and companies to which the precept refers can use Catalan with normality, without prejudice to being able to also use Spanish with normality in their internal relationships, in relations among them and in their communications with private individuals, as long as the proper mechanisms are in place to ensure that the citizens' right to receive these communications in Spanish can be carried out without either formalities or conditions that entail a burden or obligation for them in their position as active subjects in their relations with the public administration." (FJ 23, paragraph five, end).

[43] In relation to the latter, the second report on the application in Spain of the European Charter of Regional or Minority Languages, adopted by the Council of Europe on 4 April 2008, covers the partial noncompliance with the order in article 10.1.b), which requires the peripheral state administration to make administrative forms and texts available in Catalan (http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/SpainECRML2_es.pdf).

[44] Therefore, the ruling does not impose the establishment of bilingualism in the functioning of the administrations in Catalonia and enables the basic continuity of the language model shaped by the 1979 Statute and the lower-ranking norms and laws that implement it. In this sense, and inasmuch as the declaration of the "preference" of Catalan as null and void should remain

b) Language training of staff

By virtue of its dual normative nature (as a basic institutional norm of the autonomous community and as a state organic law), the 2006 Statute includes diverse provisions regarding the need for proper and sufficient knowledge of the two state languages by civil servants or public servants dependent on the state who work in Catalonia in articles 33.4 (state administration staff), 102.1 and 3 (magistrates, judges and public prosecutors), 102.4 (staff serving the administration of justice and the public prosecutor's office) and 147.1.a (notaries), for which there are precedents in other statutory texts,[45] although this did not prevent all of these provisions from being contested by the People's Party.

STC 31/2010, which rejects the logic underlying the appeals that defend the right of state public servants to work while not knowing the *co-official* language in the region, endorses the constitutionality of the statutory principles of language training in that it guarantees the right to citizens' choice of language (FJ 21). Nonetheless, the language used by the CC seems to give primacy to a weak conception of the connection established by the statutory demands involving citizens' rights and public servants' duties, which are qualified in the same legal reasoning as "barely a likeness" of those rights or the "mere formalisation of a consequence" of official status or endowed with a "declarative nature as a constitutionally inherent consequence of co-official status".

Still, the most controversial aspect of this ruling is the striking assertion of the "exclusive and *excluding* competence" of the state to outline the statutory provisions, in contrast to previous pronouncements which admitted a certain normative collaboration or concurrence between the state and regional lawmakers with regard to the regulation of the linguistic aspects of the administration of justice (STC 56/1990). The current closure of competences is the outcome of another general interpretative pattern in this ruling that reassesses or absolutises the constitutional reservations in favour of specific organic laws, next to the generic citation of the state's competences over a given sector, in detriment to the expansion of the normative function of the Statute.[46]

limited to the generic definition of its official status in its statutes, the validity of the regulatory norms on the administrative uses of Catalan which do not mention Spanish in parallel is safeguarded, given that it could be interpreted that this does not imply that the use of Spanish is excluded from the functioning of the public administrations in Catalonia (an argument that STC 31/2010 admits, for example, with regard to the statutory regulation of language rights and uses in education in article 35.1 SoC).

[45] For example, article 25 of the 1981 Statute of Galicia stated that "in the resolution of tenders and state exams to fill the posts of magistrates, judges, legal secretaries, public prosecutors and all civil servants in the administration of justice, a preferential merit shall be [...] knowledge of the language of the country."

[46] According to FJ 21 of the ruling: "In turn, sections 3 and 4 of art. 33 SoC, based on the right of language choice inherent in co-official status and proclaimed in art. 33.2 SoC, aim to ensure the effectiveness of this right in exclusive realms of state competence [...]. Still, since in the case of section 3 this is a demand for whose articulation the Statute refers to "the form established in the laws", and it being obvious that this can only refer to state laws by virtue of the reservations established in articles 122.1, 124.3 and 149.1.5, 8 and 18 SC, it can easily be seen that these sections of art. 33 SoC are hardly a likeness of the section preceding them, that is, the mere formalisation of a consequence inherent in the declaration of co-official status contained in art. 6.2 SoC: the right to language choice (art. 33.1 SoC), derived from individuals' right not to be discriminated against based on language (art. 32 SoC). To be exercised before the public

Thus, the statutory provisions on language training for public servants are conceived as principles that the state lawmaker shall flesh out with a broad leeway of discretion.[47] The only exception to this excluding criterion is in relation to non-judicial and non-prosecutorial staff in the administration of justice (articles 102.4 and 103 SoC), without prejudging the normative specificity of the duty to know the language as a requirement or merit, and with the express warning by the CC that the intervention of the competent lawmaker on this matter, regional or state, shall in any case be subjected to its judgement (FJ 21, paragraph nine, end).

Finally, in relation to article 101.3 SoC, which provides for the use of both official languages in competitions for legal places in Catalonia, the CC considers this an expression of the right to language choice, and as such it is not questionable inasmuch as it affirms the competence of the organic state lawmaker to implement it. What is more, the CC adds a corrective reinterpretation which restricts its sphere of application to the "citizens of Catalonia" (FJ 50, paragraph four), which would unjustifiably exclude citizens from other autonomous communities where Catalan is also official (a criterion that STC 55/199 bore in mind in relation to administrative procedures).

c) The right to use Catalan before state constitutional and jurisdictional bodies

From the perspective of citizens' language rights, article 33.5 SC recognises the possibilities of written uses of Catalan, with legal effects, outside the strict territory where this language is official, in relations with the constitutional bodies (including the King, the Cortes Generales, the government, the Constitutional Court and the Defensor del Pueblo and the state jurisdictional bodies (the Supreme Court and the National Court), which are expressly conditioned by the provisions of the legislation, clearly referring to state laws.[48]

The CC'S line of argumentation regarding the contestation of this precept (FJ 21, paragraphs twelve to fifteen) deserves careful analysis given its strong interpretative component. First of all, the CC preventively discards as unconstitutional an interpretation of the precept – never sought by the statutory lawmaker[49] – according to which Catalan can be considered an "official"

institutions whose discipline corresponds to the state, this would require the compulsory and excluding intervention of the state lawmaker, and in particular, with regard to judges and magistrates, the organic lawmaker of judicial power". An identical argumentative scheme is applied to the more specific analysis of articles 102.1 and 147.1.a) SoC within this legal reasoning (which refers to 51 for the first precept and 90 for the second).

[47] Despite the devaluation of the binding legal efficacy of the statutory orders, on this point the existence of the statutory reservation of article 3.2 SC enables us to avoid the declaration of unconstitutionality of articles 101.3 and 102 SoC that affects much of Section III SoC, "On judicial power in Catalonia" by considering that the CC is invading the sphere of organic law called for in article 122 SC.

[48] This precise point was introduced based on the sole objection to the language regulation in the proposed organic law reforming the Statute approved by the Parliament of Catalonia formulated by the Consultative Council in its Opinion 269/2005.

[49] In reality, the desire to extend the official status of Catalan around the state could not be attributed to the statutory precept (which strips the ruling's preventative declarations of meaning), which limits it to the specific aspect of citizens' written relationship with the bodies which, precisely because they are general or shared, directly exercise competences over Catalan

language before the state bodies not located in Catalonia proper; secondly, through a superimposition of criteria of the location of these excluded bodies (seat of authority / scope of reference of their activity), the official status of the Catalan language is territorially limited in strict terms, which contrasts with the description of Spanish as the "only shared language of Spain" (expressing the desire to favour a unique, excluding position of Spanish as the language of inter-territorial or "shared" communication); and finally, the constitutional legitimacy of the statutory precept is salvaged by wholly conditioning the content and efficacy of the proclaimed right on the provisions of the state lawmakers.[50] Therefore, even though the statutory order which requires the state to develop the multilingualism of the constitutional and jurisdictional bodies in the sense called for by the norm is maintained, the ruling reopens diverse alternatives in terms of the intensity and effects of the language uses provided for.[51]

4.2. Education

With regard to education, STC 31/2010 ruled on article 6.1 SoC, that within the framework of the definition of autochthonous language it declared that Catalan "is the language usually used for instruction and learning in education", and on the language rights contained in the first and second sections of article 35 SoC[52] (despite the fact that the appeal encompassed the entire precept, the CC excluded from its analysis the remaining sections that call for identical

speakers, and in which we can already find specific examples of these uses (communications from citizens to the Senate, or the sporadic admission of texts in Catalan by central jurisdictional bodies). What is more, we must refer to the doctrine contained in the CC's Interlocutory 27/2010 dated 25 February 2010 and cited above, which admits the legitimacy of regulatory recognition of uses with linguistic effects for citizens before administrative bodies in relation to non-official languages in a given territorial sphere. The more nuanced tone of this Interlocutory contrasts with the CC's current affirmation: "Section 5 of art. 33 SoC, in turn, would run counter to the constitution if the Statute aimed to derive from the co-official status of the Catalan language its quality as a legally valid means of communication with the public powers not located in the territory of the autonomous community of Catalonia. This condition is exclusive to Spanish" (STC 82/1986 dated 26 June 1986, FJ 2) [...]" (FJ 21, paragraph twelve).

[50] In a new example of the degradation of the binding legal efficacy of the Statute (which in the original wording of article 33.5 approved by the Parliament of Catalonia guarantees the legal effects "without the need for translation"), the CC's interpretation notes that "this legislation [the state] must be responsible for not only the way in which that right should be exercised and made effective but, even before that, must duly define its content and scope. In this sense, the existence or not of legal efficacy of the texts presented in Catalan to these bodies and, if applicable, the degree of this legal efficacy must be established with full freedom within the constitutional limits (article 3.1 SC) by the competent state lawmaker" (FJ 21, paragraph fourteen).

[51] In this sense, we should note the risk of a specificity of the statutory order similar to what has ended up happening with the recognition urged by the state government of "official uses" before EU institutions and bodies which, in reality, does not imply an official use because the translation of the text into Spanish must be attached, which the state has subsequently ignored.

[52] Article 35 SOC: "1. Everyone has the right to receive education in Catalan, in accordance with the provisions of this Statute. Catalan should be regularly used as the language of instruction and learning in university and non-university education. 2. Students have the right to receive education in Catalan in non-university education. They also have the right and duty to have sufficient oral and written knowledge of Catalan and Spanish by the time they finish their compulsory education, regardless of their habitual language when entering the educational system. Education in Catalan and Spanish must have an appropriate presence in the curricula."

treatment of both languages, including the third section, which establishes students' right "not to be separated into different centres or class groups based on their habitual language", as a cornerstone of the educational language system currently in place in Catalonia).

The ruling's argumentation on this point is conditioned by the prior conceptualisation of the principles of *autochthonous language* and *co-official status* (FJ 14), which are outlined in an initial preventative pronouncement on article 6.1 SoC, according to which the normality of the use of Catalan is considered legitimate as long as it is "equally declared for Spanish" and does not violate the ban on excluding Spanish as the language of instruction.[53]

The more specific argumentation deployed by the CC with regard to article 35 SoC does not question the two cornerstones of the doctrine formulated by STC 337/1994 – which declared the constitutional conformity of the educational language model within the 1983 LNL: the first signals the constitution's lack of a value or fundamental right that equates the right to receive instruction in a given language, based on the students' or his parents' choice; and the second entails the autonomous community's competence – within the framework of the basic state legislation – to determine the language model from the standpoint of the language of instruction, without prejudice to the state's competence to guarantee respect for language rights in the sphere of education.[54]

In fact, the broad underpinning of FJ 24 in the ruling on this point – which contrasts with a certain apodictic nature of other parts of the document – summarises the argumentative items in STC 337/1994, which are now generalised "to the entire educational process" (FJ 24, paragraphs six and seven), specifically:

> The constitutional legitimacy of education in which the language of teaching is the autochthonous language of an autonomous community.
>
> The constitutional right to know Catalan does not lead to a purported right to receive education exclusively in this language.
>
> The state has the authority to ensure respect for language rights in the sphere of education and in particular the right "to receive education in the official language of the state" (6/1982, FJ 10), "since it should not be forgotten that the constitutional duty to know Spanish (art. 3.1 SC) presupposes the satisfaction of the citizens' right to know it through the education received in elementary school".

[53] The core issue of constitutionality analysed by the CC in relation to article 35.1 and 2 SoC is summarised in these terms: "The problem of constitutionality, therefore, lies in determining whether the expressions that have just been transcribed imply, as a necessary consequence, denying Spanish its condition as a language of instruction." (FJ 24, paragraph two, end)

[54] In this sense, we should welcome the pronouncement of STC 31/2010 in relation to education, which departs from the theses upheld by the appellants (whose priority objective was to question the educational language model in force in Catalonia), which are upheld, however, by four signatory magistrates of the particular votes which unsuccessfully tried to force a change in the CC's doctrine on this matter.

> From the content of the fundamental right to education, in particular article 27, sections 2, 5 and 7, we cannot glean the right to receive education in only one of the official languages.
>
> It is the competence of the public powers, of the state through the basic legislation and of the autonomous communities as part of their educational competences, to determine the curriculum and organise its implementation at schools, such that the right to education "does not mean that the activity provided by the public powers in this field can be conditioned by the free choice of those interested in the language of teaching. And the powers – the state and the autonomous community – are therefore authorised to determine the use of the two languages which are co-official in a given autonomous community as languages of communication in education in accordance with the division of competences on educational matters."
>
> The autonomous community may organise the use of Catalan and Spanish as the languages of instruction in education combining the objectives of linguistic normalisation and the right to education "in relation to the different areas of required knowledge at the different educational levels to achieve a result proportional to these purposes."
>
> The right to language choice in the sphere of education must be modulated: both languages should be both taught and should be the languages of instruction, and it should be perfectly "legitimate that Catalan, in view of the objective of linguistic normalisation in Catalonia, is the centre of gravity of this model of bilingualism", even though with the ineluctable limit that "this does not determine the exclusion of Spanish as a language of instruction so that its knowledge and use is guaranteed in the territory of the autonomous community".

Nonetheless, STC 31/2010 adds to all the above several specifications whose meaning is somewhat unclear in terms of the more or less rhetorical or modulating scope of the decisions of the public powers in this sphere, as a constitutionally appropriate interpretation of the prescriptions of article 35 SoC, "in the sense that they do not impede the free and effective exercise of the right to receive education in Spanish as the language of instruction and learning in education" (FJ 24, paragraph eight) or the "equal use of Spanish" or the very "existence of the right to education in Spanish" (FJ 24, paragraph eight).[55] In

[55] In the words of the CC: "It is true that section 1 of article 35 SoC literally omits any reference to Spanish as a language of instruction. However, it cannot be understood that its silence on a circumstance that is imperative based on the constitutional model of bilingualism reflects a deliberate intention to exclude it given that the statutory precept is limited to stating the duty to use Catalan "normally as the language of instruction and learning in university and non-university education", but not as the only language, therefore impeding – as it could not – the equal use of Spanish. In consequence, the second point of article 35.1 SoC is not unconstitutional if interpreted in the sense that the mention of Catalan does not deprive Spanish of the status of language of instruction and learning in education. Along the same lines, the sole recognition of a right to receive education in Catalan (first point of section 1 of art. 35 SoC) cannot be interpreted as expressing an inadmissible legislative desire for exception, so the constitutionally admissible interpretation is the one that leads to the existence of the right to instruction in Spanish. The same holds true for the first point of section 2 of art. 35 SoC." (FJ 24, paragraph seven).

the context of this ruling, the intention inspiring these notes regarding guaranteeing the position of Spanish in this sphere as well seems clear, based on article 3.1 SC.[56] Still, the CC does not extract specific consequences of the limits formulated on the non-exclusion of Spanish or the principle of proportionality in relation to the different purposes present in the sphere of education, so the autonomous community bodies retain their capacity to define the educational language model from the perspective of the language of instruction.

4.3. Socioeconomic sphere

The two statutory linguistic prescriptions related to the socioeconomic sphere, which establish the rights of consumers and users (article 34 SoC[57]) and the guiding principle of encouraging labelling in Catalan (article 50.4 SoC[58]), were questioned by the People's Party and the Public Defender based on reasoning that the CC itself criticised for its "generality" which is based on a prejudice – denied by comparative law and by the existing regulations statewide with regard to the use of Spanish – that runs contrary to the linguistic intervention of the public powers in these spheres (Milian, 2010: 141 and following).

With regard to article 34 SoC, in FJ 22 of the ruling the right to linguistic availability by companies, private entities and establishments open to the public is viewed as a "necessary consequence of the right to language choice, and specifically, of users' and consumers' right to be served in the official language they choose." Therefore, according to the CC, this abstract proclamation does not violate the precepts of the fundamental rights regarding the free development of the personality, the freedom of movement of people and goods or the freedom of enterprise (articles 10, 19 and 38 SC), which clearly admit limits, nor the guarantee of the unity of the market (article 139.2 SC). Despite this, the ruling does not only forward the implementation of this duty by the competent lawmaker to possible constitutional judgement but it also adds a preventative declaration – without grounding it upon any specific constitutional precept – by stating that

> *this cannot entail the imposition on these, on their owner or personnel, of individual obligations of use of either of the two official languages generally, immediately and directly in private relations, since the right to be served in any of these languages can only be*

[56] In fact, within the framework of comparative law, from a language's official status we can glean the public powers' obligation to teach the official languages via the educational system, but without this predetermining the use of the language as the language of instruction, an argument which will prevent abusive consequences from being drawing this sphere from article 3.1 SC. Nor from international law can receiving education in the child's habitual language be interpreted as a human right (Pons, 2006: 74-77), even though the decisions of the public powers can be subjected to certain limits.

[57] Article 34 SoC: "Everyone has the right to be served orally and in writing in the official language that they choose as the users or consumers of goods, products and services. Entities, companies and establishments open to the public in Catalonia are subjected to the duty of linguistic availability in the terms stipulated by law."

[58] Article 50.4 SoC: "The public powers must encourage the information appearing on labels, packaging and user instructions of products distributed in Catalonia to also appear in Catalan."

demanded in relations between the public powers and citizens (FJ 22, paragraph three),

which does not, however, exclude a relatively broad margin of intervention for the regional lawmakers to specify the legal techniques used to guarantee the rights to oral and written service to citizens in their capacity as consumers and users in the two official languages.

With regard to the regulation on labelling contained in article 50.4 SoC, the CC has no objections if the precept is reconducted towards an order to encourage or promote the use of Spanish. Likewise, the argumentation in the ruling inspires two observations: first, because of the debatable nature of the statement that deems it "a matter outside the scope of definition of the legal co-official status of a regional language" as "a commitment to promote linguistic normalisation" (STC 69/1988, dated 19 April, FJ 3), which is not an obstacle to ratifying the non-exclusion of Spanish as a limit (which is already guaranteed by the adverb also introduced in the precept by the General Courts); and secondly, by its preventative nature in anticipating limits to the legal implementation of the statutory precept, in this case from the standpoint of competences, without mentioning article 143 SoC.

5. Final reflections

The reading – and therefore the necessary rereading – of the interpretative arguments and pronouncements of STC 31/2010 lead us to final reflections on its influence on the objectives of the statutory reform on language matters. This overall or transversal reading of the effects of the ruling can be approached from the perspective of self-governance on language matters, which, though partially concealed within its legal reasoning, becomes the result of the two general kinds of constitutional limits – substantive and competence-based – that can be identified.

With regard to the first kind of limit, a detailed analysis of the arguments and interpretative declarations made on the statutory concepts and category (on autochthonous language, official status, language rights, language training of civil servants and public servants and linguistic availability in companies and establishments open to the public), even though in many cases they point to a diminishment of the value and binding regulatory efficacy of the Statute – which is especially objectionable in language matters given the reservation contained in article 4.3 SC – they do not substantially alter the material bases upon which the language system currently in force in Catalonia is grounded, and it enables the full constitutionality of Law 1/1998 dated 7 January 1998 on language policy, as well as the decrees that implement it and the subsequent sectorial norms that are grounded upon it, to be maintained.

With regard to the competence-based limits, we should stress that the ruling does not directly affect article 143 SoC, which today attributes an explicit competence-based grounding of the Generalitat's intervention in relation to autochthonous language, which can be connected to other regional sectorial spheres (culture, education, immigration, public function, consumer affairs, etc.). Still, from this perspective as well we should consign the effects of the

ruling's weakening on the position of the Statute as a norm delimiting competences, which is translated into the deactivation of the historical rights entailed in article 5 SoC, namely "the recognition of a unique position of the Generalitat with regard to [...] language" as an autonomous underpinning of self-governance or a generator of added competences (FJ 10); the restrictive interpretation of the content of the exclusive competences contained in article 110 SoC (FJ 59); the generic and unconditioned references to the state's sectorial competences; and the reassessment or virtual absolutisation of the constitutional reservations in favour of specific state laws.

Consequently, in the vein of some critical readings that stress several *concealed rulings* within STC 31/2010, identifying in it several non-express lines of argumentation that condition the often apodictic pronouncements on the constitutionality of the statutory precepts and their future implementation, on language matters we can identify a twofold underpinning: first, the mistrust shown towards the regional lawmaker, which is translated into the constant limiting interpretations and admonitions on possible regulatory implementations of the statutory linguistic prescriptions; and secondly, the deferential treatment of the organic or ordinary state lawmaker, which is guaranteed broad room to implement the linguistic orders that affect it, which detracts from the effectiveness of the statutory reform as a mechanism for driving the still-insufficient adaptation of the state administration in Catalonia to the system of double official status and to make headway towards the respect for multilingualism statewide.

The final assessment of the effects of STC 31/2010 should nonetheless reveal its partial nature – an adjective which we are not trying to link to the composition of the CC that issued it, altered by recusals and a lack of substitutions or replacements of many of the magistrates – which, without prejudice to the breadth of the contestation, hinders us from viewing it as a global, definitive pronouncement on the constitutional limits of the language model for a variety of reasons: its necessary insertion and contextualisation in the previous constitutional jurisprudence; the ambiguity of its abstract arguments in which the logic that inspired the Catalan linguistic legislation in relation to the evolution in the process of normalisation has been ignored; the role of "stone guest" reserved for the Generalitat, by pivoting the argumentation on the appellants' desire to contest the Statute; and finally, the inherent limits on jurisdictional intervention in the definition of the language model which, as an aspect intrinsically linked to the model of state, must ultimately be the outcome of a political pact or consensus.

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Annexe

Articles or sections	General Courts (PSOE amendments)	Public Defender appeals	People's Party appeals	STC 31/2010
5	(x)	(x)	(x)	Interpretative Part containing provisions
6.1	x	x	x	Partial nullity
6.2	x	x	x	Interpretative Part containing provisions
6.3	x		x	Not analysed Lacks grounding for contestation
6.5	x		x	Not analysed Lacks grounding for contestation

Articles or sections	General Courts (PSOE amendments)	Public Defender appeals	People's Party appeals	STC 31/2010
11	(x)		x	Interpretative (not linguistic) No to part containing provisions
32	x			
33.1			x	Interpretative (not linguistic) No to part containing provisions
33.2			x	Interpretative No to part containing provisions
33.3	x		x	Interpretative No to part containing provisions
33.4			x	Interpretative No to part containing provisions
33.5		x	x	Interpretative Provisions
34		x	x	Interpretative Provisions
35.1			x	Interpretative Provisions
35.2			x	Interpretative Provisions
36.1			x	Interpretative (not linguistic) No to part containing provisions
36.2			x	Interpretative (not linguistic) No to part containing provisions
50.4	x		x	Declaration of constitutionality

Articles or sections	General Courts (PSOE amendments)	Public Defender appeals	People's Party appeals	STC 31/2010
50.5			x	Interpretative Part containing provisions
101.3			x	Interpretative No to part containing provisions
102.1		x	x	Interpretative No to part containing provisions
102.3		x	x	Reinterpreted No to part containing provisions
102.4		x	x	Interpretative No to part containing provisions
147.1.a		x	x	Interpretative No to part containing provisions

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Internet in the feminine: Using feminine strategies in hacker culture

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Abstract

A number of feminist movements have historically accused technology of being part of the patriarchal structure. Indeed, different studies demonstrate that access to the design and development of technology has an uneven gender distribution. However, Internet is a cultural production and, according to Castells, hacker culture is an essential component of the cultural underpinning of the Internet. This new culture comprises several characteristics that are closely tied to the values which are historically considered to be "typically feminine", such as creativity, cooperation and informality. Castells argues that technology is a fundamental dimension of social change and that the type of technology a society develops and disseminates is, to a great extent, a model of its material structure. Therefore, cyberfeminists see this new technology as the possibility for women to access the technology itself, to use it and be part of its design. Is the Internet an opportunity to eradicate the gender digital divide?

Key words: Internet, technology, hackers, gender, digital divide, free culture

1. Introduction

Studies show that access to the development and study of technology by gender is still profoundly unequal. Despite this, sociologists like Manuel Castells hold that hacker culture is the underpinning of the Internet as a cultural product.

The purpose of this article is to take a theoretical approach to defend the fact that this new culture has characteristics that turn into something closer to the values that have historically been considered "feminine", such as creativity, cooperation and informality, and that the Internet may therefore be an opportunity to put an end to or to diminish the gender digital divide.

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2. The second digital divide: Gender

The new information and communication technologies (ICTs) are a fundamental factor in the information society, and as such they have a major economic and social impact (Montagnier, 2007). ICTs are a means of empowerment for individuals and social groups since they offer the instantaneous capacity to access and share information and to organise resources more cheaply and quickly than ever before (Castaño, 2008). Yet despite this, there are still millions of people in the world who do not have access to these technologies.

This unequal access to ICTs (and especially the Internet) caused by physical or socioeconomic barriers is called the *digital divide*. The digital divide is also correlated with factors like race and ethnicity, age, geographic location... and gender. Still, some scholars believe that this first divide, which mainly considers physical access to the web, is beginning to subside (Katz and Rice, 2002).

But physical access to the Internet is not the only thing that causes a divide or fracture. The differences in an individual's ability to make use of the potential of the new technologies are called the *second digital divide*, and this reflects what Van Dijk (1999) notes as the absence of elementary digital experiences caused by the lack of interest, anxiety, the lack of appeal of ICTs and a lack of digital skills as the outcome of the user's insufficient *friendliness* or inadequate education or social support.

As an extension of the second digital divide, Paul Gilster (1997) created the concept of digital literacy to define the replacement of television, telephones and newspapers by the new technologies and to refer to individuals' ability to adapt to the new digital environment. Today, in a broader sense, digital literacy describes and measures the kinds of skills that vary among different groups of people depending on certain contextual and structural variables.

Lately, beyond the concept of digital literacy, the term *digital fluency* is being used (Castaño, 2008). Digital fluency is a dynamic process through which students use and transform different signs and design new meanings. It implies movement, unlike literacy, which is a static concept (Sáinz, Castaño and Artal, 2008).

As we have seen, apart from the (rising) number of users who have access to the Internet, the quality of this use is very important in discerning the digital divide. In 2006, the Organisation for Economic Cooperation and Development distinguished between ICT users and experts, and it established three categories (Castaño, 2008):

— *Basic users*: They competently use the generic tools needed for the information society, electronic administration and jobs (document managers, spreadsheets, email, etc.).

— *Advanced users*: They use specific programming tools from specific sectors, even though ICTs are not the purpose of their work but instead just a tool.

— *ICT experts*: They are able to create and maintain systems, such that ICTs are a fundamental part of their jobs.

According to Van Welsum and Montagnier (2007), just as the number of basic users is rising, the number of ICT experts in the United States is no more than 7% in the most advanced categories – computer and electronic engineers – and 50% in the less relevant categories – database administrators, operations analysts.

The table below shows the figures on higher education based on Eurostat data (2007):

Table 1: Higher education and computer skills

Tertiary education and computer skills

	Share of those aged 25-59 having graduated from tertiary education, Q2 2006		Computer skills**, Q2 2006							
			Women aged 16-74, in %				Men aged 16-74, in %			
	Women	Men	None	Low	Medium	High	None	Low	Medium	High
EU27	**23.8**	**23.1**	:	:	:	:	:	:	:	:
EU25	**24.3**	**23.7**	**44**	**15**	**26**	**15**	**38**	**11**	**22**	**29**
Belgium	33.5	30.9	45	16	24	15	36	13	22	29
Bulgaria	27.1	16.9	69	12	14	5	70	10	12	8
Czech Republic	12.6	14.7	49	16	25	10	47	15	19	19
Denmark	38.9	32.6	18	18	39	25	14	10	24	52
Germany	20.8	28.0	29	20	35	16	21	14	28	37
Estonia	39.0	28.3	49	10	22	19	47	9	13	31
Ireland	33.9	28.5	58	14	12	16	58	13	7	22
Greece	22.3	22.8	60	13	14	13	53	15	13	19
Spain	30.6	28.9	49	12	22	17	43	9	19	29
France	28.2	24.7	49	11	25	15	41	9	22	28
Italy	14.3	12.3	64	8	17	11	54	7	16	23
Cyprus	31.1	32.1	56	8	20	16	53	10	15	22
Latvia	27.8	15.1	53	17	22	8	51	15	18	16
Lithuania	32.0	24.3	53	12	24	11	54	11	15	20
Luxembourg*	25.4	29.4	37	14	28	21	17	9	23	51
Hungary	19.7	16.3	43	11	25	21	44	9	17	30
Malta	13.0	12.1	53	10	17	20	50	8	21	21
Netherlands	29.0	32.2	30	27	41	2	19	15	54	12
Austria	15.8	20.4	38	15	27	20	27	9	22	42
Poland	20.7	15.7	55	18	19	8	53	15	17	15
Portugal	16.6	11.6	61	8	15	16	55	8	12	25
Romania	11.9	12.5	:	:	:	:	:	:	:	:
Slovenia	25.5	18.8	47	11	22	20	37	10	17	36
Slovakia	13.9	15.0	37	20	34	9	34	16	25	25
Finland	41.8	30.0	29	18	34	19	25	13	24	38
Sweden	36.7	26.1	22	23	38	17	18	12	28	42
United Kingdom	30.6	31.0	38	15	28	19	30	9	26	35

* Data for those having graduated from tertiary education refer to Q2 2005

** Skills surveyed included the ability to:
- copy or move a file or folder;
- use copy and paste tools to duplicate or move information within a document;
- use basic arithmetic formula (add, subtract, multiply, divide) in a spreadsheet;
- compress files;
- connect and install new devices, e.g. a printer or a modem
- write a computer program using a specialised programming language.

In the survey, persons who ticked **none** of these six items were classed as having no computer skills, those who ticked 1 or 2 of these skills were classed as having **low level** basic computer skills, those ticking 3 or 4 were classed **medium level**, and those ticking 5 or all items were classed **high level**.

: Data not available

Source: Eurostat (2007).

First of all, we can see that the percentage of men and women in the European Union who have earned "tertiary education" (higher education) is very similar, with a slight advantage of female university graduates (23.8%) than male graduates (23.1%). Even in countries like Sweden and Estonia, the difference between the two sexes is as high as 10 to 11 points, with the balance in favour of women.

Despite this, if we compare these figures with the following columns in Table 1, which show people's computer skills, we can see that more men have a high level of computer skills than women in each European Union country. If we take Sweden as an example, where we have seen that there are far more women with higher education (36.7%) than men (26.1%), computer skills show an inversion of this trend, since 42% of the men have high-level skills compared to just 17% of the women. A lack of access to higher education is clearly not the reason why the women's computer skills are not as high.

According to the figures, we could conclude that "technology is masculine".[1] Regardless of whether or not it is, what is clear is that men develop technology: technical degrees are "traditionally male" degrees, as some authors (Elejabeitia and López Sáez, 2003) call degrees in which women account for fewer than 30% of the students.

More than men or women's "innate" or biological vocation for certain activities, the causes of this situation should instead be sought in the differences in the way males and females are socialised, as noted by Sáinz and González (2008). Sáinz (2006) holds that a combination of sociocultural factors (such as the structural variables of social class and rural/urban setting, along with gender roles and stereotypes and social influence over the choice of technical degrees) and psycho-social factors (attitudes, skills, interests, expectations of success, etc.) is what determines whether boys and girls choose technical degrees or not. For example, gender roles and stereotypes mark the choice of technical studies as "masculine", so women who choose this pathway are socially sanctioned by being stigmatised as "not very feminine" (Sáinz and González, 2008). Even in the use of technology among the new generations, the study by Thornham (2011) shows how adolescents explicitly associate the lack of technological skills or technological incompetence with gender.

Women's lack of access to the development of technology would thus signal a much more subtle digital divide than the one that refers solely to access to and basic use of the new technologies. This alternative divide would not only maintain the traditional male dominance in technology but would also block women's access to better jobs (higher pay, with more responsibility and more leadership).

3. Internet as a cultural production in the information age

As is well known, the Internet was developed as a project initially financed by the United States Department of Defence, specifically by the Advanced Research Projects Agency (ARPA), which commissioned the top researchers at the leading American universities to develop a technology which would prevent serious

[1] The relationship between feminism and technology is examined in Wajcman (2004).

information losses in the event of enemy attacks (Abbate, 1999). The first network, the precursor of the Internet, was thus called ARPANET (Advanced Research Projects Agency Network), and it connected such far-flung universities as Massachusetts Institute of Technology (MIT), Harvard, Illinois, Utah, Stanford and the University of California at Los Angeles, among others. In this way, the researchers could contact each other and share their advances using the technology itself.

As Abbate (1999) holds, the communicative identity of the Internet was not inherent to the medium; rather it was constructed based on social choices during its creation. The practices of the very users and researchers who were working on the project gave shape to what would later become the Internet, defining its structure and purposes. Abbate believes that the history of the apparently chaotic creation of the Internet was unique in that it was characterised from the start by decentralisation, fluency, collaboration (between universities and researchers) and informality.

Manuel Castells (2001) analyses the "lessons" taught to us by the Internet as a technology from the socio-structural vantage point. The first lesson, we which have discussed, is related to the military origin of the Internet from the financial standpoint, and to the origin of the web (Internet) at universities with regard to its technological contributions. To this Castells adds the radical libertarian counterculture which views the Internet as an instrument of autonomy from the state and big business. After all, we should recall that the Internet did not emerge from large business groups or from their culture, and even today it retains a degree of autonomy from all states that is totally unimaginable with any other means of social communication.

There are two aspects that Castells tries to stress as extremely important in terms of hacker culture. First of all, from the very the Internet was developed based on an open, free-access computer architecture start. The core Internet TCP/IP protocols, created in 1973-1978, are open to anyone since their source code is open. The World Wide Web is also open, and Apache, the programme that sustains more than two-thirds of the web servers in the world today, is also open-code. Secondly, the producers of Internet technology were fundamentally its users: the researchers in academia initially produced the technology, but there have been constant modifications in the applications and technological developments by the users in a steady reciprocal feedback process, one of the sources of the Internet's dynamism.

These unique features of the Internet shape its "personality" and give the characteristics of something uncontrollable, libertarian, etc. Castells states that this idea "is in the technology but it is because this technology has been designed, throughout its history, with this intention in mind" (2001). That is, it is an instrument of free communication because it was created by people who wanted it to be so.

For this reason, the Internet is a privileged form of action and organisation for social movements, because this is part of its essence.

In today's climate of crisis in traditional organisations and institutions, such as political parties and unions, new social actors are emerging who are organising themselves around specific projects and objectives, campaigns which have a very specific cause (saving the whales, stopping the demolition of a

historical building, earmarking 0.7% of the GDP to development cooperation, etc.). Generally speaking, there has been a leap in organised social movements towards networked social movements based on coalitions assembled for specific projects. The Internet is an instrument of communication which empowers the flexibility and temporality of this kind of mobilisation.

What is more, through the Internet, campaigns and mobilisations can be organised worldwide, and in this way specific local actions can be connected via the web. This unique feature has been skilfully exploited by anti-globalisation movements as well as by more low-key campaigns such as the global blackout against climate change. "The Internet is the global-local connection, the new form of control and social mobilisation in our society" (Castells, 2001).

In short, the Internet does not prompt social changes per se, but it is the material and technological underpinning for the development of new forms of social interaction and social structures. The Internet has an intention, and this intention, linked to the base cultures that make it up, has now become a new culture.

3.1. Hacker culture as the underlying culture of the Internet. The hacker ethic

As we have seen so far, once again following Manuel Castells (2003), the Internet is a combination of four cultures that mutually support each other: the university research culture (which initially made the technology of the Internet possible), the hacker culture with its passion to create, the counterculture of inventing new social forms and the business culture of making money through innovation. And they all share a common denominator: the culture of freedom.

We are going to focus on the second of these cultures: hacker culture.

But before we go on, what exactly is a hacker?

The term 'hacker' emerged in the 1960s around the MIT computers (Lunceford, 2009). In 1969, with the creation of ARPANET, its electronic highways attracted hackers from all over the United States in a critical mass: instead of remaining in small local groups developing ephemeral local cultures, they reinvented themselves in an interconnected tribe (Raymond, 1999). Therefore, hacker culture grew at the universities connected to the Internet.

The Jargon File,[2] a file containing the entire glossary used in the hacker world, offers a host of definitions of the term 'hacker', most of them based on a love of technical things and the pleasure of resolving problems by stretching beyond the usual boundaries. In fact, one of the problems is that there is a discrepancy between hackers' image of themselves and their public image, which is mainly constructed by the media (Sollfrank, 1999). This is due to confusion in terms. The media usually use the word 'hacker' when they should really be talking about crackers, people with high computer skills who commit vandalism or criminal acts via the Internet.

Hackers are also people with high computer skills, but far from committing crimes (at least in an organised fashion), they programme for pure pleasure and not for gain (Lunceford, 2009). Cornelia Sollfrank (1999) holds

[2] <http://www.catb.org/jargon/> (Retrieved 9 May 2009).

that when the term was created in the 1960s around MIT, it was positive. Some of the earliest hackers created a "hacker ethics" based on the freedom of information and respect for the privacy of others' information.

In 1982, Richard Stallman began to create GNU (*GNU is Not Unix*), a Unix clone but in open code.

One of the most famous contributions to freeware is Linux. In 1991, a student at Helsinki University, Linus Torvalds, published an early version of this operating system on the Internet. He published the code and stated that any new addition that improved upon his version would be welcome. Thus, millions of users all over the world participated in creating this new operating system called Linux, based on small contributions that Torvalds himself screened, adding the ones that worked the best (Himanen, 2002). The quality remained the same, not with rigid standards but with the simple strategy of publishing every week and getting responses from thousands of users within a matter of days. To almost everyone's surprise, this system works quite well (Raymond, 1999).

In the late 1990s, the main activities in hacker culture were the development of Linux and the spread of the Internet. Many hackers in the 1980s set up web service providers with the intention of providing the public at large with access (Raymond, 1999).

According to Raymond, the hacker mindset is not confined solely to the culture of software; instead, it is an attitude that can be applied to any art or science. In 1997, this same author published an article which would become a referent in the world of freeware: *The Cathedral and the Bazaar*. In this text, Raymond uses two metaphors to sketch out the process of constructing freeware the way hackers do compared to exclusive software. The latter would be similar to the process of constructing a cathedral, large-scale projects devised by geniuses and performed by ranks of workers who toil endlessly, in *aeternum*, without preliminary (beta) versions. In contrast, judging from the example of Linux, freeware is more like a bustling bazaar full of individuals with different interests and purposes (represented by Linux's file repository, which could accept versions from anyone) from which a stable, coherent system would emerge.

In an interview (Engler, 2000), the hacker Barbara Thoens explained:

> *"It is a life attitude that means that you are curious, that you live by getting involved with [computer] systems, that you are interested in finding out what is behind things; but it is not only about computer issues. The idea is to do things by yourself. Realise that you can set up your own system, that you can make your own tools: that is one of the most important parts of hacking to me. Because to me hacking is creating, not destroying; you can learn a lot from that. Knowledge is connected with power much more than we think. To me it is very important to attain my own knowledge or have networks with other people where I can share it. It is really great to have a community with which you can exchange these ideas; I think that it can be truly subversive."*

In 2002, Pekka Himanen published the book *The Hacker Ethic and the Spirit of the Information Age*. In this book, Himanen reveals the revolutionary values that sustain hacker culture and contrasts them with the prevailing Protestant ethic in capitalism, especially in two basic factors: time and money.

The hacker ethic is a new morality which challenges the Protestant work ethic as it was outlined a century ago by Max Weber: grounded upon diligent toil, the acceptance of routine, the value of money and a concern with the results. In contrast to this, the hacker work ethic is grounded on creativity and consists of combining passion with freedom. Himanen revives the "passion" and "enthusiasm" of the multiple definitions of hackers and attributes an ethical nature to the act of sharing their skills by devising freeware and providing access to information and resources.

Throughout this argumentation, Himanen uses the simile of the Academy and the Monastery to sketch, respectively, the hacker world, which he symbolises by Plato's Academy, and the Protestant ethic, represented by the Monastery.

To begin with, hackers establish a passionate relationship with their work, something which dates far back in the world of academia (Plato said this of philosophy). In contrast, in the Protestant ethic one assumes that the individual feels an obligation, a duty, in their work. This is not only a sense of responsibility but an attitude. Work should be performed as an end in itself as Max Weber claimed in *The Protestant Ethic and the Spirit of Capitalism* (1904-1905).

The network society does not question the Protestant ethic; Castells argues that work (meant as paid work time) is and will continue to be the core of individuals' lives, and that it is not on the verge of extinction. In this context, the radical nature of hacker culture consists of its proposal of an alternative spirit for the network society, a spirit that ultimately questions the Protestant work ethic.

The hacker ethic is more similar to the pre-Protestant ethic than to the Protestant ethic. To hackers, the purpose of life is closer to Sunday than Friday. Hacker activity is performed with passion, yet it also requires a great deal of effort and serious work.

One unique core aspect of hackers is their relationship with time. They establish a free relationship with time – most likely because hacking is done in free time, not on office time. The Protestant ethic entails organising time around work, so life becomes a regular work time. At the core of life is the repeated regularity of work, which organises all the other uses of time.

Another revolutionary element of hacker culture compared to the Protestant ethic refers to the base of capitalism: *money*.

The new economy strengthens the position of money and reinforces the idea of ownership. In contrast, the hacker ethic stresses what is open and what is free access. Yet again the simile of the Protestant era with the Monastery appears, where knowledge is secluded and remains in the hands of the privileged few, compared to the hacker ethic and the world of Plato's Academy, where knowledge is the core element available to the public at large. Even

knowledge is produced based on the famous Platonic dialogues; that is, knowledge is created via communication and cooperation.

The question is on which step on Maslow's pyramid does work lie for each side. According to the Protestant ethic, work is to earn a living, to survive. Therefore, it is located at the base of the pyramid. In the hacker world, work has higher motivations: one works to achieve self-realisation.

Continuing with the simile, Plato claimed that no free person should learn something like a slave. In the network-Academy, the hacker learns from others, and by learning teaches others. This form of informal learning fosters non-hierarchical kinds of organisation which are not only ethically superior, according to hackers, but are also more effective and productive. The absence of rigid structures is one of the success factors and one of the fundamental elements in both the hacker movement and the Internet.

4. The femininity of the Internet and the feminine strategies of hacker culture

> *"Because of its design and conception, the web is ideal for being a feminine space par excellence. The internet was envisioned as a flat network, all the nodes are equal, there are no hierarchies, anyone can generate and spread information equally, the capacity depends more on a good strategy and knowledge of the web than on one's power in the non-virtual world. The conception of the web as flat makes it a space where women can act and interact more comfortably".* (Lourdes Muñoz in De Miguel and Boix, 2002: 25).

Could the Internet, and more specifically, hacker culture, be considered "feminised" spaces?

To answer this question, we must first identify what we mean by "feminine". In order to do so, we must allude to gender roles and identities (Eccles et al., 2000), and we shall examine this aspect based on the philosophical conceptualisation of what is feminine since ancient times (Pérez Sedeño, 1994) and from the field of sociology (Kaufmann, 1999; Bourdieu, 2000).

As we have seen so far, hacker culture is one of the cultural underpinnings upon which the Internet is built (Castells, 2003). Therefore, some of the attributes of the hacker world are also attributes of the Internet. We have seen that some of the essential features of the Internet are its *fluency, informality, decentralisation* and *cooperation*, all the outcome of the way it was created (Abbate, 1999).

4.1. The web is liquid

Back in the ancient world, the male/female opposition was one of the main ideas that emerged at the beginnings of rational thought. This play of contrasts can be found in both Pythagoras and Ptolemy, both of which have echoes of Oriental culture (the idea of opposites is one of the cornerstones of the Oriental

philosophy of yin and yang) (Pérez Sedeño, 1994). Ptolemy believed that there were two kinds of nature: male and female. Each nature has its attributes: the male nature is dry, cold and warm. It is associated with the seasons of autumn and winter. The female nature, in contrast, is moist. It is associated with spring, which is also moist, since moisture is the symbol of creation, of reproduction, the essence of the concept of femininity. The moisture of femininity is manifested in menstruation and the breaking of waters at birth.

The web is viewed as a fluid, ethereal, liquid space, meaning that it must also be a feminine space, conceptually speaking.

4.2. Female leadership: Informality and cooperation

Informality, decentralisation and cooperation, important aspects of hacker and Internet culture, are essentially important features in the *female leadership style* and therefore are more closely tied to femininity than to masculinity. Alicia Kaufmann (1999) lists the aspects of feminine leadership according to Sally Helgesen (1995). According to Helgesen, women used to not be given leadership jobs because they had "counterproductive characteristics", such as attaching too much importance to affective ties, not developing a great deal of respect for hierarchical cultures and expressing doubts as to their effectiveness.

In the new economy and given the new trends in the world of business organisation, things have changed. According to Kaufmann, the way women work and communicate has shaped a new form of leadership which more aptly addresses organisational needs. Women have a more receptive, *participative* attitude; they are more *cooperative*. They try to structure their companies in the guise of "webs" instead of a hierarchical structure; information flows in many directions.

It is fairly clear that these attitudes are feminine. The lack of organised hierarchy, informality in interactions and the importance of communication skills and cooperation are just some of the cornerstones that we have seen support the hacker movement, especially according to Himanen (2002). They are feminine strategies (socially shaped as such) which inform leadership and organisation.

4.3. Passion

In Kaufmann's opinion (1999), as well, women are better equipped to take into account people's human side, bringing their emotions to work as well, unlike men (once again according to Kaufmann), who strive to reach leadership positions using their rationality. This is because of their socialisation process, where the stress is on success: what matters is winning.

Taking the emotional side of things into account entails shifting the scale of values that moves the business world. Both emotion and passion have been examined from a variety of perspectives (philosophy: Pérez Sedeño, 1994; sociology: Bourdieu, 2000; anthropology: Moore, 1991; etc.) and are regarded as basic components of the female universe.

Once again, we see how hacker culture captures these female attributes in the guise of a *passion* for work, a vital component of hackers' definition of the work they do (Himanen, 2002; Torvalds, 2002; *Jargon File*).

4.4. Flexible time

The low level of time compartmentalisation in hacker culture is also closely related to the feminine. Himanen (2002) stresses that hackers' attitude is to optimise time so that there is more room for fun. According to Himanen, in the hacker version of flexible time, the different areas of life like work, family, friends and hobbies combine with much less rigidity. This is what Himanen calls the dominicalisation of Friday, in a comparison between hacker time, when every day is Sunday with its lack of strict timetables, and the Protestant ethic, which is more similar to Fridays, when the timetables are much stricter and compartmentalised between work time, rest time, meal time, etc. Himanen says that hackers want to "dominicalise" Fridays and erase the rigid boundaries marked by timetables at work as well.

With regard to the way female timetables are organised at work, Kaufmann (1999) believes that women do not consider unplanned tasks as interruptions. Working is not the main purpose of their lives, as it is with men; rather it is one of the many things they do and are.

In fact, women know better than anyone what it means to account for the different areas of their lives like work, home and especially childcare, a job which mainly befalls women even if they work outside the home. A lack of rigidity in the compartmentalisation of time is nothing new for women, who are used to working while thinking about collecting the children from school, or leaving work because they have fallen ill, or ironing while helping them to do their homework, or preparing the next day's dinner while reading reports for a meeting they have with their superiors the following day.

4.5. The ethics of money

Just as we have seen that the time structure of the hacker world is the same structure that has been used by women for generations, the ethics of money inherent to hacker culture is also familiar to women.

As an alternative to the Protestant idea of ownership and remunerated work (which is necessary to survive), the hacker ethic is based on the free movement of knowledge and its free-of-charge status. Work does not reflect the need to earn money but to realise oneself personally.

Throughout history, we know that women have overwhelmingly not been remunerated, with the exception of industrial workers and women who are in the job market today. And even so, these women have only been remunerated when they entered the traditionally male public sphere. The work that women were traditionally assigned, such as the care of children and the elderly or the cleaning and care of the home, are not remunerated even today. Therefore, pay has historically not been a motivation for women.

4.6. Otherness

"Since ancient Greece, the ideological conceptualisation of the feminine has taken shape as a difference, not with regard to the masculine – an obvious, reciprocal difference – but with regard to that which is framed as neutral in terms of the objectivisation of the human genus" (Amorós, 1994: 22). Bourdieu claims: "The strength of the male order can be seen in the fact that it does not need to be justified: the androcentric vision is imposed as neutral and does not need to be uttered in discourses whose purpose is to legitimise it" (Bourdieu, 2000: 20).

The feminine is the other, or more accurately the other *par excellence*.

According to Castells (2001), the Internet is a privileged form of action and organisation of social movements because of the way the web was organised (decentralised, informal, cooperative, etc.). Social movements know that they are movements that promote an alternative organisation of the world that which mainly stresses the differences, inequalities and injustices in today's societies. Himanen, too, frames hacker culture as an alternative to the prevailing ethic, namely the Protestant work ethic.

What movement could be more alternative than one that advocates eradicating the inequalities of the *others*? The true alternative, therefore, must be feminine.

5. Women in the hacker world

What makes a study of female participation in the hacker world complicated is precisely gathering data on the number of hackers in the world, both male and female. Because of the very idiosyncrasy of the movement, informality, horizontality, disaggregation and the blurriness of the term, which means that hacking is closer to a way of viewing life than a specific, countable activity, there are no reliable data on the number of hackers (either male or female) in the world. In fact, in her anthropological study on hacker conferences (2010), Gabriella Coleman explains how at these gatherings female hackers encourage a list of women in the hacker world in order to know how many there are and to give them visibility.

Despite this, there are two pieces of information that may be relevant. The first is the "associations" or groups created on the Internet, and the second is data on contributions to freeware, which is regarded as the place where many hackers get their start.

The *Jargon File*, one of the documents created for newcomers to the hacker world, contains the "Portrait of J. Random Hacker"[3] written by Eric Raymond. It makes the following comments with regard to gender:

> *"Hacking is still predominantly male. Despite this, the percentage of women is clearly superior to the low, single-digit figures common in*

[3] <http://www.outpost9.com/reference/jargon/jargon_50.html#SEC57> (retrieved on 9 May 2009).

> *the technical professions, and female hackers are generally respected and treated as equals".*

However, in studies on freeware, the figures are not so promising. According to a 2002 study on the development of freeware, it is believed that only 1.5% to 2% of the developers are women (Lin, 2005; Nafus, Leach and Krieger, 2006). However, I would like to provide additional reflections on this figure.

It is difficult to know how this information was obtained, since pseudonyms (nicks) are often used in the virtual world. It may happen that some women have a male pseudonym, which would mean that they feel more comfortable in a male role than in a female role in the environment of technical issues and computers. In fact, the study by Janet Armentor-Cota on online interactions (2011) from a gender perspective corroborates the fact that women tend to use a more masculine language in technical and academic issues because they feel more respected that way. What is more, taking this figure as a strict indicator would mean equating freeware with hackers. And this is not exactly true, since a great deal of freeware is also developed by industry, and many hackers do other jobs (regarding privacy and confidentiality on the web, cyberactivism, etc.) beyond creating freeware.

Yuwei Lin (2005) and Val Henson (2002) complain about the excessively masculine environment of freeware, which means that the few women who participate in it may feel somewhat uncomfortable. In any event, these assessments contrast with the perceptions of some female hackers. Barbara Thoens, for example, believes that male hackers are very friendly with the women in their group and make the women feel comfortable (Engler, 2000).

> —Why are there so few female hackers?
>
> —I believe that historically women were not truly committed to technical matters, and I think that's the main reason. Women have not studied technical fields for many years. We women in Germany only earned the right to study in 1916, not so long ago, and I think a longer tradition is needed. In contrast, men have been in this field for much longer.
>
> I know lots of girls in CCC[4] and I think they are afraid of showing that they are so skilled at technical matters. I think that this is due to cultural traditions and prejudices.

On the other hand, if we bear in mind the number of female hacker groups or the female division of some groups, the numbers are somewhat higher. Many women organise themselves separately from their male counterparts in groups of hackers and web activists. In the most important hacker groups (with both men and women), there are women who stand out as great programmers on par with the men. Let us examine most prominent of these groups.

[4] Chaos Computer Club, one of the elite hacker groups in Germany.

In the field of freeware, there is the noteworthy Debian Women group (http://women.debian.org/home/), a sub-project of the Debian Project. This is a group especially devoted to encouraging women to participate in the Debian Project, and to participate in this particular project as well. Likewise, there are similar groups in all the main freeware projects: LinuxChix (http://www.linuxchix.org) created by Debbie Richardson; Fedora Women (http://fedoraproject.org/wiki/Women); GNOME Women (http://live.gnome.org/GnomeWomen); Ubuntu Women (http://ubuntu-women.org/); Drupal Chix (http://groups.drupal.org/drupalchix), etc.

Many women who are cyberfeminists appropriate technology as a tool for transforming society in gender terms (Paasonen, 2011). Montserrat Boix (2003) calls this *feminist hacktivism*. One example is the Old Boys Network (http://www.obn.org), created by Cornelia Sollfrank. In this vein, too, we can find geek girls,[5] a new sociological type from the end of the century, girls who work on developing software, designing websites, programming databases, devising computer systems for a company's different needs, inventing videogames, etc. Geek girls use their knowledge to investigate and deconstruct genders and roles on the web (De Miguel and Boix, 2002). GraceNet (http://gracenet.net/) is specifically devoted to spotlighting companies which they believe harm the image of women.

Halfway between these groups we have groups of women generically linked to the world of technologically. One example is Systers (http://anitaborg.org/initiatives/systers), a group created by Anita Borg which brings together more than 3,000 women from 54 different countries who are involved in different aspects of technology. Another example is the hackers of ENIAC (Electronic Numerical Integrator and Computer) (http://eniacprogrammers.org/). Their website contains the following introduction:

> *"Sixty years ago, six young women programmed the first completely electronic computer in the world, ENIAC.*
>
> *Their programme used hundreds of cables and 3,000 switches. Never brought to light, they never became part of history. Forty years later, Kathy Kleiman was told that the women who appeared in photographs with ENIAC (1946) were models posing in front of the machine".*

The ENIAC hackers wanted to do justice to the history of these early female programmers: Kay Antonelli, Jean Bartik, Betty Holberton, Marlyn Meltzer, Frances Spence and Ruth Teitelbaum, and they wanted their role to enter into the history of computing, since it could be claimed that they created software (Ricoy, 2006). The historical recovery of women in computing is also the goal of The Ada Project (http://women.cs.cmu.edu/ada/) named in honour of Ada Lovelace, one of the most picturesque figures in the history of technology and computing and the daughter of Lord Byron.

[5] <http://geekfeminism.wikia.com/wiki/Geek_Feminism_Wiki> (retrieved on 20 April 2009).

In Spain we could highlight the Mujeres en Red (http://www.nodo50.org/mujeresred/) collective, and in Catalonia DonesTech (http://www.donestech.net/ca/), which is devoted to researching the female presence in technology.

6. Conclusions

> —How did you begin to get interested in the subject of hacking?
>
> —Well, the tradition I come from is leftist movements; that's my family's tradition but it's also my own history as a student. While I was studying I belonged to different groups: women's groups, anarchists... not organised groups like the traditional left, because I don't like that kind of hierarchical organisation; they were more like groups doing spontaneous actions. So I was always looking for how to connect my computer knowledge to humanistic issues. I wanted to know what computers had to do with human beings and where the problems were... and this is what the CCC works on, examining these questions. All of this is also related to my tradition of fighting against authoritarian structures in society. (Engler, 2000).

This statement by Barbara Thoens corroborates a few things. Her connection with the hacker movement reflects some of the attributes of this movement which have gradually emerged, such as *informality* and *horizontality* ("*I don't like that kind of hierarchical organisation*"), along with cooperation and the classic female role of "caring for others" (Bourdieu, 2000; Moore, 1991). This is just an example of the female attributes of the Internet and hacker culture, and therefore in theory they would make this movement more attractive and familiar to women.

Throughout this article we have argued that certain values have historically been considered feminine in a variety of disciplines (sociology, psychology and philosophy). We have also striven to these values with the hacker culture/ethic, as a different sense of time and money, cooperation, passion and feeling towards work. For this reason, we can now state that *hacker culture, one of the cultural underpinnings of the Internet, may have mainly been created by men, but it produces technology through historically feminine values*.

Based on Himanen's ethical assessment of the hacker world, hacking has been revised as a tool for building an alternative society with alternative values, not in a process of revolution or replacing what is established in society through widespread social change but through a change in individual values (the sum of which could amount to much more). That is, hacker strategies do not act by imposition but by the free adhesion of its members. And to do this, historically feminine roles are adopted, most likely unwittingly.

Throughout this article we have seen the Internet as different interconnected nodes connected horizontally, without a clear hierarchy, a fluid space of interaction and communication. This space, which has been defined as

feminine, clearly matches some of the needs of the women who defend it. The possibility of connecting remotely allows it to be used (for both personal matters and work) from home, which merges the traditionally private sphere of women (and many women are still secluded) with the public sphere. At the same time, the asynchrony in most of its uses – forums, webs, blogs, social networks, e-commerce, etc. – facilitates the balance of free time, family life, work and almost all the spheres of personal life. In fact, cyberfemininsts are the most enthusiastic about the Internet in terms of women's struggles to achieve equal rights and responsibilities with men.

However, there are a few considerations.

The first consideration, and it is important to bear it in mind, is that here we do not mean to imply that the Internet is the solution to the female presence in the field of technology. Cyberfeminist optimism must be clearly relativised. The Internet in itself is a tool that helps, but it does not signal changes in the social structure and gender roles, which are much more deeply rooted. The Internet may be helpful, but it is not "the" solution.

Other considerations emerge when asking the following question: *Does hacker culture encourage the inclusion of women in technology?*

After what we have examined over the course of this article, everything would lead us to answer that it does. However, here we find a major problem: the lack of reliable data on the issue. The hacker world, by its very nature, poses hindrances to calculating the number of members it has overall. And in the specific case of women, there are no studies that have tried to ascertain the numbers, which even female hackers are curious to know (Coleman, 2010). All the figures available are partial and refer more to the world of open-source software. Hackers do not "clock in" or get paid a salary, nor are they part of a database; the concept is more open and broader, which makes things even more complicated.

What is more, the few figures available on the issue, which refer to open-source software, are disappointing: one report notes that only between 1.5% and 2% of all open-source software programmers are women. Even though reasonable doubts have been expressed about extrapolating these figures to the world of hackers, the fact is that the proportion is still low, too low. How can we explain this? An empirical study and more information on this issue are needed in order to explain it, and this would be a possible avenue of future research.

There is one factor in this field that is still crucial: *women's training in technology fields*. It is a clear fact that if more women study technology in official programmes, the proportion of female programmes in all spheres would rise, and therefore the proportion of female hackers would as well. If the "lack of interest in technical aspects" cited as a reason why women do not study technology fields (refuted by numerous studies, such as Sáinz and González, 2008) disappears because of a variety of social and educational changes, surely many more women would find the hacker world to be the ideal place to merge their technical or computer skills and other factors like solidarity, the construction of an alternative society and the quest for a less hierarchical structure. Another factor that should be borne in mind is the poor social image of hackers. As noted above, the media often confuse the term 'hacker' with 'cracker', people with special computer skills who use these skills to commit

crimes, large or small. The fact that the true meaning of 'hacker' is unknown by the majority of people and is instead associated with criminal behaviour, portrayed as "entertainment for freaks", does nothing to ease women's access to hacker culture.

One of the debates in feminism, one of whose consequences is the advent of the feminism of difference, which far from seeking equality between men and women by obligating women to become men focuses instead on embracing the good qualities of female roles, is to alert about precisely this: the danger that women reach positions of responsibility, of leadership and power, by "masculinising" themselves. Throughout this article, we have referred to studies that see the female leadership style as the best one for working in companies in the new economy and network society. This fact, a priori, becomes an opportunity for women to exert more influence in society without sacrificing their own *identity* (making it clear that this identity can be as particular and diverse as the individual women themselves).

If the figures do not become more satisfactory, however, the conclusion could be the opposite. Thus, since women have historically had to masculinise themselves in order to achieve the power that was otherwise denied to them, men can feminise themselves in order to exercise new kinds of leadership and organisation, *but in the absence of women*. After the characteristics that have been attributed to the hacker world, the female strategies it has been endowed with to form an alternative scale of values than the Protestant ethic, either women are there (in decent, considerable numbers) or we have to conclude that men have feminised and have used this alternative of femininity without including women. Men "feminising" could be one way of breaking down barriers with gender roles; however, not including women would mean once again reproducing unequal power relations between sexes, and this would entail a huge step backward.

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