Research Article

The Right To Same-Sex Marriage In The Light Of The Inter-American And European Human Rights Systems, And The Displacement Of The Doctrine Of National Discretion In Mexico

Rogelio López-Sánchez Universidad Autónoma de Nuevo León

https://orcid.org/0000-0002-2725-2887
rlopezs@uanl.edu.mx
Gastón Julián Enríquez-Fuentes Universidad Autónoma de Nuevo León
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enriquezg1@hotmail.com

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Abstract
This article examines the scope and limits that the figure of same-sex marriage has had within the framework of the inter-American and European human rights systems in relation to the national discretion of its Member States, and how the Supreme Court of Justice of the Mexican Nation (SCJN) has adopted a doctrine of full recognition of that civil institution as a human right and displacing that margin to the detriment of the democratic principle. The Mexican Court has perhaps been the only court in the world to compel all States of the Federation to recognize through jurisprudence the institution of marriage equally (equal marriage) which has had a number of theoretical consequences that were difficult to overcome, as well as a distortion of the democratic principle in Mexico.

Keywords: Human rights, Home marriage, Legal system, Mexico.

Introduction

Marriage was originally conceived as a civil institution, but today, Courts like Mexican have elevated it to the category of human law that is part of the free development of personality and human dignity, thus shifting the legislature's scope for action to create rules and new rights. In the first part, the status of the question arises as an institution that is originally civil, but which has been recognized as protection through institutional guarantees such as article 16 of the Universal Declaration of Human Rights or 17 of the American Convention on Human Rights (CADH) (right to start a family). Subsequently, the limits to this institutional guarantee of marriage in the Inter-American and European Systems of Human Rights are explained in the light of the most recent jurisprudence doctrine of these two major regional bodies. We will emphasize the doctrine of national discretion on this figure in relation to same-sex marriage in different sovereign nations. Upon completion of this study, we will explain the jurisprudence of the Mexican Supreme Court that has recognized gay marriage as part of the right to free development of personality and the principle of equality and non-discrimination, as opposed to the legislative assessment of some Federal Entities of the Mexican State that have refused to recognize it as such.

I. State of the issue: marriage as a civil institution in Mexico and a means to achieve the free development of the person.

Marriage is born from a civil institution of Roman law, later to become part of the canon, until it reaches its historical secularization. In Mexico, since the mid-19th century President Benito Juárez promulgates the Reform Laws that postulated as a toral argument the separation between the Church and the State (Altamirano 2010; Martinez et al 2020; Martinez and Armenta-Ramirez 2019). Thus, with the Reformation he gave birth in Mexico to civil marriage. For the Mexican legal system, the above represents a fact of paramount importance, since over the years arguments, such as those used in the USA, will be put aside in the Boers v case. Hardwick, who argued that the law represented a Judeo-Christian moral tradition of a millennial character as a moral social standard, and that, therefore, the penalty for certain sexual practices was justified (Blackmun 1986).

Internationally in Latin America, under Article 11 of the CADH, individuals are protected from arbitrary actions by state institutions affecting private and family life (IACHR Court 2012). As a result, progress has been made in the areas of sexual diversity discrimination in Mexico by abolishing the penalty for homosexuality or Sodomites practices since 1871 (Newton 2009). However, even though there are prejudices and discrimination on the part of individuals, the State protects all individuals, regardless of their sexual orientation, according to article 1st constitutional (CNPD 2010). Hence for the Mexican legal system marriage is a social institution that derives from the human right to start a family, as well as the principle of free development of the person, but it is not a right per se, that is autonomous.

The fact that it is an institution considered an essential component in society, whose preservation is considered indispensable to ensure constitutional principles, establishing a core or redoubt unavailable by the legislature, does not mean that it is, on the one hand, the only form of protection, and on the other the ideal way to do so (Constitutional Dispute 14/2010). Accordingly, Article 16 of the Universal Declaration of Human Rights (DUDH) mentions that there is a human right to start a family, which cannot be seen on matters of race, nationality or religion; it omits, however, any other limitation to be avoided and therefore gives States the power to lay down the requirements for marriage, provided that it does not violate that provision.

However, in examining the implications of differential treatment that some standards may give to their addressees, the Inter-American Court of Human Dechos (CoIDH) has established that "not every distinction of treatment can be considered offensive, in itself, to human dignity" (OC-4/84 1984, 55). In the same regard, the European Court of Human Rights (CoEDH), on the basis of "the principles that can be inferred from the legal practice of a large number of democratic States", warned that a distinction is discriminatory only when it "lacks objective and reasonable justification" (Eur. Court H.R.) In other words, it is necessary for the Court to justify that access to marriage, to start a family and all rights around the union of two heterosexual persons, necessarily entails an impairment in the dignity of homosexual persons, without implying in any case that the institution of marriage is a human right per se.

We are all equal before the law, and the group seeking access to marriage as we conceived it seeks to be the same, but as Bobbio (1993, 54) would say, "Equal to whom?" Homosexual de facto unions, while assimilated to marriage unions, contain some differences at their core. These lie, for example, in the assurance of a family by biological capacities and filial bonds that by nature of blood are formed, regardless of the technological possibilities to achieve the perpetuation of the species, so that it can more easily persist without the need for it. Therefore, for the SCJN, gay couples and heterosexual couples are not equal in practical, legal or biological terms, by virtue of the higher interest that the family is and not the marriage itself (Action of Unconstitutionality 2/2010).

Any kind of couple, homosexual and heterosexual, deserve all the protection of the law and the state. However, this does not imply the extension, modification, special or exceptional application of the rules, but it does give rise to the study of the case and establish unequal treatment of the unequal in recognition of their diversity, since it is in no way sought to infringe their rights or offend their dignity. It is therefore impossible to say that both types of couples deserve (in practical terms) the exact set of rights. We do not deny (at any time) that the intrinsic dignity and free development of the human person should be the guiding axes under which decisions around the rights of homosexuals are articulated which are invariably human rights. However, it is strange to note that CoIDH, in view of CADH numeral 17, concerning family protection, it has solved emblematic cases such as the restoration of family ties (IACHR Court 2009, 200), or the possibility of assisted procreation among others that are fully conceived also for homosexuals (IDH Court 2012), but has never ruled on gay marriage in the Inter-American System of Human Rights.

II. Limitations of marriage in the Inter-American and European Systems on the basis of the doctrine of national discretion.

There is no single position on the scope of the principle of non-discrimination when weighted against civil institutions such as marriage, as well as the rights and obligations arising therein. There is a right to the family under articles 17 of the CADH and 23 of the International Covenant on Civil and Political

Rights (ICCPR). However, the definition of marriage is strong in form, as States party to the Treaty may apply for certain conditions and requirements by being part of the so-called "reserved domain". On conjunctural issues like this, we face the endless dilemma about the tension between the democratic principle and constitutional supremacy, because sometimes the legislator does not contemplate the figure of homosexual marriage arises the question about whether the judge should supplement this omission (De Vega 1983).

Conventionality control is a system where judges and magistrates are empowered to invalidate the rule as contrary to the CADH, or to expel it from the legal system (Rey 2008; Garcia 2010); but without reaching the point of doing so by legislating positively (Thesis: P. LXVII/2011). For example, in Mexico, there are multiple manifestations about different family conceptions. To date, 19 Federal Entities may have homosexual marriages. Two of these States recognize it as a human right in its Constitution and Civil Code (Mexico City and Morelos), where as 9 other states recognize it only in their Civil Code as an institution (Baja California Sur, Coahuila, Nayarit, Hidalgo, Colima, Michoacán, San Luis Potosí, Campeche and Oaxaca) whereoever the rest of the federal states have not reformed to include this figure in their laws.

However, the question lies in whether there is a need to modify, expand or add a special figure by virtue of objective reasonableness, in addition to clearly defining whether from the unions between homosexual persons, the same rights and duties are born as those furid between heterosexual couples (marriage or concubine). Article 32.1 of the CADH affirms the duty of individuals to the family, community and humanity. In this nature, there are limitations on the rights of third parties, the safety of people and the just demands of the common good, in a democratic society. The latter concept relates to the democratic principle around marriage, which is also of order and social significance and not only private (see Yogyakarta Principles).

At the international level, there are no specific treaties for this group of people that are gay couples, as there is no particular mention of the issues around sexual orientation or gender identity explicitly. The Yogyakarta principles are the most specific international instrument regarding the rights of persons with a different sexual orientation to heterosexual ones (Unconstitutionality Action 2/2010). However, Mexico is not a party to this instrument, and in addition, despite deepening civil and political rights such as economic, social and cultural rights, it has so far not caused official reactions from the United Nations System or the Mexican Government. The minimums included in that instrument do not oblige any State to set up within its laws a parity in access to legal institutions or to modify their requirements in favour of them. In Mexico, constitutional article 30 states: "A foreign woman or male who marries a Mexican male or woman, who have or establish their domicile within the national territory and meet the other requirements indicated by law", contemplating only as parties when concluded the legal act of marriage are a woman with a male or male with a woman, without providing for any other formula for the marriage pact.

Although the extent of the marital or concubine scope already exists in some places, these are reflections of its states and the reality of each State is very different. In order for these rights and figure to be fully recognized, there must be a demand for both gay and heterosexual couples as part of an including society. In decision No. 2010-92 arising from a complaint against the French Constitutional Council, raising questions about the invocation of constitutional protection by personswho do not respond to the under-conditions of marriage, this Council refused (Constitutional Council 2010-92)..

For its part, the ECtHR admitting that the interpretation of the article in question in this case would not exclude gay marriage, warns that it is a right to lead a certain way of life, not a right to a certain legal status (European Court of Human Rights 2010), which does not undermine its normal family life, since it does not necessarily have a specific legal status (verbigracia , marriage) is the only one that can be given to a person for the full recognition of his dignity and his free development. Finally, the ECtHR has made it clear that States parties are not required to legislate or recognize gay marriage as a fundamental right, as it is part of the scope of each State's sovereignty in its margin of assessment of and recognition of each status conferred (State Agency Special Gaze bulletin of the State 2012).

The regional body has recently argued that, in the absence of a European consensus, the recognition of a gay marriage involves moral and ethical issues, so, in accordance with Article 12 of the ECHR (European Convention on Human Rights): "... it is true that some of the Contracting States have extended marriage to same-sex couples, Article 12 cannot be construed as imposing on States Parties an obligation to guarantee same-sex couples access to marriage" (See in detail H. Finnish v. Finland 2014; Chapin et Charpentier v. France 2016). In the The Inter-American System, on the other hand, Article 17.2 of the CADH recognizes heterosexual marriage, therefore internal laws protect people from discrimination, although it is also true that it imposes conditions for access to marriage only.

III. SCJN's position on marriage on the basis of the principle of equality and non-discrimination

Ferrajoli (2006) states that all fundamental rights have been established as a result of struggles or revolutions that have broken the veil of normality and naturalness that concealed a precedent oppression or discrimination. Equality must be a fundamental parameter in the organization and structuring in all areas of democratic social life. Both formal and informal barriers (International Labour Office s/f) should be removed. The prohibition of discrimination is a technical complement to the principle of equality, and materially implies in law a balance in the basic conditions of life: goods, economic situation and social situation (Cerdá Martínez-Pujalte 2005). However, in Mexico, fullness is not reached and the granting of an incomplete set of rights reflects only double discrimination, since on the one hand homosexual couples are deprived of the expressive benefits of marriage and on the other of material benefits (Thesis: 1a. CIII/2013).

For its part, CoIDH has pointed out that human rights treaties are living instruments (Altamirano, 2012) "whose interpretation has to accompany the evolution of current times and living conditions" (IACHR Court 2013, 83). Suspicious categories based on differential treatment constitute red spotlights when presumed to be illegitimate (Thesis 1a. XCIX/2013). In Karen Atala—in which a woman is denied guardianship of daughters because she is a lesbian—coIDH determined that "the specific criteria under which discrimination is prohibited (...) are not a taxative or limiting list but merely an example" and, consequently, under the category "any other social condition" falls within the prohibition of non-discrimination on the ground of sexual orientation" (Ibid., 83-93).

One of the manifestations of family protection can occur through the institution of marriage or concubine. However, if you look closely, in Mexico the purpose of marriage is multifaceted because of its federalism (each Federal Entity has the power to define it). However, we find some constants, such as living in the same home, remaining faithful, deciding freely, responsiblely and informedly the number and spacing of their children, among others; on reciprocity, they make it clear that the rights and obligations that come with marriage must always be the same for spouses and independent of their financial contribution to home support, among many more.

Upon access to marriage, a cluster of rights are born that the SCJN classifies in tax benefits, solidarity, because of the death of one of the spouses, owned, in the subrogated making of medical and migration decisions (Thesis: 1a. CCXV/2014; Thesis: 1a. CV/2013), which are only restricted and inaccessible when treating homosexuals differently without rational justification for doing so (Thesis: 1a. CCXV/2014). In this context, the SCJN stated that it was unsustainable to assert that marriage in its traditional definition is a complete concept, dogmatized by the legislator, because we are faced with the historical secularization of society and the institution itself.

Part of the characteristics or additions of marriage is the fact of: (i) deciding, and (ii) living under the terms and conditions of this contract. This is linked to the natural development and free development of the human person (Thesis: P. LXVI/2009). In this particular case, by joining another person and creating a union, there is the choice to form a common life and the possibility of having children as part of their humanity, their affective relationships (Thesis: 1a. CV/2013), which invariably bind to their sexual orientation. Since any form of discrimination in communion with article one of Magna Carta is prohibited, the fact that the couple is of the same sex should not influence the set of rights and obligations

given to this union, let alone deny its recognition. Thus, their membership in a vulnerable social group leads them to face situations of risk or discrimination that prevent them from achieving better living standards, and therefore require the attention and investment of the Government to achieve their well-being (Official Journal of the Federation, Mexico, 20 January 2004).

Marriage is an institution whose primary purpose is the formation of a family. On the other hand, the concubine was instituted by the lack of maritalis affectio, that is, the lack of exclusivity and permanence of the couple (Zúñiga 2011). Legal regulations in couples who are not married and live together are quite complex (Hunter 2012). In Mexico, permanence is imposed for the formation of a concubine, varying from 2 to 5 years, or the existence of a common child, and if you have several concubines, none is considered as so the marital affectio prevails; however, this relationship entails reciprocal rights and obligations between concubines. The above confirms the spirit of discrimination on the basis of social stereotypes or prejudices, stigmas that have been brought throughout history against homosexuals, who, in compliance with all the requirements, are not granted access to institutionalized figures, that is, that it is a "mere relationship of fact" (Devi 1977, 51).

Therefore, different treatment applies, but this does not happen with the same relationship of heterosexual fact, despite sharing with this figure the coexistence, solidarity, mutual help, permanence, publicity, equality, fidelity, cohabitation and mutual respect, fundamental values in human relations, dictated by the natural need for a sense of belonging and love (Frager 2000). Hence it rots for equality in both situations. The autonomy of the person results in the elimination of any type of barrier, in order to provide an adequate equality of opportunities, since a homosexual couple makes the biological procreation of both impossible (Cabrero 2009). Human nature, in its intrinsic complexity, manifests itself in one of its aspects by sexual preference, which will guide it in its projection of life. In heterosexual and fertile couples, the possibility of fulfilling one of the purposes of marriage remains: procreation; or, through the concubine. Biological consideration as an axis in relations is exclusive, closed and incompatible with modern society (Thesis: 1a. CIII/2013).

In addition, thanks to technology (in vitro fertilization, among others) and adoption, sexual reproduction is not a sine qua non condition for starting a family, and fulfilling one of the purposes of marriage. I mean, just because it's two people is enough. In addition, there are families in which reproduction is not the main objective and there are still figures to protect them such as concubine or cohabitation society (Action of Unconstitutionality 2/2012), while marriage does not require full fertility to contract it. For these reasons, the SCJN has said that the requirement of perpetuation of the species is irrational, as well as the conditioning that is between one man and one woman (Thesis: 1a. CV/2013), since in addition, it would be a matter of delimiting protection to the family, where the formation of the family is inherent to the human being (Zúñiga 2011); in such a way that it is impossible to restrict the exercise of this right. Therefore, the State is responsible for protecting such an institution from the first paragraph of Article 4 of the Federal Constitution, in addition to constituting an opposition to the autonomy of the will related to the free development of the person (Thesis: 1a. CV/2013).

The principle of equality translates into the recognition that all human beings are diverse and that diversity must be curbed that they weigh as factors of inequality (). According to the Mexican Constitution, all families regardless of their origin are worthy and worthy of protection regardless of sexual preferences in this regard (Thesis: 1a. CIII/2013). By concecirating access to marriage as a human right, the legislator's setting-up freedom is limited and the restriction, exclusion or preference in the exercise of this right is a clear violation of a person's rights (Thesis: 1a. CCLVIII/2014).

In conclusion, the SCJN contends that same-sex couple marriage is a new family form that appears to be intended for social acceptance. Alternatives to traditional marriage (such as concubine at the time) will bring about changes in family law and will continue to reflect new gender social practices as acceptable in the population (Hunter 2012). The current state of vulnerability challenges social standards and challenges the State to take the necessary measures to combat this problem (UNHCAP, 2003). However, a public panic is generated and the "moral majority" is whipped to arouse social anxieties and break paradigms. This blindness causes to ignore the fact that proper regulation involves a process of

improvement for all, not only for those with sexual orientation other than heterosexual, since it is not about "privileges", but about rights and obligations (in the case of marriage or concubine) (see Amparo in Revision 581/2012).

The United Nations High Commissioner for Human Rights in Mexico (OHCHR 2003) has questioned the perception of both the government and society, which ridicules or views as abnormal sexual preferences other than heterosexuality, because the multiplicity of rights that are violated by poor decision-making, poor public policy shorts, ambiguous legislation or even deliberate omission of regulation, are otherwise serious. In view of this situation, the SCJN has developed a doctrine of jurisprudential recognition that has left absolutely clear the materialization of marriage in gay couples (Habermas 1998) According to this, the right to form a family must be on an equal footing (Thesis: 1a. CCLX/2014). It is therefore urgent to study and establish an equal and total regulation, complete, equitable, aware of the need for citizens living marginalized from the benefits derived from institutions created exclusively for heterosexuals, and who irrationally continue to promote intolerance.

Therefore, the State (in accordance with article 5 of the Convention on the Elimination of All Forms of Discrimination against Women) should take all appropriate measures to eliminate prejudices and practices based on the idea of inferiority or superiority of the sexes or stereotypical roles for men and women. In accordance with the constitutional intention "to extend the guarantees implicit in the principle of equality to the scope of legislative actions that have a significant impact on the freedom and dignity of individuals" (isolated thesis CXXXIII/2004, 361) as well as Article 17 of the CADH and Article 23 of the ICCPR, there is no doubt how broad and greatly it should be considered in the present case, so it only subtracts the relevant legislation to make it a reality and end the oppression of the tyranny of a majority.

IV. The jurisprudence recognition of same-sex marriage in Mexico. Elements of constitutional identity and the shift of national discretion as a deference to the legislature.

THE SCJN's jurisprudential recognition of gay marriage imposes a vision of complete equality (note the use of the term diverse to "equity"), obliges to emphasize the urgent need to continue a dialectical and plural process around the debate of this figure, but above all to understand that it is not infallible (Vasconcelos 2010). That is, it is a process oriented towards an end that must meet certain requirements of form and substance so that the foundations of society in the spirit of the rule of law are concreted with sufficient and adequate forces and tools for its better permanence and application. In the face of legislative omission, the appropriate procedure must be followed to reseed it and respect what is provided for in our Constitution with regard to the separation of powers. In this way, only the legislator can say what rights are recognized (Lax & Phillips 2008); in sum, the competence of the legislature must be respected (Salazar 2009).

The decision, while based on rulings by various Supreme Courts of the United States of America, the reality that was lived there is diverse to that in Mexico. In that country, liberalization begins with social and political movements between voices of racial minorities, feminist waves and student demonstrations, as well as anti-war movements and the impact on the struggle of gay rights (Bérubé 2011). From that, gay life in that country became something more visible and began the mobilization of a gear in favor of equality. Despite the decision of the American Psychiatric Association Broad of Trustees in 1973 that he agreed that homosexuality is not a mental illness, and the triumph of the Lawrence vs. Lawrence case. Texas, in 2003, the road to equality is far from coming to an end (VV. AA. 1973).

The actititude assumed by the SCJN on gay marriage implies a series of theoretical problems, which also make it impossible to fit its doctrine into the social reality of the country. The evolutionary concept of the dignity of the person implies, according to Fukuyama (2019), that its recognition is due not only to a limited class of people, but to all; so that the enlargement and universalization of dignity makes this aspiration for recognition a political project. Certainly, the implementation of public policies in favour of minorities does not in themselves mean having to transform or disappear an entire institution, but to change and promote policies that eliminate discrimination so that public opinion changes and ensures change and then the issue will be that.

In this sense, the jurisprudential doctrine of the SCJN does not exclusively seek the implementation of a public policy, but rather the adoption of a decision of public morals without social support or legitimization of popular representation. The jurisprudence recognition of gay marriage has the peculiarity, moreover, of subjecting the Member States of the Mexican Republic to their particular interpretation of the federal Constitution, appearing to evoke the legal notion of constitutional identity as safeguarding the principle of equality provided for in the constitution and completely subtracted from the development made by the local legislature, completely nullify the exercise of its self-determination in matters of marriage (Bon 2014).

If we trace the origins of the notion of constitutional identity in European jurisprudence, we have to forge it as a correlate with the theory of controlimiti within the framework of multilevel protection (Romboli 2017), under which the interpretation of the principle of equality underlying the legal regime of marriage made by the SCJN, would serve to claim that its guarantee position is embedded in that notion of constitutional identity of Mexico. Nor does that seem like a plausible justification. As mentioned in the first heading of this work, the Inter-American System has never ruled on member states' obligations in relation to same-sex marriage. Therefore, the absence of an Inter-American multilevel dialogue on the issue of same-sex marriage makes it impossible to argue that the SCJN has opted for a more favourable interpretation of the principle of equality under a constitutional identity forged through its doctrine.

On the other hand, according to an important German jurist, "social identity is based on the Constitution, when the Constitution as such or at least some of the legal-constitutional institutes play an important role in the formation or changes of those moments" (Bon Bogdandy 2005, 14). It follows, however, that the guaranteed position assumed by the SCJN also does not respond to a social claim of identity with the homosexual cause; perhaps this explains why SCJN itself, in claiming an apparent legistative omission, ends up being replaced by the legislature, without justifying the need to adapt its constitutional reading to a social reality that does not demand it.

The decision to recognize homosexual marriage and concubine by the SCJN violates the democratic principle, which states that only the legislature is authorized to make the decisions that are the responsibility of the majority. This kind of "spurio guarantee" is not enough to transform a social reality; effective institutions are required for the implementation of non-discriminatory legislation, public policies aimed exclusively at this group of people, seeking cultural change, especially data to enable the progress made to be graduated in order to proceed with the exact, precise and complete legislation. Leaving to the judge the decision of what we have to decide democratically throws an important and dangerous task to the judges, who, in order to achieve social legitimacy, could dangerously strain the democratic principle, in order to seek this "guarantee" of maximum rights, at the cost of phagocitarizing deliberative democracy.

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