



Suprema Corte  
de Justicia de la Nación



DERECHOS  
HUMANOS

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**ADOPTION BY SAME-SEX COUPLES  
(ADOPCIÓN POR PAREJAS DEL MISMO SEXO)**

**CASE:** *Acción de inconstitucionalidad 8/2014*

**RESPONSIBLE JUDGE:** Margarita Beatriz Luna Ramos

**DECISION ISSUED BY:** Mexico's Supreme Court of Justice sitting in Plenary

**DATE OF DECISION:** August 11, 2015

**KEY WORDS:** Principle of equality and non-discrimination, best interest of the child, adoption, strict scrutiny test, suspect classifications, prohibited classifications of discrimination, regime of separate but equal, same-sex couples, equal marriage, marriage between people of the same sex, Campeche, civil domestic partnerships, alternatives to marriage, families, parental rights.

**CITATION OF THE DECISION:** Supreme Court of Justice of the Nation, *Acción de inconstitucionalidad 8/2014*, Plenary, Margarita Beatriz Luna Ramos reporting J., Alfredo Gutiérrez Ortiz Mena J., decision of August 11, 2015, 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-emblematicas/sentencia/2020-01/A.I.%208-2014%20PDF.pdf>

**SUGGESTED CITATION FOR THIS DOCUMENT:** Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Acción de Inconstitucionalidad 8/2014*, Mexico.

## SUMMARY OF THE *ACCIÓN DE INCONSTITUCIONALIDAD* 8-2014

**BACKGROUND:** The Regulatory Law of Civil Domestic Partnerships of the State of Campeche [Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche (LRSCC)] was published on December 27, 2013. On January 30, 2014, Ana Patricia Lara Guerrero, president of the Human Rights Commission of the State of Campeche [Comision de Derechos Humanos del Estado de Campeche (CDHC)], filed before Mexico's Supreme Court of Justice (this Court) an *acción de inconstitucionalidad* against the approval, promulgation and publication of article 19 of the LRSCC, which prohibited domestic partners from adopting together or individually and/or sharing or entrusting parental authority or guardianship and custody of minor children with the other partner. According to the CDHC, this was contrary to articles 1 and 4 of the Federal Constitution, as well as articles 1, 17 and 24 of the American Convention on Human Rights.

**ISSUE PRESENTED TO THE COURT:** Whether is constitutionally valid to prohibit domestic partners from adopting together or individually, and sharing or entrusting the parental authority or guardianship and custody of the minor children to the other partner, in accordance with protection of the development and organization of the family, the best interest of the child and the principles of equality and non-discrimination.

**HOLDING:** Article 19 of the LRSCC was declared invalid, for essentially the following reasons. The article prevented children and adolescents in adoption from forming part of a family composed of domestic partners, which was contrary to the constitutional concept of family and the principle of the best interest of the child since, instead of looking at the suitability of the adopting parents, it made a generic prohibition on a particular civil status – domestic partnership. In this regard, the article discriminated against both same-sex and different-sex couples in domestic partnerships, making an unconstitutional distinction based on the suspect classification of civil status. It also discriminated against them by not protecting that couple's family in the same manner, which threatened the principle of equality and non-discrimination and, therefore, did not pass the first level of strict scrutiny of the measure. Furthermore, the domestic partnership was the only concept in Campeche accessible to couples of the same sex and the

only one that prohibited adopting and sharing parental authority of minors, which was a discrimination by impact and a violation of the constitutional principle of equality and non-discrimination based on the suspect classification of sexual orientation, since it should not be relevant to the formation of a family or to adopting or to sharing parental authority. Therefore, it was determined that the article was unconstitutional and contrary to the constitutional concept of family, to the best interest of the child and the principle of equality and non-discrimination.

The votes may be consulted at the following link:

<http://www2.scjn.gob.mx/ConsultTematica/PaginasPUB/DetallePub.aspx?AsuntoID=161680>

## EXTRACT OF THE *ACCIÓN DE INCONSTITUCIONALIDAD* 8/2014

- p. 1 Mexico City. Mexico's Supreme Court of Justice (this Court) sitting in plenary, in session of August 11, 2015, issued the following decision.

### BACKGROUND

By brief presented on January 30, 2014, Ana Patricia Lara Guerrero, president of the Human Rights Commission of the State of Campeche [Comision de Derechos Humanos del Estado de Campeche (CDHC)], filed an *acción de inconstitucionalidad* against the approval, promulgation and publication of article 19 of the Regulatory Law of Civil Domestic Partnerships of the State of Campeche [Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche (LRSCC)].

- p. 2-3 The CDHC held that the challenged article was contrary to articles 1 and 4 of the Federal Constitution, as well as articles 1, 17 and 24 of the American Convention on Human Rights (ACHR), basically because the article in question had a discriminatory impact on those who, wishing to live together and provide long term mutual support, established a domestic partnership and eroded the right to the protection, organization and development of the family.

### STUDY OF THE MERITS

- p. 13-14 The civil domestic partnership is a civil contract that is defined by: a) the union of two persons of the same or a different sex; b) the desire for permanency; c) mutual assistance; d) life in common, and e) common address. This Court observes that such concept is similar to the definition of marriage and concubinage, in relation to mutual assistance, permanence and a common address. Partnerships also generate support, succession and guardianship rights and establish rules regarding the property of the couple.
- p. 14 For this Court it is clear that the domestic partnership generates a civil status different from cohabitants, since it has a purpose, obligations and rights, similar to marriage and concubinage but only for persons who do not fall under those other premises, and it generates rights and obligations that do not apply to the civil status of being single.

p. 14-15 In the *Amparo Directo en Revisión 597-2014*, the First Chamber of this Court emphasized that civil status is defined, in the strictest sense of the concept, as the personal situation of the individual, whether single or a couple, and for a couple, whether it is *de iure* or *de facto*. Civil status is closely related to personal liberty, dignity and freedom of thought, and addresses the autonomous decision of whether or not to enter into a permanent personal relationship with another person, with respect to which consequences are created, depending on that status.

p. 15 Thus, the domestic partnership is a civil status in Campeche whose partners – under the challenged article – are being expressly prohibited from adopting individually or together, and sharing or entrusting the parental authority or guardianship and custody of the minor children of the other partner.

This Court has been clear in determining that those who unite as a couple in fact or in law in order to form a life in common are part of a family group, essentially equal in the sense that care, support, loyalty and solidarity are provided, and that the various forms of family are all protected by article 4 of the Constitution. This protection, as this Court sitting in plenary determined in the *Acción de Inconstitucionalidad 2/2010*, must cover all its forms and manifestations in society, including – among others – the families that are constituted through *de facto* or legal unions (of same-sex or different-sex couples), as well as single parent families

p. 15-16 This Court considers that there are at least two ways to look at the challenged article. First, from the best interest of children and adolescents and the constitutional concept of family and, second, from the principle of equality and non-discrimination.

**I. Article 4 of the Constitution. Best interest of children and adolescents and the constitutional concept of family.**

p. 18 Adoption is an institution that seeks to protect and guarantee the rights of children and adolescents, in order to incorporate them into a family that can provide them with affection, care, education and adequate conditions for their development. Thus, adoption must be considered a right of minors for which the protection of their interests must be guaranteed.

For this Court it is clear that the fundamental point to consider in an adoption is the best interest of the children or adolescents, so that they may form or join a family where they will receive affection, care, education and adequate conditions for their development, all rights inherent to them.

- p. 19 The type of family into which the adopted children or adolescents will be integrated is not a factor to consider; rather what matters is the suitability of the adoptive parent or parents for providing them affection, care, education and adequate conditions for development, since that, and not the type of family, is what will permit the child or adolescent to fully develop.
- p. 22 The State's obligation in an adoption process is to protect the interest of children and adolescents in being adopted by a suitable person or persons, that allows them to form part of a family and to grow up in an environment in which they develop their potential and are cared for.
- p. 23 Thus, for this Court it is clear that the challenged rule absolutely limits the possibility of domestic partners adopting – alone or as a couple – which has an impact not only on them, but also on the minors who may be adopted, preventing them from joining a family of domestic partners.

This Court considers that the absolute and *ex ante* prohibition on being considered as an adoptive parent due to the type of civil union does not have any valid constitutional justification, and absolutely prevents minors from joining a constitutionally protected family composed of persons who would be suitable to provide a family where they can fully develop. This violates the right of minors to form part of or join a family, as long as the adoptive parent or parents meet the suitability requirements.

- p. 24 This Court thinks that belonging to a domestic partnership does not put at risk, in itself, the best interest of the child or adolescent, since any person individually and any couple of the same or different sex must be considered under equal circumstances. Furthermore, the type of civil union to which the possible adoptive parents belong cannot be among the essential requisites for adoption, nor their sexual orientation, since these circumstances have no effect on their suitability to provide the children and adolescents a family where they can fully develop.

## **II. Article 1 of the Constitution. Principle of equality and non-discrimination**

p. 26 This Court see two different kinds of discrimination in the challenged rule: on the one hand, discrimination that affects the domestic partners generically, based on the suspect classification of civil status recognized in article 1 of the Federal Constitution and, on the other hand, discrimination based on the suspect classification of sexual orientation, recognized in the same constitutional article.

### **a) Fundamental elements that make up the general parameters of the principle of equality and non-discrimination**

Article 1 of the Constitution prohibits discrimination based on the suspect classifications arising from ethnic or national origin, gender, age, disability, social condition, health conditions, religion, opinions, sexual preferences, civil status or any other that threatens human dignity and the purpose of which is to cancel or threaten the rights and freedoms of people.

p. 27-28 However, not every difference in treatment toward a person or group of persons is discriminatory. Distinction and discrimination are legally different, since the first constitutes a reasonable and objective difference, while the second constitutes an arbitrary difference that redounds at the expense of human rights. Similarly, the Federal Constitution does not prohibit the use of suspect classifications, but rather their unjustified use. A characteristic note of discrimination is that the different treatment affects the exercise of a human right. The First Chamber of this Court has held that strict scrutiny of distinctions based on suspect classifications guarantees that only those that have a very robust justification will be constitutional.

p. 28-29 The First Chamber of this Court has developed, in several *amparos en revision*, the form in which equality must be examined in these cases to clarify the differences between ordinary scrutiny and the scrutiny that must be applied to legislative distinctions based on a suspect classification.

p. 28-29 Thus, first it should be examined whether the distinction based on the suspect classification meets a compelling purpose from the constitutional point of view. When the strict scrutiny test is applied to a legislative measure that makes a distinction, the measure

must have more than a constitutionally admissible purpose. Under a higher level of scrutiny, the measure must have a compelling constitutional mandate.

p. 29 Secondly, the legislative measure must be narrowly tailored to achieving the above indicated constitutional objectives; in other words, the measure must be fully focused on achieving the purpose and cannot just be related to those objectives.

Third and last, the legislative distinction must be the least restrictive measure possible to effectively achieve the imperative purpose from the constitutional point of view.

**b) Discrimination that affects domestic partners generically, based on the suspect classification of civil status recognized in article 1 of the Federal Constitution**

p. 30-31 According to article 1 of the Constitution, civil status constitutes a suspect classification. Furthermore, under the Civil Code of the State of Campeche (the Civil Code), domestic partnerships are the only civil status for which adoption is precluded.

p. 32 In this respect, this Court considers that the distinction made by article 19 of the LRSCC based on the suspect classification of civil status not only discriminates equally against same-sex and different-sex couples who enter into a domestic partnership in function of their civil status, but also discriminates against them by not protecting the family formed by that couple equally.

p. 32-33 Thus, the national legal order can no longer tolerate allowing the type of relationship – in this case civil status and applying strict scrutiny – whether such couple is same sex or different sex, whose effects are the establishment of family ties, to result in a difference in treatment introduced by the law and not argued constitutionally, because it threatens the principle of equality and non-discrimination and does not pass the first level of strict scrutiny of the measure.

**c) Sexual orientation discrimination recognized in article 1 of the Federal Constitution**

p.33 This Court has identified a second aspect of discrimination for sexual orientation, which involves discrimination by results or by disproportionate impact.

p.33-34 In this regard, the First Chamber of this Court, in the *Amparo Directo en Revision* 1464/2013, established that discrimination may occur when the rules and practices are apparently neutral but their result or application has a disproportionate impact on persons



or groups in a situation of historic disadvantage based exactly on that disadvantage, without any objective and reasonable justification. Thus, the discrimination is not only felt when the rule directly regulates the conduct of a vulnerable group, but also when the effects of its application generate discrimination against them. This means that, as was established in the *Amparo en Revision* 152/2013, a law that in principle appears neutral, could have discriminatory effects for certain groups of persons.

- p. 35 To be able to establish that a rule or public policy that does not contemplate an explicit distinction, restriction or exclusion does generate a discriminatory effect on a person, given the place that person occupies in the social order or to the extent that person belongs to a particular social group, contextual or structural factors in the discrimination must be analyzed. Among those factors are relations of subordination regarding gender, sex-gender identity, sexual orientation, class or ethnic belonging; social and cultural practices that assign a different value to certain activities when carried out by historically disadvantaged groups, and socioeconomic conditions.
- p.36-37 In this regard, laws do not regulate human conduct in a neutral vacuum; they do so to transmit an official evaluation of the state of something, a democratic judgment on a question of general interest.
- p. 37 This Court observes that while domestic partnerships are not specified as limited to same-sex couples, in reality they constitute the only regime for those couples, which creates an axiological burden for these types of unions.
- p. 38 In this regard, the statement of intent of the challenged law shows that the intention behind domestic partnerships was to create a concept different from marriage and concubinage, emphasizing that such partnerships do not violate the matrimonial institution nor impede concubinage. It also observes that such concept does not challenge the “conventional family”, nor attempts to undermine moral values, even emphasizing that the creation of such concept does not change the rules regarding adoption.
- This is very important, since while in the first draft of the law there was no express prohibition on couples united in civil domestic partnerships adopting, it was clear from the statement of intent that the concept of the partnerships would not include adoption. This Court also observes that when the legislative process advanced, the article challenged

today prohibiting adoption was included without any explanation given in the diary of debates.

- p. 39 In this regard, it is clear that the Civil Code of Campeche reserves marriage and concubinage for heterosexual couples and, although the statement about the domestic partnerships did not seem directly discriminatory, seeing it in the local legislative context, it is clear that it is the only concept available to same-sex couples.
- p. 40-41 For this Court, the discriminatory nature of the rule is clear because adoption is only prohibited for the civil domestic partnership, and therefore the rule attempts to prevent couples of the same sex from having access to adoption based exactly on the suspect classification of sexual orientation, which is a violation of the constitutional principle of equality and non-discrimination. The idea that the homosexuality of the domestic partners implies an impact on the best interest of the adopted minors cannot be upheld.
- p. 42 To ignore the clear intention of the rule and merely analyze the protection of the family or civil status discrimination would mean ignoring a constitutional grievance with a profound impact on the principle of equality and non-discrimination.
- p. 43 Thus, the fact that same-sex couples can only avail of domestic partnerships generates a disproportionate impact constituting a discriminatory concept that, in this case, constitutes a regime of separate but equal.
- p. 44 In relation to the second regulatory portion of article 19 under analysis, regarding the prohibition on sharing or entrusting parental authority over the minor children, this Court emphasizes that under the rule, entrusting the parental authority would refer only to cases of mothers or fathers, where there is a possibility of sharing with or entrusting the parental authority to the partner.

In this regard, this Court considers that such regulatory portion is equally discriminatory, since it has the clear intention of prohibiting same-sex couples from adopting or sharing parental authority over minors, since that would imply – according to the local legislator – violating moral values of the traditional family.

This Court does not share this conception, since sexual orientation is not a relevant element to take into consideration in the formation of a family, in undertaking adoption, or in sharing the parental authority with a mother or father.

## DECISION

- p. 24 This Court concludes that the arguments of the CDHC are justified, since the challenged article is unconstitutional because it violates both the best interest of children and adolescents, and the constitutional protection of all forms of family, in light of article 4 of the Federal Constitution.
- p. 32-33 This Court considers that the distinction made by article 19 of the LRSCC based on the suspect classification of civil status is not directly connected with the constitutional mandate of protection of the family, nor with the protection of the best interest of the minor. Therefore the rule must be eliminated from the national legal order since it threatens the principle of equality and non-discrimination and does not pass the first level of strict scrutiny of the measure.
- p. 45 It is also concluded that the difference in treatment introduced and not argued constitutionally that absolutely prevents and prohibits adoptions and the sharing of parental authority does not pass the first level of strict scrutiny and, therefore, must be eliminated from the legal order since it threatens the principle of equality and non-discrimination, based on the prohibited classification of sexual orientation.
- This is in view of the fact that the rule analyzed does not pursue a constitutionally valid purpose, but rather, on the contrary, has the purpose of discriminating based on a classification prohibited by article 1 of the Constitution, relative to sexual orientation, and therefore it is considered that the CDHC's concept of invalidity relative to the violation of the principle of equality and non-discrimination is justified.
- p. 46 Therefore, article 19 of the LRSCC is declared invalid. The declaration of invalidity reached in this decision has general effects and will take effect from the date of notification of the rulings of this final decision to the Congress of the State of Campeche. The local Congress may issue a new provision in substitution of the one that has been invalidated at its discretion.
- The legislative gap may be filled by the provisions referring to the rules of adoption applicable for marriage and concubinage.