Chapter 3
Same-Sex Unions in Mexico: Between Text and Doctrine

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Abstract Currently Mexico recognizes same-sex marriage in several states. The Mexican Supreme Court has been instrumental in this recognition, advancing an interpretation of marriage outside its historical and textual interpretation. The current state of same-sex marriage and LGBTI rights in general in Mexico is the consequence of a new interpretation of the role of marriage and the family in the Mexican society, as well as the evolution of the LGBTI movement.

By 2013, Mexico City recognized same-sex marriage. The states of Coahuila, Colima, and Jalisco, recognized different forms of unions, each granting different rights that were exclusive for same-sex couples (solidarity pacts, conjugal unions, and civil unions, respectively). Through litigation, same-sex couples have been able to get married in Oaxaca, Colima, Yucatán, Sinaloa, Chihuahua, Estado de México, Jalisco, Guanajuato, and Nuevo León. Litigation was pending in other states, as well. Same-sex couples could adopt in Mexico City, Colima, and Coahuila. All of these models of recognition, with the exception of Coahuila's solidarity pacts approved in 2007, happened in a lapse of less than 5 years, after Mexico City approved same-sex marriages in 2009 and the Supreme Court affirmed its constitutionality in 2010.

This chapter contends that the recognition of same-sex unions in Mexico is the result of legal changes pushed by the LGBT movement. At the same time, this work shows how these transformations were articulated in a narrative of individual rights. For the last decade this narrative has been gaining force and it has become a source of legitimacy for the courts' decisions in the area. It was through individual rights that the Supreme Court was able to break the logic that previously informed legal reasoning around marriage: an essentialist way of reasoning that guaranteed the perpetuation of its original Catholic doctrine, sometimes in spite of its legal reforms.

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M. Sáez (ed.), *Same Sex Couples - Comparative Insights on Marriage and Cohabitation*, Ius Gentium: Comparative Perspectives on Law and Justice 42,
DOI 10.1007/978-94-017-9774-0_3

This chapter is structured in three main sections: First, this chapter will review the main transformations of marriage and family law in Mexico, focusing particularly on recent Supreme Court decisions. This section attempts to identify the logic that informed the original doctrine of marriage, and how the framework of fundamental rights, as opposed to the original logic of marriage, has been altering this institution. Second, the chapter reviews changes towards the recognition of civil unions that culminated with same-sex marriage and adoption. The third section analyzes the 2010 Supreme Court decision (*Acción de Inconstitucionalidad* 2/2010) on Mexico City's same-sex marriage legislation, and the 2012 Supreme Court decision (*Amparo en Revisión* 581/2012) that sanctioned same-sex marriage in the State of Oaxaca. This section sketches how the Court responded to the claim about marriage being linked to procreation, and the role that individual rights played as a counter argument.

3.1 Marriage and Family Law in Mexico

3.1.1 The Original Conception of Marriage and the Transformations of Marriage and Family Through History

Civil marriage in Mexico has two notable influences that affect how it functions even today.[1] The first is Catholicism's influence in the inception and understanding of marriage in Mexican society. The second, closely related to the first, is the influence of the Second Scholastic, and through them, of Thomism and Aristotelian reasoning, in the legal construction of marriage.

The first *civil* marriage in Mexico was actually a catholic institution. When the nascent Mexican Nation-State issued in 1857 its first law regulating the Civil Registry, it established that couples should get married before the Catholic Church. If they wanted their unions to have "civil effects," they had to register them before the Civil Registry. When Mexico finally issued a law 2 years later that regulated marriage, including who could get married, how, and why, it replicated the institution of catholic marriage. The statute was passed in the context of the "wars" between the Mexican State and the Catholic Church. During this time, Mexico published a series of statutes, called the *Leyes de Reforma* (Laws of Reform),

[1] I know that scholarship has identified other influences in marriage that perpetuate –or undermine– the functioning of this particular model. Capitalism –and other economic factors–, is one of them. (See, for example, Jane Collier, *Cambio y continuidad en los procedimientos legales zinacantecos,* Haciendo justicia. Interlegalidad, derecho y género en regiones indígenas, 92 (María Teresa Sierra ed.) (CIESAS 2004); and Maxine Molyneux, "Mothers at the Service of the New Poverty Agenda: Progresa/Oportunidades, México's Conditional Transfer Programme", *Social Policy & Administration*, vol. 40, no. 4, (August 2006)).

through which it tried to dismantle the power of the Catholic Church. Among other actions, the government seized control of the Church's properties and enacted the Civil Registry Law and the Law of Marriage, areas previously controlled by the Church. Replicating catholic institutions through legal secular reforms allowed people to comply with Mexico's regulations while remaining truthful to their faith. There was an acceptance of the catholic concept of marriage.[2]

The convergence between the catholic and civil concepts of marriage did not reside solely on the actual definitions, and rights and obligations, that each established. The *basic* structure of marriage, how it was defined and understood, was the same in the catholic and civil marriage institutions. Liberals followed the French Napoleonic Code in their regulation of marriage, while the Catholic Church followed Canon Law. Historian James Gordley claims that both the Napoleonic Code and Canon Law came from the same place: a conceptualist and teleological method of reasoning that Aquinas, following Aristotle, used on marriage, and, that the Second Scholastic, following Aquinas and Aristotle, used to build a doctrine of contract law.[3] This doctrine of contract law survived up until the French Civil Code and even today in most of Mexican civil and family law. It is not that individualism and other modern values did not alter the way contract law or marriage, specifically, operated. The *logic* of these legal institutions, however, and not just only moral or religious beliefs about marriage, made its reform harder.

The first big change to marriage came in 1914 when divorce was understood as the dissolution of the marriage bond and individuals could remarry. The amendment, however, allowed for no-fault divorce only in cases of mutual consent. Otherwise, divorce was granted if there was fault by one of the parties. Fault basis for divorce meant that the "realization of marriage's ends [were] impossible or unjust" or the "discord of the spouses [was] irreparable."[4] The idea of marriage as a union that could only dissolve if the realization of marriage became impossible changed in 2008 when no-fault divorce was allowed.[5] In the early years of the twentieth

[2]Pablo Mijangos argues that "that Mexico's 1859 Law on Civil Marriage was the last moment of a long debate about the clergy's incapacity to bring into being the Christian moral order envisioned by the Council of Trent in the sixteenth century. [In] other words, that civil marriage intended first and foremost to *reform* Mexican society within an essentially religious framework, and only as an unintended and long-term consequence did it contribute to the secularization of social life." Pablo Mijangos, "Secularization or Reformation? The Religious Origins of Civil Marriage in Mexico", paper presented at the 2014 annual meeting of the American Historical Association, cited with the author's permission, p. 2.

[3]James Gordley, *The Philosophical Foundations of Modern Contract Doctrine*, Clarendon Press, 1991, pp. 3–4.

[4]Ley de 14 de Diciembre de 1874, reglamentaria de las adiciones y reformas de la Constitución Federal, article 23, section IX (reformed el December 29, 1914).

[5]Código Civil para el Distrito y Territorios Federales en Materia Común y para toda la República en Materia Federal (1928), articles 266–267 (reformed October 3, 2000). For the evolution of divorce, and a list of all the states that now have no fault divorce as an option, *see* Estefanía Vela Barba, "La evolución del divorcio en clave de derechos y libertades" *Nexos: El Juego de la Corte*, August 20, 2013, http://eljuegodelacorte.nexos.com.mx/?p=3004

century, however, marriage suffered two other important changes. The first was the elimination of all distinctions between legitimate and illegitimate children. The second was the recognition of cohabitation between a man and a woman as another form of family formation. *Concubinato,* however, granted little rights to the couple.[6] With time, female concubines started gaining more rights. In the 1973 Social Security Law, for instance, female concubines were included as beneficiaries of social security. Prominently, the female concubines had a right to receive a pension derived from her partners' work disability, age retirement or death, in similar conditions as legal spouses.[7] In 1983, the law established that concubines – men and women– had the obligation to provide each other economic support.[8] In 2000, *concubinato* became a full-fledged alternative to marriage, when it was officially conceived as another source of kinship[9] and was granted "all the rights and obligations *inherent* to the family, as applicable to them."[10] In 2006, thanks to the LGBT movement, Mexico City recognized civil unions as an additional option for couples, both of same and opposite-sex ("*sociedades de convivencia*"). The law stated that these societies would enjoy the same rights and obligations established for concubines.[11] The most prominent difference between *concubinato* and a civil union was its source of formation. While *concubinato* recognized an already established relationship between a man and a woman who had been living together for 2 years, or less if they had a child, a *sociedad de convivencia* was a contract that two people had to sign and register at a government office (not the Civil Registry).[12] These changes are important because marriage stopped being the "only moral way to found a family."[13]

Adoption suffered changes as well. Legally established in 1917, it was originally conceived as an exclusive relationship between the adoptee and the person seeking to adopt.[14] It did not extend to other family members (grandparents, brothers and sisters, etc.). It was not until 1998 that the law included for the first time "full adoption" (*adopción plena*). In this case, the relationship between the adopted child and the birth parents was extinguished. And the adoption created a filial relationship

[6] *Ibid.*, articles 383, 1,368, f. V. Diario Oficial de la Federación, México, 1928.

[7] Ley del Seguro Social (1973), articles 92, 152, 155, 164.

[8] Código Civil . . . (1928), article 302 (reformed December 27, 1983).

[9] *Ibid.*, articles 292, 294. (reformed May 25, 2000).

[10] *Ibid.*, article 291-Ter. (reformed May 25, 2000).

[11] Ley de Sociedad de Convivencia para el Distrito Federal, article 5.

[12] Código Civil . . . (1928), article 291-Bis. (reformed May 25, 2000); Ley de Sociedad de Convivencia para el Distrito Federal, Gaceta Oficial del Distrito Federal, November 16, 2006, no. 136, p. 4.

[13] Ley del Matrimonio Civil, no. 5057, July 23, 1859, p. 693 (in Manuel Dublan & Jose Maria Lozano, De las disposiciones legislativas expedidas desde la Independencia de la Republica, tomo VII, Mexico, 1877).

[14] Ley Sobre Relaciones Familiares, Diario Oficial de la Federación, April 14, 1917, tomo V, 4a época, no. 87, pp. 429–430

between the child, the adoptive parents, and their extended family.[15] The recognition of adoption undermines marriage as the exclusive gateway to family formation by accepting that biological reproduction is not the only way to establish parenthood.

With regards to obligations between spouses, changes were triggered by a concern for women's equality. Even in the Law of Marriage of 1859, lawmakers denounced how "in spite of the philosophy of the century and of the great progress of humanity, the woman, that precious half of the human being, still appear[ed] degraded in the old legislation."[16] One of the innovations of the 1870 Civil Code, for example, was to give the mother, along with the father, parental authority (*patria potestad*).[17] Many other changes slowly happened throughout the years.[18] In 1974 the Constitution was amended to include a provision that men and women were "equal before the law."[19] This constitutional amendment gave an important push for the amendment of most states civil codes in Mexico, specifically with regards to marriage. Equality was enshrined in the Constitution and in the civil codes before the amendment. Sex, however, had, until then, been treated as a justified reason to allow a differential treatment between men and women, particularly within marriage. The 1974 constitutional reform was introduced precisely to change this conception. This reform was later complimented in 1981, when Mexico also incorporated the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) into its law.[20] Article 16 of CEDAW explicitly established that States must take measures to "eliminate discrimination against women in all matters relating to marriage and family relations," which includes granting them the same rights and responsibilities "during marriage and its dissolution" and "as parents." This move is important because it shattered the "sexed" nature of marriage. Before, marriage had to be between a man and a woman because only a man and a

[15] Código Civil ... (1928), articles 410-A-410-D.

[16] *See* "Circular del Ministerio de Justicia. Remite la ley del matrimonio civil", núm. 5056, July 23, 1859. Mexico. p. 3.

[17] Civil Code of 1870, articles 392, 396. Although only a father could "correct and punish his children temperately and moderately" and, as I affirmed previously, the woman had to ultimately obey him in regards to the education of the children.

Código Civil del Distrito Federal y Territorio de la Baja California, Ministerio de Justicia e Instrucción Pública (Publisher), Mexico (Publisher Location), December 22, 1870 (date of publication).

[18] Venustiano Carranza explicitly referred to the "slavery" women experienced when they were "stuck" with a bad husband and conceived of divorce as a remedy for these women. *See* Exposición de motivos del Decreto que reforma el artículo 23 de la Ley del 14 de diciembre de 1874, reglamentaria de las adiciones y reformas de la Constitución Federal, decretadas el 25 de diciembre de 1873, December 29, 1914. The Law of Family Relationships of 1917 also had a concern with women's equality.

[19] Constitución Política de los Estados Unidos Mexicanos, article 4 (reformed December 31, 1974).

[20] Both the International Covenant on Civil and Political Rights (23.4) and the American Convention on Human Rights (17.4) establish that "The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution."

woman *together* could fulfill marriage's ends. They were "halves" that, when joined, embodied perfect "conjugal duality." The man was in charge of providing for the family; the woman was in charge of taking care of the family. With equality, these roles could remain the same, or be reversed, or be distributed in other ways. This distribution had nothing to do with the sex of the person, but with their personality and interests.

One of the ends of marriage, since 1859, had been reproduction. The 1974 constitutional reform introduced, together with sex equality, the right of each individual to freely determine the number and spacing of his or her children. In response to the constitutional reform, the law established that, when it came to marriage, the right to decide the number and spacing of children had to be exercised *jointly* by the spouses.[21] This norm survives until today. It has only been altered once, in the year 2000, when the law established that couples had a right to access "any method of assisted reproduction to achieve [having] their own offspring."[22] This was also the year in which the definition of marriage changed and it became the "free union of one man and one woman to form a community of life, in which both offer each other respect, equality and mutual aid, with the *possibility* of procreating children in a free, responsible, and informed manner."[23] That same year, being incapable of copulating was no longer an impediment for marriage if the other spouse knew and accepted it. Historically, this can be viewed as the moment in which procreation stopped being one of the ends of marriage.

Originally infidelity was also grounds for divorce and adultery was a crime. In 1928, fidelity stopped being an explicit obligation of the spouses. Adultery was decriminalized in 2002 and infidelity stopped being a cause for divorce in 2008. With these changes there was no longer a link between the act of having sex and marriage. Additionally, in 2008 the Civil Code allowed people to change their birth certificate to reflect their sex change. This reform is notable for two reasons. The first is that it included *no* prohibition for trans people to get married. If a man became a woman and married a man, this became a valid marriage.[24] The second highlight of this reform is that if trans people were married at the time of their sex change, the procedure did not modify their civil status and the couple remained married in the eyes of the law. If a man, married to a woman, became a woman, the law accepted their marriage –or at least the "obligations" that spawned from it.[25] In the first case, if one considers that many trans people undergo surgery that affects their reproductive capacity, the law is implicitly sanctioning the disconnection between

[21] Código Civil ... (1928), article 162 (reformed December 31, 1974).

[22] *Ibid.*, article 162 (reformed May 25, 2000). p. 8

[23] *Ibid.*, article 146 (reformed May 25, 2000).

[24] I highlight the importance of trans people being able to marry, assuming that there are many that, like the judge in *Corbett v. Corbett* (UK, 1970), argue that they are incapable of fulfilling the ends of marriage, because they are unable to reproduce. The same goes for intersexuals.

[25] Código Civil ... (1928), article 135-Bis (reformed October 10, 2008). Mexico.

marriage and procreation. In the second case, the law is implicitly sanctioning the marriage that exist between two people that are *now* of the same sex.[26]

In December 2009, the law was reformed once more, this time redefining marriage as "the free union of two people for the realization of a community of life, in which both offer each other respect, equality and mutual aid."[27] It no longer included a mention of procreation, or sex diversity in the couple. *Concubinato* was also reformed to expand its effects to same-sex cohabitant couples. And, importantly, adoption was not reformed with the aim of excluding same-sex couples from being able to initiate an adoption process. With this reform, same-sex couples acquired the exact same rights as opposite-sex couples with regards to marriage and cohabitation.

Originally, marriage was an institution regulated almost exclusively by civil law and, marginally, by criminal law. In civil law, the State established the necessary procedures for people to get married; for marriages to get annulled (thus protecting "the essence" of marriage); and procedures for couples to separate (because they were incapable of complying with the "ends" of marriage). Out of all the obligations that marriage spawned, only one could be demanded directly before the State: the obligation of spousal and parental economic support. The rest of the obligations (living together, fidelity, etc.), could not be *demanded*; only their breach could be punished. Infidelity and abandonment of the home were grounds for divorce (which was conceived, originally, as a punishment); infidelity was also a crime (adultery).

In addition to several amendments triggered by social welfare reform, in 1974, the Constitution was amended to include the following norm: "[The law] must protect the organization and development of the family." In that reform, article 123, section XXIX was altered and *social security* became a right of the worker "and [his or her] extended family." The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the American Convention on Human Rights became Mexican law in 1981.[28] Additionally, the General Health Law was passed in 1983.[29] It established that one of the objectives of the National Health System was to "promote the development of the family and the community."[30] The law advanced maternal

[26]The importance of this is not minor. Rafael Rojina Villegas, to this day one of the most read treatise writers on family law, used examples of transexuality and intersexuality to explain why "same *sex*" marriage could not exist, according to doctrine. Rafael Rojina Villegas, *Derecho civil mexicano*, tomo II, ed. 2006 (1962), pp. 250–253.

[27]Código Civil … (1928), article 146 (reformed December 29, 2009). p. 525.

[28]They were published in the *Diario Oficial de la Federación* on May 20, 1981; March 23, 1981; and May 7, 1981, respectively.

[29]For a brief history of health services in Mexico, *see* Daniel Lopez-Acuña, "Health services in Mexico", *Journal of Public Health Policy,* vol. 1, no. 1, 1980; José Arturo Granados Cosme & Luis Ortiz Hernández, "Descentralización sanitaria en México: transformaciones en una estructura de poder", *Revista Mexicana de Sociología*, vol. 65, no. 3, 2003.

[30]Ley General de Salud (February 7, 1984), Article 6, section IV.

care,[31] determined that "health, educational and labor authorities" had to support and promote . . . cultural activities destined to strengthen the family unit . . . .,[32] and dealt with families with drug addiction and disability issues.[33] In 2003, the General Health Law was reformed to create the System of Social Protection in Health, commonly known as the "popular insurance" (*seguro popular*). It was designed to reach the population that wasn't being covered by the health insurance provided by social security. The "unit of protection," however, became the *family unit*. It was not aimed at protecting the individual or the worker but the family unit, which could consist of: couples married or in *concubinato*, and "the father and/or mother" not joined in matrimony or in cohabitation.[34]

With regard to housing, as early as 1972, the Institute of the National Fund for Workers' Housing was created by law. The loans given to each worker were to be determined considering the number of family members each worker had.[35] In 1983, the Constitution was amended to establish that "every family ha[d] a right to enjoy dignified and decorous housing." In 2006, the Federal Congress passed a law aimed at "establishing and regulating the national policy, programs, instruments and support so that every family might enjoy" this right.[36]

Besides housing, health, and property protections, the other great source of support for families came through support for children. Since 1929, several associations were created for this purpose, such as the National Association for the Protection of Childhood, the National Institute for the Protection of Childhood, the Mexican Institute for the Assistance to Childhood and the Mexican Institution of Childhood Protection. The actions these institutes took ranged from giving mothers' milk and school lunches, and trying to solve the problem of child abandonment and exploitation. The highlight of reforms in this area came in 1977 with the creation of the National System for the Integral Development of the Family –*DIF,* for its initials in Spanish– which, until today, is the organism in charge of taking care of the "most vulnerable" sectors of society, including children, the elderly,[37] and people with disabilities, and promoting policies for the "integration of the family." They offered legal counseling for families; psychological attention and homes for children and teenagers; homes for the elderly, centers for rehabilitation of people

[31] *Ibid.*, article 61, section III.

[32] *Ibid.*, article 65, section II.

[33] *Ibid.*, article 174, section IV; 188, section II; 189, section II; 191, section III.

[34] *Ibid.*, articles 77-Bis-1, 77-Bis-4.

[35] Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores, article 47, (April 24, 1972).

[36] Ley de Vivienda, article 1 (June 27, 2006).

[37] For a brief overview of the situation of the elderly in Mexico, *see* Mercedes Blanco & Edith Pacheco, "Aging and the Family-Work link: A Comparative Analysis of Two Generations of Mexican Women (1936–1938 and 1951–1953)", *Journal of Comparative Family Studies*, vol. 40, no. 2, 2009.

with disabilities.[38] Since the 1980s, the government has had several programs that supply day-care facilities for mothers. All of these programs are administered through DIF.[39]

To complete the protection of the family, there were also changes to the criminal law system. In addition to civil enforcement, not complying with the obligation of economic support became a punishable crime.[40] Homicides, assaults, rape and sexual abuse received higher sentences if committed against a family member.[41] The crime of femicide was also punished with higher crimes if the perpetrator was emotionally involved with the victim.[42] Family violence was defined as "the physical, psycho-emotional, sexual, economical, patrimonial violence [. . .] that happens [. . .] in or out of the home" against the spouse, concubine, an ascendant, a descendant, the adopted child, the adoptive parent, the ward, or the person with whom a civil union was contracted.[43] In all of these cases, the Criminal Code protects "the family" and not just the marriage bond.

3.1.2 Changes in Legal Reasoning Around Marriage

In spite of all these changes to marriage and the family, marriage was still interpreted according to the functions it fulfilled in society. Decisions on marital rape, loss of parental rights and no-fault divorce show this contradiction between textual reforms to the law and legal reasoning based on traditional concepts of marriage and family.

3.1.2.1 Marital Rape

Marital rape has been addressed by Mexican courts in several decisions. There are two separate rulings by the First Chamber of the Supreme Court of Mexico that framed the issue: one decided in 1994 (*Contradicción de Tesis 5/92*) and the other, reversing the first one, in 2005 (*Solicitud de Modificación de Jurisprudencia 9/2005*).

In the 1994 case, the Supreme Court had to decide a contradiction that existed between two circuit courts over the issue of marital rape. The disputed question was the following: Could there be an act of rape between spouses? One circuit court

[38] For a list of the services the DIF provides today, *see* their webpage: http://sn.dif.gob.mx/servicios/

[39] For an overview of the day-care programs, *see* Felicia Knaul & Susan Parker, "Cuidado infantil y empleo femenino en México: evidencia descriptiva y consideraciones sobre las políticas", *Estudios demográficos y urbanos*, vol. 11, no. 3, 1996.

[40] Código Penal para el Distrito Federal (2002), articles 193–199 (reformed July 22, 2005).

[41] *Ibid*., article 125 (July 16, 2002), article 131 and article 178 (reformed March 18, 2011).

[42] Código Penal para el Distrito Federal (2002), article 148 Bis (reformed July 26, 2011).

[43] Código Penal para el Distrito Federal (2002), article 200 (reformed March 18, 2011).

argued that it was rape in the terms established by the Criminal Code because the statute did not include an exception for spouses when regulating rape. If the law did not include this distinction, judges should not include it. The circuit court cited First Chamber precedents in which it had ruled that the fact that the victim was a prostitute did not excuse the perpetrator from being guilty of rape. If prostitutes were protected, so should spouses. Additionally, if the act was not considered rape, it would amount to allowing spouses to take justice into their own hands, which is expressly prohibited by the Constitution. The circuit court conceded, however, that spouses were subject to rights and obligations and one of those was "contributing to the ends of marriage, which implies perpetuating the species, which can only be achieved through intercourse." This reasoning, however, did not authorize spouses to demand the fulfillment of this duty with violence, "since this would be taking justice into their own hands," violating the Constitution and the rules of treating each other with respect.[44]

Another circuit court considered that forced intercourse among spouses was not rape in the terms established in the Criminal Code. The husband would be "legitimately exercising a right." At most, the court argued, the husband could be "responsible for [. . .] the injuries caused as a result of the violent coitus, but not of the crime of rape."[45] The court argued that at most forced intercourse could serve as a cause for divorce.

The First Chamber of the Supreme Court had to decide which of these two interpretations was correct. For this, it looked at procreation as an end of marriage. To fulfill this end "spouses must submit themselves to the carnal relationship as long as it is carried out normally, that is, as long as coitus is limited to the total or partial introduction of the penis in the feminine sexual organ; since they only have a right to a sexual relationship of this nature."[46]

The Chamber argued that there was a "right to the carnal benefit,"[47] but it accepted that this right had its limits. Prominently, it could not affect "morality, health or some other expressed legal norm." For example, spouses had no right to impose "unnatural sex acts" on each other, since they had not agreed to this type of "carnal joining." The Chamber added that in several situations the rape of the spouse could be possible, such as when the attacking spouse is drunk, is a drug addict, has a venereal disease or AIDS, if the rape occurred in the presence of other people, if the "woman" had an ailment, like paralysis, that prevented her from "producing herself in her sexual relationships," or if the spouses were legally separated. In all of these cases, rape was rape. In all other cases, there could be no marital rape. It could be an "undue exercise of a right," a crime of lesser significance in Mexico City's Criminal Code. But it was not rape.

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[44] Amparo en Revisión 93/92, Primer Tribunal Colegiado del Sexto Circuito, *cited in* Contradicción de Tesis 5/92, Primera Sala de la Suprema Corte de Justicia de la Nación.

[45] Eugenio Cuello Calón, only referred to by name *in* Amparo en Revisión 447/89, Tercer Tribunal Colegiado del Sexto Circuito, *cited in* Contradicción de Tesis 5/92, Primera Sala de la Suprema Corte de Justicia de la Nación.

[46] Contradicción de Tesis 5/92, Primera Sala de la Suprema Corte de Justicia de la Nación.

[47] *Ibid.*

This case is paradigmatic of how the original doctrine of marriage was used against the text of the law. This case was decided in 1994, more than 100 years after Mexico first adopted a Constitution that guaranteed basic rights to freedom.[48] And 20 years after sex equality was included in the constitutional text, along with the right to choose the number and spacing of children. It was decided almost 15 years after the CEDAW was ratified. In spite of all this constitutional guarantees and international obligations, the Chamber did not even mention a single constitutional or international norm.

Eleven years later, a Circuit Court petitioned the First Chamber to reverse its criteria. It gave several reasons for the reversal. It argued that, although the "conjugal obligation" affected both parties, it had unequal effects. Because of the physical nature of the procreative sexual act, women would generally be the victims of unconsented sex. It presented, therefore, a problem of discrimination on the basis of gender. The Circuit Court also argued that:

> It may well be true that under the current contractualist conception of marriage, our legislation and doctrine consider procreation as one of its ends, and conjugal obligation and mutual fidelity as some of its consequences, [which come to] restrict [the spouses'] sexual freedom [... However], this does not imply that the freedom to refuse [...] to have sex with the spouse disappears, regardless of whether the fact that if this refusal is deemed unjustified the [rejected] spouse might invoke it as a cause for divorce. Sustaining the opposite view would take us back to the conception of marriage in which the woman is considered an object that the man acquires as property, over which he has an absolute and unlimited power, and would [lead us to] disavow the sublime and consensual nature that every sexual union between husband and wife must have.[49]

The First Chamber's response was very brief. First, it admitted that rape in the criminal code did not include an exemption for spouses. It then analyzed the civil code, which did not include an explicit exemption for spouses with regards to rape or a right "to access the sexual act in a violent way" against the other spouse's wishes.[50] After reviewing the civil code and not finding an exemption, the Chamber concluded that although an essential component of marriage was procreation, there was a constitutional right to sexual liberty and a right to decide when to procreate.[51]

The logic of looking at the ends of marriage was not shattered entirely. The Chamber court did not go as far as to establish that the obligation to procreate did not exist. The new interpretation, however, prioritized the individual *constitutional* right to choose the number and spacing of children over the marriage-based right to "carnal access."

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[48] Although the Constitution of 1824 is celebrated as the first Mexican Constitution, it did not include a chapter on rights and it established catholicism as the State religion. This changed with the 1857 Constitution, which began by proclaiming the rights of man and ultimately – in 1973 – proclaimed the absolute separation between State and Church.

[49] Solicitud de Modificación de Jurisprudencia 9/2005, Primera Sala de la Suprema Corte de Justicia de la Nación, p. 12.

[50] *Ibid.*, p. 33.

[51] *Ibid.*, p. 32.

3.1.2.2 Marriage, Divorce and the Loss of Parental Control

The dispute spawns from two separate cases in which parents had lost their parental rights over their children because they "abandoned" the marital home for over 2 years. In the first case, the father left the marital home with his son because his wife was mentally ill and doctors had recommended the separation. The father and the paternal grandmother took care of the son. In the second case, a mother lost her parental rights over her children because she had abandoned the home for more than 6 months.

The first lower court argued that the loss of parental control was a disproportionate penalty that violated the Mexican Constitution. Following old Supreme Court precedents, the second lower court argued that the loss of parental control was not a sanction because the Civil Code did not establish it as a sanction. The Civil Code merely determined that in a divorce ruling, the judge had to decide over the situation of children.[52] The spouse lost her rights, "but this was not because she was punished."[53] A few lines further, this lower court affirmed that the law did not distinguish at all between the different types of causes for divorce, in order to establish if one was worse than the other, since they all revealed a lack of moral quality of the spouse that would affect the wellbeing of the child because any fault based cause for divorce implied recklessness with regards to the duties that parental control demands.[54] This rationale, the lower court argued, protected the family, complying with constitutional mandates.

In the lower court's decision a bad spouse was automatically a bad parent. Whether it was infidelity or abandonment of the home, fault based divorce revealed "the moral quality" of the spouse involved. What was done against one member of the family was really done against them all. Not complying with *one* end of marriage meant not complying with all the relationships that naturally spawn from marriage, such as parenthood.

In this case, the Court separated the constitutional protection of the family from the constitutional protection of "parental control" (*patria potestad*) and both, from the rights of children.[55] Although they connect, these protections were considered by the Court as independent "guarantees." The Court affirmed that parental control was an institution designed to protect minors, regardless of whether they were born to a marriage, or not; and whether the children were adopted, or not.[56] With this new reasoning the Court sees parenthood not as a natural consequence of marriage but as an independent right of parents.

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[52] Contradicción de Tesis 21/2006, pp. 15–16.

[53] *Ibid.*, p. 16.

[54] *Ibid.*, pp. 16–17.

[55] *Ibid.*, p. 36.

[56] *Ibid.*, p. 32.

The Court affirmed that the abandonment of the home did not necessarily imply the abandonment of the child.[57] The Court also reasoned that interfering with the parent-child relationship could have the effect of depriving the child of the benefits of the parent's "cultural, ethical, moral, religious formation, as well as [this parent's] patrimonial administration of the [child's] assets."[58]

3.1.2.3 The No-Fault Divorce Case

In 2008, Mexico City introduced no fault divorce in its Civil Code. Spouses could now unilaterally dissolve their marriage upon request, without having to give specific reasons for it. The new law established that all matters related to children and property, had to be decided separately. The First Chamber of the Supreme Court was called to rule on an *amparo*, an individual suit brought by a woman who had been divorced under this new procedure and was challenging it.[59] In this *amparo* procedure the plaintiff claimed that no fault divorce was a violation of article 4, paragraph 1 of the Federal Constitution, a norm that enshrined "the right the family has so that through the laws [. . .] its organization and development are protected."[60] If the family was the basic unit of society the State had to protect it and the legislature could not pass statutes against its survival by considering the will of one of the spouses to be enough to dissolve the marriage bond, without allowing the other spouse to oppose."[61] The plaintiff claim that the reform left the abandoned spouse defenseless.[62]

The plaintiff argued that this reform "violated the *theory of obligations*, [and was] contrary to all legal logic, since marriage is a bilateral act that can only end through the death of one of the parties, through a mutual agreement between the parties that started it, or because of the presence of a grave cause that leads to its termination."[63]

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[57] *Ibid.*, pp. 58, 62.

[58] *Ibid.*, p. 62.

[59] In 2011, the state of Hidalgo reformed its civil code as well, to include no fault divorce. A woman challenged this reform, after she too was divorced under this new procedure. The First Chamber of the Supreme Court was called to solve this case as well. I cannot contrast the two cases here, because technically, the Hidalgo case was decided *after* the same-sex marriage case. However, it is interesting because, like the Mexico City no fault divorce case, it is an example of how the original doctrine of marriage is used to argue against changes to the text of marriage. But the difference between both cases is that there is a slight sophistication in the way the doctrine is presented: in the first case (Mexico City no fault divorce case), the plaintiff simply refers to the "doctrine" of marriage; in the second (Hidalgo no fault divorce case), the doctrine is re-inscribed both in the constitutional text and in international treaties. The doctrine gets rearticulated as a matter of rights as well.

[60] Amparo Directo en Revisión 917/2009, p. 22.

[61] *Ibid.*, p. 22.

[62] *Ibid.*, p. 23.

[63] *Ibid.*, p. 2.

The First Chamber conceded that the State had an obligation to protect the family.[64] This protection meant that the State "must establish the best conditions for the full development of [the family] members, since [the family] is and must continue being the unit or best place for the growth and formation of individuals."[65] This implies that it must pay "attention to [. . .] the institutions that keep [families] together."[66] The First Chamber agreed that stability was important, but achieving it "[did] not imply that the spouses, per se, must remain together even if their coexistence [was] impossible."[67] "Since time immemorial," the Chamber wrote, "the State recognized the existence of a legal institution that would allow the dissolution [of the marriage] when coexistence became impossible between the spouses and with the children." Divorce, in this scenario, appeared as a "less harmful solution" than forcing the spouses to remain together in "dysfunctional relationships of abuse or family violence."[68] Divorce was just the State's recognition of a "*de facto* situation."[69]

Protecting the family implied "preventing violence, be it physical or moral, as a consequence of the controversy sparked by fault divorce."[70] This is why no fault divorce, at the same time that it protected the family, also respected "the free development of the personality."[71] If a lack of love[72] was never a valid reason to split up, now it was.

3.2 Towards the Recognition of Same-Sex Couples and Same-Sex Marriage

In 2001, the right to non-discrimination was included in the Mexican Constitution. The text read: "Every form of discrimination motivated by [. . .] gender, [. . .] health conditions, [. . .] *preferences*, or any other that violates human dignity or

[64] *Ibid.*, p. 26. By the way: the Chamber understands "the family" in a broad sense. It can originate with a marriage, but not exclusively. "Common-law marriage, societies of coexistence, and 'free unions'" also constitute family ties. This is a point that in the same-sex marriage case will be fundamental, key to winning the case. What's incredible is that nobody cited this no fault divorce decision as a precedent.

[65] *Ibid.*, p. 25.

[66] *Ibid.*, p. 26.

[67] *Ibid.*, p. 27.

[68] *Ibid.*, p. 27.

[69] *Ibid.*, p. 29.

[70] *Ibid.*, p. 29.

[71] *Ibid.*, p. 39.

[72] *Ibid.*, p. 40. The Chamber uses the word "*desamor*" which could be translated as "unlove."

seeks to annul or diminish the rights and liberties of a person is prohibited."[73] In 2003, the *Federal* Law to Prevent and Eliminate Discrimination was passed. The law established that discrimination, specifically on the grounds of "sexual preferences," "sex," and "health," was prohibited. It also created the National Council to Prevent Discrimination (CONAPRED).[74] This organism is mainly in charge of promoting the right to non-discrimination within the Federal Government.[75] Out of all the institutions that directly or indirectly have promoted LGBT rights, this one has been the most vocal, being involved, especially since 2010, in condemning violence and hate speech against the LGBT community.

Two important things happened in 2006 in Mexico City. First, hate crimes were included in the Criminal Code and, second, the law recognizing civil unions was passed.[76] By "hate crimes" (technically, the crime is called "discrimination"), article 206 of the Criminal Code understands the provocation of hatred or violence; the denial of a right or service; the exclusion of a "person or group of persons" (although the law does not say *exclusion* from what); and the denial or restriction of labor rights "on account of age, sex, civil status, pregnancy, race, ethnic origin, language, religion, ideology, sexual orientation, skin color, nationality, social position or origin, work or profession, economical position, physical characteristics, disabilities or health status or any other that violates human dignity."[77]

Starting in 2001 the law of civil unions was pushed by Enoé Uranga, a lesbian congresswoman in the Mexico City Assembly. She worked closely with a group of lesbian activists in drafting this legislation.[78] In spite of the fact that civil unions were both for same- and opposite-sex couples, it was praised as a gain by the LGBT community. A few months after this law was passed in Mexico City, the "Solidarity Pacts" were approved in the state of Coahuila. These pacts were exclusively for same-sex couples and they altered the couple's civil status. Civil unions could be dissolved, for instance, by marrying another person; a solidarity pact could not be dissolved that way. Also, the Solidarity Pact included an express provision banning adoption,[79] while civil unions did not have such prohibition.

After these changes, Mexico City Assembly reformed its Civil Code to allow sex changes.[80] The sex change did not require individuals to undergo surgery or

[73] "Decreto por el que se aprueba el diverso por el que se adicionan un Segundo y tercer párrafos al artículo 1o. [. . .]" *Diario Oficial de la Federación*, August 14, 2001. Emphasis added.

[74] Ley Federal para Prevenir y Eliminar la Discriminación, articles 1, 4, 5, 9 (June 11, 2003).

[75] *Ibid.*, articles 17, p. 20.

[76] Ley de Sociedad de Convivencia para el Distrito Federal (November 16, 2006).

[77] Código Penal para el Distrito Federal (2002), article 206 (reformed January 25, 2006).

[78] Genaro Lozano, "The Battle for Marriage Equality in Mexico, 2001–2011", *Same-Sex Marriage in Latin America*. Promise and Resistance, Pierceson, et al., (eds.) 2013, p. 156.

[79] Código Civil para el Estado de Coahuila, article 385–7. This article was just derogated this last February of 2014. Raúl Coronado Garcés, "Aprueban adopción gay en Coahuila", http://www.milenio.com/region/Congreso_de_Coahuila-adopcion_gay-PAN_contra_adopcion_gay_0_243576136.html

[80] Código Civil . . . (1928), article 135-Bis (reformed October 10, 2008).

hormonal treatment. A few months after the law was passed, the Supreme Court issued the *Amparo Directo Civil 6/2008*, in which it established that not allowing people to have a sex change was a violation of the right to the free development of the personality. This was the first time ever that the Court spoke about this right. Interestingly, the Court based its decision mostly on international treaties and their diverse articulation of the right to liberty and privacy, reinterpreted under the paradigm of dignity and non-discrimination.[81] In plain terms, the Court established that the right to the free development of the personality implied that the person was free to be who he or she was. This included deciding whether or not to get married, whether or not to have children, what profession to pursue, and, also, it included deciding over one's "sexual options" and "sexual identity."[82] In this decision, the Supreme Court basically protected gender identity, sexual orientation *and* marriage as part of the right to the free development of the personality.

Less than 1 year after this decision, Mexico City's Assembly approved same-sex marriage and same-sex *concubinato*.[83] The Attorney General challenged the reform.

Parallel to these developments, in 2007, Mexico City decriminalized abortion during the first trimester of the pregnancy. This reform was challenged before the Supreme Court as well. Among the many points that the Court was asked to rule on, one regarded the fact that the man "responsible" for the pregnancy did not have a power to veto the pregnant woman's decision to have an abortion. For those pushing this point, the right to choose was a right that had to be *jointly* exercised by the woman and the man. The Court responded that "the right to be a father or a mother" was not a right that was exercised jointly. Adoption, it argued, was a way to exercise the right to be a father or a mother and it was exercised individually.[84] The Court also affirmed that "sexual liberty and reproductive liberty" were separate liberties; and that reducing sexual liberty to reproductive liberty "ignored that the protection of the basic rights of people includes dimensions of sexuality that have nothing to do with those destined to protect a space for a decision related to the question of whether or not to have children."[85]

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[81] Articles 1, 2, 3, 6, 7, 12, and 25 of the Universal Declaration of Human Rights; 1, 2, 3, 5, 11, 18, and 24 of the American Convention on Human Rights; 2, 3, 6, 16, 17, and 26 of the International Covenant on Civil and Political Rights; and 2, 4, and 12 of the International Covenant on Economic, Social, and Cultural Rights.

Amparo Directo Civil 6/2008, pp. 75–83.

[82] *Ibid.*, pp. 85–86, 89–90.

[83] Although it did not come up during the Mexico City case (Acción de Inconstitucionalidad 2/2010), in January of 2010, the Supreme Court solved a case related to tax law, in which it established the "purpose" of the right to non-discrimination. In explaining this right, the Court ended up clarifying that when the Constitution spoke of "preferences" as a suspect category, it meant *sexual* preferences. This because of the logic of the right to non-discrimination, which was *not* designed to protect *any* preference, but those that have been a cause for discrimination for certain groups. *See* Amparo en revisión 2199/2009, p. 45.

[84] Acción de Inconstitucionalidad 146/2007 y su acumulada, p. 187.

[85] *Ibid.*

3.2.1 The Mexico City Ruling

The statutes on same-sex marriage and *concubinato* passed by Mexico City's legislature were challenged through an *acción de inconstitucionalidad* (action of unconstitutionality), a judicial mechanism of abstract review that requires a supra-majority of 8 Justices –out of 11– to strike down the challenged law. Nine Justices voted in favor of upholding same-sex marriage and upholding same-sex couples accessing the adoption procedures.

The *acción de inconstitucionalidad* was initiated by the Attorney General of Mexico. It was not the only challenge against the reform. Six other States challenged it through a mechanism known as the *controversia constitucional* (constitutional controversy), which is designed to protect the constitutional division of powers and federalism, by allowing each level and power of government to challenge what they perceive to be an infringement on their own powers by other levels and powers of government.[86] These States argued that the Mexico City reform would force them to recognize a type of marriage that their legislation either did not recognize or explicitly prohibited. All six of these challenges were ultimately dismissed. The reason was simple: it was the Federal Constitution, in its article 121, clause IV, that forced them to recognize Mexico City's marriages.

Within the *Acción de Inconstitucionalidad 2/2010,* three main briefs were filed. The first was the General Attorney's. The second was filed by Mexico City Assembly explaining why it approved the reform and why the Court should uphold it. The third brief was filed by Mexico City's government, in which it too explained why it published –and thus, implicitly approved– the reform.

The Attorney General's brief challenged same-sex *marriage*, but not same-sex *concubinato*. He argued that he was not against legal recognition of same-sex relationships but only against their recognition through marriage. Same-sex couples, he sustained, should be regulated through civil unions, an institution more "appropriate" for them. The brief did not argue that sexual preference or orientation should not be treated as a suspect class when arguing discrimination. His position was that not allowing same-sex couples to marry was an authorized differentiation, even within the doctrine of the right to non-discrimination. The law, the Attorney General argued, should treat equally those who are equal and unequally those who are unequal. Homosexuals and heterosexuals, for the purposes of marriage, were *not* equal. The brief also argued that marriage was *designed* for procreation, which he understood in strict (hetero)sexual terms. Thus, same-sex couples could not "fit" into marriage, since same-sex couples could not sexually reproduce with each other. The brief also argued that this understanding of marriage was reflected in article 4, paragraph 1 of the Federal Constitution, which states that the "law must protect

[86]The States were Morelos (controversia constitucional 6/2010), Guanajuato (7/2010), Tlaxcala (9/2010), Sonora (12/2010), Baja California (13/2010) and Jalisco (14/2010). For a review of the arguments used in these *controversias*, see Omar Feliciano, "Corta, pega, litiga: impotencia y vaginitis", *Animal Político*.

the development and organization of the family." He also argued that this was the concept of marriage included in international treaties such as the Universal Declaration of Human Rights, the American Convention on Human Rights and CEDAW. Finally, he argued against same-sex couples having access to adoption based on the suffering these children would endure from social discrimination.

The Mexico City Assembly and Government ended up writing different, yet complimenting briefs. The Assembly focused, mainly, on homophobia, making the case fundamentally about discrimination against people that were not heterosexual. It included a section in which it casted the history of LGBT persecution. Whether they were criminally prosecuted for the sex they had or whether they were denied recognition for their family life, State action against these people amounted to a violation of their rights. Given that the issue was marriage, specifically, they focused on two rights: the right to the protection of the family and the right to freedom of expression. The latter was more thoroughly developed: allowing same-sex couples to access marriage granted them access to a State-created form of expression. This was important because it was connected to the right to the development of one's personality: these couples were now free to (live and) express their love in *this* form.

The Mexico City Government, on the other hand, made the case about family diversity. This was not, the City argued, just about LGBT families, but about all families that did not conform to the husband/father-wife/mother-(sexually produced) offspring model of the family. Its brief focused on three things: (1) tracking the sociological development of the family in Mexico and showing how today, family diversity is a *fact*; (2) holding that article 4, paragraph 1 of the Federal Constitution protected *all* types of families: straight, gay, two-parent, one-parent, no children, adopted children, etcetera; (3) and holding that the Universal Declaration of Human Rights, the American Convention on Human Rights, and CEDAW did not *limit* marriage to opposite-sex couples.

The Supreme Court's ruling is a mixture of the Assembly and Government's briefs, with its own innovations. The first thing that must be noted is that it is a decision both about LGBT discrimination *and* family diversity. The Court used mainly the narrative of family diversity to resolve the issue around marriage; while it was the narrative around discrimination that helped solve the issue of adoption.

3.2.1.1 Why Is Same-Sex Marriage Constitutional?

The first question the Court answered was whether same-sex marriage was constitutional. Since the Attorney General argued that article 4, paragraph 1 of the Federal Constitution prohibited expanding marriage to same-sex couples, the Court focused its first efforts on showing why this was not the case. For the Court, article 4, paragraph 1 of the Federal Constitution mandated the protection of all families. In spite of the Constitution using the singular *the* family ("*la familia*"), the Court established that this meant *families*. And it understood this concept as implying not only couples, but filial relationships as well such as parents and

their offspring, partners, grandparents, and their grandchildren. These were all examples of constitutionally and, most importantly, *independently* protected family relationships.

In addition to understanding "the family" to mean relationships that went beyond the couple, the Court then established that the law had to recognize socially relevant family relationships. "The family," the Court reasoned, "rather than being a legal creation, spawns from human relationships, and corresponds to a social design that [. . .] is different in each culture [. . .]."[87] What a family was depended on the social context. And since social contexts change over time, so did family structures.

> Social phenomena like the incorporation of women to the workforce; reduced birth rates; divorce rates and, thus, remarriages [. . .]; the increase in the number of single parents; common-law marriages [. . .]; [the development of] assisted reproductive technology; [. . . new patterns and waves of] immigration and the economy, among other factors, have [resulted] in the traditional organization of the family changing.[88]

The Court stated that Article 4, paragraph 1 protected *families* and it was up to the legislator to determine how it would protect them. In this determination, the legislator had to acknowledge social change, if the Constitution was to be a "living document."[89] In this scheme, marriage appeared as one of the legislative – as opposed to constitutional– designs which had been used to protect family ties. And there was no reason for it to be the only one or for it to have any content in particular; other, of course, than that required by other rights. This is where international treaties came into play.

For the Court, international treaties led to two conclusions: the first was that marriage was not exclusively heterosexual. A simple reading of the articles that regulate the family and marriage in these documents did not lead to the conclusion that marriage had to be between a man and a woman[90]; but rather that both men and women had an individual right to get married. Second: these provisions did not ban States from expanding marriage. And third: even if one was to accept that international treaties assumed the heterosexual paradigm, this could not to be construed in a way that impeded recognition of same-sex marriage.

> It is an undeniable fact that in previous times –not too long ago–, homosexual persons remained hidden, didn't show themselves as such, given the social disapproval of them; this condition until recently was even considered a "pathology" [. . .] [For this reason,] evidently, in such documents –the Federal Constitution and international treaties–, their existence wasn't even conceivable or recognizable, let alone the relationships or unions that they established according to their sexual orientation.[91]

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[87] Acción de Inconstitucionalidad 2/2010, par. 238, p. 88.

[88] *Ibid.*, par. 239.

[89] *Ibid.*, par. 240.

[90] *Ibid.*, par. 255.

[91] *Ibid.*, par. 252.

"Homosexual persons" became a new reality that the law had to recognize just like the incorporation of women to the workforce or the decrease in birthrates became a reality that had to be contemplated in the regulation of the family. The law, for the Court, had to be read in accordance to these new realities, and not just within the historical context in which it came to be. The law was what people, today, demanded it to be.

Regarding marriage specifically, the Court held that it too was "not an immutable or 'petrified' concept"[92] that the legislator could not touch. The review of the history of marriage, the Court explained, showed that the legislator had been changing it, as social transformations had been taking place.

> [I]t is an undeniable fact that the secularization of society and of marriage itself, [as well as] other social transformations, have led to different sexual [and] affective relationships, and other ways in which people help each other out [. . .]. [This, in turn, has lead] to legal transformations to the institution of marriage, [which has included no longer considering procreation as one of its ends.][93]

The Court connected the many marriage modifications that have occurred with time, focusing particularly on its dissociation with reproduction. Divorce, it argued, had been one of the most fundamental changes to marriage; divorce proved how a couple could split without necessarily affecting children in a negative way. With this, the Court separated the protection of the couple from the protection of the offspring. It also argued that the will of the parties to remain together had become the most important factor in the regulation of marriage.[94] The Court even cited the reform that allowed sex reassignment surgery as relevant to marriage, specifically for the purposes of procreation: if transsexual people, who generally underwent reassignment surgery that resulted in infertility,[95] could access marriage, there was no reason to ban same-sex couples from accessing marriage too.

Marriage, the Court argued, had been changing *de facto*. Today, it is not about reproduction, but about "affection, [. . .] identity, solidarity and mutual commitment between those that want to share a life together."[96]

> A person's decision to be joined with someone else and project a life together, just like the decision to have –or not to have– children, is derived from the self-determination of each person, from the right to the free development of each individual's personality [. . .] [And it is not necessary] for the decision to be joined with someone else to [be tied] to the second one, that is, to have children with each other. [Especially considering that, in this aspect] there are [physiological] factors that might impede a person from having children, which cannot become an obstacle to the free development of the personality, as far as these decisions go.[97]

[92] *Ibid.*, par. 242.

[93] *Ibid.*, par. 242.

[94] *Ibid.*, par. 246.

[95] *Ibid.*, par. 248.

[96] *Ibid.*, par. 250.

[97] *Ibid.*, par. 251.

The Court accepted that there are differences between same-sex and opposite-sex couples regarding their ability to have children that were genetically theirs. But this was not a relevant difference for accessing marriage. First, because the decision to have children was a right that could not be conditioned to marriage. Likewise, the decision of being joined with someone was part of a right that could not be conditioned to reproduction. Second: because reproduction was no longer an end of marriage, even for opposite-sex couples, as the evolution of marriage showed. If an opposite-sex couple would not or could not reproduce, they would still have access to marriage.[98]

The Court also understood that along with the right to the development of the personality there were not only decisions regarding reproduction or marriage, but those regarding a person's "sexual options":

> A person's sexual orientation, as part of her personal identity, is a relevant element of her life's project [. . .] It is an element that will undeniably determine [her] affective and/or sexual relationships [. . .] and because of that, with whom she will form a life in common with or have children with, if she wants to.
>
> [. . .] For homosexual persons, just like it happens with people whose sexual orientation is towards those of a different sex, freely and voluntarily establishing affective relationships with persons of the same-sex is part of their full development. [Both types of] relationships, as sociological [studies] show, [are similar] in that they form a community of life built on bonds of affection, sexual attraction, and reciprocal solidarity, with a tendency towards stability and permanence in time.[99]
>
> [. . . In conclusion], if one of the aspects that drives the way in which a person projects her life and her relationships is her sexual orientation, it is a fact that, in full respect of human dignity, a person can demand State recognition both of her sexual orientation [. . .], and of her unions, *under the modalities that, in a given moment, a State decides to adopt* (civil unions, solidarity pacts, common-law marriages, and marriages).[100]

Once again, marriage appears as one of the options the State has for regulating affective relationships. In any case, if the State chooses to regulate these relationships through marriage, it does have to comply with certain rules. Freedom to enter into the marriage contract –for instance– has to be guaranteed. For the Court, women's freedom to enter a marriage is the most relevant protection granted by international treaties' regulation of marriage. Another rule is that it must be open for everybody, unless there is a very good reason for a person or group of persons to be excluded. In this decision, the Court established that a person's sexual orientation was not a good reason to restrict marriage but, on the contrary, it was precisely a reason to open it up.

State recognition and protection of people's affective relationships is at the intersection between the right to the free development of the personality and the right to the protection of the family. The first protects all matters of sex,

[98] *Ibid.*, par. 270.

[99] *Ibid.*, par. 264, p. 266.

[100] *Ibid.*, par. 269. Emphasis added.

reproduction, and love, regardless of whether they take the shape the State offers or not. The second is the right that allows people to demand State recognition and protection of their family bonds.

What is important to note about this decision is how it counters the Attorney General's essentialist and originalist arguments on marriage. While the Attorney General saw in the protection of "the family," the protection of "marriage," the Court saw in this provision the protection of all families. While the Attorney General viewed marriage as an institution with an essence the law cannot alter; the Court viewed marriage as an institution that had been, could be and should be altered by the law. While the Attorney General viewed the "essence" of marriage as reproduction, the Court viewed marriage as important because, *today*, it is *one* way to protect affective bonds. It is not that marriage ceases to be "for" something (it is designed to protect affective bonds); it is that the purpose of marriage changed with time, according to the current realities of society and people's rights.

3.2.1.2 Why Is Same-Sex-Parent Adoption Constitutional?

The second fundamental question the Court had to solve was regarding same-sex couples adoption. The Attorney General's main argument was that opening the process of adoption to same-sex couples was a violation of the "best interest of children," also included in article 4 of the Constitution and in the Convention on the Rights of the Child. By not excluding same-sex couples from the process of adoption, Mexico City's Assembly had privileged the adults' rights vis-á-vis the children's. Specifically, the right to grow up in a constitutionally protected –that is, two opposite-sex parent– household, and the right not to be discriminated against by others, which is what would happen to children adopted by these couples. The Court responded with several arguments.

Homosexuality, according to the Court was "simply one of the options that is present in human nature and, as such, is part of a person's self-determination and her right to the free development of her personality."[101] For this reason, it cannot be argued that being gay makes a person –or a couple– less valuable and should therefore be "considered harmful for the development of a minor." The Court cited "expert testimony" through a brief filed by the National University (*Universidad Nacional Autónoma de México*) sustaining that:

> There is no basis to affirm that homo-parental homes or families possess an anomalous factor that directly results in bad parenting. Whoever believes otherwise has to offer evidence to support the claim. Neither the Attorney General, nor anybody in the world, has presented this evidence in the form of studies that are serious and methodologically sound. [...] Those [that believe that homosexual parents damage their children] are making an inconsistent generalization, based on a particular fact or anecdote, elevating

[101] *Ibid.*, par. 314.

> it to a characteristic of a whole social group. These inconsistent generalizations are called stereotypes and they are the erroneous cognitive bases of social prejudices and of intolerance.[102]

This is where the Court turns to the issue of out-right discrimination:

> [We] cannot tell the constitutional or legal difference between excluding an entire group of people from adoption because of their sexual orientation or excluding them for reasons of race, for example, or because of their ethnic, religious, or economical origins [. . .] For the same reason that it is not necessary to know the effect for children of living in families that are indigenous or not indigenous, rich or poor, with parents that have a disability or not [. . .] because, in any case, it would be constitutionally prohibited to not consider them a family protected by the Constitution or to consider them a "threatening" or "dysfunctional" family for children: the Constitution makes this inquiry unnecessary.[103]

"Heterosexuality," the Court wrote, "does not guarantee that the adopted child will live in optimal conditions for her development: this has nothing to do with heterosexuality-homosexuality. Every family model has advantages and disadvantages and every family must be analyzed in particular, not from a statistical point."[104] What "the best interest of the child" requires, the Court reasoned, is a legal structure that allows administrative authorities to limit potential adoptive parents on account of *other* factors that specifically relate to their ability to offer the adopted child the necessary conditions for her development and care.[105] This principle does *not* force the State to guarantee the "best possible parents," in the sense that the Attorney General implies. Understanding the "best interest of the child" in his terms would render the adoption regime "absolutely inoperative"[106] and it "would probably also result in grave violations of"[107] the right to non-discrimination.

At this point, the Court turned to the issue of children being discriminated against on the basis of their parents.

> In a democratic State, the legislator must eliminate the diverse ways of discrimination and intolerance present in society, [a feat that] is accomplished through the recognition and protection of all families [. . .], not through their "exclusion" or "denial."
>
> [A]s we said when we referenced the family and marriage: societies are always dynamical. At some point, in other countries, interracial couples were discriminated and an object of criticism, which no longer happens today. Interracial adoptions were also frowned-upon and today are completely accepted. Likewise, children of single mothers or divorced parents, at some point, were discriminated. Adoption itself, for some time, was kept a secret, because adopted children could be discriminated against [. . .].[108]

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[102] *Ibid.*, p. 131, footnote 3.

[103] *Ibid.*, par. 317.

[104] *Ibid.*, par. 338.

[105] *Ibid.*, par. 318.

[106] *Ibid.*, par. 319.

[107] *Ibid.*

[108] *Ibid.*, par. 329–330.

Last but not least, the Court referred to the possibility of children already living with their "biological father or mother and their homosexual partner. What happens if the biological father is missing, if he is not there physically at some point or dies? Who is going to be responsible for that child?"[109] The challenged law also remedies these situations, the Court argues. And for this reason, it does *not* violate the best interest of children, but rather guarantees it.

> [...] Law must be part of social change. If this Supreme Court established that the challenged law was unconstitutional, because society would discriminate against children adopted by homosexual couples, [the Supreme Court itself would be discriminating against] these children.[110]

In this decision the Court did not get tangled up in the debate regarding the existence of a fundamental right to parenthood *per se*, which covers adoption. In its view, adoption is a legal option "for those persons that, for whatever reason, cannot or do not want to have biological children," and it is also an optimal way to "satisfy the right of every boy and girl –that, for whatever reason, are not with their biological mother or father or both–, to have a family that will provide assistance, care, and love, with all that this implies: education, housing, clothes, food, etcetera."[111] The regulation of adoption should be judged, thus, from these two perspectives: does it guarantee for children what it should guarantee? And, regarding adults, does it discriminate in any way?

Although the Court affirmed that the right to non-discrimination bars us from even questioning whether children should grow up in certain types of families (those that fall under a suspect class), it did offer a response to the question of whether same-sex couples were impaired –in some way– of fulfilling the duties that spawn from a filial relationship. For the Court, the answer was that they were not. Same-sex couples are capable of offering what parenthood, ultimately, entails: both material goods and emotional care. This is the core of the Court's argument. If adoption exists, it must be opened to all of those that are able to give children what they need. Unless there is proof that same-sex couples cannot give children what they need, they cannot be barred from accessing the process of adoption.

Finally, the Court went as far as to affirm that, if people were genuinely concerned with the best interest of children, their efforts should rather be focused on improving the process of adoption. The focus should be on guaranteeing that "thousands of children, that today remain in shelters or orphanages, have a family" and that "thousands of couples that want children" are actually able to get them "in ways that are safe for those boys and girls."[112]

[109] *Ibid.*, par. 334.

[110] *Ibid.*, par. 331.

[111] *Ibid.*, par. 325.

[112] *Ibid.*, par. 328.

3.2.2 The Oaxaca Ruling

The First Chamber of the Supreme Court solved, in December of 2012, three different *amparo* suits brought against the Oaxaca Civil Code for *excluding* same-sex marriage. In Mexican law, the *amparo* suit is a mechanism of judicial review designed for individual persons to combat laws or governmental acts that infringe on their rights. The most important feature of this mechanism is that, if the case is won, it only benefits the parties to the suit. Ultimately, if five separate cases are won on the same issue, with the approval of 4 –out of 5– Justices (in cases solved by the First Chamber), a *jurisprudencia* will be formed. The *jurisprudencia* is a normative criterion that, in the case of the First Chamber, must be followed by all inferior *judges*, federal and local. As of recently, the Constitution established that when this *jurisprudencia* gets formed, the Supreme Court must notify the legislature so it modifies the law at hand. If in 90 days the law is not modified, the Supreme Court will issue –if it is approved by 8 out of 11 Justices–, a "declaration of unconstitutionality" of the law.[113] This means that it will no longer be applicable, for *anybody*. Now, for the case of same-sex marriage, this still implies that *each* civil code –out of the 31 states– must be challenged at least on five different occasions for a change within that legislature to happen.

In this section, I want to focus on what the First Chamber of the Court solved in one of these *amparos*. I am not going to focus on what the defendants claimed, since they did not really innovate on the arguments, but just replicated the Mexico City ruling; nor am I going to focus on what the Oaxaca authorities, defending the Code, argued, since they didn't, either, present novel arguments against same-sex marriage. For instance, the Governor of Oaxaca, one of the authorities that opposed same-sex marriage, argued that marriage could not be reduced to the will of the parties; that, by virtue of its "historical, natural, social, cultural, and axiological formation" it was a legal institution with one purpose and specific elements: (i) it was a contract; (ii) that required a man and a woman; (iii) with the purpose of procreating and (iv) mutually aiding each other. "Marriage's own teleology essentially entails [that it be considered an] alliance between a man and a woman, that set out to procreate, educate those children and aid each other."[114] Essentialism in all its glory, even after the Supreme Court's Mexico City ruling.

The first thing that must be noted about the Oaxaca ruling is how it frames the problem and understands the Mexico City ruling. For the First Chamber of the Supreme Court, this new case differed from the previous, since in the latter, the Court had to establish if *expanding* same-sex marriage was "allowed," while in the former, it had to decide if *excluding* same-sex marriage was "prohibited". In the first case, the question was, according to the Oaxaca ruling, whether there is something

[113] Article 107, fractions (I) and (II) of the Federal Constitution; Articles 216, 217, 218, 223, 232 of the *Ley de Amparo* (Law of Amparo).

[114] Amparo en revisión 581/2012, pp. 19–20.

about the constitutional regulation of the family that prohibits expanding marriage; in the second case, the question is whether the traditional definition of marriage as the union of a man and a woman violates equality.[115]

This is a curious distinction, given how the Mexico City decision is *actually* written: same-sex marriage is not *allowed*, it is *required* given the right to the protection of the family and the right to the free development of the personality. However, the Court, 2 years later, considers it is deciding a new problem. A problem it chooses to decide according to the logic of the right to non-discrimination.[116]

3.2.2.1 The Right to Non-discrimination

Analyzing the case according to the right to non-discrimination, implies two things, according to the Court: (1) first, determining whether the Oaxaca Civil Code, when defining marriage, draws a distinction based on a suspect class, prohibited by the right to non-discrimination; and (2) second, determining whether this distinction is constitutional. Establishing the first point is important, because it determines the "test" the Court must use to determine the second point: if the distinction was based on a suspect class, the Court had to use a strict scrutiny test to analyze it.[117]

The Court determined that "sexual preference" was a suspect class, according to article 1 of the Federal Constitution. It thus proceeded to establish why the definition of marriage contained in the Oaxaca Civil Code was drawn based on a distinction on sexual preference.

For the Court, although every "person" could get married, "a homosexual could only access [marriage] if she denied her sexual orientation, which was precisely the characteristic that defined her as a homosexual."[118] "Sexual preference," the Court wrote, "is not a status that a person holds, but something that is shown through concrete conducts like the choice of a partner."[119] If a person could not choose to marry a partner of the same sex, the definition of marriage was "implicitly" drawing a distinction based on sexual preference.

3.2.2.2 Is the Distinction Constitutional?

Given that the Oaxaca Civil Code established access to marriage based on sexual preference, the Court had to determine whether this distinction: (a) pursued a constitutionally *compelling* interest; (b) whether it was a measure that was narrowly tailored to this end; and (c) whether it was the least restrictive means to pursue this end.[120]

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[115] *Ibid.*, pp. 27–28.

[116] *Ibid.*, p. 29.

[117] *Ibid.*, pp. 30–32.

[118] *Ibid.*, p. 33.

[119] *Ibid.*

[120] *Ibid.*, pp. 34–35.

The Court determined that the definition of marriage pursued a constitutionally compelling interest: to protect the family, in compliance with article 4, paragraph 1 of the Federal Constitution. The question was really whether defining marriage as the union between a man and a woman with the purpose of procreating was tailored to that end. The Court's response was that it was not.

This was where the Court connected the Oaxaca ruling with the Mexico City ruling. How could it determine whether defining marriage in such terms complied with article 4, paragraph 1? By determining what article 4, paragraph 1 protects: all families –including couples and filial relationships; and couples, specifically, through marriage, without it being tied to procreation. Under this scheme, the Court argued, Oaxaca's definition of marriage was both over-inclusive and under-inclusive. It was over-inclusive because, if it aimed to connect marriage to procreation, it failed to do so by allowing opposite-sex couples that could not or did not want to have children to marry. It was under-inclusive, because same-sex couples that were similarly situated –that is, that wanted to and had children– could not access the norm.

> For all relevant effects, homosexual couples are in an equivalent situation as heterosexual couples [...] [Following] the European Court of Human Rights [in] *Schalk & Kopf v. Austria*, [...] the relationship two homosexual persons who form a life as a couple constitutes *family life* under the European Convention of Human Rights. But the family life of two homosexual persons is not limited to life as a couple. Procreating and raising children is not a phenomenon that is incompatible with homosexual preferences. There are same-sex couples that make a family life with minors procreated or adopted by one of them, or homosexual couples that use means derived from scientific progress to procreate, regardless of having access to the normative power of marriage.[121]

Given that the definition of marriage contained in the Oaxaca Civil Code was not directly connected to the end it pursued, the Court concluded that validating it in such terms could only perpetuate "a decision based on prejudices that historically have existed against homosexuals."[122] Their exclusion from marriage was not a "legislative over-sight", "but the legacy" of these "severe prejudices."[123]

In this point, the Court referred to the "historical disadvantages" suffered by homosexuals, which had been "widely recognized and documented: public harassment, verbal violence, employment and access to health discrimination, besides the exclusion of some aspects of their public life."[124] Citing *Loving v. Virginia*, it drew on the analogy between race and sexual orientation discrimination and concluded: "the normative power to get married does little if it does not grant a person the possibility of marrying the person of her choice."[125]

Next, the Court proceeded to establish why marriage was important. "The right to marry did not only include the right to access the expressive benefits associated

[121] *Ibid.*, pp. 39–40.

[122] *Ibid.*, p. 41.

[123] *Ibid.*

[124] *Ibid.*

[125] *Ibid.*, p. 42.

to marriage" –benefits that were never individually referred to–, "but also the right to the material benefits that the laws ascribe to the institution."[126] "In this sense," it wrote, "marriage is really 'a right to other rights'."[127] Then it affirmed: "the rights that civil marriage grants increase considerably the quality of life for people."[128] "In Mexican law there are a great amount of economic and non-economic benefits associated to marriage ...."[129] After citing some concrete examples of these benefits, the Court concluded that denying them for homosexuals was treating them like "second class citizens."[130] The Court then stated that excluding same-sex couples from marriage, also "translates into a differentiated treatment towards the children of homosexual couples, placing them in a disadvantage vis-à-vis the children of heterosexual couples."[131]

3.2.2.3 Would a Different Distinction Be Constitutional?

The Court took up one of the arguments made by the Oaxaca government: that marriage is for heterosexual couples and that same-sex couples should have access to a different institution. Technically, this was not part of the problem, especially since Oaxaca didn't even have a different regime for same-sex couples. However, the Court took it upon itself to answer this problem.

In this point too, the Mexican Supreme Court decided to make an analogy between the discrimination suffered on account of sexual orientation and racial discrimination in the United States. "Even if [same-sex couples could access a different regime with the exact same rights as marriage, such a regime] evokes the measures validated by the doctrine known as 'separate but equal' that developed in the United States in the context of racial segregation at the end of the nineteenth century."[132] After briefly recapping *Plessy v. Ferguson* and *Brown v. Board of Education*, the Mexican Court concluded:

> The models for the recognition of same-sex couples, even if their only difference with marriage is the name they get, are inherently discriminatory because they constitute a "separate but equal" regime. Just like racial segregation was based on the unacceptable idea of white supremacy, the exclusion of homosexual couples from marriage is too based on the historical prejudices that have existed against homosexuals. Their exclusion from marriage perpetuates the notion that same-sex couples are less worthy of recognition than heterosexuals, thus offending their dignity as persons.[133]

[126] *Ibid.*, p. 41.

[127] *Ibid.*, p. 42.

[128] *Ibid.*

[129] *Ibid.*

[130] *Ibid.*, p. 46.

[131] *Ibid.*, p. 47.

[132] *Ibid.*, p. 48.

[133] *Ibid.*, p. 49.

3.3 Conclusion

The Supreme Court rulings on marriage are a result of changes to family law and those brought about by the LGBT movement.

First, the rulings represent the defeat of the essentialist thrust of the original doctrine of marriage. These rulings were not, as I showed, the first time the Court countered this logic. It had been doing it for some years, in many issues that involved marriage. What the Mexico City ruling did was to expose and counter-argue this logic to its full extent. It showed the prominence of text versus doctrine, which is another way of saying that it showed that what is important is *who* determines the content of marriage: today's legislature –through the Constitution, international treaties and the law– and not those that created the original doctrine of marriage. The Court uncovered marriage for what it was: an institution actually created by people that must always be able to respond *why* they chose a certain design.

Second: the rulings upheld a conception of marriage that has been evolving in the law through time. Marriage is *one* type of family relationship. The Court inverts the logic of marriage: before, marriage was the path that people had to conform to; today, marriage can be a path people conform to, if they want to. Constitutionally, family relationships are protected, unless there's a constitutional reason for them not to be.

Third: same-sex relationships have no reason to be excluded from family arrangements. They have no reason to be excluded from marriage –and thus, from *concubinato*–, nor can they be excluded from parenthood. Regarding marriage, the Court was clear: even if marriage was understood as tied to reproduction, same-sex couples would be able to access it because same-sex couples can and do, actually, "reproduce." The Court did not restrict reproduction to the genetic reproduction of the couple; it understood reproduction as the ability to "have" children, legally speaking. If marriage is understood as a "community of life," in which people help each other out, same-sex couples are perfectly capable of complying with it.

Fourth: regarding social discrimination suffered by children of LGBT parents, the Court was clear to state that the law must recognize same-sex families as a reality, in order to better protect these children and their parents from this discrimination.

Since the Supreme Court rulings the victories for the LGBT community have spread beyond Mexico City. The only real pushback since the 2010 ruling came from the Federal Government. The two institutions in charge of social security (IMSS, for workers in private companies, and ISSSTE, for government employees) refused to recognize same-sex marriages, thus denying them social security benefits. The strategy was clear: if the Federal Government could not control *who* would *marry*, it would try to control what being married, in terms of access to rights vis-à-vis the State, implied. It would empty marriage of its content.[134] The citizenry, however,

[134]The Defense of Marriage Act of the United States, for instance, did this by redefining marriage. The Federation did this by denying rights that *federal laws* attached to state marriages. The distinction is not minor, especially if one considers the ideas that bounced around in the U.S.

pushed back. Couples that were denied access to these rights challenged these administrative decisions before the federal judiciary. Every single case that was brought forth was won. The Supreme Court Mexico City precedent started being used in all these cases to challenge the denial of social security benefits as a violation of rights.[135] Ultimately, the ISSSTE started recognizing these marriages.[136] The IMSS, however, refused to do so until the Supreme Court ruled that denying these benefits amounted to discrimination.[137]

Other than the pushback from these two institutions, the battle has been concentrated in getting marriage in other Mexican States. First, there was a wave of individual challenges to several state civil and family codes for their exclusion of same-sex couples from marriage. Until this day, suits have been brought and won in at least 8 of the 31 states.[138] And the numbers are growing. The Supreme Court has been called to rule on several of them.

In addition to judicial challenges, changes also happened in the legislative and administrative arenas. In the State of Colima, "conjugal unions" (*enlaces conyugales*) were approved by the legislature exclusively for same-sex couples.[139] These unions have the exact same rights and obligations as marriage; they even grant access, as couples, to adoption.[140] The members that comprise the couple, once married, are even considered "spouses."But the name of the institution that

Supreme Court, for example, with DOMA. The Federation may not have the power to define marriage; but the Federation does have the power to determine what protections it offers to the family –within its powers–. The Federation could choose not to give Access to citizenship for marriage, for example. The problem is that this got lost, when the federation denied access to a whole group of families, with criteria that were not sound.

[135]The Supreme Court has not ruled on the merits, yet, only regarding the admissibility of the suit brought against one of these decisiones (*see* Amparo en Revisión 86/2012); the National Council to Prevent Discrimination issued a resolution in which it condemned the authorities for denying these benefits. *See* CONAPRED, Resolución por disposición 2/2011, July 6, 2011.

[136]CONAPRED, "Registra ISSSTE a matrimonios igualitarios en cumplimiento a Resolución del Conapred", May 13, 2013. Several news outlets, including CONAPRED's own note, talk about a press release done by ISSSTE in which it communicates its change in policy. I have not been able to find this release.

[137]Amparo en Revisión 485/2013, decided on January 30, 2014; IMSS, "Comunicado de prensa no. 009", February 17, 2014, http://www.imss.gob.mx/prensa/archivo/201402/009

[138]Oaxaca, Colima, Yucatán, Sinaloa, Chihuahua, Estado de México, Jalisco, and Nuevo León.

[139]"Congreso de Colima aprueba unions civiles entre personas del mismo sexo", *CNN México*, July 4, 2012; Código Civil del Estado de Colima, articles 139 on.

[140]Coahuila in 2007 created "solidarity pacts" (*pactos de solidaridad*) for same-sex couples and opposite-sex couples. Unlike the conjugal unions in Colima, whoever, these pacts, when it comes to same-sex couples, do not grant access to adoption; nor is it clear if they grant access to social security and other federal benefits (since the laws in which these benefits are established are for "spouses"). Código Civil para el Estado de Coahuila, articles 385–1 on.

these couples say "yes" to is named differently: *matrimonio* for opposite-sex couples, *enlace conyugal* for same-sex couples. The reform has been challenged for establishing a "separate-but-equal" regime.[141]

The State of Jalisco passed a law regulating civil unions (*sociedades de convivencia*), for two *or more* persons living in the same household, regardless of their sex.[142] Unlike the conjugal unions approved in Colima, this new figure offers far less rights and obligations for the contracting parties (just like the civil unions that were approved in Mexico City in 2007). Prominently, it does not grant access to social security benefits. However, it is being supported by major LGBT organizations as a victory in what is considered to be a very conservative State. It has also been challenged by the new Attorney General for establishing a "separate-but-equal" regime.[143]

In the State of Quintana Roo, local authorities started marrying same-sex couples after one of them argued that since the Quintana Roo Civil Code did not even include a definition of marriage (such as the widely reproduced "marriage is the union of a man and a woman . . . "),[144] there was not any legal impediment for them to get married.[145] Without any formal –be it legislative or judicial– change, the Code was transformed. Following the same logic of administrative reinterpretation, authorities in Mexico City started issuing new birth certificates for children that were born *prior* to the 2009 reform that had been registered as sons and daughters of single parents, thus recognizing *both* of their same-sex parents.[146] This change was done not by using second parent adoption, but through the process originally established to force "irresponsible men" to *recognize* their children (a processed dubbed "the recognition of children").[147] The advantage of this strategy –besides not having to adopt one's own child– is that the process is done directly before the Civil Registry without the need to go to court. This is another novel use of an existing law.

In the middle of all these changes, in June of 2011, the Federal Constitution was reformed to include the right to non-discrimination specifically on account

[141] Pedro Zamora Briseño, "Se amparan contra figura de 'enlace conyugal' en Colima", *Proceso*, September 30, 2013, http://www.proceso.com.mx/?p=354188

[142] Ley de Libre Convivencia del Estado de Jalisco, *El Estado de Jalisco. Periódico Oficial*, 1 de noviembre de 2013, núm. 27 bis. http://app.jalisco.gob.mx/PeriodicoOficial.nsf/BusquedaAvanzada/EE03503DDBE546E786257C16007AAB33/$FILE/11-01-13-BIS.pdf

[143] The Attorney General –incredibly so– has challenged it through an *Acción de Inconstitucionalidad* (number 36/2012), so the Supreme Court will have to solve the case.

[144] Código Civil para el Estado de Quintana Roo, articles 680–704.

[145] Adriana Varillas, "Revocan anulación de bodas gay en QRoo", *El Universal*, May 3, 2012, http://www.eluniversal.com.mx/notas/845171.html; Estefanía Vela Barba, "Derecho y ciudadanía: el caso del matrimonio gay en México", *Nexos: El Juego de la Corte*, March 20, 2013, http://eljuegodelacorte.nexos.com.mx/?p=2501

[146] Valentina Pérez Botero, "Familias homoparentales logran reconocimiento jurídico de su composición", *Revolución. Tres punto cero*, August 21, 2013. http://revoluciontrespuntocero.com/familias-homoparentales-logran-reconocimiento-juridico-de-su-composicion/

[147] Código Civil para el Distrito Federal, articles 78–8 (1928).

of *sexual* preference (before, it only established a generic "preference"). Also, it determined that *every* authority, within its own powers, had to respect, protect, guarantee and promote human rights, established both in the Constitution *and* in international treaties subscribed by Mexico. With this new norm, a Civil Registry in one of the State of Colima's towns began marrying couples arguing that, as an authority with the power to marry people, it had to respect, protect and guarantee human rights when doing so. Colima is a State in which three separate strategies have been tried: the legislative one (resulting in conjugal unions), the judicial one (at least one *amparo* –an individual suit– has been won) and the "administrative" one (directly before the Civil Registry, couples are getting married).

It seems that the issue of same-sex unions is legally solved in Mexico. All that is left to do is to continue pushing the transformation of *all* legal codes. Two notes, though: in the rest of the states, people have not been pushing for the recognition of same-sex *concubinato*, only of marriage. Although this thrust is understandable –especially if the way to push change is through the judiciary–, it would be lamentable to see the LGBT movement reinstate the prominence of marriage, especially in a country with an important history of alternative family arrangements.[148] And particularly when it was the protection of *all* families what rendered same-sex marriage a *must*. Second: same-sex unions in Mexico show how successful lobbying and litigation can bring about change. Also: it shows how change in one area of law can "spark" change in other areas. However, I am not sure if the path and tools that were used to fight for same-sex unions are useful to fight other types of exclusion, such as those suffered when class is added to the mix. Although the first prominent LGBT case that was won before the Supreme Court was related to trans rights, it has been noticeable how, unlike the same-sex marriage case, there have been no other cases related to trans rights. The barriers to effectively access justice cannot be forgotten.[149] Remembering the original Homosexual Revolutionary Action Front: "no one is free until we are all free."[150]

[148] See, for example, Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*, Beacon Press, 2009; Janet Halley, "Behind the Law of Marriage (I): From Status/Contract to the Marriage System", *Unbound*, 2010, vol. 6, no. 1; Brook J. Sadler, "Re-Thinking Civil Unions and Same-Sex Marriage", *The Monist,* vol. 91, no. 3/4, 2008; and Libby Adler, "The Gay Agenda", *Michigan Journal of Gender & Law*, 2009, vol. 16, no. 1.

[149] See, for example, Libby Adler in "Gay Rights and Lefts: Rights Critique and the Distributive Analysis", *Harvard Civil Rights-Civil Liberties Law Review* (Amicus Online Supplement), Vol. 46, No. 1, 2011; and Dean Spade, "Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change", *Rutgers School of Law Newark*, vol. 30, 2009.

[150] Rodrigo Parrini, "Sujeto, tiempo y nación. La emergencia de un sujeto politico minoritario", *supra*, p. 8.

Bibliography

1. Aquinas, Thomas. 1920. *Summa Theologica. Supplement to the third part (Supplementum Tertiae Partis*). Second and Revised Edition, Question 64, Article 3. Available at: http://www.newadvent.org/summa/5.htm.
2. Blanco, Mercedes, and Edith Pacheco. 2009. Aging and the family-work link: A comparative analysis of two generations of Mexican women (1936–1938 and 1951–1953). *Journal of Comparative Family Studies* 40(2).
3. Censida. 2006. *Manual de organización específico del Centro Ambulatorio Para la Prevención y Atención del SIDA e Infecciones de Transmisión Sexual,* noviembre. http://www.censida.salud.gob.mx/descargas/man_org_capasits.pdf.
4. Collier, Jane. *Cambio y continuidad en los procedimientos legales zinacantecos,* Haciendo justicia. Interlegalidad, derecho y género en regiones indígenas, ed. María Teresa Sierra. (CIESAS 2004).
5. Cosme, Granados, José Arturo, and Luis Ortiz Hernández. 2003. Descentralización sanitaria en México: transformaciones en una estructura de poder. *Revista Mexicana de Sociología* 65(3): 591–627.
6. De la Dehesa, Rafael. 2010. *Queering the public sphere in Mexico and Brazil*. Durham: Duke University Press.
7. Gavito, Barrón, and Miguel Ángel. 2010. El baile de los 41: la representación de lo afeminado en la prensa porfiriana. *Historia y Grafía* 34: 62–64.
8. George, Robert P., Sherif Girgis, and Ryan T. Anderson. 2010. What is marriage?. *Harvard Journal of Law & Public Policy* 34(1).
9. Gordley, James. 1991. *The philosophical foundations of modern contract doctrine*. Oxford: Clarendon.
10. Gordley, James. 2013. The method of the roman jurists. *Tulane Law Review* 87: 940, 941, 947, 948.
11. Halley, Janet. 2010. Behind the law of marriage (I): From status/contract to the marriage system. *Unbound* 6(1).
12. Knaul, Felicia, and Susan Parker. Cuidado infantil y empleo femenino en México: evidencia descriptiva y consideraciones sobre las políticas. *Estudios demográficos y urbanos* 11(3).
13. Libby, Adler. 2009. The gay agenda. *Michigan Journal of Gender & Law* 16(1).
14. Libby, Adler. 2011. Gay rights and lefts: Rights critique and the distributive analysis. *Harvard Civil Rights-Civil Liberties Law Review* (Amicus Online Supplement) 46(1).
15. Lopez-Acuña, Daniel. 1980. Health services in Mexico. *Journal of Public Health Policy* 1(1): 83–95.
16. Lozano, Genaro. 2013. The battle for marriage equality in Mexico, 2001-2011. In *Same-sex marriage in Latin America: Promise and resistance*, ed. J. Pierceson et al., 156. Lanham: Lexington Books.
17. Madrazo Lajous, Alejandro. 2012. El formalismo desde el derecho privado. In *Teoría y crítica del derecho civil y comercial*, ed. Martín Hevia, 290–291. Mexico: Fontamara.
18. Madrazo Lajous, Alejandro. 2008. From revelation to creation: The origins of text and doctrine in the civil law tradition. *Mexican Law Journal*, New Series 1(1); *Revelation and creation: The theological foundations of modern legal science in Mexico*, Yale Law School JSD dissertation (directed by Paul Kahn), 2006.
19. Matrimonio, Requisitos del Contrato de. *Semanario Judicial de la Federación*, tomo XLVIII, 3297 (Segunda Sala, Quinta Época, Tesis Aislada, 358723).
20. Mijangos, Pablo. 2014. *Secularization or reformation? The religious origins of civil marriage in Mexico*. Paper presented at the 2014 annual meeting of the American Historical Association, cited with the author's permission.
21. Molyneux, Maxine. 2006. Mothers at the service of the new poverty agenda: Progresa/Oportunidades, México's Conditional Transfer Programme. *Social Policy & Administration* 40(4), August.

22. Moreno, Hortensia. 2010. La construcción cultural de la homosexualidad. *Revista Digital Universitaria* 11(8).
23. Pacheco Escobedo, Alberto. 2006. El matrimonio canónico y el matrimonio natural. *Familia. Naturaleza, derechos y responsabilidades,* Virginia Aspe Armella (comp.), Porrúa-Universidad Panamericana, México, 57.
24. Pérez Botero, Valentina. 2013. Familias homoparentales logran reconocimiento jurídico de su composición, *Revolución. Tres punto cero*, August 21.
25. Polikoff, Nancy D. 2009. *Beyond (straight and gay) marriage: Valuing all families under the law*. Boston: Beacon.
26. Rojina Villegas, Rafael. *Derecho civil mexicano*, tomo II, ed. 2006 (1962), 250–253.
27. Sadler, Brook J. 2008. Re-thinking civil unions and same-sex marriage. *The Monist* 91(3/4).
28. Spade, Dean. 2009. Trans law reform strategies, Co-optation, and the potential for transformative change. *Rutgers School of Law Newark* 30.
29. Vela Barba, Estefanía. 2013. La evolución del divorcio en clave de derechos y libertades. *Nexos: El Juego de la Corte*, August 20. http://eljuegodelacorte.nexos.com.mx/?p=3004.

Statutes

30. American Convention on Human Rights.
31. Circular del Ministerio de Justicia. Remite la ley del matrimonio civil.
32. Código Civil de Mexico (1928).
33. Código Civil ... (1928), article 291-Bis. (reformed May 25, 2000).
34. Código Civil para el Distrito y Territorios Federales en Materia Común y para toda la República en Materia Federal (1928), (reformed October 3, 2000).
35. Código Penal para el Distrito Federal (2002).
36. Constitución Política de los Estados Unidos Mexicanos 4 (reformed December 31, 1974).
37. International Covenant on Civil and Political Rights.
38. Ley de 14 de Diciembre de 1874, reglamentaria de las adiciones y reformas de la Constitución Federal, article 23, section IX (reformed December 29, 1914).
39. Ley de Sociedad de Convivencia para el Distrito Federal.
40. Ley de Sociedad de Convivencia para el Distrito Federal, November 16, 2006.
41. Ley de Vivienda (June 27, 2006).
42. Ley del Matrimonio Civil (1859).
43. Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores (April 24, 1972).
44. Ley del Seguro Social (1973).
45. Ley Federal para Prevenir y Eliminar la Discriminación, June 11, 2003.
46. Ley General de Salud (February 7, 1984).
47. Ley General de Salud (May 15, 2003), Articles 77-Bis-1, 77-Bis-4.
48. Ley Sobre Relaciones Familiares (1917).

Cases

49. Acción de Inconstitucionalidad 146/2007 y su acumulada, p. 187.
50. Acción de Inconstitucionalidad 2/2010, par. 238, p. 88.
51. Amparo Directo Civil 6/2008, pp. 75–83.
52. Amparo Directo en Revisión 917/2009, p. 22.
53. Amparo en revisión 581/2012, pp. 19–20.
54. Amparo en Revisión 485/2013.

55. Amparo en Revisión 93/92, Primer Tribunal Colegiado del Sexto Circuito, *cited in* Contradicción de Tesis 5/92, Primera Sala de la Suprema Corte de Justicia de la Nación.
56. Contradicción de Tesis 21/2006, pp. 15–16.
57. Contradicción de Tesis 5/92, Primera Sala de la Suprema Corte de Justicia de la Nación.
58. *Corbett v. Corbett* (UK, 1970).
59. Solicitud de Modificación de Jurisprudencia 9/2005, Primera Sala de la Suprema Corte de Justicia de la Nación, p. 12.