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SAME-SEX MARRIAGE
(MATRIMONIO ENTRE PERSONAS DEL MISMO SEXO)

CASE: *Amparo en Revisión 581/2012*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: December 5, 2012

KEY WORDS: same-sex marriage, legislative omission, principle of equality, equality and non-discrimination, sexual preference as a suspect classification, strict scrutiny test.

CITATION OF THE DECISION: Supreme Court, *Amparo en Revisión 581/2012*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of December 5, 2012, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-embematicas/sentencia/2022-02/AR%20581-2012.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo en Revisión 581/2012*, Mexico.

SUMMARY OF THE *AMPARO EN REVISION* 581/2012

BACKGROUND: In 2012, a same-sex couple applied to the Civil Registry of the State of Oaxaca to get married. The petition was denied because it was considered that it was legally impossible to celebrate the marriage, since article 143 of the Civil Code of the State stated that: "marriage is a civil contract executed between one man and one woman who unite to perpetuate the species and provide each other with mutual help in life." In light of the refusal, the couple filed an *amparo* lawsuit on the grounds that they were discriminated against because of their sexual preference. The district judge ruled that the challenged norm violated the principles of equality and non-discrimination, protected by articles 1 and 4 of the Constitution, since sexual preference is not a valid reason for differential treatment, so this difference is illegitimate. Therefore, the judge ordered the Civil Registry to disregard the law in this case and allow the couple to marry. In view of this determination, the Executive and Legislative branches filed a *recurso de revisión*. At the couple's request, Mexico's Supreme Court of Justice (this Court) asserted jurisdiction over the case because of the importance and significance of the issue involved.

ISSUE PRESENTED TO THE COURT: Whether the distinction made by a norm establishing that marriage is the union between one man and one woman who unite to perpetuate the species and provide mutual help in life, thus excluding same-sex couples, is constitutional, as well as to establish how the normative discrimination is to be remedied in this case.

HOLDING: The *amparo* was granted for the following reasons. The challenged law constitutes a discriminatory legislative measure, since it makes a distinction based on the sexual preference of persons that results in the arbitrary exclusion of homosexual couples from access to the institution of marriage. This Court has held that when a legal distinction is based on a "suspicious category" a strict scrutiny must be carried out to examine its constitutionality in light of the principle of equality. In this sense, a distinction is based on a suspicious category when it uses any of the criteria stated in the last paragraph of article 1st of the Constitution, including sexual preferences. The use of these categories should be examined more rigorously, precisely because they are suspected of being unconstitutional. The challenged precept implicitly distinguishes between different-sex couples and same-sex couples and effectively makes a

distinction based on that suspicious category. Attending to the test of equality to be able to clarify the differences that exist between an ordinary scrutiny and the one that must be applied to the legislative distinctions that are based on a suspicious category, in these cases, the first thing that must be determined is if the distinction made in the challenged norm pursues a constitutionally imperative purpose which, in this case, is the protection of the family. However, this Court considers that the distinction is not directly connected with the constitutional mandate of protection of the family. Thus, the measure is clearly discriminatory because the relationships established by homosexual couples can be perfectly adapted to the current foundations of the marriage institution and, more broadly, to those of the family.

VOTE: The First Chamber decided this case unanimously by four votes of justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz and Jorge Mario Pardo Rebolledo. Justice Alfredo Gutiérrez Ortiz Mena was absent.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetailPub.aspx? SubjectID=1439>

EXTRACT OF THE *AMPARO DIRECTO* 581/2012

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of December 5, 2012, issues the following decision.

BACKGROUND

p.1-2 In 2012, a same-sex couple applied to the Civil Registry of the State of Oaxaca to get married. The petition was denied because it was considered that it was legally impossible to celebrate the marriage, since article 143 of the Civil Code of the State stated that: "marriage is a civil contract executed between one man and one woman who unite to perpetuate the species and provide mutual help in life".

p.2 In light of the refusal, the couple filed an *amparo* lawsuit on the grounds that they were discriminated against because of their sexual preference.

p.2-3 The district judge determined that the challenged norm violated the principles of equality and non-discrimination, protected by articles 1 and 4 of the Constitution, since sexual preference is not a valid reason for differential treatment, so this difference is illegitimate. The judge therefore ordered the Civil Registry to disregard the law in this case and allow the couple to marry.

p.3 In view of this determination, the Executive and Legislative branches filed a *recurso de revisión*.

p.3-4 At the request of the couple, this Court asserted jurisdiction over the case because of the importance and significance of the issue involved.

STUDY OF THE MERITS

I. Same-sex marriages as a constitutional problem

p.26 In comparative law, two ways of approaching the issue of same-sex marriages can be identified in the constitutional setting. In those cases where legislation expanding access to marriage to same-sex couples has been challenged, the question that arises is whether such regulation is constitutionally legitimate.

p.27 On the other hand, on other occasions the challenge has been directed against rules that do not allow same-sex couples access to marriage. In these cases the problem has been analyzed primarily in terms of equality. The question is whether this regulation is discriminatory by not allowing homosexual couples access to the institution of marriage.

In this respect, it should be noted that the logic on which these problems are considered is totally different. In the first case, it is a question of determining whether same-sex marriage is possible or has a place within the Constitution. The second approach, in contrast, seeks to establish whether the Constitution requires same-sex couples to be allowed access to marriage.

p.28 The problem posed to this Court in this *recurso de revisión* must be analyzed from the second of these approaches. The couple argued in their lawsuit that Article 143 of Oaxaca's Civil Code (OCC) was discriminatory for not allowing equal access to the institution of marriage to both heterosexual and homosexual couples. Thus, this case must be examined in light of the criteria developed by the Supreme Court for judging cases alleging violations of the constitutional principle of equality.

II. Same-sex marriages in light of the principle of equality

p.28 The argument that the effects [of the ruling] are incongruous because there is no applicable norm for resolving the request made by the couple to get married is unfounded.

p.29 In this regard, this First Chamber of this Court held in the *Amparo en Revisión* 416/2010 that when the unconstitutionality of a law is claimed by tacit exclusion of a classification of persons from a certain legal regime or benefit, that argument must be analyzed in light of the principle of equality.

p.30 The challenged law constitutes a discriminatory legislative measure, since it makes a distinction based on a person's sexual preference which results in the arbitrary *exclusion* of homosexual couples from access to the institution of marriage. In order to be in a position to justify that assertion, the challenged measure is examined below in light of the principle of equality.

A. The intensity of the scrutiny

A first step is to determine the intensity with which the distinction made by the legislator must be scrutinized. In this regard, the Supreme Court has held in multiple precedents that when the challenged distinction is based on a "suspect classification" strict scrutiny must be applied to examine its constitutionality in light of the principle of equality.

p.30-31 In these cases, it has been indicated that the constitutional judge must subject the work of the legislator to a particularly careful scrutiny from the point of view of respect for the right to equality.

p.31 In this regard, a distinction is based on a suspect classification when it uses any of the criteria set forth in the last paragraph of article 1 of the Constitution, within which sexual preferences are found.

p.31-32 The use of these classifications must be examined more rigorously precisely because they are suspected of being unconstitutional. In these cases, it can be said that the laws that use them to make a distinction are affected by a presumption of unconstitutionality. However, the Constitution does not prohibit the use of suspect classifications; it prohibits their unjustified use. Strict scrutiny of distinctions based on suspect classifications ensures that only those with a very robust justification will be constitutional.

p.32 The challenged provision provides the following: Article 143. Marriage is a civil contract executed between one man and one woman, who come together to perpetuate the species and provide each other with mutual help in life.

p.32-33 The legislative measure under consideration implicitly distinguishes between different-sex couples and same-sex couples: the former are allowed access to marriage, while the latter do not have that possibility. While it could be argued that the provision does not make a distinction based on people's sexual preferences because no one is asked to express their sexual preference in order to access marriage, that does not preclude holding that the challenged norm does indeed make a distinction supported by that suspect classification. The fact that access to the normative power to get married is apparently not conditioned on sexual preferences does not mean that there is no implicit distinction based on this criterion.

p.33 In order to establish whether there is an implicit distinction, it is not enough to know who has the normative power in question, but also what it allows those people to do. In this regard, even if the norm grants the normative power to marry any person, regardless of their sexual preference, if that power can only be exercised to marry someone of the opposite sex, there is no doubt that the challenged norm does actually entail a distinction based on sexual preferences.

In this respect, it can be argued that such norms make an implicit differentiation because homosexuals can only access the same right heterosexuals have if they deny their sexual orientation, which is precisely the characteristic that defines them as homosexual. Thus, this Court considered that the challenged measure is based on a suspect classification, since the distinction it draws in determining who can use the normative power to create a marriage bond is based on the sexual preferences of individuals.

B. The strict scrutiny test

p.34 This Court considered it appropriate to provide an explanation as to the way in which the equality test must be carried out in these cases in order to clarify the differences that exist between ordinary scrutiny and the scrutiny that should be applied to legislative distinctions that are based on a suspect classification.

First, it must be examined whether the distinction based on suspect classification serves a constitutionally compelling purpose. Thus, as the intensity of the scrutiny rises, the purpose must have clear constitutional support: it must pursue a constitutionally important objective. The legal theory has pointed out that one way of understanding this concept in the continental tradition could be that the measure must seek the satisfaction or protection of a mandate of constitutional rank.

p.35 Secondly, it must be analyzed whether the legislative distinction is closely linked to the constitutionally compelling purpose. That is, the legislative measure must be directly connected with the achievement of the constitutional objectives outlined above.

Finally, the legislative distinction must be the least restrictive measure possible in order to effectively achieve the compelling purpose from the constitutional point of view.

C. Strict scrutiny of the challenged measure

p.35-36 The first thing to be determined is whether the distinction made in the challenged norm serves a constitutionally compelling purpose. From a comprehensive interpretation of the justified report rendered in the *amparo* proceeding by the representative of the Legislative Branch and of the *recurso de revisión* filed by the authorities involved in the legislative process, it can be deduced that the purpose of the measure under consideration is the protection of the family.

p.36 Therefore, the challenged distinction pursues a compelling purpose, in so far as article 4 of the Constitution imposes on the legislator the obligation to protect "the organization and development of the family". The protection of the family is not only a legitimate purpose for the legislator, but also a constitutionally required purpose. Consequently, it must be understood that the measure at issue satisfies the first tier of a strict scrutiny of the equality of the measure.

However, in order to determine whether the distinction is directly connected with the stated compelling purpose, two things must be specified: (i) who is included and who is excluded in the classification used; and (ii) what is the precise content of the constitutional mandate for the protection of the family.

On the one hand, the definition of marriage in the challenged norm includes only heterosexual couples who intend to procreate.

p.36-37 On the other hand, the Plenary of this Court in the *Action of Unconstitutionality 2/2010* established that although article 4 of the Constitution mandates the protection of the family, this provision does not refer to an "ideal family model" that presumes a heterosexual marriage and whose purpose is procreation. The Constitution protects the family understood as a social reality. This means that this protection must cover all its forms and manifestations existing in society.

p.37 In accordance with the foregoing, this Court considered that the distinction made by the contested norm based on the suspect classification of sexual preferences *is not directly*

connected with the constitutional mandate of protection of the family interpreted in the terms set forth above.

On the one hand, the distinction is clearly overinclusive because heterosexual couples who do not marry for the purpose of procreating are included in the definition of marriage.

p.39 In this regard, in the precedent cited above, this Court determined that the institution of marriage is based primarily on the emotional, sexual, identity, solidarity and mutual commitment bonds of those who wish to have a life in common.

p.39 On the other hand, the measure under consideration is sub-inclusive because it unjustifiably excludes from access to marriage homosexual couples who are situated in similar conditions to couples who are covered by the definition. The distinction is discriminatory because sexual preferences are not a relevant aspect for making the distinction in relation to the constitutionally compelling purpose.

In this regard, the measure is clearly discriminatory because the relationships entered into by homosexual couples can be perfectly adapted to the current foundations of the institution of marriage and more broadly to those of the family. For all relevant purposes, homosexual couples are in an equivalent situation to heterosexual couples, and therefore their exclusion from marriage is totally unjustified.

p.40-41 If the distinction is not directly connected with the compelling purpose that marriage may have from a constitutional point of view, the Supreme Court cannot consider such a measure constitutional because it would be endorsing a decision based on prejudices that have historically existed against homosexuals. The absence of the benefits that the law assigns to the institution of marriage is a direct consequence of the prolonged discrimination that has existed against homosexual couples on the basis of their sexual preference.

p.41-42 The right to marry entails not only the right to have access to the expressive benefits associated with marriage, but also the right to the material benefits that the laws ascribe to the institution. In this regard, access to marriage actually entails "a right to other rights". The rights granted by civil marriage significantly increase people's quality of life. In the Mexican legal system there are a large number of economic and non-economic benefits

associated with marriage. These include: (1) tax benefits; (2) solidarity benefits; (3) benefits caused by the death of one of the spouses; (4) property benefits; (5) benefits in subrogation of medical decisions; and (6) immigration benefits for foreign spouses. Some examples may serve to show how deprivation of these benefits affects the quality of life of homosexual couples.

- p.42 The Income Tax Law, for example, provides for the following *tax benefits*: (i) exemption from the payment of income tax when the income derives from a donation made by one of the spouses or from withdrawals made from the retirement, advanced age and elderly sub-account for "marriage expenses" and (ii) personal deductions for the payment of medical, dental and hospital expenses by one the spouses for the other, and premiums for complementary or independent medical insurance for health services provided by social security institutions when the beneficiary is the spouse.
- p.42-43 With regard to solidarity benefits in marriage, the Social Security Law (SSL) considers the spouse of the insured person or pensioner to be his or her "beneficiary" for purposes of said Law, which means that the spouse becomes the creditor of all the benefits due to the insured or pensioner, which are unseizable unless there are alimony obligations. For example, there are "family allowances" consisting of support for a family burden granted to beneficiaries of the pensioner with disability and where the spouses receive the highest percentage of the amount of the pension. And of course, the spouse of an insured person has the right to receive medical, maternity, surgical, pharmaceutical, and hospital care guaranteed by social security.
- p.43 With respect to alimony, the OCC establishes, for example, a preferential right over the salaries, income and property of the spouse who is responsible for the economic support of the family. In connection with this right, the Federal Labor Law (FLL) prohibits deductions from workers' wages, except in cases where they are for the payment of alimony "in favor of the wife".

With regard to *death* benefits, the OCC establishes that the surviving spouse has the right to inherit in the intestate succession. In the event that the community property system was chosen and one of the spouses dies, the Civil Code also establishes that the one who

survives maintains the possession and administration of the social fund, until the distribution is made.

- p.43-44 The FFL establishes that a widow or widower who has been financially dependent on the worker and who has a disability of fifty percent or more shall be entitled to compensation in cases of death of the worker due to an occupational hazard. In the same vein, the SSL contemplates a large number of benefits that are granted to the spouse of an insured or pensioned person when his/her death occurs.
- p.44 The OCC establishes the following property rights under the community property system: (i) cessation of the effects of the community property system for the spouse who unjustifiably left the marital home for more than six months since the first day of abandonment; (ii) the right to have the inventory, partition and award of property carried out after the marriage has been dissolved; and (iii) the right that any transfer of part of the property of each spouse to the other is regarded as a donation, without financial encumbrances for the one who received the property.
- p.44-45 Regarding the subrogation of medical decisions, the OCC establishes that a spouse will become guardian in case the other spouse becomes disabled, thus exercising all the rights and obligations conferred to guardians. Similarly, the Regulations of the General Health Law (GHL) on the Provision of Medical Services confer rights on the spouse, as a relative or guardian of the other spouse, to make certain medical decisions. The spouse's written authorization is required in cases of emergency or when the spouse is in a state of temporary or permanent disability, to perform any diagnostic or therapeutic procedure, or any surgical procedures, or to have their spouse admitted to a hospital.
- p.45 With regard to post-mortem medical decisions, the GHL establishes that the spouse must give consent for the following decisions to be taken: (i) whether the body of the spouse or its components are donated in the event of death, unless the deceased has manifested refusal; (ii) dispense with artificial means of support when the brain death of the other spouse is established; (iii) give consent for the performance of autopsies on the corpse of his/her partner; and (iv) whether educational institutions may use the corpse of the deceased spouse.

As for immigration benefits, according to the Immigration Law, foreign spouses can access different immigration statuses by being married to a Mexican. Access to nationality is also a benefit granted by the Nationality Law to the foreign spouse of a Mexican who has resided and lived together in the matrimonial domicile established in national territory, during the two years immediately preceding the application.

p.45-46 As can be seen, marriage gives spouses a large number of rights. In this respect, denying gay couples the tangible and intangible benefits that are accessible to heterosexuals through marriage means treating homosexuals as if they were "second-class citizens." There is no rational justification for giving homosexuals all the fundamental rights they are entitled to as individuals and, at the same time, granting them an incomplete set of rights when behaving according to their sexual orientation and bonding in stable relationships.

p.46 Thus, the exclusion of homosexual couples from the matrimonial regime results in double discrimination: not only are homosexual couples deprived of the expressive benefits of marriage, but they are also excluded from the material benefits. Furthermore, this exclusion affects not only homosexual couples, but also the children of those who live a family life with the couple.

p.47 In this specific case, the most effective way to redress normative discrimination is, on the one hand, to declare the unconstitutionality of the normative portion that states that the purpose of marriage is "to perpetuate the species" and, on the other hand, to make a conforming interpretation of the expression "one man and one woman" to understand that this meeting of the minds is between "two persons", in such a way that this interpretation avoids the declaration of unconstitutionality of this normative portion.

The Legislative Branch argued that there was no need to "disfigure" the institution of marriage, since it is possible for the legislator to conceive "new legal concepts" according to the reality of homosexual couples. According to the Supreme Court, such an approach is totally unacceptable in a constitutional State under the rule of law that aspires to treat all its citizens with equal consideration and respect.

p.48 If access to marriage is denied, the existence of a differentiated legal regime that homosexual couples can choose instead of marrying, even if the concept in question had

the same rights as marriage, evokes the measures endorsed by the well-known doctrine of "separate but equal" arising in the United States in the context of racial discrimination in the late nineteenth century.

- p.48-49 Models for the recognition of same-sex couples, regardless of whether their only difference from marriage is the designation given to both types of institutions, are inherently discriminatory because they constitute a regime of "separate but equal". Just as racial segregation was based on the unacceptable idea of white supremacy, the exclusion of same-sex couples from marriage is also based on the prejudices that have historically existed against homosexuals. The exclusion of same-sex couples from the institution of marriage perpetuates the notion that same-sex couples are less deserving of recognition than heterosexual couples, thereby offending their dignity as individuals.
- p.49 In this regard, the Inter-American Court of Human Rights in the case of *Atala Riffo y niñas v. Chile* has also stated that "States must refrain from actions that in any way are intended, directly or indirectly, to create situations of de jure or de facto discrimination", in addition to being obligated to "adopt positive measures to reverse or change discriminatory situations existing in their societies, to the detriment of a certain group of people."
- p.50 Finally, this Court pointed out that the freedom of configuration that the State Congresses possess to regulate the civil status of individuals is limited by constitutional mandates. In this sense, the fundamental rights materially condition that regulation.

DECISION

- p.54 The couple is covered and protected against article 143 of the OCC, of which the normative portion that states that the purpose of marriage is "to perpetuate the species" is declared unconstitutional and it is ordered that the expression "one man and one woman" be construed to refer to the meeting of minds between "two people".