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Research Review

HISTORICAL EVOLUTION OF MARITAL UNION IN COSTA RICAN LAW

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In this brief review the author presents an overview of the historical development of marital union in Costa Rican law, which has had a very interesting and varied evolution from the time of the indigenous societies before the arrival of the Spaniards in the sixteenth century to very recent dates, which have brought new profiles and forms to this legal institution.

1. Indigenous society

At the arrival of the Spaniards to the current Costa Rican territory in the sixteenth century, there were two large cultural areas of very different origins and customs. In the northeast region, in the Nicoya peninsula and the shores of the gulf of the same name, cultures of roots of mesoamerica predominated, especially the chorotegas; in the rest of the territory cultures belonged to the area that archaeologists and ethnologists call the Middle, with influences varied and predominance of the languages of the family macrochibcha.

a. The Mesoamerican Area

Among the Chorotegas, the family organization was fundamentally cognatic or matrilineal (Ferrero Acosta, 2000: 125). Marriage was monogamous and apparently indissoluble, except in cases of adultery or bigamy. Some kings and high-ranking officials had concubines, but they were never considered as lawful wives (Chapman, 1974: 34). Marriage between ascendants, descendants and consanguine brothers was prohibited although incest was virtually unknown (Arellano, 1997, I: 24; Chapman, 1974: 33; Ferrero Acosta, 2000: 125; Quesada Lypez-Calleja, 1980: 242).

Marriage usually required a series of ceremonies. It began with the woman's request for a hand, which was made by the suitor's father through a formal visit to her parents. If the request was accepted, a date for the wedding was set. The marriage engagement was celebrated with large parties, which were attended by the families of the bride and groom and their friends and neighbors. Prior to the wedding, both parties received a dowry from their respective parents, which could include arable land, a dwelling and various movable property. The lands and jewels were inherited by the children of the couple; but if one of the spouses died without the marriage having had offspring, these assets were returned to their parents (Guerrero & Soriano, 1982: 53–54).

In the kingdom of Nicoya and another nearby kingdom, Orotica, monarchs exercised the right of the First Night (*Ius primae noctis*) at the request of the wife's family, it was easier for her to find a husband (Ferrero Acosta, 2000: 125; Meléndez, 1978: 37). Lypez de Gymara says that women '*before marriage they are usually bad, and after marriage become good*' (Lypez de Gymara, 1965, I: 354) which seems to indicate that chastity was irrelevant for unmarried women but fidelity was considered important for married women. Many men preferred to take as spouses women who were no longer virgins and even those who already had great sexual experience (Chapman, 1974: 34–35; Guerrero & Soriano, 1982: 55–56; Lypez de Gymara, 1965, I: 354).

The Chorotega marriage ceremony was held in the presence of the king and the families of the bride and groom. The monarch with his right hand took the spouses by the middle and little fingers of their left hands, led them to a small house intended for marriage rites and there told them: *'Take heed that ye be good spouses, and that ye look for your wealth, and increase it always, and do not lose it'* (Arellano, 1997, I: 23; Ferrero Acosta, 2000: 124; Guerrero & Soriano, 1982: 55). Then the couple remained silent as they watched a splinter of ocote burn. When it was burnt out, the ceremony was considered finished, and the new spouses returned to a room in the house to consummate the marriage. The wedding celebrations began the next day, when the couple left the house and the husband told his friends and relatives that he had found the wife a virgin. This statement gave rise to general rejoicing. In case he announced that the woman was not a virgin and had been given to her as such, the bride was returned to her parents' house and the wedding was considered not to have been celebrated. However, if the groom had known before the wedding that the woman was not a virgin, the marriage was considered valid (Ferrero Acosta, 2000: 124; Quesada Lypez-Calleja, 1980: 242).

The adultery of the Chorotega woman was punished with a reprimand, severe corporal punishment and expulsion from the home. Her relatives insulted and ignored her, and the community regarded her as an impure, disloyal and shameless woman (Quesada Lypez-Calleja, 1980: 242). However, when the community celebrated rites of purification or **collective catharsis** sometimes accompanied by drunkenness, human sacrifice and ritual anthropophagy (Arellano, 1997, I: 27; Chapman, 1974: 56–61; Ferrero Acosta, 2000: 128, 133), a married woman, even of high rank, could have sexual relations with whomever she wanted or paid her, without scenes of jealousy or punishment being presented afterwards (Lypez de Gymara, 1965, I: 354; Quesada Lypez-Calleja, 1980: 242; Ferrero Acosta, 2000: 125).

The man's bigamy was punished with loss of property and banishment, and his lawful wife could remarry, if she had no children with the bigamist. If there were, she could not marry again, but if she took care of the children, she enjoyed the bigamist's property. A woman who knowingly married a married man lost all her property for the benefit of a lawful wife (Arellano, 1997, I: 23; Chapman, 1974: 47; Ferrero Acosta, 2000: 125; Guerrero & Soriano, 1982: 57; Quesada Lypez-Calleja, 1980: 242).

b. The Intermediate Area

In the Intermediate Area the kinship was usually matrilineal. Violators of this rule were buried alive (Gabb, 1978: 115). On the other hand, agnatic kinship was not recognized and therefore carnal treatment between two persons bound by exclusively patrilineal ties was irrelevant. There was also a uxorilocal residence system, that is, the man had to go to live at the house of his in-laws (Castro & Tosi, 1975: 65; Ferrero Acosta, 1988: 63) and contribute by their labor to the common sustenance of their new family; for this reason having daughters were considered advantageous, while it was known that the males, upon marriage, would work for another family (Gabb, 1978: 114). In case of illness, the husband had to return to his parents, but if the illness was sore or lasted too long, or if the man was lazy, the wife would not admit it again (Ferrero Acosta, 1988: 63).

In the Intermediate Area there seems to have prevailed a system of syndiasmic marital union, that is, voluntary and informal, which could be dissolved very easily, although some communities could have forms of monogamous marriage with a ceremony (Ferrero Acosta, 2000: 210). Polygamy, as among the Nicoyans, was usually reserved for kings and the upper strata of society, although other sectors also practiced it: in the second half of the nineteenth century, among the indigenous groups of Talamanca many men had two or more women, and the plurality of wives was at the option of the husband (Ferrero Acosta, 2000: 209–210; Gabb, 1978: 113). In addition, in some communities there was a custom of marrying a young girl to a young adult, so that she would be brought up with him until the moment of consummation of the union (Fernández Guardia, 1975: 155). Polyandry could also exist in certain groups (Stone, 1993: 63).

Term *ur betsuk* used today in the bribri language to designate marriage, which literally means *united hands*, gives an idea of how simple the ceremony could have been, when there was some (Stone, 1993: 61–63, 75–91). A German missionary stated that, even at the beginning of the twentieth century, a marriage with few formalities persisted among the bribri, but in which the mother of the bride played an important role, since she was the person to whom the suitor explained his intentions and who decided whether the union was convenient. The next day, after informing her husband, the mother told the suitor to come and live with them and the marriage was considered concluded (Bozzoli de Wille, 1978: 229–240).

As in other cultures, in the Intermediate Area of Costa Rica married women could have an equal or even higher position in the family than their husbands. Possibly, she also enjoyed greater sexual freedom than the Chorotega woman, since the groups of the Intermediate Area did not seem to give importance

to virginity and there were women who gave themselves to those who requested them (Ferrero Acosta, 2000: 209; Gabb, 1978: 113). As usual in syndiasmic families, there did not seem to be a substantial difference in the position of men and women in terms of the dissolution of marriage, as suggested by the customs maintained by the indigenous groups of Talamanca at the end of the nineteenth century: in the event of infidelity on the part of the woman, or of undue cruelty on the part of the husband, the couple separated temporarily or permanently (Gabb, 1978: 114).

It is possible that in some communities sexual coexistence between men was allowed. Fernández de Oviedo, commenting on this practice with respect to a group from the Panamanian Intermediate Area, culturally closely linked to the Costa Rican Intermediate Area, stated that those who maintained this type of coexistence were not despised or mistreated by other members of the community, but that if one of the cohabitants was unfaithful, his companion could kill him (Ferrero Acosta, 2000: 210).

c. Current situation

With the European conquest, the indigenous communities that came under the authority had to adopt as the only legal and permitted form of marriage the indissoluble canonical marriage performed by the Catholic Church. However, a few communities that maintained their culture in inaccessible or remote regions also retained their own model of family organization. In 1867, the Costa Rican law recognized the legal validity of indigenous customs, now also protected by Convention No. 169 of the International Labor Organization and the jurisprudence of the Inter-American Court of Human Rights and the Costa Rican Constitutional Chamber.

In several of the Costa Rican indigenous communities today their own systems of kinship and family organization are maintained with matrilineal or cognatic links (Bozzoli de Wille, 1979: 41–57; Guevara & Bozzoli, 2002: 45–46; Stone, 1993: 61–63, 75–91), and in which institutions such as uxorilocal residence and maternal inheritance of the land survive, although some of these customs have begun to decline (Guevara & Bozzoli, 2002: 46; Villalobos & Borge, 1995: 78–79). Between the Maleku and other communities, next to the monogamous marriage of state legislation and the Christian religion, the figure of the syndiasmic family subsists, with couples who after a certain courtship are constituted as such, without complex ceremonies to begin coexistence or to dissolve the union (Stone, 1993, 61–63; Instituto de Estudios de las Tradiciones Sagradas de Abia Yala, 2000: 73)¹. A woman's sexual initiation usually occurs early and on a voluntary basis, and her previous sexual experiences are often not given greater importance when forming a stable partner (Espinoza Espinoza & Aguilar Rojas, 1996: 91–92; Mucoz Corrales & Portilla Chaves, 2002: 249; Sánchez Romero et al., 2009; Bozzoli de Wille, 1969: 37)². Few vestiges of other traditional practices, such as polygamy, seem to remain (Instituto de Estudios de las Tradiciones Sagradas de Abia Yala, 2000: 64; Marrero, 2003: 14; Bozzoli de Wille, 1969: 36–37; Bozzoli de Wille, 1979: 97)³ and polyandry (Stone, 1993: 63)⁴.

¹ According to the Instituto de Estudios de las Tradiciones Sagradas de Abia Yala, 2000, the traditional custom of the Maleku states that when a young man wants to marry, his father accompanies him to the house of the intended one and bring cocoa and meat. The young man's father exposes his wishes, and the host communicates to them, takes her hand and tells the budding son-in-law: *'Here, I give her to you, she doesn't have another boyfriend, here in the house she lived, I don't strave her, I don't hit her, I don't mistreat her'*. Finally they drink chocolate, toast and ask for the divine blessing; the parents of both spouses turn to the divinity and ask him *'... may he take care of them and have sons and daughters, may they be strong and may the devil not harm them'*.

² In the Maleku community in the 1960s, as recorded in Bozzoli de Wille, M. E. *Costa Rican indigenous localities 1960–1968*: *'... An informant had four partners at different times each, the first three left her children... sexual experience occurs at an early age...'*

³ Among several rules for the life of the Maleku, recorded in Instituto de Estudios de las Tradiciones Sagradas de Abia Yala, 2000 is included one, according to which *'If you marry, you cannot have another woman, God Toku does not like you to be unfaithful to your wife'*. However, Marrero notes that in 2003 one of his Maleku informants, Don Luciano Castro, expressed: *'My grandfather told me that the caciques always had three women, but today the judge confuses the culture with rape or prostitution...'* The anthropologist María Eugenia Bozzoli de Wille, as a result of research carried out among the Maleku in the 1960s, says: *'Judging by our informants and our observations, what happens is that you change partners (this word is used) easily, but each union seems to be supposed as monogamous ...'* (1969: 36–37). Referring to the marriage customs of the bribris and the cabecars, the same author indicates that when a married woman refuses to have sexual relations with her husband, *'... it has been legitimate for the husband to seek a wife's sister'*. (1979: 97) There are also ngöbe families where polygamy exists.

⁴ Dr. Doris Stone, whose investigations were carried out in 1959, stated that in the cabécar community of Ujarrás *'... there have been cases of one woman and two or three men living in the same household. The woman washes and cooks only when she wants to. Otherwise men carry out these trades'*.

2. Catholic religious marriage as the only valid one

Throughout the period of Spanish rule and much of the nineteenth century marriage and related issues were regulated in Costa Rica by the Catholic canon law of the Latin rite, especially that contained in the norms of the Council of Trent. Thus it was arranged in the *Siete Partidas*, great Castilian legislative work of the thirteenth century, that was put into force throughout Spanish America.

Its part IV contained numerous regulations on betrothal and marriage, although both institutions were governed primarily by canon law. The betrothal was an enforceable contract before the ecclesiastical courts, and for its validity it was necessary that both betrothed were at least seven years old, although it could be valid with respect to minors of that age, if it was confirmed later. Marriage had the character of a sacrament and there was no divorce binding, with the exception of the few cases provided for in canon law. In addition to the rules of marriage, a number of civil laws, especially those relating to *Partidas*, regulated aspects of marriage relating to impediments, adultery, kinship and other matters (Jordan de Asso y del Río, Manuel & Rodríguez, 1984: 45–50).

The adultery of a woman was considered a crime and the laws established severe punishments for the adulteress and her accomplice.

Although Costa Rica became independent from Spain in 1821, Castilian laws continued to govern for twenty more years. In 1841 the *Código General del Estado* was issued, largely copied from laws of Peru and Bolivia, but the marriage system remained practically the same. According to its regulations, betrothal required a minimum age of ten years for the bride and groom and was an enforceable contract before the civil courts. Marriage had the status of a sacrament and was governed substantially by the provisions of canon law. The husband owed protection to the wife and this obedience to him. In addition, this regulation imposed a severe legal restriction on married women, which had not existed in the *Siete Partidas*, since in order to conclude contracts or exercise judicial acts, a married woman required authorization from the husband or in his absence from the judge, although she was allowed to test freely. Divorce existed, but a divorced person could not remarry while his spouse lived, and only ecclesiastical courts had jurisdiction to rule on divorce.

3. Civil marriage registered by foreign consuls (1864)

Until 1864 foreigners who were not Catholics had a serious problem if they wanted to marry in Costa Rica. Under Costa Rican law, the only valid marriage was that celebrated by the Catholic Church. Consequently, if, for example, an Anglican priest celebrated in Costa Rica the wedding of a British couple of that religion, according to Costa Rican law they were still single people, with all the problems that entailed. This caused the British Government to ask the Government of Costa Rica to eliminate by means of a law the difficulties related to the marriage of its non-Catholic subjects resident in the country, and this was communicated to Congress in May 1863 by the acting Secretary of Foreign Affairs Aniceto Esquivel in his annual report⁵.

On 18 December 1863 Congress passed a law according to which marriages between non-Catholic foreigners celebrated before the diplomatic or consular agents of their country, legally authorized, would have all civil effects in Costa Rica. It was necessary for the diplomat or consul to submit to the Ministry of Foreign Affairs the authorization of his own government to perform marriages. After each wedding, the official would send the certified copy of the ceremony to the Costa Rican authorities⁶.

Thus it was established for the first time that a civil marriage could be validly celebrated in Costa Rica, although such a case was strictly limited to non-Catholic foreigners whose country gave such power to its diplomats or consuls.

4. The Civil Code of 1888

The Civil Code, which entered into force on 1 January 1888, regulated family matters in titles IV–X of its book I, which dealt with persons, and replaced the regulations of the General Code on that subject⁷. This Code introduced substantial changes in matrimonial matters, since although it maintained Catholic

⁵ *Memorias de la Cancillería de Costa Rica (1842–1889) (1998) Heredia, Escuela de Relaciones Internacionales de la Universidad Nacional, y San José, Instituto Diplomático Manuel María de Peralta.*

⁶ Decree No. 45 of 18 December 1863. *Collection of laws, decrees and orders issued by the supreme Legislative and Executive powers of Costa Rica, in the years of 1863 and 1864, 1872.* 87–89.

⁷ Civil Code (1887) 1 ed. San José, Imprenta Nacional.

marriage as valid for the purposes of civil law, it established civil marriage and binding divorce, which allowed divorced persons to remarry. The betrothal had no civil effect and only civil judges could hear claims concerning divorce, separation and annulment of marriage. The Code also established a new property regime for the family and women, whether married or not, had full capacity to act.

The issuance of the Civil Code was highly controversial, because it faced strong resistance from the Catholic Church. For many years, despite the legal possibility of divorce, many people were reluctant to accept such an idea. Although legally their marriage was perfectly valid, divorced people who had remarried were not well regarded, and were often excluded from social treatment and even from family events. In addition, although divorce was legally permitted, it was not an easy matter: divorces were often long-term proceedings in the courts and almost always caused some scandal.

5. *The Family Code of 1974*

On 7 November 1973, the Legislative Assembly adopted the Family Code (Trejos, 1990, I: 39–40), which entered into force on 5 August 1974⁸. Although this new Code maintained in its fundamental guidelines the norms contained in the Civil Code, it included various precepts aimed at ensuring the equal rights of spouses and a more flexible regulation with regard to divorce. Over the course of successive reforms, divorce became increasingly easier and even divorce by mutual consent, agreed upon by the spouses without the need to express any reason, was allowed to exist.

6. *Protection of de facto unions (1995)*

Through a reform of the Family Code, carried out through the act No. 7532 of 8 August 1995, legal protection was established for the so-called de facto union (in other countries, common law marriage)⁹.

With this reform there was an important change, because before that couples who lived together but without a formal bond did not have any legal protection. If one of them died without a will, the other had no right over the inheritance or over the property they had gathered during their cohabitation. If one of them unilaterally dissolved the union, it was not considered that there was a common heritage, but that each retained the assets that were his own.

According to this law, the public, notorious, monogamous and stable de facto union, for more than three years, between a man and a woman who are legally capable of marriage (i.e. both are unmarried, widowed or divorced), shall have all the property effects of the legally formalized marriage at the end of any cause.

7. *Same-sex marriage (2020)*

This has been the most notable of the recent innovations to Costa Rican marriage legislation. Since 1976, an article of the Family Code had established that same-sex marriage was legally impossible in Costa Rica. The validity of such marriages was not recognized even if they were concluded outside Costa Rica, and a decision by the Office of the Attorney General even prohibited foreign consuls to register same-sex marriages in Costa Rica¹⁰ even if the legislation of their countries allowed it and even if such marriages were not going to have effects on Costa Rican territory.

At the end of 2017 the advisory opinion 24/17 of the inter-American Court of Human Rights, according to which the conclusion of marriage between persons of the same sex should be considered as part of human rights, caused a great stir in Costa Rica, and even had a strong effect on the first round of the presidential elections of February 2018, as the two candidates, the majority were those who had adopted the position more clear in favor and against the idea.

After many controversies, the Constitutional Chamber of Costa Rica, in a judgment of August 8, 2018, in its vote 2018-012782 and by majority vote, adopted the same criterion of the Inter-American Court of Human Rights and declared unconstitutional the prohibition of marriage between persons of the same sex established in the Family Code¹¹. Based on the resolution of the Chamber, in May 2020 it was established the legal possibility of the civil marriages between persons of the same sex with the same rights and duties

⁸ Family code (1974).

⁹ Act No. 7532 of 8 August 1995, Available at: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=22272&nValor3=23625&strTipM=TC [Accessed: 10 September 2021].

¹⁰ Views 243 of 11 August 2014. Available at: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Pronunciamiento/pro_ficha.aspx?param1=PRD¶m6=1&nDictamen=18504&strTipM=T [Accessed: 10 September 2021].

¹¹ Vote 2018-012782 of the Constitutional Chamber of 8 August 2018. Available at <https://delfino.cr/2018/11/lea-aqui-el-voto-completo-de-la-sala-constitucional-sobre-matrimonio-igualitario> [Accessed: 01 October 2021].

as between heterosexual couples. De facto union between persons of the same sex was also protected with the same characteristics as that existing since 1995 for persons of different sex.

8. Synthetic

Costa Rican family law has evolved in a very remarkable way, from a rigid conception of marriage as a strictly religious and indissoluble act with civil effects to today having a varied range of options. Changes have accelerated especially since the late twentieth century. Currently there are several possibilities in Costa Rica for legally protected marital union:

(a) Forms of traditional union enshrined in indigenous traditional rights protected by the Act of 25 July 1867 and International Labour Organization Convention No. 169.

(b) Marriage concluded according to the rites of the Catholic Church, provided that it complies with the formalities stated in the Family Code. This marriage may be annulled or dissolved by a family judge, even if this has no canonical effect. Similarly, the annulment or dissolution of marriage by a Church court has no legal effect.

(c) Civil marriage between unmarried, divorced or widowed persons of the same or different sex.

(d) De facto union between unmarried, divorced or widowed persons of the same or different sex.

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