

Spain, long dominated by autocratic rulers and adherence to a conservative Roman Catholic orthodoxy, excited the imaginations of lesbians and gay men worldwide when in 2005 it became one of the first countries to grant same-sex couples the right to marry.

Until the death of General Franco in 1975, Spanish queers suffered for centuries under repressive political regimes which were strictly deferential to fundamentalist religious values. They were socially marginalized; many were jailed and brutalized. Then quickly, Spanish societal norms and cultural attitudes changed.

As an American lawyer who specializes in the creation and protection of queer families, I took advantage of a trip to Madrid celebrating my own same-sex marriage to understand how Spain is adjusting to these dramatic changes. I also sought to learn how Spanish laws and culture affect the Spanish lesbian, gay, transgender and bisexual (lgbt) community and how they differ from those in the United States where cultural recognition and acceptance has evolved over a longer period of time.

Because the cultures and legal systems of the two countries differ in origin and concept, direct comparisons can be imprecise. Spanish law evolved from the traditions of Roman law, the Napoleonic Code and the laws of other Mediterranean countries. In contrast, the laws of the United States come from the English common law system.

Further, the U.S. operates under a federal system where individual states control many areas of law, particularly those laws affecting lgbt persons and couples. Spain is divided into 17 autonomous communities, each having limited rights. These regions have spawned some of the first

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laws benefitting the lgbt community, but the national government maintains authority over the creation and implementation of laws of most importance to lgbt people.

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Comparing the two nations' constitutions reveals a stark contrast in how they treat sexual minorities. In 1978, only three years after Franco's death, Spaniards amended their Constitution with two provisions startling to the American observer.

Article 13: "Spaniards are equal under the law, without any regard or discrimination for birthplace, race, sex, religion, opinion or any other condition or circumstance personal or social."

Article 32: "A man and a woman have the right to engage in matrimony equally under the law. The law regulates the types of matrimony, the age and capacity to engage in marriage, the right and duties of the participants, the reasons for separation and termination and its effects."

Spaniards enunciate in their fundamental statement of principles a sweeping policy of nondiscrimination, including lgbt people. In addition, the wording of Article 32 provided a constitutional method to allow same-sex marriage.

The American constitution and federal laws lack any statement of nondiscrimination for sexual minorities. As a result, the few federal recognitions of the mere existence of a lgbt community have been won only through long, hard fought battles. Although some states have passed varying degrees of nondiscrimination laws to protect sexual orientation and gender identity, there remains no national protections.

During the Clinton administration in the 1990's, the United States

enacted specific legislation barring any federal recognition of a same-sex marriage or relationship. Even with this national prohibition in place, some U.S. politicians still seek to amend the federal constitution to specifically prohibit same-sex marriage.

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From a constitutional viewpoint, Spain far outdistances the United States in protecting its queer population. But in comparison to the United States, Spain lags in its lgbt community infrastructure, organizing and group identity. In the United States, innumerable lgbt community organizations work both nationally and in states to extend the rights of lgbt persons. Such groups are themselves part of a national legacy of democratic activism. American history – from the nation’s creation through the Emancipation Proclamation, women’s suffrage and the civil rights movement - is very much the story of the struggle against discrimination and for the expansion of civil rights.

Spanish history and culture tells a different story. Its authoritarian history foreclosed the opportunity for the formation of groups and becoming part of the political process. Community infrastructure common to other democracies is still being created in Spain. Other than national independence movements like the Basques or Catalonians, the concept of minority groups organizing to assert rights was uncommon.

The Spanish lgbt community is still adjusting to the revolutionary changes in their country. A legal ban on homosexual organizations was only lifted in 1982. The first organizations established to fight for lgbt rights were ephemeral. Newer ones have yet to establish a national scope. Reflecting this history of hostility and discrimination, fewer than 20% of queer Spaniards are out in their work environment according to a recent survey.

Spanish lesbian and gay lawyers working in the lgbt community

similarly lack organization and a shared sense of identity. In contrast to the U. S. where local and national minority bar organizations thrive, Spanish LGBT lawyers have not formed any similar associations. In Spain, a lawyer confronting a problem for a queer client has difficulty even learning how a colleague has dealt with similar issues. In the United States, there are multiple sources for this information. One monthly legal publication reporting current court decisions and statutory changes has existed for 30 years. Now internet news sources abound. No similar Spanish publications or other modes of communication exist.

Some lawyers in Spain did not recognize themselves as part of a distinct portion of the population. One lesbian lawyer who represented same-sex couples reported that she saw no reason for a lesbian or gay person to seek a lesbian or gay lawyer. To her, the laws are all applied the same. She did not consider that a queer person might find more comfort in being counseled by a lawyer who shared her orientation.

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A strong, cultural premium on family raises further impediments to full realization of rights by members of the Spanish lgbt community.

For example, Spanish law mandates the concept of forced heirship or compulsory heirs. One-third of a decedent's estate, known as "la legitima," must be left to one's children or in the absence of children, that portion of the estate belongs to the decedent's ascendants (usually the parents). Another portion of a decedent's estate is subject to the legal concept of usufruct which gives a surviving spouse lifetime use of from one-third to two-thirds of the estate depending on what other heirs of the decedent survive. The surviving spouse has the right to enjoyment of all of the advantages of the property during her or his lifetime. The remainder of the decedent's estate can be left to whomever the decedent desires.

Thus, the rights of family supersede the possible wishes of a

decedent. In Madrid, I visited with a well-educated, prosperous gay male couple who have together for 35 years. They reported that when one of them dies, the decedent's parent will inherit a portion of their apartment and vacation house, both of which they co-own. Unless the parent of the decedent agrees to disclaim that right, the surviving member of that same-sex couple will co-own their real estate with his partner's parent.

These two men are resigned to this eventuality. They admitted that neither of their parents recognized their relationship and considered them "friends." At holidays and family occasions, each man goes home to his family and never accompanies his partner. Remarkably, in a country that allows this couple to get married, this same couple is unable to protect themselves in the case of death and still suffers from a cultural ignorance of or indifference to their relationships.

American laws governing inheritance are distinctly different. The law does not impose any obligation for a decedent to leave any property to a family member, save for a spouse's right to a marital share in most states. Under American law, a decedent can leave her or his estate to anyone she chooses. Although in most jurisdictions in the United States a same-sex couple cannot obtain the benefits of marriage, they have the ability under the law to protect each other when one of them dies.

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In juxtaposition to these inheritance laws, Spain far out surpasses the United States in the ability of a same-sex couple to obtain governmental recognition and governmental benefits. Spain offers same-sex couples three levels of relationship recognition – de facto recognition, registration and marriage. In the United States, there is no federal recognition of the relationship of a same-sex couple and therefore, no access to federal benefits offered to heterosexual unions. Less than ten states offer couples a means to obtain state benefits.

Spain recognizes an unregistered same-sex couple as a de facto

relationship if the couple has been living together for a period of time and have common interests such as joint contracts or assets. A couple can choose to register as a de facto relationship at a local registry and opt among possible economic systems to govern their relationship. Certain government benefits are available to these couples.

Starting in 2005, same-sex couples in Spain can marry. Marriage establishes a legal heir under the estate laws, allows a foreign-born spouse of a Spanish citizen to live in Spain, allows a couple to adopt each other's children, provides tax advantages and family leave rights. American couples have none of these rights.

In most jurisdictions in the United States, members of a same-sex couple are considered legal strangers to each other. They are forced to piece together some protections through legal documents. Other protections and benefits, like social security and advantageous federal tax laws, are out of reach.

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Adoption by a co-parent is distinctly different in the two countries. A Spaniard's right to adopt a partner's child has only followed the right to marry. The reverse is true in the United States. Since the early 1990's, same-sex couples have been winning the right to adopt a partner's child while not being able to marry.

Again, part of the difference is attributable to that strong Spanish sense of family. Spaniards find it difficult to understand how two unrelated persons could adopt the same child. When I discussed this issue with Spaniards, they were dumbfounded by the concept that a child could have two parents who did not share a family relationship.

In the United States, courts consider what is in the best interest of the child. Judges see adoptions as confirming a relationship between an adult

and a child. Adoption does not confer any relationship rights between the parents. In Spain, only a married couple can both be the parents of a child. Therefore, for a Spanish same-sex partner to adopt a partner's child, the non-biological parent must be married to the biological parent.

The strong Spanish sense of family influences other child-related laws. Spain does not recognize concepts like surrogacy and egg donation is rare. In Spain, the law directs that whoever carries a child is the mother of that child which forecloses the ability of a same-sex male couple to have its own biological child. A Spanish lawyer told of a male couple from Valencia who recently went to California to have a surrogate carry the biological child of one partner. He indicated that the couple will face legal difficulties when they bring their child home to Spain.

In the United States, laws are being developed to recognize different types of parents. An increasing number of state courts have adopted the concept of a "parent by estoppel" or a "psychological" parent which protects the relationship of an adult who has helped to raise a child with the consent of the child's biological parent. Thus, even without a legal adoption, a parent's relationship to a child can be preserved.

In Spain, if an unmarried couple is raising the biological child of one parent and the biological parent dies, the non-biological parent has no right to continue to raise that child or even be granted visitation rights. A child will be separated from the adult with whom it has the closest relationship. Spanish legislators and judges have yet to grapple with ways to protect vulnerable children.

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In both Spain and the United States, the queer communities are making significant strides to achieve equality as individuals and as families. Based on their different national cultures, histories and legal traditions, these two countries are following different paths - which might be

instructive to their lgbt communities. While Americans can point to the right of Spaniards to marry in making a case for changes in U.S. law, the Spanish lgbt community can look to the widespread and more evolved institutions and consciousness in the United States to help address the cultural and legal inequities that still exist in Spain.