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An Ideologically Neutral Concept of Family – A Comparative Analysis of Mexico, Spain and Hungary

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Table of Content

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Abstract

This paper examines the extent to which the constitutional concept of family is ideologically neutral in three countries where the dominant religion was or still is the Catholic religion. It will be shown that it is rather the state-church model adopted by the country that influences the constitutional concept of family, and not the fact that the dominant religion is the Catholic religion. The comparison relies on the constitutions, relevant case law of constitutional or supreme court decisions, and also on secondary literature. Beyond relying on the concept of family that can be detected from the constitutions, it will be also shown, how the concepts evolved over time, what the landmarks were and who triggered the changes.

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1. Introduction

The present paper aims to show the extent to which the constitutional concept of family is neutral in three countries: Mexico, Spain and Hungary. It will be shown that despite the fact that in all the three compared countries the dominant religion was or still is the Catholic religion,[1] their constitutional concept of family varies to a great degree; some of them meeting the requirement of neutrality, some of them not. It will be also shown that the fact that a country is a Catholic country does not really influence the constitutional concept of family; it is rather the state-church relationship that influences the result. The yardstick of the comparison is state neutrality, as opposed to the doctrines of the Catholic Church.

[1] By dominant I refer to the extent to which the populace identifies itself as Catholic. I rely on the data provided by Pew Research Center, according to which in Hungary 59.4%, in Spain 75.2% and in Mexico 85% of the populace identified itself as Catholic in 2010. Data available from a century earlier show that in Spain 99.9%, in Mexico 91% of the populace identified itself as Catholic. http://www.pewforum.org/2013/02/13/the-global-catholic-population/ and http://www.globalreligiousfutures.org/countries/hungary#/?affiliations_religion_id=26&affiliations_year=2010&region_name=All%20Countries&restrictions_year=2016.

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The first chapter shows the state-church models adopted in the compared countries, and it also defines the yardstick of the comparison. The second chapter deals with the constitutional concept of family as defined by the explicit text of the constitutions, in order to lay down the general framework in which these countries operate. The third chapter shows how the constitutional concepts of family evolved over time. It will be shown how civil marriage and divorce was introduced, and how the legal recognition of same-sex relationships evolved. The last chapter summarizes the findings of the comparison, supporting the claim that the extent to which the constitutional concept of family is neutral is not a consequence of the country's dominant religious affiliation, rather of the state-church model adopted by the country.

The comparison relies on the constitutions, relevant case law of constitutional and supreme court decisions, and also on secondary literature. The main actors of the development of the constitutional concept of family will be identified in each country, and also the most significant events that triggered changes.

1.1. Models of state-church relationship

Currently, there is a wide range of concepts on state-church/ state-religion relationship in the literature. Some distinguishes only between two or three main models,[2] others between ten or eleven.[3] It can be said that the two basic models are the one when state and church are one, the other is when state and church are separate; all the other models stay somewhere in-between these two basic models. The present comparison is relying on the concept invented and used by Durham and Scharffs, this being the most accurate and understandable.

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[2] See for example Miroshnikova, Elena. 2011. *The Cooperation Model in State-Church Relations: Experience and Problems*. Saarbrücken: LAP LAMBERT Academic Pub. p.10.; and Halmai, Gábor. 2017. "Varieties of State-Church Relations and Religious Freedom through Three Case Studies." *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2984222. pp.180-184.

[3] See Durham Jr., W. Cole, and Brett G. Scharffs. 2010. *Law and Religion: National, International, and Comparative Perspectives*. New York : Aspen Publishers. pp.118-122.

Durham and Scharffs differentiate between ten models of state-church relationship: absolute theocracy, established churches, religious status systems, historically favored churches, preferred set of religions, cooperationist regimes, accomodationist regimes, separationist regimes, secular control regimes and abolitionist status.[4] Given the scope limits of this paper, the focus will be primarily on those models that are relevant for the present research. In order to detect the models that best describe the given countries' state-church relationship, the provisions dealing with state-church relationship, with freedom of religion and with other additional questions will be scrutinized, such as education and churches' right to property.

Mexico – "separationist regime"

The Mexican Constitution describes Mexico as a "representative, democratic, *secular*, federal Republic". Art.130/1 of the Mexican Constitution declares, that the "historic principle of separation between State and religion shall guide the provisions established by law". The following provisions further detail the outline of separation: the "government shall not intervene in the internal affairs of the religious associations",[5] but simultaneously the intervention of the churches in public matters is also prohibited; even the passive voting right of the clergy is limited. Article 130 paragraph 2 subparagraphs d) and e) declares that "(r)religious ministers cannot hold public offices, according to the statutory law. As citizens, religious ministers have the right to vote, but they not have the right to be elected. (…) Church ministers cannot join together for political purposes nor proselytize in favor of certain candidate, party or political association against them." Paragraph 3 constitutes an explicit prohibition on the "formation of any kind of political group with a name containing any word or other symbol related to any religion", and declares that "(n)o meeting of a political character may be held in churches or temples". Churches and religious groups may acquire

[4] Ibid.
[5] See Article 130 paragraph 2 subparagraph b) of the Mexican Constitution.

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legal status as religious associations after a registration procedure (Art.130/1/a), and "Mexicans can become ministers of any religious denomination" (Art.130./1/c).

Art.24/1 ensures the right to freedom of religion (and of conscience and ethical convictions), and the right to adhere or adopt, as well as to "participate, individually or collectively, in both public and private ceremonies, worship and religious acts of the respective cult". But this provision also contains limitations: these acts shall not constitute a "felony or a misdemeanor punished by law", and "no person is allowed to use these public acts of religious expressions with political ends, for campaigning or as means of political propaganda". A further limitation is incorporated in Art.24/3: "ordinarily all religious acts will be practiced in temples and those that extraordinarily are practiced outside temples must adhere to law". The Mexican Constitution lays down prohibitions for the state as well in relation to freedom of religion, by declaring that "Congress cannot dictate laws that establish or abolish a given religion" (Art.24./3). As it can be seen, freedom of religion is ensured by the Mexican Constitution and beyond this, equality regardless religion is also protected (Art.130/1).

Given the changes in the history of the Catholic Church and the Mexican state,[6] it is important to mention that today churches can acquire and possess properties that are essential for their religious activities (Art.27/II.), but education provided by the state still shall be secular (Art.3/I.).

It is questionable whether Mexico fits in the model of "separationist regimes" or rather in the "secular control regimes". According to Scharffs and Durham, in a separationist regime "any suggestion of public support for religion is deemed inappropriate". There is no public funding or special tax exemption for churches, religious symbols are basically prohibited in the public sphere, and the clergy shall not hold any public office. Arguments based on religious

[6] See Serna de la Garza, José Maria. 2013. *Constitution of Mexico: a Contextual Analysis*. Oxford: Hart. pp.185-191.

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assumptions in the public discourse are strictly unacceptable: "(t)he mere reliance on religious premises in public argument may be deemed to run afoul of the church-state separation.[7] In the "secular control regimes" the state either uses religion for its own ends, or tries to ensure "the freedom from religion for ideological reasons", or it tries limiting the possibility that religion becomes a threat to it as a "competing source of popular legitimacy within the society".[8]

Considering the fact that the separation in the Mexican system is two-way, i.e. neither churches may intervene in public matters, nor the state can intervene in religious matters, Mexico might be detected as a "separationist regime". However, one might claim that prior to the 1992 reform, Mexico had a "secular control regime".[9]

Spain – "cooperationist regime"

The Spanish Constitution does not contain any explicit provision on secularism, as the Mexican Constitution. The relationship between state and church is governed by Art.16.3. According to this provision "(n)o religion shall have a state character" and "(t)he public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions."

Freedom of religion (and of ideology and worship) is protected under Art.16.1, both for individuals and communities, "with no other restriction on their expression than may be necessary to maintain public order as protected by law". Freedom of religion ensures that no one may be compelled to make statements on his or her religious beliefs (Art.16.2) and equality regardless religion is also protected (Art.14).

[7] See Durham and Scharffs, p.120.
[8] Ibid.
[9] See Blancarte, Roberto J. 1993. "Recent Changes in Church-State Relations in Mexico: An Historical Approach." *Journal of Church and State* 35 (4): 781–805. https://doi.org/10.1093/jcs/35.4.781. p.789.

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A further provision, that might be interesting in comparison to its Mexican counterpart, is that "public authorities shall guarantee the rights of parents to ensure that their children receive religious and moral instructions in accordance with their own conviction" (Art.27.3).

In cooperationist regimes there is "no special status to dominant churches, but the state continues to cooperate closely with churches in a variety of ways". The churches may receive significant public funding, they might enter into concordats or other forms of agreements with the state, but the state specifically does not endorse any religion and it ensures for all religions equal treatment.[10] According to the definition used by Durham and Scharffs, Spain falls under the model of "cooperationist regime": it maintains "appropriate cooperation relations with the Catholic Church and other confessions." It implies that there is no strict separation, as in the case of Mexico, but cooperation exists between the state and the Catholic Church – or other confessions.[11]

Hungary – "preferred set of religions" model

Before examining the most relevant provisions of the Hungarian Fundamental Law, it is important to note, that it gives a central role to Christianity and Christian values in general. In its preamble, in the National Avowal it says that "(w)e are proud that our king Saint Stephen built the Hungarian State on soil ground and made our country a part of Christian Europe on thousand years ago." It adds that "(w)e recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country." After these commitments it is interesting to see what the other, legally more enforceable provisions say. However, these commitments are not without any legal enforceability: according to Art.R/3 the provisions of the Fundamental Law shall be interpreted in accordance with the National

[10] See Durham and Scharffs, p.119.
[11] The Spanish state has a Concordat with the Holy See and it has a cooperationist agreement with Islamic, Evangelic and Jewish organizations. See Expósito González, Miriam. 2018. *La evolución del Sistema Matrimonial y las Diferentes Confesiones Religiosas en España*. Universidad de La Laguna, Facultad de Derecho. p.5.

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Avowal. Furthermore, Art.R/4 lays down for every state organ the obligation of the "protection of the constitutional identity and Christian culture".[12]

According to Art.VII/3 the "State and religious communities shall operate separately" and it adds that "religious communities shall be autonomous". At first it seems like a separationist model, but the following paragraph gives further details: the "State and religious communities may cooperate to achieve community goals" (Art.VII/4). The National Assembly decides on the issue of cooperation upon the request of the religious community, and the rules for this and for the specific privileges provided for them "with regard to their participation in the fulfillment of tasks that serve to achieve community goals"[13] shall be laid down in a cardinal act.[14] This is Act no. CCVI of 2011 *on the right to freedom of conscience and religion and the legal status of Churches, denominations and religious communities* ("the 2011 Church Act"). As it can be seen, the Fundamental Law distinguishes between religious communities and established churches, with whom the state cooperates and to whom it gives special treatment. The system is further detailed on statutory level. The current and recently amended Hungarian system distinguishes between religious associations ("*vallási egyesület*"),[15] registered churches ("*nyilvántartásba vett egyház*"), inscribed churches ("*bejegyzett egyház*") and established churches ("*bevett egyház*").[16] In order to qualify as one of the first three types, the religious community has to meet some objective criteria laid down in the recently modified 2011 Church Act. The qualification as established church is depending on the discretionary decision of the state. According to the law modifying the 2011 Church Act ("the Modifying Act"), an established church is a registered or inscribed church with which the state concludes an *overall cooperation agreement* (Article 3/B). The conclusion of such an agreement

[12] Article R) paragraph 4) has become part of the Fundamental Law with the 7th amendment of it, in June 2018.
[13] See Article VII paragraph 4 of the Hungarian Fundamental Law
[14] See Article VII paragraph 5 of the Hungarian Fundamental Law
[15] See the Act no. CXXXII of 2018 on the modification on the 2011 Church Act (hereinafter: "the Modifying Act") was enacted in December 2018 and is entering into force on 15 April 2019. Available: https://mkogy.jogtar.hu/jogszabaly?docid=A1800132.TV
[16] See Article 3 (2) of the Modifying Act.

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depends on the church's historical, social role, social embeddedness or its organization. These churches are listed in the annex of the 2011 Church Act. All these religious communities are legal entities and may cooperate with the state after concluding a cooperation agreement, but there is a significant difference in the extent of benefits resulting from the cooperation.

As it can be detected, the Hungarian system regarding state-church relationship is a multi-tier system. It lays down some criteria for enhanced cooperation, as a result of which certain churches are preferred, although the Fundamental Law or the implementing law does not mention explicitly any churches that should be preferred. If one reviews the list of the current established churches, may see that a lot of these churches are rather traditional churches.[17] Provisions on freedom of religion and equality regardless religion add no specific or different rules compared to the Spanish and Mexican provisions.

Based on the concept used by Durham and Scharffs, Hungary has a "preferred set of religions" model. In the model of "preferred set of religions", certain religions are in a better position compared to others, i.e. they enjoy certain benefits. It might happen explicitly or implicitly as well; an implicit preference exist in multi-tiers systems, where the law regulating state-church relationship does not distinguish explicitly between different religions, but the provisions themselves have the effect of preference, giving advantages usually for traditional groups.[18]

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Concluding remarks on state-church relationship

In short, Mexico has a "separationist regime", where neither the state may intervene in religious matters, nor the church may intervene in public matters; both have their own territory. Spain has a "cooperationist regime", where the state and the church are two different entities, such as in a "separationist regime", but they may cooperate in certain areas, which

[17] See the Annex of the 2011 Church Act.
[18] See Durham and Scharffs, p.119.

stays in contrast with the separationist approach of Mexico. Hungary follows a "preferred set of religions" model, which is somewhat similar to the cooperationist model, in the sense that the state may cooperate with churches. But what is distinct from the "cooperationist regime" that it differentiates between churches, thus there are no equal opportunities for churches to meet the conditions for cooperation.

1.2. State neutrality as a yardstick

The yardstick of the present comparison is neutrality and its manifestation in public discussion: public reason.[19] In a modern society there are a wide range of competing values and understandings of morals, and one has to find some common denominator when it comes to questions that concern the public.[20] The concept of neutrality and public reason relies on the division of our social life to public and private spheres. What happens in the private sphere is not really a concern of the state or the society, but what happens in the public sphere is something that concerns everyone.[21] Since in a pluralistic society there are irreconcible values shared by citizens, when a public issue is at stake, one has to find arguments that are understandable and also acceptable for every citizen.[22] The concept of public reason, invented by John Rawls and then used by many,[23] aims to tackle the challenges resulting from a pluralistic society. In this concept, when it comes to a public issue, one can only use arguments that stay in the sphere of public reason, and cannot rely on comprehensive doctrines.[24] Comprehensive doctrines – such as religious, secular or moral doctrines –try to

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[19] See Horwitz, Paul. 2011. *The Agnostic Age Law, Religion, and the Constitution*. Oxford: Oxford University Press. p.14.
[20] See Rawls, John. 1997. "The Idea of Public Reason Revisited." *The University of Chicago Law Review* 64 (3): 765. https://doi.org/10.2307/1600311. p.771.
[21] See Horwitz, pp.16-17.
[22] See Rawls, p.771.
[23] See for example Horwitz, p.13; and Sajó, András. 2014. "Preliminaries to a Concept of Constitutional Secularism." Essay. In *Constitutional Secularism in an Age of Religious Revival*, edited by Mancini, Susanna, and Michel Rosenfeld. Oxford, United Kingdom: Oxford University Press. p.72.
[24] See Horwitz, p.13; Rawls, p.786; Sajó, p.72.

give answer to every possible question from one certain mindset. But since "the whole truth cannot be embodied in politics", one cannot rely on comprehensive doctrines.[25]

Speaking of neutrality and public reason, there is another important distinction beyond the division of public and private spheres: the distinction between citizens and public officials. A citizen has a duty to use arguments that are in the sphere of public reason, but this duty is even stricter for public officials, since they represent the state as a whole.[26] This distinction is very important for the present comparison, since it primarily examines how different state actors fulfill their duty while being neutral. But what is expectable both from citizens and public officials is that they rely on arguments that are understandable and acceptable for everyone, for those too who might share different religious or moral views. That is a *conditio sine qua non* for a democratic and liberal state, such as Mexico, Spain and Hungary.

Although this yardstick might seem indefinite, it helps to measure how the different states have defined family over time. The concept of neutrality and the criteria of public reason help to detect arguments or concepts that fall outside the scope of neutrality and public reason. In the present comparison state neutrality will be defined as the exclusion of religious arguments and ideologies (more precisely exclusion of Catholic doctrines) from public discourse.

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[25] See Rawls, p.767.
[26] Ibid.

2. Constitutional concept of family

Before examining country by country how the constitutional concept of family evolved over time, it is important to see in what legal framework the different countries currently operate, in order or detect the main similarities and differences. To see a broader picture, provisions related to gender equality, the right to marry, the right to found a family, the right of children and duties of the parents, protection of family (children, mothers and elderly), state aids and the right to family privacy will be identified.

2.1. Mexico

The Mexican Constitution declares that man and woman are equal (Art.4.1), and equal wages shall be paid for equal work, regardless sex (Art.122/A/V.). Interestingly, there is neither a provision on the right to marry, nor any reference to marriage as such.[27] Despite the lack of any provision on marriage, the Mexican Constitution contains a set of provisions in relation to children. First of all, it declares that "every person has the right to decide, in a free, responsible and informed manner about the number of children desired and timing between each of them".[28] Children enjoy a high protection under the Mexican Constitution, and both the State and the parents have several duties regarding them. According to Article 4.9 of the Constitution, "(t)he State, in all decisions it makes and all actions it carries out will safeguard and comply with the principle of doing what is in the best interest of children, thus entirely guaranteeing their rights. Boys and girls have the right to have their nutritional, health, educational and recreational needs satisfied for their proper development. This principle should guide the design, enforcement, following up and evaluation of the public policies focused on childhood." To this very detailed state obligation adds the duty of the parents:

[27] Marriage is regulated on state level. See: Beer, Caroline, and Victor D. Cruz-Aceves. 2018. "Extending Rights to Marginalized Minorities: Same-Sex Relationship Recognition in Mexico and the United States." *State Politics & Policy Quarterly* 18 (1): 3–26. https://doi.org/10.1177/1532440017751421. p.4.
[28] See Art.4.2 of the Mexican Constitution.

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"(a)scendant relatives and guardians have the obligation of maintaining and demanding the compliance of these rights and principle" (Art.4.10), but the "State will grant aid to individuals in order to assist with the compliance of the rights of children" (Art.4.11).

As to the broader protection of the family, the Constitution says that "the law shall protect the organization and development of the family" (Art.4.1), and beyond this general provision it declares that women have a right to enjoy a disability leave six week prior to and six week after giving birth to the child, for which period they are entitled to their full wages.[29] The state also supports the elderly by retirement pension.[30]

Beyond the provisions on explicit state support for families, it is also important to see to what extent may the state intervene in family life. Family privacy is protected under the Mexican Constitution. Art.16.1 of the Constitution says: „No person shall be disturbed in his private affairs, his/her family, papers, properties or be invaded at home without a written order from a competent authority, duly explaining the legal cause of the proceeding."[31]

As described above, the Mexican Constitution does not contain explicitly the right to marry, but it has several provision protecting families – with special regard to children, mothers and the elderly.

2.2. Spain

Spain likewise has an explicit provision on gender equality: in Article 14 it says that "Spaniards are equal before the law and may not in any way be discriminated against on account of (…) sex", which equality is further supported by Article 35. This provision

[29] See Art.122/A/V of the Mexican Constitution.
[30] See Art.122/A/XXIX of the Mexican Constitution.
[31] This is further supported by Art.16.16: „ Administrative authorities shall have powers to search private households only in order to enforce sanitary and police regulations. Administrative authorities can require the accounts books and documents to corroborate compliance with fiscal provisions, following the procedures and formalities established for search warrants."

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requires that there shall be no discrimination in relation to the right to work on account of the workers' sex.

The Spanish Constitution explicitly contains the right to marry: "man and woman have the right to marry with full legal equality" (Art.32.1), and the law shall regulate the forms of marriage, the age and capacity required for marriage, the rights and duties of the spouses and also the grounds for separation, dissolution, and the effects deriving from these (Art.32.2).

There is no explicit right to found a family, as in the Mexican Constitution, but the Spanish Constitution also contains several rights for the children. Public authorities ensure the full social, economic and legal protection of the children, who are equal before the law, "regardless their parentage", and the law shall also "provide for the possibility of the investigation of paternity" (Art.39.2). The protection of children is further supported by a reference to protection provided for in international agreements (Art.39.4). Beyond the state, obviously parents have obligations too: "parents shall provide their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law so establishes" (Art.39.3). It is important to mention, that the Spanish Constitution emphasizes that there shall be made no distinction between children born within wedlock and children born outside wedlock.[32]

The Spanish Constitution too has a general provision on family protection: Art.39.1 says that public authorities shall ensure social, economic and legal protection of the family, which is further supported by the protection of mothers, regardless their marital status (Art.39.2), and the protection for the elderly, by guaranteeing sufficient income, and promoting their welfare, without prejudice to the obligations of the families (Art.50). There is another interesting provision in relation to family protection: by declaring that all Spaniards have the right to

[32] See Art.39.2 and Art.39.3 of the Spanish Constitution.

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work, it declares that they also have a right to sufficient remuneration for the satisfaction for their needs *and those of their families*.

As to family privacy, the Spanish Constitution ensures the right to it (Art.18.1), and declares that "(t)he home is inviolable" and that "no entry or search may be without the consent of the householder or a legal warrant, except in cases flagrante delicto" (Art.18.2).

As we can see, the Spanish Constitution does explicitly ensure the right to marry (as opposed to the Mexican Constitution), and it protects families with a wide set of rights, with special regard to children, mothers and the elderly.

2.3. Hungary

The Hungarian Fundamental Law gives a central role to family, and beyond protecting family and marriage in several provisions, it already emphasizes the importance of families in the preamble, the National Avowal. It says: "(w)e hold that the family and the nation constitute the principal framework of our coexistence". It is relevant, because according to Art.R/3 of the Hungarian Fundamental Law, the provisions of the Fundamental Law shall be interpreted in accordance with the National Avowal.

The Fundamental Law ensures equality regardless gender, as the Spanish and Mexican Constitution.[33] With regard to marriage, it is interesting that it is not framed as a right, rather as an obligation of the state to protect: "Hungary shall protect the institution of marriage as the union of a man and a woman established by a voluntary decision". As the Mexican Constitution has provisions on founding family, the Hungarian Fundamental Law declares that "Hungary shall support the commitment to have children (Art.L./2) (which beyond ensuring financial support for children, also encourages having children). Beside this it

[33] See Art.XV./4 of the Fundamental Law.

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protects the life of the fetus from the moment of conception (Art.II), which may have further implications on the issue of abortion. As the Mexican and Spanish Constitution, the Hungarian Fundamental Law likewise contains a set of provisions on the protection of children. According to Art.XVI./1, "(e)very children shall have the right to the protection and care necessary for his or her proper physical, mental and moral development." It is really interesting that parents have explicit rights as well beside duties in relation to their children: they have "the right to choose the upbringing to be given to their children" (Art.XVI./2), and they are "obliged to take care of their minor children", which includes "the provision of schooling their children" (Art XVI./3).

The Fundamental Law, as it follows from the central role of families envisioned in the National Avowal, puts a huge emphasis on the protection of families. According to Art.L./1, "Hungary shall protect (…) the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children." Further provisions protecting families shall be regulated by a cardinal Act (Art.L./3), which implies a heightened protection.[34]

The Fundamental Law has a general provision on the protection of families, children, women and the elderly. Art.XV./5 says that "(b)y means of separate measures, Hungary shall protect families, children, women". This general protection is further promoted by social security in the event of maternity, widowhood or orphanage (Art.XIX./1), and by pension, where women are entitled for stronger protection (Art.XIX./4). Beyond the before mentioned financial supports, the Fundamental Law declares that in determining tax obligations, the raising of children shall be taken into consideration.[35]

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[34] According to Article T) paragraph 4 of the Fundamental Law: „Cardinal Acts shall be Acts, the adoption and amendment of which requires the votes of two thirds of the Members of the National Assembly present."
[35] Art. XXX./2 says: „For persons raising children, the extent of their contribution to covering common needs must be determined while taking the costs of raising children into consideration."

Before going to the question of family privacy, the obligation of adult children to "take care of their parents if they are in need" (Art. XVI./4) is important to note. This provision implies certain reciprocity: not only parents have obligations towards their children, but children likewise have obligations towards their parents. As to family privacy, Art.VI./2 says that the "State shall provide legal protection for the tranquility of homes", and Art.XXII./1 declares that the "State shall provide legal protection for the homes."

To put it briefly, the Fundamental Law puts a huge emphasis on families and it also defines – contrary to the Mexican and the Spanish Constitution – a concept of family.

2.4. Concluding remarks on the constitutional concepts of family

In order to see more precisely the different concepts enshrined in each constitution, it is important to detect the similarities and most notable differences in these countries. Gender equality and strong protection of children may be deemed as a common denominator. The main difference lies in the definition of marriage and (the lack of) definition of family. In addition to these, there are several minor or greater specialties of each country.

The Mexican Constitution does not say anything explicitly about marriage, or about what constitutes a family. The Spanish Constitution says that "man and woman have the right to marry with full legal equality",[36] but has no explicit definition on family. Hungary, as it was mentioned before, has a definition for both marriage and family. Marriage is protected as "the union of a man and a woman established by voluntary decision",[37] and it is declared that "(f)amily ties shall be based on marriage or the relationship between parents and children".[38] Looking at these provisions, a significant difference can be detected between the three concepts.

[36] See Art.32.1 of the Spanish Constitution.
[37] See Art .L./1 of the Hungarian Fundamental Law.
[38] See Art. L./1 of the Hungarian Fundamental Law.

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As it was mentioned earlier, all countries have some "specialties". Mexico is interesting, because it explicitly grants the right to decide on the number of the children and the time between them, what may have further implications in relation to abortion.[39] Spain is unique (compared to the other two countries) in emphasizing the equality of children and mothers regardless wedlock.[40] Spain is also special in the sense that it explicitly refers to international agreements in relation to protection of children,[41] also with the right to investigate paternity[42] and with the requirement that in determining wages the needs of the family shall be taken into consideration.[43] What makes Hungary unique – beyond its definition of marriage and family– is the protection of the fetus[44] (which might be deemed contrary to the Mexican approach), the extra duties of both the parents (namely the obligation of schooling for their children)[45] and the children (namely the obligation to take care of their parents if they are in need),[46] and also the state aid in founding family (namely the family tax benefit).[47] What can be concluded from all these, is that Mexico's approach is liberal, Spain's is a bit less, and Hungary's approach is conservative with regard to defining family and intervening in family life, but this will be detailed later.

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[39] See Art.4.2 of the Mexican Constitution.
[40] See Art. 39.2 and 39.3 of the Spanish Constitution.
[41] See Art. 39.4 of the Spanish Constitution.
[42] See Art. 39.2 of the Spanish Constitution.
[43] See Art. 35.1 of the Spanish Constitution.
[44] See Art. II of the Spanish Constitution.
[45] See Art. XVI./3 of the Fundamental Law.
[46] See Art. XVI./4 of the Fundamental Law.
[47] See Art. XXX./2 of the Fundamental Law.

3. Evolvement of the concepts and their evaluation

So far it has been shown, what the relationship between Church and state is in Mexico, Spain and Hungary, and what kind of constitutional concept of family can be detected from the explicit text of the constitutions. Now it will be shown, how these concepts have evolved, what the milestones were and who triggered the changes. In the present chapter the main focus will be on the regulation of marriage, divorce and same-sex relationships.[48] It will be shown how marriage as a civil act came into force (whether the aim of the legislator was to counteract the Church, or it had different reasons), how divorce was regulated over time, and – as to a more recent issue – how marriage or civil union for same-sex couples came into force.

3.1. Mexico

Civil marriage in Mexico

Mexico, as it was mentioned earlier, is traditionally a Catholic country. Soon after it had been conquered by Spaniards, the Catholic Church started to play an important role in Mexico. Most of the acts that had any legal ramification someone's life belonged to the Church: birth, marriage, death. Over time, the Church became enormously wealthy as a result of the conclusion and registration of all these acts.[49] Not surprisingly, the tensions between conservative forces and those who opposed them were constant from the very beginning. In 1857, a new constitution was enacted (following the first Constitution of 1824), which significantly changed the position of the Church: it declared the separation of Church and

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[48] Other provisions mentioned earlier, such as equality and the protection of children will not be examined in details. These provisions were mentioned earlier in order to see the bigger picture, and will be left out for reason of scope limitations.

[49] See Vargas, Jorge A. 2002. "Family Law in Mexico: A Detailed Look into Marriage and Divorce." *Southwestern Journal of Law and Trade in the Americas* 9 (5): 5-88. p.11.

state.[50] Beyond enacting a new constitution, the new regime – led by President Benito Juárez – introduced a number of laws, known as the Reform Laws that further modified the state-church relationship. The following laws were enacted: the Law on Nationalization of Church Properties, the Law on Civil Matrimony and the Law on the Civil Status of Persons in 1859. In the following years other laws were adopted that further restricted the power of the Catholic Church. In 1873, all these laws were incorporated in the Constitution of 1857.[51]

Prior to the Constitution of 1857 and to the Law on Civil Matrimony and on the Civil Status of Persons, the Catholic Church had exclusive jurisdiction over baptized persons. If two persons were baptized the Church had the authority to conclude their marriage, but in case the persons were not baptized, the Church acknowledged that it had no jurisdiction.[52] In 1857, the state introduced the Civil Registry, and since then marriage had civil effects only if they were reported to state authorities and it was registered in the Civil Registry.[53] It is important to note, that at this time marriage was concluded by the Church, according to canonic laws. In 1859 the Law on Civil Matrimony was introduced, and the Church had no longer the authority to conclude marriages with civil law effects. Marriage had to be performed before state authorities.[54] The next landmark was at the time of the Second Mexican Empire (1864-1867), when Emperor Maximilian introduced a new system, allowing the Church to conclude marriages. But marriage still had no civil law effects, therefore for Catholics two marriages had to be concluded: one before state authorities, and one before the Church. This dual system was introduced as a compromise, and is still in force today.[55]

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[50] See Vargas. p.13.
[51] Decree that Prohibits the Intervention of the Church in the Administrations of Cemeteries (1859), Decree Severing the Relations with the Vatican (1860), Law on Freedom of Religion and Worship (1860), Law on the Secularization of Hospitals and Charitable Institutions (1861) and the Decree Declaring the Extinction of all Religious Communities in the Mexican Republic (1863). See: Serna de la Garza, p.14.
[52] See Vargas. p.11.
[53] See Vargas. p.13.
[54] See Vargas. p.14.
[55] See Vargas. p.16.

The new Civil Codes of 1870 and of 1884 introduced no significant changes; they essentially upheld the existing system. A new Constitution was enacted in 1917, which is the one still in force, however with significant amendments. The Constitution declared the "exclusive jurisdiction of the officials" with regard to marriage. In 1928, the new Civil Code was introduced, that upheld the previous system, and is still in force, with several amendments.[56]

As it can be seen, marriage initially had fallen under the exclusive jurisdiction of the Catholic Church, and then registration of marriage in the Civil Registry had been required to produce civil law effects, then for a short period of time the authority of the Catholic Church to conclude marriages had not been acknowledged. Finally a compromise had been made between marriage as a civil act and marriage as an act belonging to the Catholic Church. Given the historical tensions between the Church and opposing forces, it can be concluded, that civil marriage was introduced to counteract the power of the Catholic Church.[57]

Divorce in Mexico

Since canonic law does not know the institution of divorce, divorce was unknown in Mexican law before the introduction of civil marriage. However, for a long time, civil law followed the canonic approach and declared marriage as indissoluble. According to the Law on Civil Matrimony of 1859, divorce was only a temporal act, it did not allow the spouses to remarry someone else, and the grounds for divorce were enumerated.[58] The Civil Code of 1870 and 1884 upheld this regulation. They strengthened that divorce only suspends certain civil obligations, they allowed the physical separation of the parties, and the grounds for divorce were enumerated.[59]

[56] See Vargas. pp.16-21.
[57] See Serna de la Garza, pp.13-14.
[58] See Vargas. p.15.
[59] See Vargas. pp.16 and 73.

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A significant change was introduced by two decrees in 1914-1915: one eliminating the term "indissoluble" from the definition of marriage, and one amending the Civil Code accordingly.[60] Marriage could be dissolved three years after its conclusion by free and mutual consent of the parties, or any time, in case the procreation was impossible or in case of a grave omission of one of the parties.[61] It is important to emphasize, that either the free and mutual consent of both parties was required, or the existence of one of the enumerated grounds. The Family Relations Act enacted in 1917 allowed for divorce by mutual consent, and no other grounds were required for dissolution. This was a breakthrough in the regulation, and some claimed that "(i)t shook Mexico's family structure from its very foundations (…). At the same time, it is a work of sincerity and courage."[62] In the 1920's and 1930's some other reforms took place that further facilitated divorce,[63] but the real change came in 2008, with the introduction of unilateral divorce. The regulation was changed from fault-based system to no-fault divorce procedures. The current forms are the administrative voluntary divorce and the unilateral divorce. No further ground is required if the marriage was concluded at least one year earlier, but the parties have to reach an agreement on some important questions, such as child custody and the separation of real property.[64]

Same-sex relationships in Mexico

Before examining how same-sex marriage acquired legal force in some parts of Mexico, it is very important to emphasize, that in Mexico marriage is essentially regulated on state level, and not on federal level. Therefore, although the Civil Code of the Federal District is applicable on federal matters throughout the country, on ordinary matters it is only applicable

[60] See Vargas. p.74.
[61] See Silveria, Graciela Jasa. 2013. "Family Law Reform in Mexico City: The Contemporary Legal and Political Intersections." *The International Survey of Family Law*. 2013: 267-89. p.282.
[62] See Vargas. p.74.
[63] See Silveria. p.283.
[64] See Silveria. p.281.

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in the Federal District.[65] The civil codes of the states in general do not show significant deviation from the Federal District Civil Code, but there some differences, especially with regard to same-sex marriage.[66]

The equality of homosexual persons usually evolves gradually, and the first institution that gives equal rights to same-sex couples is civil union and not same-sex marriage. In Mexico the starting point of the movements that reached the desired equality originated from the capital, Mexico City. Gay rights movements started in the 1970's: the first gay rights organization was Frente de Liberación Homosexual and the first Pride was held in 1979 in Mexico City. Although being homosexual was more and more accepted by society, and also some politicians were openly homosexual, a quite considerable time had to pass before substantial legislation came into force. In Mexico City the first law on civil union was enacted in 2006, and then in 2009 the law on same-sex marriage and adoption by same-sex couples came into force.[67] The law enacted practically amended the provision of Civil Code on marriage (Article 146), but it left intact the provision dealing with adoption (Art. 391). The amendment on marriage abolished the terms "man" and "woman", and declared the following: "Marriage is a union of two persons for the achievement of a community of life, where both consorts will encourage respect, equality and mutual assistance".[68] Article 391 on adoption remained unchanged, thus married or unmarried same-sex couples can adopt children together, if they accept the child as their own.[69]

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[65] The Federal District is equivalent to the capital, Mexico City.
[66] See Beer, Caroline, and Victor D. Cruz-Aceves. 2018. "Extending Rights to Marginalized Minorities: Same-Sex Relationship Recognition in Mexico and the United States." *State Politics & Policy Quarterly* 18 (1): 3–26. https://doi.org/10.1177/1532440017751421. p. 4.
[67] See Capece, Brandon. 2016. "The Catholic Church and Mexico: The Struggle for LGBT Equality." *Human Rights Documents Online*. https://doi.org/10.1163/2210-7975_hrd-1224-2016004. pp.3-4.
[68] See Silveria, p.280.
[69] See Unzelman, Allen C. 2011. "Latin American Update: The Development of Same-Sex Marriage and Adoption Laws in Mexico and Latin America." *Law and Business Review of the Americas* 17: 135-146. p.139.

As it was mentioned earlier, the law was immediately challenged after its adoption, and the Supreme Court ruled in two separate decisions that both same-sex marriage and adoption is constitutional.[70]

In the decision of 2/2010, the Supreme Court ruled that the Constitution does not refer to the institution of marriage, nor to a specific type of family.[71] In its decision upholding the constitutionality of the provision on adoption, the Court relied on its decision on same-sex marriage. It claimed that since same-sex marriage is constitutional, it would be discriminatory not allowing adoption by same-sex couples.[72] It also emphasized that the Constitution "did not define the ideal family as one with a mother and a father".[73]

Although the abovementioned decisions of the Mexican Supreme Court are applicable for the Federal District, it has further implications throughout the country. The Court struck down several state level legislation that ban same-sex marriages, thus step by step same-sex marriage was getting acknowledgment. More importantly, the Court in its decision 43/2015 declared that any state legislation that does not allow same-sex marriage is unconstitutional. Unfortunately, this decision is not directly applicable, thus same-sex couples first has to challenge the law banning same-sex marriage before an ordinary judge, then they can get married.[74]

It is important to note, that the adoption of regulations giving equal rights to same-sex couples is a result of a long process. LGBTQ organizations had proposals already in 1999; the leftist party PRD had a proposal in 2000 and in 2001. The latter proposal was finally enacted in 2006 ensuring civil union for same-sex couples.[75] The position of the Catholic Church and

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[70] See Unzelman, p. 135.
[71] See the decision of the Mexican Supreme Court: tesis aislada –P. XX/2011, 9a época – 2/2010.
[72] See Unzelman, p.135.
[73] See Unzelman. p.141.
[74] See the decision of the Mexican Supreme Court: tesis de jurisprudencia – 1a 43/2015, 10a época.
[75] See Silveria, p.280.

some conservative forces with regard to these developments is extremely interesting, especially in light of the fact that a very high percentage of the population is Catholic and at the same time is in favor of the recognition of same-sex couples.[76] The Church harshly opposed the amendments of 2009, and it mobilized its believers to protest against the law. However, the protest was unsuccessful, and it was too late to prevent the adoption of the new law. The Church was more successful when former President Nieto proposed the amendment of Article 4 of the Constitution to ensure same-sex marriage throughout the country. As a consequence of the protest by the Church and its allies, the debate on the constitutional amendment stopped.[77]

Even if the Church openly opposed the legislation legally acknowledging same-sex relationships, Mexico ended up with one of the most liberal and protective regulation. So far same-sex marriage and civil union is allowed in more than half of the states, and according to the decision 43/2015 of the Supreme Court, all state legislations prohibiting same-sex marriage is unconstitutional. This is especially interesting in light of the country's Catholic tradition. How is it possible that a country that is so deeply Catholic has such a liberal approach? A possible explanation is the relationship between state and church. According to Caroline Beer and Cruz Aveces, the historical principles of separation of state and church, and the total exclusion of religious arguments from public debates (even by conservative politicians) are the reasons why these legislations could take place. But this question will be addressed later, when comparing with the experiences of the two other countries.[78]

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[76] See Beer and Cruz Aveces, p.6.
[77] See Beer and Cruz Aveces, p.14.
[78] See Beer and Cruz Aveces, p.11.

3.2. Spain

Civil marriage in Spain

In Spain, marriage belonged to the Catholic Church for a long period of time, such as in Mexico. In 1870 the Act on Civil Registry and the Act on Civil Marriage was introduced, and for the very first time in Spain's history, civil marriage was the only marriage that had civil law effects. The law allowed for canonic marriage too, but it had no legal consequences. However, this period did not last for a long time. With the decree of 1875, canonic marriage was reestablished, and civil marriage became a substantial institution, only for those who did not profess the Catholic religion. The system was upheld with the Civil Code of 1889, and also in 1900. It is important to note, that people were entitled to conclude a civil marriage, only in case none of the two persons professed the Catholic religion, i.e. the conclusion of a civil marriage was not a choice of the spouses. Civil marriage as an obligatory institution was introduced in the 1932, at the beginning of the secular Second Republic. Until 1938, when the system was abolished, only civil marriage had civil law effects. In 1938 the system of 1900 was introduced, but with a slight modification: couples could conclude a civil marriage only if at least one of them was not Catholic.[79] The fact that someone was not Catholic had to be proved by documents. In 1956 the system was amended again, and both of the persons had to be non-Catholic in order to be entitled to have a civil marriage. This was reinforced in 1958. In 1967 the Act on Freedom of Cults and Religion was enacted, and accordingly the Civil Code allowed for civil marriage only in case both of the spouses were non-Catholic. People belonging to other religions could conclude a civil marriage and a religious one, before or after the civil marriage. From 1967 no documentation was required to prove that someone is

[79] Prior to that, both of the persons had to be non-Catholic.

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not Catholic, and from 1977 the sole fact that someone concluded a civil marriage, implied the presumption that the person is not Catholic.[80]

In 1978 a new Constitution was enacted, which is still in force. Article 16 of the Constitution ensures the right to freedom of religion; Article 32 ensures the right to marry. The Civil Code was amended accordingly, and it introduced a facultative system. Article 42 of the Civil Code declares that everyone has the right to conclude a civil marriage, irrespective of his or her religion. One may decide whether he or she wants to conclude a religious marriage, or a civil marriage. Canonic marriage and marriages concluded by religious authorities that have an agreement with the state, do have civil law effects from their conclusion, but they have to be registered in the Civil Registry. However, registration has a declarative, and not a constitutive effect.[81]

Thus the current marriage system in Spain is a facultative system. One can decide between a civil marriage and a religious marriage. Religious marriages have civil law effects from their conclusion, but they have to be registered in the Civil Registry. Currently the following churches and religions may conclude marriages that have civil law effects: the Catholic Church, the Islamic religion, the Evangelical religion, the Jewish religion, the Church of Jesus Christ of the Saints of the Last Days, the Church of the Witnesses of Jehovah, the Buddhist Church and the Orthodox Church. The Spanish State has a concordat with the Holy See; it has a cooperation agreement with the Islamic, Evangelical and Jewish religions. It has no cooperation with the other abovementioned religions, but they are "recognized by notorious rootedness".[82]

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[80] See Expósito González, Miriam. 2018. *La evolución del Sistema Matrimonial y las Diferentes Confesiones Religiosas en España*. Universidad de La Laguna, Facultad de Derecho. pp.5-16.
[81] See Expósito González, pp.17-19.
[82] See Expósito González, p.5.

Divorce in Spain

As it was shown it the last subchapter, canonic marriage – except two short periods of time between 1870-1875 and 1932-1938 – produced civil law effects, and also the current system gives civil law effect to canonic marriage.[83] Since the majority of Spaniards was and is Catholic, the dissolution of marriage was one of the most problematic legal issues, given that according to canonic law marriage is indissoluble.[84]

The first law on divorce was introduced in the Second Republic, in 1932, and it was in force until 1938. The law of 1932 was much more progressive than the one enacted almost 50 years later, in 1981. The law on divorce of 1932 did not require judicial separation as a prior step to divorce, and the temporal limitations applicable for spouses were also a lot shorter.[85] However, the law was in force for a very short period of time, and when Franco came into power, he did not only annul the law on divorce of 1932, but also declared that all divorces based on the law shall be deemed null and void.[86]

After the law on divorce of 1932 was abolished, there was no law regulating divorce for almost 50 years. At this time, only judicial separation without dissolution was allowed.[87] In 1978, the new Constitution was enacted and it created the constitutional basis for divorce. Article 32 paragraph 2 of the Constitution says that "(t)he law shall make provisions for the forms of marriage (…), the grounds for separation and dissolution (…)." The Party of Suárez

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[83] See Glos, George E. 1983. "The Spanish Divorce Law of 1981." *International and Comparative Law Quarterly* 32 (3): 667–88. https://doi.org/10.1093/iclqaj/32.3.667. p.688.
[84] See Glos, p.667.
[85] See Glos. pp. 667., 680., 688.
[86] See De Santa Olalla Saludes, Pablo Martín. 2001. "La Ley Del Divorcio De Junio De 1981 En Perspectiva Histórica." *Espacio Tiempo y Forma. Serie V, Historia Contemporánea* 14: 519–51. https://doi.org/10.5944/etfv.14.2001.3055. p.536.
[87] See Glos, p.667.

used the promise of divorce already in its electoral campaign; and soon after his party won the elections, the project for preparing a law on divorce has started.[88]

It is important to highlight again, why the issue of divorce was so contentious in Spain. Marriage is indissoluble according to canonic law. Therefore it is really interesting to see what role the Catholic Church played in the discussions prior to enactment of the law on divorce. Surprisingly, it did not prevent the adoption of the law. The Catholic Church was divided with regard to the question of divorce; those who strongly opposed the institution and have voiced their concern were the ones in minority. The majority of the Church rather stayed silent. The reason behind it that this part of the clergy realized that there is an irreconcilable tension between the doctrines of the Catholic Church and political reality. Therefore, meanwhile the draft of the law was discussed the in the Committee of Justice, the Episcopal Conference did not make any official statement with regard to the new law. When the new law was enacted it made a declaration on the new law claiming that divorce makes families incredibly fragile. However, beyond this declaration, it did not do anything that could or would have constituted a real obstacle against the adoption of the law.[89]

Although, some conservative Catholics protested against the law on divorce and some archbishops made statements arguing that marriage is indissoluble and divorce goes against the institution of family, the position of the Catholic Church as a whole may be regarded as very progressive.[90] The Catholic Church in Spain remained silent and left the decision on divorce in the hands of political authorities. It did so despite the fact that the Catholic doctrine explicitly deems marriage as indissoluble and practically every pope in the 20th century campaigned against divorce.[91]

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[88] See De Santa Olalla Saludes, p.526.
[89] See De Santa Olalla Saludes. pp.520-526., 549.
[90] See De Santa Olalla Saludes, pp.521-522.
[91] See De Santa Olalla Saludes, pp.530., 540., 550.

The law on divorce that was finally enacted in June 1981 did not really satisfy any of the two sides. Those who opposed divorce criticized the law because it allowed for divorce by mutual consent. Those who were in favor of divorce criticized the law because although it allowed for divorce, it was extremely difficult to get it. Practically it introduced separation as a prior step to divorce, which duplicated the procedure, moreover consumed money and time. The temporal limitations applicable for the spouses were also very long.[92]

To sum up, the law on divorce of 1981 was a compromise, and it reflected the division of the governing collation (UCD) which comprised of Christian democrats and social democrats. It can be seen, that the legislator wanted to give possibility for divorce, but it also imposed serious obstacles on divorce (requirement of separation, temporal limitations), in order to avoid hasty divorces.[93]

The system of divorce, that was introduced in 1981 and only allowed for divorce on explicit grounds, after a certain period of time and separation, was changed in 2005. The new system upheld the two main forms of divorce – contentious procedures and mutual agreement – but abolished the enumerated grounds for divorce, and also the institution of separation as a prior step to divorce. Although the reason behind separation was to use divorce only as a last resort, in 2005 the legislator considered it to be too demanding, both personally and economically. Beyond the two major modifications, the temporal limitations were also shortened; under the current system it is possible to divorce already three months after the marriage was concluded.[94]

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[92] See Glos. pp.677-672.
[93] See Glos, p.682.
[94] See Camacho Serrano, Julia. 2007. "El Proceso de Divorcio Español tras la Ley 15/2005, de 8 de Julio." *Revista Jurídica U.I. P.R.* 41 (1-2): 181-196. pp.181-182.

Same-sex relationships in Spain

Same-sex marriage was introduced in Spain in 2005, after the victory of the Socialist Workers Party (PSOE). The party campaigned with the promise of the introduction of same-sex marriage, and after winning elections, the project to enact a law on same-sex marriage had started soon. The law amended Article 44 of the Spanish Civil Code, which declared: "A man and a woman have the right to marry in accordance with the provisions of this Code." The amendment added: "Marriage will have the same requirements and effects whether both contracting parties are of the same or different sex." The amendment replaced in further 18 articles certain gendered terms with gender neutral terms. The law of 2005 did not only allow for marriage for same-sex couples, but also for adoption, and several other rights with regard to inheritance, divorce, residence and certain tax benefits. To put it briefly, same-sex couples now enjoy the same rights in marriage as heterosexual couples.[95] However, it has to be mentioned, that the prior to the adoption of the law on same-sex marriage, same-sex couples had more or less the same rights as heterosexual couples. Therefore the real change after the enactment of the new law was the use of the notion of "marriage".[96] Some people claimed, and also the Constitutional Court reached the conclusion, that the amendment did not really give a right to homosexual couples that was so far denied, it rather did change the definition of marriage.[97]

The definition of marriage brings us to an important question. The Spanish Constitution, as opposed to the Mexican Constitution that does not contain any definition for marriage, in Article 32 paragraph says, that "(m)an and woman have the right to marry with full legal equality." Although the terms "man" and "woman" are explicitly mentioned, those who

[95] See Villars, Rina. 2016. "Same-Sex Marriage and the Spanish Constitution: The Linguistic-Legal Meaning Interface." *International Journal for the Semiotics of Law* 30 (2): 273–300. https://doi.org/10.1007/s11196-016-9491-8. pp. 273-274.
[96] See Garcimartín, Carmen. 2013. "The Spanish Law on Same-Sex Marriage: Constitutional Arguments." *BYU Journal of Public Law* 27 (1-2): 443-464. p.451.
[97] See Garcimartín, p.454.

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favored the amendment claimed that mentioning these terms does not mean that one man and one woman can only marry; there is nothing indicating that they have to marry "each other".[98]

The law, not surprisingly was challenged real soon after its adoption. Less than three months after the new law came into force, seventy-two deputies of the Group Parliamentary Popular challenged the law, but it took the Constitutional Court seven years to decide on the case, and dismiss the complaint. The Court mainly relied on the evolutionary interpretation of the Constitution, and argued that the text neither bans nor requires same-sex marriage.[99]

The reasoning of the Court was criticized by many, among scholars and important public institutions. To a certain degree it also contradicts to its earlier judgments. As to its earlier judgments, the Court in one of its Resolutions in 1994 said that "the union between persons of the same biological sex is neither a regulated juridical institution nor a constitutional right." Practically it said that legislator has the right to grant the same rights to homosexual couples, but it can also grant some rights only to heterosexual couples. In contrast, in its judgment of 2012 it claimed that Article 32 paragraph 1 "cannot be understood as the establishment of the heterosexual principle of marriage."[100]

As it was mentioned before, the linguistic interpretation of the constitutional text stood in the center of legal debates. Those who favored the amendment claimed that the heterosexuality is not an essential element of marriage, those who opposed the amendment claimed the opposite. The Court reached the conclusion that it does not follow from the text that marriage can be concluded only between one man and one woman.[101]

From the many claims that were raised by the plaintiffs and public institutions (such as the right to freely develop the personality, the principle of nondiscrimination), the only one that

[98] See Villars, p.274.
[99] See Villars, pp.275-276.
[100] See Garcimartín p.448.
[101] See Villars, p.296.

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the Court found could lead to the conclusion that the amendment is unconstitutional, is the institutional guarantee of the protection of family. The Court reached the conclusion that marriage and families are addressed in different sections of the Constitution, therefore family does not necessarily stem from marriage.[102] It also said that the heterosexual feature rather belongs to the "traditional idea of marriage, which is no longer the only or even the more relevant idea in today's society."[103]

To say a few words on how the Catholic Church reacted, it has to be mentioned that it highly criticized the amendment, and it actively opposed homosexuality since the 1990's. At that time, the Episcopal Conference argued that homosexuality is a result of bad habits, company and early experiences. The Church was also active opposing homosexual relationships from 2000, when the socialists introduced their first proposals in 2001 and 2003. In 2003 the Church even presented a pastoral directory for the family.[104] In 2005 several bishops were marching on the streets of Madrid "in favor of family".[105] But despite its high mobilization capacity, the Church was unable to prevent the amendment of the Civil Code.[106]

It is important to highlight, that although the Constitutional Court declared that the amendment of the Civil Code is constitutional, it also declared that there is no constitutional requirement to ensure same-sex marriage. The decision implies that the Court left open the issue to a future legislator to change the legislation in force if it desires.[107] The differentiation between a constitutional requirement and a law that is constitutional is really interesting with regard to the decision and reasoning of the Mexican Supreme Court. The Mexican Supreme

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[102] See Garcimartín, p.449.
[103] See Garcimartín, pp.450-456.
[104] See Schmitt, Sophie, Eva-Maria Euchner, and Caroline Preidel. 2013. "Regulating Prostitution and Same-Sex Marriage in Italy and Spain: the Interplay of Political and Societal Veto Players in Two Catholic Societies." *Journal of European Public Policy* 20 (3): 425–41. https://doi.org/10.1080/13501763.2013.761512. p.440.
[105] Colom González, Francisco. 2013. "Political Catholicism and the Secular State: A Spanish Predicament." *RECODE Working Paper* 20: 1-14. p.11.
[106] See Schmitt, Euchner, and Preidel, p. 436.o.
[107] See Garcimartín, pp. 445., 463.

Court based its reasoning on the prohibition of discrimination, and declared that the right to same-sex marriage is deriving from a constitutional requirement. It can be seen, that in the two cases the decisions of the Spanish Constitutional Court and the Mexican Constitutional Court have different legal enforceability.

3.3. Hungary

Civil marriage in Hungary

In Hungary, the first act that introduced civil marriage was the Act XXXI of 1894. The reason why the Hungarian legislation on civil marriage is interesting is because it introduced at the same time the institution of divorce, so the debate around the introduction of civil marriage is indispensable of the debate on divorce.[108]

When the Act was enacted in 1894, eight different marriage systems were in force according to eight different religions: the Roman Catholic, the Greek Catholic and Serbian, the Protestant, the Transylvanian Reform, the Transylvanian Evangelical, the Unitarian, the Hungarian Israelite and the Transylvanian Israelite. All these religions and churches had jurisdiction over their own believers, and the eight systems existed parallel. This regulation obviously led to confusion, and it went against the very essence of a modern state, namely the requirement of a uniform jurisdiction over every citizen. Thus the system, where one's religion and domicile were the decisive factors of what religion or church has jurisdiction, could not be any more maintained. Although previously there had been some attempts to enact legislation on civil marriage, the first act on civil marriage and the act on civil registry were enacted in 1894.[109]

[108] See Cserbáné Nagy, Andrea. 2012. *A házassági jog kodifikációi*. Miskolci Egyetem Állam és Jogtudományi Kar. p.30.
[109] See Cserbáné Nagy, pp.30-31.

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The debate prior to the enactment shows the division between the opposing forces, namely the Catholic Church and the Protestants, and the Catholic Church and the liberal state. This debate took place in the upper house (the House of Magnates) of the Hungarian Parliament, after the Chamber of Deputies (lower house) voted in favor of the act. The reason why the real interesting debate took place in the upper house is that some high-ranked members of the clergy were ex officio members of the upper house.[110]

Catholic bishops and archbishops highly opposed the act, so the act was at the end enacted only after an initial rejection and four highly tensioned debates in the upper house. The Catholic members of the upper house opposed the new legislation because they claimed the jurisdiction of churches (more precisely the Catholic Church) over marriage. They argued that civil marriage does not only go against the Church, but also against the Hungarian tradition, and it is both harmful for the Church and the State. They relied on arguments of divine and natural law, that was clearly unacceptable for those who were in favor of civil marriage (Protestants, liberal forces). Perhaps the biggest problem of the Catholics was that according to them the definition of marriage relied on the Protestant understanding of marriage. According to this, marriage is a civil contract, that is dissoluble and its validity is decided by the state. Another really interesting argument used by the Catholic Church is that the state benefited a lot from its relationship with the Church in its battle for independence. Some bishops warned that the state is not strong enough to a loose such an important ally like the Catholic Church.[111]

To understand the tensions around civil marriage and divorce, it is important to note that at that time Hungary was part of the Austro-Hungarian Monarchy, thus it was not independent from Habsburg Austria, and besides that, Hungary was multi-ethnical and multi-religious.

[110] See Eppel, Marius, and Andreea Dancila. 2016. "Ties That Divide: Nationalities and Confessions in the Debate on Civil Marriage in the Hungarian Parliament (1894–1895)". *Transylvanian Review* 4: 109-124. p.110.
[111] See Eppel, pp.111-117.

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There was very often an overlap between ethnicity and religion, and especially in case of smaller ethnicities, the clergy constituted the political elite. That is also a reason why churches were involved in the debate on civil marriage and divorce.[112]

The system introduced in 1894 regulated marriage as a civil act, therefore the same legislation was applicable for everyone throughout Hungary. The jurisdiction of churches and other religions remained intact, but the marriages concluded before religious authorities had no longer civil law effects, as before.[113] The act of 1894 remained in force with modifications until 1952.[114]

Divorce in Hungary

As it was mentioned above, the introduction of divorce took place at the same time as the introduction of civil marriage, and this novelty of the regulation – namely that marriage was deemed to be dissoluble – was the reason for the intense debates.

Before 1894, the possibility to divorce depended on the jurisdiction of each religion, e.g. Protestants allowed not only for temporal, but for final separation as well. According to Canonic law, only "separation from bed and table" was possible, and only in case of adultery. According to this, the spouses were separated physically, i.e. they did not have to live together, but some rights and obligations remained in force, such as the community of property. It was possible to reinstate marriage if the spouses desired so, but it was not possible to marry someone else. The consequence of this was that although people could not remarry,

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[112] See Eppel. p.118.
[113] See Cserbáné Nagy, p. 31.
[114] See Cserbáné Nagy, p.32.

in reality they lived in concubine relationship with their new partner, but this relationship enjoyed no legal protection.[115]

From 1894, marriage was deemed to be dissoluble; therefore it was possible to remarry after divorce, however, the institution of "separation from bed and table" also remained in force. The regulation on divorce relied on a fault-based system at this time. The grounds were enumerated in the act, and one could sue for divorce if his or her spouse committed one of the acts enumerated as a ground for divorce. The act of 1894 distinguished between absolute and relative grounds. Adultery, fornication, bigamy, willful desertion without cause and infliction if willful and grievous bodily harm on the spouse constituted absolute grounds for divorce. In these cases, judges had no discretionary power, not like in the cases of relative grounds. Among relative grounds, the legislator included a general clause of "grievous breach of conjugal duties", which term covered several acts, such as the woman's duty to follow her husband. In case of relative grounds the judge had discretionary power.[116]

This fault-based system remained intact at the time of the 1928 codification, since the topic was already highly debated, so modifying the provisions only would have added fuel to the debate. Therefore the institution of divorce by mutual consent was first established by judicial case law.[117] The fault-based system was finally abolished only in 1952, with the enactment of the new act on family law, and unilateral divorce was introduced only later.[118]

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Same-sex relationships in Hungary

As opposed to Mexico and Spain, in Hungary the institution of marriage is available only to heterosexual couples. However, in 2009 the institution for registered partnership was

[115] Cs. Herger, Eszter. 2012. "The Introduction of Secular Divorce Law in Hungary, 1895-1918: Social and Legal Consequences for Women." *Journal on European History of Law* 3: 138-148. pp.138-140.
[116] See Cs. Herger. p. 141.
[117] See Cs. Herger. p. 148.
[118] See Cserbáné Nagy, p.84.

introduced for same-sex couples with the Act XXIX of 2009 on Registered Partnership. As regards the backgrounds, in Hungary we cannot detect such strong LGBTQ movements as the ones in Mexico and Spain.

Since some scholars claim that the current definition of family in the Fundamental Law did not bring any novelties, only consolidated the case law of the Hungarian Constitutional Court, the case law of the HCC and the relevant legislations will be examined together.[119]

In its decision 14/1995 (III.13.) the Constitutional Court declared that the institution of marriage is traditionally the union of a man and a woman in Hungarian culture and law. However, it also emphasized, that "the ability to procreate and give birth to children is neither a defining element, nor the condition of the notion of marriage, but the idea that marriage requires the partners to be different sexes is a condition that derives from the original and typical designation of marriage". Although the Court defined marriage as the union of a man and a woman, it declared that the "union of two persons may realize such values that it can claim legal acknowledgment irrespective of the sex of those living together". Therefore, the Court found that the fact that same-sex couples cannot enter into marriage is not discriminatory, but it is contrary to the Constitution, that the partnership outside marriage is not acknowledged in case of same-sex couples.[120]

In December 2007 the Hungarian Parliament adopted the Act on Registered Partnership, but the Constitutional Court annulled it before entering into force, in its decision 154/2008 (XII.17.). The reason was that according to the new act, registered partnership ensured almost similar rights as marriage, and it was available to both same-sex and heterosexual couples.

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[119] See Jakab, András, and Pál Sonnevend. 2013. "Continuity with Deficiencies: The New Basic Law of Hungary." *European Constitutional Law Review* 9 (1): 102–38. https://doi.org/10.1017/s1574019612001058. p. 115.; Dombos, Tamás, and Eszter Polgári. 2013. "Zavaros progresszió: Az Alkotmánybíróság a családok védelméről szóló törvényről." *Fundamentum Human Rights Quarterly* 2013 (1): 55-62. p.55.

[120] See the English summary of the decision: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1995-1-002?fn=document-frameset.htm$f=templates$3.0

The fact that it ensured almost the same rights as marriage and it was available for heterosexual couples, led to the "doubling-up" of marriage. The "doubling-up" of marriage devaluates the institution of marriage that is protected by the Constitution. The Court annulled the act, but declared that an act providing registered partnership only to homosexual couples would be in line with the Constitution.[121]

The Hungarian Parliament adopted the new Act XXIX of 2009 on Registered Partnership in line with the requirements laid down in the decision of the Hungarian Constitutional Court 154/2008 (XII.17.).The new act opened registered partnership only to same-sex couples, and it ensured the same rights as in marriage, only with a few, but quite important differences. According to the act, registered partners cannot adopt jointly, not even each other's children. They cannot take the surname of their partner, and they cannot participate in assisted reproduction. The act was challenged by many. Some claimed that it undermines the institution of marriage; others claimed that it is discriminatory, since it excludes same-sex couples. Religious arguments were also used, claiming that homosexuality is immoral and disorderly.

The Court in its decision 32/2010 (III.25.) reaffirmed its previous position, described in its decision 154/2008 (XII.17.). It declared that "the right of same couples to legal recognition and protection can be derived from the fundamental right to human dignity" and that "the introduction of an institution similar to marriage for same-sex couples is a duty of the state imposed by the Constitution". The Court also declared that registrars cannot reject the request

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[121] English translation of the decision available: https://hunconcourt.hu/uploads/sites/3/2017/11/en_0154_2008.pdf

of same-sex couples to establish a registered partnership, on the grounds of freedom of conscience and religion.[122]

The most recent development of the Court's case law can be detected in the decision 43/2012 (XII.20.). In this decision the Court annulled several provisions of the Act CCXI of 2011 on the Protection of Families, since it unduly narrowed the definition of family. The petitioner, the ombudsman, claimed that the legislator did not take into consideration any other form of partnership than marriage, and discriminated on the grounds of sexual orientation. The Court concluded that rights cannot be revoked and the level of the protection of fundamental rights cannot be diminished, therefore the provisions that define family narrower than other acts (such as the Civil Code, the Act on Registered Partnership) are unconstitutional. It also emphasized that children shall not be discriminated as a consequence of the legal acknowledgment of the partnership in which their parents live.[123]

This decision is also interesting, because for the very first time, the Court gave a definition of family.[124] According to the Court every *life community* shall be deemed family, which is based on free will, which has at least two members who are connected by a real relationship, attachment and dependence, and in which relationship each member has specific rights and obligations.[125]

The legislator "responded" to the Court with the fourth amendment of the Fundamental Law, and amended Article L) defining family and marriage. Marriage was already defined as the union of a man and a woman, but the fourth amendment added that "(f)amily ties shall be

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[122] See the English summary of the case: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2010-1-003?fn=document-frameset.htm$f=templates$3.0
[123] No official English translation or summary is available. To see the Hungarian version: http://public.mkab.hu/dev/dontesek.nsf/0/065D43D1183D5A48C1257AE8004C12E8?OpenDocument
[124] See Dombos, Tamás, and Eszter Polgári. 2013. "Zavaros progresszió: Az Alkotmánybíróság a családok védelméről szóló törvényről." *Fundamentum Human Rights Quarterly* 2013 (1): 55-62. p.61.
[125] See Decision 43/2012 (XII.20.) of the Hungarian Constitutional Court.

based on marriage or the relationship between parents and children".[126] By this, the legislator explicitly favored the traditional family model to others.[127] This modification is interesting in light of the fact, that initially this definition was part of the draft of the Fundamental Law, but in the first version enacted on 25 April 2011, this definition was left out. The definition that is now included is only the result of the fourth amendment.[128]

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[126] See Article L) paragraph 1 of the current Fundamental Law.
[127] See Szente, Zoltán. 2016. "Az Alaptörvény (2012-2015)." Essay. In *A magyar jogrendszer állapota,* edited by Jakab, András and György Gajduschek. MTA Társadalomtudományi Kutatóközpont. 213-242. p.218.
[128] See Dombor and Polgári, p.55.

4. Conclusion

Mexico, Spain and Hungary are all countries with a strong Catholic tradition, and in some of them the percentage of people confessing Catholic religion is still remarkable. Despite the common Catholic heritage, all these three countries have adopted a different model of state-church relationship. Mexico, to counteract the dominant position and the enormous influence of the Catholic Church, adopted the Reform Laws and amended its Constitution in 1873. Since then, the Mexican state shall be a secular state, and church and state are separate. Spain, after the fall of the Franco regime, in its 1978 Constitution opted for the cooperationist regime. Hungary, with the enactment of the Fundamental Law in 2011 and with the adoption of the 2011 Church Act (and its significant modifications), established a preferred set of religions model.

According to Durham and Scharffs, there is correlation between the state-church model and the extent of religious freedom.[129] The assumption of this paper was that similarly to that correlation, there might be a correlation between the state-church model and state neutrality, more precisely the extent to which the constitutional concept of family is ideologically neutral. Relying on the correlation between Durham and Scharffs, the assumption is that in Mexico – adopting the separationist model – and in Spain – adopting the cooperationist model – the constitutional concept of family is ideologically more neutral than in Hungary that adopted the preferred set of religions model.

Looking only at the text of the constitutions, it can be seen, that there are some similarities, but also some significant differences in the constitutional concepts of family. What is similar in these three countries is that women and men are equal and state shall support and protect children, women and the elderly. However, the significant difference lies in the definition of

[129] See Durham and Scharffs, p. 117.

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marriage and family. The Mexican Constitution does not refer to marriage at all, neither does it provide any definition of family; the regulation of marriage is primarily left to states. The importance of this could be seen especially in the regulation of same-sex relationships. The Spanish Constitution ensures the right to marry, but it does not define family. It is also important to note, that although the Spanish Constitution explicitly mentions "woman" and "man" when it talks about the right to marry, it did not prevent an interpretation of this provision that would allow for same-sex marriage. The Hungarian Fundamental Law explicitly defines marriage as a union of a man and a woman, and moreover it declares that family bonds shall be based on marriage and the relationship between the parent and the child. Thus, there is an enormous difference between leaving the definition of marriage and family open (Mexico), giving a definition of marriage that is open to interpretation and not giving a definition of family (Spain), and explicitly defining both marriage and family (Hungary).

These concepts of families are especially relevant with regard to same-sex relationships, because the definition or lack of definition of marriage and family frame the possibilities for the legal recognition of same-sex relationships. Although the only recent issue now is the legal recognition of same-sex relationships, it is also important to know how the previous steps – marriage as a civil act and divorce – were made, because these also show the interplay between the state and the church (more precisely the Catholic Church).

In Mexico, canonic marriage has no civil law effect. Civil marriage was introduced in 1857 to counteract the influence of the Catholic Church; its jurisdiction had been cut back gradually: first registration was required to produce civil law effect (between 1857-1859), and then canonic marriage had no civil law effects at all (from 1859). Today the dual system exists, which was introduced in 1864. According to this, canonic marriage and civil marriage coexist, but only the latter produces civil law effects. In Spain canonic marriage (and some other religious marriages) produce civil law effect, but registration in the Civil Registry is required.

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Interestingly, except the two short periods, when secular forces were in power that introduced obligatory civil marriage (between 1870-1875 and between 1932-1938), civil marriage was only available for non-Catholic people. Only since 1978 is it possible for everyone to conclude civil marriage, regardless religion. In Hungary, civil marriage was introduced in 1894, and since then it is the only one that produces civil law effects. The introduction of civil marriage and modifications on it reflected the tensions between the Catholic Church and the state in all three countries, as it was shown before.

The introduction of divorce, and the debates around it also reflected the tensions between the Catholic Church and the state. In Mexico, divorce had been introduced in 1914-15, but unilateral divorce became possible only in 2008. In Spain, except the short period between 1932 and 1938, divorce had become possible first in 1981. Unilateral divorce was introduced in 2005. In Hungary, divorce was introduced with civil marriage already in 1894, and the law later allowed for unilateral divorce. As it can be seen, the introduction of divorce was gradual in all three countries, and sometimes a real significant time had to pass between two steps. What is even more interesting is the time difference between the three countries.

The issue, that shows the best the current tensions between the Catholic Church and the state, is the legal recognition of same-sex relationships. In Mexico, civil union was introduced in 2006 and same-sex marriage was introduced in 2009 in the Federal District. By now, in more than half of the states civil union and same-sex marriage is ensured. Moreover, according to the Mexican Supreme Court decision, all state legislation that ban same-sex marriage are illegal, and there were also some attempts to amend the Constitution to ensure same-sex marriage at constitutional level. The Catholic Church opposed the legal recognition of same-sex couples; although it was not able to prevent the adoption of the same-sex marriage law of the Federal District, it was successful in preventing the amendment of the Constitution. In Spain, the law on same-sex marriage was adopted in 2005, and was upheld by the

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Constitutional Court in 2012, despite the opposition of the Catholic Church. In Hungary only the law on registered partnership was adopted.

In order to see clearly the constitutional concepts of family and their evolvement clearly, it is important to summarize again the most important landmarks and legislations in force.

Mexico adopted a separationist model already in 1873, introduced obligatory civil marriage in 1859 and divorce in 1914-15. Its Constitution does not define marriage and family, and the Supreme Court declared that all state laws banning same-sex marriage are illegal. Spain adopted the cooperationist regime in its 1978 Constitution, and it allowed for everyone civil marriage and divorce only after that (1978 and 1981). The Constitution ensures the right to marry for man and woman, but it does not define family. Despite the fact that "man " and "woman" are explicitly mentioned with regard to the right to marry, a law on same-sex marriage was adopted in 2005, and was upheld by the Constitutional Court. Hungary introduced both obligatory civil marriage and divorce in 1894. Since the adoption of the new Fundamental Law and the Act on Churches, it has a preferred set of religions model. The Constitution does define both marriage and family. Only registered partnership is available for same-sex couples.

The assumption of the paper was that the same correlation might apply as the correlation identified by Durham and Scharffs. They claim that there is a correlation between the adopted state-church relationship and the extent of freedom of religion. According to them in a cooperationist or separationist model the extent of freedom of religion is bigger than in a preferred set of religions model.[130] Applying analogously this correlation to state neutrality, the assumption is that in Mexico (separationist model) and in Spain (cooperationist model) the extent of state neutrality is bigger than in Hungary (preferred set of religions model).

[130] See Durham and Scharffs, p. 117.

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As it was laid down in Chapter 1.2, the yardstick of the comparison is state neutrality, more precisely the exclusion of religious arguments and ideologies from public discourse. Since in all these countries the position of the Catholic Church was examined as opposed to the state, the reference is the Catholic doctrine on family and marriage. According to the Catholic doctrine, marriage is the indissoluble union of a man and a woman, and family is based on marriage. Therefore it is easy to conclude that the constitutional concept of family in Mexico and Spain does not reflect the Catholic ideology, since it does not only deem marriage dissoluble, but it also does ensure the right to marry for same-sex couples. In contrast, in Hungary the constitutional concept of family does reflect the Catholic doctrine to a certain degree. Although marriage is not indissoluble, it is defined as a union of a man and a woman. Thus, the correlation used by Durham and Scharffs are valid in the relation between the state-church model and the extent of state neutrality with regard to the constitutional concept of family.

The present comparison was driven by the problem that not all constitutional concepts of family are ideologically free. The comparison showed that despite the common Catholic background, it is not actually this background, but the state-church model that has an influence on the constitutional concept of family. In the separationist Mexico all religious arguments were excluded from public debate, even conservative forces had to translate their arguments into secular ones. Obligatory civil marriage divorce was introduced to cut back the power of the Church. Laws on civil union and same-sex marriage were introduced in several states, despite the opposition of the Church. In the cooperationist Spain optional civil marriage and divorce were introduced after the adoption of the Constitution of 1978. The Church remained silent on the issue, and left the decision on the regulation of divorce in the hands of political authorities, acknowledging the principle of separation between church and state. It opposed same-sex marriage, but it did not have the capacity to prevent its adoption.

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Hungary has now a preferred set of religions model, but it introduced obligatory civil marriage and the possibility of divorce more than a hundred years ago. The issue that shows the implications of the currently adopted model is the legal acknowledgment of same-sex couples. The recently adopted Fundamental Law and its several amendments give more and more a central role to Christianity and Christian values. However, this is another question, whether this reflects the aim of the Catholic Church itself, or it is just a political tool used by the current regime.

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Bibliography

Beer, Caroline, and Victor D. Cruz-Aceves. 2018. "Extending Rights to Marginalized Minorities: Same-Sex Relationship Recognition in Mexico and the United States." *State Politics & Policy Quarterly* 18 (1): 3–26. https://doi.org/10.1177/1532440017751421.

Blancarte, Roberto J. 1993. "Recent Changes in Church-State Relations in Mexico: An Historical Approach." *Journal of Church and State* 35 (4): 781–805. https://doi.org/10.1093/jcs/35.4.781.

Camacho Serrano, Julia. 2007. "El Proceso de Divorcio Español tras la Ley 15/2005, de 8 de Julio." *Revista Jurídica U.I. P.R.* 41 (1-2): 181-196.

Capece, Brandon. 2016. "The Catholic Church and Mexico: The Struggle for LGBT Equality." *Human Rights Documents Online*. https://doi.org/10.1163/2210-7975_hrd-1224-2016004.

Colom González, Francisco. 2013. "Political Catholicism and the Secular State: A Spanish Predicament." *RECODE Working Paper* 20: 1-14.

Cs. Herger, Eszter. 2012. "The Introduction of Secular Divorce Law in Hungary, 1895-1918: Social and Legal Consequences for Women." *Journal on European History of Law* 3: 138-148.

Cserbáné Nagy, Andrea. 2012. *A házassági jog kodifikációi*. Miskolci Egyetem Állam és Jogtudományi Kar.

De Santa Olalla Saludes, Pablo Martín. 2001. "La Ley Del Divorcio De Junio De 1981 En Perspectiva Histórica." *Espacio Tiempo y Forma. Serie V, Historia Contemporánea* 14: 519–51. https://doi.org/10.5944/etfv.14.2001.3055.

CEU eTD Collection

Dombos, Tamás, and Eszter Polgári. 2013. “Zavaros progresszió: Az Alkotmánybíróság a családok védelméről szóló törvényről.” *Fundamentum Human Rights Quarterly* 2013 (1): 55-62.

Durham Jr., W. Cole, and Brett G. Scharffs. 2010. *Law and Religion: National, International, and Comparative Perspectives*. New York : Aspen Publishers.

Eppel, Marius, and Andreea Dancila. 2016. "Ties That Divide: Nationalities and Confessions in the Debate on Civil Marriage in the Hungarian Parliament (1894–1895)". *Transylvanian Review* 4: 109-124.

Expósito González, Miriam. 2018. *La evolución del Sistema Matrimonial y las Diferentes Confesiones Religiosas en España*. Universidad de La Laguna, Facultad de Derecho.

Garcimartín, Carmen. 2013. “The Spanish Law on Same-Sex Marriage: Constitutional Arguments.” *BYU Journal of Public Law* 27 (1-2): 443-464.

Glos, George E. 1983. “The Spanish Divorce Law of 1981.” *International and Comparative Law Quarterly* 32 (3): 667–88. https://doi.org/10.1093/iclqaj/32.3.667.

Halmai, Gábor. 2017. “Varieties of State-Church Relations and Religious Freedom through Three Case Studies.” *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2984222.

Horwitz, Paul. 2011. *The Agnostic Age Law, Religion, and the Constitution*. Oxford: Oxford University Press.

Jakab, András, and Pál Sonnevend. 2013. “Continuity with Deficiencies: The New Basic Law of Hungary.” *European Constitutional Law Review* 9 (1): 102–38. https://doi.org/10.1017/s1574019612001058.

Miroshnikova, Elena. 2011. *The Cooperation Model in State-Church Relations: Experience and Problems*. Saarbrücken: LAP LAMBERT Academic Pub.

CEU eTD Collection

Rawls, John. 1997. "The Idea of Public Reason Revisited." *The University of Chicago Law Review* 64 (3): 765. https://doi.org/10.2307/1600311.

Sajó, András. 2014. "Preliminaries to a Concept of Constitutional Secularism." Essay. In *Constitutional Secularism in an Age of Religious Revival*, edited by Mancini, Susanna, and Michel Rosenfeld. Oxford, United Kingdom: Oxford University Press.

Schmitt, Sophie, Eva-Maria Euchner, and Caroline Preidel. 2013. "Regulating Prostitution and Same-Sex Marriage in Italy and Spain: the Interplay of Political and Societal Veto Players in Two Catholic Societies." *Journal of European Public Policy* 20 (3): 425–41. https://doi.org/10.1080/13501763.2013.761512.

Serna de la Garza, José Maria. 2013. *Constitution of Mexico: a Contextual Analysis*. Oxford: Hart.

Silveria, Graciela Jasa. 2013. "Family Law Reform in Mexico City: The Contemporary Legal and Political Intersections." *The International Survey of Family Law*. 2013: 267-89.

Szente, Zoltán. 2016. "Az Alaptörvény (2012-2015)." Essay. In *A magyar jogrendszer állapota,* edited by Jakab, András and György Gajduschek. MTA Társadalomtudományi Kutatóközpont. 213-242.

Unzelman, Allen C. 2011. "Latin American Update: The Development of Same-Sex Marriage and Adoption Laws in Mexico and Latin America." *Law and Business Review of the Americas* 17: 135-146.

Vargas, Jorge A. 2002. "Family Law in Mexico: A Detailed Look into Marriage and Divorce." *Southwestern Journal of Law and Trade in the Americas* 9 (5): 5-88.

CEU eTD Collection

Villars, Rina. 2016. "Same-Sex Marriage and the Spanish Constitution: The Linguistic-Legal Meaning Interface." *International Journal for the Semiotics of Law* 30 (2): 273–300. https://doi.org/10.1007/s11196-016-9491-8.

Other sources

Albaladejo, María Cristina Berenguer. 2015. "Los Matrimonios En Forma Religiosa No Canónica: Celebración e Inscripción En El Registro Civil De Acuerdo Con Las Reformas Operadas Por La Ley 15/2015, De 2 De Julio, De La Jurisdicción Voluntaria." *Derecho Privado y Constitución* 29: 83–131. https://doi.org/10.18042/cepc/dpc.29.03.

Barrero Ortega, Abraham. 2005. "El estado y las iglesias en España, 1978-2004." *Claves: de Razón Práctica* 151: 64-70.

Barrero Ortega, Abraham. 2014. "El matrimonio entre ciudadanos del mismo sexo: ¿derecho fundamental u opción legislativa?" *Revista de Estudios Políticos, Madrid: Centro de Estudios Políticos y Constitucionales* 163: 41-66.

Begné, Patricia. 2005. "Parental Authoirty and Child Custody in Mexico." *Family Law Quarterly* 39 (2): 527-542.

Cianitto, Cristiana, W. Cole Durham, Silvio Ferrari, and Donlu D. Thayer. 2013. *Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law*. Farnham, Surrey, England: Ashgate.

Comella, Víctor Ferreres. 2013. *The Constitution of Spain: A Contextual Analysis*. Oxford: Hart.

Delgado Molina, Cecilia Ardisia. 2012. "Entre lo Público y lo Privado: Análisis del Discurso del Cardenal Juan Sandoval Iniguez Frente a la Conyugalidad de Parejas del Mismo Sexo en Ciudad de México." *Ciencias Sociales y Religión* 14 (16): 61-77.

CEU eTD Collection

Gallego José Andrés, and Antón M. Pazos. 1999. *La Iglesia en la España contemporánea*. Madrid: Ediciones Encuentro.

Guitron, Julian. 1994. "Mexico: A Decade of Family Law 1983-1993." *Journal of Family Law* 33: 445-470.

Lápossy, Attila. 2009. "Az alkotmánybírák a házasság védelméről." *Fundamentum Human Rights Quarterly* 2009 (1): 109-116.

López Emilio La Parra, and Cortina Manuel Suárez. 1998. *El Anticlericalismo español contemporáneo*. Madrid, España: Biblioteca Nueva.

Madeley, John T. S. 2013. "Church and State in Western Society: Established Church, Cooperation and Separation." *Journal of Contemporary Religion* 28 (3): 531–33. https://doi.org/10.1080/13537903.2013.832503.

Mátyás, Ferenc. 2015. "Melegházasság Magyarországon?" *Ars Boni* 3 (2): 48-63.

Resende, Madalena Meyer. 2017. "A Holy Alliance between the Catholic Church and Constitution-Makers? The Diffusion of the Clause of Cooperation in Third Wave Democracies." *Politics and Religion* 11 (1): 55–78. https://doi.org/10.1017/s1755048317000311.

Nieuwenhuis, A. J. 2012. "State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks." *International Journal of Constitutional Law* 10 (1): 153–74. https://doi.org/10.1093/icon/mos001.

Pásztor, Emese. 2018. "Alkalmazni az alkalmazhatatlant: az alkotmányos családfogalomról." *Fundamentum Human Rights Quarterly* 2018 (2-3): 28-42.

CEU eTD Collection

Pfeffer, Leo. 1951. "Church and State: Something Less than Separation." *The University of Chicago Law Review* 19 (1): 1. https://doi.org/10.2307/1597719.

Scharffs, Brett G. 2017. "Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent and Those Hostile to Religion Should Care." *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2911086.

Soberanes Fernandez, José Luis. 1993. "La Reforma Constitucional Mexicana de 1992 en Materia de Relaciones Iglesia-Estado." Essay. In *Homenaje a Carlos Restrepo Piedrahita*, edited by Belisario Betancur Cuartas, Manuel Aragon Reyes, Schrader Camilo Calderón, José Bidart Campos Germán, and Brewer-Carías Allan Randolph. Santa Fe de Bogota: Universidad Externado de Colombia.

Uitz, Renáta. 2011. "…Megtalálni a lehető legsemlegesebb jogi keretet, amely elfogadja a vallási közösségek különbségeit". *Fundamentum Human Rights Quarterly* 2011 (3): 43-48.

CEU eTD Collection