

# The Legalization of Intimacy in Mexico

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# THE LEGALIZATION OF INTIMACY IN MEXICO

Dissertation

zur Erlangung des akademischen Grades Dr. iur.

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Bei der Juristischen Fakultät der Humboldt- Universität zu Berlin

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## ABSTRACT

### THE LEGALIZATION OF INTIMACY IN MEXICO

by Manuel Castillo

This dissertation has been submitted in partial fulfillment of the requirements for the degree of Doctor iuris (Dr. iur.) at the Faculty of Law, of the Humboldt-Universität zu Berlin in Germany. The main scope of the research is the legalization of intimacy, using Mexican law as a case study. Considering that the right to intimacy arises from the right to privacy, this research discusses the fundamental human rights that constitute a framework for the legalization of intimacy. The research provides an approach to the analysis of this subject that includes what has been introduced as the Spheres of Intimacy and the Structures of Intimacy. The issue of gender is discussed in its relationship with the law and intimacy. From a queer perspective, this dissertation questions the equality of marriage and same-sex marriage, arguing that a new form of legalization of intimacy for all is needed. Furthermore, this study provides a comparative review of Mexican legislations within the framework of international law. At the end, this dissertation offers a proposal for the legalization of intimacy in the twenty-first century.

#### Keywords:

Intimacy, privacy, marriage, family, sexuality, civil union, partnership, matrimony, cohabitation, concubinage, Mexico, human rights, LGBTQI, partners, spouses, love, law, relationship, gay, queer, feminist, masculine, feminine.

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### DIE LEGALISIERUNG DER INTIMITÄT IN MEXIKO

von Manuel Castillo

Diese Dissertation wurde zur Erlangung des akademischen Grades Doctor iuris (Dr. iur.) an der Juristischen Fakultät der Humboldt-Universität zu Berlin in Deutschland vorgelegt. Das Hauptthema der Forschung ist die Legalisierung der Intimität, am Fallbeispiel des mexikanischen Rechts. Mit der Prämisse, dass das Recht auf Intimität sich aus dem Recht auf Privatsphäre ergibt, bespricht diese Forschungsarbeit die grundlegenden Menschenrechte, die einen Rahmen für die Legalisierung der Intimität ermöglichen. Die Einführung, der Sphären und Strukturen der Intimität, liefert eine Vorgehensweise zur Analyse dieses Themas. Es erfolgt eine Betrachtung der Frage der Geschlechter in ihrer Beziehung mit dem Recht und der Intimität. Aus einer „queer“ Perspektive hinterfragt diese Dissertation die Gleichstellung von Ehe und gleichgeschlechtlicher Ehe, mit dem Argument, ob eine neue Form der Legalisierung der Intimität für alle notwendig ist. Darüber hinaus, liefert diese Arbeit eine vergleichende Bewertung der mexikanischen Rechtsvorschriften im Rahmen des Völkerrechts. Am Ende der Dissertation, wird ein Vorschlag zur Legalisierung der Intimität im einundzwanzigsten Jahrhundert dargeboten.

#### Schlagwörter:

Intimität, Privatsphäre, Ehe, Familie, Sex, Sexualität, Lebenspartnerschaft, Partnerschaft, Ehe, Lebensgemeinschaft, Konkubinat, Mexiko, Menschenrechte, LGBTQI, Partner, Ehepartner, Liebe, Recht, Beziehung, schwul, feministisch, männlich, weiblich.

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## I. INTRODUCTION

For many centuries, societies and individuals have valued and pursued intimacy. Primarily, in a local (regional and/or cultural) form of marriage, individuals have formed new units of cohabitation, developed new relationships and family ties. Nowadays, the 21<sup>st</sup> century is quite demanding, and factors like globalization and the growth of the world population after the baby boom generation have created new opportunities for different forms of intimate interaction between individuals. The development of societies and the availability of information, which includes facts as well as vision, passive data as well as interactive spheres, via new technologies, have enabled individuals to question their own desires and to separate them from socially imposed volitions. Marriage is now an option both for women and for men, but not the only one. There are additional forms of intimacy that allow individuals to be together, sometimes but not necessarily with legal recognition, and they are not necessarily matrimony. The transformation and evolution of societies and peoples includes new trends in their sexual life, and also in their lifestyle. This encompasses new forms of intimacy, and different combinations of the individuals who engage in intimacy. That is to say, man and woman is not the only combination; but also, man and man, woman and woman, and woman and man (men not being the priority).

Many events took place in the twentieth century, including feminism and gay liberation movements, and opened the doors for related rights and obligations for individuals. What is known as the sexual revolution that took place between the 1960s and the 1980s can be seen as just the preamble for what is now occurring, which includes an evolution in the legalization of intimacy. In previous decades, social movements that claimed more sexual liberties focused on the acceptance of different sexualities. Now, they seem to be more interested in the recognition of their intimacy with other individuals; and in this domain, sexuality is just a component.

What is important – though – is not just acknowledgement and tolerance, but rather a legal recognition of intimacy that includes the enforcement of its rights and obligations. This is already the case for heterosexual couples in most of the world. Nevertheless, other sexual minorities are disadvantaged or simply unable to get

appropriate recognition of their intimate partners. Some countries have already approved legislations that enable the legal recognition of intimacy for same-sex couples. Unfortunately, these countries are outnumbered by a big majority of territories where this issue is not even debated yet. Mexico is currently one of the countries where the debate around gay marriage and LGBTI rights has lasted for years, and there is still a lot to be done in order to have a fair protection of human rights for these minorities. For those who seek recognition, the future seems to be promising and the forecast is positive, because some states have already embraced these sexual minorities by granting them some sort of rights for their intimacy. Nonetheless, these rights are not equally recognized at the federal level.

In any case, the social demand for same-sex marriage in Mexico has a heteronormative footprint that is not discussing the overarching and gender-neutral issue of intimacy. Considering this fact, this dissertation will provide a new and distinct approach to the legal discussion of gay marriage; one where the core issue is intimacy, i.e. not just marriage or merely being gay.

This dissertation introduces an innovative analysis of intimacy that explores the way it is legalized, with the case study of Mexico. Intimacy is a human and thus universal topic; consequently, and insofar this is true, the ideas presented in this research may also be applied in different countries. In this research, the issue of intimacy is observed and handled differently than in many other debates, and it could serve as an example to examine intimacy and its legalization in other jurisdictions with this same method. This thorough study on the legalization of intimacy in Mexico is divided in six chapters. Chapter I introduces the topic and provides background information. Chapter II will provide the conceptual framework around the question of intimacy in general. This framework includes the identification of what this research calls the Spheres of Intimacy and the Structures of Intimacy. Chapter III describes how the legalization of intimacy in Mexico has evolved, detailing the current forms that are legally recognized, some court cases and a review of the applicable international law. Chapter IV deals with the fundamental rights of intimacy, which encompass constitutional law, human rights and comparative law. This section finds the legal ground for the right to intimacy as a derivative of the right to privacy embraced by the Mexican constitution. The following, Chapter V, reconsiders the

relationship between law and gender and its relevance for the study of intimacy. At this point, the research will introduce a more critical legal reasoning for the debate on gay marriage, taking into account queer, feminist, and conservative positions. The concluding Chapter VI at the end of this dissertation offers a new proposal for the legalization of intimacy in the 21<sup>st</sup> century. This proposal was drafted after the analysis of the current legalization of intimacy in Mexico and with a more profound understanding of intimacy in general, regardless of the sex and sexuality of individuals. One of the arguments of this research is that individuals should be empowered to determine the way they want to manage their intimacy and the state should solely set up the legal platform for this management. Same-sex couples should have that right as well, and this is justified with the review of the connection between human rights and intimacy. After reading this research, it will be clear how intimacy is legalized in Mexico and how it could be legalized in a different way, both in Mexico and abroad.

### **I.1. An insight into Mexico**

According to the most recent federal census, Mexico has a population of at least 112,336,538 citizens.<sup>1</sup> Some of them are married, some of them are divorced and some of them are planning on getting married sometime in the future. At some point, they have been or will be interested in intimacy and the legal aspects of it. The registries have recorded a little bit over half a million new matrimonies per year in the last decade.<sup>2</sup> The behavior for marriage appears to be quite steady, approximately the same number of people get married every year; and more than half of those who do get married, accomplish their goal between the age of 20 and 29.<sup>3</sup> However, the numbers for divorce are more surprising because of their upward trend. The divorce rate has almost tripled since 1995; in the last recorded year, the rate of people getting divorced came close to 16% of those who got married that year.<sup>4</sup> The main grounds for divorce that were reported were, for the most part (88%), *de facto* separation and

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<sup>1</sup> Instituto Nacional de Estadística y Geografía (INEGI). *Anuario estadístico de los Estados Unidos Mexicanos 2012*. Mexico: INEGI, 2013. Chart 2.1.

<sup>2</sup> Ibidem, Chart 2.10, the figure registered for 2011 was 570,954.

<sup>3</sup> Ibidem

<sup>4</sup> Ibidem, Chart 2.11.

no-fault (by mutual agreement).<sup>5</sup> Currently available statistics from the government only show the data for matrimony. Unfortunately, by the time the most recent census was completed, there were no additional structures of intimacy that could be surveyed. For instance, it would have been quite interesting to read information regarding the number of households with same-sex partners, married or not. Hopefully, this information will be included in the next census, considering that the social reality has changed a lot in the past decade.

With these figures, it becomes evident that the legalization of intimacy is a phenomenon that directly affects at least half a million Mexican citizens and foreigners who reside in Mexico every year. Additionally, there are more individuals affected indirectly, like children and other third parties. Therefore, it is important to understand this phenomenon more clearly.

Furthermore, the divorce rates also suggest that there might be some areas for improvement that could help individuals to define the rules for their intimacy differently, and to improve their relationships in general; of course, with the protection of the legal system. Not only is it important to improve one's relationships with others, but also to secure them legally with official recognition of that relationship by the state. That is why this dissertation approaches the issue of intimacy from a legal perspective, because individuals should be informed of the impact of the legalization of their intimacy, or the lack thereof.

Just as many other developing countries, Mexico is trying to promote the protection of human rights. The constitutional amendments of June 9, 2011 are the most transcendental reforms in human rights matters in Mexico since the 1980's.<sup>6</sup> Chapter IV will discuss these reforms and their connection with intimacy. That section will explain why the right to privacy and intimacy should be construed as human rights that fall within the protection of the constitution. Yet the reader might wonder: Given the atrocious murders in Ciudad Juarez (Mexico) and similar human rights violations taking place every day in the country, why is it important to learn about marriage, gay marriage and intimacy? It may not be necessarily obvious, but the

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<sup>5</sup> Ibidem, Chart 2.12.

<sup>6</sup> OJF. June 10, 2011. First Section, pp. 2-5.

essence of the problem is the same: *there is no gender equality in Mexico*. And this is precisely one of the core topics that this dissertation tackles.

Since 1993, Ciudad Juarez became famous for being – infamously – one of the most dangerous cities for women in the world. Neither the Mexican government nor the justice system has been able to solve this problem. This is why this research must embrace the issue of gender. The women-specific crimes that keep occurring are an indicator of the gender inequality in Mexico. Misogyny is represented in different forms; in Ciudad Juarez, these murders show the most extreme consequence of women-specific hatred. These deaths are just the symptoms of a more profound problem, gender inequality. The sentence of November 16, 2009 from the Inter-American Court of Human Rights in the case of *Gonzalez et al (“Cotton Field”) v. Mexico*<sup>7</sup> is a reminder of this sad reality, because Mexico, as a state, was found guilty. One of the findings during this procedure was that “the issue of gender is the common denominator of the violence in Ciudad Juarez, which ‘occurs as a culmination of a situation characterized by the reiterated and systematic violation of human rights.’ They alleged that “cruel acts of violence are perpetrated against girls and women merely because of their gender and, only in some cases, are they murdered as a culmination of this public and private violence.”<sup>8</sup> Although the court in this case did not classify these particular murders as femicide, it is sadly a common practice in Mexico that has killed hundreds in Ciudad Juarez and thousands in Mexico as a whole.<sup>9</sup> So, going back to the connection between human rights and intimacy, it is necessary to review the issue of gender in order to understand why the constitution must protect individuals equally. And this includes fair access to the legalization of their intimacy. Chapter V will particularly review the issue of gender and its relevance for the comprehension of intimacy and this legal research in general.

## **I.2. Democracy, Constitutionalism and Legal Pluralism**

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<sup>7</sup> *Gonzalez et al (“Cotton Field”) v. Mexico*. Inter-American Court of Human Rights. C-Series No. 205.

<sup>8</sup> *Ibidem*, Section 128, p. 37.

<sup>9</sup> For further information about this topic, see: Bowden, Charles. *Murder City: Ciudad Juárez and the Global Economy’s New Killing Fields*. New York: Nation Books, 2010.

Mexico is still a developing country, and certainly full of contradictions. According to Forbes magazine, Carlos Slim (a Mexican citizen) has kept the record as the richest man in the world for four consecutive years,<sup>10</sup> while a few million Mexicans still live in extreme poverty. Inequalities are everywhere in this developing democracy, and regarding the right to intimacy, this is not an exception. Heterosexuals in Mexico have the right to get married and are entitled to benefits out of marriage in the whole country; whereas same-sex couples can only get married in Mexico City and Quintana Roo, and may get some sort of benefits with a Civil Pact of Solidarity in Coahuila or a Civil Union in Colima. This restriction represents a discrimination based on sexual preferences and creates first-class and second-class citizens. In a democratic state, such differences should be eliminated. If the goal is to have an actual rule of law according to the constitutional provisions, then human rights should be respected at all times. There is a clear prohibition for discrimination within Article 1 in the Mexican Constitution; however, there are still many issues that must be challenged in order to reach a state of equality. Granting equal rights for the legalization of intimacy to same-sex couples is one of these challenges.

In Mexico, the Mexican Supreme Court of Justice (SCJN) has played a more important role since 2000, standing a solid institution regardless of the ruling party in the executive branch. As part of the democratization process, the SCJN has become more autonomous and more proactive. A culture of constitutionalism is since then shaping up; and crucial debates, like “The Valls Project”, empower the autonomy of the Court because the Court is now acting proactively with an investigatory approach to justice. Supreme Court Justice Sergio Valls was very proactive in the defense form marriage equality in Mexico City. As Chapter IV will report in detail, his project during the Motion of Unconstitutionality that attempted to invalidate the Mexico City’s marriage laws proved that the judicial power was independent from the executive branch.

Before year 2000, the same political party in Mexico ruled by a factual absolute majority for more than seventy years. This political party acted as a quasi-dictatorship that controlled all branches of government. After more than a decade of

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<sup>10</sup> Kroll, Luisa. *Forbes*. *Inside The 2013 Billionaires List: Facts and Figures*. March 25, 2013.

political transition, the changes in the political structure of the country cannot only be seen in the congress and government, but they can be seen at the Supreme Court as well. Now, the decisions made there are not necessarily compatible with or dictated by the federal government. These changes are slow, but little by little, the judicial system is becoming stronger.

The twentieth century was marked by a system of authoritarian presidentialism, where the Mexican presidents and their political party (the PRI) were the most powerful entities that controlled all institutions. Nowadays, there is more political and legal pluralism, different parties control different branches of government at different levels; federal, state, and local. Consequently, the SCJN is more independent and sovereign, less politics-oriented and more justice-centered. In acknowledgment of these positive developments, on December 10, 2013, the United Nations awarded the Mexican Supreme Court as one of the winners of the United Nations Prize in the Field of Human Rights for year 2013. This recognition added in the press release that: “The Mexican Supreme Court of Justice provides legal protections for constitutional rights of Mexican citizens and residents. The national Supreme Court has accomplished very considerable progress in promoting human rights through its interpretations and enforcement of Mexico’s Constitution and its obligations under international law. Additionally, the national Supreme Court has set important human rights standards for Mexico and the Latin American region.”<sup>11</sup> The separation of powers envisioned by the constitution is now more real and the effects of constitutionalism are noticeable.

Since its creation, the Mexican Constitution of 1917 has maintained a spirit of equality and social justice. This spirit, however, does not actually match the current reality. For instance, Mexico is still struggling to integrate the indigenous communities, and this challenge is not an easy task. Although the constitution, explicitly in Article 2, acknowledges these indigenous groups, the legal system and the access to justice in Mexico work in Spanish. As a result, these communities are disadvantaged and unable to social entitlements and justice in their native languages.

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<sup>11</sup> United Nations. Press Release HR/5164. “*Selection Committee Announces 2013 Winners Of United Nations Human Rights Prize.*” URL=<<http://www.un.org/News/Press/docs/2013/hr5164.doc.htm>>

The internal colonialism based upon the mainstream Spanish-speaking Mexican identity is reducing the indigenous communities, their languages and identities. Almost seven out of every 100 Mexicans speak an indigenous language; and out of this population, eighty percent are poor, half of them living in extreme poverty.<sup>12</sup> Women in indigenous groups are particularly affected, because they have fewer opportunities to succeed within their local groups and even fewer within the overarching Mexican establishment. Official statistics prove that indigenous women are a special concern that requires institutional priority; indicators show the inequalities in terms of health, education, access to services, law-enforcement and violence.<sup>13</sup>

Nevertheless, mainstream Mexico can also learn from some indigenous groups about gender equality. The Zapotec Indians, for instance, are an example of pre-Colombian gender diversity. The city of Juchitán, in the Mexican state of Oaxaca, is one of the most tolerant cities in Mexico. For centuries, the Zapotec communities have embraced a third gender called “muxe”; the muxes are people born as men who dress as women or men indifferently, and perform some of the roles usually attributed to women. The muxes are embraced by the local population and are fully integrated. Anthropologist Lynn Stephen has observed that “while an active/passive system of sexual relations suggests inequality and hierarchy, the role of the muxe is defined not in terms of power or its absence in sexual interactions but in terms of the gendered social relations of work, food, dress, speech, and ritual.”<sup>14</sup> The clash between the Hispanic tradition and the pre-Hispanic cultures, like the Zapotec, still coexists in some areas in Mexico; Oaxaca is just an example. This is part of the paradox of colonialism (previously Spanish, now mainstream Mexican), while the central Mexican culture is trying to educate the indigenous communities about gender equality; the dichotomization of gender is being reinforced. However, some of these tolerant pre-Hispanic<sup>15</sup> traditions should survive. Stephen points out that: “the

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<sup>12</sup> OJF. February 27, 2013. Fourth Section, p. 2.

<sup>13</sup> Ibidem. For further information and statistics about indigenous communities in Mexico, see also: INEGI. *The indigenous population in Mexico*. Mexico: INEGI, 2004.

<sup>14</sup> Stephen, Lynn. “*Sexualities and Genders in Zapotec Oaxaca*.” *Latin American Perspectives*. Issue 123, Vol. 29, No.2 (March 2002): 41-59. p. 55.

<sup>15</sup> For further information regarding the history of sexuality in Mexico, including the status quo at the time the Spanish colonization process began and pre-Hispanic homosexuality, see: Trueba Lara, Jose Luis. *Historia de la Sexualidad en México*. Mexico: Random House Mondadori, 2008.

simultaneous presence and absence of sexual labeling, and the centrality of gender as an organizing principle in sexual behavior suggest that sexuality and sexual identity have not been evenly deployed in concepts of social identity and selfhood...we see multiple historical strands of identity that have commingled for more than 500 years and continue to be in constant motion. The simultaneous influence in Zapotec communities of indigenous, Spanish colonial, and contemporary urban and transnational systems of gender and ideas about sex and sexuality suggests a rich and interesting future.”<sup>16</sup> Amaranta Gomez Regalado (born as Jorge Gomez Regalado) was the first transsexual congressional candidate in Mexico in year 2003.<sup>17</sup> Her nomination by *Mexico Posible*, a defunct political party, triggered a national debate about transsexuals and their rights in Mexico. Transsexual and Zapotec, she had the courage to run for a seat in congress; and even though she did not succeed, she is now a political activist. In July 2013, the first openly gay candidate for a municipality, Benjamin Medrano, was elected as mayor of Fresnillo, Zacatecas.<sup>18</sup> These candidacies serve as examples of the legal pluralism that the Mexican democracy is currently experiencing.

### **I.3. Gay rights and the critique of marriage**

Social activism in Mexico has grown exponentially since 1978, especially in bigger cities like Mexico City.<sup>19</sup> Lesbian, Gay, Bisexual and Transsexual (LGBT) groups are now more proactive when influencing political parties to include the gay rights agenda in the political debate. Nonetheless, the discussion around intersexuality is almost inexistent; and, as pointed out by Christian Rea, it does not have a political identity yet.<sup>20</sup> Therefore, the term LGBTI, (Lesbian, Gay, Bisexual, Transsexual and Intersex) is seldom used in Mexico. Some of the objectives of these LGBT activists are: to get the authorities to prosecute hate crimes, to fight discrimination, to fight

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<sup>16</sup> Stephen, p. 56.

<sup>17</sup> Medina, Antonio. *La Jornada*. “La nueva visibilidad lésbico-gay”. Mexico: UNAM, June 5, 2003.

<sup>18</sup> Stevenson, Mark. *The Huffington Post*. “Benjamin Medrano, Mexico's First Openly Gay Mayor, Elected In Rough North.” July 18, 2013.

<sup>19</sup> See Diez, Jordi. *La trayectoria política del movimiento Lésbico-Gay en México*. *Estudios Sociológicos*. El Colegio de México. Vol. 29, No. 86 (May-Aug., 2011), pp. 687-712. The author marks this date as the birth of the gay and lesbian movement in Mexico due to a demonstration that took place on July 26, 1978 in Mexico City.

<sup>20</sup> Rea, Christian. *Intersexuales: La notable excepción de la regla*. *La Jornada*. May 7, 2009.

HIV/AIDS and to have marriage equality in the whole country.<sup>21</sup> The goal of some gay activists is to have equal access to matrimony, and they are pushing their agendas through the Party of the Democratic Revolution (PRD) at the National Commission for Sexual Diversity.<sup>22</sup> However, the goal to have equal access to matrimony in the whole country is not changing the terms of marriage, but rather just making that available for same-sex couples. In other words, LGBT rights activists represented by this political party are implicitly agreeing with the current provisions for marriage, except the gender restriction for access. Nonetheless, they are not criticizing the actual obligations (fair or not) that one commits to in marriage.

Considering the position of LGBT activists for marriage equality detailed above, it is also important to review the feminist perspective of marriage. Women are already able to marry men. However, not all women see marriage as an ideal form of legal union. Susan Moller Okin in *Justice, Gender and the Family* analyses thoroughly the vulnerability of women before, during and after marriage, she suggests that “Marriage continues the cycle of inequality set in motion by the anticipation of marriage and the related sex segregation of the workplace. Partly because of society’s assumption about gender, but also because women, on entering marriage, tend already to be disadvantages members of the work force, married women are likely to start out with less leverage in the relationship than their husbands.”<sup>23</sup> This difference in access to income creates inequalities in the distribution of justice within the family, because it also grants the male figure more authority. Nicola Barker in *Not The Marrying Kind: A Feminist Critique of Same-Sex Marriage* also provides an extensive feminist critique of marriage that includes the legal consequences of marriage. Mexican Feminist Psychologist, Marina Castañeda, has studied the phenomenon of Mexican *machismo* for many years in her practice. In her book, *The invisible machismo returns*,<sup>24</sup> she points out some of the imbalances in marriage, and in particular the assumed gender roles in Mexican homes. Castañeda argues that: “Matrimony, in its traditional form does not allow a periodical renegotiation of its own rules. But other

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<sup>21</sup> For instance, see the Civil Association “Agenda LGBT, A.C.”, and its mission.  
URL=<<http://www.agendalgbt.org.mx/>>

<sup>22</sup> *Comisión Nacional de la Diversidad Sexual*. URL=<<http://diversidad.prd.org.mx/>>

<sup>23</sup> Okin, Susan Moller. *Justice, Gender and the Family*. USA: Basic Books Inc., 1989. p.146.

<sup>24</sup> Castañeda, Marina. *El Machismo Invisible Regresa*. Mexico: Santillana Ediciones Generales, 2007.

forms of relationships that we can observe today, for example homosexual couples, allow us to envisage different ways of maintaining egalitarian relationships in the long term.”<sup>25</sup> She points out legal obstacles in Mexico that foster such inequalities. For instance, the monopoly of maternity attributed to women in marriage; which is promoted by regulations that allow women to take a maternity leave, but does not apply to men who might be willing to take a paternity leave.

Elizabeth Brake also suggests that: “While many feminists have focused on the reform of marriage, others have argued for its abolition. It is sometimes claimed that marriage is inherently structured, socially, by sexist norms, precluding the possibility of true feminist reform. On such views, abolishing marriage is necessary to reshape social expectations and change patterns of choice accompanying it. For example, legal marriage may encourage women's economic dependence by enabling and providing incentives for it. Thus, the legal structure of marriage, in combination with social norms, is taken to encourage choices which disempower women relative to men.”<sup>26</sup> After the Cohabitation Partnership Law was enacted in Mexico City, many opposite-sex couples decided to opt for a cohabitation partnership instead of matrimony. Even though they had the option to choose matrimony, they opted for a limited-liability version of the legalization of their intimacy. Even heterosexual couples were able to see more equality in a cohabitation partnership than in matrimony. Such imbalances in marriage will be discussed in Chapter III, and it will be clear why matrimony, as is it now, is not a perfect structure for the legalization of intimacy in Mexico. In marriage, women have a strong pressure to procreate. And with procreation, women become more susceptible to financial dependence from their husbands. Therefore, the impulse or social pressure for reproduction is one of the greatest challenges that women face during marriage. Men do not lose their power or independence after their children are born, because the duties of education and the household in general are usually delegated to women. Many women stop working after marriage or childbirth, this creates a dependent relationship with their husbands that will constrain their decisions based on this dependency. Abortion is only legal in Mexico City and only within the first twelve weeks of pregnancy. In the rest of the

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<sup>25</sup> Ibidem, pp. 237-238.

<sup>26</sup> Brake, Elizabeth. “*Marriage and Domestic Partnership*”, The Stanford Encyclopedia of Philosophy (Fall 2012 Edition), Edward N. Zalta (ed.), Section 5.1.

country, it is only possible under certain conditions, like rape and incest. These restrictions limit the capacity of women to make rational choices and do not foster their autonomy.

Considering this, it is difficult to fight for and advocate for gay marriage, because marriage is not perfect to begin with. To ban same-sex couples from matrimony is obviously a form of discrimination, but matrimony is not the answer either, the goal is to legalize intimacy efficiently. Hence, the approach of this dissertation to marriage is a more critical one, which has been influenced by *queer studies*.<sup>27</sup> Cressida Heyes explains that “Queer politics, then, works to trouble the categories “gay” and “lesbian,” as well as “heterosexual” (or indeed other categories of social thought in general), and eschews a genetic quest for the origins of homosexuality. In addition to historicizing and contextualizing sexuality, including the very idea of sexual identity, the shift to queer is also characterized by *deconstructive methods*. Rather than understanding sexual identities as a set of discrete and independent social types, queer theorists adduce evidence and read to emphasize their mutual implication...Queer theorists point out that the homo/hetero dichotomy, like many others in western intellectual history that it arguably draws on and reinforces, is not only mutually implicated, but also hierarchical (heterosexuality is superior, normal, and originary, while homosexuality is inferior, deviant, and derivative) and masquerades as natural or descriptive.”<sup>28</sup>

Thus, it is along this line of thought that this dissertation will tackle the issue of the legalization of intimacy in Mexico. In order to understand whether marriage is the most appropriate form of legalization of intimacy or not, the essence and legal elements of marriage must be deconstructed. It is necessary to understand the social and legal construct of marriage, and to analyze it separately from a given (hetero-) sexuality. The queer critique of marriage, that this dissertation will further develop in Chapter V, is that marriage is heteronormative. In other words, that it takes compulsory heterosexual principles as the ideal norm. This can be better understood with the following eloquent argument from Judith Butler:

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<sup>27</sup> For more particular references on Queer Theory, see: Stychin, Carl F. *Law's Desire: Sexuality and the Limits of Justice*. New York: Routledge, 1995, pp. 140-156.

<sup>28</sup> Heyes, Cressida, "Identity Politics", *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition), Edward N. Zalta (ed.), Section 5.

“To say that one is for or against gay marriage is not always easy to do, since it may be that one wants to secure the right for those who wish to make use of it even as one does not want it for oneself, or it may be that one wants to counter the homophobic discourses that have been marshaled against gay marriage, but one does not want to be, therefore, in favor of it. Or it may be that one believes strongly that marriage is the best way for lesbian and gay people to go and would like to install it as a new norm, a norm for the future. Or it may be that one not only opposes it for oneself but for everybody, and that the task at end is to rework and revise the social organization of friendship, sexual contacts, and community to produce non-state-centered forms of support and alliance, because marriage, given its historical weight, becomes an ‘option’ only by extending itself as a norm (and thus foreclosing options), one that also extends property relations and renders the social forms for sexuality more conservative.”<sup>29</sup>

The issue at stake here is how to regulate and to legalize intimacy in such a way that it does not replicate the heterosexual formula for reproduction and intimate behavior; and at the same time, to respect equality for access to this intimate association and equality within it. As Butler underscores: “For a progressive social movement, even one that may want to produce gay marriage as an option for nonheterosexuals, the proposition that marriage should become the only way to sanction or legitimate sexuality is unacceptably conservative.”<sup>30</sup> This research proposes a new way to legalize intimacy that would enable both same-sex and opposite-sex couples to engage in a different legal structure that will empower them to regulate their own intimacy, with more liberty, self-determination and equality.

#### **I.4. Research Question, Materials and Methodology**

This dissertation poses a specific research question, focuses on a distinct set of material and sources to answer it, and applies a scientific methodology throughout the research. It will be seen later how this research answers the research questions with primary and secondary sources, using scientific methods and also applying the approaches proposed by this same dissertation; in other words, making use of the ideas presented here.

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<sup>29</sup> Butler, Judith. *Undoing Gender*. USA: Routledge Chapman & Hall, 2004, p. 109.

<sup>30</sup> *Ibidem*

#### I.4.1. The Research Question

During the initial sketch of this dissertation, the idea was to write about gay marriage in Mexico; how to fight for it and how to legalize it. However, as the analysis of this topic began to shape up, it became more and more evident that the issue at its core was not gay marriage, but rather a more comprehensive understanding of intimacy. The first phase of the research lead to the conclusion that marriage and same-sex marriage, for that matter, are just the visible surface of the more transcendental issue: Intimacy. As a result, the lead research question was rephrased as follows:

#### **How is intimacy legalized in Mexico?**

This lead question begs for additional answers to subsidiary questions, such as: What is intimacy? What are the legal elements of intimacy? Is there a right to intimacy? Why should intimacy be legalized at all? The first hypothesis is that intimacy is a close reciprocal relationship of future-oriented companionship with attachment in different private domains. The second one is that the legal elements of intimacy are found in what will be described as the Spheres of Intimacy. These elements are then identified in different forms or Structures of Intimacy provided by the Civil Code and other separate legislations in Mexico. The third hypothesis is that the Mexican Constitution provides a set of fundamental human rights that enable a right to privacy out of which the right to intimacy arises. Consequently, individuals should have the right to intimacy, regardless of their sex, gender or any other characteristic; because the protection of human rights must be applicable to all without discrimination. A further hypothesis is that intimacy should be legalized, but with a different approach, a regulation for self-regulation that is provided as the conclusion in this research.

This research shows how intimacy is legalized in Mexico from a critical perspective. Moreover, in the quest to answer this lead question, different forms of legalization of intimacy in general are examined; for example, matrimony, civil unions, cohabitation partnerships and concubinage. Having answered the lead question and subsidiary questions at the end of this dissertation, a new proposal for the legalization of intimacy in the 21<sup>st</sup> century is suggested. This proposal includes the

elements observed throughout the development of this thesis, as a fundamental part of the discovery process.

#### I.4.2. Materials and Sources

For the preparation and creation of this research, it was necessary to make use of a large amount of materials and diverse sources. This dissertation relies intensely on primary sources of research, such as the Mexican Constitution, federal and local Civil Codes, as well as separate legislation and, in particular and extensively, jurisprudence. Just as an example, in order to understand the meaning and interpretation of the word Intimacy in the Mexican Supreme Court of Justice, it was inevitable to read and analyze ninety-six verdicts, just to grasp and identify the accurate definitions. Additionally, commentaries and reviews have been fundamental to appreciate the different perspectives around the issue of intimacy. Secondary sources that were used include, commentaries, judicial opinions, articles and essays by scholars, as well as rich encyclopedias like the Stanford Encyclopedia of Philosophy. The discovery phase of this research also required the use of some tertiary sources like databases and statistical sources. However, such sources and empirical research were used mostly to corroborate some information and to inform the researcher, but not as a tool to provide or create empirical evidence. Most of the resources were found either in English or in Spanish; in any case, a translation into English is provided for sources that have been originally published in other languages.

One of the challenges finding materials for this research project was that the issue of marriage and gay marriage in Mexico is mostly discussed within a gay rights discourse; and taking into account that the approach to marriage provided here comes from an understanding of intimacy and privacy, the Mexican literature was rather scarce. Many articles advocating for gay rights have been published in Mexico recently, but they do not handle the issue of gay marriage in an academic fashion; only a couple of exceptions stand out, such as the works of Adame Goddard<sup>31</sup> and De

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<sup>31</sup> Adame Goddard, Jorge. “Análisis y juicio de la Ley de Sociedades de Convivencia para el Distrito Federal”. *Boletín Mexicano de Derecho Comparado*, XL, No. 120. Mexico: Instituto de Investigaciones Jurídicas UNAM, Sep.- Dec. 2007. pp. 931-939.

La Mata et al.<sup>32</sup> Even though this research disagrees with most of their ideas, it must be acknowledged that they created a possibility to contrast the point of view of this dissertation with their perspectives. Fortunately, North American and European scholars have been doing research in this field for decades, and their ideas also nurtured the discussion around intimacy and privacy presented in this research. A complete list of all the sources, authors, articles, journals, books, reports, encyclopedias, and commentaries used here is provided in detail at the end of this dissertation.

#### I.4.3. Research Methodology

The structures and spheres of intimacy introduced in the second chapter of this dissertation provide both a theoretical framework and a method to analyze intimacy. The question of intimacy is analyzed first, and with the working definition of intimacy, the five spheres of intimacy will be introduced. These spheres are crucial to understand and to dismantle the concept of intimacy, but also, to read the legislations around intimacy with a different lens. Simultaneously, these spheres prove to be *content* and *factors* of intimacy. They are content, because they lie within the realm of intimacy; and factors, because they can be used to assess intimacy in different structures.

Chapter II also provides a theoretical analysis, discussing the concepts and definitions necessary to understand the content of this dissertation. This includes discourse analysis; in the sense that Foucault<sup>33</sup> would make use of this word, not as speech, but rather as a more embracing and lasting phenomenon that occurs in different domains because of the relationships of power in society. The language and terms introduced in this part of the research is fundamental for the interpretation of the rest of the dissertation. It is essential to construe the terminology the way it is

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<sup>32</sup> De La Mata Pizaña, Felipe and Roberto Garzón Jiménez. *Sociedades de Convivencia*. Mexico: Editorial Porrúa-Universidad Panamericana, 2007.

<sup>33</sup> For further details on the Foucault's Discourse Analysis Methodology see: Jäger, Siegfried and Florentine Maier. "Theoretical and Methodological Aspects of Foucauldian critical discourse analysis and dispositive analysis." In *Methods of Critical Discourse Analysis*. Ed. by Ruth Wodak and Michael Meyer. London: SAGE Publications, 2009, pp. 34-61; and Foucault, Michel. *The Archeology of Knowledge and The Discourse on Language*. New York: Pantheon Books, Random House, 1972.

presented in the second chapter, for it will be used in that particular connotation throughout the research.

Chapter III begins with a historical research approach to the subject matter since the introduction of the first Law on Civil Matrimony in 1859 in Mexico. It is important to see how intimacy was legislated in the past, so as to understand how it is legalized now. But most importantly, in order to foresee a new way to legalize it in the future. In the analysis of the different types of structures of intimacy, the historical approach is present, comparing the past with the present civil code provisions. The chapter also provides a comparative analysis of the structures of intimacy. It was important to compare and contrast the different types of legalization of intimacy in order to identify the advantages, the disadvantages and the missing elements in every structure. At the end of chapter III, the chart depicting all the distinctions among them proves how important it was for this research to use the comparative analysis methodology. Furthermore, the dissertation also compares the situation of the legalization of intimacy in Mexico with the current situation around this issue in other countries in the world. This has helped to understand the stage of development of the Mexican legal system, and also, to compare different forms of legalization of intimacy.

The fourth chapter is particularly permeated by pure legal research. This section discusses the fundamental rights of intimacy; consequently, the method used here is the legal analysis of primary sources of law such as the constitution. The research here reviews even the literal wording of constitutional law, international human rights and jurisprudence. It was important at this stage of the dissertation to analyze the doctrines of the Mexican Supreme Court of Justice. So, during the examination of jurisprudence, a more doctrinal research method was applied, especially in the examination of the synergy between privacy and intimacy in constitutional law and human rights.

Chapter V is more focused on gender and its relationship with intimacy. The method used for this chapter was rather a critical and social analysis of literature around the issue of gender. The approach here is to embrace different perspectives

and points of view regarding intimacy and its legislation. This includes, among others, queer theory, feminism and conservatism. The goal was to describe all these perspectives as part of the broader debate around the legalization of intimacy, maintaining a critical perspective.

In addition to the research methods detailed above, this dissertation carries on a critical legal research approach. During the discovery and review phases of the research, the literature and sources are always analyzed from a critical legal research perspective. This includes the identification of material and immaterial elements and phenomena; and also, a more sensitive analysis of the narrative of social and political issues. The study of the legalization of intimacy is an inter-disciplinary ambition. One cannot focus entirely on the law and ignore the related aspects like sociological and psychological issues. Hence, the research methods applied in this dissertation include the historical research, comparative analysis, descriptive/narrative methods, conceptual research, theoretical analysis, doctrinal legal research, and a projective model for the conclusion.

#### I.4.4. State of Research

Up until now, there is plenty of basic literature around the issue of marriage and gay marriage in Mexico. There are comprehensive scientific works like those of Jorge Adame Goddard,<sup>34</sup> that analyze all of the legal aspects of matrimony and other forms of legalized intimacy, like the Cohabitation Partnership Law in Mexico, also studied by De La Mata Pizaña et al.<sup>35</sup> And also comparative studies like that of Julio Bustillo, with a more international approach.<sup>36</sup> However, the debate goes around the idea of whether it should be approved or not, whether it is right or wrong, whether it is legal or illegal. Currently available research in Mexico (including the works mentioned above) focuses on the issue of marriage or other forms of legalization, but not on the intrinsic meaning of intimacy and/or how to legalize it differently. This dissertation deals with the core of the issue, the fundamental essence of marriage: Intimacy.

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<sup>34</sup> See for instance: Adame Godard (2007), op. cit.; and Adame Godard, Jorge. *El Matrimonio Civil En México (1859-2000)*. UNAM: Mexico, 2004.

<sup>35</sup> De la Mata Pizaña et al (2007), op. cit.

<sup>36</sup> Bustillo, Julio. *Human Rights and Constitutional Protection. A brief study on same-sex marriage in Mexico and in comparative perspective*. *Boletín Mexicano de Derecho Comparado* (UNAM-IIJ), XLIV, num. 132, Sep.-Dec. 2011, pp. 1017-1045.

As it will be shown in the fourth Chapter, the concepts of intimacy and privacy are very often used as synonyms in the literature, in the jurisprudence and by commentators. Significant literature, like the works of Julie Inness<sup>37</sup> and Karen Prager<sup>38</sup> will be used in this dissertation; as well as definitions in the jurisprudence that help distinguish the difference between intimacy and privacy, such as the one provided by Mexican Supreme Court Justice Olga Sánchez Cordero de García Villegas.<sup>39</sup> The arguments presented here will discuss the difference that is not handled in the literature in Mexico, that important distinction between intimacy and privacy. Only after that distinction is made, can the right to privacy and the right to intimacy be understood clearly. One of the assets of this research project is that it proposes a new way to analyze intimacy, furthering the debate around same-sex marriage. The hypotheses presented here have the capacity to reignite the debate at a different level and to foster more academic research in this particular contemporary field.

## **I.5. Objectives and Purpose**

Certainly, one of the goals of this dissertation is to inform the reader of the current situation regarding the legalization of intimacy in Mexico. It is important to understand the real legal obligations and the limits of an individual's liability before engaging in intimacy; however, to have a merely informative purpose would not be an ambitious objective. The arguments that will be introduced throughout this research are a reflection on the issues of intimacy, privacy, gender, sexuality, and human rights (among others); and they will enable any reader to develop a more critical reasoning for the analysis of these matters. Hopefully, a more informed opinion will prepare the ground for a more proactive attitude towards the legalization of intimacy. Because only a proactive reaction from individuals can catalyze change, and undoubtedly, many changes are necessary to fight the current discriminatory legislations that

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<sup>37</sup> See in particular Chapter 6: Inness, Julie C. *Privacy, Intimacy, and Isolation*. New York: Oxford University Press, 1992, pp. 74-94.

<sup>38</sup> Especially regarding the concept of intimacy. Prager, Karen J. *The psychology of intimacy*. New York: Guilford Press, 1995.

<sup>39</sup> Supreme Court of Justice of the Nation (Mexico). Constitutional Injunction 402/2007. May 23, 2007. Case registration number: 171883.

prevent many same-sex couples from engaging in intimacy; and those that create injustices within intimacy, even for opposite-sex couples. One of the most important intentions of this research is that when the reader comes to the end of this work, the concept of intimacy and the way it is regulated will have been understood. This applies to the specific case study of Mexico presented here, but it is also applicable in the broader international context. After this comprehension in depth, readers will be able to ask themselves; how they want to legalize their intimacy, whether they are doing it appropriately, or whether they want to engage in intimacy at all. In any case, it will be clear that individuals have the capacity and the right to determine and to define the rules for their own intimacy.

There must be a shift of paradigm in the legalization of intimacy. And changing these paradigms requires engaging all stakeholders, including legislators, judges, and the citizenry in general. As Cohen has pointed out: “Rather, from the perspective of the reflexive legal paradigm, determining the appropriate forms of regulating self-regulating of intimate association, and for which purpose, can become a topic of discussion. What must replace the moral (and medical) assessment of sex acts and object choice is an egalitarian morality of intimate relationships...Freedom of intimate association should go together with regulations fostering equality fairness and responsibility.”<sup>40</sup> In other words, when it comes to legalizing intimacy, the current paradigm in contemporary societies is to regulate a formula or a prescription for intimacy that imposes a specific morality, based on generalized or “normalized” ideas of acceptable sexuality, sexual practices, admissible family ties, idealized parenthood, and religious fundamentalism. Yet, one can only wonder, have these formulas really worked? They might have for some people, but they do not work for everybody. Individuals should be able to decide what they want for themselves and their intimate lives. This is the idea behind the paradigm shift in the legalization of intimacy; the legislations must be enacted in such a way that they include provisions that allow people to self-regulate their intimate behavior and rules. Only this way can individuals truly enjoy their privacy, equality and self-determination. This dissertation is also promoting this paradigm shift; as mentioned before, the conclusion in Chapter VI summarizes the ideas of this research and puts the methodology and theory into

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<sup>40</sup> Cohen, Jean L. *Regulating Intimacy: A new legal paradigm*. USA: Princeton University Press, 2002. pp. 114-115.

practice, suggesting a new proposal for the legalization of intimacy in the 21<sup>st</sup> Century. The goal is to deliver this message at all levels, not only at the academic level, but also at the political and personal ones; because intimacy is not only an abstract and ethereal construct debated by academics, it has an impact in real life, and in individuals of all social classes, genders, cultures, ages, and backgrounds. The chapters to follow will show every aspect in the realm of intimacy, and particularly in its legalization, hoping that the hypothesis presented here will have a powerful and effective impact on the legalization of intimacy in present and future generations.



## II. THE QUESTION OF INTIMACY

### II.1. Introduction

Before the actual analysis of the legalization of intimacy in Mexico, it is crucial to discuss the question of intimacy. The four sections in this chapter will provide an insight into intimacy. First, the *definition of intimacy* will be dismantled in order to answer the following question: What is intimacy? Such a broad concept demands a deep analysis. Using a specific classification of connotations, the concept will be assessed at different levels. The contrast of fourteen different definitions of intimacy, including the one developed by this research, will clarify the interpretation of this word throughout the rest of the text. Second, a study of the discourse on sexuality and intimacy is necessary to be aware of the evolution of societies. The idea of the *discourse of intimacy* will be developed from the discourse of sex, predominantly using the discourse of sexuality observed by Michel Foucault, and the transformation of intimacy, as it is perceived by Anthony Giddens. This discourse analysis will situate the current debate on the legalization of intimacy within the contemporary epoch. Third, this chapter also includes the introduction of what shall be called the *Spheres of Intimacy*. The complexity of intimacy has been broken down into five different domains. These spheres of intimacy and their interaction will be analyzed individually. The emotional, moral, sexual, economic and constructive spheres will show how the legalization of intimacy affects more than one particular area of an individual's personal and private environment. Fourth, it will be explained how intimacy and its spheres function within a specific structure, and such structures are called *Structures of Intimacy*. The description of the structures of intimacy will entail the definition of traditional marriage, same-sex or gay marriage, common-law marriage, putative marriage, civil unions, domestic or registered partnerships, and a biblical analysis of marriage. At the end of this chapter, it will be easier to grasp the essence of intimacy and to identify it in the subsequent sections of this thesis, because the legalization of intimacy cannot be understood if the concept of intimacy is not intelligible. In particular, the abstraction of the spheres of intimacy and the structures of intimacy is necessary to comprehend the issues that will be developed later on. Both the spheres and the structures of intimacy will be used as tools of analysis for

the legalization of intimacy. Therefore, beyond their theoretical or hypothetical inception, they will have a practical use in the following discussions.

## II.2. The Definition of Intimacy

First of all, it is necessary to begin with the definition of the word *Intimacy*. The main problem with intimacy is that it is not clearly defined. And before discussing the legalization of intimacy, it is necessary to understand what is it that needs to be legalized. This concept, as many others, has multiple connotations. It is a widely used concept in everyday language, and it is quite difficult to define with precision, because everybody uses the term with a different meaning. Beyond the scholarly interpretations of intimacy, people have daily experiences of intimacy that shape their perception or redefine their personal abstraction of the concept. Intimacy is love, intimacy is trust, intimacy is closeness, intimacy is self-disclosure, intimacy is bonding, intimacy is attachment, intimacy is sexuality, intimacy is support, intimacy is commitment, intimacy is nothing, intimacy is everything.

The first known use of the word intimacy in the English language dates back to 1641.<sup>1</sup> But today, scholars and experts debate the actual meaning of the word, the spectrum it encompasses and its relevance. In this regard, every discipline approaches the issue differently. In the area of psychology, Karen J. Prager has developed a classification system with categorical principles that help understand the different interpretations of the word intimacy. Her research, *The Psychology of Intimacy*, is a comprehensive and informative study of intimacy in the field of psychology.<sup>2</sup> However, for this research on the legalization of intimacy, it is important to analyze intimacy from a legal point of view. In this area, Julie C. Inness and Jean L. Cohen bring the issue of intimacy into the legal focus. Inness, in a philosophical/legal fashion, discusses the significance of intimacy in *Privacy, Intimacy and Isolation*.<sup>3</sup> She sees intimacy as the core of privacy, and she links the behavioral side of intimacy, the acts and activities, to their love, liking or care. Inness argues that,

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<sup>1</sup> “Intimacy”. The Merriam-Webster Dictionary 2013.

<sup>2</sup> Prager, Karen J. *The psychology of intimacy*. New York: Guilford Press, 1995.

<sup>3</sup> Inness, Julie C. *Privacy, Incimacy and Isolation*. New York: Oxford University Press, 1992.

“An examination of a range of paradigmatic examples of intimate matters produced an account of intimate acts and activities: to claim that an act or activity is intimate, is to claim that it draws its meaning and value from the agent’s love, liking or care. Intimate decisions concern such matters. Hence, they involve a choice on the agent’s part about how to (or not to) embody her love, liking, or care.”<sup>4</sup>

Cohen nurtures the debate with a political and legal interpretation of intimacy. She analyzes the constitutional side of privacy and intimacy with a feminist critique. In her work, *Regulating Intimacy: A new legal paradigm*,<sup>5</sup> she reviews the rights to privacy and intimacy questioning the current regulations and providing a new paradigm for the legislation on intimacy. She points out that,

“...despite the demise of the old public/private dichotomy, we still need a normatively compelling and analytically cogent conception of privacy and of privacy rights. Otherwise, the issues involved in the regulation of intimate relationships cannot be addressed fruitfully because *privacy is an enabling condition of intimacy*.”<sup>6</sup>

From a legal point of view, the debate on intimacy requires a discussion on privacy, because both concepts are closely related. The works mentioned above are key sources and provide a holistic insight into the debate of intimacy and its legalization. The following references are additional definitions of intimacy by other academics:

*Definitions of Intimacy emphasizing Intimate Interactions [Intimate Behavior]*

“An interaction that...is self-revealing and/or relationship-focused in its content...one partner does or says something [that]...is readily discriminated...by the partner, who responds in a positive, understanding and/or self-revealing way her- or himself.”<sup>7</sup>

(Fruzzetti & Jacobson)

“Clearly formulated adjustments of one’s behavior to the expressed needs of the other person.”<sup>8</sup> (Sullivan)

“A product of eye contact, distance, smiling and other behaviors.”<sup>9</sup> (Patterson)

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<sup>4</sup> Ibidem, p. 90.

<sup>5</sup> Cohen, Jean L. *Regulating Intimacy: A new legal paradigm*. USA: Princeton University Press, 2002.

<sup>6</sup> Ibidem, pp. 2-3.

<sup>7</sup> Fruzzetti, A.E. & N.S. Jacobson. “Toward a behavioral conceptualization of adult intimacy: Implications for marital therapy.” In E.A. Blechman (Ed.), *Emotions and Family* (117-136) Hillsdale, NJ: Erlbaum, 1990. pp. 126-127.

<sup>8</sup> Sullivan, H.S. *The interpersonal theory of psychiatry*. New York: Norton, 1953. p. 246.

“An interpersonal process that involves communication of personal feelings and information to another person who responds warmly and sympathetically. This response validates the first person’s experience.”<sup>10</sup> (Reis & Shaver)

*Definitions of Intimacy emphasizing Intimate Interactions [Intimate Experience]*

“A subjective appraisal, based upon interactive behaviors, that leads to certain relational expectations.”<sup>11</sup> (Chelune, Robinson & Krommor)

“Closeness, love, caring, affection.”<sup>12</sup> (Sexton & Sexton)

“The sharing of hurt and of fears of being hurt.”<sup>13</sup> (L’Abate & L’Abate)

*Definitions of Intimacy emphasizing Intimate Relationships*

“(a) A desire to promote the welfare of the loved one, (b) experienced happiness with loved one, (c) high regard for the loved one (d) high regard for the loved one (e) mutual understanding with the loved one (f) sharing of one’s self and one’s possessions with the loved one (g) receipt of emotional support from the loved one (h) giving of emotional support to the loved one (i) intimate communication with the loved one, and (j) valuing the loved one in one’s life.”<sup>14</sup> (Sternberg)

“A deep form of acceptance of the other as well as a commitment to the relationship.”<sup>15</sup> (Gilbert)

“A composite of ...affection ...expressiveness ...compatibility ...cohesion ...sexuality ...conflict resolution ...autonomy ...and identity.”<sup>16</sup> (Waring)

“The degree of mutual need-satisfaction within the relationship.”<sup>17</sup>

(Clinebell & Clinebell)

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<sup>9</sup> Patterson, M.L. “An arousal model of nonverbal exchange.” *Psychological Review*, 83, 235-245. p. 235.

<sup>10</sup> Reis, H.T. and P. Shaver. “Intimacy as interpersonal process.” In S. Duck (Ed.), *Handbook of Personal Relationships: Theory, Relationships, and Interventions* (pg. 367-389). Chichester, UK: Wiley, 1988. p. 375.

<sup>11</sup> Chelune, G.J., Robison, J.T. and M.J. Krommor. “A cognitive interactional model of intimate relationships.” In V.J. Derlega (Ed.) *Communication, Intimacy, and Close Relationships* (pg. 11-40). Orlando, FL: Academic Press, 1984. p.13.

<sup>12</sup> Sexton, R.E. & V.S. Sexton. “Intimacy: A historical perspective.” In M. Fisher & G.Stricker (Eds.), *Intimacy* (pg. 1-20). New York: Plenum, 1982. p. 2.

<sup>13</sup> L’Abate, L. & B.L. L’Abate. “The paradoxes of intimacy.” *Family Therapy*, 3, 175-184. 1979. p.178.

<sup>14</sup> Sternberg, R.J. “A triangular theory of love.” *Psychological review*, 93, 119-135. 1986, pp. 120-121.

<sup>15</sup> Gilbert, S. J. “Self-disclosure, intimacy and communication in families.” *The Family Coordinator*, 25, 221-231, 1976, p. 221.

<sup>16</sup> Waring, E.M. “Facilitating marital intimacy through self-disclosure.” *The American Journal of Family Therapy*, 9, 33-42, 1981. p. 34.

<sup>17</sup> Clinebell, H.J. & C.H. Clinebell. *The Intimate Marriage*. New York: Harper & Row, 1970. p. 1.

“The closeness and interdependence of partners, the extent of self-disclosure, and the warmth or affection experienced [within the relationship].”<sup>18</sup> (Perlman & Fehr)

“Reflects feelings of closeness and emotional bonding including intensity of liking, moral support and ability to tolerate flaws in the significant other.”<sup>19</sup>

(Tolstedt & Stokes)

The definitions listed above show the diversity across the literature in the field of intimacy, they have been grouped according to their common denominator. This classification helps better understand the diverse conceptions of intimacy that different scholars have, they have been sorted out according to Prager’s taxonomy.<sup>20</sup> She acknowledges two different elements within the concept of intimacy:

- A. Intimate Interactions, and
- B. Intimate Relationships.

She defines intimate interactions as dyadic communicative exchanges. These intimate interactions are time-specific and location-specific. Moreover, they include two additional sub-elements: (a) Intimate Behavior, and (b) Intimate Experiences. Intimate behavior happens when people share what is private and personal. Intimate experiences are individual experiences of intimacy, closeness, bonding, etc. While these interactions and behavior have a more temporary character, intimate relationships have a history of intimate interactions with anticipation of future intimate contact over time. Intimacy in a relationship has a more complex time and space framework. She supports the idea that intimate relationships include sustained affection (or love for that matter), mutual trust and partner cohesiveness.<sup>21</sup> Thus, she explains the concept of intimacy in a multi-tiered arrangement of elements, as shown in the figure below:<sup>22</sup>

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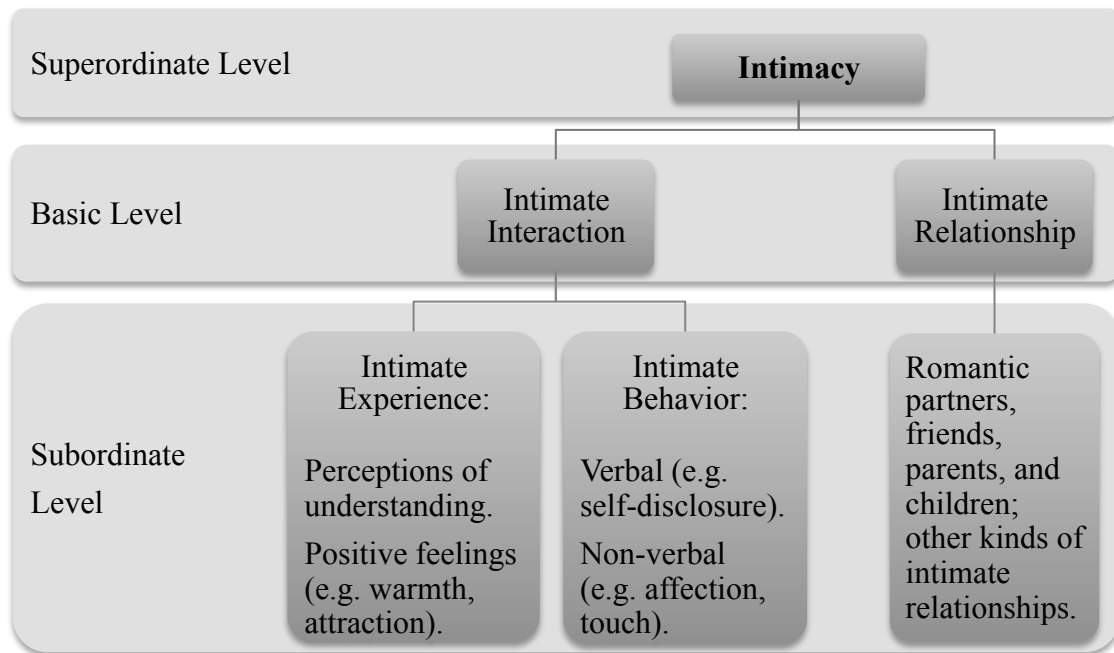
<sup>18</sup> Perlman, D. & B. Fehr. “The development of intimate relationships.” In D. Perlman & S. Duck (Eds.), *Intimate Relationships: Development, Dynamics, and Deterioration* (pp. 13-42). Newbury Park, CA: Sage, 1987. p. 16.

<sup>19</sup> Tolstedt, B.E. & J.P. Stokes. “Relation of verbal, affective, and physical intimacy to marital satisfaction.” *Journal of Counseling Psychology*, 30, 573-580. 1983.p. 574.

<sup>20</sup> Prager, p. 3.

<sup>21</sup> Ibidem, p. 24.

<sup>22</sup> Ibidem. Figure 1.2., p. 20.



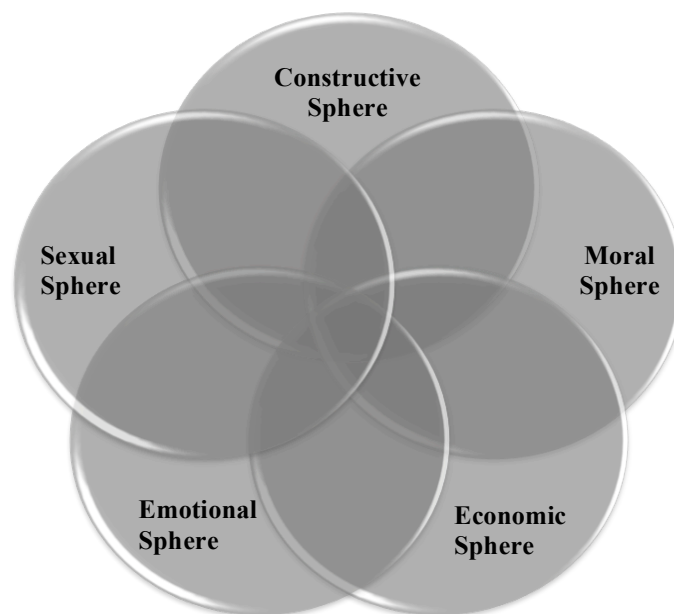
Taking into consideration all the nuances and ambiguities regarding the concept of intimacy, how shall it be construed in the context of the legalization of intimacy? For the purposes of this research, the concept of intimacy shall be defined and interpreted as:

***A close reciprocal relationship of future-oriented companionship with attachment in different private domains.***

This working definition could be located above, in the categorical classification of intimate relationships within the superordinate concept of intimacy. This dissertation understands intimacy this way because it encompasses the social, political, cultural and economic dimensions of the relationships that individuals build. Their intimacy, their association, is also a dynamic unit inside the wider scope of society. The first part of this definition implies an interpretation of intimacy as a frequent relationship, and not as an isolated one-time event. It is reciprocal because it is bilateral and due to its longer-term assumption, it creates the space for commitments (rights and obligations) for and from both parties. These commitments generate attachment in different private domains that link the individuals who form that intimacy. In this research, considering the different aspects of an intimacy, such private domains shall be called *Spheres of Intimacy*.

### II.3. The Spheres of Intimacy

After the evaluation of many factors that affect or shape intimacy, this research has identified five groups of elements that share these common domains. Each one of these groups shall be denominated *Sphere*. Consequently, the analysis of intimacy is ultimately a study of these five Spheres of Intimacy. Some components in the spheres are isolated while some of them are co-dependent because they overlap in different areas. The interaction among them can be best understood within the logical depiction of a Venn diagram:



Intimacy is the combination of all of the above. Therefore, the concept of intimacy should be analyzed as a construct, whose conceptual elements are each one of these spheres. Since intimacy is a reciprocal relationship, these spheres do not represent an individual's intimacy. They depict, rather, the intimacy of individuals (in plural). Intimacy is, thus, the sum of the Emotional Sphere, the Moral Sphere, the Sexual Sphere, the Economic Sphere and the Constructive Sphere. In the legalization of intimacy, the elements within these spheres are materialized and their implications are more tangible. The legal components of intimacy might be spread across different legislations, not in a condensed set of regulations. The materialization of intimacy through its legalization will be explained in the individual discussion of each sphere.

### II.3.1. The five spheres in depth

#### A. *The Emotional Sphere of Intimacy*

Romance can be clearly identified in the narrative of novels and films of the nineteenth and twentieth century. However, that emotional side of intimacy was a feminine romance where women provided the emotional side and men were in charge of the sexual wisdom and romantic passion. Giddens uses the term *pure relationship* when referring to the close and continuing emotional tie to one another. He argues that while love used to be tied to sexuality, the pure relationship is part of a restructuring of intimacy and it emerges nowadays in other contexts of sexuality besides heterosexual marriage.<sup>23</sup> Giddens adds that the transmutation of love is as much a phenomenon of modernity as is the emergence of sexuality.<sup>24</sup> This emotional sphere has now changed in intimacy. Men and women are equally allowed to express and to involve their emotions into intimacy. As western societies move farther away from twentieth century masculinities, the emotional sphere and the gender-balance within becomes more relevant. Feelings like love, confidence, friendship, companionship, liberty, self-esteem, pride and trust are inherent to contemporary intimacies in all the combinations of relationships: man-man, woman-man, and woman-woman. These sensations validate the individual's perception of the self as a member of the relationship with the other. Individuals are the human capital in intimacy, and they feel proud of that companionship in the different legal forms it can be found or structured.

How are all these emotions consolidated in the legalization of intimacy? Although feelings are difficult to explain and to show as something solid, they do materialize in different forms by law. First of all, the solemnity of a civil or religious ceremony and the signatures on the marriage license guarantees the commitment of individuals as it is made public. The emotional symbolism of intimacy is displayed in ceremonious events.<sup>25</sup> Some religions, like Catholicism, have specific protocols for

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<sup>23</sup> Giddens, Anthony. *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies*. Cambridge, UK: Polity Press, 1992. p. 9.

<sup>24</sup> *Ibidem*, p. 34.

<sup>25</sup> See the "Symbolic Recognition" in Barker, Nicola. *Not The Marrying Kind: A Feminist Critique of Same-Sex Marriage*. UK: Palgrave Macmillan, 2013. pp.103-109.

marriage ceremonies. Civil codes also detail specific wordings for civil matrimonies. For the most part, this is because the emotional impact of intimacy is acknowledged. Furthermore, partners may demonstrate their trust and confidence through legal instruments such as the figure of “legal guardianship.” In many jurisdictions, spouses are legal guardians by default. This means, your life may depend on your spouse’s decisions if you are deprived of your legal capacity. Therefore, the trust and faith you may have in your intimacy will be demonstrated in legal guardianship. This is narrowly connected with the legal figure of emancipation. Parents usually have the legal guardianship of their children, but they lose or waive this right when their children get married or reach adulthood. The trust conferred by the state upon parents is then transferred onto spouses. This legal emancipation that an intimacy may provide represents the emotions of liberty and independence. Moreover, intimacy is a milestone for adulthood. Not only legally, but also psychologically and sociologically. As children leave their parents’ intimacy in order to constitute their own, they become adults.

Intimacy – and the lack thereof – has developed a taxonomy of civil (or marital) status. Hence, an individual is married (in intimacy); divorced (former member of an intimacy), separated (distant from an intimacy), widow (the sole living member of an intimacy) or single (in absence of intimacy). Individuals have different feelings and pride about the status the law grants them. But also – and most importantly – these different statuses may give individuals specific rights and obligations. The rights can be as simple as collecting a partner’s mail and signing documents on behalf of them (access to privacy), or they can also be as crucial as allowing individuals to visit their partners at a hospital or prison.<sup>26</sup> In sum, the emotional elements of an intimacy can be materialized at least through the civil status, the solemnity of the ceremony, emancipation and legal guardianship.

### *B. The Moral Sphere of Intimacy*

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<sup>26</sup> It is worth considering the legal implications of an individual’s civil status. See the publications by the International Commission on Civil Status (ICCC). For example: “*Bogus Marriages*” (09/2010) and “*Fraud with respect to civil status*” (1996/2000), available at URL=<<http://www.cieci1.org>>.

Values, principles and standards are found in intimacy as well. On one hand, intimacy is a *moral subject* because each of the individuals that form that intimacy comes with a morality that permeates their intimacy. On the other, it is a *moral object* whose righteousness will be scrutinized by society. The moral assessment will include the value assigned to the individual because of their intimacy, and also, to the interpretation of the individual's own perception of their intimacy. It is in the moral sphere – unquestionably – where religion plays its most important role, because the ethical barometer will be strongly influenced by a particular religion and its exegesis of right and wrong. Morality promotes or hinders the socialization and integration of an intimacy in communities. This will affect employment protection or discrimination, the distribution and application of justice, social inclusion or exclusion and the involvement of that intimacy or any of its members in the public sphere.

It cannot be forgotten, that the State has the moral monopoly of intimacy. The state through its legislation will then allocate its own morality on intimacy. Moral clauses that are materialized legally are, for instance, provisions regarding gender-bias access. Thus, the difference between the legalization of exclusive opposite-sex marriage and including same-sex marriage is that the former is influenced by the principle of morality, whereas the latter is guided by a principle of justice.<sup>27</sup> Also, in religious states like Israel and most Islamic countries, morality is directly solidified because religion *is* the law. Therefore, any religious (i.e. moral) standards are immediately applied to the legalization of intimacy.

An intimacy is supposed to persist through a longer period of time. Married individuals are supposed to be married forever; this is exemplified in the well-known phrase “*Till death do us part.*” Morality decides on the beginning, duration, and also on the termination of intimacy. The impediments or prerequisites to begin an intimacy with someone show the moral outlines. Incest is a clear indicator; individuals are not allowed to marry a close relative. This is most of the times not only an impediment to start intimacy, but also a crime. Whether an intimacy can be terminated or annulled,

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<sup>27</sup> For reference regarding the morality of the legal debate around gay marriage read: Baird, Robert M., and Stuart E. Rosenbaum. *Same-sex marriage: The moral and legal debate*. New York: Pyr Books, 2004.

it will depend on the grounds for divorce or annulment. These grounds or justifications are allocated according to moral doctrines.

Social values also contribute to the dichotomization of male and female roles in society. This will dictate the duties and positions of individuals within their intimacy, or at least the collective expectations. The equilibrium within intimacy is affected by the gender differentiation. This separation of masculinity and femininity is based on social bigotry. Equality in intimacy can only be reached without this bisection. For this reason, a heavier moral sphere in intimacy will produce more internal disproportionality.

### *C. The Sexual Sphere of Intimacy*

As discussed before, intimacy is much more than plain sex. Yet, the sexual feature of intimacy is still very important. The sexual sphere can be explored in three different contexts: *sexual practice*, *sexual preference*, and *sexual identity*.<sup>28</sup>

First of all, sexual practice relates to the sexual activity of partners in intimacy. The physical appetite, desire and eroticism around intimacy are key ingredients. While sexual contact was prominent in the discourse of sex, it now plays a less important part in intimacy. Giddens points out: “In an interesting –and significant–reversal of the trends remarked upon by Foucault, the proponents of Sex Addicts Anonymous...have sought to medicalize sex addiction.”<sup>29</sup> The clinical treatment of sex addiction shows, if nothing else, that the element of sexual practice requires boundaries, and these very limits are now determined by intimacy. It is also true that the mutual sexual desire of individuals is usually a given precondition. However, the contemporary typification of spousal rape as a crime proves that sexual activity must be voluntary as well, and that there is no such thing as sexual obligation in intimacy.

Secondly, sexual preferences become relevant from two perspectives. On one hand, the sexual preference of individuals will “label” their intimacy. It will make it a

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<sup>28</sup> It is important to consider in the sexual sphere of intimacy, the criminalization of any forbidden act like sodomy, which indirectly targets and discriminates specific sexualities.

<sup>29</sup> Giddens, p. 65.

homosexual, heterosexual, bisexual, asexual, mono-sexual or pansexual intimacy; according to the sexual partners they choose. On the other hand, individuals may choose the type of sexual exclusivity they want to have in the course of their intimacy. For example, adultery is the sexual preference beyond the spousal bed. Partners may choose what kind of sexual commitment they prefer. They may opt for sexual exclusivity (monogamous sexual activity), but they may also choose sexual liberty; allowing their partners to engage in sexual intercourse with someone else as it happens in what is now denominated “open relationships” (polygamous sexual activity). Either type of sexual commitment must be observed only as a single component of intimacy in its superordinate level.

And last, but most certainly not least, the consideration of sexual identity cannot be ignored. Individuals experience a validation of self as they join in intimacy. The cognitive factor of intimacy is crucial for individuals, because they affirm their sexuality and reinforce their identity as they begin their own intimacy.<sup>30</sup> The embracement of their sexual identity is fundamental for the establishment of their self-identity in its broader meaning. Therefore, being able to choose one’s same-sex or opposite-sex partner in a legal intimacy endorses and legalizes the individual’s sexuality and lifestyle.

#### *D. The Economic Sphere of Intimacy*

In a world where the capital is necessary to survive, the economic sphere of intimacy is vital. Arranged marriages are the epitome of the economic and class relevance of intimacy. The practice of arranged marriages, where usually parents or other family members decide upon an individual’s (especially women) intimacy partner, has declined in the west. Nonetheless, it is still frequent in Asia, Africa and in the Middle East. Individuals “own” property separately until they engage in intimacy. At that point, the concept of ownership must change because companionship also means sharing time and property. In the legalization of intimacy, the management of

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<sup>30</sup> See Herdt, Gilbert and Robert Kertzner. “*I do, but i can’t: The impact of marriage denial on the mental health and sexual citizenship of lesbians and gay men in the United States*”. *Sexuality Research and Social Policy Journal*. National Sexuality Resource Center (USA). March 2006, Volume 3, Issue 1, pp. 33-49. The authors have done specific research on the mental health and well-being linked to the ability of gay men and women to get married in the U.S.

assets can be determined. For example, marriage in many jurisdictions provides a *community property* or *separate property* modality. These legal mechanisms allow individuals to keep their property or assets secured for one of them, or they may also choose to own their goods and chattels jointly. Individuals in intimacy may also be liable for their partners. When dealing with third parties, being in intimacy could change the types of financial responsibilities a person has, not only for themselves, but for their partners as well.

Moreover, there is a welfare dimension regarding intimacy. Contemporary welfare states in the west grant some sort of benefits to their citizens. These benefits may include social security in the form of medical assistance and pensions. An individual's intimacy or their status of intimacy could determine whether they are entitled to specific welfare benefits or not. For instance, widows and spouses have access to specific compensations arising from a spouse's death or disability. The prerogatives can include a different taxation scheme for individuals depending on their intimacy status.<sup>31</sup> Donations of property between spouses may also have some tax-exempt or tax-reduction advantages.

The legal responsibilities that an intimacy can generate also include alimony. During or after an intimacy, individuals usually have the responsibility to look after each other and, if applicable, their descendants. As a consequence, they will have the financial obligation to support their intimacy partners or to claim that obligation from them. In other words, intimacy can guarantee that nourishment and care will be provided, in some cases, even after the termination of that intimacy.

#### *E. The Constructive Sphere of Intimacy*

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<sup>31</sup> Taxation is a very important issue for many couples. For example in the United States, in the Supreme Court landmark decision *United States v. Windsor, Executor of the Estate of Spyer, et al. No. 12-307. 2013. Decided on June 26, 2013, 570 U.S. \_\_\_ 2013*; the original motivation for the case was tax-related, due to a federal estate-tax exemption that was not being honored in a same-sex marriage estate.

The names of the previous four spheres were almost self-explanatory. The conception of the constructive sphere requires, undoubtedly, a certain degree of abstraction. In the first place, intimacy is the relationship of two individuals; these individuals are the founders and pillars of that intimacy. This research identifies two types of construction of intimacy: a horizontal and a vertical one. A *horizontal intimacy* is that type of intimacy whose constructive sphere includes only two individuals, the founders. A *vertical intimacy* is the one where the intimacy expands through a generation, in other words, when it includes descendants.<sup>32</sup> Neither type of construction is better than the other; they are just morphologically different formations. Foucault talked about the deployment of sexuality, he distinguished two fundamental dimensions: the husband-wife axis and the parents-children axis. He noted: “The family, in its contemporary form, must not be understood as a social, economic, and political structure of alliance that excludes or at least restrains sexuality, that diminishes it as much as possible, preserving only its useful functions. On the contrary, its role is to anchor sexuality and to provide it with a permanent support.”<sup>33</sup> And, “to ensure its reproduction (...the regulated fabrication of children).”<sup>34</sup> It is true that some intimacies in the twenty-first century include children, the vertical ones. However, in the contemporary discourse of intimacy, a horizontal intimacy is just as worthy. What he calls a structure of alliance, the family, also exists in a horizontal intimacy that has chosen not to include descendants.

It is important to implement the concept of agency in intimacy. When two individuals constitute their intimacy, they form a single unit; namely, a family unit. Even without children, individuals increase their capacity, their power, in other words their agency as they begin their intimacy. This intimacy agency they construct is a family. This agency will further or constrain their socialization; the limitations of their agency will be determined by the structure of intimacy they form, owing to the fact that they interact as a family unit and not as isolated individuals. The legal capacity to change last names in intimacy is a legal mechanism of the constructive sphere.

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<sup>32</sup> For further reference on adoption and same-sex couples, read: Tobin, John and Ruth McNair. *Public International Law and the Regulation of Public Spaces: Does the Convention on the Rights of the Child impose an obligation on states to allow gay and lesbian couples to adopt?* *International Journal of Law, Policy and the Family* 23, (2009), Oxford University Press, pp. 110-131.

<sup>33</sup> Foucault, Michel. *The History of Sexuality: An introduction*. Volume 1. New York: Random House, Vintage Books Edition, 1990. p. 108.

<sup>34</sup> *Ibidem*, p. 14.

Feminists are against changing their last names when they get married. If it is only possible to take the husband's last name, but not the wife's, it is certainly unfair. Nonetheless, if the family unit can decide which last name to take, the issue is gender-balanced. The decision to keep one last name for both intimacy partners can actually be interpreted as an asset, inasmuch as the new agency they constitute will be identified by a shared last name. Individuals who keep their *original* last names denote that they still belong to their parents' agency, as a product of their vertical intimacy. Whereas those who opt for the new last name demonstrate they have fully emancipated from their parents, even in their legal identity. Whether changing last names is possible or not, this resolution is also a very emotional one. Horizontal intimacies may become vertical as they include descendants. These descendants may come from different paths. Biological reproduction was certainly the rule in the discourse of sex. The current discourse of intimacy includes new alternatives such as adoption, surrogacy and assisted reproduction. The legalization of these options includes the legal framework around kinship ties and access to reproduction. The subject of inheritance is present in either type of construction of intimacy. However, it becomes more important as the construction expands because the web of connections is multilined.

It is in the State's best interest to legislate on intimacy. The construction of intimacy, after all, builds citizenry *and* citizenship. Pluralism, diversity and other democratic values can come from the very establishment of intimacy. The values an individual learns within an intimacy, be it from a spouse in a horizontal intimacy or from parents in a vertical one, eventually influence the individual's participation in the state as a citizen. This is a constructive element of intimacy. Because families, that is to say, intimacies structure societies. And the democratization of these societies depends on the very democratization of intimacy as well, not only on its internal distribution of justice, but also on the equal access of citizens to intimacy. Immigration is then strictly linked to this subject-matter, the benefits or limitations that an intimate relationship will bring about are very significant. While previous generations used to be more endogamous, contemporary intimacies are much more exogamous ever since the phenomenon of globalization. Immigration provisions are thus related to intimacy because they may affect an individual's right to construct their intimacy. In the past, inter-racial stipulations used to play a bigger role; the

racial controls have now merged into the immigration rhetoric. A foreign citizen's right or impediment to be physically present in a specific country may jeopardize or reduce their constructive capacity and cohesiveness in intimacy. Therefore, immigration regulations fall within the constructive sphere in the legalization of intimacy.

### II.3.2. The Interaction of Spheres

These five domains of intimacy are depicted as spheres because they interact among themselves. They do not have a cause-effect relationship, but rather an interdependent correlation. It can be exemplified while deconstructing a specific issue, e.g. the decision to have children. This decision would fall within the constructive sphere, as the intimacy would change from a horizontal, to a vertical one. Furthermore, individuals could choose to adopt children, to use a surrogate or to have children via sexual intercourse. In this context, the sexual sphere may or may not be involved. The modality to bring descendants into that intimacy – or not – may be guided by moral decisions. So, abortion, biological reproduction or the use of in-vitro fertilization could bring in the moral sphere. The bigger the family, the more financial resources will be necessary. In other words, children also fall within an intimacy's economic sphere. Probably in most cases, the determination to have children involves feelings i.e. is a part of the emotional sphere. Considering the legalization of these spheres, the decision to have children includes legal mechanisms in each sphere: the legal guardianship of these children (emotional); alimony, nourishment and financial support (economic); adoption and available types of assisted reproduction (moral); inheritance and kinship ties (constructive), [de-] criminalization of abortion and constraints regarding biological reproduction (sexual). This example shows the interconnection and dependence of all spheres in specific domains of intimacy.

### II.4. The Structures of Intimacy

Up until now, intimacy has been defined as a close reciprocal relationship of future-oriented companionship with attachment in different private domains. These private domains are the five spheres that have been detailed above. As discussed in the constructive sphere, the two agents of intimacy form an agency. Thus, they are also

that form through which the agency of intimacy will circulate. Consequently, the web of legal connections between the two agents in the five spheres of intimacy constitutes a *Structure of Intimacy*. These structures shape, bound and hold the five spheres of intimacy. The reciprocal association in intimacy requires a mutual understanding of rules and commitments. When intimacy is legalized, these rules become legally binding due to its contractual relationship. Intimacy, however, is much more than a simple commercial contract between two individuals. Hence, structures of intimacy are closely related to, and rely on the law in a broader scope that includes different areas of law. The legalization of the agents' intimacy will have repercussions in a wide range of fields that will affect much more than their mere dyadic relationship. As their intimacy is legalized, the relationship of each individual with others will change, and so will the relationship of both of them – as an item – towards third parties. Therefore, the legal framework around that relationship constitutes and reinforces their legal structure of intimacy. The most important aspect to consider in the structures of intimacy is that they are and represent the body of law in an intimacy. In other words, the role of law, the legality and legally binding cohesion is what configures a given structure of intimacy, and such structures include all five spheres of intimacy as well.

### *Typology of Structures*

Observing different types of legislations around the world in the domain of intimacy, one can identify that they share similarities in terms of their legally binding commitments. As mentioned before, intimacy is a phenomenon that affects people of all cultures, so these regulatory schemes of relationships in different countries or jurisdictions have elements in common. Therefore, the following types of structures group or cluster the most usual forms of legalization of intimacy that are called Structures of Intimacy in this research; namely, marriage (in its different forms), civil unions, and domestic or registered partnerships.

#### II.4.1. Relationships

Partnerships like the boyfriend-girlfriend, boyfriend-boyfriend, and girlfriend-girlfriend bonds are more “informal” constructions of intimacy. They usually precede

a more formal structure and are seen as a precondition or an embryonic stage towards a deeper commitment. Nonetheless, many individuals spend a lifetime experiencing one solid relationship or a series of serious relationships without ever legalizing them. These sorts of relationships have their own rules and customs; indeed, the mutual understanding between partners exists. However, these relationships are amorphous constructions of intimacy whose boundaries are not clearly defined. And most importantly, they are not legally recognized. So, they shall not be considered structures of intimacy in the context that this concept is being used in this research. Giddens claims that "the idea of the 'relationship' emerges as strongly in gay sub-cultures as among the more heterosexual population."<sup>35</sup> Even though heterosexual men and women qualify for marriage, many of them now choose to remain single and exercise their intimacy in unofficial relationships. "Gay women and men have preceded most heterosexuals in developing relationships, in the sense that term has come to assume today when applied to personal life. For they have had to 'get along' without traditionally established frameworks of marriage, in conditions of relative equality between partners,"<sup>36</sup> the author added. Thus, in this context, relationships are forms of intimacy whose framework or structure is not recognized by law. As Giddens has underscored, they are *unofficial*. In other words, they are not legally binding types of intimacy and cannot be considered a structure of intimacy for the comparative purpose of this dissertation.

#### II.4.2. Marriage

Marriage is one of the oldest legal types of intimacy. Discussions on marriage can be found from Socrates, Plato and Aristotle to our contemporaries.<sup>37</sup> Time has changed the interpretations and legalization of marriage. Yet, it is still strongly influenced by religious thought. Christian philosophers and theologians like St. Augustine and St. Thomas Aquinas have made an impact on the discourse of marriage.<sup>38</sup> Notwithstanding, and particularly for the legalization of marriage, it is the *Corpus*

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<sup>35</sup> Giddens, p. 14.

<sup>36</sup> Ibidem, p. 15.

<sup>37</sup> Lacey, Walter K. *The Family in Classical Greece*. New York: Cornell University Press, 1984.

<sup>38</sup> See Augustine, Saint. *Treatises on marriage and other subjects*. Vol. 27. New York: Fathers of the Church, Inc., 1955; and Thomas Aquinas, Saint. *Basic Writings of Saint Thomas Aquinas*. Ed. Anton C. Pegis. USA: Random house, 1945.

*Iuris Civilis* that has contributed the most to the current laws on marriage in the west. The Justinian Codex is by far, the oldest comprehensive body of legalization of intimacy whose influence lasted for almost one thousand years in the Common Era. One of the definitions of marriage, provided in the digest by Modestine, states that:

“Matrimonium est maris et femina, conjunction et consortium, monis vitae, divini et humani juris communication.”<sup>39</sup>

In other words, marriage is the union between a man and a woman in company forever, in reciprocal communication of human and divine interests. This definition shows at least two things; (a) that marriage has been considered as a life-long commitment for centuries, and (b) that Roman law discerned the religious and mundane aspects of marriage. Although the piety and virtuousness of marriage increased over the medieval period, it was not until the 16<sup>th</sup> century that the Catholic Church took over the monopoly of matrimony in the Council of Trent.<sup>40</sup> In the twenty-fourth session, matrimony became the seventh sacrament, and the Church reformed modern marriage by requiring the solemnity of the church, taking over the jurisdiction of marriage, confining sexual activity to matrimony, and banning concubinage and divorce.<sup>41</sup> Over the years, as highlighted by Foucault, “...relations of sex gave rise, in every society, to a *deployment of alliance*: a system of marriage, of fixation and development of kinship ties, of transmission of names and possessions.”<sup>42</sup> What Foucault conceived as a *system* of marriage also has some elements of the structures of intimacy, because he was able to identify the agency of marriage as discourse, whose complexity affects the domains of the spheres of intimacy. This system of marriage has not precisely been a system of justice. The critique of marriage focuses on the gender role distribution. As pointed out by John Stuart Mill in *The Subjection of Women*, “It is not a sign of one’s thinking the boon one offers very attractive, when one allows only Hobson’s choice, ‘that or none.’ And here, I believe, is the clue to the feelings of those men, who have a real antipathy to the equal freedom of women”, he adds, “The conditions which the laws of this and all

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<sup>39</sup> Pacheco Pulido, Guillermo. “*La olvidada enseñanza del derecho romano.*” *Revista Jurídica de la Escuela Libre de Derecho de Puebla*. Year 1. Vol. 1. Number 1, March 1999. p. 60.

<sup>40</sup> *Canons and Decrees of the Council of Trent*. (Translation by Theodore A. Buckley). London: George Routledge and Co., 1851.

<sup>41</sup> *Ibidem*, pp. 176-186.

<sup>42</sup> Foucault (1990), p. 106.

other countries annex to the marriage contract. Marriage being the destination appointed by society for women.”<sup>43</sup> Feminists view marriage as an institution that fosters inequalities, and asymmetry between men and women. For example, Susan Moller Okin claims that the vulnerability of women by marriage begins even before marriage in the anticipation, it continues in the duration of marital life and it continues even after a divorce.<sup>44</sup> Considering the gender-bias disadvantages of marriage, why is marriage as a structure of intimacy still alive? One of the answers is that many people choose marriage as a structure because they have deep religious convictions. In the case of a large majority of the western world, where Mexico is included, religious beliefs are a decisive factor. That is why it is now important to review the Christian doctrine within the bible.

### *A. Biblical Analysis of Marriage*

The purpose of marriage according to the Bible is the interdependence of men and women, to provide companionship, commitment to an exclusive relationship, longtime partnerships, the context for raising children, a covenant, procreative sexual relationship, love and the submission of wives to their husbands. The Bible reads: “That is why a man leaves his father and mother and is united to his wife, and they become one flesh.”<sup>45</sup> This is the idea of cohesiveness and unity in marriage, the interdependence. Companionship is fundamental because “It is not good for the *man* to be alone. I will make a helper suitable for him.”<sup>46</sup> Of course, *women* are that suitable help. The commitment to an exclusive and long-time relationship is formulated as: “Therefore what God has joined together, let no one separate.”<sup>47</sup> Or, until one of the spouses dies, “For example, by law a married woman is bound to her husband as long as he is alive, but if her husband dies, she is released from the law that binds her to him.”<sup>48</sup> Marriage is the incubator of children, “Has not the one God made you? You belong to him in body and spirit. And what does the one God seek? Godly offspring. So be on your guard, and do not be unfaithful to the wife of your

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<sup>43</sup> Mill, John Stuart. *The Subjection of Women*. London, UK: Savill, Edwards and Co. Printers, 1869. pp. 51-53.

<sup>44</sup> Okin, Susan Moller. *Justice, Gender and the Family*. USA: Basic Books Inc., 1989. pp. 134-169.

<sup>45</sup> Genesis 2:24.

<sup>46</sup> Genesis 2:18. See also Genesis 2:20-22; Genesis 3:12; Proverbs 31:10-12.

<sup>47</sup> Matthew 19:6.

<sup>48</sup> Romans 7:2 and 1 Corinthians 7:39.

youth.”<sup>49</sup> “For the unbelieving husband has been sanctified through his wife, and the unbelieving wife has been sanctified through her believing husband. Otherwise your children would be unclean, but as it is, they are holy.”<sup>50</sup> Marriage is perceived as a contract, “You ask, ‘Why?’ It is because the Lord is the witness between you and the wife of your youth. You have been unfaithful to her, though she is your partner, the wife of your marriage *covenant*.”<sup>51</sup> The sexual experience belongs exclusively in marriage, “But if they cannot control themselves, they should marry, for it is better to marry than to burn with passion.”<sup>52</sup> “If a man is found sleeping with another man’s wife, both the man who slept with her and the woman must die. You must purge the evil from Israel. If a man happens to meet in a town a virgin pledged to be married and he sleeps with her, you shall take both of them to the gate of that town and stone them to death—the young woman because she was in a town and did not scream for help, and the man because he violated another man’s wife. You must purge the evil from among you.”<sup>53</sup> Sexual intercourse is then an obligation called spousal or marital debt; “The husband should fulfill his marital duty to his wife, and likewise the wife to her husband. The wife does not have authority over her own body but yields it to her husband. In the same way, the husband does not have authority over his own body but yields it to his wife. Do not deprive each other except perhaps by mutual consent and for a time, so that you may devote yourselves to prayer. Then come together again so that Satan will not tempt you because of your lack of self-control.”<sup>54</sup> The emotional side of marriage is considered, being love a precondition for marriage, “So Jacob served seven years to get Rachel, but they seemed like only a few days to him because of his love for her.”<sup>55</sup> “His heart was drawn to Dinah daughter of Jacob; he loved the young woman and spoke tenderly to her. And Shechem said to his father Hamor, ‘Get me this girl as my wife.’”<sup>56</sup> “Now Saul’s daughter Michal was in love with David, and when they told Saul about it, he was pleased.”<sup>57</sup> The submissive role of women becomes clear: “Wives, submit yourselves to your own husbands as you do to the Lord. For the husband is the head of the wife as Christ is the head of the church, his

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<sup>49</sup> Malachi 2:15.

<sup>50</sup> 1 Corinthians 7:14.

<sup>51</sup> Malachi 2:14, see also Ezekiel 16:8 and Proverbs 2:17.

<sup>52</sup> 1 Corinthians 7:9, see also Genesis 29:21.

<sup>53</sup> Deuteronomy 22:22-24.

<sup>54</sup> 1 Corinthians 7: 3-5.

<sup>55</sup> Genesis 29:20.

<sup>56</sup> Genesis 34: 3-4.

<sup>57</sup> 1 Samuel 18:20.

body, of which he is the Savior. Now as the church submits to Christ, so also wives should submit to their husbands in everything.”<sup>58</sup> Women, allegedly without their own head, are also reproductive machines: “I will make your pains in childbearing very severe; with painful labor you will give birth to children. Your desire will be for your husband, and he will rule over you.”<sup>59</sup> The termination of marriage through a divorce of widowhood was also foreseen, “They said, ‘Moses permitted a man to write a certificate of divorce and send her away.’”<sup>60</sup> “If a man marries a woman who becomes displeasing to him because he finds something indecent about her, and he writes her a certificate of divorce, gives it to her and sends her from his house.”<sup>61</sup>

In the appalling Bible extracts above, what this research has called the spheres of intimacy can be appreciated. Marriage, even in the Bible, has an emotional sphere (love), a moral sphere (gender roles), a sexual sphere (sexual practice), an economic sphere (the wife being the property of the husband and her unpaid labor), and a constructive sphere (procreation).

### *B. Traditional Marriage in Christianity*

Traditional marriage in Christianity is the legal union between a *man* and a *woman*. What is now called traditional marriage is based on the legal idea of matrimony. The word matrimony dates back to the fourteenth century and it arises from the Latin word *matrimonium*,<sup>62</sup> used in Justinian’s Code and in Canonical Law. The set of laws around the structure of marriage may include provisions for adoption, reproduction, abortion, inheritance, legal guardianship, divorce, immigration, property ownership, taxation, social security, and gender-specific access among others. These traditional marriages can be performed via a civil or religious ceremony, depending on the jurisdiction. It is important, though, that the validity of that marriage be effective in the domains detailed above. Although most conservatives claim the origins and “sanctity” of marriage have biblical foundations, it must be taken into account that the Bible also describes other types of marriages and family formations. For example, the

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<sup>58</sup> Ephesians 5:22-24.

<sup>59</sup> Genesis 3:16, see also 1 Peter 3:1-6, Titus 2:4-5, and Colossians 3:18.

<sup>60</sup> Mark 10:4.

<sup>61</sup> Deuteronomy 24:1.

<sup>62</sup> “*Matrimony*”. The Merriam-Webster Dictionary 2013.

levirate marriage, i.e. marrying a brother-in-law, as the story of Tamar and Onan and the marriage of Ruth and Boaz explain.<sup>63</sup> Also, the mandatory marriage of a woman after she has been raped,<sup>64</sup> or the forced marriage of female slaves,<sup>65</sup> including slaves of someone's wife, as the case of Abram and Sarai relates;<sup>66</sup> and female prisoners of war<sup>67</sup> or polygynous marriages like those of Lamech and Solomon.<sup>68</sup> For better or worse, traditional marriage has not embraced these biblical forms of marriage. In the west, traditional marriage is still considered the highest level of intimacy between opposite-sex individuals, and one where sexual activity is expected to be monogamous.

### C. "Same-sex" or "Gay" Marriage

The current trend to add the attributive adjective *same-sex* or *gay* to the word marriage implies that the concept is something different. Nevertheless, same-sex and gay marriage are nothing else but traditional marriage. The only difference is that this type of marriage has opened its access to spouses of the same sex. However, the structure of intimacy as a regulatory scheme of intimacy is the very same. The eighteen developed societies where this type of marriage is currently available countrywide are: The Netherlands<sup>69</sup> (since January 11, 2001), Belgium<sup>70</sup> (since June 1, 2003), Spain<sup>71</sup> (since July 2, 2005), Canada<sup>72</sup> (since July 20, 2005), South Africa<sup>73</sup> (since November 30, 2006), Norway<sup>74</sup> (since January 1, 2009), Sweden<sup>75</sup> (since May 1, 2009), Portugal<sup>76</sup> (since June 5, 2010), Iceland<sup>77</sup> (since June 27, 2010), and

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<sup>63</sup> Genesis 38:6-10 and Ruth 4.

<sup>64</sup> Deuteronomy 22:28-29.

<sup>65</sup> Exodus 21:4.

<sup>66</sup> Genesis 16.

<sup>67</sup> Deuteronomy 21:11-14.

<sup>68</sup> Genesis 4:19 and 1 Kings 11:3, Solomon had 700 wives of royal birth and 300 concubines.

<sup>69</sup> *Staatsblad van het Koninkrijk der Nederlanden* 2001, Number 9 (11 January). Official Journal of the Kingdom of the Netherlands.

<sup>70</sup> *Moniteur Belge* (Official Gazette) on Feb 28, 2003 ed. 3, pp. 9880-9883.

<sup>71</sup> Law 13/2005 of July 1, published on the Official Journal of Spain, BOE Number 157 (July 2) pp. 23632-23634.

<sup>72</sup> Bill C-38, the Civil Marriage Act. S.C. 2005, c. 33, §§ 2, 4.

<sup>73</sup> After the Constitutional Court Decision on *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (December 1, 2005).

<sup>74</sup> *Norsk Lysningsblad*. Norwegian Official Journal. The Marriage Act Number 47 of July 4, 1991. Amended by the Act Number 53 of June 27, 2008.

<sup>75</sup> *Äktenskapsfrågor* (Government Bill) 2008/09:80. December 11, 2008.

<sup>76</sup> Law 9/2010. *Diário da República* (Official Journal), 1.a série—N.o 105—May 31, 2010, p.1853.

Argentina<sup>78</sup> (since July 22, 2010), Denmark<sup>79</sup> (since June 12, 2012), Brazil<sup>80</sup> (since May 15, 2013), France<sup>81</sup> (since May 17, 2013), Uruguay<sup>82</sup> (Since August 1, 2013), New Zealand<sup>83</sup> (since August 19, 2013), and the United Kingdom<sup>84</sup> (England and Wales), where the bill has Royal Assent already, but will not come into effect until mid-2014. Moreover, this type of marriage is locally available in some regional jurisdictions within Mexico (Mexico City and Quintana Roo), and within the United States (California, Connecticut, D.C., Delaware, Iowa, Massachusetts, Maryland, Maine, Minnesota, New Hampshire, New Mexico, New York, Rhode Island, Washington and Vermont). Mexico and the U.S. have limited jurisdictions to perform the legal act of marriage; however, these marriages are valid in the whole country.

The countries listed above are jurisdictions that have basically opened the access to same-sex couples, with higher court decisions, amending the wording of legislations with gender-neutral language or changing the definition of marriage. Nonetheless, the structure of intimacy and the components of marriage are still the same as traditional marriage. In other words, same-sex marriage is a relabeled structure that has not been transformed in its essence. Furthermore, it must be considered that there is also a powerful trend to ban same-sex marriage. As pointed out by Ian Curry-Sumner:

“At the same time, alongside the trend towards recognition, it is nonetheless important to be aware of an opposing trend towards prohibition. In 2011 constitutional bans to same-sex marriage have been proposed in four jurisdictions around the world (Chile, Hungary, Jamaica and Zambia) thus far. Currently at least 25 jurisdictions worldwide provide for the constitutional limitation of marriage to one man and one woman. Cuba (1976), Burkina Faso

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<sup>77</sup> *Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög)*. Law on amendments to the marriage and other laws and repealed the Act on registered partnership (one marriage). Act 65/2010, entered into force June 27, 2010.

<sup>78</sup> Decree 1054 that modifies Law 26618 on Civil Matrimony. Published on the Official Journal of Argentina on July 22, 2010.

<sup>79</sup> *Lov om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab*. Law amending the Law on Marriage and Divorce, law on the legal effects of marriage, and repealing the Act on registered partnerships. Act 532, published on June 13, 2012.

<sup>80</sup> *Resolução N° 175, de 14 de maio de 2013. Diário da Justiça. Edição n° 89/2013*. Published on May 15, 2013.

<sup>81</sup> *Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*. Published on the *Journal officiel de la République française* N°0121 May 28, 2013, p. 8733.

<sup>82</sup> Amendment to Art. 83, Civil Code. Law 19.075, published on May 3, 2013.

<sup>83</sup> Marriage (Definition of Marriage) Amendment Act 2013 (13/20). Royal Assent: April 19, 2013.

<sup>84</sup> Marriage (Same Sex Couples) Act 2013 (c. 30), Royal Assent July 17, 2013.

(1991), Bulgaria (1991), Vietnam (1992), Paraguay (1992), Lithuania (1992), Cambodia (1993), Belarus (1994), Moldova (1994), Ukraine (1996), Poland (1997), Venezuela (1999), Rwanda (2003), Burundi (2005), Honduras (2005), Uganda (2005), Latvia (2005), Democratic Republic of Congo (2005), Serbia (2006), Montenegro (2007), Ecuador (2008), Bolivia (2009), Cayman Islands (2009), Dominican Republic (2010) and Kenya (2010).<sup>85</sup>

In the analysis of same-sex relationships in Europe, Curry-Sumner also identifies three trends in European regulatory schemes, (1) allowing same-sex couples to marry or creating institutions akin to marriage, (2) formalizing relationships through the registration of their partnerships, and (3) granting rights after a given period of cohabitation.<sup>86</sup>

#### *D. Common-law Marriage*

Some common-law jurisdictions<sup>87</sup> have admitted the legal figure of marriage even in the absence of a written contract. For example, the State of Colorado in the United States defines common law marriage “as a marriage not otherwise prohibited by law between a man and a woman who are at least eighteen years old that is not based upon a license, ceremony, or any other legal formality but upon the couple's agreement to have a marital relationship. Most states recognizing common law marriage require that the couple intend to have a marital relationship, live together, and have a reputation of being husband and wife.”<sup>88</sup> The requirements for the recognition of a common-law marriage vary from state to state, but they all require that the minimum conditions for marriage be met. The *more uxorio* practice (as if they were husband and wife) is *sine qua non*. The legitimation of a common-law marriage represents the official acknowledgment of that intimacy *a posteriori* in the same terms as marriage, meaning that the state has recognized their marital behavior even if they did not sign a marriage license. Yet, once it has been legitimized through a court or a similar

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<sup>85</sup> Curry-Sumner, Ian. “*Same-Sex Relationships in Europe: Trends towards tolerance?*” *Legal perspectives on Gender and Sexuality*. The Amsterdam Law Forum. Vol 3:2. Netherlands: VU University Amsterdam, 2011. p. 48.

<sup>86</sup> *Ibidem*, pp. 52-53. See also: Curry-Sumner, Ian. “*A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe*.” *Legal recognition of same-sex relationships in Europe*. Boele-Woelki, Fuchs (Ed.) Second Edition. Cambridge: Intersentia Publishing Ltd., 2012. pp. 71-90.

<sup>87</sup> For instance, in the United States it is possible in the States of Alabama, Colorado, D.C., Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas and Utah.

<sup>88</sup> “*Common Law Marriage*”. Law Summaries. Office of Legislative Legal Services. State of Colorado. August 24, 2011.

procedure, the structure of intimacy as far as rights and obligations is still the same: Traditional marriage.

### *E. Putative Marriage*

Jurists describe this type of marriage as one that has been contracted in good faith by at least one of the spouses, ignoring facts that constitute an impediment for that marriage to be celebrated.<sup>89</sup> The recognition of this type of marriage is only available in certain jurisdictions and in canonical law (*matrimonium putativum*).<sup>90</sup> In order for them to be validated, the putative marriage must meet three conditions: *bona fide* (good faith) by either party, the marriage must have been solemnly celebrated and it must have been considered lawful by one of the parties. For example, a woman marries a man who is already married in another country to another woman. When she finds out, her marriage would be declared annulled because being married in an impediment to sign into a new marriage. Her marriage could then be declared a putative marriage so that the effects of her marriage are still valid, despite the condition of bigamy, owing to the fact that she acted in good faith when she married the man. Once the putative marriage has been approved by a legal system, the rights of that marriage remain effective. That is to say, the structure of (traditional) marriage is acknowledged and the rights and obligations become putative; in other words, mandatory.

### II.4.3. Civil Unions

First of all, it should be admitted that marriage is also a civil union. Marriage is a *civil* union because it is the union of two *citizens*. In secular states, even if the marriage ceremony is a religious one, the validity of that marriage union is granted due to the civil recognition of that specific religion or Church, but not by the religious vow alone. Thus, religious ministers act as mere legitimate notaries exercising a subsidiary public duty and endorsing a public act as witnesses. Nowadays, the term civil union is used to denominate a structure of intimacy that is not religious, and also, that is not as

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<sup>89</sup> "Putative marriage." A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. 1856.

<sup>90</sup> See Gasparri, *De Matrimonio*, I, nn. 47, 1375 (3rd ed., Paris, 1904) and Rosset, *De Sacr. Matr.*, n. 17.

strong as marriage. Usually, these unions cannot be legalized otherwise but civilly. Civil unions generally have some sort of judicial legitimation, be it though a court, a civil registry or a similar ratification by the state, and the partners of a civil union cannot claim all the benefits a married couple would. Hence, civil unions are a second-class type of intimacy whose structure is also recognized. Although civil unions are typically associated with same-sex partners, many of them are available for opposite-sex partners as well. The defunct *Registreret Partnerskab*<sup>91</sup> in Denmark, repealed by same-sex marriage, the *Lebenspartnerschaft* in Germany,<sup>92</sup> the *Civil Partnerships* in the United Kingdom,<sup>93</sup> and the *Pact Civil de Solidarité* (PACS) in France<sup>94</sup> are prominent examples of civil unions that are similar to marriage, but are not. Kees Waaldijk, the Dutch member of the European Commission on Sexual Orientation Law, has pointed out some of the problems with the international recognition of civil unions like the PACS, particularly in the harmonization of rights and obligations of the individuals who form that intimacy when they interact at the international level.<sup>95</sup> In his classification of same-sex types of intimacy, he distinguishes three types: Civil marriage, informal cohabitation, and registered partnerships. Although this classification encompasses most types of intimacy according to international standards, for the purposes of this research, civil unions must be discerned from domestic or registered partnerships. Primarily, because civil unions involve more spheres of intimacy, whereas domestic or registered partnerships focus for the most part on cohabitation. Therefore, in the analysis of these forms of intimacy as legal structures it is important to detect the nuances.

#### II.4.4. Domestic or Registered Partnerships

The terms Domestic Partnerships, Registered Partnerships, Civil Partnerships and even Civil Unions are sometimes used as synonyms. As mentioned before, civil

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<sup>91</sup> Registered Partnerships. Denmark, Act on Registered Partnerships No. 372 of June 7, 1989. Repealed by Act 532 of June 12, 2012.

<sup>92</sup> Life Partnerships. *Gesetz über die Eingetragene Lebenspartnerschaft* of February 16, 2001.

<sup>93</sup> “The Civil Partnership Act 2004” (Commencement No.2) Order 2005 No. 3175 (C.136). *The Stationery Office Limited* under the authority and superintendence of Carol Tullo, Controller of Her Majesty’s Stationery Office and Queen’s Printer of Acts of Parliament.

<sup>94</sup> Civil Pacts of Solidarity. Decree No. 2006-1806 of December 23, 2006. *Décret No. 2006-1806 du 23 décembre 2006 relatif à la déclaration, la modification, la dissolution et la publicité du pacte civil de solidarité.*

<sup>95</sup> “Same-Sex Partnership, International Protection.” Max Planck Encyclopedia of Public International Law, 2010. Sec. 2, par. 27 et sqq.

unions have contractual obligations that are recognized by judicial systems. Domestic or Registered Partnerships, however, are a downgraded structure of intimacy. In contrast to the other structures analyzed above, these partnerships are more basic. It could be said that the difference between Civil Unions and Domestic or Registered Partnerships is that the former are structures of intimacy with stronger legal consequences whereas the latter focus rather on the registration of cohabitation. Domestic partnerships are usually local-level registrations used for basic procedures such as lease agreements and access to privacy. Many countries that have domestic partnerships do not even recognize them in the whole country, and they are just valid in the jurisdiction where they were registered. For instance, the Spanish Civil Code does not recognize domestic partnerships. However, autonomous communities like Catalonia<sup>96</sup> and Aragon<sup>97</sup> have issued independent legislations that recognize stable partnerships. Domestic and Registered partnerships are weak structures of intimacy that provide options for registration of a *de facto* cohabitation. These partnerships are normally registered at City Halls or local government offices; they grant minimal benefits and generate simple obligations, like the payment of a lease.

## II.5. The Discourse of Intimacy

Intimacies are an important part of the social fabric. History shows that societies have evolved differently, but they all have included particular forms of unions, values, religions, economies, family ties, sexuality, procreation, and domesticity. Considering the role of intimacy in history and in additional realms beyond sexuality, it can be said that intimacy has a permeating effect on surrounding issues. Intimacy creates knowledge and power and this relationship has an impact on domains of life that go beyond private. That is to say, observing a specific science like architecture, the influence of intimacy can also be identified. Houses are built in such a way that they accommodate expected social interactions of the family unit, internal and external. The master bedroom represents the nest for sexuality, while the distance between the main bedroom and additional rooms for children are meant to secure the disciplinary mechanisms established by parents. Therefore, intimacy has a discursive behavior that

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<sup>96</sup> Law 10/1998, of July 15, regarding domestic partnerships (*uniones estables de pareja*). Valid until January 1, 2011, when they were incorporated into the Catalan Civil Code.

<sup>97</sup> Law 6/1999, of March 26, regarding stable unmarried couples. Valid until April 23, 2011, when it was incorporated into the Civil Code of Aragon.

allows the formation of objects as it deploys its impact onto a broader scope. Taking into account Michel Foucault's discourse theory, discourse in this dissertation should not be interpreted as a synonym for speech; rather, it shall be interpreted as a transversal phenomenon:

“Whenever one can describe, between a number of statements, such a *system of dispersion*, whenever, between objects, types of statement, concepts, or thematic choices, one can define a regularity (an order, correlations, positions and functionings, transformations), we will say, for the sake of convenience, that we are dealing with a *discursive formation* - thus avoiding words that are already overladen with conditions and consequences, and in any case inadequate to the task of designating such a dispersion, such as 'science', 'ideology', 'theory', or 'domain of objectivity'. The conditions to which the elements of this division (objects, mode of statement, concepts, thematic choices) are subjected we shall call the *rules of formation*. The rules of formation are conditions of existence (but also of coexistence, maintenance, modification, and disappearance) in a given discursive division.”<sup>98</sup>

Up until now, the system of dispersion of intimacy has been a system of marriage. Nevertheless, with the evolution and democratization of societies and human rights, intimacy is experiencing a transformation. This transformation includes changes in the current regulatory schemes of intimacy and the creation of new structures of intimacy. The discovery of the discursive behavior of intimacy leads this research to the inclusion of a dimension of discourse in the study of the legalization of intimacy, using Foucault's approach, in order to understand why the State legalizes the spheres of intimacy.

### II.5.1. Foucault and Sexuality

Paul Johnson argues that “Discourse, for Foucault, is both productive and constraining of sexuality: it is the mode by which sexuality is conceived across a proliferating number of sites – as a ‘scientific’ object to be studied and as a set of subjects to be scrutinized – and the mechanism that delimits the parameters to how it

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<sup>98</sup> Foucault, Michel. *The Archeology of Knowledge and The Discourse on Language*. New York: Pantheon Books, Random House, 1972. p. 38.

is conceptualized and understood.”<sup>99</sup> The approach to intimacy in this research, is therefore within the discursive analysis of the power of sexuality as both productive and constraining of intimacy. Michel Foucault published a compelling study on *The History of Sexuality*.<sup>100</sup> He analyzes the influence of sex as a means of power. Foucault observed that towards the beginning of the eighteenth century there emerged a political, economic, and technical incitement to talk about sex,<sup>101</sup> resulting in the transformation of sex into discourse. Claiming that the use of sex (or sexuality) by modern institutions was an instrument of power, he developed what he called: The Repressive Hypothesis. An imperative was established in the incitement to discourse it fostered: “Not only will you confess to acts contravening the law, but you will seek to transform your desire, your every desire, into discourse.”<sup>102</sup> Sex became then a *police* matter, he argues, not the repression of disorder, but an ordered maximization of collective and individual forces.<sup>103</sup> The relationship between power and population lead states to regulate on sexual behavior. Therefore, “it was necessary to analyze the birthrate, the age of marriage, the legitimate and illegitimate births, the precocity and frequency of sexual relations, the ways of making them fertile or sterile, the effects of unmarried life or of the prohibitions, the impact of contraceptive practices.”<sup>104</sup> Because a country’s richness and power depended on the number and uprightness of its citizens, on its marriage rules and family organization, but also on the manner in which each individual made use of its sex. Thus, in the relationship between the state and the individual, sex became an issue, a public one.<sup>105</sup> This peculiar imperialism, that compelled everyone to transform their sexuality into a perpetual discourse, institutionalized, extracted and distributed the sexual discourse in the areas of economy, pedagogy, medicine and justice.<sup>106</sup> The transformation of sex into discourse then revolved around the strict economy of reproduction, banishing casual pleasures, reducing and excluding practices whose object was not procreation.<sup>107</sup> Foucault

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<sup>99</sup> Johnson, Paul. ‘An essentially private Manifestation of Human Personality’: *Constructions of Homosexuality in the European Court of Human Rights*. Human Rights Law Review (Oxford University Press), 10:1 (2010), pp. 71.

<sup>100</sup> Foucault, Michel. *The history of sexuality*. New York: Random House, Vintage Books Edition, March 1990.

<sup>101</sup> Ibidem, p. 23.

<sup>102</sup> Ibidem, p. 21.

<sup>103</sup> Ibidem, p. 24.

<sup>104</sup> Ibidem, p. 25.

<sup>105</sup> Ibidem, p. 26.

<sup>106</sup> Ibidem, p. 33.

<sup>107</sup> Ibidem, p. 36.

noticed that until the eighteenth century; Canonical law, Christian pastoral, and Civil Law, “they were all centered on matrimonial relations: the marital obligation, the ability to fulfill it, the manner in which one complied with it, the requirements and violence that accompanied it...its fecundity or the way one went about marking it sterile...the marriage relation was the most intense focus of constraints...it was under constant surveillance.”<sup>108</sup> The west created two great systems for governing sex: The law of marriage and the order of desires.<sup>109</sup> According to Foucault, it was in this discursive context that the nineteenth-century homosexual became a personage, when the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized not only as a type of sexual relations but also as a quality of sexual sensibility, a certain way of inverting the masculine and feminine in oneself. “Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.”<sup>110</sup> And, this form of sexuality or newfound species was certainly not reproductive.

#### II.5.2. From a *Discourse of Sex* towards a *Discourse of Intimacy*

On May 17, 1990, the General Assembly of the World Health Organization (WHO) removed homosexuality from its list of mental disorders.<sup>111</sup> This significant event should be interpreted not as a vindication of homosexuality, but rather as the endorsement and acknowledgment of different sexualities beyond heterosexuality. Up until this point, the discourse was focused on the sexual practice: Heterosexual practices were encouraged and protected, and all other forms of sexual experiences were hindered. The discourse of sexuality was then centered on its most basic element, the sexual practice or sexual behavior. Sexual practices that protected heterosexual life and masculinity were secured with law-enforcement and the criminalization of

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<sup>108</sup> Ibidem, p. 37.

<sup>109</sup> Ibidem, p. 39.

<sup>110</sup> Foucault marks Carl Westphal’s article “Contrary sexual sensations” of 1870 as the date of birth. (Carl Westphal, *Archiv für Neurologie*, 1870). Ibidem, p. 43.

<sup>111</sup> Official Records WHA43/1990/REC/1. *Handbook of Resolutions and Decisions of the World Health Assembly and the Executive Board*. Volume III. Third Edition. (1985-1992) 38<sup>th</sup> to 45<sup>th</sup> World Health Assemblies 75<sup>th</sup> to 90<sup>th</sup> sessions of the Executive Board. Geneva: World Health Organization, 1993.

clashing acts like sodomy. Nevertheless, heterosexuals were also affected by this discourse of sex; for instance, the entire discourse around abortion (legal, moral and clinical discourse) sheltered the [hetero]sexual practice with its reproductive aspiration. As Anthony Giddens has claimed, even masturbation has come out as open as homosexuality.<sup>112</sup> Hence, removing homosexuality from a compendium of mental illnesses meant that the sexual experience and other sexual conducts at large were admitted in the global consensus.

Western societies are now moving away from a discourse of sex and evolving towards a broader discourse, i.e. the Discourse of Intimacy, from the stigmatization of non-genital or rather non-phallic sex, the criminalization of sexual practices (such as sodomy) and non-reproductive practices (such as abortion) towards the embracement of other forms of intimacy, which include homosexual intimacy. This discourse is shifting towards the defense of intimacies (in plural) as gender-equality is mainstreamed in the west. The sexuality of the individual loses power as the intimacy of individuals together as agency becomes more and more relevant every day. The WHO opened the path for a new variety of intimacies that have dimmed the ideological hegemony of heterosexuality and its masculine intimacy. Heterosexuality is no longer a Hobson's choice.<sup>113</sup> The earlier discourse of sex was the forerunner of the discourse of intimacy. If these discourses were to be identified in the hierarchy of intimacy,<sup>114</sup> the discourse of sex now lies at the subordinate level of the wider discourse of intimacy. Fundamentally, the discourse of sex was one of sexual behavior, whereas the contemporary discourse of intimacy at the superordinate level now includes intimate relationships. The discourse of sex has merged into a fuller discourse of intimacy, which encompasses sexuality but also other domains like assisted reproduction, surrogacy, adoption, marriage, and legal guardianship, among other derivative elements. Foucault stated that "the deployment of sexuality established one of its most essential operating principles: the desire for sex – the desire to have it, to have access to it, to discover it, to liberate it, to articulate it in discourse, to formulate it in truth. It constitutes 'sex' itself as something desirable."<sup>115</sup> Nowadays, this very desire is a desire for intimacy. For sex by itself does not suffice.

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<sup>112</sup> Giddens, p.15.

<sup>113</sup> Hobson's choice: That or none.

<sup>114</sup> See figure in II.2.

<sup>115</sup> Foucault (1990), p. 107.

The present discourse contemplates intimacy, the desire to have it, to have access to it, to discover it, and to liberate it. Intimacy in its comprehensive and all-embracing connotation, and not sexual behavior *per se*, is the object of desire. Giddens has also noted: "...the emergence of what I call plastic sexuality is crucial to the emancipation implicit in the pure relationship, as well as to women's claim to sexual pleasure. Plastic sexuality is decentered sexuality, freed from the needs of reproduction...it becomes further developed as a result of the spread of modern contraception and new reproductive technologies...it frees sexuality from, the rule of the phallus, from the overweening importance of male sexual experience."<sup>116</sup> What Giddens has named plastic sexuality and pure relationships are now a part of the discourse of intimacy.

The relations of power perceived by Foucault were also "*juridico-discursive*." He defined this as the conception that governs the thematics of repression as well as the theory of the law as constitutive of desire.<sup>117</sup> This juridico-discursive relation is exceptionally important in the study of the legalization of intimacy. Because sex became a public issue in the discourse of sex, and as a consequence, intimacy is a public issue in the discourse of intimacy nowadays. This public issue prevails in the juridico-discursive relation of power through which the state legislates and legalizes (or illegalizes) intimacy. In his analysis of discourse, the French philosopher adds: "We must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable...we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that come into play in various strategies."<sup>118</sup> This multiplicity can be perceived in the discourse of intimacy. Giddens has observed that "...the term 'perversion' itself has now more or less completely disappeared from clinical psychiatry, and the aversion, felt by many towards homosexuality no longer received substantial support from the medical profession."<sup>119</sup> Nevertheless, while the clinical discourse against homosexual practices has diminished its value after the WHO milestone, it still persists in the conservative social psyche and has barely morphed in the religious discourses. Furthermore, the progress in technological development has incorporated the

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<sup>116</sup> Giddens, p. 2.

<sup>117</sup> Foucault (1990), p. 82.

<sup>118</sup> Ibidem, p.100.

<sup>119</sup> Giddens, pp.13-14.

discourse of intimacy, recognizing its many forms. Nonetheless, the anachronic remnant elements of the discourse of sex find a way to coexist.<sup>120</sup> Also, as the support for abortion has spread out, the discourse of sex has weakened in one of its pillars: the goal of reproduction. The imperative of the State is no longer to reproduce in order to be more powerful with a larger population. On the contrary, in this day and age after the impact of the baby boom generation, the discourse of intimacy is more environment-friendly inasmuch as it includes – among other issues – the debate on Planned Parenthood and alternatives to reproduction.

Therefore, it is within this juridico-discursive context that intimacy must be analyzed. The current discourse of intimacy can be appreciated while the discursive elements are examined separately. The legalization of intimacy is also a legalization of the different discourses that concern – or overlap with – intimacy. This multiplicity of discourses, these interdependent components, these reciprocal constitutions of desire and their interaction, configure the spheres of intimacy.

## II.6. Conclusion

This introduction to the question of intimacy has provided a working definition of intimacy for this dissertation. The definition of intimacy has been discussed in such a way that it should be easy to identify the meaning of the term in this research, despite its many connotations. The broader, superordinate sense of this concept will be used in a comprehensive manner. It has been established that intimacy is a close reciprocal relationship of future-oriented companionship with attachment in different private domains. These private domains have been called: the spheres of intimacy. These spheres interact among themselves and circulate within a specific constitution that has been denominated structure of intimacy. While analyzing Foucault's perspective on the history of sexuality, the attention has been drawn to the relationship between sexuality and power that he called the Repressive Hypothesis.<sup>121</sup> Along with the ideas

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<sup>120</sup> For instance, Apple Inc. recently removed the application "GayCure" from its application store. This application supposedly "helped" homosexuals to become heterosexual. See Bosker, Bianca. "Apple Under Fire For Approving 'Gay Cure' iPhone App From Exodus International". *The Huffington Post*. May 25, 2011.

<sup>121</sup> Foucault (1990), pp. 21 et sqq.

presented by Giddens in his read on the transformation of intimacy,<sup>122</sup> it becomes clear that sexuality and intimacy have been changing since the last decade of the twentieth century. It was argued how these developments constitute an evolution, where the discourse of sex shifting towards a wider discourse of intimacy. In this discourse of intimacy, the discourse of sex is a subordinate component. And this generation might be the missing link in this evolution process. As the dominant heterosexual discourse has lost some of its power, this new phase in the progress of societies in the western world has embraced new forms of intimacy.

The legalization of intimacy will be analyzed from a juridico-discursive perspective, as defined by Foucault, and considering the fact that the law forms structures of intimacy through the legalization of the elements in each of the spheres of intimacy. Although the discourse of intimacy encompasses many domains, what is important for this dissertation is the *legal* discourse of intimacy, because the scope of this study is not intimacy in general, rather, its legalization. This legalization includes all the collateral legislation that has an effect on the five spheres of intimacy. Ultimately, laws that affect one of the spheres consequently influence intimacy as a whole. It has been demonstrated how the emotional components of intimacy can also be materialized, like legal guardianship. Moral ideas are merged into intimacy as well. The sexual sphere, which used to have a pivotal personality in intimacy, is now just one more factor in terms of sexual practice, preference and identity. The reproductive goal of intimacy has been debated in the constructive sphere. It has been described how intimacies can be either horizontal or vertical, having equal value in societies. Intimacies in either form constitute an agency that builds citizenship. Immigration and intimacy have a connection that is also regulated by the state. As mentioned before, democratic values can come from the mere establishment of intimacy and the application of justice in intimacy. This chapter has also presented different types of structures of intimacy. Namely: relationships, marriage, civil unions, and domestic or registered partnerships. The biblical analysis of marriage has provided a sample of ideas that can still be identified in current traditional marriages. These regulatory schemes show how intimacy can be legalized differently.

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<sup>122</sup> Giddens, Anthony. *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies*. Cambridge, UK: Polity Press, 1992.

Now, the concept of intimacy has been understood, the discourse of intimacy has been discussed, the spheres of intimacy have been developed and the structures of intimacy have been classified. Therefore, it will be much easier to understand the legalization of intimacy. And, the best method to do so is by defragmenting the elements of intimacy in a case study. Thus, the next chapter will center specifically on the evolution of legal intimacy in Mexico. That is to say, the chapter will encompass the four structures of intimacy in Mexico, identifying all five spheres of intimacy in each of them. As these ideas are represented and materialized in the following chapter, the definitions introduced here in an abstract manner will be perceived more concretely within the specific context of Mexican law.

### III. LAW IN CONTEXT: THE EVOLUTION OF LEGAL INTIMACY IN MEXICO

As discussed in the previous chapter, intimacy can be embodied in different structures; the law creates a possibility to recognize an intimacy by enacting legislations that handle issues of intimacy, in the form of marriage, or some sort of similar civil union. These sets of provisions configure the structures of intimacy. Now, this chapter will appraise the current available options in Mexico, focusing particularly on the material aspects of such structures. This chapter is composed of three sections: The first one will describe the legally recognized types of intimacy in Mexico, as they are interpreted by Mexican law, the second one will review relevant court cases and decisions regarding these forms of intimacy, and the third section will discuss the significance of international law. This chapter explores predominantly the legal circumstances as they are and not as they should be. For the most part, this will provide an insight into this specific area of Family Law. The spheres of intimacy introduced in the previous chapter will be more clearly appreciated in this chapter as they are identified in every form of intimacy in Mexican law. The analysis of the jurisprudence in this chapter is limited to the cases that affect particular administrative, procedural and jurisdictional conflicts. The scrutiny of jurisprudence from a human rights perspective will be later developed in Chapter IV. Certain events of Mexico's legal history have been briefly included, only in order to contextualize the current legal reality.

#### III.1. The Mexican Legal System

Since the Constitution of 1857, Mexico has been declared a secular state.<sup>1</sup> Relationships between individuals, such as marriage, can only be formalized through the Civil Code and not through religious ministers. The constitutional reform of September 25, 1873 stated in the second provision that “Matrimony is a civil contract. This and other acts of civil status of a person are of the exclusive competency of officers and authorities of the civil order, in the terms established by law, and will

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<sup>1</sup> Zertuche Muñoz, Fernando. “*El Congreso Constituyente de 1856-1857: El decenio de su entorno.*” In Valadéz, Diego; Carbonell, Miguel. *El proceso constituyente mexicano: a 150 años de la Constitución de 1857 y 90 de la Constitución de 1917.* Mexico: UNAM, 2007. pp. 845-868.

have the effect and validity that they grant them”.<sup>2</sup> This constitutional amendment embodied the essence of the previous Law on Civil Matrimony and the Organic Law of the Civil Registry promulgated by Benito Juarez in 1859.

There are four different types of legal intimacies in Mexico: Matrimony, Concubinage, Cohabitation Partnerships and Civil Pacts of Solidarity. The first two forms are recognized throughout the country at a Federal level, whereas the last two are only recognized locally. Recently in summer 2013, the States of Colima and Oaxaca started to take action to allow same-sex civil unions and marriage respectively. These cases will not be discussed in this chapter, because they are still in development. Also, because they will not create a new or different structure of intimacy, they will be either civil unions or marriage without gender-bias access restrictions. The analysis of these four types of contract detailed above aims to review the material aspects in each of them, and it will be sufficient to identify the differences among them. It has been determined how an intimacy has at least five spheres: the Emotional, Moral, Sexual, Economic and Constructive Spheres. These five domains of intimacy will be identified in the four structures of legal intimacy as a lens of examination. That is to say, the portrayal of these structures will test the five spheres in all four of them. Moreover, a comparison and contrast of these four structures will be included at the end of the chapter. Mexico City has been a pioneer in many developments in Mexico’s legal system. The recognition of intimacy and its legalization has certainly been one of Mexico City’s achievements. The court cases that will be analyzed in this chapter demonstrate the liberal trends in the legislative agenda in the city. Also, they manifest the feud between the state and federal systems. The different forms of intimacy that Mexico City has legalized have catalyzed the evolution of the legalization of intimacy in the country as a whole. Furthermore, private international law and public international law will be considered in the section of international law analysis. Intimacies celebrated abroad can be harmonized into the Mexican legal system. The registration, validity and termination of such intimacies will be discussed within the context of the Supreme Court jurisprudence. The relationship between

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<sup>2</sup> The amendment was promoted by President Sebastián Lerdo de Tejada. “*Decreto que incorpora las Leyes de Reforma a la Constitución de 1857. 25 de septiembre de 1873.*” Mexican Parliamentary Encyclopedia. Series III. Vol. 1. Num. 2. Mexico: Chamber of Deputies, 2007. p. 1186.

foreign citizens, foreign intimacies, comparative law and Mexican law will be detailed in this section also.

### III.1.1. The Origin of Matrimonial Law

The types of recognized intimacy have not changed much since the first Law on Civil Matrimony (LCM) in 1859. When religious ceremonies were recognized by law before 1859, priests defined the obligations and duties of future spouses according to their beliefs: Catholicism, and Canonical Law. With the secularization of intimacy, the fifteenth article of the LCM outlined the commitments of the civil contract of matrimony in the iconic Epistle of Melchor Ocampo:<sup>3</sup>

“...This is the only *moral* way to found a family, to preserve the species and to integrate the imperfections of an individual, who cannot reach the perfection of mankind by himself...The individual does not exist in a single person, but rather in the spousal duality.... Spouses must be and will be *sacred* to one another, even more than for themselves.”

“...The *man*, whose sexual endowments are mainly courage and strength, must give the woman protection, food and direction, treating her always as the most delicate, most sensible and finest part of himself, and with the magnanimity and generous benevolence, that the strong owe the weak, essentially when the latter surrenders to the former, and for the society he has been entrusted with.”

“...The *woman*, whose sexual endowments are mainly abnegation, beauty, compassion, wit and tenderness, must give and will give her husband, obedience, joy, assistance, sympathy and advice, treating him always with the veneration that we owe those who support and defend us, and with the delicacy of that who does not want to exasperate the brusque, irritable and hard part of herself, they owe themselves and will have respect, deference, fidelity, trust and tenderness for one another.”

“...Society *blesses*, considers and praises good parents for the great good that they do by giving good and responsible citizens, and it censures and repudiates those who through their abandonment, misunderstood care, or bad example, corrode the *sacred* deposit that nature entrusted them with by granting them such children.”<sup>4</sup>

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<sup>3</sup> Melchor Ocampo drafted the Laws of Reform, including the LCM, along with President Benito Juarez. He has been given credit for the addition of this epistle in Art. 15. and is widely recognized as the “Melchor Ocampo Epistle”. “*Ley de Matrimonio Civil. 23 de julio de 1859.*” Mexican Parliamentary Encyclopedia. Series III. Vol. 1. Num. 2. Mexico: Chamber of Deputies, 2007. pp.931-934.

<sup>4</sup> Ibidem. Law on Civil Matrimony, 1859. Literal translation of Art. 15. The original text in Spanish: “*Artículo 15.- El día designado para celebrar el matrimonio ocurrirán los interesados al encargado del registro civil, y éste, asociado del alcalde del lugar y dos testigos más por parte de los contrayentes, preguntará a cada uno de ellos, expresándolo por su nombre, si es su voluntad unirse en matrimonio*”

Through the LCM, Melchor Ocampo unintentionally created the first legal definition of Mexican intimacy. Despite the secularization of matrimony, this civil contract was irrefutably laden with the catholic moral philosophy. The content and rhetoric of the epistle was at least sexist, if not misogynist, but it reflected the mentality and social values of that decade. What is most outrageous, though, is the fact that this text continued to be read until 2006. The infamous epistle was a fragment of the LCM. Therefore, it was legally abolished when the civil code of 1870 entered into force. For almost 150 years, the epistle was read in civil marriages as customary law, even though judges did not have the obligation to read it. On March 14, 2006, the Congress finally approved a request to ban the epistle.<sup>5</sup>

### III.1.2. Code Civil

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*con el otro, ...les manifestará: que éste es el único medio moral de fundar la familia, de conservar la especie y de suplir las imperfecciones del individuo, que no puede bastarse a sí mismo para llegar a la perfección del género humano. Que este no existe en la persona sola sino en la dualidad conyugal. Que los casados deben ser y serán sagrados el uno para el otro, aun más de lo que es cada uno para sí. Que el hombre, cuyas dotes sexuales son principalmente el valor y la fuerza, debe dar y dará a la mujer protección, alimento y dirección, tratándola siempre como a la parte más delicada, sensible y fina de sí mismo, y con la magnanimidad y benevolencia generosa, que el fuerte debe al débil, esencialmente cuando este débil se entrega a él y cuando por la sociedad se le ha confiado. Que la mujer, cuyas principales dotes sexuales son la abnegación, la belleza, la compasión, la perspicacia y la ternura, debe dar y dará al marido, obediencia, agrado, asistencia, consuelo y consejo, tratándolo siempre con la veneración que se debe a la persona que nos apoya y defiende, y con la delicadeza de quien no quiere exasperar la parte brusca, irritable y dura de sí mismo, el uno y el otro se deben y tendrán respeto, deferencia, fidelidad, confianza y ternura, y ambos procurarán que lo que el uno se esperaba del otro al unirse con él, no vaya a desmentirse con la unión. Que ambos deben prudenciar y atenuar sus faltas. Que nunca se dirán injurias, porque las injurias entre los casados deshonran al que las vierte y prueban su falta de tino o de cordura en la elección: ni mucho menos se maltratarán de obra, porque es villano y cobarde abusar de la fuerza. Que ambos deben prepararse con el estudio y con la amistosa y mutua corrección de sus defectos, a la suprema magistratura de padres de familia, para que cuando lleguen a serlo, sus hijos encuentren en ellos buen ejemplo y una conducta digna de servirles de modelo. Que la doctrina que inspire a estos tiernos y amados lazos de su afecto, hará su suerte próspera o adversa; y la felicidad o desventura de los hijos será la recompensa o el castigo, la ventura o desdicha de los padres. Que la sociedad bendice, considera y alaba a los buenos padres por el gran bien que le hacen dándole buenos y cumplidos ciudadanos y, la misma, censura y desprecia debidamente a los que por abandono, por mal entendido cariño, o por su mal ejemplo corrompen el depósito sagrado que la naturaleza les confió, concediéndoles tales hijos. Y, por último, cuando la sociedad ve que tales personas no merecían ser elevadas a la dignidad de padres, sino que sólo debían haber vivido sujetas a tutela, como incapaces de conducirse dignamente, se duele de haber consagrado con su autoridad la unión de un hombre y una mujer que no han sabido ser libres, y dirigirse por sí mismos hacia el bien.”*

<sup>5</sup> The proposal to ban the epistle was submitted by congressman Ángel Pasta Muñuzuri, on April 13, 2004. Ironically, it was submitted by a man, and a member of the conservative party. It was approved almost two years later on March 14, 2006 and published in the official minute of sessions on the same day. Parliamentary Gazette. Chamber of Deputies. Num. 1966-III, Mexico, March 14, 2006.

Mexican Law has the Napoleonic influence of the *Code Civil*.<sup>6</sup> All rights and obligations between persons are described and regulated by the *Código Civil Federal*, the Federal Civil Code. The current federal civil code dates back to 1928.<sup>7</sup> It is a successor of the previous codes of 1870 and 1884. The State of Oaxaca had promulgated the first Civil Code in Latin America in 1829, however, that code was only valid within the state.<sup>8</sup> The code of 1870 was especially relevant for its national scope of application. In addition to the Federal Civil Code,<sup>9</sup> there are 32 regional civil codes: One for each of the 31 Mexican States and one for Mexico City, the Federal District. Most of the 32 state-level civil codes have the same structure and language. As Jorge A. Vargas described it: “At the outset, it deserves to be mentioned that the language of the Federal Civil Code (as reflected in the Civil Code of 1928) has been literally incorporated, word by word, in each of the thirty-one local civil codes enacted by the Mexican States (with significant changes from very few states). Accordingly, this means that, de facto, regarding civil law matters the Federal Civil Code may be said to be the common law of Mexico governing throughout the entire country.”<sup>10</sup> Civil acts performed in any state must be recognized by all others, even though the conditions and procedures may slightly differ.

### III.1.3. Mexico City

Until July 26, 1994, Mexico City was considered a Department of the Federal Government. The mayor was then appointed directly by the President of Mexico. One of the largest cities in the world could not even elect its own mayor. With the new Government Statute for Mexico City,<sup>11</sup> the city gained the equal status of a State. Although it was not literally declared a state, it is now a quasi-state with its own judicial, executive and legislative bodies. Nonetheless, subject to the federal powers in some capacities. The first election for a Mexico City mayor took place in 1997.

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<sup>6</sup> *Code Civil des Français*. (French Civil Code) Paris: Imprimerie de la République, An XII, 1804.

<sup>7</sup> Published in the OJF in four parts, on May 26, July 14, August 3 and 31, 1928.

<sup>8</sup> See Ortiz, Raul. *Oaxaca, cuna de la codificación iberoamericana*. (Oaxaca, the nest of Ibero-American codification) México: Porrúa, 1974.

<sup>9</sup> The Federal Civil Code has a total of 3074 articles divided into four “Books”: First Book (Persons), Art. 22-746. Second Book (Property), Art. 747-1280. Third Book (Successions), Art. 1281-1791. Fourth Book (Obligations), Art. 1792-3074.

<sup>10</sup> Vargas, Jorge A. *Features: The Federal Civil Code of Mexico*. USA: LLRX, May 15, 2005.

<sup>11</sup> *Estatuto de Gobierno del Distrito Federal*. (Government Statute for the Federal District) Published: OJF on July 26, 1994.

The statute reformed article 122 of the Mexican Constitution, enlisting the faculties of the new Legislative Assembly of the Federal District (LAFD). Among them, “(h) the capacity to legislate in civil and criminal matters.” This faculty would enter into force on January 1, 1999. Before the LAFD could legislate, the Federal Civil Code acted both at the federal level and at a local level in Mexico City. On May 29, 2000, the LAFD finally enacted its own Civil Code.<sup>12</sup> Even though it was basically a replica of the federal one, it became an independent legislation subject to amendments by the LAFD exclusively and not by the federal congress anymore. Back then, the 31 Mexican States were not very active when it came to amending their local civil codes. No one would have thought that the newly enacted code was going to be more dynamic in Mexico City than anywhere else in the country. Instead of analyzing every single civil code in Mexico, state by state, a review of the Federal Civil Code will depict the current forms of intimacy that are recognized by law.

### **III.2. Types of Legally Recognized Intimacy in Mexico**

#### III.2.1. Matrimony

The Civil Code does not provide a literal definition of matrimony. However, the essential description can be extracted from the conditions established for spouses: Matrimony is a civil contract between a *man* a *woman*. “In order to be joined in matrimony, the man must have reached the age of sixteen and the woman, must have reached the age of fourteen.”<sup>13</sup> The first differentiation or discrimination is established in the age condition. Before the parties reach the legal age of eighteen, a parental consent is necessary.<sup>14</sup> In the case of men, their rights as a minor are protected until they reach the age of 16. Women, on the other hand, can emancipate since the age of 14. This could be seen as an advantage or a disadvantage. Be that as it may, the condition is not fair for one of the parties.

Matrimony is a unique contract ratified by two spouses. Just as any other type of contract, it creates rights and obligations that have a direct impact on the future

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<sup>12</sup> *Official Gazette of the Federal District*. Mexico. Number 88, May 25, 2000.

<sup>13</sup> Art.148, FCC

<sup>14</sup> Art.149-155, FCC

lives of spouses, and eventually, of their descendants. The civil code outlines these rights and obligations on the First Book, Title 5, Chapter III. The very first obligation begins during courtship, when a fiancé or fiancée fails to honor their promise of marriage, the affected party may file a lawsuit and claim a compensation of damages.<sup>15</sup> Premarital courtship is the only recognition of intimacy before matrimony that generates a specific right. This is the only article regarding matrimony in the FCC where the word intimacy is used explicitly.

The Spheres of Intimacy in Matrimony:

*a. The emotional sphere of matrimony*

The decision about matrimony is a voluntary one. Spouses are obliged to help each other and to contribute to the purposes of matrimony.<sup>16</sup> So, it can be said that the self-determination to make that decision is a representation of the spouse's emotions. The commitment or promise to engage in matrimony can be formalized in written form; but even with this spousal vow, there is no obligation to marry one's fiancé(-e) until the actual act of matrimony has been celebrated.<sup>17</sup> A negative emotion can cause the annulment of matrimony. Fear and violence can lead to that annulment if they were present during the decision-making for matrimony.<sup>18</sup> The legislator also sees matrimony as an emotional contract. One of the clearest examples of the emotional element is that the FCC uses the word *home*,<sup>19</sup> when referring to the property where spouses live; whereas in the second book, regarding property, the legislator uses the terms "house" or "real estate".<sup>20</sup> As analyzed in the previous chapter, the concept of trust is also an emotional aspect. That trust is materialized in the cases of tutelage or legal guardianship,<sup>21</sup> because the spouse becomes the legal guardian when a spouse is incapable of making their own decisions. A case of tutelage comes about, for instance, when a spouse has had an accident and falls into a coma. The spouse will have the obligation to make the decisions on behalf of the other spouse as long as they still

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<sup>15</sup> Art. 143 FCC

<sup>16</sup> Art. 162 FCC

<sup>17</sup> Art. 139 FCC

<sup>18</sup> Art. 245 FCC

<sup>19</sup> Using the term "*hogar*" instead of "*casa*".

<sup>20</sup> The second book regarding property, starting in Art. 747 FCC.

<sup>21</sup> Art. 449-481 FCC

have that marital status.<sup>22</sup> So, a spouse must trust the other with their capacity and good judgment to make the right decisions whenever needed. The spouse becomes the automatic guardian, children of legal age are the second priority and parents are third in line for legal guardians.<sup>23</sup> Matrimony grants minors the power of emancipation. Consequently, the trust that is conferred to parents until minors reach legal age is transferred to the spouse at the time of matrimony; given that at least one of the parents of that minor gave their consent for matrimony.<sup>24</sup>

*b. The moral sphere of matrimony*

Matrimony is considered the highest level of intimacy and the preferred legal structure for conservatives. The Mexican society embraces married men and women. The moral value of matrimony comes from the high value of religious marriage, particularly the catholic one. Spouses are forbidden to practice any activity that would damage the *morality* of the family or its structure. In cases of objection by one of the spouses, a judge will decide on the interpretation of that morality and decide whether that activity should be practiced or not.<sup>25</sup> When fiancé(e)s fail to honor their promise of matrimony, the disadvantaged party can claim a compensation of damages. This guarantee also ratifies the moral dimension attributed to intimacy and matrimony.<sup>26</sup> There is a presumption of good will in matrimony, unless the evidence proves otherwise. That presumption, just as the presumption of innocence in Criminal Law, has the moral nature granted to matrimony by the legislator.<sup>27</sup>

There are two ways to terminate matrimony: through a divorce,<sup>28</sup> or with a declaration of annulment.<sup>29</sup> The grounds for divorce also show the moral components of matrimony. Among others, adultery is a cause for divorce.<sup>30</sup> This shows the moral value of the protection of fidelity. If a husband prostitutes his wife, a divorce can be requested. It is remarkable, though, that the same provision does not apply to a wife

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<sup>22</sup> Art.466 and Art. 486 FCC

<sup>23</sup> Art 486-489 FCC

<sup>24</sup> Art. 641 FCC

<sup>25</sup> Art. 169 FCC

<sup>26</sup> Art. 143 FCC

<sup>27</sup> Art. 257 FCC

<sup>28</sup> Chapter X. Art. 266-291FCC

<sup>29</sup> Chapter IX. Art. 235-265 FCC

<sup>30</sup> Art. 267. I. FCC

prostituting her husband.<sup>31</sup> *Immoral* acts performed by a husband or wife with the purpose of corrupting their children is also a cause for divorce.<sup>32</sup> Spouses also have the obligation to provide their children with an occupation or profession that is honest and appropriate for their *gender*.<sup>33</sup> The mere use of the word *gender* in this article denotes the moral dichotomization of male and female roles in society.

Matrimony comes with a moral duty to constitute a family, and it prohibits any action or condition established in opposition to the perpetuation of the species. That motivation to form a family has the moral values linked to the constructs of family and matrimony as codependent units. Therefore, all the moral values given to the concept of family are inherently transferred to the moral value of matrimony. All members of the family have the right to the psychological and physical respect from the other members, aiming to contribute to their healthy development for the full incorporation and participation in the social nucleus.<sup>34</sup> The social component of the moral sphere is explicitly declared in the previous sentence. Family violence is also typified as the use of physical or moral force against another member of the same family.

*c. The sexual sphere of matrimony*

As mentioned before, the concept of marital or spousal debt was developed in Catholicism. However, it cannot be directly identified in matrimony. There is no sexual obligation directly attributed as a clause in matrimony. In any case, the sexual elements can be pointed out. The most important one is sexual exclusivity. Adultery is a cause for divorce, committed by either spouse.<sup>35</sup> Nonetheless, the affected spouse may only claim adultery as a ground for divorce within six months after the adulterous act became known. In other words, after that six months deadline, that adulterous act is construed as consensual.<sup>36</sup> Beyond the moral aspect of prostitution

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<sup>31</sup> Art. 267. III FCC

<sup>32</sup> Art. 270 FCC

<sup>33</sup> Art. 308 FCC

<sup>34</sup> Art. 323 bis. FCC

<sup>35</sup> Art. 267. I FCC

<sup>36</sup> Art. 269 FCC

and its prohibition discussed above, the repudiation of prostitution reinforces the value of sexual exclusivity between spouses.<sup>37</sup>

Impotence, or erectile dysfunction, is another sexual element handled in matrimony. One of the impediments to engage in matrimony is to be afflicted by impotence.<sup>38</sup> Incurable impotence is also a justification for divorce after the matrimony has been celebrated.<sup>39</sup> The legislator does not mention that spouses have sexual intercourse or are obliged to have it. Nonetheless, it can be assumed that spouses are meant to have sex and cannot sign into matrimony if they will be incapable of doing so. This sexist and phallic conception of matrimony is the epitome of the sexual sphere, and also, it appoints the husband as the stud in matrimony. It is a visible discrimination or disadvantage for men, inasmuch as the husband must be able to have sex; or he will lose his value and will not qualify for matrimony.

Women, on the other hand, have more conditions in matrimony when it comes to the reproductive aspect of their sexual activity. If a wife gives birth to a child conceived before matrimony, the husband can request a divorce and the child will be judicially declared illegitimate.<sup>40</sup> Whereas a wife cannot request a divorce if another woman gave birth to a child whose paternity is attributed to her husband. This inequality protects the sexual exclusivity of the wife, but not that of the husband. If a woman has been married before, she cannot sign into a new matrimony until after 300 days have passed after terminating the first matrimony unless she has given birth to a child in that period.<sup>41</sup> Putting the paternity issues aside, this restriction guarantees the sexual and reproductive readiness that the woman will have for the new husband and underscores the female role of a reproductive machine. After the first matrimony, men can remarry without the three-hundred-day limit, and even if they have fathered multiple children afterwards.

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<sup>37</sup> Art. 267 III FCC

<sup>38</sup> Art. 156. VIII FCC

<sup>39</sup> Art. 267. VI FCC

<sup>40</sup> Art. 267. II FCC

<sup>41</sup> Art. 158 FCC

Furthermore, the evidence confirming that spouses are under no obligation to have sexual intercourse in matrimony is the typification of spousal rape as a crime.<sup>42</sup> The Federal Criminal Code literally describes the penalty for rape in cases when the victim is a spouse, be it the husband or the wife.<sup>43</sup>

*d. The economic sphere of matrimony*

The protection of assets is also considered in the matrimonial contract. There are two basic forms for the management of goods in matrimony; namely, separate property and community property.<sup>44</sup> Basically, the separate property regime stipulates that the assets or any goods owned by one of the spouses will remain personal property, regardless of their marital status. On the contrary, community property is a joint venture of the property of both spouses. A combination of both approaches is also possible, but must be indicated in the prenuptial agreement. The prenuptial agreement<sup>45</sup> is a special pact signed by spouses in order to regulate the administration of their assets. This regulation can specify their current and/or future assets. Even if the matrimony began in the separate property regime, it can transform into community property and vice versa. The modality can be amended throughout the duration of the matrimonial life. With the community property system, the spouses become financial partners and their assets function as an entity, as if they were a corporation. Both spouses act as shareholders, and one of them must be appointed as the administrator. The community property deed or prenuptial agreement must be registered at the Public Registry of Property and Commerce in order to become effective toward a third party.<sup>46</sup> In addition to the internal management of goods in matrimony, the economic dimension of matrimony also has external repercussions. Taxation is evidently one of them. An individual who has signed into matrimony can claim certain tax deductions based on their spouse.<sup>47</sup> In the community property regime, some tax incentives are also applicable.<sup>48</sup> Donations between spouses are

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<sup>42</sup> Art. 265 bis FCRC

<sup>43</sup> From eight to fourteen years in prison. Art. 265 FCRC.

<sup>44</sup> The exact terms used by the FCC in Spanish are “*separación de bienes*” and “*sociedad conyugal*”. Art. 178.

<sup>45</sup> Art. 179 FCC, named “*capitulaciones matrimoniales*” in Spanish.

<sup>46</sup> Art 186 FCC

<sup>47</sup> Law on Income Tax Return. Art. 176. I., and Art.176.VI.

<sup>48</sup> Art. 218 LITR

regulated by the civil code,<sup>49</sup> and are also treated as tax-exempt by the Law on Income Tax Return.<sup>50</sup>

Spouses can claim welfare benefits as well. Welfare in a developing country like Mexico should not be interpreted as welfare in the more developed European countries. The Social Security Law in Mexico comprises two different regimes, a mandatory and a voluntary one.<sup>51</sup> Active workers are beneficiaries of welfare because their employers are obliged to pay their social security contributions, whereas unemployed individuals do not get any benefits unless they pay the contributions themselves or qualify as dependents. In the latter case, being able to demonstrate you are a dependent is crucial. In matrimony, spouses qualify as dependents and are considered beneficiaries.<sup>52</sup> Welfare benefits include a healthcare plan,<sup>53</sup> access to a widowhood pension plan,<sup>54</sup> and derivative social security coverage for their well-being, such as day-care centers for children, sports and cultural centers and so on. Married individuals can also request a thirty-day salary allowance for matrimonial expenses.<sup>55</sup> Probably the most fundamental element of the economic sphere is the obligation to provide nourishment. Spouses have the reciprocal obligation to provide each other with food since the beginning of the matrimonial contract.<sup>56</sup> This obligation may remain even after separation for a period to be determined by the judge.<sup>57</sup> After a divorce, this responsibility is usually called alimony. It includes food, clothing, room and assistance in case of sickness.<sup>58</sup> The concept of alimony is foundational to matrimony, not only because it shows the economic interdependence of spouses, but also by reason of the protection of the individual's integrity. Alimony is present during and after matrimony especially with children, it remains mandatory until children, if there are any, reach legal age.<sup>59</sup>

*e. The constructive sphere of matrimony*

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<sup>49</sup> Art. 219-234 FCC

<sup>50</sup> Art. 109. XXIII LITR

<sup>51</sup> Art. 6 SSL

<sup>52</sup> Art. 5.A.XII SSL

<sup>53</sup> Art. 84.III SSL

<sup>54</sup> Art. 5. A.XIV and Art. 130 SSL

<sup>55</sup> Art. 165. II SSL

<sup>56</sup> Art. 301 FCC

<sup>57</sup> Art. 275 FCC

<sup>58</sup> Art. 308 FCC

<sup>59</sup> Art. 309-323 FCC

Family ties display the constructive sphere of a structure of intimacy. The civil code recognizes three types of kinship: Consanguinity, Affinity and Civil Kinship.<sup>60</sup> Consanguinity is that type of connection between individuals who are descendants of the same parent.<sup>61</sup> Affinity is the sort of kinship generated by matrimony between the husband and the wife's family or the wife and the husband's family.<sup>62</sup> Civil kinship is the type of bond established between the adopter and the adoptee.<sup>63</sup> The extension and ramification of these ties is what builds and shapes the constructive sphere of matrimony. As discussed before, a family can be built even with two members. In the case of matrimony, the founders of that intimacy are both spouses. The horizontal construction they form becomes a family unit even as they socialize within their affinity relatives. If spouses decide to build up their family in a vertical construction, matrimony offers two options: biological reproduction and adoption.

With biological reproduction (which also involves the sexual sphere), there is a presumption of paternity in favor of both spouses.<sup>64</sup> That is to say, a child born after the contract of matrimony has been celebrated will have the spouses as parents by default. Even if the husband is not the biological father, the presumption of paternity reigns over. The burden of proof is on the father who tries to disown the child.<sup>65</sup> A mother does not have the right to disown her child.<sup>66</sup> Children of matrimony have the right to take the last names of parents, to nourishment, and to the corresponding portion of inheritance.<sup>67</sup> According to the Spanish tradition and as it happens in most Latin American countries, children take both parents' last names, the first last name of the father and the first last name of the mother, in that order. It means that after two generations, the mother's last name is lost and the father's last name prevails over generations. The choice of biological reproduction is intrinsically linked to the decision to interrupt it. That is to say, abortion is an element of the constructive sphere of an intimacy. Even in matrimony, abortion is a personal choice of the woman

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<sup>60</sup> Art. 292 FCC

<sup>61</sup> Art. 293 FCC

<sup>62</sup> Art. 294 FCC

<sup>63</sup> Art. 295 FCC

<sup>64</sup> Art. 324 FCC

<sup>65</sup> Art. 326 FCC

<sup>66</sup> Art. 60 par. 2 FCC

<sup>67</sup> Art. 389 FCC

who bears the fetus. The husband can only make a decision on abortion when the wife is unable to do so and the spouse is the legal guardian; as it is the case when a woman is in a coma and only the fetus or the woman can be saved.<sup>68</sup> In a situation like this one, the husband could determine whether an abortion should be forced.

Adoption comes in two different forms: Simple and Complete.<sup>69</sup> The most remarkable difference between them is that the former may be revoked, whereas the latter is peremptory. Adopters must be at least 25 years old and have at least a 17-year difference with the adoptee.<sup>70</sup> Only one person can adopt a child, no one can be adopted by more than one individual, the only exception is in matrimony.<sup>71</sup> When spouses agree to adopt a child, both spouses become parents and they are equally responsible for the adoptee. Adoptees in the complete adoption modality become children of adopters and are regarded as kindred in the context of consanguinity by the civil code.<sup>72</sup> In the simple adoption system, the legal relationship is between adopter and adoptee only and does not include the extended family, while the natural kinship with the biological parents of the adoptee still remains unaffected.<sup>73</sup>

One of the most powerful elements of the constructive sphere is the capacity to inherit. Both the horizontal and vertical constructions of an intimacy can have a legacy, and this legacy can be materialized along with the economic sphere of that intimacy in the form of an inheritance. Spouses and children are entitled to inheritance rights. There are two types of inheritance: Testamentary and Legitimate.<sup>74</sup> A testamentary inheritance is that acquired through a written testament. A legitimate inheritance is that obtained when no testament has been written, when the written testament has been annulled, when the person who inherits does not fulfill the conditions set in the testament, when the inheritor dies, or when the person did not specify all their property in a testament and the remnant is distributed through the legitimate inheritance rights.<sup>75</sup> In the case of matrimony, testamentary inheritance

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<sup>68</sup> Art 486-489 FCC

<sup>69</sup> Named "*adopción simple*" and "*adopción plena*" in the FCC in Spanish.

<sup>70</sup> Art. 390 FCC

<sup>71</sup> Art. 391-392 FCC

<sup>72</sup> Art. 410.A FCC

<sup>73</sup> Art. 402 FCC

<sup>74</sup> Art. 1282 FCC

<sup>75</sup> Art. 1599 FCC

plays almost no role because the individual can declare in their testament that their family members will not inherit anything. Individuals are not obliged to leave their inheritance to their family. In this case, if no inheritance has been granted to the children or spouse, they can only claim nourishment when the deceased had the obligation to provide it. That nourishment is then dispensed through the inheritance and only in the limited terms that nourishment is defined.<sup>76</sup> Nonetheless, when there is no written testament and the legitimate succession is applicable, family members are first-preference inheritors and matrimony plays then a key role. First of all, inheritance rights penalize adultery. Spouses who have committed adultery, and a judge has ruled against them, lose their capacity to inherit.<sup>77</sup> This is again, a clear mechanism of the moral sphere that the legislator uses to protect the exclusivity within the sexual sphere of intimacy. Legitimate succession establishes priorities according to the closeness with the individual. Those who qualify for inheritance are: Descendants (children, grandchildren, etc.), Spouses, Ascendants (parents, grandparents, etc.), Collateral relatives (siblings, cousins, nephews, etc.); in that order and priority.<sup>78</sup> That is to say, when descendants are still alive, ascendants, and collateral relatives lose their capacity to inherit from that individual. For a partner, matrimony becomes very important, since they are able to qualify as inheritors in the same proportion as a descendant is they are official spouses via a matrimonial contract. When discussing the issue of inheritance, the focus is usually set on the property and financial part of an inheritance. However, it must also be considered that the legacy of an inheritance may also include non-economic items, such as memorabilia. That is why inheritance rights lie rather within the constructive sphere of an intimacy and not within the economic sphere. Some inheritances may involve the economic sphere. But the abstract concept of an inheritance, especially in its conceptualization of a legacy, belongs in the generational and future-oriented constructive sphere.

For the proper construction of a family, the Mexican Constitution protects a type of private property denominated Family Patrimony. This type of property cannot

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<sup>76</sup> Art. 1372 FCC. Nourishment is then also interpreted as in Art. 308 FCC, food, clothes, room and board in cases of sickness.

<sup>77</sup> Art. 1316.III FCC

<sup>78</sup> Art. 1602-1634 FCC

be levied upon or seized in any way.<sup>79</sup> The Civil Code regulates the conditions for the establishment of a family patrimony. A family can constitute one family patrimony only.<sup>80</sup> The object that forms the family patrimony is the house where the family actually lives and, if applicable, the cultivable land around it.<sup>81</sup> Unlike other types of private property, this one cannot be leased or used as guaranty for credit purposes. The family patrimony can only be used for residential purposes. Only spouses and those entitled to nourishment, as it is the case with children, have the right to live in that house and to take advantage of the produce of that land.<sup>82</sup> After the house has been registered as a family patrimony in the Public Registry for Property and Commerce, it becomes an inalienable property. Basically, that property loses its commercial value as an economic asset the family can trade with, and turns into a nest for the incubation of the family. The family patrimony, hence, is the tool the legislator created to stimulate the constructive sphere of intimacy. It is regulated in the civil code, but most importantly, it is protected as a fundamental human right in the constitution: The right to own an inalienable Family Patrimony.

### *Conclusion*

In sum, matrimony is the oldest and most-respected type of intimacy contract in Mexican Law. It enables spouses to have a trusted legal guardian, to administer assets jointly or severally, to adopt children and to inherit legitimately. With a matrimonial contract, couples also have access to taxation exemptions and welfare benefits. Matrimony protects the sexual exclusivity of spouses, and it encourages the development of families ensuring the rights to nourishment of all family members with the same obligation in reciprocity. Even though the matrimonial contract attempts to protect equality within, some inconsistencies still lean the scale in favor of the man. Matrimony at the federal level in Mexico is until now a contract between a man and a woman, that is to say, only available for opposite-sex couples.

### III.2.2. Concubinage

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<sup>79</sup> Art. 27. XVII Mexican Constitution of 1917.

<sup>80</sup> Art. 729 FCC

<sup>81</sup> Art. 723 FCC

<sup>82</sup> Art. 725 FCC

Although the word “concubine” tends to be linked to polygamy and infidelity, the term concubinage in the Mexican Civil Code is used as a form of legally recognized intimacy precisely opposed to polygamy. Concubinage is another admitted structure of intimacy with specific characteristics and limitations. In matrimony, the pillars of that structure are spouses, husband and wife. In concubinage, the partners are called concubines and they must also be opposite-sex partners. Same-sex couples are ineligible for concubinage inasmuch as they fail to qualify for civil matrimony. One of the most distinguishable elements of concubinage is the lack of a written contract. Unlike spouses in matrimony, concubines do not reveal themselves in the initiation of their intimacy through a civil ceremony. They simply start acting *more uxorio*,<sup>83</sup> as if they were married without signing any civil document. However, after concubinage has been established and recognized, concubines do undertake certain rights and obligations despite the absence of a legal contract. Concubinage in Mexico can be compared to the legal figure of a *common-law marriage* in common-law systems.<sup>84</sup> Federal laws recognize the phenomenon of concubinage; yet only matrimony is a legal act that can be initiated as an *a priori* recognition of a *prêt-à-commencer*<sup>85</sup> intimacy, whereas concubinage can only be recognized *a posteriori*.

Even without a contract, concubinage has a consuetudinary type of legitimation. When spouses need to demonstrate their civil relationship, the matrimonial certificate is used for third-party effectiveness. Since there is no written testimony in concubinage, the recognition of that intimacy is granted differently. In cases where the acknowledgement of the concubinage must be established; in inheritance trials for instance, the evidence can be presented during the same judicial process. When the recognition is not mandatory, the establishment is also possible through a Voluntary Jurisdiction procedure.<sup>86</sup> The Federal Code for Civil Procedures enables this type of process for individuals who require the intervention of a judge, but it is not a trial with the duality of a plaintiff and defendant. Cohabitation is the ruling principle, concubines must prove that they have lived together for five years

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<sup>83</sup> According to the matrimonial custom.

<sup>84</sup> As it can be found for instance in many jurisdictions in the United States: Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, Utah.

<sup>85</sup> Ready to begin, in French.

<sup>86</sup> Art. 530-537 FCCP

and at least two witnesses must ratify that. The five-year requirement is waived when concubines have at least one child.

The Spheres of Intimacy in Concubinage:

*a. The emotional sphere of concubinage*

When a woman and a man decide to start living together and commence their intimacy, it can be assumed that their concubinage begins. The decision to move in together determines the volition that secures the precondition of concubinage. If the couple has had a relationship before, but they do not live together, they would not be considered concubines and would be regarded as simple lovers. Concubines must then strengthen their mutual treatment as husband and wife before society. For the mere act of cohabitation does not certify concubinage if concubines do not introduce each other as partners when meeting other people. There is a component of pride in this type of intimacy. The fact that the intimacy must be made public forces concubines to externalize their relationship proudly in order to have it recognized later. Because when concubines attempt to get the recognition of their concubinage, they will have to demonstrate the five years of cohabitation and provide at least two witnesses who have been aware of their intimacy as if they were spouses.

Uncertainty is a common feeling in concubinage. The lack of a written contract in concubinage goes hand in hand with the lack of a civil ceremony. Not having a symbolic event can be interpreted as a lack of emotional value for concubines, owing to the fact that the absence of a commitment ritual is insufficient to provide the emotional support and affirmation so characteristic in civil matrimonies. Moreover, the exit mechanisms are as simple as the initiation. Terminating the cohabitation ends concubinage immediately, and this decision can be made unilaterally. After an unexpected death of a concubine, for instance, the survivor concubine is left unprotected. There are very few exceptions where the concubine can find protection, as it is the case with the subrogation of rental contracts for concubines, applicable as if they were spouses. This is not only a protection of the concubine, but

also the assurance for the tenant, that the lease will still be honored.<sup>87</sup> A benefit like this one is also representative of the core element in concubinage: cohabitation.

As mentioned in III.2.1.a, the right to legal guardianship for spouses is an element of trust. In matrimony, spouses have the legal guardianship whereas concubines do not have a right to be their concubine's guardian while they are incapable.<sup>88</sup> Furthermore, concubines do not even get automatic hospital visitation rights. The civil code does not trust concubines as guardians, and the legal guardianship remains with ascendants or adult descendants, if any. In a similar way; when two minors sign into matrimony, they are able to legally emancipate from their parents. If they decide to cohabit, e.g. to begin concubinage, they will still be legally tied to their parents and will not be able to emancipate, regardless of their domicile and cohabitation. Hence, albeit physically and emotionally separated from their parents, they will be legally linked to them.

*b. The moral sphere of concubinage*

Before society, concubines do not have the same status as spouses. Concubinage is seen as a second-class type of intimacy and not as a desired type of union. The legislator uses the word *house* and *domicile* when referring to the place where concubines reside, and not the word *home* as it is used for spouses when describing matrimony. The emotional value granted and reserved for matrimony is not given to concubinage. Concubines are regarded as single individuals, even if their concubinage is recognized for all effects, their legal status remains as single. This non-binding legal status depicts the perspective of the legislator, recognizing concubinage as a non-binding intimacy. One of the requirements for the recognition of concubinage is that concubines must not be married; and if concubines get married at some point, their concubinage ends automatically. The following clause: "...as long as both of them [concubines] have remained free of matrimony during their concubinage",<sup>89</sup> subordinates concubinage to matrimony and makes it more susceptible to termination. Since concubines keep their legal status of "single" individuals, they can engage in

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<sup>87</sup> Art. 2448-H FCC

<sup>88</sup> Art. 466 FCC, only applicable to spouses and not to concubines.

<sup>89</sup> Art. 1635 FCC

matrimony at any point even without the consent of their concubines. This freedom to engage in matrimony reflects the lack of commitment of the legislator to protect concubinage, or concubines for that matter. While spouses change their legal status to “married” and cannot create another type of intimacy until that legal status has changed, concubines always have the liberty to create new intimacies. This very liberty comes with the risk of the multiplicity of intimacies.

Polygamy, in both its polygyny and polyandry forms, is forbidden in matrimony. In concubinage, however, there is no restriction to engage in more than one intimacy simultaneously. There is no moral protection of the intimacy of concubinage as a loyal commitment, and its recognition lacks a mechanism to secure the exclusivity of concubines. The law protects spouses from concubines, but not concubines from spouses. As discussed in Chapter II, some marriages are declared putative when at least one of the spouses acts in good faith and believes that their marriage is valid; concubines do not have the option of a *putative concubinage*, rather quite the opposite. When more than one concubinage coexists, all concubines lose their rights. That means they are all penalized by the non-exclusivity, even if they were the victims of that concurrency.<sup>90</sup>

*c. The sexual sphere of concubinage*

Although the initial connotation of the term concubine may be a sexual one; as well as in matrimony, there is no sexual obligation in concubinage. The criminal code has defined the crime of spousal rape, this same principle and penalty is applicable to concubines.<sup>91</sup> Not having an obligation to have sexual intercourse with their concubines is another indication of the primary purpose of concubinage, the element of cohabitation. Any type of physical or psychological violence, which would thus include rape, is prohibited between concubines and it is typified as domestic violence in the civil code as well.<sup>92</sup> Voluntary sexual activity, however, does help concubines in at least two aspects. First of all, it demonstrates that they act as husband and wife. And secondly, if they have a child through biological reproduction, it will accelerate

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<sup>90</sup> Ibidem, par. 2.

<sup>91</sup> Art. 265 bis. FCRC. From eight to fourteen years in prison.

<sup>92</sup> Art. 323 ter FCC

the recognition of their intimacy. The five-year cohabitation requirement is by-passed if they have a child together. Adopting a child would not be the same, because only one of them would be the adopter. As discussed in III.2.2.2.e, only married couples may adopt as a family unit.<sup>93</sup> In any case, having a biological child with reproductive assistance would not require any sexual activity, and yet, it would by-pass the longer cohabitation requirement. Consequently, the means of reproduction in concubinage (e.g. via sexual intercourse) are not as relevant as the goal of reproduction, having a child. And that phenomenon of parenthood is not precisely sexual; it belongs rather in the constructive sphere of concubinage.

It is noteworthy, that there is no sexual exclusivity protection either. A man or a woman may have as many sexual partners as they wish. As underlined before, they would only qualify as concubines if they live together or if they have a child together. Therefore, if a man has children with different single women, they would all be his concubines. Also, if a woman gives birth to children of different men as a single mother, all those men would qualify as her concubines as long as they are not married. Fundamentally, childbirth (and not just their sexual activity) becomes a fast-track evidence for the recognition of their concubinage. Sexually, concubinage may be considered a more liberal type of intimacy. Not because it is a polygamous intimacy *per se*, but rather because it lacks a legal mechanism that secures the commitment for sexual exclusivity.

*d. The economic sphere of concubinage*

It has been pointed out before that in Matrimony, spouses can decide upon either a separate property or community property regime. In concubinage, assets remain separate property throughout the duration of that intimacy. This is a clear disadvantage for concubines, because if their patrimony has grown as their concubinage developed, there is no way to control a fair redistribution of assets in case of separation. In a similar way, it is much more difficult for concubines to build a patrimony because they cannot claim the collateral support that a spouse would provide as guarantor in credit applications. Their belongings will always be the

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<sup>93</sup> Art. 390-392 FCC

property of two different individuals and can never be quantified as a family unit. Concubines do have the obligation to provide each other with nourishment as they would if they were spouses.<sup>94</sup> This obligation will remain even after a separation, as long as concubines satisfy the provisions outlined for inheritance.<sup>95</sup> The obligation and limitations of nourishment are also considered temporary after a separation.<sup>96</sup> A judge must determine the entitlement, duration and proportion of that alimony according to the specific details of their intimacy.

The welfare dimension of concubinage is also very similar to that of matrimony. Taxation benefits and restrictions are applicable for concubines in the same manner they are for spouses.<sup>97</sup> The taxation provision on community property of spouses does not affect concubines because they are unable to opt for the community property regime.<sup>98</sup> However, donations between concubines are not tax-exempt as donations between spouses are.<sup>99</sup> Furthermore, social security benefits are also granted to concubines as if they were spouses. The Social Security Law explicitly recognizes concubines as beneficiaries.<sup>100</sup> The types of benefits they can claim as dependents are equal to those of spouses, as long as there is no spouse who can claim them. Widowhood benefits are also included as long as the concubinage has lasted at least five years or the dependent has had a child with the main holder of the social security insurance.<sup>101</sup> If there is more than one concubine, none of them will be able to claim the benefits. Again, the figure of the concubine is subject to the existence, or rather, non-existence of the more protected spouse or concurrent concubines.

*e. The constructive sphere of concubinage*

In concubinage, the constructive capacity is somewhat reduced in comparison with matrimony. First of all, concubines cannot adopt as a couple. If they decide to adopt a child, only one of the concubines will be recognized as the adopter and the legal

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<sup>94</sup> Art. 302 FCC

<sup>95</sup> Art. 1635 FCC

<sup>96</sup> Art. 320 FCC

<sup>97</sup> Art. 176.I, Art. 176.VI and Art. 212 LITR

<sup>98</sup> Art. 218 LITR

<sup>99</sup> Art. 109.XIX.A LITR

<sup>100</sup> Art. 5.A.XII SSL

<sup>101</sup> Art. 84.III SSL

rights and obligations will only apply to that concubine, whereas in matrimony, spouses are able to adopt as a family unit.<sup>102</sup> When it comes to having biological children, concubines do not have that disadvantage anymore. In the Law on Family Relationships of 1917, there was a distinction between *natural* and *legitimate* children.<sup>103</sup> Natural children were those recognized by their parents out of wedlock, and only those born to married parents were considered legitimate. This distinction disappeared in the Federal Civil Code of 1928. Therefore, regardless of the marital status of parents, all children have the same rights. This is particularly important when it comes to inheritance rights.

All children are entitled to inheritance even if they were born out of wedlock or if they coexist with siblings born in matrimony.<sup>104</sup> The multiplicity or coincidence of concubinage and matrimony does not affect children in their inheritance. However, it does impact the capacity to inherit of the surviving concubine. If the deceased concubine had signed into matrimony, their spouse would be entitled to inheritance and the concubinage would be declared invalid. Thus, concubines can only inherit when the following conditions are met: (a) their concubinage existed in the five years immediately preceding the death of the concubine or a child was born during that concubinage, (b) both concubines remained unwed during the duration of their concubinage, (c) no other concubines coexist. If these prerequisites are complied with, the concubine will inherit in the same proportion as a spouse would have. But, if there were multiple concubines, none of them will be able to claim inheritance rights.<sup>105</sup> As mentioned in III.2.1.e, the legal figure of Family Patrimony protects the integrity of the family and is both a constructive and economic aspect of an intimacy. Unfortunately, concubines cannot constitute a family patrimony. Only the spouse and those entitled to nourishment (children) have access to the constitution of the family patrimony.<sup>106</sup> Consequently, if concubines have children they will be able to constitute the family patrimony but only one of the concubines will appear in the constitution.

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<sup>102</sup> Art. 391 FCC

<sup>103</sup> Chapter XI Art.186-219 LFR

<sup>104</sup> Art. 1602.I FCC

<sup>105</sup> Art. 1635 FCC

<sup>106</sup> Art. 725 FCC

## *Conclusion*

Essentially, concubinage can be defined as a second-class type of intimacy whose structure is recognized without a written contract. Concubines do not have the same rights as spouses and their rights are always subject to the concurrency of another concubinage. Concubines are not each other's legal guardians and they manage their assets separately. Children in concubinage get the same rights from parents as if they were married. Inheritance restrictions only affect the concubine, but not their descendants. The welfare dimension of concubinage includes social security coverage and some taxation benefits. Since there is no exclusivity clause in concubinage, there is always a susceptibility to immediate termination or a penalization of benefits due to the multiplicity of intimacies. Ultimately, concubinage can only be established between a man and a woman.

### III.2.3. Cohabitation Partnership Law

On November 9, 2006, the Legislative Assembly in Mexico City passed a new bill: the so-called "*Ley de Sociedad de Convivencia*" (Cohabitation Partnership Law), a new law that would enable same-sex or opposite-sex couples to legalize their status for the first time in Mexican history. This milestone in the Mexican legal system had been in debate for more than five years before the legislation was approved. Enoe Uganda was the most prominent advocate of this proposition.<sup>107</sup> The decree was published on November 16, 2006 and the law entered into force on March 17, 2007.<sup>108</sup> Unlike matrimony and concubinage, the CPL is not found within the civil code. This legislation is a local decree that is only valid in Mexico City, but not at the federal level. Cohabitation partnerships are equated to matrimony and concubinage in some elements. And, even when a right or obligation is matched, the connection is made with the Mexico City civil code. That is to say, the equivalent effects of matrimony and concubinage described in this law correspond to those of the Mexico City local code, but not the Federal Civil Code that has been analyzed before and that has legal effect in the entire country. This concise legislation has been structured in

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<sup>107</sup> De La Mata Pizaña, Felipe and Roberto Garzón Jiménez. *Sociedades de Convivencia*. Mexico: Editorial Porrúa-Universidad Panamericana, 2007. p. 17.

<sup>108</sup> *Official Gazette of the Federal District*. Mexico. Number 136, November 16, 2006.

twenty-five articles. Beyond the formalities, further effects are encapsulated in the equalization to the rights or treatment of other forms of intimacy already framed within the civil code. The following chart outlines the content of this law. The most important fact is that the Cohabitation Partnership Law initiated the path for a new type of structure of intimacy, Cohabitation Partnerships,<sup>109</sup> which for the first time in history in Mexican law allowed the recognition of an intimacy between same-sex partners.

<b>TABLE 1: COHABITATION PARTNERSHIP LAW</b>	
<b>Chapter I</b>	<b>General Provisions</b>
Art. 1	Subject-matter
Art. 2	Definition
Art. 3	Obligation to mutual support
Art. 4	Monogamy – Relatives
Art. 5	Concubinage – Civil code
<b>Chapter II</b>	<b>Registration of a Cohabitation Partnership</b>
Art. 6	District where the home will be established
Art. 7	Requirements (Patrimonial administration)
Art. 8	Proper identification of parties
Art. 9	Modifications – Dynamism
Art.10	Registration process and effect towards third parties
Art.11	Certificates
Art.12	Exclusivity
<b>Chapter III</b>	<b>The Rights of the Cohabitants</b>
Art.13	Reciprocal obligation to provide nourishment (Alimony)
Art.14	Inheritance rights
Art.15	Legal Guardianship
Art.16	Civil Code
Art.17	Act of good will – compensation of damages
Art.18	Patrimonial relationships regulated by law
Art.19	Denial of rights by wrongdoing
<b>Chapter IV</b>	<b>Ending the Cohabitation Partnership</b>
Art.20	Termination: Unilateral, matrimony, concubinage, abandonment, death.

<sup>109</sup> *Sociedades de Convivencia* in Spanish.

Art.21	Nourishment
Art.22	Vacate in three months
Art.23	Subrogation in lease agreements
Art.24	Notification within 20 days
Art.25	Jurisdiction: First Instance Judge

So far, the spheres of intimacy have been identified in Matrimony and Concubinage. Cohabitation Partnerships, as any other structure of intimacy, are made up of different elements. All of these elements itemized in the articles above, belong in different spheres of intimacy and they will be analyzed individually in the following paragraphs.

The Spheres of Intimacy in the Cohabitation Partnership Law:

*a. The emotional sphere of the Cohabitation Partnership Law*

It has been pointed out before that the ability to choose one's legal guardian is a demonstration of an individual's emotions. The component of trust has been included in the CPL. Article 15 states that when one of the cohabitants has been declared in state of interdiction in the terms foreseen by the CCFD, the other cohabitant will be called upon to perform the duties of a legal guardian.<sup>110</sup> The precondition is that the Cohabitation Partnership must have been celebrated at least two years before, or it will be automatic when there is no other relative who may act as legal guardian. This article literally equated the figure of legal guardianship to the status of spouses. The CCFD states that spouses not only have the right for their spouse's legal guardianship, but rather the obligation to act as guardians.<sup>111</sup> Therefore, Art.15 in the CPL bridges the CCFC's Art. 486 directly. Although the CPL grants cohabitants less rights than concubinage and matrimony, legal guardianship is a unique advantage of matrimony that has been included in the CPL even though concubinage does not have it as

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<sup>110</sup> Art. 15 CPL. In Spanish: "Cuando uno de las o los convivientes sea declarado en estado de interdicción, en términos de lo previsto por el Código Civil para el distrito Federal, la o el otro conviviente será llamado a desempeñar la tutela siempre que hayan vivido juntas o juntos por un periodo inmediato anterior a dos años a partir de que la Sociedad de Convivencia se haya constituido, aplicándose al efecto las reglas en materia de la tutela legítima entre cónyuges o sin que mediere este tiempo, cuando no exista quien pueda desempeñar legalmente dicha tutela".

<sup>111</sup> Art. 486 CCFD

previously discussed in III.2 .2.a. Furthermore, the emotional impact of the CPL is embodied in the celebration of the cohabitation ceremony. Beforehand, it had been mentioned how concubinage lacks the symbolism of an official act to initiate the intimacy; in the case of cohabitation partnerships, the partnership begins with the official act of registration. The partnership must be constituted in written form and ratified before the administrative body of the district where the cohabitation will be established.<sup>112</sup> In the case of Mexico City, there are sixteen boroughs.<sup>113</sup> The registration and public ratification must take place in the corresponding borough according to the cohabitants' domicile. Just as in a matrimonial ceremony, cohabitants must appear in person and have witnesses to testify their ratification.<sup>114</sup> However, this legal act is not performed in a civil registry. The registrar is not a judge either, who admits the registration of the cohabitation partnership is just an administrative officer who will collect the application forms, and will then stamp and sign the copy that cohabitants will keep.<sup>115</sup> This partnership has third-party effects immediately after registration. Having the category of a public act, cohabitation partnerships are registered at the General Archive for Notaries where any citizen may have access to a registered copy.

*b. The moral sphere of the Cohabitation Partnership Law*

For the most part, the CPL was initially criticized harshly from a moral point of view because it opened the possibility for same-sex couples to structure their intimacy. Even though the CPL is far from being close to civil matrimony, the legislator attempted to offer a legal acceptance of these intimacies. The wording of the law also reflects the moral character of the legislator. The definition of a Cohabitation Partnership is presented in Article 2: “The Cohabitation Partnership is a bilateral legal act, constituted when two individuals of the opposite or same sex, of legal age and with legal capacity, establish a common *home*, with the purpose of permanence and mutual support”.<sup>116</sup> The use of the word “home” instead of “house” is noteworthy. As

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<sup>112</sup> Art. 6 CPL

<sup>113</sup> “*Delegaciones*” in Spanish.

<sup>114</sup> Art. 8 CPL

<sup>115</sup> Art. 10 CPL

<sup>116</sup> Art. 2 CPL. In Spanish: “*La Sociedad de Convivencia es un acto jurídico bilateral que se constituye, cuando dos personas físicas de diferente o del mismo sexo, mayores de edad y con*

examined before, the word “home” is only used in matrimony in the FCC and the local legislator in the LAFD has opted for this word.

The core element of the CPL is cohabitation. But a mere cohabitation is not considered a cohabitation partnership, because the purpose of this law is to recognize a new type of intimacy. That is the reason why relatives within the fourth degree of separation may not establish a cohabitation partnership even if they live together. This explicit prohibition<sup>117</sup> depicts the moral conception of the legislator, considering cohabitation partnerships within the treatment of intimacy. Also, it is clearly stated that for any legal order, cohabitation partnerships will be aligned in the terms of concubinage and the legal relationships that derive from it.<sup>118</sup> In the same manner, partners in cohabitation partnerships are still considered single individuals and their legal status as citizens does not change.

The establishment of a cohabitation partnership is also seen as an act of good will. Cohabitants are expected to constitute the partnership in good faith. Therefore, their wrongdoing is penalized. If either partner engaged in the cohabitation partnership by wrongdoing, they will lose any rights conferred by it and they will be liable for the compensation of damages.

*c. The sexual sphere of the Cohabitation Partnership Law*

Cohabitation Partnerships are not necessarily sexual unions. The legislator did not characterize these partnerships with a sexual element. However, sexual restrictions are also present. There is an explicit prohibition of the multiplicity of intimacies. This limitation simulates the ban on polygamy so distinctive in matrimony. Nonetheless, even this prohibition is not precisely sexual, but rather contractual; because it blocks the simultaneity of cohabitation partnerships.

The monogamous element is included in Article 4: Individuals united in Matrimony, Concubinage or those who have a current Cohabitation Partnership will

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*capacidad jurídica plena, establecen un hogar común, con voluntad de permanencia y de ayuda mutua”.*

<sup>117</sup> Art. 4 par. 2 CPL

<sup>118</sup> Art. 5 CPL

not be able to constitute a new Cohabitation Partnership. Relatives in the same bloodline or collateral relatives up until the fourth degree of separation cannot form a Cohabitation Partnership either.<sup>119</sup> Although the sexual element is not clearly spelled out, these restrictions of kinship, concubinage and matrimony are established as a sexual restriction. This is the tacit evidence of the ulterior conception of the Cohabitation Partnership in the mind of the legislators. A cohabitation partnership can be terminated a) voluntarily by either partner, b) by abandonment, c) by death, d) by wrongdoing establishing the partnership, or e) if one of the partners engages in concubinage or matrimony.<sup>120</sup> This very last option is outstanding because it ranks Cohabitation Partnerships below matrimony and concubinage, making it a weaker structure of intimacy more susceptible to termination. It also implies that the cohabitation partnership must terminate when any other type of recognized sexual relationship has begun.

When a cohabitation partnership is formed, the document constituting the partnership must indicate - among other things - the explicit manifestation of both partners to live together in a common home, with the purpose of continuity and mutual support.<sup>121</sup> Nevertheless, this declaration of housing intentions does not include a sexual motivation or obligation. Therefore, as it has been stated before in the cases of matrimony and concubinage, involuntary sexual acts even within the cohabitation partnership could be considered crimes.

*d. The economic sphere of the Cohabitation Partnership Law*

One of the most remarkable assets of the CPL is the ability of partners to regulate their patrimony. As in a matrimonial structure of intimacy, cohabitation partners have to option to manage their goods in community property or separate property. During the constitution and registration process of the cohabitation partnership, partners must establish the conditions on the management of their patrimony. If they do not arrange

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<sup>119</sup> Art. 4 CPL. In Spanish: “No podrán constituir una Sociedad de Convivencia, las personas unidas en matrimonio, concubinato y aquéllas que mantengan vigente otra Sociedad de Convivencia. Tampoco podrán celebrar entre sí Sociedad de Convivencia, los parientes consanguíneos en línea recta sin límite de grado o colaterales hasta el cuarto grado.”

<sup>120</sup> Art. 20 CPL

<sup>121</sup> Art. 7 CPL

them since the beginning, the property will be managed separately by default.<sup>122</sup> This opens the possibility of a prenuptial agreement that concubinage lacks. Moreover, at any point throughout the duration of the cohabitation partnership, members may establish, add, delete or modify any of the clauses regarding the administration of their patrimony.<sup>123</sup> This alternative makes the economic sphere of cohabitation partnerships very dynamic. Patrimonial conditions are always expressed in written form and officially registered as the cohabitation partnership. According to art. 3, the cohabitation partnership has effects towards third parties. So, partners may benefit from a cohabitation partnership when they apply for credits, for their economic capacity as a two-member financial unit may increase. But also, as Adame Goddard has pointed out, it could also be diminished.<sup>124</sup> Furthermore, the obligation to provide mutual support includes nourishment. The right is reciprocal and is regulated according to the rules for nourishment in the Civil Code for the Federal District.<sup>125</sup> Even after the cohabitation partnership has ended, and regardless of the reasons that caused that termination, partners may demand nourishment within the following year after the date the partnership came to an end.<sup>126</sup> They will be entitled to nourishment for a period of half the duration of the cohabitation partnership. They may only claim that right if they lack any financial means and have not engaged in matrimony, concubinage or another cohabitation partnership.

What remains very unclear within the economic sphere is the application of welfare in cohabitation partnerships. The CPL does not mention any social security or taxation benefits. The Social Security Law and the Law on Income Tax Return does not mention cohabitation partnerships either, for these legislations were passed before cohabitation partnerships existed. Notwithstanding, the CPL includes a provision that equates cohabitation partnerships to concubinage for other legal regulations. Article 5 states that regarding other legal ordinances, the Cohabitation Partnership will be governed, when applicable, in the terms of concubinage and the legal relationships

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<sup>122</sup> Art. 7. IV CPL

<sup>123</sup> Art. 9 CPL

<sup>124</sup> Adame Goddard, Jorge. “Análisis y juicio de la Ley de Sociedades de Convivencia para el Distrito Federal”. *Boletín Mexicano de Derecho Comparado*, XL, Num. 120. Mexico: Instituto de Investigaciones Jurídicas UNAM, Sep.-Dec. 2007. p.939.

<sup>125</sup> Art. 301-323 CCFD

<sup>126</sup> Art. 21 CPL

that derive from the latter will be generated in the cohabitation partners.<sup>127</sup> Thus, it can be said that any legal right granted to concubines can be claimed by cohabitation partners if not directly specified.

*e. The constructive sphere of the Cohabitation Partnership Law*

A structure of intimacy may also grant partners inheritance rights. In the case of the CPL, cohabitation partners are also entitled to these rights. Article 14 underlines that some of the rights of cohabitants are inheritance rights. They become effective immediately after the registration of the cohabitation partnership and these rights are regulated according to the legitimate inheritance of concubines.<sup>128</sup> Unlike concubinage at the federal level, in the Civil Code for the Federal District concubinage is established after only two years; whereas five years are necessary for a concubinage recognized at the federal level in the FCC. That is to say, inheritance rights are enabled faster.<sup>129</sup> Cohabitation partners must meet the conditions established for concubines in the federal district, but not the conditions set out for concubines at the federal level.<sup>130</sup> The constructive capacity of cohabitation partners may only be horizontal. The CPL does not include any provisions regarding adoption or any other schemes that would make the construction of that intimacy a vertical one. However, if cohabitation partners have had a child together the two-year requirement for the recognition of concubinage would be waived. Consequently, they would be entitled to all rights applicable to concubinage immediately, including the capacity to inherit. And the children originated from that cohabitation partnership may inherit even if their parents are not married, because both the FCC and the CCFD grant them inheritance rights through the recognition of parenthood in a birth certificate independently of the marital status of parents.<sup>131</sup>

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<sup>127</sup> Art. 5 CPL. In Spanish: “*Para los efectos de los demás ordenamientos jurídicos, la Sociedad de Convivencia se registrará, en lo que fuere aplicable, en los términos del concubinato y las relaciones jurídicas que se derivan de este último, se producirán entre los convivientes.*”

<sup>128</sup> Art. 14 CPL. In Spanish: “*Entre los convivientes se generarán derechos sucesorios, los cuales estarán vigentes a partir del registro de la Sociedad de Convivencia, aplicándose al efecto lo relativo a la sucesión legítima entre concubinos.*”

<sup>129</sup> Art. 291 Bis CCFD

<sup>130</sup> Art. 1635 CCFD

<sup>131</sup> Art. 1607-1614 CCFD and Art. 1607-1614 FCC

Although the CPL does not automatically grant adoption rights, it has been detailed how any other rights applicable to concubinage have a tacit effect in the CPL according to Art. 5. Adoption in the federal district outlined in the CCFD is more flexible than adoption at the federal level in the FCC. The CCFD does not differentiate simple and complete adoption; there is only one type of adoption.<sup>132</sup> At the federal level only spouses are able to adopt as a family unit, but in the federal district concubines also have that right.<sup>133</sup> Therefore, it can be argued that cohabitation partners also have that right through the implicit application of article 5 of the CPL.<sup>134</sup>

Furthermore, the nest for the construction of this intimacy is the home that will be formed by cohabitants. Thus, it was very important that the legislator protected that domain. The CPL allows cohabitants to subrogate rental contracts when one of the cohabitants dies. If the deceased cohabitant was the holder of the lease, the survivor partner will be entitled to all the rights and liable for all the obligations of that contract.<sup>135</sup> This territorial provision only applies to rental agreements, but not mortgages. Regarding property, the CCFD also allows concubines to constitute family patrimonies.<sup>136</sup> Hence, as in the case of adoption,<sup>137</sup> it could be claimed that the application of article 5 of the CPL would also allow cohabitants to constitute their family patrimony.

### *Conclusion*

Cohabitation Partnerships are a new structure of intimacy introduced by the legislators of Mexico City in 2006. It is only possible to constitute a cohabitation partnership within the federal district. Same-sex or opposite-sex partners may establish a cohabitation partnership and the registration process is simple. These partnerships, however, do not go through a civil procedure and partners keep the legal status of single individuals. Such partnerships also allow a dynamic and joint administration of assets. Cohabitation partnerships rank below concubinage and

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<sup>132</sup> Art. 390- 401 CCFD

<sup>133</sup> Art. 391-392 CCFD

<sup>134</sup> De La Mata, et al, p. 67. The authors grudgingly admit that adoption is also possible through the application of art. 5 CPL.

<sup>135</sup> Art. 23 CPL

<sup>136</sup> Art. 724 CCFD

matrimony as a weaker structure of intimacy, more susceptible to termination. The decision to terminate the partnership can be unilateral, and after a partner notifies their purpose to end it, the other partner will have a deadline of only three months to vacate.<sup>137</sup> In spite of the fact that cohabitation partnerships are not as solid as matrimony or concubinage, they are constituted in written form. Therefore, and unlike concubinage, the act of constitution has a greater emotional value for cohabitants.

#### III.2.4. Civil Pact of Solidarity

After the social impact of the Cohabitation Partnerships in Mexico City and the evident influence of the French *Pact Civil de Solidarité*, the Mexican State of Coahuila enacted a legislation that targeted the same issue: The recognition of a civil union between members of opposite-sex or same-sex. This new structure of intimacy is only valid within the state of Coahuila and not at the federal level. The State Congress on January 11, 2007 approved the Civil Pact of Solidarity<sup>138</sup> (CPS) as Decree Number 209. The decree amended a series of articles in the state civil code that were related to matrimony and concubinage. With this amendment, the CPS was incorporated directly into the State Civil Code, differently from the CPL, which was legislated as a separate law. The decree modifies forty-four articles of the State Civil Code and ten articles of the Law on the Civil Registry.

A Civil Pact of Solidarity, as the Civil Code of the State of Coahuila now defines it, is a contract celebrated by two individuals, of legal age, of the same or opposite sex, to organize their life in common. Those who celebrate it will be considered *civil partners*. They owe each other mutual support and assistance, consideration and respect, as well as reciprocal gratitude and they will have the obligation to act in common interest; in the same manner, they will have the obligation to provide each other with nourishment.<sup>139</sup>

The CPS is legally binding toward third parties after its celebration and registration. Just as matrimony, these acts are celebrated solemnly in the Civil

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<sup>137</sup> Art. 22 CPL

<sup>138</sup> *Pacto Civil de Solidaridad* in Spanish.

<sup>139</sup> Art. 385-1 CCSC

Registry. The act becomes public and is registered in the books as any other civil act. The termination of a CPS is also possible and is registered as a divorce. These pacts may include conditions on the economic administration of assets and they generate inheritance rights. The decree that created the CPS also modified a specific article of the civil code that defines the concept of family, the new version of that article currently states that those individuals united by matrimony, a civil pact of solidarity or by kinship who live in the same house and have, by law or voluntarily, unity in the administration of that home, are considered a family.<sup>140</sup>

This new structure of intimacy seems very comprehensive. However, the CPS includes limitations as well, such as the explicit ban on adoption by both or either civil partner. In the development of this chapter, the five spheres of intimacy have been identified in the structures of Matrimony, Concubinage and Cohabitation Partnerships. Now, these same spheres will be recognized in the CPS.

The Spheres of Intimacy in the Civil Pact of Solidarity:

*a. The emotional sphere of the Civil Pact of Solidarity*

Signing a CPS is an emotional civil act celebrated at a Civil Registry in the same manner as matrimony. The symbolism and solemnity of this act consolidate the emotional sphere of this civil contract. Art.195-5 CCSC describes the protocol of the ceremony, which is very similar to that of matrimony. The Civil Registry officer must verify the identity of witnesses and of the civil partners, and ratify their will to celebrate the CPS. Besides the solemnity of the act, the CPS grants both parties a new legal status: the condition of Civil Partners. Citizens joined in matrimony are considered spouses and have that legal treatment. Unlike concubines and those who sign a cohabitation partnership, the signatories of a CPS do get a new legal status. Officially, these individuals are not single anymore. Being able to legally change the status from single to civil partners has a strong emotional impact. Furthermore, it legitimates partners to claim any sort of benefits and to use that status on behalf of the

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<sup>140</sup> Art. 714 CCSC

other in any act or business.<sup>141</sup> For instance, in everyday situations such as collecting a private certified letter, a civil partner could collect that mail in automatic legal representation of their partner. These nuances in common life have a significant emotional value for partners.

The fact that civil partners can introduce their partners before society as their legal partners has a sentimental magnitude. The legislator has also opted for the term *home* when referring to the domicile of civil partners. Moreover, and as pointed out before when analyzing other structures, the element of trust is represented in the ability to act as legal guardian. In the case of civil partners of a CPS, the legal guardianship is not granted explicitly. However, it can be argued that according to Art 384-4 par. 3 CCSC, the legal guardianship should be automatic as it is for spouses because this provision enables partners to claim any benefit granted by law based on that civil partnership. In any case, the CCSC has the option of designating a legal guardian before a notary public.<sup>142</sup> Therefore, civil partners could even include this clause in the constitution of the legal partnership, that they will be appointed as each other's legal guardian in order to avoid conflict with other relatives entitled to claim legal guardianship in the state of interdiction.

*b. The moral sphere of the Civil Pact of Solidarity*

The legislator aimed to grant the CPS a high social value, including the modification of the legal status of civil partners and the wording chosen for this legislation. The moral standard of the CPS includes the protection of civil partners with the right to claim a compensation of damages if affected by their civil partner.<sup>143</sup> Especially, when the partner has committed a crime, when the partner exercises violence or intimidation at home, when the partner does violence to close relatives, when the partner has hidden they are affected by sexually transmitted diseases and when the partner has signed into the CPS while still being joined in a previous matrimony or

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<sup>141</sup> Art. 385-4 CCSC

<sup>142</sup> Art. 616 CCSC

<sup>143</sup> Art. 385-15 CCSC

CPS.<sup>144</sup> These situations denote the moral standards of civil partners as well as the mentality of lawmakers, banning polygamy, dishonesty and violence.

Moral provisions also highlight some of the prejudices against same-sex civil partners; for instance, the direct link with sexually transmitted diseases. One of the requirements to celebrate a CPS is to provide health certificates indicating that neither partner has a contagious disease; and if they do, that the other partner is aware of that situation. While providing such certificates is a prerequisite for matrimony as well, it is handled differently. In matrimony, having a sexually transmitted disease (STD) like AIDS is an impediment to celebrate the matrimony. Whereas in CPS, a partner with this illness can celebrate the pact as long as the other partner is aware of it. Once in matrimony, getting an STD becomes a ground for divorce<sup>145</sup> inasmuch as it diminishes the constructive capacity of that intimacy. However, this is not a ground for termination of a CPS, unless the disease was not informed to the affected partner and they claim an annulment of the CPS.<sup>146</sup> Likewise, the legislator has linked transsexuality to the CPS, emphasizing that acquiring the condition of transsexuality will not be an impediment to celebrate a CPS.<sup>147</sup> Needless to say, transsexuality *per se* is not a limitation to sign any type of legal act because the requirements will be fulfilled or not depending upon the individual's sex, the state of being male or female by law and not by the physical aspect or metamorphosis. These connections or associations between the CPS, and transsexuality and STDs depict the biased moral perception of the CPS.

*c. The sexual sphere of the Civil Pact of Solidarity*

Civil Partners are not obliged to have sex. As analyzed in matrimony, concubinage and cohabitation partnerships, the sexual element is present; nevertheless, the structure of intimacy does not force the members of that intimacy to have sexual intercourse. In the case of the State of Coahuila, involuntary sexual intercourse is also typified as a crime. The penalty for rape ranges from seven to fourteen years in prison,

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<sup>144</sup> Art. 385-15. I-V CCSC

<sup>145</sup> Art. 363.VI CCSC

<sup>146</sup> Art. 385-12. IV and Art. 385-15. V CCSC

<sup>147</sup> Art. 384-2. Par.2. CCSC

similar to that penalty at the federal level, from eight to fourteen years.<sup>148</sup> It is noteworthy, however, that when it comes to spousal rape, the penalty in the state of Coahuila ranges only from three to six years.<sup>149</sup> It means that an individual in intimacy is less protected when it comes to spousal rape, which might be applicable to civil partners. Although the legislation does not clearly name incidences regarding the criminal code, in terms of equivalency and proportionality, the same penalty would be applicable to civil partners.

Also, the clause regarding STDs underscores the tacit notion of the sexual element in the CPS. Civil partners must be aware of any contagious diseases before they celebrate the CPS and if they are not, the CPS can be annulled. This is a means of protecting the pure sexuality of that intimacy. The fact that Art.385-2 CCSC mentions transsexuality is not an obstacle to form a CPS indicates that a different sexual identity does not interfere with the constitution of this intimacy. Sexual activity is also regulated from a reproductive or constructive perspective, namely, with the presumption of paternity. When the CPS is celebrated between opposite-sex partners, any children born during the validity of the pact are considered children of the male partner. Paternity is attributed to him as well when the child is born within the 300 days immediately following the termination of the CPS. Therefore, this legislation assumes that civil partners are responsible for their sexual activity and that any sexual activity is exclusive of civil partners, thus directly allocating paternity as in matrimony. This only applies to opposite-sex partners, because when it comes to same-sex partners, paternity issues are handled as if the CPS did not exist at all. That is to say, joint paternity of same-sex individuals will not be recognized even if one of the partners is the biological parent.

*d. The economic sphere of the Civil Pact of Solidarity*

In terms of the economic side of this intimacy, the options are equal to those of matrimony: separate property and community property.<sup>150</sup> When the CPS is constituted, partners must indicate whether they will opt for community property or

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<sup>148</sup> Art. 384 CRCSC and Art. 265 FCRC

<sup>149</sup> Art. 385 CRCSC

<sup>150</sup> Art. 385-10 CCSC

not. If they do not clearly notify the type of management of assets, the CPS will be established in the separate property modality by default. The prenuptial agreement regarding assets must be registered within the deeds of the CPS. All formalities and prerequisites of property management are exactly the same as in matrimony. Actually, Art. 385-11 links the economic aspect of the CPS to the same principles of the economic aspect in matrimony. If a CPS begins in the separate property modality, it can later be changed to community property and vice versa. The community property assets have third-party effects as soon as the CPS is registered. This may be helpful to increase a couple's financial capacity. If civil partners decide to terminate their pact, they must also settle the liquidation of the community property before the termination of their CPS can be registered.<sup>151</sup>

Besides the type of property management the partners choose, the CPS grants them access to welfare. This entitlement is explicitly declared as a particular effect of the pact.<sup>152</sup> The acquired status of civil partners legitimates both parties to claim any benefits, pensions, welfare, legacy, or equivalent perquisites. This broad inclusion of collateral benefits allows partners to claim all the benefits that spouses are able to claim in matrimony. These advantages also come with attached obligations, for instance, the obligation to provide nourishment and to care for civil partners.<sup>153</sup> When one of the partners is ill, in state of interdiction, or physically disadvantaged, the pact cannot be terminated unilaterally by the other partner unless a judge has already established an alimony.<sup>154</sup> A family judge must adjudicate the corresponding rights and obligations when the termination is initiated unilaterally;<sup>155</sup> and the applicable jurisdiction of the court is determined by the domicile where the CPS has been established.<sup>156</sup>

*e. The constructive sphere of the Civil Pact of Solidarity*

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<sup>151</sup> Art. 385-13 par. 2 CCSC

<sup>152</sup> Art. 385-4 par. 3 CCSC. In Spanish: “*El estado adquirido como compañeros civiles, legitima a los interesados para reclamar las prestaciones que, bajo las modalidades de pensiones, disposiciones testamentarias especiales o beneficios o provechos por prestaciones sociales u otros análogos, contemplan las leyes.*”

<sup>153</sup> Art. 402 CCSC

<sup>154</sup> Art. 385-14 par. 3 CCSC

<sup>155</sup> Art. 385-5. II CCSC

<sup>156</sup> Art. 385-16 CCSC

The introduction of the CPS in the State of Coahuila motivated the legislator to introduce a definition of “Family” in the civil code. The amendment of Art.714 CCSC now embraces civil partners within the concept of family. The CCSC declares that every family has the right to enjoy a dignifying homestead. In this context, the term “family” is to be construed as those people united in matrimony, a civil pact of solidarity or kinship who cohabit in the same domicile and have, by law or voluntarily, unity in the administration of that home.<sup>157</sup> Not only does this definition grant access to the constitution of a family patrimony, but also it may guide judges to decide upon conflict on the applicability of this concept to civil partners. It is clear that civil partners with or without children do form a family. And their patrimony can be safeguarded as in matrimony, so their home cannot be levied upon if they constitute the family patrimony.<sup>158</sup>

Regarding children, it has been previously mentioned that in an opposite-sex CPS, the recognition of paternity is automatic and mandatory throughout the duration of the CPS and up until 300 days after its termination.<sup>159</sup> In biological reproduction, a CPS does not affect the civil registration process because it is regulated independently of the legal status of parents. The problem arises when same-sex civil partners cannot have children biologically or opt not to, because adoption is strictly prohibited.<sup>160</sup> One of the most outstanding limitations of a CPS is that when civil partners celebrate it, they are voluntarily waiving their right to adopt children. The legislator included this ban specifically targeting same-sex partners. The impediment is applicable to civil partners both as individuals and as a family unit. Furthermore, if same-sex civil partners have already had children, the legal guardianship of minors cannot be shared or adjudicated to the other civil partner. These provisions are an explicit discrimination to same-sex civil partners in a CPS, opposite-sex civil partners are not affected by this. This differentiation shows the moral value that legislators designated

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<sup>157</sup> Art. 714 CCSC modified on January 12, 2007. In Spanish: “*Toda familia tiene derecho a disfrutar de una vivienda digna y decorosa. Para los efectos de este título, se entiende por familia a las personas que estando unidas por matrimonio, pacto civil de solidaridad o por parentesco consanguíneo, civil o afín, habitan una misma casa y tienen, por ley o voluntariamente, unidad en la administración del hogar. Para los mismos efectos se entiende por familia a las personas que viven juntos como si estuvieran casados sin estarlo y sin que exista en ellos ningún impedimento no dispensable para que contraigan matrimonio.*”

<sup>158</sup> Art. 714-755 CCSC

<sup>159</sup> Art. 385-6 CCSC

<sup>160</sup> Art. 385-7 CCSC

for this structure of intimacy. Same-sex intimacy is allowed, however reducing the constructive capacity of civil partners. Therefore, a same-sex CPS can only build a horizontal type of intimacy.

Inheritance rights are also included in the CPS and civil partners are protected. In all the relevant articles regarding testamentary and legitimate inheritance, civil partners through a CPS get the same proportion of inheritance as spouses in matrimony. When there are no descendants, the civil partner is entitled to 50% of the legacy and the remaining 50% is given to ascendants.<sup>161</sup> When there are descendants, civil partners are entitled to a fragment of that endowment as if they were a descendant.<sup>162</sup> That is to say, the assets will be divided in equal parts for all children and the civil partner.

### *Conclusion*

Civil Pacts of Solidarity are a new structure of intimacy legislated in the State of Coahuila and not recognized at the federal level, only locally. When two individuals celebrate this pact, their legal status changes and the pact is registered in the civil registry. The pact is signed in a solemn ceremony at the civil registry just as matrimony. The pact has third-party effects after its registration. Civil partners may manage their assets jointly or severally. All the welfare benefits that a spouse would get are also applicable to civil partners. The right and obligation to provide nourishment is also a condition of this pact, along with any other condition mutually established by partners. Civil partners may constitute a family patrimony as well. Unfortunately, when same-sex partners celebrate the CPS, they explicitly lose their right to adopt children; opposite-sex partners do not give up that right. This ban particularly targets and discriminates same-sex couples.

### III.2.5. Conclusion (Compare and Contrast)

After the thorough analysis of these four structures of intimacy recognized legally in Mexico, it is easy to acknowledge some similarities and differences among them.

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<sup>161</sup> Art. 1077 CCSC

<sup>162</sup> Art. 1075 CCSC

Now, in a more graphic manner, the following table compares some core items that can be found in the four structures. These material elements are included in the five spheres of intimacy; and as it can be easily appreciated, they are weaker or stronger, available or not applicable, according to each structure. So, in the form of a matrix, with the structures of intimacy on one axis and the material elements of the spheres of intimacy on the other, these comparative advantages and/or disadvantages will be clearly identified. This table also shows the way structures of intimacy and spheres of intimacy interact, as discussed in the previous chapter. In order to interpret this information adequately, a comparative and contrasting review is provided in the paragraphs following this table.

**Table 2:**

		Matrimony	Concubinage	Cohabitation Partnership	Civil Pact of Solidarity
Emotional	Solemnity of Civil Act: Ceremony	At the civil registry	None	At a simple administrative office	At the civil registry
	Individual's legal status	Married	Single	Single	In civil partnership
	Legal Guardianship	Automatic	Not applicable	Automatic after two years of cohabitation	Not automatic, but possible
Moral	Gender	Opposite-sex spouses Same-sex spouses only allowed in Mexico City	Opposite-sex concubines	Same-sex or opposite sex cohabitation partners	Same-sex or opposite sex civil partners
	Termination	Divorce procedure, must justify grounds	Automatic	Unilateral, must register termination	Unilateral, must register termination
Sexual	Sexual practice	Sexual Exclusivity No sexual obligation	No sexual obligation	No sexual obligation	No sexual obligation

Economic	Management of Assets	Community or separate property	Separate property	Community or separate property	Community or separate property
	Welfare benefits for partners	Eligible	Eligible	Not directly eligible	Eligible
Constructive	Family Patrimony	Spouse included	Concubines not included	Cohabitation partners not directly included	Civil Partner included
	Paternity	Automatic	Not automatic	Not automatic	Automatic
	Adoption	Possible	Individual adoption, not as a couple	Individual adoption, not as a couple	Forbidden for same-sex couples
	Inheritance	Eligible	For exclusive concubines	After two years of cohabitation	Civil partners are eligible

Matrimony and Concubinage are recognized at the federal level, whereas Cohabitation Partnerships and Civil Pacts of solidarity are only recognized locally. The disproportionality of the rights conferred by these different types of intimacy contracts contributes to the deeper differentiation of social classes in Mexico. It can be said that there are first-class (Matrimony), second-class (Concubinage) and third-class intimacies (Cohabitation Partnerships and Civil Pacts of Solidarity). Spouses in Matrimony get the recognition of all their rights as soon as they celebrate their civil ceremony. Concubines have to demonstrate their concubinage exists, having more difficulties with the burden of proof. Concubinage can only be corroborated *a posteriori* while all other structures are certified *a priori*. The emotional protocol of a civil ceremony represents an important step in the lives of many individuals. These solemn ceremonies in matrimony and civil pacts of solidarity are celebrated in civil registries; cohabitation partnerships are registered in a simple government office and concubines never reach a phase of ceremonial recognition. For many people, being unable to celebrate the commencement of their intimacy at a civil registry demerits their union. Furthermore, throughout their lives, citizens like to show their legal status before any legal procedure. Those united in matrimony will change their status to *married*, as well as those in a civil pact of solidarity who will change their status to *civil partners*. Nonetheless, concubines and cohabitation partnerships do not alter an

individual's legal status and they will remain to be considered single individuals. It hinders the public recognition of their intimacy, a very remarkable element of socialization that sometimes affects and individual's capacity to claim perquisites in the private sector, such as benefits at work for married employees *vis-à-vis* the lack thereof for single employees. Besides, members of an intimacy may be each other's legal guardians. In matrimony, spouses get an automatic legal guardianship of each other, including hospital visitation rights. Concubines do not qualify as legal guardians and cohabitation partners may only claim guardianship after their cohabitation has matured for at least two years. Civil partners may qualify as legal guardians; not because the legislation grants it explicitly, but rather because they can be appointed as any other individual and can claim it before a judge.

When an intimacy is about to begin, not many people think about the possibility of terminating it. Yet, the requirements to finish an intimacy are clearly defined and available in the civil code; partners should consider them before they legalize their intimacy. Matrimony has the social weight and religious expectation to last forever. Therefore, spouses who request a divorce must be able to justify their grounds, and the civil procedure is rather long and stern. Concubines can terminate their intimacy at any time, for there are no formalities to begin concubinage and neither are there any procedures to cancel it. Cohabitation Partnerships and Civil Pacts of Solidarity do have to register their termination, but the process is quite simple and unilateral. These structures are legally binding, but do not bind partners forever against their will.

Although many people would guess that having sexual intercourse is a given fact in any type of intimacy, it has been mentioned individually while analyzing these structures that there is no obligation to engage in sexual activity with one's spouse, concubine or partner. The intentions and motivations are clearly shown, forbidding relatives to sign into these intimacies and with other factors like monogamy and the limitation to begin a further intimacy contract. Nevertheless, the members of an intimacy must be willing to engage in any sexual practice. Otherwise, it would be considered a crime that has already been typified in the criminal codes. Out of these four types of intimacy structures, only matrimony requires sexual exclusivity.

Concubinage, cohabitation partnerships and civil pacts of solidarity do not regulate adultery or any consequence arising from adulterous behavior.

The economic capacity of an intimacy plays a big role in its socialization, integration, survival and success. When couples can choose the type of management they consider best for their assets, they can shape their finances. These structures of intimacy allow couples to decide between a community property and a separate property modality, all of them except concubinage. In addition to the management of their own belongings, couples may be eligible for welfare benefits such as pensions, social security benefits, tax deductions and so on. Matrimony offers this welfare protection for spouses, concubines qualify for welfare when there is only one concubine and it is not concurrent with a different type of intimacy such as matrimony. Cohabitation partners may be eligible for welfare even though the CPL does not explicitly state that. Civil partners do get derivate welfare benefits according to the CPS. In this respect, concubines and cohabitation partners are less protected.

Moreover, the constructive sphere of an intimacy varies in these structures. An intimacy may be built in a horizontal or a vertical construction. The constitution of a family patrimony is not available for concubines and may apply for cohabitation partners although it is not directly granted in the CPL, the concept of family does not embrace them. In the cases of matrimony and civil pacts of solidarity, the concept of family is inclusive for spouse and civil partners. If couples want to expand their constructive sphere in a vertical direction, adoption is only permitted in matrimony. Concubines and cohabitation partners may adopt as single individuals but not as a family unit. For same-sex civil partners in a CPS, adoption is out of the question, inasmuch as they give up this right when they celebrate their pact. Regarding biological reproduction, paternity is automatically established in matrimony and opposite-sex civil pacts of solidarity. In concubinage and cohabitation partnerships, paternity is recognized according to the general principles of a newborn's registration. That is to say, only a father and a mother, or the mother alone can register a child. So, again, same-sex couples face a problem if they want to claim a joint paternity or maternity for that matter. Only one of the members of that intimacy will be able to claim parenthood and the child or children will not belong (legally) to the family unit, but rather to the individual as a separate entity. Also, these structures grant inheritance

rights to the members of that intimacy. Spouses and civil partners are eligible for inheritance directly. Concubines, though, only qualify as heirs if they demonstrate that there was not multiplicity of concubines, that their concubinage lasted at least five years or that they had a child during their concubinage. The condition for cohabitation partners is that they must have cohabitated for at least two years in order to qualify for inheritance.

Finally, there are also gender-based access restrictions to these types of contracts. Matrimony and concubinage are only available for opposite-sex couples. Partners of the same sex may only choose between a cohabitation partnership, a civil pact of solidarity, or matrimony in Mexico City. But, as it will be further discussed in the next section of this chapter, these options are only available at the state level; the federal level offers matrimony and concubinage for heterosexuals only.

### **III.3. Court Cases and Decisions**

In the previous section of this chapter, all four structures of intimacy as regulated in Mexico have been analyzed. A distinction has been made between the types of intimacy contracts that are recognized at a state level and those accepted at the federal level. Now, it will be explained how a state legislation in the form of a federal structure of intimacy has created social, administrative and constitutional controversies. These conflicts will show the incompatibility of state legislations with federal institutions. Especially, as local legislations begin to be more flexible, the federal structure remains rigid. The administrative challenges of the federal system in Mexico end up affecting an individual's spheres of intimacy as well.

First of all, it is necessary to discuss the amendments made to the structure of matrimony in Mexico City. The case landed in the Mexican Supreme Court of Justice (SCJN), with a motion of unconstitutionality. This section will describe, in a brief manner, the decision made by the Supreme Court. Nonetheless, the actual examination of the grounds for this decision, the opinions and human rights evaluation will be discussed in Chapter IV.4. Then, the lawsuits against the Mexican Institute of Social Security (IMSS) will depict the administrative barriers same-sex

married couples face even after their matrimony has been celebrated.<sup>163</sup> Matrimony is not the end, but rather a life instrument. The necessities that arise after celebrating a civil matrimony come from all five spheres of intimacy. Unfortunately, the public administration is not prepared to face new types of intimacy. Such inconsistencies underline the fact that a structure of intimacy has many ramifications. And, the regulations of the intimacy contract *per se*, do not suffice unless there is a holistic approach, adjusting all the secondary legislation that overlaps with the structure of intimacy as a whole. It is important to note that jurisdictions are different; a local legislation affects the operation of a federal institution. But, up to which point can a local legislative assembly override the faculties of a federal jurisdiction? This can only be understood after analyzing the case of civil matrimony in the Federal District, Mexico City, where the state/federal feud is evident.

### III.3.1. Matrimony in Mexico City

On December 21, 2009, the Legislative Assembly in Mexico City passed another extraordinary legislation: the modification of Civil Matrimony in the Federal District. The decree was published in the Official Gazette of the Federal District on December 29, 2009.<sup>164</sup> This bill is actually very concise; it modifies eight articles of the Civil Code of the Federal District and the Code of Civil Procedures of the Federal District. The amendments mostly replace the wording of these articles, with a more gender-neutral language, allowing both men and women to claim these rights. The most important amendment was made to Art. 146, now stating:

*“Matrimony is the free union between **two persons** in order to accomplish life community, where they owe each other respect, equality and mutual support. It must be celebrated before a Judge of the Civil Registry and with the formalities that this code stipulates.”<sup>165</sup>*

Entering into force forty-five days after its publication, since March 4, 2010, matrimony for same-sex couples is now available as well; however, only if the civil matrimony is celebrated within Mexico City. This new wording grants access to

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<sup>163</sup> *Instituto Mexicano del Seguro Social* in Spanish (IMSS).

<sup>164</sup> *Official Gazette of the Federal District*. Mexico, December 29, 2009 pp. 525-526.

<sup>165</sup> In Spanish: “*Artículo 146.- Matrimonio es la unión libre de dos personas para realizar la comunidad de vida, en donde ambos se procuran respeto, igualdad y ayuda mutua. Debe celebrarse ante el Juez del Registro Civil y con las formalidades que estipule el presente código.*” Art. 146 CCFD

same-sex couples to a structure of intimacy that remained until then exclusive of opposite-sex couples. Therefore, all the elements of matrimony discussed in the five spheres of intimacy, including adoption, are now offered to same-sex spouses. The legislation has not been embraced with the same excitement by all political parties. The bill passed with 39 votes in favor, 20 against and 5 abstentions.

Mexico's Attorney General submitted a Motion of Unconstitutionality<sup>166</sup> before the Supreme Court of Justice on January 27, 2010. According to the Federal Constitution, Art.105.II.C, the Attorney General may submit a motion of unconstitutionality whose thesis is to exhibit the possible contradiction of a general norm and the Constitution. The deadline to submit these actions is thirty calendar days after the publication of that supposedly conflicting law. The Attorney General, Mr. Arturo Chavez Chavez, managed to submit the action last-minute and the request was admitted for review.<sup>167</sup> The motion of unconstitutionality was based upon the following grounds:

- a. The Legislative Assembly did not justify the need to pass the bill.<sup>168</sup>
- b. This legislation damages the ideal [heterosexual] family model.<sup>169</sup>
- c. Adoption by same-sex couples damages and discriminates children.<sup>170</sup>
- d. It diverts the federal order, with the recognition of same-sex matrimony in the entire country.<sup>171</sup>
- e. It violates the constitutional normative hierarchy.<sup>172</sup>

The Supreme Court of Justice ruled against the Motion of Unconstitutionality on August 16, 2010, supporting the amendment made by the Legislative Assembly of the Federal District with nine votes in favor and only two against it. This sentence ratified the bill amendments made to the civil code in Mexico City and it reiterated the following:

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<sup>166</sup> *Acción de Inconstitucionalidad* in Spanish.

<sup>167</sup> *Judicial Gazette of the Federation*. Supreme Court of Justice of the Nation. Mexico, Vol. XXXII, December 2010. File number 00002/2010-00.

<sup>168</sup> Art. 16 MexCon

<sup>169</sup> Art. 4. I MexCon

<sup>170</sup> Art. 4. VI-VII MexCon

<sup>171</sup> Art. 14, Art. 16, Art. 121. IV MexCon

<sup>172</sup> Art. 133 MexCon

- a. Matrimony between same-sex spouses in the Federal District is constitutional, because Mexican States have the faculty to legislate in local civil matters.
- b. A civil matrimony signed in and recognized by the Federal District must be recognized by the remaining 31 states in the Federation.
- c. Same-sex spouses must not be discriminated against, so they also qualify for adoption as much as opposite-sex spouses do.

This sentence endorsed the legislation of the local legislative assembly in the Federal District, simultaneously commanding other states to acknowledge the validity of same-sex intimacy, even if constituted in a different jurisdiction in Mexico. The positive effects of this jurisprudence can be exemplified in the specific case of a lesbian couple who fought against the Federal Social Security System in Mexico City claiming their rights as spouses.

### III.3.2. Castañeda v. the Mexican Institute of Social Security<sup>173</sup>

Mrs. Lol Kin Castañeda Badillo and Mrs. Judith Minerva Vazquez Arreola are two social activists in Mexico City, Castañeda is the President of the Pride Committee and Vazquez gave up her dream of becoming a nun when she realized she was a lesbian, so she joined the social cause as well. Castañeda and Vazquez were pioneers in many aspects; they were the first same-sex couple to sign into matrimony in Mexico on March 11, 2010,<sup>174</sup> the first female matrimony in Latin America, and also, the first same-sex matrimony to face the nightmare of the Mexican bureaucracy. Castañeda was already working and was thus a beneficiary of social security.<sup>175</sup> After their matrimony, she decided to register her now wife as her dependent so that she could be eligible for social security benefits as well. On April 12, 2010, the IMSS rejected their application arguing that only opposite-sex spouses qualified for social security benefits. They attempted to solve the issue at different levels within the IMSS. However, a notification received on August 2, 2010, officially terminated their

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<sup>173</sup> Injunction submitted on August 23, 2010 before the District Court in Labor Matters in Mexico City. The case was filed as an appeal for a constitutional injunction called *Amparo* in Mexico. The so-called Amparo Law is very similar to the German *Verfassungsbeschwerde* figure. The discussion on the specific violation of Constitutional rights will be further developed in Chapter IV.

<sup>174</sup> Marriage license number 875781.

<sup>175</sup> Social Security Number: 4592762489-5.

request for application.<sup>176</sup> It did not take long before Castañeda used her right to appeal for a constitutional injunction. The appeal was submitted at the Fourth District Court for Labor Matters and approved on November 9, 2010, the judge order the IMSS to proceed with the registration. Nonetheless, the Federal Government appealed the judge's decision on November 22, 2010. A few weeks later, the Federal Government withdrew the appeal and the verdict made on November 9, 2010 was declared firm.<sup>177</sup> The judicial process was quite political; the truth is that Art. 5 of the Social Security Law states that spouses and concubines are considered beneficiaries. Nowhere does the article mention gender, or rather opposite-gender, as a precondition for eligibility. Daniel Karam, Secretary of the IMSS opposed the application, due to his party affiliations (the PAN) he maintained a rather conservative approach to this case in general. The result of the lawsuit was expected, because the wording of the SSL is clear. As soon as Castañeda and Vazquez signed into matrimony, they became spouses. Therefore, they could claim any rights conferred to spouses, regardless of their gender.

### III.3.3. Conclusion

After the Castañeda case, Mexico City residents may now register their same-sex spouses as beneficiaries in the social security system. This process, however, is not automatic. The IMSS has the policy of denying the applications for registrations, same-sex spouses will only be admitted after the judicial process has ended and the applicants provide a court order. The interpretation of article 5 has been ratified by judges as they decide on social security registration cases. Nonetheless, the IMSS is reluctant to act proactively and change the requirements for applicants. The SSL does not need to be modified, because the word spouse is actually gender-neutral. The administrative procedures of the IMSS show the opposition of the federal government to acknowledge the rights granted to same-sex couples at the state level in Mexico City. If same-sex couples have to go through this legal process before a right can be acknowledged, they will incur in additional expenses that many citizens might not be able to afford. Moreover, time is of the essence in medical cases. A delay in a

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<sup>176</sup> Mexican Institute of Social Security (IMSS). Notification number 35 01 60 61 9100/AV/1670, signed by Mr. Samuel Palafox Pichardo.

<sup>177</sup> AMD. Grupo Formula. *Ratifican amparo a matrimonio gay para que IMSS inscriba a cónyuge*. January 6, 2011. Mexico City, Mexico.

registration process could represent severe problems and could cause irreparable damage. It still remains to be seen whether any of these affected couples will end up suing the IMSS for a compensation of damages in a civil or criminal lawsuit.

#### **III.4. International Law and Intimacy**

The analysis of Mexican law by itself cannot be complete unless it is ordered within the international law context and from a comparative perspective. It is important to review where Mexico stands in comparison to foreign jurisdictions and within the Americas, including both North and South America. There are different issues to be considered in this section regarding international law and intimacy:

- a. Applicable law to transnational/non-Mexican intimacies
- b. International law applicable to all intimacies
- c. The comparative perspective

In the previous sections of this chapter, it has been discussed how Mexican Law recognizes and structures intimacy. Nonetheless, in a world of globalization and multiculturalism, intimacies nowadays involve partners of different nationalities, legal systems and jurisdictions. Thus, the recognition and legalization of an intimacy becomes a matter of private international law with the subsidiary repercussions or international treaties signed by states, i.e. public international law. It should be considered that an intimacy will be affected by the location where it is constituted, by subsequent locations of residency and, if applicable, by the jurisdiction where it is modified or terminated. The nationalities of the members of that intimacy as well as the set of laws that governs their structure of intimacy are foundational elements.

This section will review the issues that have an effect on an intimacy inasmuch as it includes an international component. An intimacy may not only be registered in order to claim its recognition and benefits, but also by obligation. Especially in cases where one of the parties is a foreign citizen, the responsibility to notify and to register an intimacy may be linked to their legal residency status. The omission of this duty could bring negative consequences to that (foreign) citizen. It is necessary to analyze the applicable law and the legal treatment given to foreign

intimacies in Mexico. The economic sphere of intimacies is particularly important, for it may have an impact on third-party transactions and involve other areas of law. Furthermore, even if an intimacy has been constituted abroad, partners might desire to modify it or to terminate it while residing in Mexico. The determination of the applicable law and procedural viability of a divorce will also be discussed in the following paragraphs.

#### III.4.1. International Law and International Intimacies

Mexico has ratified many international instruments that affect or are related to the recognition of intimacies; such as the multilateral “Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards”<sup>178</sup> and bilateral agreements like the “Spain-Mexico Agreement on the Recognition and Execution of Judgments and Arbitral Awards in Civil and Commercial Matters”,<sup>179</sup> among others. At the end of 2010, Mexico joined the International Commission on Civil Status (ICCS)<sup>180</sup> as well. Some of the provisions ratified in these international commitments have already been incorporated into the Federal Code of Civil Procedures, articles 543-577. In section III.2, the four available structures of intimacy were described and analyzed. These structures, however, are the options to begin an intimacy in Mexico. An intimacy that has begun abroad has a different behavior in Mexican law.

##### *a. Registration and Validity.*

In order to claim the validity of an intimacy that has been celebrated abroad, it must be registered in a Mexican Civil Registry. Nonetheless, the only structure of intimacy that can be harmonized into Mexican law and subsequently registered is matrimony. The foreign marriage license must be registered in the civil registry that corresponds to the new Mexican domicile of spouses. The FCC sets a relative deadline of three months after the arrival in Mexico.<sup>181</sup> If the matrimony is registered in Mexico within this deadline, the validity will be retroactive since the date that matrimony was celebrated. After the three months have passed, spouses may still register their

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<sup>178</sup> Montevideo, May 7, 1979.

<sup>179</sup> Madrid, April 17, 1989.

<sup>180</sup> Mexico joined the ICCS but has not ratified all instruments yet.

<sup>181</sup> Art. 161 FCC

intimacy but its legal effects will begin on the day of the delayed registration. The FCC does not specify any conditions that the foreign matrimony must meet; it only adds the provisions for the deadline.

At the beginning of this chapter, it was explained how religious matrimonies have no legal effect in Mexico since the introduction of the Law on Civil Matrimony by President Benito Juarez in 1859. Thus, it is ironic how religious matrimonies are recognized in Mexico if they are celebrated abroad, at least since the jurisprudence of June 2, 1960. The SCJN resolved then in the constitutional injunction 5752/59 that matrimonies celebrated abroad – including the religious ones – are recognized by Mexico and have all legal effects.<sup>182</sup> The justification of that decision was that Mexico had international commitments on that matter. Nevertheless, as Jorge A. Silva has pointed out, Mexico had not signed any international conventions about this at that point.<sup>183</sup> Having said that, the common denominator in the analysis of many sentences by the SCJN over the period of 1917 to 2011 is that the principles of private international law are applicable to this matter; namely *locus regit actum*<sup>184</sup> and *lex patriae*.<sup>185</sup> Justice Mariano Azuela, who would later become Chief Justice of the SCJN, elaborated on his thesis of February 14, 1968: “...This is admitted [the recognition of a foreign matrimony] for practical and logical reasons, because it would not be possible that a matrimony were celebrated according to the forms and laws of all countries on earth in order for it to be valid worldwide, or that the condition of spouses were only valid in the country where they got married, or that the matrimony were celebrated in every country. Therefore...it is extraterritorial, because the personal statute of spouses follows them everywhere.”<sup>186</sup> His arguments, if nothing else, were genuine common sense.

Regardless of the country where the matrimony was celebrated and whether it is a religious or civil matrimony, the marriage certificate must be duly registered in

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<sup>182</sup> Constitutional Injunction 5752/59. Rosario Marcos Sánchez de Sena. June 2, 1960. Unanimous decision. Lead Justice: José López Lira. Case registration number: 271398.

<sup>183</sup> Silva, Jorge A. *Los efectos en México del matrimonio celebrado conforme a una ley extranjera*. *Revista de Derecho Privado*. Year 8, Num. 24. Mexico: UNAM, 1997. p. 80.

<sup>184</sup> In Latin, the applicable law is that of the place where the act was celebrated.

<sup>185</sup> In Latin, the law of the nationals.

<sup>186</sup> Constitutional Injunction 5649/67. Juan Gari Pallares et al. February 14, 1968. Lead Justice: Mariano Azuela. Case registration number: 269381.

the country where it was celebrated and duly legalized, either via a consular legalization or with the Apostille,<sup>187</sup> and a sworn translation into Spanish (when applicable) so that it can be registered in Mexico and have legal effects. This is true when a) two Mexican citizens celebrate their matrimony in a foreign country, b) when the spouses are a Mexican and a foreign citizen, or c) when both citizens are non-Mexican. The FCC already constrains the validity of that matrimony according to the date of registration subject to the conditions of Art. 161. The registration of the foreign matrimony is detailed as an administrative procedure, but not as an obligation. It remains unclear whether spouses are obliged to register their matrimony celebrated abroad if they do not want to claim its legal effects. In any case, the SCJN has stated that spouses are obliged to register at least the patrimonial administration of that matrimony, i.e. the economic sphere is very relevant, and it must be clear whether their matrimony contract has a separate property or community property modality.<sup>188</sup> Justice Ernesto Solís López explained: "...the registration is for the benefit of third parties who establish legal relationships with spouses. This is obvious, for the transcription is a means to make the act public, so that everyone knows and in order to avoid prejudice against those who might be affected by ignoring their civil status..." This sentence made a distinction between the family or moral effects, and the patrimonial ones. The SCJN considered that the validity in terms of the family law effects was given even without the registration, but the registration of their patrimonial regime was mandatory. Furthermore, foreigners have a constitutional restriction to purchase land along the coastline in Mexico, as set out in Art. 27.I. The SCJN ruled that when the foreigner had a Mexican spouse in a community property regime, this constitutional restriction did not apply because the foreigner did not purchase the land directly but rather it was considered a joint asset.<sup>189</sup> This sentence shows again, how important it is to register the patrimonial modality of that matrimony.

*b. Termination: Divorce and annulment.*

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<sup>187</sup> The Apostille legalization of The Hague Convention of October 5, 1961 Abolishing the Requirement of Legalization for Foreign Public Documents. Mexico is a member of this convention.

<sup>188</sup> Constitutional Injunction 9288/67. Evangelina Contreras de Cenizo. September 13, 1968. Lead Justice: Ernesto Solís López. Case registration number: 803670.

<sup>189</sup> Constitutional Injunction 206/75. María Guadalupe Terroba Canaliza widow of Bella. June 30, 1975. Unanimous decision. Lead Justice: Efraín Angeles Senties. Case registration number: 254577.

So far, it is clear how a foreign intimacy or an intimacy that has begun abroad can be recognized in Mexico. The partners of that intimacy may also choose to terminate it while in Mexico. While the Mexican legal system did not intervene when the intimacy was constituted, it will play an important role when terminating it. The judicial process to discontinue that intimacy, i.e. the divorce procedure is tightly linked to the immigration provisions for foreigners in Mexico. For instance, during the conservative period of Spain, while in transition towards a democracy, the SCJN resolved a very important case regarding a divorce of a Spanish citizen.<sup>190</sup> Spanish Laws, still legacies of the Franco dictatorship, did not offer a divorce as an option to spouses. The case that landed in the SCJN was particularly relevant because on one hand it discussed the possibility of terminating a matrimony celebrated in a country where a divorce was impossible, and on the other hand, the grounds for divorce had occurred in Spanish territory. In this case, the SCJN ruled that while the Spanish citizen had the right to the protection of Mexican laws in this civil matter, the right was generated when she moved to Mexico; thus, the six-month deadline began at that point disregarding the events that had happened in Spanish territory. In contradiction to this sentence, the Court did admit evidence of events that supposedly had taken place beyond the Mexican borders in the divorce case of Mrs. Maria Cristina de Borbón de Patiño,<sup>191</sup> who was accused of adultery. Her husband did not have any direct evidence to prove his case, but through declarations and documentation he was able to prove his wife had travelled abroad with her friend and stayed at hotels together while travelling. The SCJN ruled that adultery had taken place (even without conclusive evidence), because it was not “normal” that a woman travelled abroad with another man “without her husband’s authorization.” The Court assumed that the overnight stays at hotels in other countries had been sexual encounters. There is no evidence for a reader to decide whether this sentence was gender-bias, except for the wording itself.

Just as a religious matrimony celebrated abroad is recognized in Mexico, the annulment of a religious marriage has legal effects as well. In the constitutional

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<sup>190</sup> Constitutional Injunction 1891/77. Enrique Bernat Suárez. December 1, 1978. Unanimous decision. Lead Justice: J. Ramón Palacios Vargas. Case registration number: 913801.

<sup>191</sup> Constitutional Injunction 7803/58. María Cristina de Borbón de Patiño. 9 de diciembre de 1959. Mayoría de cuatro votos. Disidente: Gabriel García Rojas. Ponente: Mariano Ramírez Vázquez. Registro No. 271632.

injunction of 1978<sup>192</sup> the court ruled that the sentence issued by the ecclesiastical tribunal was valid because it was considered *res judicata*.<sup>193</sup> The appeal lacked any solid grounds, inasmuch as the sentence had fulfilled the legal requirements of the Code of Civil Procedures. Again, the secular legal system in Mexico recognized the applicability of canonical law. In this case, the emphasis was laid on the procedure formalities of that sentence. Formal requirements become important from the immigration perspective also. Foreign citizens in Mexico must demonstrate that they have legal residency in order to file a divorce. The domicile will determine whether the divorce is admitted; and in addition to other requirements, foreigners must submit evidence of their legal status in Mexico according to the Jurisprudence Report of 1973.<sup>194</sup> However, when the foreign citizen is the defendant, they are not required to submit their residency permit in order for their defense to be valid.<sup>195</sup> This is, of course, independent of the obligations that foreigners have in Mexico in order to reside legally. And, a divorce may also lead to the expiration of a foreigner's residency permit.

#### III.4.2. Summary

The case of religious matrimonies, being valid in Mexico when celebrated abroad even when Mexican law does not recognize religious matrimonies, proves the applicability of private and public international law in civil matters in Mexico. While the separation of church and state in Mexico still remains intact, the secular legal system allows for the recognition of religious acts from abroad. Although the recognition of a foreign matrimony is possible, other international forms of intimacy cannot be harmonized into a Mexican structure of intimacy other than matrimony. Foreign forms of intimacy that may resemble concubinage, a civil pact of solidarity or a cohabitation partnership cannot be registered. Partners may sign into one of these forms when they arrive in Mexico, but their foreign intimacy will have no effects. They will only have legal effects related to the new structure of intimacy that they

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<sup>192</sup> Constitutional Injunction 1891/77. Enrique Bernat Suárez. December 1, 1978. Secretary: Agustín Urdapilleta Trueba. Case registration number: 387712.

<sup>193</sup> In Latin, a matter already judged.

<sup>194</sup> Report of 1973, First Part, General Assembly, p. 250. "Legal Requirements that Foreigners must fulfill in order to submit a divorce procedure". Case registration number: 233169.

<sup>195</sup> Constitutional Injunction 118/91. Ruth Adelina Marseh. April 26, 1991. Unanimous decision. Lead Justice: Joaquín Dzib Núñez. Secretary: Jorge Valencia Méndez. Case registration number: 222505.

form in Mexico. The SCJN cases analyzed underline the fact that intimacies are affected many times by more than one legal system and that Mexican law may apply to foreign civil contracts. This is also a consequence of globalization, neither positive nor negative, simply another global issue that must eventually be considered: *matrimonium in itinere*.

### **III.5. Conclusion**

Now that the structures of intimacy have been analyzed, it is easier to understand and to identify the spheres of intimacy in each of them. This closer inspection of the legal recognition of intimacy in Mexico has provided a description of the types of relationships that individuals can constitute. The table of contrasts presented in III.2.5 exhibits the key aspects that each structure of intimacy encompasses. These elements demonstrate that Matrimony, Concubinage, Cohabitation Partnerships and Civil Pacts of Solidarity are much more than a mere contract, because they have subsidiary effects in different areas and they overlap with other legislations beyond the provisions regarding civil unions in the civil code. Emotional issues like the solemnity of a civil act may be very relevant for partners who want to legitimate their intimacy, while the access to legal guardianship may be considered more important by others. Gender-bias wording has been pointed out in this chapter; it shows that legislators, who are for the most part men, have not reached a level of impartiality that is necessarily in democratic legislative bodies. Although the term of intimacy is generally associated with sexual practice, it has been proved how all four structures treat the sexual matter in a different way, but none of them indicates a sexual obligation. The financial provisions of an intimacy are ever so relevant in a century of capitalism. So, especially with the application of welfare, it has been discussed how the type of civil unions can be a criterion that affects the wellbeing of partners. Furthermore, the constructive capacity is a component that partners usually do not want to give up. The right to constitute a family, be it a vertical or horizontal one, is inherent to any structure of intimacy. The restrictions on adoption, however, show how choosing the most adequate type of structure is critical.

Another feature in this chapter was the evaluation of court cases that have exposed the struggle between the state level and the federal level in Mexico. The case

of *Castañeda v. The Mexican Institute of Social Security* underscores the bureaucratic obstacles that a legally constituted same-sex intimacy still has to face in order to claim basic rights. The Motion of Unconstitutionality that tried to revoke same-sex matrimony in Mexico City was – fortunately – unsuccessful. Yet, these examples in III.3 confirm the resistance of conservative groups who are still fighting the recognition of intimacy between same-sex partners. It is appalling that cases must land in the Supreme Court in order to claim basic benefits of an intimacy contract. A comprehensive, more holistic approach must still be applied to subsidiary legislations so that they can actually be effective.

Globalization and contemporary trends of the 21<sup>st</sup> century have proved to be closely related to intimacy. Therefore, the review of private and public international law along with its impact on intimacy in Mexico has confirmed that legal systems are not completely independent of each other. Mexico does not exist in autarchy, and the mobility of intimacy and individuals around the world ends up shaping the decisions on the recognition, validity and termination of that very intimacy when they are subject to the jurisdiction of Mexican Law. The SCJN cases discussed in this chapter revealed the international ramifications of intimacy and the problems that partners face nowadays. The differences between the four structures of intimacy that were thoroughly examined include subtle and crucial factors; access is definitely a very important one. Access denotes who is allowed to join a certain structure of intimacy and who is not. In this context, the gender of partners determines whether they may or may not have the right to use the legal protections embodied in a specific form of intimacy. Whether this and other limitations represent a discrimination or not, the subject must be analyzed from a human rights perspective. And this human rights argument cannot be found in the civil code that this chapter has studied in detail, it arises rather from the kernel of law, the constitutional protection of fundamental human rights. This profound debate will be the matter of the following chapter.



## IV. THE FUNDAMENTAL RIGHTS OF INTIMACY

### IV.1. Introduction

Up until now, this research has studied the question of intimacy in general and the particular legal status of intimacy in the Civil Code. It is now necessary to analyze intimacy from a perspective of the fundamental rights that protect it. Thus, this chapter will review the connection between intimacy and constitutional law, human rights and international treaties from a comparative law approach. The first section of this chapter will review Mexican Constitutional Law, examining constitutional human rights provisions and the constitutional framework that makes intimacy and its legalization possible. Especially, the difference between privacy and intimacy will be discussed along with the jurisprudence of the Supreme Court. The relevance of privacy and intimacy will also be juxtaposed with other constitutional rights in order to determine the constitutional value of privacy and intimacy. At the end of this chapter, it will be clear that intimacy cannot be studied without privacy. The constitutional approach to intimacy requires the examination and inclusion of privacy and its synergy with the concept of intimacy. Hence, a three-layer abstraction of privacy is presented in this section to discern intimacy from privacy and to pinpoint their interconnection.

The review of human rights will include the recent amendments to the constitution of June 2011, and their direct impact on human rights and intimacy. Furthermore, all the relevant international treaties ratified by Mexico in this matter will be examined, particularly looking for their applicability with regards to intimacy. As a comparative analysis, this section will discuss U.S. Constitutional Law jurisprudence. There are four pertinent cases that will help compare intimacy and privacy in a neighbor legal system. They will also provide an example for a better comprehension of intimacy and privacy in general.

Last, but certainly not least, this chapter will discuss the emblematic battle for intimacy that landed in the Mexican Supreme Court of Justice (SCJN) in 2010. When Mexico City passed a bill to legalize same-sex marriage, the Attorney General

submitted a Motion of Unconstitutionality to revoke that bill. This landmark case ignited a national debate that concluded with a significant decision by the Supreme Court a year and a half later. The arguments, constitutional attacks, and defenses of this battle will be explored in detail as well. This chapter is important for this research, because constitutional law provides the nest for the subsequent legalization of intimacy. If nothing else, before the beginning of Chapter V it will be evident that, fundamental rights in Mexico provide a foundation for the legalization of intimacy and that intimacy is a human rights issue. Therefore, the support for the legalization of alternative types of intimacy promotes a more inclusive protection of human rights.

## **IV.2. Constitutional Law and Intimacy**

The Mexican Constitution of February 5, 1917, with its multiple amendments, is still in force. It was considered one of the most modern constitutions at the time it was approved. Drafted after the Mexican Revolution of 1910 and during a period when communism was thriving, this constitution managed to incorporate social provisions regarding labor, a mandatory secular education system, a separation of powers based on Montesquieu's three branches, a federal system, and most importantly, the foundations of human rights in Mexico. The first title of the constitution, from Article 1 to 29, details the core set of human rights. These rights were originally called the *Individual Guarantees*; the name was actually quite appropriate, it showed that Mexico – as a state – was the guarantor of this fundamental protection. Although some authors<sup>1</sup> debate the euphemisms and differences around the concepts of human rights and individual guarantees as explained by the constitution, in a practical sense and from a comparative law perspective, these individual guarantees shall be interpreted as human rights.

Constitutional provisions include first-generation and second-generation human rights, respectively, embracing the individual's intrinsic personal rights and also the rights of individuals as social beings.<sup>2</sup> Jorge Carpizo argues that human rights

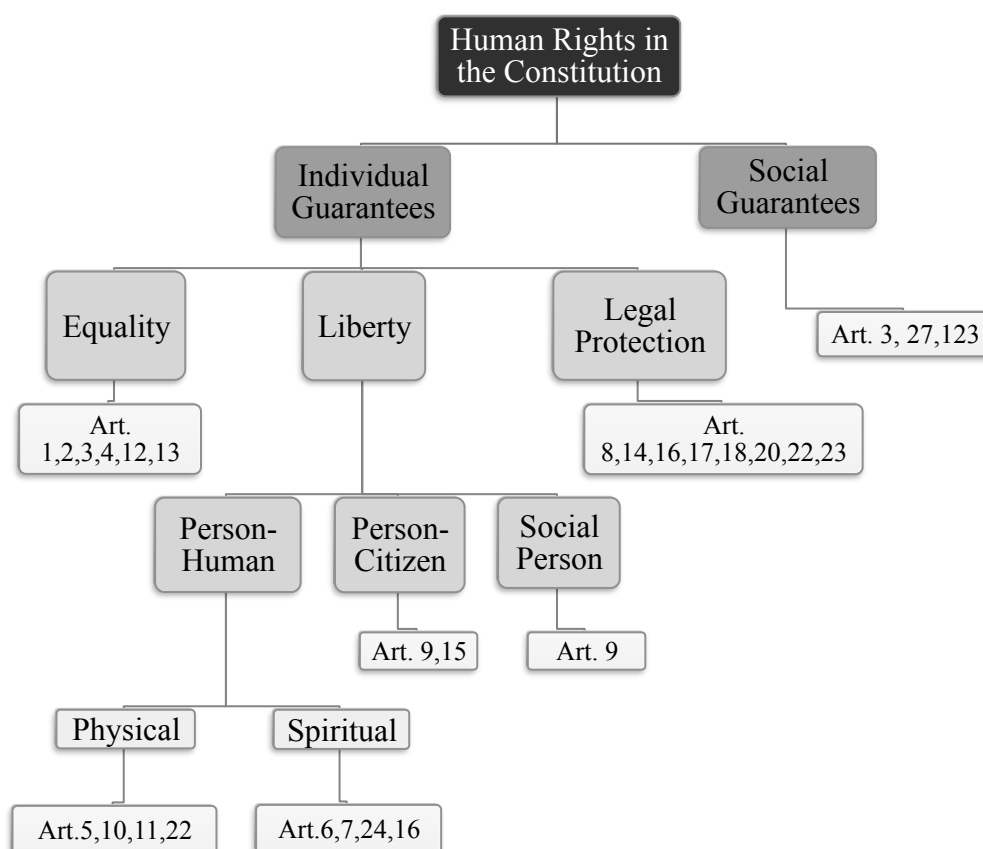
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<sup>1</sup> Martínez Bullé-Goyri, Victor M. "Las garantías individuales en la constitución mexicana de 1917." in *Estudios jurídicos en torno a la Constitución mexicana de 1917, en su septuagésimo quinto aniversario*. Mexico: UNAM, 1992. pp.1-18. The author discusses nuances around these concepts.

<sup>2</sup> Lara Ponte, Rodolfo. *Los Derechos Humanos en el Constitucionalismo Mexicano*. Mexico, UNAM-III, 1993. pp.157-158.

are general ideas whereas guarantees are individualized and concrete ideas.<sup>3</sup> In his analysis of human rights in the constitution, he classifies the provisions in three parts: the rights of equality, the rights of liberty and the rights of legal protection.<sup>4</sup>

The rights of liberty are divided into three groups, the guarantees of the person as a human being, the guarantees of the person as a citizen and the guarantees of persons as social individuals. The guarantees of individuals as human beings are classified as physical liberties or spiritual liberties. In addition to these individual guarantees, there are other human rights clauses conceived as social guarantees. They can be found in the first twenty-nine articles along with the individual guarantees, but also in article 123, regarding work and social welfare. According to Carpizo's classification system,<sup>5</sup> constitutional human rights provisions could be represented in the following chart:



<sup>3</sup> Quoted from Lara, *idem*, p. 186.

<sup>4</sup> *Ibidem*, pp. 163-164.

<sup>5</sup> See Lara, p. 186.

#### IV.2.1. A review of constitutional human rights and individual guarantees

In order to understand that there is a constitutional framework for the legalization of intimacy, it is necessary to analyze these rights and guarantees in their relationship with privacy. Some constitutional articles describe a specific right, while others are more complex and encompass more than one right. This review will present a discussion of the most important rights in the first chapter of the constitution, considering the subsequent applicability of these rights in their relationship with intimacy.

##### A. Constitutional provisions for the protection of *Equality* and *Dignity*

[Art. 1, 3, 4, Mexican Constitution]

This first article of the constitution, beyond its introductory tone, is particularly important because of its scope. It provides a non-discrimination clause and it presents the essence of human rights: Equality, Liberty and Dignity. The non-discrimination clause included in Art. 1 par. 5 prohibits any discrimination based on ethnicity, citizenship, gender, age, disability, social or health conditions, religion, opinions, sexual preferences, civil status, or any other form of discrimination that diminishes the rights and liberties of people.

In a constitutional injunction currently in review,<sup>6</sup> the SCJN is discussing Art. 143 of the Civil Code in the State of Oaxaca. This article shows a restriction for matrimony, allowing only opposite-sex spouses. The first chamber of the SCJN has published an isolated thesis<sup>7</sup> (not yet jurisprudence) concluding that, this restriction is implicitly based upon a *suspicious category* because the matrimonial union relies on the sexual preferences of people, which constitute one of the criteria in the last paragraph of Art. 1. In other words, with this statement, the SCJN is acknowledging that reducing marriage to opposite-sex spouses (at least within the context of the Oaxaca Civil Code) is a hidden form of discrimination incompatible with the non-discrimination principle in Art. 1. This is a first step towards the recognition of this *de*

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<sup>6</sup> Constitutional Injunction in review 581/2012. December 5, 2012. Lead Justice: Arturo Zaldívar Lelo de Larrea.

<sup>7</sup> *Judicial Gazette of the Federation*. Thesis. 10<sup>th</sup> Epoch. Book XIX, Vol.1. April 2013. p. 963.

*facto* discrimination. Furthermore, the SCJN is allocating sexual preferences within the scope of matrimony as well. Once this constitutional injunction has become a firm decision, it will produce changes in the civil code of Oaxaca, and it may influence future jurisprudence on other local civil codes in Mexico.

Also, education is conceived as a social guarantee by the state and as an individual guarantee. The right to education reinforces equality, due to the fact that all individuals can access the free education system provided by the State. Moreover, this very education system is a mechanism that must perpetuate human rights. This article serves simultaneously as a human right to education and as an education of human rights. According to Article 3 par 3.II.c., reformed on February 26, 2013, the State shall contribute to the appreciation and respect for cultural diversity, dignity, the *integrity of the family*, the conviction of the general interest in society, the ideals of fraternity and equality of all, avoiding the privileges of races, religion, groups, sexes or individuals. Considering that the purpose of this article is to foster values in the education system, and in accordance with the principles of diversity and equality mentioned in the same article, the State should reform the curricula of the public education system in such a way that it accommodates new forms of family formations that embrace same-sex parenthood.

The principle of equality established in Article 4 par. 1. states that “men and women are equal before the law”. The second paragraph introduces the right to self-determination linked to the decision to have children. If individuals can decide upon the number of their children, there is a strong argument for abortion claiming the rights conferred by this article. If an individual decides to have an abortion, their self-determination is then to have zero children.<sup>8</sup> The seventh paragraph states that every family has the right to enjoy a dignifying house. In the commentary by Roberto Lara, he states that the group of rights framed by a globalizing family security in this article encompasses: Legal equality for both sexes, the protection and motivation of the family unit and responsible parenthood; the fundamental rights of children, the

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<sup>8</sup> See commentary in Lara, p. 168.

protection of health, the right to adequate housing and the protection of indigenous groups.<sup>9</sup> That is to say, this article secures equality, dignity and the family.

B. Constitutional provisions for the protection of *Liberty* and *Privacy*

[Art. 6, 7, 10, 16, 20, 24, 27, Mexican Constitution]

In Article 6, the freedom to express one's thoughts is guaranteed while protecting the rights of third parties and the public order. It is important to analyze liberty and privacy together, because the constitution reduces liberty in proportional relation to the protection of privacy, Art. 6 par. 2. II. states that the information regarding private life and personal data will be protected in the terms and with the exceptions set out by the law. This liberty granted by Art. 6 is linked to Art. 7, which forbids censorship of any kind. However, in a decision on a constitutional injunction last year,<sup>10</sup> the SCJN decided that this very freedom of speech granted by Art. 6 does not protect homophobic discourse. The Court added, "such discriminatory treatment implies a form of submission, through a hierarchy in sexual preferences, granting heterosexuality a superior rank." In other words, the Court identified and banned the element of heteronormativity in homophobic discourse.

Also, the liberty to choose and to practice one's religion is granted by Art. 24, that is to say, religious freedom is guaranteed by the constitution. Evidently, individuals may also choose not to practice a religion. In other words, laicism can be equally practiced. Considering the moral sphere of intimacy, Art. 24 provides the constitutional right to religious freedom. The religious validation of an intimacy through a ceremony or ritual is permitted. Nonetheless, as mentioned in Chapter III.4.1.a., the legality of that intimacy is not recognized by law, unless it is a foreign structure of intimacy harmonized into Mexican law.<sup>11</sup>

Marco Celis points out in his commentary on intimacy as a fundamental right for Mexicans, that there is no explicit right to intimacy in the constitution. He argues, that the constitution does acknowledge some of the rights associated with

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<sup>9</sup> *Ibidem*, p. 183.

<sup>10</sup> *Judicial Gazette of the Federation*. Constitutional Injunction 2806/2012. Thesis: CXLVIII/2010. First Chamber. 10th Epoch. Vol. XX, May 2013, Book 1, p. 547.

<sup>11</sup> See *Judicial Gazette of the Federation*. Third Chamber. 6<sup>th</sup> Epoch; Vol. CXXVIII, Fourth Part. p. 39.

intimacy, and therefore, intimacy is partially guarded.<sup>12</sup> Nonetheless, as the following section in this chapter will show, the jurisprudence of the SCJN does include intimacy and privacy and fundamental rights protected by the constitution. Article 16 introduces the legal protection of liberty, for the most part, in regard to privacy. As guaranteed by Articles 6, 7 and 10, this article protects the privacy of individuals in their personhood, in their family, domicile, documents and possessions. It is noteworthy that an individual's family is linked to their personal sphere by this clause. Thus, there is an explicit acknowledgement that an individual's family falls within that individual's privacy. Paragraph 12 adds that, private communications are inviolable and that the law shall criminalize acts that threaten their liberty and privacy. This validates, on one hand, the liberty to establish private communications, and on the other, the inclusion of communication within privacy. From a different approach, in the relationship between decisional privacy and secrecy, Art. 20 protects the rights of an accused individual to remain silent. This article protects the liberty of the individual making that decision, and maintains their privacy in the context of secrecy, not being obliged to disclose information. One of the characteristics of privacy is its connection with self-disclosure. In judicial processes, this legal protection clause grants the accused the right to remain silent. In other words, it defends their privacy and autonomy for disclosure of information.

With a language that resembles the Second Amendment of the Constitution of the United States of America,<sup>13</sup> Article 10 grants the liberty to keep and bear arms at home. This liberty of individuals creates a *de facto* personal jurisdiction within their domicile. Although bearing arms is considered a crime in general, it is not typified as such within a private domicile.<sup>14</sup> In other words, it reiterates the autonomy of individuals to exercise their liberties within their private sphere, within their domicile. Articles 6 and 7 treat the issue of privacy in connection with personal information regarding the private life of individuals, whereas privacy in article 10 is location-specific. Hence, the physical space of an individual at their domicile is to be considered as an extension of their privacy. Also regarding private property, Art. 27

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<sup>12</sup> Celis Quintal, Marcos A. "La protección de la intimidad como derecho fundamental de los mexicanos" in Estudios en homenaje a Marcia Muñoz de Alba Medrano. Protección de la persona y derechos fundamentales. Mexico: UNAM-IIIJ, 2006. p. 94.

<sup>13</sup> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Second Amendment. U.S. Constitution.

<sup>14</sup> *Judicial Gazette of the Federation*. 9<sup>th</sup> Epoch. Vol. XX, July 2004, p. 1676.

par. XVII, protects the privacy of families through the figure of the *family patrimony*. This provision also outlines the difference between public and private property and its legal protection. As discussed before in Chapter III, the family patrimony is protected by the constitution as a fundamental right. Although this article lacks a definition of the concept of “Family”, it is an important element in the constructive sphere of an intimacy.

#### IV.2.2. The constitutional framework for intimacy

It has been mentioned that the articles in the constitution that relate to human rights do not discuss intimacy directly. As a matter of fact, the word intimacy is not mentioned in the constitution at all. There are inconsistencies in the use of terminology, by scholars,<sup>15</sup> by the Mexican Supreme Court,<sup>16</sup> by commentators,<sup>17</sup> and by citizens in general, because the terms privacy and intimacy are sometimes used as synonyms in Spanish. The constitution grants a right to privacy and a right to intimacy; and these rights are limited where the privacy of others begins. Thus, the treatment of privacy is a defensive one. If the right to intimacy is not explicit in the constitution, how does the Supreme Court handle it in the jurisprudence? And, how do commentators and scholars interpret it? Also, the allocation of intimacy within the scope of privacy and its range of application requires a deeper analysis. The constitutional framework for intimacy is supported within articles 6, 7, 10 and 16. These articles actually protect privacy, and not intimacy directly. However, the production of law, the jurisprudence, claims and defenses, function under the premise that intimacy lies within privacy. And, that the protection of privacy includes the underlying protection of intimacy. These are the issues that shall now be addressed in the following paragraphs.

#### *Privacy vs. Intimacy*

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<sup>15</sup> See Jorge Carpizo’s use of intimacy as synonym of privacy in the interpretation of Article 16. In Lara, p. 163.

<sup>16</sup> See usage in *Judicial Gazette of the Federation*. Second Chamber. 9<sup>th</sup> Epoch; Book XXVII, May 2008. p. 229.

<sup>17</sup> For instance: Fernandez, Jose. *Lo público y lo privado en internet. Intimidación y expresión en la red*. Mexico: UNAM, 2004. pp. 85 et sqq.

Since the approval of the constitution of 1917, the Mexican Supreme Court of Justice (SCJN) has resolved 96 cases that involve the concept of intimacy. In some decisions, the Supreme Court has an interpretation of intimacy that differs from the literature. But, it is surprising that the Supreme Court itself has conflicting interpretations of intimacy in the jurisprudence. Out of these 96 cases that the SCJN has reviewed, 60 cases have been admitted between 2000 and 2012. This represents more than 62 per cent in just over the last decade, and the remaining 38 per cent between 1917 and 1999, 82 years. These figures may indicate that the issue of intimacy has become more relevant today and that the debate around it is contemporary.

An analysis of these 96 cases in depth, leads to the observation that the interpretations of intimacy by the SCJN can be classified or grouped into six different connotations:

1. *Privacy*. Intimacy used as a synonym of privacy in its broader definition. (65 cases)<sup>18</sup>
2. *Isolation*. Intimacy interpreted as isolation from other human beings, in solitude. (1 case)<sup>19</sup>
3. *Dyadic relationship*. Intimacy seen as a dyadic relationship between two friends, colleagues at work, etc. (7 cases)<sup>20</sup>
4. *Sexual Activity*. Intimacy described as a sexual practice. (7 cases)<sup>21</sup>
5. *Frequent contact*. Intimacy defined as a frequent interaction of two individuals. (2 cases)<sup>22</sup>
6. *Structure of Intimacy*. Intimacy understood as a close reciprocal relationship of future-oriented companionship with attachment in different private domains. (14 cases)<sup>23</sup>

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<sup>18</sup> See for example: Constitutional Injunction 9129/41. Herrera García, Efraín. August 24, 1955. Lead Justice: Juan José González Bustamante. Case registration number: 384427.

<sup>19</sup> Constitutional Injunction 2093/55. December 2, 1955. Lead Justice: Teófilo Olea y Leyva. Case registration number: 803536.

<sup>20</sup> See for example: Constitutional Injunction 3395/55. January 21, 1956. Lead Justice: Luis Chico Goerne. Case registration number: 293730.

<sup>21</sup> See for example: Constitutional Injunction 8697/61. Aureo Zepeda Muciño. April 20, 1964. Lead Justice: Mario G. Rebollo F. Case registration number: 270201.

<sup>22</sup> See for example: Constitutional Injunction 889/43. Lazcano, Catalina. April 30, 1943. Lead Justice: Eduardo Vasconcelos. Case registration number: 375330.

<sup>23</sup> See for example: Constitutional Injunction 3637/52. López de Beltrán, María de los Angeles. April 17, 1953. Lead Justice: José Castro Estrada. Case registration number: 341750.

These six different connotations may indicate that there are some inconsistencies within the jurisprudence. While it is clear that the SCJN recognizes that intimacy lies within the realm of privacy in all 96 cases, the conflict of interpretation remains outstanding. On May 23, 2007, Justice Olga Sánchez Cordero de García Villegas provided a definition that would help better understand the nuances between intimacy and privacy:

“Life is constituted by the private domain reserved for each person and in which everyone else is excluded, whereas intimacy is integrated with the most personal extremes of life and the family surrounding, whose knowledge is reserved for the members of the family unit. Thus, the concept of private life encompasses intimacy as the most protected nucleus with care and strength because it is understood as essential in the configuration of a person, that is to say, private life is something generically reserved and intimacy –as a part of the former- is something radically closed, the most personal; therefore, while being two different rights, since one is a part of the other, when intimacy is affected, the private life is aggravated.”<sup>24</sup>

This clear definition, unfortunately, has not become a doctrine in the interpretation or disambiguation of these two terms: privacy and intimacy. The use of these concepts, in cases after 2007, shows that the terminology is still unsettled. For instance, Justice Victor Francisco Mota Cienfuegos revisits the debate around intimacy a year later, using the terms intimacy and privacy indistinctively.<sup>25</sup> Nonetheless, the SCJN acknowledges that there is a right to privacy and a right to intimacy and that both of them are protected by the individual guarantees in the constitution.

In the literature of privacy and intimacy in Mexico, some commentators and scholars use the terms of privacy and intimacy as synonyms. Marco Celis has published a comprehensive analysis of the protection of intimacy as a fundamental right in Mexico.<sup>26</sup> He argues that the difference between privacy and intimacy is not fundamental, and he uses both terms indiscriminately, considering that they are used as synonyms in the doctrine.<sup>27</sup> It is true that they are widely used as synonyms in the

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<sup>24</sup> Constitutional Injunction 402/2007. May 23, 2007. Lead Justice: Olga Sánchez Cordero de García Villegas. Case registration number: 171883.

<sup>25</sup> Constitutional Injunction 73/2008. May 6, 2008. Lead Justice: Víctor Francisco Mota Cienfuegos. Case registration number: 168944.

<sup>26</sup> Celis Quintal, pp.71-108.

<sup>27</sup> *Ibidem*, p. 73.

Mexican literature. However, the difference between the two concepts is pivotal for the legalization of intimacy; it is the crux of the legal argument, because the inclusion of the right to intimacy is not needed if intimacy is allocated within the right to privacy. When Celis uses the common law in the United States as reference, he mentions the “right of privacy,” literally in English, as support for his intimacy arguments. But, the Spanish language has two words that translate into privacy and intimacy, respectively, *privacidad* and *intimidad*. Thus, translating privacy into *intimidad* is an obvious fallacy. Even well known scholars like Jorge Carpizo use the word for intimacy when describing the rights of privacy in the constitution.<sup>28</sup>

Although the semantic conflict can be seen in the literature and jurisprudence in Mexico, the debate on this subject-matter in the United States is more mature both in the philosophical and legal branches. These debates lean rather towards the definition provided Justice Olga Sánchez, as quoted above.

Julie C. Inness has noticed that “the debates between the legal and philosophical literature [around intimacy and privacy] can be grouped into three categories: (1) the skeptical debate about the conceptual and moral distinctiveness of privacy; (2) the debate about the two components of a definition of privacy – the function of privacy and the content of privacy; (3) the debate about the value of privacy.”<sup>29</sup> She claims that constitutional privacy protects the agent’s freedom of action in a privacy sphere that includes the home, sexuality, the body, and the family.<sup>30</sup> This privacy is control-based, because the agent has control over access and information, without separation from others, given that the state of privacy does not require isolation.<sup>31</sup> In Mexican privacy law, the element of control and consent is fundamental; especially in the criminal code, consent determines the typification of the violation of privacy,<sup>32</sup> and in the civil code, it can lead to a compensation of damages.<sup>33</sup>

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<sup>28</sup> Lara, p. 163.

<sup>29</sup> Inness, Julie C. *Privacy, Intimacy, and Isolation*. New York: Oxford University Press, 1992. p. 23.

<sup>30</sup> *Ibidem*, p. 16.

<sup>31</sup> *Ibidem*, p. 17.

<sup>32</sup> FCRC, Art. 210 -211bis 7.

<sup>33</sup> FCC, Art. 1916.

The constitution protects the information regarding private life in Articles 6 and 7. In article 10, it recognizes the spatial privacy of the home with the right to possess arms for legitimate defense. And, in article 16, it reinstates the privacy of home and the family, also including private communications. As Inness has pointed out, “even when we think about the privacy in non-spatial contexts, we still place an emphasis on separation from the public realm, for example, we tend to describe the privacy of the family in terms of its separation from the power of the state and that of the body in terms of its separation from the access of others.”<sup>34</sup>

Privacy can be territorial, but the element of privacy is also transportable. The SCJN has resolved that the interpretation of Art. 16 regarding the inviolability of domicile includes an objective element, a usual residency, but also a subjective element, any space where private and intimate acts of an individual take place.<sup>35</sup> Intimate is again the operative word.

Inness sees intimacy as the core of privacy, considering that “to claim that an act or activity is intimacy is to claim that it draws its meaning and value from the agent’s love, liking, or care.”<sup>36</sup> She adds that intimacy links together the bulk of tort and constitutional privacy law,<sup>37</sup> being “not merely the conceptually distinguishing feature of constitutional privacy claims – intimacy is also their morally relevant feature.”<sup>38</sup> This is true as observed in the Mexican criminal and civil codes, the compensation of damages represents moral damages based upon the defense of intimacy. Hence, the arguments provided by Inness are compatible with the definition of Justice Olga Sánchez Cordero de García Villegas and vice versa. Inness identifies intimacy as the core of privacy, drawing its meaning from the agent’s love, liking or care; and Sánchez interprets it as its nucleus, limited to the members of the family unit.

### *Privacy & Intimacy vs. other Constitutional rights*

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<sup>34</sup> Inness, p. 43.

<sup>35</sup> Contradiction of thesis 75/2004-PS. January 17, 2007. Lead Justice: Olga Sánchez Cordero de García Villegas. Case registration number: 171779.

<sup>36</sup> Inness, p. 90.

<sup>37</sup> Ibidem, p. 117.

<sup>38</sup> Ibidem, p. 122.

When the rights of privacy and intimacy clash with other constitutional rights, the SCJN has determined that the principles of rationality and proportionality must be observed. The following situations show that privacy and intimacy can indeed be legally violated, although they are protected as fundamental constitutional rights. However, these restriction have to be justified and proportional. For instance:

- a. *Due process clause.* Article 17 grants individuals the right to the administration of justice. This guarantee of legal protection represents the due process clause. The jurisprudence defends that the right to due process may restrict the right to privacy. An individual's chance to submit evidence during a trial may justify the right of another individual to their own privacy. Nonetheless, the principles of rationality and proportionality must always be applied. The intervention of the state in an individual's intimacy is justified as a gift to the right to submit evidence so that the state can effectively administer justice, but that intervention must be authorized only when necessary and up to a certain degree, protecting as much as possible the privacy of a person.<sup>39</sup>
  
- b. *Visitation rights.* The protection of privacy includes the safekeeping of a family's home according to Art. 16. However, there is a conflict when two parents begin a separation process and both of them keep the legal guardianship of children. In such cases, the privacy of the home and the intimacy of the family are involved. Up to which extent will the leaving parent have the right to violate the privacy of the home they are leaving? The jurisprudence supports that as long as both parents are legal guardians, they will not lose their right to visit their children unless there is a clear danger for the minor. In order to protect the healthy development of children and their personal and emotional stability, the state will intervene through a trial and will designate the most appropriate system to exercise the visitation rights of parents so as to foster the socialization with their children. Therefore, the

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<sup>39</sup> Constitutional Injunction in review 265/2006. Javier Quijano Baz. June 7, 2007. Lead Justice: Francisco J. Sandoval López. Case registration number: 168890.

protection and wellbeing of children as envisaged in Art. 4 may justify the restriction of a parent's personal right to privacy.<sup>40</sup>

- c. *Alimony*. In a case of family law, a judge requested private information from an individual to their employer. The judge's intention was to gather enough information to determine the alimony for a child. The parent filed an appeal for a constitutional injunction claiming that the judge had violated their right to privacy. The SCJN decided that since that parent had the obligation to provide nourishment, and that the child's subsistence and their access to justice according to Art.14 was more important than the parent's right to privacy. An individual's life and their physical integrity shall be more important than another individual's privacy.<sup>41</sup> This case shows a justified restriction in privacy and personal data protection.
  
- d. *Warrant*. According to Art. 16, authorities need a warrant before they can access an individual's domicile. This spatial protection of privacy is not limited to the actual residence, but rather, it includes any private place. Even though the wording of Art. 16 uses the word "domicile" in the first paragraph, the use of the word "place" in the eighth paragraph has broadened its interpretation in criminal law. The violation of privacy with the justification of the due process clause is admitted because it protects another individual's right to justice. Nevertheless, when state authorities violate privacy without a warrant as provided in Art. 16, the evidence they gather will not be admitted in a criminal trial. That is to say, the invasion of privacy by another individual claiming the protection of Art. 17 is allowed, but the invasion of privacy by authorities is not justified without a warrant.<sup>42</sup>

With these decisions, the jurisprudence of the SCJN has set the boundaries for the violation of privacy. Essentially, the right to due process, the access to the

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<sup>40</sup> Constitutional Injunction 3656/2003. August 7, 2003. Lead Justice: Gustavo R. Parrao Rodríguez. Case registration number: 177259.

<sup>41</sup> Constitutional Injunction in review 485/2003. October 31, 2003. Lead Justice: Leonardo Rodríguez Bastar. Case registration number: 182497.

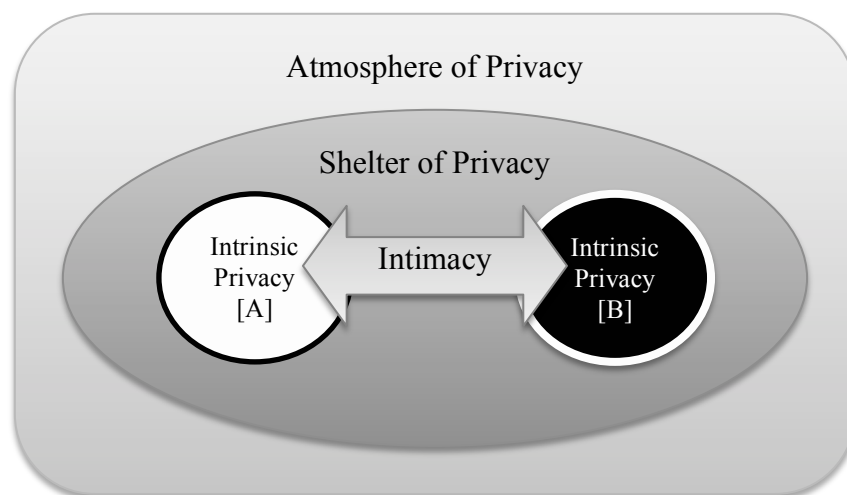
<sup>42</sup> Contradiction of thesis 75/2004-PS. January 17, 2007. Lead Justice: Olga Sánchez Cordero de García Villegas. Case registration number: 171779.

administration of justice and the right to life are more important than the right to privacy and intimacy. As seen in the provisions above, an individual's privacy can be restricted with valid and proportional justifications. This may include violations of privacy among family members, as mentioned above in the case of alimony. Considering that family members are a part of an individual's privacy and intimacy, how can individuals be vulnerable in their privacy that way? The best way to answer this question is by understanding the different layers of privacy.

*The layers of privacy and intimacy*

So far, the terms privacy and intimacy have been used in many contexts as synonyms that create fallacies and nebulous definitions; and as constitutive components, where intimacy is the heart of privacy. In order to understand the difference between the terms privacy and intimacy in the context of the legalization of intimacy, this section provides an approach to define these terms as juxtaposed elements. This approach works under the following premises: (a) privacy and intimacy are two different matters, (b) the right to privacy is an individual right, not a collective one, and (c) intimacy exists after privacy.

First of all, in order to identify privacy and intimacy as two distinct features, it is necessary to discern the span of privacy. The best way to do so is by recognizing three layers of privacy: an intrinsic privacy of individuals, a shelter of privacy, and an atmosphere of privacy. The graph below shows these layers in different shades:



Intrinsic privacy is the innermost range of privacy. This layer of privacy protects personal autonomy and self-determination. An individual has complete ownership over their intrinsic privacy and it exists even during intimacy. This intrinsic privacy is valued, as Inness would say, “because it embodies our respect for persons as choosers.”<sup>43</sup> The capacity to make personal decisions regarding sexuality, getting a tattoo, having an abortion, etc., is determined by the intrinsic privacy of individuals. Intrinsic privacy empowers the individual to take control over their personal actions. Intrinsic privacy shall be interpreted as a human right because it belongs to a specific human being.

The second layer is a shelter of privacy that covers one or more agents. This shelter can be a home, a workplace, a car, but it can also be non-spatial, such as an e-mail account. A shelter of privacy provides the infrastructure (solid or not) for the security of an individual’s privacy. The spaces created by individuals build a domain that must be protected beyond the individual’s physical or intrinsic privacy. Such spaces are also protected by constitutional rights as extensions of one or more individuals, sheltered from external influences or third parties that do not belong in that shelter of privacy. The decisional power of an individual, their intrinsic privacy, defines who the members of the shelter of privacy are and the rules for interaction within that shelter.

Lastly, the third layer of privacy is an atmosphere of privacy. This layer is an external level of privacy that floats over the public realm. For example, when an individual sends a letter to another person, there is a guardianship of privacy in the public space that involves more than one agent outside the shelter of privacy to make sure that the privacy of that letter is not violated. The atmosphere of privacy allows for the privacy of many individuals to be protected simultaneously. Data protection laws, for example, determine the extent of the atmosphere of that informational privacy. Also, sanitary regulations for restrooms in public and rules for the prison system determine the atmospheres of privacy in public places.

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<sup>43</sup> Inness, p. 22.

Thus, considering the layers of privacy, where is intimacy located? As introduced in Chapter II, intimacy is a close reciprocal relationship of future-oriented companionship with attachment in different private domains. Intimacy requires two different agents, and each agent is entitled to their own intrinsic privacy. Therefore, intimacy is that link between the intrinsic privacies of two individuals within a shared shelter of privacy, as displayed above. Justice Olga Sánchez in her definition of intimacy points out that it is integrated with the most personal extremes of life and the family surrounding; and what she sees as a nucleus of privacy can be seen as a shelter of privacy. Because every family member has their own right to privacy, independently of the shelter of privacy that they share. Inness argues that, “if close relationships require that the agent necessarily possess a zone of autonomy to realize them, then privacy, by providing and protecting this zone of autonomy, does enable these relationships to be realized.”<sup>44</sup> What she sees as a zone of autonomy can be related to an intrinsic privacy that enables these relationships: Intimacy. She adds, “privacy is valuable because certain relationships cannot be established between individuals without privacy.”<sup>45</sup>

Intimacy is closeness, that closeness that can only arise in and from privacy, but the establishment of that intimacy does not destroy the personal, individual, intrinsic privacy. Inness defends that “privacy is the state of the agent having control over a realm of intimacy, which contains her decisions about intimate access to herself (including intimate informational access) and her decisions about her own intimate actions.”<sup>46</sup> It is this control what allows the agent to engage in intimacy. And, “to be respected as a person with the capacity for love, care, and liking, an agent needs a zone with two characteristics: a zone in which she possesses autonomy of action and a zone that gives rise to duties of noninterference from external parties.”<sup>47</sup> This non-interference from external parties is a shelter of privacy. She has admitted that privacy is not necessarily individualistic, because as soon as one individual encounters another, no matter the nature of the encounter, privacy is necessarily lost.<sup>48</sup> Inness consistently talks about an agent’s capacity for love, care and liking. However,

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<sup>44</sup> Ibidem, p. 97.

<sup>45</sup> Ibidem, p. 22.

<sup>46</sup> Ibidem, p. 56.

<sup>47</sup> Ibidem, p. 110.

<sup>48</sup> Ibidem, pp. 43-44.

she does not give the second agent enough relevance. Intimacy has been defined as a close *reciprocal* relationship; therefore, in order to understand the legalization of intimacy and its connection with privacy, this research cannot rely exclusively on Inness' terminology for the nuances of privacy.

It must be acknowledged that to love, to care and to like are transitive verbs. Consequently, agent A loves, cares about or likes agent B. Intimacy is that connection between the two agents. Considering that intimacy is interpersonal; it takes place within the atmosphere of privacy and it bridges two personal perceptions of privacy. Intimacy requires, inherently, an invasion of personal privacy from the inside while protecting the collective privacy from external violations and creating a shelter of privacy. So, although intimacy presupposes agent A invading the privacy of agent B and vice versa, both of them are still protected from agent C, that could be a third party or the State, in their shelter of intimacy. Jean Cohen in her analysis of constitutional privacy in the domain of intimacy does acknowledge the second agent, in her analysis she talks about "entity privacy", attached to the family as a unit,<sup>49</sup> In the establishment of intimacy, both individuals consent to the recurrent invasion of their personal privacy by their intimate partner. This is the premise under which intimacy operates. The mutual understanding and consent to this breach of privacy is *sine qua non*.

Privacy and its three layers are construed in this research as positive concepts. Nonetheless, there is also a critique of privacy in the literature. Judith Thomson reduces privacy as a derivative element of property, she diminishes the right to privacy to its relationship with property: "It begins to suggest itself, then, as a simplifying hypothesis, that the right to privacy is itself a cluster of rights, and that it is not a distinct cluster of rights but itself intersects with the cluster of rights which the right over the person consists in and also with the cluster of rights which owning property consists in."<sup>50</sup> Understanding privacy in this reductionist perspective makes it difficult to find a specific area for intimacy. Privacy shall be understood as a separate right that enables intimacy. Other critics, such as Richard Posner view

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<sup>49</sup> Cohen, Jean. *Regulating Intimacy: A new legal paradigm*. USA: Princeton University Press, 2002. p. 26.

<sup>50</sup> Thomson, Judith. "The Right to Privacy." *Philosophy & Public Affairs*. 4 (1975), p. 306.

privacy in economic terms. Posner defines privacy as a richly ambiguous and highly charged word with three distinct meanings: Secrecy, seclusion and autonomy.<sup>51</sup> In the *Economics of Justice* his analysis focuses on the quantitative side of privacy and its relevance for tort law; he argued: “My economic analysis implies that privacy of business information should receive greater legal protection, in general, than privacy of personal information.”<sup>52</sup> In the legalization of intimacy, privacy cannot be interpreted only in economic terms, because intimacy, as explained before, encompasses five spheres; and the economic sphere is just one of them, but the remaining four spheres are just as important.

Feminists also may see privacy as something negative and not as a positive right. As Judith DeCew has argued: “There is no single version of the feminist critique of privacy, yet it can be said in general that many feminists worry about the darker side of privacy, and the use of privacy as a shield to cover up domination, degradation and abuse of women and others.”<sup>53</sup> This critique from a feminist interpretation relates to the secrecy associated with privacy. However, if you refer back to the layers of privacy above, it can be seen that this sort of negative privacy would only find its place in a corrupted shelter of privacy. Only the actors, with their decision-making capacity arising from their intrinsic privacy can create a shelter, positive or negative, and they are responsible for that. Nonetheless, privacy as a human right that includes all layers, is not negative *per se*.

#### IV.2.3. Conclusion

In sum, the Constitution provides a framework for the legalization of intimacy in Mexico. Although the individual guarantees do not mention an explicit right to privacy, the jurisprudence has admitted the right to privacy exists in Art. 6, 7 and 16. Subsequently, the right to intimacy has been developed as a cognate right. If individuals engage in intimacy, why must the State intervene? With the acknowledgement that intimacy is a dyadic relationship, and that intimacy requires the invasion of personal privacy, the State must also establish the limits of the

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<sup>51</sup> Posner, Richard A. *The economics of Justice*. Cambridge: Harvard University Press, 1981. p. 231.

<sup>52</sup> *Ibidem*, p. 248.

<sup>53</sup> DeCew, Judith, "Privacy", *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), Edward N. Zalta (ed.) Section 2.4.

invasion of that privacy. The social contract requires that the state be the intermediary between individuals. Article 17 states that all individuals have the right to the administration of justice and that the laws will foresee alternative mechanisms for the resolution of controversies. Therefore, the state should provide a platform for the legalization of intimacy. Considering that intimacy will require an invasion of another individual's privacy, the platform for the legalization of intimacy should include features for the regulation of consent to that invasion in all five spheres of intimacy. This legal platform should allow individuals to exercise their liberty, self-determination and autonomy, because these rights are protected in the constitution as individual guarantees, just as privacy and intimacy. In Chapter VI, this research will discuss a proposal for the legalization of intimacy that will be coherent with the constitutional rights to privacy and intimacy.

### **IV.3. Human Rights and Intimacy**

In the previous section, intimacy has been identified as a constitutional right in Mexico. The protection of intimacy in the constitution shows that it may be considered a fundamental right of individuals. Also, and probably most importantly, it may be construed as a human right. The allocation of intimacy as a human right is crucial. It determines its relevance along with other constitutional rights, and this very acknowledgment of intimacy as a human right finds a broader protection within the international treaties ratified by Mexico, because international treaties are integrated into constitutional law. Particularly after the constitutional amendments of June 2011, the relevance and effectiveness of international treaties has increased. Now, in order to understand intimacy from a human rights perspective, it is necessary to review these recent amendments to the constitution, the international law applicable to intimacy, and a comparative analysis of intimacy, considering the jurisprudence of the Supreme Court in the United States.

#### **IV.3.1. Recent amendments to the constitution and their direct impact on human rights and intimacy**

The constitutional amendments of 2011 represent the most important development in human rights protection in Mexico in over three decades. Signed by President Felipe

Calderón on June 9, 2011, these reforms entered into force on June 11, 2011.<sup>54</sup> The essence of these amendments has been so remarkable, that it marked the beginning of a new epoch in the SCJN.<sup>55</sup> Among other things, this amendment incorporated a more gender-neutral language, changing words like “men” (masculine) to “persons” (genderless). The following observations are the most outstanding modifications introduced by these reforms:

*Literal wording.* The title of Chapter I was renamed. It used to be called “Of the Individual Guarantees”, and it is now called “Of the Human Rights and their Guarantees.” Before the change of this wording, it was unclear whether individual guarantees were the same as human rights. Scholars like Victor Martínez have discussed this issue in depth, portraying individual guarantees as something different to human rights, and backing up their point of view with plenty of literature supporting this argument.<sup>56</sup> However, it is now clear that Human Rights have a constitutional status in Mexico, and the wording is no longer controversial. Moreover, gender-neutral language was introduced in Article 1, the first paragraph of this article acknowledges human rights recognized by the constitution and also by international treaties ratified by Mexico. It includes a non-discrimination provision based on sexual preferences and it adds that all authorities at all levels of government must protect the application of human rights. In this article, this gender-neutral language changed the word in Spanish “individuo” (male individual) to “persona” (person), securing a broad interpretation of the application of human rights, to all individuals regardless of their gender. Nonetheless, the meaning of the word *persona* is so broad in Spanish, that a recent decision by the SCJN had to limit the interpretation. In Mexican tax laws, an individual is called “persona física” (physical person) and a company, or a legal entity, is called “persona moral” (moral person). Since both individuals and companies are considered *personas* in the literal wording, a private company filed a constitutional injunction based on human rights grounds, claiming that the amount of taxes they were paying were so high that it violated their dignity as human beings, because with this taxation scheme, they were being used as a means to collect taxes

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<sup>54</sup> *Official Journal of the Federation*. Mexico, June 10, 2011. First Section, pp. 2-5.

<sup>55</sup> The SCJN sorts out its jurisprudence by epochs, every major constitutional reform leads to the initiation of a new epoch. These reforms of June 9, 2011 have started the 10th epoch. The establishment of the Constitution of 1917 marked the beginning of the 5th epoch, and there have been only four other important reforms before this one.

<sup>56</sup> See: Martínez Bullé-Goyri, pp. 1-18.

and not as human beings. The SCJN decided that the word *persona* in human rights provisions in the constitution was applicable to human beings only, and not to companies.<sup>57</sup>

*Interpretation and procedural changes.* Human rights must be interpreted according to the constitution and according to international treaties on human rights. In the past, the interpretation of the constitution had supremacy over any other legal provisions, including international treaties. This represented a problem before, individuals were not able to claim any rights conferred by international treaties directly. Any claim regarding human rights had to be justified according to legal provisions in national law. As a consequence, the material scope of international treaties had to be transposed into Mexican law so that individuals could claim a specific right. With this amendment, international human rights treaties and their jurisprudence are integrated into constitutional law, and this has modified the procedural access. Now, individuals can claim a right granted by an international treaty ratified by Mexico, even if that treaty has not been transposed into federal or local legislations. This has established a mechanism similar to the one European states have undergone when ratifying the Council of Europe (ECHR). In the European Union, member states must transpose directives, regulations and jurisprudence. In a similar way, Mexican laws, judges and courts must integrate international treaties from now on. So, any individual can claim and appeal to constitutional rights, international human rights and also their corresponding jurisprudence. Furthermore, if there is a conflict of interpretation, whichever interpretation is most favorable to the individual will be applicable.

These new approach to the direct interpretation of human rights could be identified in a recent divorce matter. A Mexico City tribunal made a decision on the interpretation of the obligations to provide nourishment after marriage.<sup>58</sup> Their thesis is that women have the right to alimony after a divorce even if they did not have children during that marriage. The tribunal argued that the requirement of procreation for alimony was a discriminatory measure against women, with particular

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<sup>57</sup> *Judicial Gazette of the Federation*. Constitutional Jurisprudence. 10<sup>th</sup> Epoch. Book XXIII, Vol. 3, August 2013; p. 1408.

<sup>58</sup> *Judicial Gazette of the Federation*. Third Tribunal on Civil Matters, First Circuit. 10<sup>th</sup> Epoch. Book XVIII, March 2013, p. 1908.

disadvantage to men or to same-sex couples, who did not have that requirement in the Cohabitations Partnership Law. The decision added:

“The conception of women that serves this interpretation and institutionalizes gender inequality is that of woman-mother, woman-child bearer, woman-sexual object, but it does not treat women as a person. This is a historic social interpretation made from a masculine logic (androcentrism), because even if the decision to have children belongs to the couple, it is not the male, but rather, the female who is judged for the lack of procreation.”<sup>59</sup>

This decision separates the constructive and economic sphere of matrimony when it comes to executing the right to alimony. The tribunal based its thesis on Art. 4 MexCon (men and women are equal before the law) and Art. 16 par. 1 of The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women...”<sup>60</sup> This thesis issued by the tribunal is important for this research due to its material scope and to its procedural approach. The scope includes marriage and gender equality, using the term *androcentric* to describe the logic of the discriminatory measure. And from a procedural point of view, it can be seen that a lower tribunal is directly applying an international treaty (CEDAW), without the intermediation of the SCJN. As mentioned before, international treaties have been integrated into constitutional law. Therefore, a Mexico City tribunal can directly integrate these treaties as constitutional law into their decision-making.

*Basic conditions.* In the temporary suspension of human rights due to a state of emergency as described by Article 29, this reform introduces restrictions for the application of such suspension mechanism. Even during the temporary state of emergency, human rights shall be protected, forbidding torture and capital punishment. The fifth paragraph of Art. 29 also foresees a review mechanism by the SCJN of any executive decrees passed during the state of emergency. The protection

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<sup>59</sup> Ibidem

<sup>60</sup> Ratified by Mexico on March 23, 1981. United Nations. *Treaty Series*. Vol. 1249. New York: United Nations Secretariat, 1990. pp. 13 et sqq.

of human rights is also applicable for citizens in basic conditions; Article 18 introduces the respect for human rights within the prison system.

*Foreigners.* Article 33 reinforces the human rights of foreign citizens, limiting the executive power of the President to expel foreign citizens without justification. After this amendment, the deportation process cannot discriminate a specific foreign citizen without a cause and a due process. Also, the amendments reinforce the protection of foreigners through asylum.

*Delegation.* The duty to protect human rights is also delegated to entities beyond the Supreme Court. These reforms grant the National Commission for Human Rights (NCHR) the proactive capacity to investigate human rights violations. The NCHR is currently entitled to submit Motions of Unconstitutionality. Any federal or state law, as well as treaties ratified by Mexico can be challenged by the NCHR if it considers that they would constitute a violation of human rights. Also, public servants in general, according to Article 102, are now obliged to respond to the recommendations and claims regarding human rights issues. The public officer with the highest rank, the President, is now responsible for the protection of human rights as well. Article 89 includes the protection and promotion of human rights as another duty of the President.

#### IV.3.2. International Law

Mexico has signed and ratified many international treaties in human rights matters. As a member of the Organization for American States (OAS) since its very beginning, Mexico ratified its Charter on November 23, 1948. Subsequently, the American Convention on Human Rights (ACHR), also known as the Pact of San Jose, Costa Rica, was ratified on March 2, 1981.<sup>61</sup> In this convention, Article 11 describes the right to privacy:

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<sup>61</sup> United Nations. *Treaty Series*. Vol. 1144. New York: United Nations Secretariat, 1987. pp. 123 et seq.

- (1) Everyone has the right to have *his*<sup>62</sup> honor respected and his dignity recognized;
- (2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation;
- (3) Everyone has the right to the protection of the law against such interference or attacks.

Furthermore, Article 17 defines the rights of the family:

- (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state;
- (2) The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention;
- (3) No marriage shall be entered into without the free and full consent of the intending spouses;
- (4) 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. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests;
- (5) The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

These provisions are in accordance with the United Nation's Universal Declaration of Human Rights (UDHR) from the General Assembly Resolution 217 A (III) of December 10, 1948. They relate to Article 12 for privacy:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks;”

and Article 16 for family and marriage:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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<sup>62</sup> The use of masculine possessive pronouns appears in the text of the conventions, it was not modified in this research.

Moreover, the International Covenant on Civil and Political Rights (ICCPR) of 1966, which was ratified by Mexico on March 23, 1981<sup>63</sup> reinstates the protection of privacy in Article 17,

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation;
- (2) Everyone has the right to the protection of the law against such interference or attacks.

Directly linked to this Convention, there is the case of *Joslin et al v. New Zealand*,<sup>64</sup> decided on July 17, 2002, where the United Nations Human Rights Committee (UNHRC) rejected the arguments, stating that the New Zealand law regarding marriage did not violate the International Covenant on Civil and Political Rights. Fortunately, this is now irrelevant, because same-sex marriage became legal in that country on April 19, 2013. However, it does show precedent regarding the approach of the UNHRC towards this issue.

In a similar way, the Convention on the Rights of the Child of 1989, ratified by Mexico on September 21, 1990,<sup>65</sup> protects the privacy of children in Article 16,

- (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honor and reputation.
- (2) The child has the right to the protection of the law against such interference or attacks.

John Tobin and Ruth McNair have analyzed the Convention on the Rights of the Child extensively and they question whether it imposes an obligation on states to allow gay and lesbian couples to adopt.<sup>66</sup> At least, there is no clear prohibition and the convention does not limit the term “parent” to a male-female couple constellation. In their findings, they share that, “There is no credible evidence that such relationships

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<sup>63</sup> United Nations. *Treaty Series*. Vol. 999. New York: United Nations Secretariat, 1983. pp. 171 et sqq.

<sup>64</sup> Dorsen, Norman, et al. *Comparative Constitutionalism: Cases and Materials*. Second Edition. USA: West, 2010. p. 640.

<sup>65</sup> United Nations. *Treaty Series*. Vol. 1577. New York: United Nations Secretariat, 1999. pp. 44 et sqq.

<sup>66</sup> Tobin, John and Ruth McNair. *Public International Law and the Regulation of Public Spaces: Does the Convention on the Rights of the Child impose an obligation on states to allow gay and lesbian couples to adopt?* *International Journal of Law, Policy and the Family*, 23 (2009), Oxford University Press, pp. 110-131.

[same-sex] cause harm to the development of children by virtue of the sexual orientation of their parents. On the contrary, there is an overwhelming and growing body of evidence to suggest that people living in same-sex relationships are just as capable of fulfilling their duties and responsibilities towards the children in their care as parents living in heterosexual relationships.”<sup>67</sup>

Regarding the protection of women, the Convention on the Elimination of All Forms of Discrimination against Women ratified by Mexico on March 23, 1981,<sup>68</sup> provides specific details regarding the rights of women in marriage and family life; Article 16 states:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

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<sup>67</sup> *Ibidem*, p. 127.

<sup>68</sup> United Nations. *Treaty Series*. Vol. 1249. New York: United Nations Secretariat, 1990. pp. 13 et sqq.

Comparing these multilateral treaties, what all of them have in common is that they grant the right to some sort of privacy and they protect the rights of the family. However, they do not mention the concept of intimacy and they do not define the concept of family. Reviewing the layers of privacy discussed in IV.2.2., the term privacy is being used in these conventions as a shelter of privacy in the umbrella of private life that secures its protection from external interference. Although the term family is not clearly defined by any of these international conventions, the UDHR does acknowledge in Art. 16 par. 3. that the family is the natural and fundamental group unit of society and that it is entitled to the protection by society and the State. It is noteworthy that the recognized fundamental group unit is the family, not marriage. As Chapter VI.1. will argue later on in this research, the most important institution when it comes to the legalization of intimacy is not marriage, but rather, the family. And the UDHR already acknowledges the family as the most important unit. As mentioned before, with the recent amendments to the constitution, international treaties and their jurisprudence become constitutional law. Hence, how do these conventions affect the protection of intimacy in Mexico and the decisions of the SCJN?

In terms of jurisprudence, the Inter-American Court of Human Rights has issued seven sentences in trials that involved Mexico. However, none of these cases has dealt with the issue of privacy, intimacy, marriage or the family yet. Eventually, any changes in the jurisprudence, even in cases that do not involve Mexico, will be used to interpret human rights according to Mexican Constitutional Law. Although the concept of intimacy is not mentioned in these treaties, it has been explained how the SCJN identifies intimacy within privacy. Justice Jose Ramón Cossío Díaz has clearly underlined the applicability of international human rights treaties in cases regarding privacy and intimacy:

“What does not constitute public life; the reserved area in relation to the action and knowledge of others; what one shares only with those one chooses; the activities of persons in the particular sphere related with home and family...The right to private life (or intimacy) is recognized and protected in the declarations and treaties on human rights included in the Mexican legal order, such as the Universal Declaration of Human Rights (article 12), the International Covenant on Civil and Political Rights (article 17), the American Convention on Human Rights (article 11) and the Convention on the Rights of the Child (article 16).

Interpreting these provisions, the international organizations have pointed out that the notion of private life corresponds to the sphere of life where people can freely express their identity, be it in their relationships with others or individually, and they have underscored its link to a wider scope of rights, such as the inviolability of correspondence and communications in general, the inviolability of home, the guarantees regarding personal and bodily registrations, those relate to gathering and registering personal information in databases and other devices; the right to an adequate homestead, to health and equality, reproductive rights and the protection against forced evacuations.”<sup>69</sup>

In this decision, Justice Cossío Díaz had already taken into account international treaties and their jurisprudence, even though this constitutional injunction was resolved before the constitutional amendments mentioned above. Now, the effectiveness of these amendments will be seen at all levels of the justice system, not only at the SCJN, as shown by a recent decision in June 2013.<sup>70</sup> In this decision, the Mexico City tribunal acknowledged that even though the Mexican constitution does not make a specific reference to the right to a person’s honor, intimacy and personal image, these shall be considered inherent to the human being because they are inseparable from the holder. And thus, fall within the protection of human rights in the constitution. The tribunal argued that according to the new wording of Article 1, these rights were protected by international treaties ratified by Mexico; namely, the ACHR and the ICCPR. Therefore, there were indirectly integrated into Mexican constitutional law although they were now explicitly there.

Regarding the legalization of intimacy in Mexico, it is important to observe that the international treaties discussed above are now an integral part of Mexican constitutional law. Therefore, the rights they grant may have an impact on the legalization of intimacy in Mexico. These conventions do not grant the right to same-sex marriage directly, but they do not prohibit it either. In the analysis of CEDAW’s Art. 16, some of the spheres of intimacy can be found: emotional (consent, legal guardianship, official registration of marriage), economic (occupation, ownership, acquisition, enjoyment, disposition and management of property), constructive (adoption, family name, procreation). Rereading Art. 16, par. 1. b), the convention

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<sup>69</sup> Constitutional Injunction in review 2044/2008. June 17, 2009. Lead Justice: José Ramón Cossío Díaz. Case registration number: 165823.

<sup>70</sup> *Judicial Gazette of the Federation*. Fifth Tribunal on Civil Matters, First Circuit. 10<sup>th</sup> Epoch. Book XXI, Vol. 2. June 2013, p. 1258.

provides a right to *freely choose a spouse* and to enter into marriage with free and full consent; hence, the right to choose a same-sex spouse should be interpreted as a right to freely choose a spouse within the protection of CEDAW. The UDHR protects the right to marry and to found a family in Article 16. Nowhere does the declaration state that this right shall be limited to opposite-sex spouses. Considering these provisions for marriage and their direct applicability in Mexican constitutional law; there is a strong case for the constitutional legalization of same-sex intimacy in Mexico.

#### IV.3.3. Comparative Law

The debate around privacy and intimacy is not exclusive of Mexico. Other legal systems have established relevant jurisprudence with cases that have also reached the highest courts. Comparing this matter with the United States is of particular interest, because of its proximity and unique influence on Mexico.

Samuel Warren and Louis Brandeis ignited the legal discourse on privacy in the United States back in 1890 with the publication of the famous article in the Harvard Law Review, *The Right to Privacy*.<sup>71</sup> They triggered the foundation of tort privacy law.<sup>72</sup> And their analysis includes the connection of the right to privacy not to a specific property, but rather to the individual. As Robert Post has pointed out, the central substance in their article is to disentangle privacy from property.<sup>73</sup> Warren and Brandeis defended Judge Cooley's argument for the *right to be let alone*. Years after the publication of their article, when Brandeis became a Supreme Court Justice, he expressed his ideas on privacy on a permanent basis. A landmark case was his dissent on *Olmstead v. United States*, 277 U.S. 438 (1928), where he argued in favor of the protection of privacy invested in the Fourth and Fifth Amendment. The actual protection of privacy and intimacy by the U.S. Supreme Court would arrive in the jurisprudence years later, with the cases that will be reviewed in the following paragraphs:

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<sup>71</sup> Warren, Samuel D. and Louis D. Brandeis. "*The Right to Privacy*". *Harvard Law Review*, Vol. IV, No. 5, Boston. December 15, 1890. pp. 193-220.

<sup>72</sup> Inness, p. 116.

<sup>73</sup> Post, Robert C. "*Rereading Warren and Brandeis: Privacy, Property, and Appropriation*". Yale Law School. *Case Western Reserve Law Review*. 41 (1991). p. 648.

*Griswold v. Connecticut*, 381 U.S. 479 (1965)

The Executive Director and Medical Director of the Planned Parenthood League of Connecticut were convicted for providing advice to married couples on how to prevent conception and for the prescription of contraceptive materials for wives. While the prevention of contraception was a crime, the appellants argued that the statute in the State of Connecticut violated the Fourteenth Amendment, in its substantial due process clause. Justice Goldberg concluded that the concept of liberty was not so limited and that it embraced the *right of marital privacy* even though the right was not explicitly mentioned in the Constitution.<sup>74</sup> Justice White considered that the law in the State of Connecticut deprived married couples of their liberty without the due process of law.<sup>75</sup> This decision overturned the ruling of *Olmstead v. United States*, establishing for the first time in history, a constitutional right to privacy, and adding to the concept of marital privacy. This right, as supported by Justices, was linked to the liberties of individuals. Thus, any intervention by the State to reduce liberty was an invasion of privacy, in this case, marital privacy.

*Loving v. Virginia*, 388 U.S. 1 (1967)

Anti-miscegenation statutes in the State of Virginia prohibited interracial couples. An African-American<sup>76</sup> woman and a white man who got married in the District of Columbia, were charged with a felony for marrying out of state and returning, leaving the state to evade law. This form of discrimination was analyzed from the perspective of the equal protection and due process clause of the Fourteenth Amendment. Chief Justice Warren delivered the opinion of the Court explaining that, “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment

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<sup>74</sup> 381 U.S. 486 (1965)

<sup>75</sup> 381 U.S. 502 (1965)

<sup>76</sup> The Supreme Court records, in fact, use the words “Negro woman”. 388 U.S. 2 (1967).

requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.”<sup>77</sup> This case confirms the idea that marriage is an extension of the application of liberty, including the decision whether to get married or not, and choosing the person you want to marry, without classification of individuals based upon their race.

*Roe v. Wade, 410 U.S. 113 (1973)*

In the State of Texas, it was a crime to procure an abortion according to the Criminal Code. Jane Roe, unmarried and pregnant, wanted to terminate her pregnancy through a legal clinical procedure with qualified physicians, even though her life was not threatened by the pregnancy as allowed by the statutes. The State of Texas was then represented by Henry Wade. The primary arguments were that the statutes invaded the rights of the pregnant woman, particularly the right to liberty of the due process clause in the Fourteenth Amendment and claiming the protection of privacy vindicated in *Griswold v. Connecticut* only eight years before. The Supreme Court concluded that the right of privacy was broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. Although the Court established that right was not absolute, because the pregnant woman could not be isolated in her privacy, it associated this determination to a right of privacy. This right was acknowledged, but also the potentiality of human life was protected by the State of Texas, and a woman’s right to privacy and subsequently to terminate that pregnancy, was determined accordingly, establishing the conditions when an abortion was legal.<sup>78</sup> The Court defended a patient’s right to privacy in their communication with a doctor. Furthermore, it acknowledged a single person deserves privacy, not only in cases of family units, married couples as in *Griswold*, but also as an unmarried person.

*Lawrence v. Texas, 539 U. S. 558 (2003)*

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<sup>77</sup> 388 U.S. 12 (1967). See also: *Skinner v. Oklahoma, 316 U. S. 535, 316 U. S. 541 (1942)* and *Maynard v. Hill, 125 U. S. 190 (1888)*.

<sup>78</sup> 410 U.S. 114 (1973)

This decision overruled the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) directly, the Court decided that intimate sexual activity (including sodomy) is part of the liberty of individuals. Therefore, it is protected under the substantive due process clause under the Fourteenth Amendment. Although in *Bowers* the Court had stated that there was no constitutional right to engage in homosexual sodomy, seventeen years later, the Court interpreted this issue from a liberty and privacy perspective. Adding that, “The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.”<sup>79</sup> Justice Kennedy led the opinion of the Court with a clear explanation of the right to engage in sexual activity in private, declaring that, “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain *intimate* conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”<sup>80</sup> Even with the clear dissent of Justice Scalia, arguing that there was no fundamental right to homosexual sodomy,<sup>81</sup> this ruling constituted a *de facto* invalidation of sodomy laws in thirteen states that criminalized homosexual behavior. Again, the opinion of the Court has an emphasis on the right to liberty and the right to privacy protected by the Constitution in substantive due process. As argued by Dorsen *et al*, “Sexuality can be understood both as a decisional aspect of the right to privacy and as an emanation of the right to autonomy.”<sup>82</sup> Furthermore, as this research will discuss further in V.5.2., the privacy and liberty that allow individuals to exercise their sexuality freely is linked to the *legalization of desire*.

In Europe, there are also very important cases from the European Court of Human Rights that deal with the issue of privacy. For instance, *Dudgeon v United*

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<sup>79</sup> 539 U. S. 558 (2003)

<sup>80</sup> 539 U. S. 562 (2003)

<sup>81</sup> 539 U. S. 594 (2003)

<sup>82</sup> Dorsen, Norman, et al. *Comparative Constitutionalism: Cases and Materials*. Second Edition. USA: West, 2010. p. 628.

*Kingdom*<sup>83</sup> (Criminalization of private consensual sexual activity); *Norris v Ireland*<sup>84</sup> (Criminalization of private consensual sexual activity); *Modinos v Cyprus*<sup>85</sup> (Criminalization of private consensual sexual activity); *Smith and Grady v United Kingdom*<sup>86</sup> (Discrimination in employment, armed services); *Lustig-Prean and Beckett v United Kingdom*<sup>87</sup> (Discrimination in employment, armed services); *Salgueiro Da Silva Mouta v Portugal*<sup>88</sup> (Discrimination in custody of a child); *A.D.T. v United Kingdom*<sup>89</sup> (Criminalization of private consensual group sexual activity). All these cases fall within the scope of protection of Article 8 of the European Convention on Human Rights which, in a very similar way to other international conventions, protects the right to respect for private and family life, including home and correspondence. In all of these cases, a violation of Article 8 has been acknowledged. Also, their common denominator is that they recognize the right of individuals to private life, regardless of their sexuality or sexual practices. As reminded by Paul Johnson, “the Court has held that ‘private life’ is ‘a concept which covers the physical and moral integrity of the person, including his or her sexual life.’”<sup>90</sup>

#### IV.3.4. Conclusion

Human Rights are the most fundamental rights in any legal system. This section has presented the relationship between human rights and intimacy. Mexico has given human rights the highest rank in the Constitution with these recent amendments, even subordinating the Constitution itself to International Treaties regarding human rights.

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<sup>83</sup> *Dudgeon v. United Kingdom*, 7525/76, Council of Europe: European Court of Human Rights, October 22, 1981.

<sup>84</sup> *Norris v. Ireland*, 10581/83, Council of Europe: European Court of Human Rights, October 26, 1988.

<sup>85</sup> *Modinos v. Cyprus*, 7/1992/352/426, Council of Europe: European Court of Human Rights, March 23, 1993.

<sup>86</sup> *Smith and Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, Council of Europe: European Court of Human Rights, September 27, 1999.

<sup>87</sup> *Lustig-Prean and Beckett v. The United Kingdom*, 31417/96; 32377/96, Council of Europe: European Court of Human Rights, July 25, 2000.

<sup>88</sup> *Salgueiro da Silva Mouta v. Portugal*, 33290/96, Council of Europe: European Court of Human Rights, December 21, 1999.

<sup>89</sup> *A.D.T. v United Kingdom*, 35765/97. Council of Europe: European Court of Human Rights, July 31, 2000.

<sup>90</sup> Johnson, Paul. ‘An essentially private Manifestation of Human Personality’: *Constructions of Homosexuality in the European Court of Human Rights*. *Human Rights Law Review* (Oxford University Press), 10:1 (2010), p. 75.

The comparative analysis with the United States has shown that privacy is protected as a fundamental right as well. International Human Rights Treaties, Mexico and the United States, all of them defend a right to privacy, a right to form a family and a right to marry. Intimacy is protected under the umbrella of privacy; the constitutional protection of privacy in the U.S. embraces intimacy, just as the Mexican constitution includes intimacy within privacy. Dorsen *et al* point out that “Self-determination, privacy and dignity, as well as the right to respect for who one is and aspires to be, may provide the constitutional basis on which to consider intimate relationships and sexuality, including sexual activities as well as sexual orientation.”<sup>91</sup> The respect for marriage equality and same-sex intimacy requires an understanding of an individual’s right to privacy and the concept of intimacy as inherent to privacy. Currently, the jurisprudence both in Mexican and in U.S. constitutional law are moving in that direction.

The contemporary evolution of human rights is also opening its scope for *gay rights*. On December 6, 2011; former U.S. Secretary of State Hillary R. Clinton gave a speech at the United Nations in Geneva, Switzerland. Her approach to the recognition of the International Human Rights Day is clearly exemplified in the following sentence: “Some have suggested that gay rights and human rights are separate and distinct; but, in fact, they are one and the same...Gay rights are human rights, and human rights are gay rights.”<sup>92</sup> She added: “I am talking about gay, lesbian, bisexual, and transgender people, human beings born *free* and given bestowed *equality* and *dignity*, who have a right to claim that, which is now one of the remaining human rights challenges of our time.” Her speech reminded the international community of the need to understand gay rights as human rights. While some people oppose marriage or other forms of intimacy between same-sex partners, the question is not whether to accept gay marriage, but rather, to acknowledge human rights violations. As explained in Chapter II, gay marriage is nothing but traditional marriage; the difference is who has access to this structure of intimacy. If a legal system does not allow same-sex individuals to get married, the problem is not

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<sup>91</sup> Dorsen, Norman, et al. *Comparative Constitutionalism: Cases and Materials*. Second Edition. USA: West, 2010. p. 628.

<sup>92</sup> U.S. Department of State. *Remarks in Recognition of International Human Rights Day* by Hillary Rodham Clinton, Secretary of State. United Nations. Palais des Nations, Geneva, Switzerland. December 6, 2011. The complete transcript of the speech can be found online in Press Release Number: 2011/T57-13.

marriage *per se*; the ulterior problem is a violation of human rights based upon a legalized form of discrimination. Therefore, intimacy must be analyzed within the holistic perspective of human rights. Admitting a right to intimacy, regardless of the gender of the partners, means accepting and respecting human rights. An inclusive legalization of intimacy contributes to the development of a more solid human rights system.

#### **IV.4. The Constitutional Battle for Intimacy**

Chapter III.3. introduced some of the cases regarding the legalization of intimacy in Mexico City. These cases showed the constitutional conflict generated by the legalization of same-sex matrimony with the amendment of the Civil Code in Mexico City. Now that intimacy has been analyzed from a constitutional and a human rights perspective, the constitutional battle for intimacy can be revisited. This battle has two parties, the Legislative Assembly of Mexico City (with a left-wing majority) and Mexico's Attorney General (representing the Federal Government by the ruling conservative party.) Exactly one month after the Legislative Assembly (LAFD) passed the bill that allowed same-sex couples to get married; the Attorney General filed a Motion of Unconstitutionality.<sup>93</sup> With this measure, the Mexican Supreme Court had the jurisdiction to solve the dispute and to determine whether that bill was valid or not. This triggered a national debate around the rights of same-sex couples for intimacy and adoption. Supreme Court Justice Sergio Valls was nominated to manage the case, and unofficially, the Motion of Unconstitutionality 2/2010 was called the "Valls Project."

##### *Attorney General v. Legislative Assembly of the Federal District and Mayor*

The Attorney General (AG), Mr. Arturo Chavez, justified the motion of unconstitutionality according to five premises:

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<sup>93</sup> According to Art.105.II.C MexCon.

- a. *The Legislative Assembly did not justify the need to pass the bill.* The AG argued that the LAFD was obliged to justify and motivate its legislative acts as described in Art. 16 of the Constitution.
- b. *This legislation damages the ideal [heterosexual] family model.* The AG claimed that Art. 4 protects a heterosexual type of family formed by a husband, a wife, and children. Therefore, matrimony between same-sex partners violated this constitutional guarantee.
- c. *Adoption by same-sex couples damages and discriminates children.* The AG declared that the rights of children were not protected if adoption was available for same-sex spouses. He mentioned that children adopted by same-sex parents would not find an appropriate environment for their development, and would be disadvantaged in comparison to children raised by opposite-sex parents.
- d. *It diverts the federal order, with the recognition of same-sex matrimony in the entire country.* The AG was preoccupied, because civil acts recognized in one state must be recognized by all other states in the federation, as stipulated in Art. 121. IV.
- e. *It violates the constitutional normative hierarchy.* The AG considered that the LAFD had attempted to override the constitutional supremacy with a legislation that was beyond its powers.

On February 23, 2010, in response to the motion submitted by the AG, the LAFD submitted a report before the SCJN.<sup>94</sup> Maria Alejandra Barrales Magdaleno was the President of the Governmental Commission in charge of this defense. The fifty-five-page report was very comprehensive and it was divided into three sections, each of them presenting counterarguments for the AG's allegations. The report described the motivations of the LAFD to pass this bill, but also, it informed the SCJN of the situation around homosexuality and same-sex matrimony in general, including comparative law.

*Section I.* The AG challenged Art. 391 CCFD in Motion 2/2010. Nonetheless, as pointed out by the LAFD, the article was not amended. The LAFD had originally

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<sup>94</sup> LAFD V Legislature. Report 2/2010. Maria Alejandra Barrales Magdaleno. Mexico City: CIDE, February 23, 2010.

planned to change this article to limit adoption for same-sex couples. The legislators had thought that it would have been easier to pass a bill allowing same-sex marriage if the bill banned adoption for same-sex spouses. At the end of the debate rounds, the legislators decided to go ahead with the whole package, allowing same-sex partners not only to get married, but to adopt children as well. Therefore, the AG's arguments against Art. 391 could not be assessed by the SCJN because they lacked a foundation; there was no amendment to judge.

*Section II.* This part of the report is by far the largest; it provides the SCJN with an extensive analysis on the issue of homosexuality. The study included the criminal repression of homosexuals in the nineteenth and twentieth century in Europe and in Mexico, using examples such as the trials of Oscar Wilde and theories of Michel Foucault; the pathologization and stigmatization of homosexuality; and the persistent stigmatization of homoparental adoptions. The report cited the official opinion of the American Association of Psychiatry in 2002:

“Numerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents. This research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults. The research also shows that children who have two parents, regardless of the parents’ sexual orientations, do better than children with only one parent.”<sup>95</sup>

Furthermore, the LAFD argued that after the years of repression, homophobia is now on a second phase trying to disguise homosexuality, with actions like those of the Attorney General. The arguments in the report directly accused the AG of homophobic behavior, with his attempt to position homosexual individuals as second-class citizens using authoritarian techniques whose purpose is to keep the balance in favor of heterosexuality.

Moreover, the LAFD affirmed the constitutional rights to equality and to freedom of speech. Quoting the South African Constitutional Court, the LAFD stated

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<sup>95</sup> Ibidem, p. 10.

that the evolution of science and constitutional transformations now lead to the recognition of homosexuals as subjects of rights, not as objects of injuries, persecution and stigmatization. Consequently, matrimony between same-sex partners is a part of the right to equality and non-discrimination. It adds, excluding same-sex partners from the institution of matrimony deprives them of their constitutional protection for the organization and development of the family as detailed in Art. 4. This hypothesis was supported with jurisprudence in comparative law.<sup>96</sup> The LAFD perceives matrimony as an expressive conduct as well. Thus, protected by the constitutional guarantee to freedom of speech in Art. 6 as a spiritual liberty. The symbolic dimension of matrimony falls within the scope of freedom of speech because individuals can express their love and commitment publicly.<sup>97</sup> This very liberty contributes to the free development of an individual's personality, also defended by the SCJN in the Constitutional Injunction 6/2008.<sup>98</sup> The LAFD considers that recognizing this freedom of speech for persons who have sexual preferences different to those of heterosexuals regarding matrimony must be interpreted as a constitutional imperative due to its importance in the democratic debate in a pluralistic and diverse society. The report criticized the declarations of Catholic Cardinal Norberto Rivera, who openly expressed his dissent and constantly used a rather aggressive and offensive language to condemn the legislation passed by the LAFD.

*Section III.* This final section responded directly to every allegation in the strict order of the AG's submission.

- a. The LAFD reiterated there was no violation of Art. 16, legislators must not justify their acts in this matter, because this legislation grants individuals more rights. They would have justified a legislation that would deprive citizens of their rights, but considering they were recognizing and legalizing a right to

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<sup>96</sup> *Minister of Home Affairs and Another v Fourie et al* (Doctors for Life International and Others, Amicus Curiae) (CCT 60/04); *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (CCT 10/05), South Africa, December 1, 2005.; *Stan Barker et al. v. State of Vermont*, 170 Vt. 194, 744 A.2d 864 (1999), United States.

<sup>97</sup> The report made a reference to *Halpern et al. v. Attorney General of Canada et al.*, Ontario Appeals Court, Canada, June 10, 2003.

<sup>98</sup> Constitutional Injunction 6/2008. Regarding the amendment of a birth certificate for a transsexual individual. Lead Justice: Sergio Valls. January 6, 2009.

marry one's partner without gender discrimination, the justification is not necessary, but rather evident.

- b. Although the AG claimed that the constitution protected a heterosexual concept of family, the LAFD sustained that Art. 4 protects all types of family, there is no explicit definition of the term and therefore, its broadest protection for individuals is applicable, not limiting the interpretation of that concept to opposite-sex constellations.
- c. Regarding adoption in connection with matrimony, the LAFD pointed out that the AG had not demonstrated how children adopted by a homoparental matrimony would prejudice a child's welfare. This allegation was unfounded and did not rely on any empirical research unlike the argument the LAFD used with the survey of the American Association of Psychiatry. Also, the LAFD was not obliged to justify the effects on children of homoparental matrimonies, because the legislation did not change any provision regarding adoption. The LAFD detailed Arts. 20 and 21 of the Convention on the Rights of the Child and jurisprudence of the European Convention on Human Rights.<sup>99</sup>
- d. The LAFD demonstrated that according to the jurisprudence of the SCJN, civil acts celebrated in one state must be recognized in all states even if they contradict an internal regulation of that state. There is no conflict of laws in this case, because the civil act is celebrated within the jurisdiction of the Federal District and it is only the recognition of that act that must be acknowledged by other states, but they are not involved in the process of the civil act.
- e. According to the line of arguments submitted in the report, there is no violation of Art. 133 and the constitutional supremacy is recognized and respected by the LAFD. The AG, with the premise that the legislation was in conflict with Art. 4, argued the supposed violation of that article in its definition of a family. However, as explained in (b), there is no contradiction because that article does not constrain the definition of the concept of family in the constitution. Therefore, the LAFD admits the constitutional supremacy at all times.

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<sup>99</sup> *E.B. v. France* (Application 43546/02), January 22, 2008, and *Karner v. Austria* (Application 40016/98), October 24, 2003.

The Valls Project concluded that matrimony by same-sex spouses in Mexico City was constitutional. The decision by the court ratified that the legislation had been enacted by the LAFD within the scope of its faculties. This decision supported the bill and recognized the validity of same-sex matrimony in the entire country. In addition to solving the Motion of Unconstitutionality 2/2010 submitted by the Attorney General, Justice Sergio Valls asked the National Autonomous University of Mexico (UNAM) to prepare an *amicus curia* report regarding the matters challenged by the AG. That *ad hoc* report concluded that legalizing same-sex marriage could have a positive effect in the Mexican society, contributing to fight intolerance, segregation, violence, discrimination and homophobia. Also, the UNAM found out that biological or adopted children with homoparental households had little or none psychological or social impact in comparison to children raised by heterosexual parents. Justice Valls decided to expand the project and, although Art. 391 CCFD had not been amended; he submitted a proposal before all Justices to pronounce the opinion of the court regarding adoption by same-sex spouses. Subsequently, a couple of days after the defense of the legalization of same-sex marriage, the SCJN declared that adoption by same-sex matrimonies was also constitutional.

#### **IV.5. Conclusion**

This Chapter has presented the fundamental rights around intimacy, including the constitutional analysis, the human rights issues and the international and comparative perspective on this matter. Privacy is protected by the individual guarantees in the Mexican Constitution; as explained before, the jurisprudence has determined that this constitutional protection of privacy includes the protection of intimacy as well. Specifically, this can be found in Articles 6, 7, 10 and 16. The difference between privacy and intimacy was established with the analysis of the SCJN jurisprudence. These 96 cases handling the issue of intimacy have reaffirmed the contemporary relevance of intimacy and the different connotations of these concepts. The definition introduced by Justice Olga Sanchez serves as a reference in the decision-making process for the court, although it has not been consolidated as a doctrine. The rank of privacy and intimacy with regard to other constitutional rights has been determined in the domains of the due process cause, visitation rights, alimony and warrants. In order to understand the difference between privacy and intimacy, it was important to

include this research's approach with the three layers of privacy. The interpretation of intimacy in its dyadic form can be best identified while taking into account that there is an intrinsic privacy of individuals, that there is a shelter and an atmosphere of privacy where intimacy exists as a bridge that links the intrinsic privacies of two persons. Understanding this difference and the connection between these two concepts is fundamental in the analysis of intimacy. Moreover, the human rights survey of intimacy lead this research to the particular study of recent constitutional amendments, to international treaties ratified by Mexico and to case-law in the United States that is relevant for the deeper comprehension of intimacy. The most important change with the constitutional amendments of June 2011 is that it gives international treaties and jurisprudence the same rank as direct constitutional law. This development now allows individuals to submit constitutional injunctions based on a broader spectrum of rights at a national and international level. Also, the changes include a more gender-neutral language and wording that reflects the intention of the legislators to evolve towards a more impartial legal system in terms of gender equality. All the international treaties that were reviewed in this chapter talk about a right to privacy and a right to form a family. However, they lack a specific right to intimacy. Even though it is clear in the jurisprudence that intimacy lies within privacy, the right to intimacy *per se* as a separate right still remains to be developed.

The U.S. case-law detailed here has provided a comparative example of the debate around intimacy, from the marital protection of intimacy in *Grisworld*, to the right to abortion in *Roe* and the liberty of sexual practices in *Lawrence*. These cases confirm and support an individual's right to privacy and intimacy. However, the ideas discussed in this chapter were best characterized by the constitutional battle for intimacy in the case of the *Attorney General of Mexico v. the Legislative Assembly of Mexico City*. The SCJN has now endorsed same-sex marriage in Mexico City and, voluntarily, adoption by same-sex couples. The first phase of this process, ratifying the current Mexico City law, has enabled the possibility of a second phase in the evolution of the legalization of intimacy in Mexico: the acknowledgement that same-sex matrimony is constitutional can lead the SCJN to the conclusion that banning same-sex matrimony in the rest of the country is, thus, unconstitutional. Just the mere fact the same-sex matrimony has ben legalized in Mexico City confirms that the

Mexican legal system has the capacity to legislate in intimacy-related issues in general, and specifically, to modify the current status of intimacy.

The contemporary legal reality of intimacy can and will eventually have to be changed, because the current trend within Mexico and at an international level is now demanding it. These changes are necessary not only for political purposes, but rather as an improvement in human rights conditions. Again, quoting the words of former U.S. Secretary of State Hillary Clinton, gay rights are human rights and human rights are gay rights. The urgent recognition and legalization of same-sex intimacy is a human rights issue that cannot be ignored anymore by any democracy in the twenty-first century.

In addition to the legal approach to this matter, there are different perspectives in the debate about intimacy and marriage. So far, this research has made an emphasis on the law of the Civil Code in Chapter III, and the Constitution, International Treaties and Jurisprudence in Chapter IV. With this solid legal basis, it is also important to evaluate the debate from other, rather social points of view, such as: political parties, political actors, interest groups, activists, gender and religion. They cannot be disregarded in this research, because they are the catalysts of the eventual legal changes that can be produced. These stances require an extensive and inclusive review; therefore, they will be discussed in detail in the forthcoming pages.



## V.1. Introduction

A deeper reflection on legislative processes will lead us to the conclusion that the legal is political and the political is legal. At some point, it becomes rather difficult to draw a line between a legal and a political or sociological phenomenon taking place, because both of them are the same.

In this context, it is crucial to analyze different perspectives on the issue of intimacy. In Chapter II, the question of intimacy was introduced. It included the conceptual framework, the analysis of discourse, the spheres of intimacy and the structures of intimacy. The following chapter reviewed the evolution of legal intimacy in Mexico, going through the different spheres and structures as they are identified in Mexican Law. Chapter IV provided a constitutional examination of intimacy in its relationship with human rights, at a national and international level. Now, it is quite relevant to discuss the diversity of perspectives and approaches to intimacy that end up influencing lawmakers and lawmaking in general. These perspectives are developed with different ideas regarding sex, gender, laicism, religion, justice, human rights and state intervention. In this chapter, these components will be explored in connection with the legalization of intimacy.

First of all, it is important to study the relevance of conservatism and religion in Mexico, including the Catholic Church, the Pro-life Movement and the Conservative party in Mexico that has controlled the federal government for over a decade. Their ideas have an impact on the legalization of intimacy in Mexico. Second, a review of the issue of gender will go over feminism, masculinities (in plural), gay and queer. In this section, it will be important to understand the concept of heteronormativity, the idealization of heterosexual paradigms, and how it permeates the legalization of intimacy. The notion of heteronormativity will also help us understand what will be described as the fallacy and algebra of gay marriage, and the paradox of privacy. This formulation of gay marriage would ask gay activists the following question: Do you *really* want gay marriage? The net effect of gay marriage is not necessarily equality. The claim for equal rights can be misleading in this sense.

Third, after the discussion on gender, the obstacles of legalized gender will be identified easily. This comprises the requirements for birth certificates and marriage licenses and provisions for transsexuals. Furthermore, this subsection will relate the case of Quintana Roo in the legalization of intimacy; a rather unexpected case of a legal void that opened the doors for same-sex couples to join in matrimony in southeast Mexico because of the absence of gender obstacles. No one would have thought that gay marriage has been there all this time. Fourth, the nuances of undoing, unlearning and destroying gender will be contrasted. This demands a thorough analysis of the connection between gender, intimacy and queer theory. At the end of this chapter, it should be clear how sex as a category and gender are differentiated. In order to accomplish that, this chapter embraces key literature in gender studies, such as the works of Judith Butler, Eve Sedgwick, Judith Halberstam, Jean Cohen and Susan Moller Okin. Their gender theories are fundamental for the abstraction of intimacy and its subsequent legalization. This includes a feminist and queer critique of marriage and a different approach to the issue of gender and its connection with intimacy.

So far in this research, the structures of intimacy that have been analyzed underline the presence of sex as a category. The classification of marriage, for instance, as opposite-sex or same-sex marriage proves at least one thing: that sex is a factor. The *factorization of sex* causes unnecessary segregation and discrimination. How can a fair legal system avoid this? One of the answers would be to grant the same rights to every category. Nonetheless, the simplest and most efficient solution is to get rid of the very discerning factor that creates and fosters this segregation, the dilemma of difference also known as the feminist dilemma. The last pages of this chapter discuss the issue of hermaphrodites. Neither traditional marriage nor gay marriage is an answer to hermaphrodites or intersexuality, because the factorization of sex works against them. They are forced to fit into either choice. These discussions will provide an insight into the relationship between gender and intimacy as a means to evaluate the different options that can optimize the legalization of intimacy. Especially, there will be an emphasis on the problem that the binarism of sex and gender creates. Up until now, the duality of male and female persists. The goal for an appropriate legalization of intimacy would be to grow beyond this dichotomization, because an “either/or” proposition can only limit the alternatives in any circumstance.

## V.2. Conservatism and Religion

In the battle for equality in intimacy, conservatives have been outspoken opponents of marriage equality and of the respect for self-determination in intimacy. Mexico has had three main strong influences: the Catholic Church, the Pro-life movement and the ruling conservative party, the National Action Party (PAN). These entities have a powerful impact on the Mexican society and legislative processes. Beyond the legal considerations and the vindication of human rights, the conservative movement defends old interpretations and constructions of intimacy that they are not willing to change. The conservative movement has direct and indirect stakeholders. In the past years, they have blocked and slowed down the evolution of the legislation regarding intimacy. Conservatives cling to their beliefs and attempt to limit the equal opportunities of access to a legalized form of intimacy for some individuals. The following paragraphs will summarize the basic position of these groups.

### *a. The Catholic Church*

Catholicism plays an important role in Mexico. According to the 2010 Census, 82.71% of the population is catholic.<sup>1</sup> Therefore, the catholic creed is a powerful persuasion mechanism for the large majority of the population. The official position of the Catholic Church is transmitted to the Mexican churchgoers. Other religions are increasingly gaining more territory, but have little or no influence on national politics and lawmaking. The catholic views on gender and intimacy permeate the Mexican society, particularly in the older generations. The role of men and women is determined by religious confirmation. As Okin has pointed out, old stereotypes are used to justify separate spheres for men and women, and she uses Pope John Paul II's Apostolic Letter "On the Dignity of Women" to exemplify it.<sup>2</sup> This letter is actually quite symbolic;<sup>3</sup> it depicts the catholic ideal of the role of women in society. In his letter, Karol Wojtyla revisits the duties of women as (a) virgins, (b) mothers and (c) wives. What he calls the *mystery* or *trinity* of women is this obligation to be all of the

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<sup>1</sup> Instituto Nacional de Estadística y Geografía (INEGI). *Panorama of Religions in Mexico 2010*. Mexico : INEGI, 2011. p.10.

<sup>2</sup> Okin, Susan Moller. *Justice, Gender and the Family*. USA: Basic Books Inc., 1989. p.15.

<sup>3</sup> Apostolic Letter "Mulieris dignitatem." Of the supreme Pontiff John Paul II, on the dignity and vocation of women on the occasion of the Marian Year. Rome, Saint Peter's: Libreria Editrice Vaticana, August 15, 1988.

above at different stages of life. Although he advocated equality of men and women before God, his letter is full of contradictions and consistently uses the predestination of masculinity and femininity. The infamous value attributed to virginity is nothing but the objectification of women in preparation for a male-centered marriage, shockingly denominated the “gift of self”. According to this approach, the gifts (objects) are women who become property of the recipients (owners) of the present: Husbands. Motherhood is justified with the role of the Woman as the mother of God (*Theotókos*),<sup>4</sup> with the emphasis on procreation according to the motto of "Be fruitful and multiply, and fill the earth and subdue it".<sup>5</sup> The duty of women as mother confirms their objectification, because they are seen as industrial machinery capable of childbearing. Pope John Paul II considered both motherhood and virginity as the two dimensions that fulfilled the “female personality”. Last, but certainly not least, women are wives whose obligation is to be subordinated to their husbands in the marriage trap. The Pope promoted this passive attitude claiming that "to serve means to reign". He reminded women that "your desire shall be for your husband, and he shall rule over you", supporting the idea that marriage represents the "sincere gift of the person", of course, of the bride to the groom. This Catholic creed and discourse has perpetuated the role of women in marriage, an institution that has fostered inequalities and injustices. As discussed in Chapter II, in the Biblical Analysis of Marriage, the five spheres of intimacy could be identified in the traditional Christian marriage. It is especially important to observe the allocation of roles and their impact on the social imaginary of masculinity and femininity. This morality is rather evident in the letter “On the dignity of women”, which should be called “On the *indignity* of women” instead. The essence of this apostolic letter is that it links the role to women, its moral values, to their dignity, a human right. If analyzed from this reverse-perspective, the letter is very effective. Thus, everybody can agree upon the fact that gender roles are linked to an individual’s dignity and that the limitation, stigmatization or restraint of such roles may attack or jeopardize a human being’s dignity as well.

Joseph Ratzinger was the Prefect of the Congregation for the Doctrine of the Faith in the Vatican before he became Pope Benedict XVI. On June 3, 2003; he released a

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<sup>4</sup> In Greek, as used in the original.

<sup>5</sup> Genesis 1: 28

letter on the “Considerations regarding proposals to give legal recognition to unions between homosexual persons.”<sup>6</sup> This letter is an open directive calling for action by Catholic politicians and Bishops to stop the legalization of any sort of recognized intimacy between same-sex individuals. Ratzinger reminded them that “Homosexuality is a troubling moral and social phenomenon”, the letter opposed not only the legalization of different forms of intimacy analogous to marriage, but also any path to adoption. He claims that according to Catholic teachings, homosexuals “must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided”. This statement contradicts the foundation of his letter, because its ultimate objective is to attempt to justify the discrimination of same-sex couples with the alleged moral law of Christianity. Ratzinger adds, “Not even in a remote analogous sense do homosexual unions fulfill the purpose for which marriage and family deserve specific categorical recognition.” The arguments used in this letter reinforce the institutional perspective of marriage, with the generational function of procreation as a duty of marriage. Regardless of the arguments, the Catholic Church opposes marriage between individuals of the same sex and any other similar type of union. This open call to catholic politicians demonstrates that the Church is aware of the political influence it has, and it uses it. However, no alternative is offered to same-sex couples that claim legal recognition. This opinion is just a defensive strategy that aims to protect the current legal form of intimacy, not offering further options to respond to this social demand.

Mexico is constitutionally a secular state, however, the influence of religion on politics and lawmaking is still a major concern. Even with first-world legislative accomplishments, like legalizing same-sex marriage in Mexico City, the country as a whole is still fundamentally catholic. The deep religious convictions of Mexicans represent an obstacle in the legalization of intimacy, because these convictions are proportionally represented in the congress through the political parties. And conservative ideas, like the catholic creed, delay or stall a fair and adequate legalization of intimacy for all. The legislation of intimacy-related matters in Mexico is slow, although the Mexican society is evolving at a faster rhythm, for political

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<sup>6</sup> Ratzinger, Joseph. “*Considerations regarding proposals to give legal recognition to unions between homosexual persons.*” Congregation for the Doctrine of the Faith, Document number: 20030731. Rome: The Vatican Archives, 2003.

parties, it is not profitable to upset their constituents with the legalization of these issues. Therefore, the political trend is to put these sensitive issues on hold, because Mexico is, for better or worse, still a very catholic country; with the second largest population of Catholics around the world.

*b. Prolife*

The constructive sphere of intimacy is also very controversial. As analyzed in the letters above, the Catholic Church has very firm interests in the protection of procreation. Consequently, the Prolife movement has also influenced the legalization of intimacy. The *Comité Nacional Provida* started in 1978 in Mexico and it has delegations throughout the entire country, in 25 states. This civil organization is very active in abortion-related issues and also in opposing any equal rights for homosexuals. This organization still provides support to “cure” homosexuality. Mr. Jorge Serrano Limon, a religious fanatic and Director of this Committee has been charged with corruption and sentenced to four years in prison recently.<sup>7</sup> This case showed how the organization used public funds for their operations and then failed to distribute the funds appropriately. It is striking, not only to learn about corruption cases like this one, but also to find out how public funds are channeled to an organization with religious activism in the detriment of the equality of rights for women in particular. This can only be understood in connection with the third influence group, the conservative party.

*c. The ruling conservative party in Mexico*

The National Action Party (PAN) won the federal elections in year 2000 and presided the federal government until December 1, 2012. The power of the Catholic Church, the Prolife movement and this party has been exponential with the support of federal resources that have been evident in corruption cases like the one of Mr. Serrano Limón. The twelve years of a conservative federal government in Mexico coincided with a decade of international evolution in terms of equality in intimacy. As detailed in Chapter II, since January 11, 2001 in the Netherlands, federal governments around

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<sup>7</sup> Vera, Rodrigo. Proceso. “*Condenan a Serrano Limón por peculado.*” Mexico City: April 20, 2012.

the world have begun to recognize marriage for same-sex couples. In Mexico, this recognition has been only possible at a local, state-level. The reason behind it is that the PAN is a resistant opponent of the legalization of same-sex types of intimacy. The analysis of the battle for intimacy discussed in Chapter IV.4 also showed the use of the federal order to fight the local legalization of same-sex matrimony in Mexico City. Although it was unsuccessful, the PAN fought hard to negate the social demands for equality in intimacy rights. The attitude of the conservative party has been very protective of traditional Christian matrimony, and according to the imperative guidelines of Joseph Ratzinger's letter. The PAN has constantly and consistently attempted to install and permeate the catholic morality in the federal legislations, with predetermined conceptions of gender and duties for men and women.

### *Summary*

Mexico is trying to evolve towards a more developing economy and society. Nonetheless, the spirit of the old Mexico is still present. Two continuous presidential terms controlled by the conservative party in Mexico have slowed down necessary reforms in the legalization of intimacy. As the Mexican psychologist and scholar Marina Castañeda suggested, "...the debate about gay marriage in Mexico has been complicated. It can be simplified if we consider that adult homosexuals must have exactly the same rights and obligations as heterosexuals...Of course, a strict separation between State and Church is necessary, and only the State should regulate matrimony, or civil unions, and divorce."<sup>8</sup> The generation gap in the country can be seen, newer generations are more open to sexual liberty and pro same-sex intimacy legislation. Castañeda has also observed the positive progress in tolerance and acceptance in Mexico over fifteen years of practice as a psychotherapist. She recalls only two or three cases over hundreds of patients, whose families never accepted them as homosexuals.<sup>9</sup> Furthermore, on December 1, 2012, the previous ruling political party (PRI) took over the federal government. This political party leans towards the center of the political spectrum and is less influenced by the Catholic Church and similar conservative groups. This new constellation at the congress could ease a better and more equal legalization of intimacy in the years to come.

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<sup>8</sup> Castañeda, Marina. *La nueva homosexualidad*. Mexico: Paidós, 2006. p.103.

<sup>9</sup> *Ibidem*, p. 33. See also: Castañeda, Marina. *La experiencia homosexual*. Mexico: Paidós, 1999.

### V.3. Gender: Feminism, Masculinities, Gay and Queer

What individuals think about intimacy, their expectations around it and the way they define it depends on their ideas and prejudices regarding gender. Therefore, it is crucial to explore the question of gender in its relationship with intimacy. The following paragraphs will review key aspects, like feminism, masculinities, gay activism and queer within the framework of intimacy. These different perspectives enrich and make the debate on intimacy a more dynamic one. It is important to single out every group because a collective heterosexual or homosexual point of view does not exist. A heterosexual man interprets intimacy according to his perception of masculinity, whereas a heterosexual woman may define it in terms of her feminist ideas. In a similar manner, a homosexual man will consider his concept of masculinity and a homosexual woman may be motivated by her political activism. Consider, for instance, the following statement from Sigmund Freud regarding the concepts of masculine and feminine:

“It is essential to understand clearly that the concepts of “masculine” and “feminine”, whose meaning seems so ambiguous to ordinary people, are amongst the most confused that occur in science. It is possible to distinguish at least three uses. “Masculine” and “feminine” are used sometimes in the sense of activity and passivity, sometimes in a biological, and sometimes, again, in a sociological sense...The third, or sociological, meaning receives its connotation from the observation of actually existing masculine and feminine individuals. Such observation shows that in human beings pure masculinity or femininity is not to be found either in a psychological or a biological sense. Every individual on the contrary displays a mixture of the character-traits belonging to his own and to the opposite sex; and he shows a combination of activity and passivity whether or not these last character-traits tally with his biological ones.”<sup>10</sup>

Unequivocally, feminism and masculinities, and the interpretation of what masculine and feminine means, affect both heterosexuals and homosexuals. Be it in a positive, a neutral or a negative way, these ideologies are decisive factors in the construction of intimacy and in its legalization. In order to understand how feminism, masculinities and gay activism influence the perspectives of intimacy, the following sections will explore these issues separately in detail.

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<sup>10</sup> Freud, Sigmund. *Three Essays on the Theory of Sexuality*. Translated by James Strachey. USA: Martino Publishing, 2011. p. 97.

### V.3.1. Feminism and Intimacy

In the feminist perspective of intimacy, there are four central arguments against marriage: (a) Predestination, (b) Injustice, (c) Economic disadvantaged, and (d) Abuse. Going back to John Stuart Mill, marriage was criticized for its consequences in prejudice of women at least since two centuries ago. Mill defined marriage as a Hobson's choice,<sup>11</sup> because women had no alternative to intimacy but marriage. Marriage has been a legal instrument that has fostered the oppression of women and subsidized the empowerment of men for centuries. Thus, marriage being the one and only form of intimacy consolidates the first argument of the feminist critique: Predestination. The social pressure, cultural values and family dynamics have pushed (and many times forced) women into marriage. The belief that women have the obligation to get married is still present in many contemporary societies. Another argument against marriage is the analysis of the internal injustices it creates. Men and women assume different roles within marriage and these roles usually create a disadvantage for women, making them more vulnerable and depriving them of many rights. Cohen has analyzed that since many years ago, "the power exercised by husbands and fathers (over femmes-couverts and children) should be understood as a set of legal immunities granted (delegated) to them in their capacity as 'private office holders' heading the household. Courts traditionally justified their refusal to intervene in intrafamily disputes by invoking the family as a private domain..."<sup>12</sup> This quote points out at least two different issues, the existence of a "head of household" and the distribution of justice. Men have traditionally exercised the roles of heads of households, taking advantage of a patriarchal structure where they stand at the top of the pyramid. This vertical organization results in a distribution of labor where women usually end up taking a less-favored position as housewives. The nomination of men as heads of household or leaders of the family unit usually goes hand by hand with the appointment of men as judges in the family order. Consequently, men who financially support their households also get to be the judges who will make important decisions and who will eventually distribute justice within the family unit. Indirectly, men buy their position as family judges. Of course, their decisions will most likely be partial,

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<sup>11</sup> Mill, John Stuart. *The subjection of women*. London: Savill, Edwards and Co. Printers, 1869. p. 51.

<sup>12</sup> Cohen, Jean L. *Regulating Intimacy: A new legal paradigm*. USA: Princeton University Press, 2002. p. 39.

because there will be a conflict of interests in most situations. The dual role of head of household-justice represents a lethal weapon for women during the course of their matrimony. They are usually trapped in an unjust mechanism, which prevents them from being heads of household and distributing justice. This trap brings about the third argument: the gender role distribution reduces opportunities for women.

This phenomenon should be interpreted, not in a traditional Marxist account of power<sup>13</sup> (as class exploitation), but rather in a more discursive manner, as analyzed by Foucault in his repressive hypothesis<sup>14</sup> (as discussed in Chapter II); where gender and sexuality are factored in. In other words, where the class distinction merges with the power of sexuality and reproduction, as producers and products of these very inequalities. In family units where wives do not work, their full-time job immediately becomes housekeeping. Every day women invest in their houses, they will lose an opportunity to find a job and to pursue a professional career. Women who have temporarily stopped working during their maternity leave and plan to go back to work afterwards, will also find it much more difficult to reintegrate to their professional lives and to get the same treatment and advantaged their male counterparts have at work. Furthermore, their performance at work will probably be reduced, because they will have obligations at home that are also demanding and time-consuming. Even women who do work must make an additional effort to manage their professional and personal lives in parallel, because after a day of hard work during the day, they must come home to what has been called the “second shift.”<sup>15</sup> The first shift may have a salary but the second shift most certainly will not. It will only represent a hindrance in the performance of mothers/wives in the workplace. The fourth argument against marriage is that it provides a space for abuse. In this case, both verbal/emotional and physical abuse should be taken into account. As described in Chapter III, many criminal codes have amended provisions in order to regulate family life and to protect women from their husbands (and vice versa). In the case of Mexico, the Federal Criminal Code literally describes specific penalties for crimes such as spousal rape.<sup>16</sup>

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<sup>13</sup> For further insight see: Allen, Amy. "Feminist Perspectives on Power", *The Stanford Encyclopedia of Philosophy* (Spring 2013 Edition), Edward N. Zalta (ed.) Section 3.3.

<sup>14</sup> Foucault, Michel. *The history of sexuality*. New York: Random House, Vintage Books Edition, March 1990. pp. 21 et seq.

<sup>15</sup> Brake, Elizabeth, "Marriage and Domestic Partnership", *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), Section 5.1.

<sup>16</sup> Art. 265 bis FCRC

For many women, marriage has become a life-sentence that has taken away their liberty as they become property of their husbands, just as in slavery. Considering these four feminist arguments against marriage, it is clear that marriage as an institution, provides an unjust structure of intimacy for women.

### V.3.2. Masculinities and Intimacy

Almost in opposite direction of feminism, masculinities contribute to the limitation of intimacy in a very peculiar way. First of all, in order to protect a patriarchal structure of society, the dominance of the male hinders the legalization of same-sex intimacy as a defense mechanism for the perpetuation of gender-based relationships. Secondly, within the heterosexual intimacy, masculinity secures the supremacy of men as breadwinners and heads of household, while maintaining a second-rank, submissive role for women. Consequently, the establishment and continuation of masculinity in society encourages inequality in two dimensions; (a) screening the access of individuals to intimacy based on gender, and (b) developing and exercising values of inequality within the heterosexual structure of intimacy. Societies around the world have different hues of masculinities; some are more fundamentalist, whereas some others are more liberal or flexible. Also, within a given society, different degrees of masculinity may coexist and may even be institutional. This is the case of a very particular tradition: Masculinity in the military.

#### *Masculinity in the Military: Don't ask, don't tell!*

U.S. President Bill Clinton was criticized for his federal policy concerning homosexuality in the armed forces, casually recognized as “don't ask, don't tell,”<sup>17</sup> which was eventually repealed by President Barack Obama. In this policy, gay, lesbians and bisexuals were forbidden to serve in the military if they disclosed their sexuality. In other words, it allowed serving for the military as long as individuals did not engage in homosexual activity or disclosed any personal information about it. One of the justifications of this policy is quite remarkable, “The worldwide deployment of United States military forces, the international responsibilities of the United States,

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<sup>17</sup> 10 United States Code § 654. Pub. L. 103-160.

and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by *forced intimacy* with little or no *privacy*.<sup>18</sup> The word “intimacy” in this context was used as closeness and cohabitation, and the word “privacy” was used – most likely – in the personal-spatial connotation. Implicitly, the premise of this policy is acknowledging an invasion of privacy that is justified by the protection of masculinity disguised in the wording of “armed forces’ high standards of morale, good order and discipline, and unit cohesion.”<sup>19</sup> Masculinity in the military is always a unique element, because on top of other immunities, the military does not abide by civilian law, it abides by martial law instead.

In a similar way, the Mexican armed forces attempt to shelter masculinity, excluding women and homosexuals from the military. Women are admitted in the armed forces as volunteers only and cannot join as full-time service members. Homosexuals are not officially excluded, but they can always be separated from the armed forces claiming “faults against the honor and reputation of the military” according to the Regulations on Duties for Soldiers.<sup>20</sup> In the Mexican army, homosexuality is still considered a “sexual identity disorder”. Although the issue is a sort of limbo, homosexuals are not wanted in the armed forces and they are usually intimidated and bullied while they fulfill the mandatory duty. There are three waivers of the obligation, individuals who do not want to serve during the mandatory year may be released if they meet one of the following conditions: (a) they have a disease that will not allow them to perform well in the army, (b) they must leave the country because of their jobs, or, (c) they declare they are homosexuals. Individuals who choose the third option must be subject to a medical examination that will determine whether they are actually homosexuals or not. What this test consists of is still unclear. What is evident, though, is that the mere fact that being homosexual is a waiver represents a confirmation of the dismissal of homosexuality as a means to protect masculinity within the Mexican armed forces. The military is a traditional masculine institution; it maintains the male values alive as the police of virility, particularly with

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<sup>18</sup> *Ibidem*, par. 12.

<sup>19</sup> *Ibidem*, par. 14.

<sup>20</sup> General Regulation on Military Duties. *Official Journal of the Federation*. Mexico, March 26, 1937.

the use of discipline. In this case, the discipline of gender has a specific target, to keep gender roles apart guaranteeing the supremacy of men, and their expected values of manhood.

Another example of masculinity in the military can be analyzed in the case of *Marangos v Cyprus*<sup>21</sup> tried before the European Court of Human Rights. A Cypriot citizen refused to perform the military service with the Cypriot National Group, fearing that he would be subject to degrading treatment. The Court decided that there had been no violation of Article 6 of the Convention, and did not consider the claim for the violation of Article 3, regarding the prohibition of degrading treatment or punishment. As pointed out by Paul Johnson, “this is unfortunate, for it provided an opportunity for the Court to judge whether the prevalence of the institutional and systematic homophobia complained of by the applicant would have reached the minimum standards of Article 3.”<sup>22</sup> It would be a great development in case-law to acknowledge the degrading treatment embodied by homophobic conduct, especially in “masculine” environments like the military.

### *Masculinity in Politics*

When it comes to legislating on intimacy, it cannot be forgotten that most legislators and judges around the world are mainly men. In Mexico, out of 500 seats in the congress only 187 are held by women, this represents only 37.4% of the total.<sup>23</sup> For the most part, men are deciding on the regulation of intimacy for the population as a whole. Heterosexual standards are applied in the decision-making process, and these standards are rather bias. Not only because they are heterosexual, but also because they are male-centered. They attempt to secure the dominance of the male ideal. Therefore, the essence and inertia of masculinity is also a constant factor in politics that affects the legal body in general; during the legislation process at first and later during judicial proceedings. It is men who decide what type of intimacy men and women should have. It is heterosexual men who define the rules of intimacy between

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<sup>21</sup> 23 ECHR CD192, Application No. 12846/05.

<sup>22</sup> Johnson, Paul. ‘An essentially private Manifestation of Human Personality’: *Constructions of Homosexuality in the European Court of Human Rights*. *Human Rights Law Review* (Oxford University Press), 10:1 (2010), p. 85.

<sup>23</sup> *Cámara de Diputados* (Chamber of Deputies). Information published on the website of the Mexican Congress. (September 15, 2013)

two men or two women. As long as legislatures are predominantly run by men, masculinity will prevail and it will hinder the development of a more equal system of intimacy for individuals. This can only be fixed with the proportional inclusion of more gay men and women in politics. Masculinity in politics has a snowball effect in society, it represents social male ideals and it fosters a systemic male dominance with the legalization of masculinity. With masculine politics, the male, the masculine, the heterosexual becomes and remains legal, while the female, the feminine and the homosexual remains or turns illegal. Hence, the legalization of intimacy demands a gender balance in politics that can help distribute rights more equally.

### *Female Masculinity*

Another category of masculinity that cannot be ignored is female masculinity. The lesbian movement in Mexico has been very active in the demand for equality in the legalization of intimacy. It was a woman who promoted the Cohabitation Partnership Law in Mexico City (Enoe Uganda). It was a woman (Lol Kin Castañeda) who challenged the Social Security System claiming the rights for her wife as a dependent and beneficiary of welfare. Women and their masculinity play an important role in Mexico. Their masculinity is not necessarily a replica of the mainstream Mexican male masculinity; it is rather a new expression of self that challenges and threatens traditional masculinity. Judith Halberstam explains the binarism of gender with what she calls “The Bathroom Problem.”<sup>24</sup> She argues that individuals who do not fit into given community standards for male or female are usually questioned or approached when they are in a public bathroom and tend to be confronted with the message “*You are in the wrong bathroom!*” People are always trying to classify individuals as either male or female, and gender policing is stricter in public places. As she points out, restrooms at airports are particularly intensified versions of the bathroom problem. Halberstam underscores the fact that:

“If we use the paradigm of the bathroom as a limit of gender identification, we can measure the distance between the binary gender schema and lived multiple gendered experiences. The accusation ‘you’re in the wrong bathroom!’ really says two different things. First, it announces that your gender seems at odds with your sex (your apparent masculinity or

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<sup>24</sup> Halberstam, Judith. *Female Masculinity*. USA: Duke University Press, 1998. p. 20.

androgyny is at odds with your supposed femaleness); second, it suggests that single-gender bathrooms are only for those who fit clearly into one category (male) or the other (female). Either we need open-access bathrooms or multigendered bathrooms, or we need wider parameters for gender identification. The bathroom, as we know it, actually represents the crumbling edifice of gender in the twentieth century. The frequency with which gender-deviant ‘women’ are mistaken for men in public bathrooms suggests that a large number of feminine women spend a large amount of time and energy policing masculine women. Something very different happens, of course, in the men’s public toilet, where the space is more likely to become a sexual cruising zone than a site for gender repression...The men’s room, in other words, constitutes both an architecture of surveillance and an incitement to desire, a space of homosocial interaction and of homoerotic interaction.”<sup>25</sup>

In Mexico, the policing of gender and the paradigm of the bathroom problem are a constant. The predominant *macho* culture is fostered not only by men, but surprisingly promoted by women as well. Traditional values of masculinity are cultivated and encouraged; this includes expected behavior at school, at work, at church, and at home in the interaction with the family. The paradigm of the bathroom problem is embodied in different contexts and produces reactions like: You’re wearing the wrong clothes! You have the wrong haircut! You are drinking the wrong drink! You’re eating the wrong food! You’re listening to the wrong music! You’re watching the wrong show! You’re choosing the wrong color! Because men and women have expected choices for clothes, food, music, shows, colors, etc. Although the policing of gender is present in the whole country, rural areas are particularly affected by this. Bigger cities are less gender-policed and more liberal. Furthermore, other phenomena have changed and challenged the traditional male masculinity; for instance, single motherhood. Immigration of many Mexican men to the United States in the past decades has modified the circumstances of many households and the number of single mothers has increased. According to a study published by the Mexican Congress, there are approximately five million single mothers in Mexico. In only one quarter of a century, the percentage of households run by single mothers rose from 13.5% in 1976 to 20.6% in 2000.<sup>26</sup> These changes in the population and in the behavior of many Mexican families discourage the ideal of the male “head of household” and contribute to the transformation of male and female roles. Female

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<sup>25</sup> Ibidem, pp. 23-24.

<sup>26</sup> *Cámara de Diputados* (Chamber of Deputies). AAP/ASC/ALRG. Report Number 3766. May 10, 2008.

masculinity is not only an expression of lesbian women, it can occur also when heterosexual women challenge traditional male roles, for example, taking over the role of head of household and becoming bread-winners. This is accompanied by more access of women in the work sphere and different patterns of authority within the family sphere. In sum, female masculinity also jeopardizes the supremacy of traditional male masculinity.

### V.3.3. Gay Activism and Intimacy

Strongly influenced by the post-Stonewall gay liberation movement in the seventies, Mexico has lived an exponential emancipation of the LGBT population in the past two decades. Bigger cities in the country, like Monterrey, Guadalajara and Mexico City have a very active gay community. The number of LGBT people attending gay pride parades and demonstrations is increasing every year. Gay activists and associations demand tolerance, respect, protection and equality. Tolerance and respect are specially needed in a predominantly catholic society. Furthermore, activists demand an effective protection from the public administration of justice. Many crimes against lesbian, gay, bisexual and transsexual citizens are not prosecuted. Authorities ignore claims of harassment reported by LGBT individuals, because they consider they are “normal” or “justified”. The current reality shows that there is little or no protection for this particularly vulnerable group. Gay activist do not expect additional attention by authorities, but rather, they demand protection and law-enforcement in the same terms and to the same extent as for heterosexuals. In other words, the fundamental idea of activism is to ask for and reach *equality*. In terms of intimacy, the goal of activists is to legalize gay marriage. Gay activism in Mexico does not have any radical ideas when it comes to marriage, their aspiration is to replicate the traditional heterosexual model of matrimony and family with a sole variation: same-sex spouses. This is the equality trap that gay activism around the world has fallen into and that can be easily identified in Mexico. Gay activists demand a heterosexual form of intimacy called *marriage*. However, they fail to notice that the mere fact of asking for this so-called equality validates the heterosexual role model and endorses the injustices and inequalities inherent to opposite-sex marriage. Therefore, what appears to be a demand for emancipation involuntarily supports and nurtures heteronormativity, the heterosexual social system. Reaching equality by having this

type of gay marriage will generate the inequalities that heterosexual marriage has maintained for centuries. Thus, when it comes to the issue of intimacy, gay activism has a bogus claim. Even if gay marriage were legalized in the whole country, the inequality would not be eradicated. On the contrary, there would be a larger population that would reproduce the same old-fashioned gender roles. Average gay activists fail to identify the ulterior problem behind gay marriage; their blind spot is that they fail to see that gay marriage is also the same as the good old heterosexual marriage.

#### V.3.4. Queer and Intimacy

There is a small fraction of the gay population that is happy without gay marriage and whose point of view is actually to disown gay marriage. From this queer perspective, there is a harsh critique of marriage. And, it is from this queer approach that this section will analyze intimacy, considering the issues of heteronormativity, privacy and identity.

##### *The fallacy and algebra of gay marriage*

During a lecture at the University of Dresden in June 2007, Prof. Wyduckel explained that after the reunification of Germany in 1991, West Germany and East Germany (German Democratic Republic)<sup>27</sup> had merged into a single state: Germany, the *Bundesrepublik Deutschland*. In a peculiar metaphor, he juxtaposed algebra to synthesize how the two legal systems had evolved. He explained that in algebra, all students learn in school that  $A + B = C$ ; however, in the reunification of Germany, A (West Germany) plus B (East Germany) had equaled A. In other words, the unification of both legal systems did not create a new one. It merely replicated the first one. The same axiom is true for gay marriage. The trap that most gay activists fall into is that in the algebra of gay marriage there is a fallacy:

$$\mathbf{A} \text{ (Heterosexual Marriage)} + \mathbf{B} \text{ (Gay Marriage)} = \mathbf{A} \text{ (Heterosexual Marriage)}$$

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<sup>27</sup> *Deutsche Demokratische Republik.*

Homosexual couples have failed to provide a new form of intimacy that will represent a new structure of intimacy for family life. There is no official gay alternative for intimacy yet. Instead, homosexuals want to use the “heterosexual recipe” for intimacy and family relationships. Consequently, gay marriage is per se *heteronormative*. Queer studies and theories use the term “heteronormativity” to describe the idealization of the heterosexual paradigm and lifestyle. The problem with gay marriage in this context is that it uses heterosexual norms as the benchmark. Gay marriage is sexist and heterosexist, pursuing a form of intimacy with a heterosexual imperative that replicates male dominance and unjust inequalities within the family structure. Cohen pointed out that “Neither strategy can transcend the dilemmas posed by difference: going public (assertion of difference) or choosing silence (pseudo-assimilation) are two flawed alternatives constructed by a context in which a particular mode of intimate relationships and sexuality – heterosexual marriage – is (re-) centered as the norm and the standard to which one must either conform or be construed as deviant.”<sup>28</sup> Heterosexual marriage is the norm, and by choosing the same heterosexual model as the structure of gay marriage, heterosexuality is being re-centered as the norm. Using Mary O’Brien’s term, the social movement and call for gay marriage is part of the “malestream thought.”<sup>29</sup> Gay mainstream is for the most part malestream as well. Considering these reasons, the whole ideal of gay marriage becomes nothing but a fallacy.

### *The paradox of privacy*

Another question to consider is the relationship between privacy and intimacy, not in the context analyzed in the previous chapter, but rather as a potential justification for censorship. Chapter IV analyzed the issue of privacy as a right in light of the constitutional individual guarantees, from a human rights perspective. This privacy, however, may be exercised or not. In claiming this right to privacy, individuals may be falling into a trap that would be counter-productive for the emancipation of LGBT individuals. Social interactions constantly force people to disclose information about their lives, their sexuality and their status of intimacy. A simple introduction of a

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<sup>28</sup> Cohen, p. 87.

<sup>29</sup> For more insights into her term, see O’Brien, Mary. *The Politics of Reproduction*. London: Routledge & Kegan Paul, 1981.

person may reveal plenty of information; simply indicating the title Mr., Jr., Mrs., Miss. will imply information about gender and intimacy. If we introduce Miss Jones, interlocutors will know we are talking about a single woman. There is a constant peer pressure to disclose information about one's intimacy status. For instance, married individuals are expected to show a ring on their left hands. The disclosure of intimacy often comes together with the ever-present disclosure of gender and sexuality. It is also the case with married women who change their last names to their husband's. As Sedgwick has argued, "A woman's use of a married name makes graphic at the same time her subordination as a woman and her privilege as a presumptive heterosexual."<sup>30</sup> Although this research could agree with the first premise, on the issue of subordination, it has also been explained in Chapter II that the right to change last names after marriage is also an agency element that belongs in the constructive sphere of intimacy; and it can only be considered heterosexist if the legal provision only allows women to take their husband's name, but not the husband to take their wife's. When it comes to revealing one's intimacy status, many gay individuals – married or not – choose to claim their right to privacy and not to disclose personal information about their private lives and intimate partners. In spite of the fact that individuals do have the right to keep their personal information private, exercising the right to privacy in this case is effectively a mechanism of self-censorship. Consequently, *privacy* is a double-edge sword. On one hand, the right to privacy allows individuals to choose their intimate partners and to have decisional autonomy. On the other, privacy (in the connotation of secrecy) may lead to a subtle self-censorship that may nurture oppression and hinder the emancipation of LGBT minorities. The right to marry a same-sex partner is only reinforced and effective for social change if it is accompanied by the self-disclosure of intimacy status. In other words, if gay men and women really want to promote the development of contemporary societies, they must come out of the closet in the first place; and eventually, they must come out of the intimacy closet as well. This paradox of privacy has been thoroughly analyzed by Eve Sedgwick in the *Epistemology of the Closet*, she has studied the constant actions of self-disclosure and self-censorship. She adds that "The closet is the defining structure for gay oppression in this century... The image of coming out regularly interfaces the image of the closet, and its seemingly

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<sup>30</sup> Sedgwick, Eve K. *The epistemology of the closet*. USA: University of California Press, 2008. p. 32.

unambivalent public sitting can be counterposed as a salvational epistemologic certainty against the very equivocal privacy afforded by the closet.”<sup>31</sup> Hence, the public legal recognition of other forms of intimacy validates individual privacy. Coming out of the intimacy closet is an additional burden for homosexuals. This required disclosure is not expected of heterosexuals, because the heteronormative construction of society takes their masculine and feminine roles for granted. Cohen adds that “The logic of self-disclosure inherent in the first option has, perforce, the form of an open secret: an admission or public confession that “I am one of them,” a member of a despised social category”...The privacy afforded by remaining in the closet (the second option) is equivocal, to say the least.”<sup>32</sup>

### *Gender Identity and Stigmatization*

A legalized form of intimacy is also linked to an individual’s gender and sexual identity. By marrying a same-sex partner, individuals (voluntarily or not) “join the homosexual club.” LGBT individuals who legalize their intimacy are simultaneously confirming their sexual identity and assuming gender and social expectations and stigmatization. Going back to Karen Prager, “Gender identity is a feeling of confidence in one’s femaleness or maleness, whereas gender constancy is an understanding that one always will be the gender one is now.”<sup>33</sup> In a certain way, when individuals choose to marry their same-sex partners, they are aware of the gender constancy that the legalization of their intimacy will grant them. Nonetheless, this gender identity will still be either male or female.

#### V.3.5. Conclusion

When it comes to the legalization of intimacy, gay men and woman face a rather complicated dilemma: to get married or not. If you consider the issue of equality from a gay activist perspective, what you can get out of marriage is the opportunity to access a structure, an opportunity that is a given for heterosexuals. However, this equality brings you to marriage, an institution that creates and conserves inequalities.

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<sup>31</sup> Ibidem, p. 71.

<sup>32</sup> Cohen, p. 87.

<sup>33</sup> Prager, Karen J. *The psychology of intimacy*. New York: Guilford Press, 1995. p. 93.

So, the actual material effect of equality as a principle of justice disappears. Many gay couples reproduce the roles of male and female. Not only the behavioral mannerisms, but also the distribution of labor associated with marriage. Such couples are nothing but a carbon copy of a heterosexual husband and wife. Access to marriage for this type of gay couples will only lead to more injustices, because one of the partners will eventually be disadvantaged with fewer opportunities, losing professional autonomy and financial independence. In this context, what is the net effect of marriage equality? At the end of the day, is it just access to an institution of inequality. On the other hand, if you analyze a gay couple where both partners work, you will find fewer injustices and fewer inequalities. Even if they do not get married and without an allegation of marriage equality, the net reality in their unmarried lifestyle may show more equality, more justice and more consistency than in a married couple, be it a heterosexual or a homosexual one.

Households where both partners work are informally called “DINKs”, an acronym for Double Income No Kids.<sup>34</sup> Dinks are usually more successful couples with a higher income, a more active lifestyle and a more comfortable purchasing power. The financial independence and equality of income of both partners is the reality of many queer couples. For such combinations, what is the advantage of marriage? The truth is that in these cases, marriage does not have a lot to offer, except for the visual impact on society and its contribution to the emancipation of LGBT minorities. Thus, the real advantage of gay marriage is the effect of “going public.” It has been argued before in this research that the right to privacy is the essence of a right to intimacy. However, ironically, it is the publicity effect what may lead to equality. Oxymoronically, the privacy of marriage can only contribute to equality if it goes public. Using Sedwick’s metaphoric discourse, in an epistemology of the intimacy closet, the epistemological process of marriage equality occurs not while same-sex partners are allowed to enter into matrimony, but rather when their society learns that same-sex partners have had the equal opportunity to get married. It is, thus, with this objective that marriage is relevant for all men, women, straight, gay and queer, because same-sex marriage teaches our communities the democratic values of equality. The alleged equality of gay marriage is a delusion. In the critique of

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<sup>34</sup> According to the Merriam Webster’s Dictionary, the term DINK had its first known use in the English Language in 1986.

marriage and gay marriage, equality must be analyzed from a material perspective with a real ulterior effect, and not merely considering who has access to marriage or not.

#### **V.4. The Obstacles of Legalized Gender**

As detailed in the previous section of this chapter, the different perspectives on gender are very relevant in their relationship with intimacy. When talking about the legalization of intimacy, what becomes extremely important is the legalization of gender. Some ideas or prejudices around gender lose their impact because they have no legal effect. It is now time to study particular elements of legalized gender and the obstacles they represent in the legalization of intimacy.

##### **V.4.1. Birth certificates and marriage licenses**

Regardless of the genitalia one is born with, a newborn becomes male or female at the time of registration. Birth certificates in Mexico must show the sex of the child, “The birth certificate will be registered with two witnesses. It will show the date, the time and the place of birth, the *sex* of the newborn, the corresponding last names; also, whether it has appeared dead or alive; and the fingerprints of the baby.”<sup>35</sup> The civil code has clear indications for the legalization of gender. The options are rather limited, it must be either “male” or “female”; the option to determine “hermaphrodite” or “intersexual” does not exist. Neither is it possible to choose a “rather not disclose” alternative. What parents do not realize is that since that very moment onwards, the newborn is predestined to follow a path of gender profiling and gender learning for the rest of their lives. Of course, sometimes this fate begins even before birth, when parents start buying either blue or pink clothes for the baby according to the ultrasound gender forecast. But legally, it all starts with the registration of the birth certificate. Surprisingly, it is at that time as well, that the legalization of that child’s future intimacy is being predetermined. The sex shown on their birth certificate will

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<sup>35</sup> Art. 58 FCC. In Spanish: “*El acta de nacimiento se levantará con asistencia de dos testigos. Contendrá el día, la hora y el lugar del nacimiento, el sexo del presentado, el nombre y apellidos que le correspondan; asimismo, la razón de si se ha presentado vivo o muerto; la impresión digital del presentado. Si éste se presenta como hijo de padres desconocidos, el Juez del Registro Civil le pondrá el nombre y apellidos, haciéndose constar esta circunstancia en el acta.*”

consequently constrain the options for the legalization of their intimacy in the future. Most likely, they will only be able to choose partners of the sex their parents did not register. Hence, the declaration of the child's sex made by parents at the time of registration becomes an obstacle for the eventual decisional privacy of that individual when they reach adulthood. In a similar manner, the binary gender system found in birth certificates is repeated in marriage licenses. The taxonomical dichotomization of spouses forces civil registries to identify a husband and a wife. These roles will arise from the sex indicated on their birth certificates. Thus, marriage licenses contribute to the perpetuity of the legalized gender specified on birth certificates. In order for a civil registry to issue a marriage license, it is necessary to submit "the birth certificates of the applicant, and if required, a medical certificate that determines their age, when it is unclear that the man is more than 16 years old and the woman more than 14 years old."<sup>36</sup> As outlined by the civil code, birth certificates and marriage licenses have an integral and sequential relationship.

#### V.4.2. Transsexuals and the amendment of their legalized gender

On August 29, 2008, Congresswoman Leticia Quezada, President of the Commission for Equality and Gender at the LAFD, backed up by the Human Rights Commission for the Federal District, submitted a bill to give transsexuals the opportunity to amend their personal civil records in accordance with their gender identity. The bill was approved and published on the Official Gazette on October 10, 2008, entering into force thirty days later.<sup>37</sup> This reform changed the wording of three articles and included a new section in the Civil Code for Mexico City only, not at the federal level. The civil code now recognizes legal capacity in equal terms for men and women, with an anti-discrimination provision, banning unequal treatment based on age, pregnancy, legal status, race, language, religion, ideology, *sexual orientation*, *gender identity*, *gender role expression*, skin color, nationality, origin or social class, job or profession, economic status, physical appearance, disability or health status.<sup>38</sup> What used to be a more overarching protection of sexuality is now a more nuanced acknowledgement of

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<sup>36</sup> Art. 98 par. 1 FCC. In Spanish: "El acta de nacimiento de los pretendientes y en su defecto un dictamen médico que compruebe su edad, cuando por su aspecto no sea notorio que el varón es mayor de dieciséis años y la mujer mayor de catorce."

<sup>37</sup> OGFDF Number 439. October 10, 2008.

<sup>38</sup> Art. 2 CCFD

minorities. Including different sexualities, different gender identities and different expressive mannerisms of gender roles. It is important that the legal capacity be recognized in all of the above-mentioned cases, so that civil rights claimed by all types of individuals be respected and not merely disregarded by alleged diagnoses of disorders. Transsexuals and transgender individuals could not even claim their equal rights in the past, because they were considered mentally-ill, diagnosed with a sexual identity disorder, and consequently losing their legal capacity. This amendment provides an anti-discrimination provision that allows judges to reissue birth certificates in accordance with the actual gender identity of citizens.<sup>39</sup> Now, the judicial procedure for gender redetermination is clear. The process includes specific deadlines and protocols for the new registration of birth certificates, including the amendment of the previous one, the issuance of the new one and the protection of privacy.<sup>40</sup> After the new birth certificate has been issued, the original birth certificate is locked and cannot be accessed by the public without a court order. This enhances the protection of individual privacy and the respect for their gender identity. Individuals who rectify their gender identity, always have the right to change it again if their gender identity changes in the future.<sup>41</sup> Transsexuals and transgender individuals can now change the gender shown on birth certificates and subsequently amend their identification documents; but, is this the solution to the problem with the legalization of gender? This research must answer in the negative form. The capacity to amend one's gender identification exists, but the options are still the same: male or female. That is to say, the root of the problem, the binary systematization of gender persists even after this amendment. Individuals may redefine their gender identity as long as they remain within the dichotomization of gender taxonomies. After an amendment of the birth certificate, the options for the legalization of intimacy will still be the same, and they might be limited to choosing an opposite-sex partner. So, what seems to be a real answer to the question of gender identity is actually just a patch to the fundamental problem with gender: its categorical binary system.

#### V.4.3. Quintana Roo and the absence of gender obstacles

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<sup>39</sup> Art. 35 CCFD

<sup>40</sup> Art. 498 Bis 1-8 CCFD

<sup>41</sup> Art. 498 Bis 8 CCFD

The Yucatan Peninsula recently became popular for legal analysts, and not precisely for tourism purposes; the State of Quintana Roo (where the Resort City of Cancun is located) faced an unexpected legal battle for the legalization of intimacy. On November 28, 2011, two same-sex couples submitted their applications for matrimony in the municipality of Lázaro Cardenas, Quintana Roo.<sup>42</sup> These couples (Patricia Novelo & Areli Castro, Sergio Monje & Manuel Reyes) noticed that the Civil Code in the State of Quintana Roo had a legal void, the wording of the provisions for marriage were and had always been gender-neutral. Therefore, there was in fact no legal impediment for same-sex couples to submit their applications for matrimony. Art. 680 states: “*Persons* who pretend to engage in matrimony will submit a petition before the civil registry...”<sup>43</sup> None of the articles regarding matrimony (Art. 680-797 CCQR) defines it in terms of a man and a woman. In a certain way, heterosexual marriage had been customary law, but the text of the civil code was actually open to any sort of couples. After a detail review of the Civil Code, the local civil registry admitted their applications and the couples got married. However, on April 13, 2012, they received a notification issued by the Secretary of State, declaring the nullification of their marriage licenses. The argument of the State Government was that matrimony defined in terms of man and woman as spouses was implicit in the Civil Code. Both couples filed an appeal and along with the support of human rights and gay activists, the annulments were revoked. The decision of May 3, 2012 finally ratified the lawfulness of same-sex matrimony in Quintana Roo, confirming the validity of the previously registered marriage licenses and endorsing any future same-sex matrimonies in all municipalities in the state.

This unique case of gay marriage by accident in Mexico did not happen because the local legislators in Quintana Roo were open-minded and wanted to allow same-sex couples to get married in the state. But rather, it happened because nobody paid attention to the wording and they did not use the words man and woman literally to restrict access to this structure of intimacy. As discussed, the existence of legalized gender is an obstacle for the legalization of intimacy. In this case, however, the use of gender-neutral language removes the obstacle of the gender barrier. Chapter IV.3.

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<sup>42</sup> Santana, Rosa. *Proceso. “Rectifica gobierno de Quintana Roo: valida bodas gay”* (Rectification by the government of Quintana Roo: validates gay marriage.) May 3, 2012. Mexico City, Mexico.

<sup>43</sup> Art. 680 CCQR. In Spanish: “*Las personas que pretendan contraer matrimonio presentarán un escrito al oficial del Registro Civil...*”

detailed the recent amendments to the constitution in 2011, which incorporated a more gender-neutral language that would ease the protection of minorities and the legalization of their intimacy. Quintana Roo had this unbiased language before, but it had not been exercised or even questioned before these two couples submitted their applications for matrimony. In sum, the gender obstacle was absent in this civil code, and in order to legalize same-sex intimacy nothing had to be modified, citizens merely needed to claim their equal access rights.

### V.5. Undoing, Unlearning and Destroying Gender

Up until now, the question of gender in this research has been linked to intimacy primarily in the context of restricting access to intimacy based on the binary male or female. This limitation, however, is merely an external and visual obstacle of the more complicated, complex and inner problem of gender. In the previous section, it was shown how gender creates obstacles in the legalization of intimacy. It must be acknowledged first of all, that gender is already socialized and legalized. Second, that the current legal forms of intimacy are permeated by gender. And third, that a more just legalization of intimacy requires changes in the legalized gender elements, such as gender-based access to marriage. The contemporary trend since 2001 has been to undo gender,<sup>44</sup> undoing it in such a way that the removal of a gender restriction results in a more encompassing and more equal formulation of intimacy. Amending the wording of legislations to “fix” the gender-bias access restriction is merely a mechanism to undo gender. Switching from “marriage is the union between a **man** and a **woman**” to “marriage is the union between two **persons**” is a dismantlement of gender.

In other words, *undoing gender* means starting the engine in reverse mode, but that backward movement is still linear and it walks along the axis of gender. Gendered intimacy orbits around the binary and imaginary of a heterosexist axis, where same-sex intimacy is the satellite deviation of an opposite-sex intimacy where women are the reflection of the male mirror. Undoing gender can only be the first step in the legalization of intimacy; nonetheless, it is not the ultimate goal or a real answer

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<sup>44</sup> With the legalization of same-sex marriage in The Netherlands, see Chapter II.

to the problem of gender. Individuals are taught and learn gender even before they are born. The cognitive and constant existence of gender in human beings requires a deeper and more difficult process: Unlearning gender. *Unlearning gender* suggests changing or reshaping the gendered paradigms from intimacy. To be more precise, the tendency to shift from “marriage is the union between **a man and a woman**” to “marriage is the union between **two** persons” is not unlearning gender. If you read the words in bold and compare them with the same sentence above, you will see that undoing gender was the transition from the man/woman binary to a more gender-neutral wording. Nevertheless, this second sentence where gender has been undone still talks about *two* persons. So, even though gender neutrality has been accomplished, the binary morphology of intimacy still remains intact. Therefore, *unlearning gender* would mean forgetting the paradigm of a binary code for intimacy that necessarily implies two individuals for its constitution. Of course, it is difficult enough to legalize intimacy in a constellation of two individuals, let alone a structure of intimacy where more members are contemplated. However, understanding that the current shape of intimacy with two members is a result of a gendered intimacy is crucial for the process of unlearning. Once it has been established that gender should not only be undone but also unlearned, the following question arises: Can individuals unlearn gender? The answer is yes. If the body (and the reproductive organs of an individual) and its given gender were to be separated, gender lies only in the imaginary. This construct is nurtured by cultures, societies, families, and is subject to change. Therefore, what is learned can also be unlearned, in spite of the fact that unlearning is a more difficult epistemological process that requires deconstruction. Consequently, in the legalization of intimacy the ultimate goal should be to destroy gender. Undoing gender is a prerequisite for unlearning gender; in the same correlation, unlearning gender is imperative for the destruction of gender. Hence, *destroying gender* in intimacy means to identify and to fix a specific problem (like male-female wording), then to identify the paradigm (binarism) in order to finally destroy it: legalizing a form of intimacy where that very binarism is not present or mandatory.

#### V.5.1. Deconstructing Gender in the Spheres of Intimacy

Chapter II introduced the Spheres of Intimacy, which were identified in the structures of intimacy in Mexico in Chapter III. Now, it is time to analyze the spheres of intimacy in their relationship with gender. First, the emotional sphere in marriage links all the feelings directly to women, the emotional side of intimacy is considered the “feminine” side. The problem with this direct association is that it creates a distribution that reserves the rational side for men. For example, after a divorce, children under seven years of age are to remain in the care of their mothers by default, unless they are in danger.<sup>45</sup> The legislator added this provision with a gendered and heterosexist mentality where women are supposed to take care of their children. The imaginary that binds feelings with the feminine is a threat to a gender-free or gender-neutral intimacy. This emotional side attributed to women is also materialized in a spatial context: The House, especially with the myth of the ideal housewife who turns a house into a home with her warmth. This domesticity of women is part of the gendered paradigm that must be changed. Marriage has been a heterosexual weapon for the continuation of male repression for centuries, and the *home* has been the architecture of the disciplinary discourse where women are – in a certain way – *tamed*. Second, the moral sphere has the binary of right and wrong, which is strongly influenced by religions. On top of that, there is a gendered expectation of male and female that comes with religions and it creates a matrix where rights and obligations are determined and predestined by gender roles. *Till death do us part* is the preface that has enslaved many women who have no way out of marriage because of the moral, i.e. religious, doctrine of predestination in a supposed lifelong intimacy. The social inertia promotes a constitution of intimacy in compliance with a compulsory heterosexuality. The gender roles in the structure of marriage are determined in such a way that they serve men and hinder the personal and professional development of women. Third, the sexual sphere of intimacy has an idealized exclusivity of spouses that is consolidated and secured through monogamy. The impediment to engage in multiple and concurrent intimacies protects the ownership of men over women. When individuals think of polygamy, they are usually thinking about a man having more than one wife, which is technically polygyny; but rarely do they consider polyandry, a polygamous condition when a woman has multiple husbands. This is the result of the preconceived gender structure where men own women through marriage, but women

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<sup>45</sup> Art. 282. VI par. 2 FCC

do not own men. The female body, thus, becomes property of the male. The current tendency to criminalize spousal rape<sup>46</sup> is a means to undo the sexual ownership of men who have abused their wives for generations. Consequently, monogamy has historically served men in heterosexual marriage. Fourth, the economic sphere is tied to the power structure in intimacy, one where men hold the decision-making role and control women. The traditional heterosexual distribution of labor with the figure of men as breadwinners traps women in a domestic function that perpetuates the economic and power disadvantage of women. This unbalanced relationship stimulates the ownership of heterosexual men, who buy women in a sale transaction where they are both the seller and the buyer in a market they have created themselves. This economic power is a purchasing power for men, a power that generates injustices within the intimacy but also in society in general. The subjection of women in their families perpetuates the subjection of women in the social environment in general, because the same structure of male power is replicated and amplified. Last, but not least, the constructive sphere of intimacy comes with a very clear obligation according to gender roles: Reproduction. Women have a compulsory duty to give birth to children. The ideal construction of a heterosexual intimacy is a vertical one. Reproduction serves men in a transcendental deployment of power that will remain across generations. The production of children secures the reproduction of the same structure of power where men remain at the top. Through the establishment of kinship, gender is bridged in such a way that it becomes a legal path for the transfer and traffic of power in a structure that guarantees the dominance of men. Furthermore, women are objectified even more through pregnancy and childbirth. They become the machinery used by a male subject. A horizontal intimacy (like a marriage with no children) jeopardizes heterosexual men, because it does not secure the reproduction of the power structure *ad infinitum*.

#### V.5.2. Gender, Intimacy and Judith Butler

As has been established in the previous chapter, that the human right to intimacy is linked to an individual's right to privacy. This decisional autonomy to choose a

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<sup>46</sup> As it is typified in Art. 265 bis FCRC.

partner (or multiple partners for that matter) for intimacy must remain at the discretion of every individual as a fundamental and protected right. Analyzing the legalization of intimacy, it has been proved that this legalization is an acknowledgment of that privacy. And at the same time, this is a legitimization of volition and desire. In most countries, this desire can only be a heterosexual one. Judith Butler argues that, “The heterosexualization of desire requires and institutes the production of discrete and asymmetrical oppositions between ‘feminine’ and ‘masculine,’ where these are understood as expressive attributes of ‘male’ and ‘female’.”<sup>47</sup>

In the case of marriage, that desire is gender-dependent, because it requires opposite-sex desire with a male-female binary when one individual desires the contrast just as in a black and white polarity. In this social picture, women represent the negative reflection that validates the exposed attributes of men. In order to undo, to unlearn and to destroy gender in intimacy, it is necessary to identify it in the *performative* function proposed by Butler. Separating the sexual-anatomical from gender, she states, “If the body is not a ‘being,’ but a variable boundary, a surface whose permeability is politically regulated, a signifying practice within a cultural field of gender hierarchy and compulsory heterosexuality then what language is left for understanding this corporeal enactment, gender, that constitutes its ‘interior’ signification on its surface?”<sup>48</sup> According to this proposition, the body is merely a vehicle, a given one, for the expression of gender. She adds, “Consider gender, for instance, as a *corporeal style*, an ‘act,’ as it were, which is both intentional and performative, where ‘*performative*’ suggests a dramatic and contingent construction of meaning.”<sup>49</sup> Interpreted from this perspective, compulsory heterosexuality demands the limitation of desire to a specific category of vehicle (opposite-sex bodies) and the constraint of expression to a specific expression where the performance can only convey a specific meaning, either male or female. Butler has also affirmed that even if the sexes appear to be unproblematically binary in their

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<sup>47</sup> Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. USA: Routledge Classics, 1990. p. 24.

<sup>48</sup> *Ibidem*, p. 189.

<sup>49</sup> *Ibidem*, p. 190.

morphology and constitution, there is no reason to assume that genders must remain as two.<sup>50</sup>

Understanding gender in its performative purpose, gender becomes a practice of expression. And if individuals have the right to freedom of expression, then gender must be acknowledged as a fundamental human right. A dichotomization of gender can only foster a system that serves and perpetuates the power of male heterosexuality.

### *Intimacy and Objectification*

For the study of the legalization of intimacy so far, the main characters or pillars of intimacy have been the individuals, the subjects. These individuals, however, are and become objects of intimacy as well. The interchangeability of positions as subjects and objects functions in a dialectical manner, where both subject and object are necessary for intimacy. Nonetheless, objectification does not always guarantee equality and justice. Objectification can be defined as seeing and/or treating another individual as an object.<sup>51</sup> Marta Nussbaum and Rae Langton have identified ten elements of objectification:

1. *Instrumentality*: the treatment of a person as a tool for the objectifier's purposes.
2. *Denial of autonomy*: the treatment of a person as lacking in autonomy and self-determination.
3. *Inertness*: the treatment of a person as lacking in agency, and perhaps also in activity.
4. *Fungibility*: the treatment of a person as interchangeable with other objects.
5. *Violability*: the treatment of a person as lacking in boundary-integrity.
6. *Ownership*: the treatment of a person as something that is owned by another (can be bought or sold).
7. *Denial of subjectivity*: the treatment of a person as something whose experiences and feelings (if any) need not be taken into account.

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<sup>50</sup> Ibidem, p. 9.

<sup>51</sup> Papadaki, Evangelia (Lina), "Feminist Perspectives on Objectification", *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.)

8. *Reduction to body*: the treatment of a person as identified with their body, or body parts.
9. *Reduction to appearance*: the treatment of a person primarily in terms of how they look, or how they appear to the senses.
10. *Silencing*: the treatment of a person as if they are silent, lacking the capacity to speak.”<sup>52</sup>

Immanuel Kant affirmed that the only structure of intimacy in which two individuals can practice their sexuality without reducing themselves to objects is monogamous marriage (because both spouses surrender exclusively and reciprocally), in comparison to prostitution and concubinage, where the prostitute and the concubine are objects that satisfy a sexual desire.<sup>53</sup> He described it with the following sentences: “... if I yield myself completely to another and obtain the person of the other in return, I win myself back; I have given myself up as the property of another, but in turn I take that other as my property, and so win myself back again in winning the person whose property I have become. In this way, the two persons become a unity of will.”<sup>54</sup>

Nevertheless, even if spouses have surrendered to one another it should not mean that the other will have arbitrary immunity for any act. In other words, even if this objectification is recognized and approved by law, it does not negate the fact that the objectification has taken place. It must be acknowledged that intimacy – legalized or not – involves an objectification process of the intimate partner. Under this premise, the discussion would rather focus on the evaluation of a *voluntary* vs. an *involuntary* objectification and of a *positive* vs. a *negative* one, and it would create a matrix of objectification with these two axes. Individuals who voluntarily join in a structure of intimacy are simultaneously endorsing the objectification process. This legally recognized form of intimacy, though, should not grant an individual a *carte blanche* over their partner. That is to say, voluntary objectification also has its own limits. These boundaries, for instance, draw the line between spousal sex (voluntary) and spousal rape (involuntary). Regarding the positive-negative axis, it could be said that

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<sup>52</sup> Ibidem. For further reference see: Nussbaum, Martha, 1995, “Objectification”, *Philosophy and Public Affairs*, 24(4): 249–291, and Langton, Rae. *Sexual Solipsism: Philosophical Essays on Pornography and Objectification*. Oxford: Oxford University Press, 2009.

<sup>53</sup> Ibidem

<sup>54</sup> Kant, Immanuel. *Lectures on Ethics*. Louis Infield (Translator). New York: Harper and Row, Publishers, 1963.

with the instrumentality element, during sexual intercourse both spouses practice a positive and voluntary objectification where the sexual exchange is for reciprocal benefit. As opposed to rape, where the objectifier is causing a negative effect with the involuntary use of the other person. Acknowledging one of the elements of objectification should not mean that the individual is subject to all sorts of vulnerabilities in general. For example, if an individual accepts the instrumentality of a situation, it should not allow the other to deny their subjectivity, or autonomy, or to assume their violability. In the case of procreation (i.e. biological reproduction in an opposite-sex intimacy), women are the instruments, the objects that will carry the fetus until birth. But also, men are objectified for the production of semen. This type of consensual and reciprocal objectification is not negative. The problem would be to assume that after women have agreed to procreate once, they can be reduced to their bodies and be forced to procreate even against their will. Therefore, objectification is not necessarily a negative or harmful concept and it is not absolute either. The limits of objectification are to be determined and are relative to the circumstances of the objectification process and the subject to be objectified. Approving a single element out of the ten mentioned above does not imply the consent for objectification in all of them.

Butler has analyzed the critical exchange in structuralist discourse, especially reviewing the regulation of exchange in the systems of kinship. She reminds us of Lévi-Strauss's point of view in *The Elementary Structures of Kinship*:

“the object of exchange that both consolidates and differentiates kinship relations is *women*, given as gifts from one patrilineal clan to another through the institution of marriage. The bride, the gift, the object of exchange constitutes ‘a sign and value’ that opens a channel of exchange that not only serves the functional purpose of facilitating trade but performs the symbolic or ritualistic purpose of consolidating the internal bonds, the collective identity, of each clan differentiated through the act. In other words, the bride functions as a relational term between groups of men; she does not have an identity, and neither does she exchange one identity for another. She *reflects* masculine identity precisely through being the site of its absence. Clan members, invariably male, invoke the prerogative of identity through marriage, a repeated act of symbolic differentiation. Exogamy distinguishes and binds patronymically specific kinds of men, Patrilineality is secured through the realistic expulsion of women and, reciprocally, the ritualistic importation of women. As wives, women not only secure the reproduction of the *name* (the functional purpose), but effect a symbolic intercourse between

clans of men. As the site of a patronymic exchange, women are and are not the patronymic sign excluded from the signifier, the very patronym they bear. The woman in marriage qualifies not as an identity, but only as a relational term that both distinguishes and binds the various clans to a common but internally differentiated patrilineal identity.”<sup>55</sup>

In this context, the economization of women highlights their objectification as a precondition for intimacy, marriage. The expulsion and importation of women as if they were products creates an exogamic imperative. And this very imperative will determine the rules of kinship, thus, delimiting the options for intimacy and desire. Simultaneously, this system secures the hegemonic position of men and it forbids any non-heterosexual behavior that would jeopardize this position, i.e. other forms of intimacy. This exogamic trade requires the objectification of women, but necessarily where men are the objectifiers, preserving the subjection of women and the power of heterosexual men. Therefore, exogamy as a principle in kinship represents a heterosexist element in intimacy that perpetuates the heterosexual social structure. Exogamy, along with its objectification premise, validates a legalized morality on the structures of kinship, one that endorses the trade of women in a heterosexual economy.

### *The legalization of desire*

In the discussion of the legalization of intimacy, it is necessary to highlight the legalization of *desire*. Desire in this context, is to be analyzed both as a noun and as a verb: What may you desire? And, may you desire at all? Starting with the second question, the action of desiring can be linked to an individual’s will and liberty, both physical and spiritual as reviewed in the constitutional guarantees in IV.2. The first question, however, turns out to be more complicated. Desire (the thought) and the object of desire must be legalized and legitimated by the state. Butler argues: “To be legitimated by the state is to enter into the terms of legalization offered there, and to find one’s public and recognizable sense of personhood is fundamentally dependent on the lexicon of that legitimation.”<sup>56</sup> This legitimation creates a binary of (a) the permitted – the legal – and (b) the forbidden – the illegal. Those desires usually authorized by the state are the heterosexual and heterosexist ones, demonizing and

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<sup>55</sup> Butler (1990), pp. 52-53.

<sup>56</sup> Butler, Judith. *Undoing Gender*. USA: Routledge Classics, 2004. p. 105.

punishing the forbidden impulses. The legalization of these desires creates taboos for prohibited events like pedophilia and incest. There is a clear condemnation for pedophilia in the legalization of intimacy; this is consolidated with the minimum age requirement for any structure of intimacy. In the case of the Federal Civil Code in Mexico this is established in Art. 148, the minimum age for marriage is 16 for men and 14 for women.<sup>57</sup> The moral message in this provision is delivered clearly: You must not desire intimacy with men under sixteen or women under fourteen years of age! In other words, the state legalizes intimacy after a certain age and simultaneously penalizes intimacy before then.<sup>58</sup> Both for heterosexual and homosexual scenarios, as Butler has argued, “For both sides of the debate, the question is not only which relations of desire ought to be legitimated by the state but also who may desire the state, *who may desire the state’s desire*.”<sup>59</sup> In a similar manner, the disapproval of incest is also expressed literally. One of the impediments for matrimony is kinship, both legal and biological vertical and collateral up until the third degree of separation.<sup>60</sup> Judith Butler has also studied the incest taboo from a heterosexist perspective, revisiting the Lacanian psychoanalysis, “The symbolic is the realm of the Law which regulates desire in the Oedipus complex.”<sup>61</sup> This symbolic representation is distinctly censured in the legalization of intimacy with an explicit ban on incest, whose moral context is: You must not have intimacy with your relatives! As expressed by Butler, the prohibition against incest is one “that makes sense only in terms of kinship relations in which various ‘positions’ are established within the family according to an exogamic mandate. In other words, a mother is someone with whom a son and daughter do not have sexual relations, and a father is someone with whom a son and daughter do not have sexual relations, a mother is someone who only has sexual relations with the father, and so forth.”<sup>62</sup> In the *The Elementary Structures of Kinship*, Lévi-Strauss has claimed that biology does not require the incest taboo and that it is merely a cultural phenomenon.<sup>63</sup> Biologically justified or not, incestuous

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<sup>57</sup> It has already been mentioned in III.2. that this differential treatment in Art.148 FCC represents a form of discrimination.

<sup>58</sup> The penalization of rape and molestation is clearly defined in the Federal Criminal Code, Art. 259 bis – 266 bis.

<sup>59</sup> Butler (2004), p. 111.

<sup>60</sup> Art. 156.III-IV FCC

<sup>61</sup> Evans, Dylan. *An introductory Dictionary of Lacanian Psychoanalysis*. p. 202.

<sup>62</sup> Butler (2004), p. 44.

<sup>63</sup> *Ibidem*, pp. 44-45.

desire is discouraged and castigated.<sup>64</sup> “In the Lévi-Straussian model, the position of man and woman is what makes possible certain forms of sexual exchange. In this sense, gender operates to secure certain forms of reproductive sexual ties and to prohibit other forms. One’s gender in this view is an index of the proscribed and prescribed sexual relations by which a subject is socially regulated and produced.”<sup>65</sup> The prescribed sexual activity is the one where procreation is possible, meaning that other forms of sexuality (as it is the case with incest) that would stop or may jeopardize reproduction are forbidden. As expressed by Butler, the law forbidding incest is the locus of an economy of kinship that prohibits endogamy.<sup>66</sup> Going back to the heterosexist instruction of procreation, the incest taboo takes for granted a biological hazard not only for the potentially pregnant woman, but for heterosexuality in general. As clarified with incest and pedophilia, some desires are unwanted and forbidden by the state. In jurisdictions where same-sex intimacy has not been legalized, the tacit moral meaning of that omission is: Same-sex desire is forbidden. This is sometimes accompanied by the criminalization of sodomy. Supporters of gay marriage are not only advocating for a structure of intimacy, they are concurrently demanding the legalization of their very desires. Because, “...the sexual field is circumscribed in such a way that sexuality is already thought of in terms of marriage and marriage is already thought of as the purchase of legitimacy.”<sup>67</sup> Consequently, the legalization of intimacy implies a legalization of desire that endorses an individual’s sexuality and free will.

### *Another Sex for Gender?*

One of the problems with gender is the establishment of the binary system, male and female. This binarism does not allow any points in between, in the current universal culture only two sexes are intelligible and the existence of anything else is ignored or refuted. In her commentary on the politics of sexual discontinuity, Butler revisited the history of the French hermaphrodite Herculine Barbin.<sup>68</sup> Foucault wrote the

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<sup>64</sup> In the Federal Criminal Code, Art. 272, incest is punished with up to six years in prison.

<sup>65</sup> Butler (2004), p. 47-48.

<sup>66</sup> Butler (1990), p. 56.

<sup>67</sup> Butler (2004), p. 106.

<sup>68</sup> Butler (1990), p. 127 et sqq. For reference see also: Foucault, Michel, ed. *Herculine Barbin, Being the Recently Discovered Memoirs of a Ninetenth Century Hermaphrodite*, trans. Richard McDongall. New York, Colophon, 1980.

introduction to the publication of the journals of Herculine. Butler revisits this narrative and questions Foucault's perspective. Herculine, this nineteenth-century hermaphrodite also known as Alexina, falls in love with Sara and becomes her lover. Eventually, Herculine discloses his/her genital secret to a doctor and a priest. In return, his/her revelation leads to his/her separation from Sara and a legal transformation of Alexina into a male form or citizenship. S/he is forced to dress as a man and to act as a man in public. His/Her love and desire for a woman motivated these men to determine Herculine must have been a man; because one may only desire a woman if one is a man. This determination implies a prohibition of a woman desiring another woman and it confirms that the legalization of desire is only possible as a mirror in the binary of gender. Before committing suicide, Herculine was almost in isolation and s/he claimed to soar above both sexes.<sup>69</sup> S/he was for the most part angry at men "whose 'title' s/he sought to usurp in h/er intimacy with Sara and whom s/he now indicts without restraint as those who somehow forbid h/er the possibility of love."<sup>70</sup>

Hermaphroditism reminds us of the categorization of sex and its relationship with gender. First of all, the genitals present in hermaphrodites are both male and female organs. This represents a complication for science, especially considering that contemporary cultures only conceive two sexes. Is creating a new sex, a third sex the solution to this problem? The answer to this question can only be negative. The real problem is not only the dichotomization of sex, but also that the whole legal discourse is based upon this dualism. Constituting and instituting a new category of sex would only reinforce that idea and praxis that gender and sex must be intelligible for the application of law. The truth is, when it comes to human rights (especially equality), if justice is really blind, it does not have to comprehend an individual's sex or gender to be fair. The goal is to remove all the imperatives that require segregation, such as the category of sex. Second, the social understanding of sex and gender dictates the nomination of a legal sex. This legal sexuality, independently of an identity, requires a male or female performance accordingly. When Herculine was transformed into a man, s/he did not change her body, his/her appearance was expected to be different, and his/her social rights and obligations as a man were amended consequently. In other words, her new social identity repositioned his/her worth before the eyes of

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<sup>69</sup> Butler (1990), p. 141.

<sup>70</sup> Ibidem

justice. And last but not least, Herculine's intimacy with Sara ironically solved the equation of his/her sexuality. Before the eyes of priests and doctors using the formula of heterosexuality:

$$\text{Intimacy (Z)} = \text{Man (X)} + \text{Woman (Y)}.$$

They believed that taking into account that Herculine/Alexina (X) had intimacy (Z) with Sara (Y), a woman, ergo X could only be a man (!) This limited perspective on intimacy negates any other combinations of love and desire. Thus, the categorization of sex is also a categorization of desire. And it is this classification what determines what is permitted and what is forbidden for a particular individual of a given sex. Hermaphrodites are clear victims of objectification. The social, clinical and legal discourses violate their integrity, reduce them to their bodies and deny their autonomy. Treating them as objects, they are sorted into the groups of male or female with a phallic classifier. Nonetheless, they also learn the principle of objectification and become objectifiers when it comes to intimacy. The words of Herculine confirm this fact when s/he implies having sexual relations with Sara she relates: "From that moment on, Sara *belonged* to me...!!!"<sup>71</sup> With this eloquent choice of words, Herculine described her intimacy. Perhaps it is in intimacy where they find their only opportunity for agency. Going back to the original question, another sex for gender? Does the legal system need a sexual category for someone like Herculine so that s/he can legalize his/her intimacy? The problem is not the existence of a hermaphrodite, but rather the promotion and perpetuation of a legal system that demands a sexual index. Adding a third sex to the universe of gender would not be the most appropriate solution because the paradigm of classification would still be present. Another sex would not negate this discrimination; it would just validate it instead. Unlearning and undoing the category of sex would actually generate a more positive impact on the application of justice, with a legal system that discouraged the objectification and separation of individuals based on the phallism of their body parts.

## V.6. Conclusion

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<sup>71</sup> Foucault (1980), p. 51.

When it comes to sexuality, there is a subconscious and almost compulsive imperative to categorize individuals based on their preferences. Accordingly, those sorted out as heterosexuals qualify for the legalization of their intimacy automatically. Those left out are trying to fit in, via a heteronormative approach they try to buy an entry ticket to “the heterosexual club.” The gay activist fight for equal rights is embodied or reduced to the demand for same-sex marriage. Nevertheless, this is not the solution, or at least not the only one. Butler explores this issue with a question: “One critical question thus becomes, how does one oppose the homophobia without embracing the marriage norm as the exclusive and most highly valued social arrangement for queer sexual lives?”<sup>72</sup>

Certainly, claiming marriage as an option for homosexuals is one way to fight homophobia. But, why is marriage the most valuable contract for intimacy? And, does this type of deal work for queer lifestyles? In the manufacturing of intimacy, the heterosexual recipe for intimacy should be considered as a sample, but not as the benchmark or role model. As argued in Chapter II, contemporary societies are evolving from a discourse of sex towards a discourse of intimacy. However, the current discourse of intimacy is still contaminated by the discourse of heterosexuality, and it is alarming that homosexuals are playing a game with cards that have been dealt by heterosexuals. The more the legislation moves towards a genderless intimacy, the more just it will be for all individuals, both heterosexuals and homosexuals, man, woman, transsexual or intersexual. Discovering one’s sexuality and gender identity is an epistemological process where gender is learned, performed and taught simultaneously by an individual. And whatever the discovery may be, individuals should not be deprived of the opportunity to legalize their intimacy with whomever they choose. An egalitarian legal system should provide a platform for the development of the citizen, regardless of their personal choices. Legal systems with a heterosexist tendency must not prescribe a formula for social arrangement that will not be applicable for different types of relationships and intimacies. As Butler points out, “what is most important is to cease legislating for all lives what is livable only for some, and similarly, to refrain from proscribing for all lives what is unlivable for some. The differences in position and desire set the limits to universality as an ethical

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<sup>72</sup> Butler (2004), p. 5.

reflex. The critique of gender norms must be situated within the context of lives as they are lived and must be guided by the question of what maximizes the possibilities for a livable life, what minimizes the possibility of unbearable life, or indeed, social or literal death.”<sup>73</sup> She frames her argument in this utilitarian perspective where more possibilities should be promoted. It has been mentioned before that gay marriage is nothing but traditional marriage. Hence, the options are not really being maximized, they are being replicated or duplicated. New technologies in our times have opened the path for alternatives that other generations did not have, e.g. reproductive technologies. Laws regarding intimacy, however, have not been as diligent adapting these opportunities accordingly. Clinical developments have exponentially embraced Sex Reassignment Surgery (SRS), and yet, legislations constrain the opportunities that these technologies offer. Contemporary legislations on marriage are basically a heterosexual template for intimacy. The current challenge is to evolve beyond these templates and to come up with a new one, an enhanced version of an intimacy pact that would serve a larger and more equal population. How can this be accomplished in such a way that it provides the necessary protection for individuals while securing their autonomy and equality? This is not a simple question; it requires an exhaustive analysis of all the factors involved. Since the beginning of this research, intimacy and its legislation has been defragmented with the use of the spheres and the structures of intimacy. The fundamental human rights around intimacy have been highlighted, as well as their protection by the Mexican Constitution. Considering that the core elements of intimacy have been reviewed, they shall now be consolidated in the next and final chapter in the form of a proposal for a functional structure of intimacy that takes into account all of the findings that have been discussed throughout this research.

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<sup>73</sup> Butler (2004), p. 8.

## VI. CONCLUSION

Since the beginning of this research, the meaning of intimacy was questioned. Love, trust, closeness, self-disclosure, bonding, attachment, sexuality, support and commitment are ideas or interpretations of the concept of intimacy. The working definition provided in Chapter II synthesized intimacy as a close reciprocal relationship of future-oriented companionship with attachment in different private domains. After that definition was established, the outstanding question was: How is intimacy legalized? With the case study of Mexican Law, it has been clarified how close reciprocal relationships can be legalized. In different forms, and through a variety of legal mechanisms, intimacy can be regulated indeed. Nonetheless, are these forms of regulation appropriate? Are they flexible enough so that individuals can legalize their chosen standards of intimacy? And, most importantly, are these forms of legalization fair? Through the introduction and analysis of the spheres of intimacy, separate elements of intimacy could be identified. The sum of the emotional, the moral, the sexual, the economic and the constructive sphere constitute the conglomerate of intimacy. As discussed before, intimacy comes in different forms that have been called Structures of Intimacy in this research. Simple relationships, marriage, common-law marriage, putative marriage, same-sex marriage, civil unions and domestic or registered partnerships are different formations or structures of intimacy that have individual types of legalization. In the case study of Mexico, Chapter III analyzed matrimony, concubinage, cohabitation partnerships and civil pacts of solidarity; and their contrasting advantages and disadvantages. Considering the entire discovery in these legalized structures of intimacy, can it be said that there is a perfect formula for the legalization of intimacy? This research can only answer this question in a negative way. Hence, this last chapter will provide a proposal to legalize intimacy differently, in the form of a *Family Contract*. The ideas that will follow in the next sections of this chapter shall serve as a recommendation that may or may not be followed up by legislators, courts, stakeholders and individuals, in Mexico and in other countries. After all, as discussed in Chapter IV, human rights and intimacy are closely interrelated. Intimacy is a relatively universal topic for human beings, regardless of their culture and citizenship. Therefore, any advise for a new form of legalization of intimacy in Mexico can be considered in other parts of the

world as well. The proposal for a new type of legalization of intimacy comes after the analysis of the problems observed in the current forms of legalization. Moreover, it takes into account the fundamental rights of individuals and their right to intimacy. This concluding proposal does not attempt to negate the *status quo* on the legalization of intimacy. It merely suggests a new recipe for a more inclusive structure of intimacy that can embrace contemporary realities of intimacies in our societies.

## VI.1. Unlearning Marriage

In order to conceive a new form of legalization of intimacy, the first step must be to “unlearn” what we know about the most popular form of intimacy: Marriage. As discussed before, traditional opposite-sex marriage is the expected form of intimacy for individuals in many countries around the world. Therefore, one must unlearn marriage and the expectations around it, and be prepared for new types of intimacy that do not follow the traditional paradigms of marriage. As pointed out by Elizabeth Brake,<sup>1</sup> there are two main approaches to the arrangement of marriage: the *contractual* and the *institutional* view.

The contractual view of marriage denotes a scheme of rights and obligations outlined in the form of clauses as any other commercial agreement. The clauses on the marital contract represent promises or pledges to specific duties or prohibitions that spouses are willing to comply with in their intimacy. These clauses are preset provisions, and in some cases, spouses have the right to choose between two options. For instance, choosing between community or separate property. All stipulations regarding the marriage contract are usually determined by Civil Codes, or by separate legislations that shape the marital contract. Unlike other types of contracts, the marriage contract is drafted by legislators and is only executed by individuals. Thus, individuals are left with a socialized and legalized understanding of intimacy that they must adopt as theirs.

The institutional view of marriage seems to be a social and morally dictated view of marriage that citizens must abide by and that limits their liberty when it

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<sup>1</sup> Brake, Elizabeth, "Marriage and Domestic Partnership", *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), Section 3.

comes to making personal decisions. Blake adds that “much like the professional moral obligations of a doctor; to become a doctor, one must voluntarily accept the role and its obligations, but one cannot negotiate the content of these obligations.”<sup>2</sup> Hence, marriage construed as an institution bestows social obligations that even spouses cannot modify. In other words, individuals are free and have the right to marry, but they lose their freedom and leverage as soon as they get married. While considering marriage as an institution, philosophers like John Stuart Mill have pointed out the inequalities that the institution promoted: “The relation between husband and wife is very like that between lord and vassal, except that the wife is held to more unlimited obedience than the vassal was.”<sup>3</sup> Under this premise, it can be said that not all institutions are good. And, that the fact that marriage might be considered an institution, it does not make it a perfect one, or one that must be perpetuated *ad infinitum*. Furthermore, it is still debatable whether marriage *per se* is the institution.<sup>4</sup> Marriage can be considered an institution only in the inseparable connection with the construct of “Family.” That is to say, marriage is rather an instrument of the institution of the family. Therefore, the institutional component of marriage is rather an extension of the institution of The Family. Undoubtedly, the family is a social institution. As mentioned in Chapter IV.3.2., the UDHR already acknowledges the family group unit of society that is entitled to the protection by society and the State. Nonetheless, having a family is also possible without marriage. Consequently, the institution or instrument of marriage is not as necessary or as fundamental as the more robust institution of the family.

Considering both approaches, which one of them is more appropriate for the legalization of intimacy? This research supports the idea that intimacy should be regulated as a contract. One of the problems with the institutional perspective of intimacy is that it is laden with a social (including religious) morality that imposes behavior on individuals. This imposition diminishes the liberty of individuals and overrides the “freedom of contract” principle. In their intimacy, individuals should keep their ability to choose the conditions of their contractual terms – written or not – in their emotional, sexual, social, economic and constructive spheres. In other words,

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<sup>2</sup> Ibidem, Section 3.2.

<sup>3</sup> Mill, John Stuart. *The subjection of women*. London: Savill, Edwards and Co. Printers, 1869. p. 150.

<sup>4</sup> See: Dorsen, Norman, et al. *Comparative Constitutionalism: Cases and Materials*. Second Edition. USA: West, 2010. pp. 632-651.

the *laissez-faire* state policy should apply not only to economics, but also to the individual's entitlement to intimacy. The current paradigms of marriage as the norm for intimacy have to evolve in a different way that allows societies to structure their intimacies differently. This process of unlearning marriage should begin with adequate legislation to *divorce* intimacy from marriage. That is to say, the legalization of intimacy should not be made according to the standards of marriage anymore.

The process of unlearning marriage must be accompanied by a proper educational program. That means, that a new legalization of intimacy must include regulation on the education system so that it can accommodate a new education curriculum that will include other types of intimacy. If individuals have the right to intimacy, they must also have the right to be informed about it. Just as set out by Art. 3 par. 2 in the Mexican Constitution, the education system must foster respect for human rights and justice, public schools curricula should then embrace a wider scope of intimacy that will inform citizens and future citizens of their legal options for intimacy, in the all-encompassing human rights protection. Because one can only grasp the idea of new forms of intimacy when there is more than one option available. The current education system is only promoting heterosexual values, and it would be fair to include different forms of intimacy in public education materials, so as to inform students and people in general about other forms of intimacy while teaching the values of equality.

## **VI.2. A proposal for the Legalization of Intimacy in the 21<sup>st</sup> Century**

This research has advised the reader to unlearn marriage in order to legalize intimacy differently. Now, the following paragraphs will propose an approach to legalize intimacy more efficiently and more fairly. First, consider why should intimacy be legalized at all? Intimacy between individuals creates a pact, an agreement, a covenant, a deal, a contract. Be it in written form or consuetudinary, individuals create a free and private treaty that should be acknowledged by the state. Not necessarily determined by the state, but undoubtedly recognized and enforced officially; primarily for the protection of the individuals who form that intimacy and for the individuals that might arise from that family unit, but also for the security of third parties that might be affected by this intimacy. Therefore, the approach for the

legalization of intimacy proposed here is also one of contractual nature. Second, the twentieth century was marked by a flexibility of intimacy, including no-fault divorce, interracial marriages, the typification of spousal rape as a crime, and the trend to secularize marriage in general. Nevertheless, all these ideas and movements orbited around the axis of marriage, in a heterosexist manner. The reality in the twenty-first century is a different one, with phenomena that include globalization, different population growth patterns, changing economic factors, new forms of reproduction, etc. A new form of legalization of intimacy must take into account all these changes and embrace them accordingly. Third, the analysis of the Spheres of Intimacy introduced in Chapter II has identified the most fundamental elements of intimacy, both in abstract and in pragmatic terms. Consequently, the proposal for a new form of legalization of intimacy must and will obviously include the domains of the spheres of intimacy as well. What this new suggestion for legalization creates is rather a new structure of intimacy, a flexible one that would be structured and determined by individuals more freely. This structure is basically a foundation where individuals will be able to structure their own structure of intimacy.

The character of a new legalization of intimacy should be a more flexible and adjustable one. All individuals are different, and the acknowledgement of particular differences in tastes, preferences and lifestyles can only lead to a more understanding legalization where the terms of behavior and commitment between partners are customized by them, not by the state. Going back to Cohen's ideas, "The previously hegemonic form of intimate association – monogamous, heterosexual, permanent, patriarchal marriage – with its rigid gender norms, moralistic attitude towards sex, and explicit homophobia, was widely acknowledged to constitute a public status regime directly regulated and enforced by the state."<sup>5</sup> This should evolve towards a more individual form of association that is self-regulated, as she suggests, the legislative goals in the domain of intimacy should be to "regulate self-regulation."<sup>6</sup> She concludes that, "The only way to secure freedom, equality, and the chance of happiness for everyone in this domain is to let go of unhelpful approaches, embrace

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<sup>5</sup> Cohen, Jean L. *Regulating Intimacy: A new legal paradigm*. USA: Princeton University Press, 2002. p. 182.

<sup>6</sup> *Ibidem*, p. 178.

the paradigm shift, and reflect together on the choices it opens up for us.”<sup>7</sup> In the same line of logic, this research now proposes a form of intimacy that can be self-regulated by individuals. The state should enable a platform where citizens can regulate their cohabitation and harmony by themselves; and of course, regardless of their gender, guarantee equal access to both men and women.

#### VI.2.1. You name it!

What should be the appropriate name of a new form of legalized intimacy? Having analyzed the different structures of intimacy, and having asked the reader to unlearn marriage, how should this new form of intimacy be called? Although the name might seem irrelevant, the debate around gay marriage has shown that many people have problems with the use of the term “Marriage”. Conservatives, for the most part, cling to the defense of the word marriage based on religious reasons or whatever. The *Defense of Marriage Act*,<sup>8</sup> known as “DOMA” in the United States is a clear example of the fight for the wording of spouses and marriage. The act provided a clear definition to be inserted in the United States Code:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”<sup>9</sup>

This part of the act ended up being declared as unconstitutional in a landmark Supreme Court decision on June 26, 2013.<sup>10</sup> However, it does show that opting for the word marriage has been controversial in the debate of same-sex marriage, in the United States and abroad. At the end of the day, the chosen word is a euphemism and what really counts is the protection of human rights granted by any given form of

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<sup>7</sup> Ibidem, p. 203.

<sup>8</sup> DOMA. Pub.L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C

<sup>9</sup> Ibidem. Section 3.

<sup>10</sup> *United States v. Windsor, Executor of the Estate of Spyer, et al.* No. 12-307. Argued March 27, 2013. Decided on June 26, 2013, 570 U.S. \_\_\_\_2013.

intimacy. Therefore, the more people fight for the use of the word marriage, the more they drift apart from the argument of equality and liberty.

The word marriage is nowadays too contaminated. And so are the concepts of gay and same-sex marriage, because they have been exposed to heteronormative discourses. The best thing to do is to move forward with a different name. New is better. Choosing a new name should secure that all individuals are included and that a new form of intimacy does not discriminate access unfairly. As discussed earlier, marriage is also just the instrument, but the actual institution observed is the family. An intimacy builds a family unit, even with two partners without children; their intimacy has a binding effect that pushes them to act as a family unit. Considering the institution of the family and the contractual personality of intimacy, one of the appropriate names would be: *Family Contract*. For the purposes of this argument, this research will consolidate the proposal for a twenty-first century legalization of intimacy in the nominated name, Family Contract.

#### VI.2.2. The elements of a Family Contract

After the establishment of the name for this suggested form of legalized intimacy, the core elements of this type of contract must be highlighted. These items should be seen as a checklist for the legalization of an intimacy. These elements are factors or variables that must be established in the structure of the contract, however, individuals must have the liberty to determine the conditions and specific resolutions on each one of them. This includes the possibility of adding *ad hoc* clauses to dictate the behavior and governance of their intimacy.

##### *A. Parties*

While discussing gender in Chapter V, the binary morphology of intimacy was identified as a gender-permeated element. Shifting from male-female relationships to male-male or female-female relationships does not change the fact that these intimacies still rely on the premise that intimacy can only happen between two individuals. A new form of legalized intimacy should be more inclusive and allow multiple members of an intimacy, enabling partners to decide how many members

they want to include in the family unit. Consequently, a family contract should be open to relationships that engage more than two adults and without limitation acknowledging their freedom of contract as adults. There should be no limitation or discrimination (as long as they are of legal age) to engage in a family contract; the sex, gender, sexuality, intersexuality or transsexuality should not hinder their eligibility for a given family contract.

### *B. Duration*

Nothing lasts forever, especially in contemporary societies with multiple factors that change in an environment that individuals alone can no longer control. As a result, the myth of “Till death do us part” has become ever so outdated. What is then the ideal duration of a family contract? Only the signatories can define the answer. The suggestion here is to determine an initial term, subject to renewal, renegotiation or reaffirmation of the clauses in the family contract. In other words, the contract should be designed for an initial duration with renewal intervals instead of trying to believe in the myth of eternity in intimacy, which may of course happen, but the approach should be to see the contract as a renewable commitment.

### *C. The Spheres of Intimacy in the Family Contract*

After the introduction of the spheres of intimacy, the third chapter of this dissertation identified all the legal elements of these spheres in the different types of structures of intimacy in Mexico. In the Family Contract, as a new suggested structure, the legal components of intimacy in every sphere will now be detailed.

#### a) The emotional sphere of the Family Contract

Individuals who decide to sign a family contract should be able to modify their legal status, from “single” to “committed” or a similar word that denotes their new obligations and rights. The objective would be to grant them a specific and publicly recognized status that will enable them to claim any public rights, but also any entitlements in the private domain. For instance, having their employers acknowledge

their family partners for private events and benefits, or hospitals recognizing a partner's right to visit a patient they are committed to.

Closely linked to an individual's right to change their status comes the right to legal guardianship. Partners who choose to sign a family contract do so because they trust the partner they are committing to. In the event that one of the partners becomes ill or loses their legal capacity to make decisions, their partner should have the automatic legal guardianship to care for that person. However, individuals should keep the right to appoint a third party for the duty of legal guardianship if they decide to have another relative or individual they trust. Ideally, the default legal guardianship should be granted to the family partner, unless otherwise advised by the signatories when they formalize or amend their family contracts.

It has been pointed out before, that for many individuals it is very important to formalize their intimacy in a particular ceremony. The means of formalization is also an emotional element that should be considered for a Family Contract and individuals should have the right to make their intimacy official at a civil registry or an analogous public office where they feel comfortable and fairly acknowledged for the celebration of their intimacy in a public environment.

#### b) The moral sphere of the Family Contract

In the best-case scenario, a family contract should remain as objective and as fair as possible. This should also include, avoiding pre-conceived moralities on spousal duties, and opting for a more balanced distribution of duties. As mentioned before, gender usually plays a big role in the moral sphere. In the family contract, nonetheless, there should be gender equality for access to this structure of intimacy; but also, for the labor division in the family unit. Cornelia Fine points out that, "Both the breadwinner and the caregiver roles are, of course, necessary. Without the breadwinner there is no money for food. But without the caregiver, the food is not cooked; there is no clean plate on which to place it; and the children are living naked, filthy and wild in the garden, communicating by way of a primitive system of grunts. The 'separate spheres' of men and women – his public, her private – were seen as complimentary and equally, but in an Animal Farm-ish some-spheres-are-more-equal-

than-others sort of way.”<sup>11</sup> She adds, “Not until 1974 did US legislation require that married women be able to apply for credit in their own names. And it was only in 1994 that it became possible in the eyes of the law for a British husband to rape his wife. I mention these points not to lower the mood, but simply to highlight the asymmetry of power and status in the traditional marriage contract.”<sup>12</sup> Undoubtedly, one of the challenges of the family contract is to manage and to cope with the allocation of roles in the family in order to reach a type of contract where power is not asymmetric.

In general, people do not like to plan for negative scenarios, like death or illness. Nonetheless, it is very important that the family contract foresee a scenario of termination, a “way-out.” No contract should enslave a signatory forever. With this premise, the family contract should provide a clause where individuals are able to resign freely. One of the problems with intimacies is that sometimes they also have a short shelf life. A family contract should certainly stipulate the conditions for termination/separation and the course of action to take afterwards, including due notification to the affected party (or parties). Ideally, it should establish a minimum notification period of three months or so before further action is initiated. Regardless of the mechanisms, no moral justification should prevent an individual from separating. The approach for termination should be one where damages are reduced or avoided, for the members of the family unit and also for third parties.

### c) The sexual sphere of the Family Contract

For most intimacies, the sexual sphere plays a big role, undoubtedly, a more relevant one during the initial phase of the relationship. How important should this be in the Family Contract? First, it should be considered whether there is a sexual obligation at all. And second, the exclusivity of sexual relations should be determined by the parties. As pointed out when analyzing the four structures of intimacy in Mexican Law, there is no sexual obligation in any of them. Although it is implicit that spouses, concubines, or civil partners have sexual intercourse; they are not obliged to do so by

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<sup>11</sup> Fine, Cordelia. *Delusions of Gender: How Our Minds, Society, and Neurosexism Create Difference*. USA: W.W. Norton, 2011. p. 79.

<sup>12</sup> *Ibidem*

the mere fact that they are in a legally recognized structure of intimacy. In the Family Contract, this non-obligation should be respected as well, because an individual's physical integrity or intrinsic privacy should not be ignored after signing into any structure of intimacy.

Moreover, the very same personal liberty that allows an individual to choose their partner for intimacy should allow them to a sexual liberty after they engage in an intimacy as long as the other party or parties are informed and accept that. Therefore, the Family Contract should include a provision where partners declare whether they want to have sexual exclusivity or not. This exclusivity could be waived as long as all parties agree to modify the conditions of their contract. For the protection of signatories individually, and their health, it is important to protect them with due notification and conditional acceptance of any new terms regarding their sexual practices. It is unfair when only one partner takes advantage of an open sexuality, while the other is limited to an exclusive sexual arrangement. Being informed of the sexual rules for the intimacy is a right that partners should have and that should be included as a provision since the creation of the Family Contract. Nonetheless, all parties should have the right to enjoy their sexual liberties with the proper amendment or termination of the contract.

The issue of sexual exclusivity leads to the question of the multiplicity of Family Contracts. On one hand, it should be possible to include more than one partner in the Family Contract. On the other, should individuals be free to sign more than one Family Contract? In other words, should Family Contracts encourage monogamy? This issue should be resolved by partners. Although it is already complicated enough to have one structure of intimacy with one partner, individuals should still have the liberty to engage in another intimacy as long as it is accepted by their partners. That is to say, during the creation of the Family Contract, all parties should determine whether they will keep the right to engage in other concurrent intimacies. These are the types of personal decisions that individuals must be able to determine freely according to their own morals and standards, and not to those dictated by society and the state. Partners should decide whether they will be able to sign additional Family Contracts or not.

#### d) The economic sphere of the Family Contract

How can an intimacy survive in the twenty-first century without the appropriate economic arrangements? It is very difficult, if not impossible, to think of a structure of intimacy where the economy does not affect the behavior of partners and their interactions. Thus, the Family Contract should include all the economic provisions that will regulate the management of income and assets, alimony and any applicable compensation of damages.

In order to maintain an even-handed system of justice within an intimacy, it should be clear since the creation of the Family Contract how the income will be generated, managed, and distributed among members of the family unit. A fair generation and allocation of resources will provide a platform within the family where injustices will be minimized. In contemporary societies where both partners in intimacy work, the power structure within the family changes. Domestic governance is also determined by the ability of partners to bring home additional funds. Hence, the Family Contract should allow clauses where partners can decide on the administration of their income and their estate in general. This includes straightforward rules for the new status of the properties and possessions that partners had before the creation of the family contract, the patrimony during the maturity of the intimacy, and unambiguous terms for the redistribution of assets after a potential termination or separation. What some jurisdictions allow as a pre-nuptial agreement (informally known as a pre-nup) should be incorporated directly in the Family Contract as a fundamental part of the family pact. Beyond the simple community or separate property binarism, these clauses should be more specific and include different scenarios, both positive and negative. These scenarios should foresee death of partners, and how assets will be transferred accordingly; as well as voluntary and involuntary separation and termination.

Furthermore, the economic sphere may include the potential obligation to provide financial support for children or former partners. Among the terms for the distribution of assets after termination or separation, the Family Contract should include the obligation of partners to provide financial support even after the intimacy has come to an end. This should be regulated by partners and consider the length and

dimension of the obligation. For instance, temporary support during the notification of termination period, or alimony for children until they reach legal age. Lastly, partners should foresee and outline a scenario for a compensation of damages. Many commercial contracts end up in unexpected situations that create damages. In intimacy, considering the economic sphere of the structure, individuals might incur in the generation of damages to their partners. The affected party should be able to claim the corresponding economic compensation for the damages caused due to the violation of any of the clauses in the Family Contract. The time invested in intimacy also may represent an opportunity cost for an individual. If the terms of the family contract are ignored or contravened, the affected individual should be entitled to some compensation as initially provided in the contract. If all of these obligations are defined since the formulation of the Family Contract, individuals will be able to assess the limits and the magnitude of their liability before they make the decision to commit to any obligations.

e) The constructive sphere of the Family Contract

As discussed in Chapter II, there are issues in a relationship that represent the foundation, the constructive sphere of intimacy. They include, among others, parenthood, reproduction, adoption and inheritance. Considering the two types of construction described, an intimacy may have a horizontal or a vertical structure. In a horizontal one, the founders of the intimacy, the partners have reciprocal obligations and rights. The right to inherit one's patrimony to a partner in the Family Contract should be established by default. Choosing a different person as a heir should be an option. But, in cases where no heir has been determined, the partner in the Family Contract should be considered as the primary heir along with descendants, if any.

*Descendant(s)* is the keyword that brings the focus to the second type of construction, a vertical form of intimacy. Some partners in intimacy may decide to include children to expand or perpetuate their family unit. Individuals who sign a Family Contract should be able to have their own children via traditional biological reproduction, to adopt children or to use new means of technology in fertility to assist them in the biological reproduction, such as surrogacy. A Family Contract should represent the legal nest for the incubation of a newborn, regardless of the methods of

reproduction. Also, there are many individuals who decide to create an intimacy after a divorce or single parenthood, a Family Contract should allow them to include a mechanism to acknowledge the new relationship or kinship between the children of previous intimacies and the new partners of a parent. It is quite common to have stepsiblings and stepparents, but they are almost never legally linked. It is rather complicated to get the legal guardianship of a stepchild, even if the stepparent has spent more time and effort than the biological parent raising that child. Sometimes this void of acknowledgement represents an obstacle when travelling or visiting relatives at a hospital, let alone claiming any inheritance rights. A Family Contract should establish provisions that create a new form of legal kinship in the stepparent-stepchild-stepsibling triangle. And the state should recognize these family ties with equal rights and obligations, considering that if parents have decided to include these individuals in their family units, the state cannot restrict the legally recognized kinship based upon an old abstraction of family structures where divorce was not possible and individuals did not move on with their lives to construct a subsequent structure of intimacy. In this century, these new forms of kinship should be legalized and embraced by a new form of legalized intimacy. This would enable individuals to have equal rights and obligations despite their family history.

Moreover, choosing a common last name should be an option for partners in a Family Contract, be it the last name of one of the partners, a composite one, a hyphenated one, an anagram, an acronym or a completely new one for the new family they will construct. The chosen last name should be transferable to children as well. As argued before, cross-cultural relationships are not isolated events anymore, and immigration laws are crucial for many families. In order to guarantee the cohesion of a family unit, signing a Family Contract should allow individuals to have their partners in their country of residency, no matter what citizenship they have, and they should not be subject to discriminatory restrictions. The state should recognize an individual's entitlement to have a foreign partner as a legal resident in the country where the intimacy will be established, and eventually, wherever they decide to move. In view of the relevance of international or cross-border intimacies it is also important to develop the role of the jurisdiction in the Family Contract.

#### D. Jurisdiction

As is the case with most contracts, it will be particularly important to determine a jurisdiction in order to avoid the phenomenon of *forum shopping*. The current globalized world demands a mobility of individuals and their families. This international mobility of intimacies creates problems of conflict of laws. Hence, intimacies become mobile or nomadic – voluntarily or involuntarily – and the enforcement of the commitment of these intimacies becomes more complicated. It would be absurd to think that a couple would engage in a new form of intimacy in a different legal system every time they move to a new country. For this reason, the “portability” of the family contract is pivotal. It is necessary to contemplate a new international order of civil status and international registration and recognition of intimacies.

For the establishment of the jurisdiction, it is important to consider at least three principles that will affect the intimacy:

- a) *Primary jurisdiction*. In most cases, the primary jurisdiction is that of the place where the contract or ceremony is celebrated, under the principle of *lex loci celebrationis*. Therefore, it is important to choose carefully the place where the intimacy will be legalized.
- b) *Country of citizenship*. Regardless of the country where the intimacy was legalized or celebrated, the country of citizenship or nationality of the individuals who engage in that intimacy is also relevant. Following the doctrine of *lex patriae*, an intimacy may be affected by the laws of the country of citizenship of the individuals who ultimately form it.
- c) *Place of residency*. Independently of the country of citizenship and the place where an intimacy was legalized, the obligations of individuals because of that intimacy may vary if they change residency to a different country, according to the *lex domicilii* approach, the local laws of the country of residency of individuals could be applicable to their intimacy.

Therefore, it should be strongly advised to determine the jurisdiction of a family contract; and to decide up to what degree, these principles of private international law will affect the rights and obligations of an intimacy; not only at the beginning, but also throughout the maturity of that intimacy.

#### *E. Registration*

As part of the process of legalization, the registration of the family contract is important so that the document can become a public record. Civil, cohabitation and domestic partnerships, as well as matrimonies are usually registered at the local or corresponding civil registry. A similar process should work for the family contract. In addition to that, the economic sphere of the intimacy is also important before third parties. Therefore, and ideally, a type of contract like this one should have the option for registration at the local commercial registry as well. Not exclusively, but as a subsequent and optional registration of the commitments outlined in the family contract. Especially, considering the impact that intimacy may have on an individual's patrimony.

#### VI.2.3. Scope of Application

The content and rationale of this proposal is mainly to inform of a new possibility for the legalization of intimacy. These ideas may motivate legislators to submit amendments to the civil code in Mexico or elsewhere. But also, to advise constituents and stakeholders on how to approach intimacy in the fight for equal rights for same-sex relationships. Needless to say, this proposal to legalize intimacy differently is not a proposal to legislate gay marriage. This proposal sets the common ground for partners and intimacies of any sex and gender roles.

##### *a. Legislation of the Family Contract*

If a new form of intimacy will be legally recognized, it must go through the legislative process first. The implicit suggestion in this research is that the issue of intimacy begs for a reform. Particularly in the case of Mexico, some states have already made progress allowing same-sex partners to engage in matrimony. Nonetheless, the

arguments presented throughout this dissertation have detailed the inefficiencies of marriage as it is now. The civil code must be compatible with contemporary families and lifestyles. Therefore, it is urgent to legislate reforms that will embrace and accommodate these changes. The message to legislators is clear: Please include equality, liberty and privacy in the current federal and local provisions regarding intimacy. It is necessary, these obsolete legislations must be amended; these must change as soon as possible to stop further human rights violations.

*b. Social Activism and Advocacy*

The recommendation for social advocates is to reconsider what they are fighting for. It has been underlined before in the fallacy and algebra of gay marriage that gay marriage is intrinsically heteronormative. In spite of the fact that the activism for gay rights attempts to get the acknowledgement of equality, liberty and privacy for same-sex couples; it should be considered that the same means of activism reinstate and consolidate heterosexuality as the norm. Therefore, this research also invites activist to rethink and to double-check the paradox behind the logic of the arguments they are defending.

*c. Individuals*

And last, but not least, individuals who read this piece of research are also encouraged to sit down and assess their current structure of intimacy. Is it legalized? Have all the spheres of intimacy been considered in the most adequate manner to protect the interests of the family unit legally? Many individuals, gay and straight, never consider the legal aspects of their intimacy until they face a real problem. The issues that have been underscored in this research are clear indicators of the potential problems that a family unit could have or could avoid. Therefore, the invitation for individuals is to examine the legal aspects of their intimacies and to find a way to address them promptly.

### **VI.3. The Future of Intimacy**

As long as societies continue to evolve, what is understood by the word “intimacy” will keep changing constantly. Traditional marriage is becoming an obsolete form of intimacy, while assisted reproduction, surrogacy, adoption and same-sex unions are being legalized in more jurisdictions. Hence, what is the future of intimacy? On one hand, there is a reality of intimacy that individuals shape and redefine everyday. This reality develops with the maturity of societies and their degree of tolerance, openness, fairness, and their respect for privacy. On the other hand, there is a future of legalized intimacy. The democratization of societies demands the inclusion, protection and enforcement of human rights. In this century, and hopefully in many to follow, individuals should be entitled to the legalization of their intimacy the way they want to live it and with whom they want to do it. This dissertation has pointed out the importance of equality, privacy, dignity and liberty in their connection with intimacy. The discrimination of same-sex intimacies is a clear violation of fundamental human rights. The upcoming decades should bring about many positive changes in the acknowledgement of an individual’s right to intimacy. Both the legislative and judicial bodies will play a key role. Legislators must realize that societies need to embrace new forms of intimacy, and enact appropriate legislation. Nevertheless, they should keep in mind that the best approach is to regulate for self-regulation, recognizing the rights of individuals to draft the rules of their own intimacy, not necessarily following the moral rules dictated by the state. The judiciary is also competent for legal transformation; Courts should be able to defend the basic human rights of individuals, granting them equal rights to intimacy regardless of their sex, gender or any other preferences. Justices have the power to make changes that will protect individual liberties, in many cases, just by applying current laws that prevent discrimination. In Mexico, some states have already enabled new structures of intimacy at the state level. In the years to come, the Mexican Supreme Court of Justice must resolve that restricting marriage to opposite-sex spouses is a discriminatory practice that violates the fundamental human rights granted by the Mexican Constitution. Likewise, the Congress can enact adequate legislation that prevents this discrimination. Whether either body will act promptly, still remains to be seen. However, the judicial, legislative and executive branches, they all have the obligation to respect fundamental legal rights. This research has analyzed the

legalization of intimacy thoroughly. Yet, there is a related issue that should be taken into account: the right to be single. Because the right to privacy leads us to the right to intimacy in the same axiom that it leads us to the right to solitude. The inertia to engage in intimacy and to negate solitude can also be construed as a heterosexist obligation coming from the social pressure to get married. The right to bachelorhood, the right to that utmost privacy, the right to solitude should also be acknowledged. And considering equally all those individuals who do not want to engage in intimacy, although they have the right to, their right to solitude should also be respected. It should be observed that legal provisions that reward intimacy with social benefits are sometimes also penalizing single individuals. Taxation in many jurisdictions, for example in Mexico, is unfair to single people; it rewards married people with benefits while it punishes single people for their decision to remain single or their inability to change that condition. Therefore, legal bachelorhood as a mirror of legal intimacy, is a phenomenon that could also be analyzed in a separate research. The true development of intimacy and bachelorhood will grow exponentially as societies drift apart from marriage and traditional paradigms of relationships and intimacy. New forms of legalization of intimacy will have an impact on people, not only in contemporary societies, but also in the future. Hopefully, there will be a time when history books will narrate the period of time when only heteronormative intimacy was possible and how it changed for a more inclusive legal recognition of intimacy. The legalization of new forms of intimacy will bring positive social changes that will be easily identified by future generations. Among others, by legally embracing other forms of intimacy, the state sends a clear message of social justice to its citizens: Basic human rights are protected. And, this very protection of human rights is a pivotal element of any State of Law. If there is a real state of justice in Mexico, the legalization of intimacy shall encompass liberty, dignity, equality and privacy. At a federal level, this is not yet the case. The optimistic expectation is that there will be positive legal changes in the following years that will enable a better legalization of intimacy, only time will tell.

## LIST OF ABBREVIATIONS

<b>ACHR</b>	American Convention on Human Rights
<b>Art.</b>	Article
<b>CCFD</b>	Civil Code for the Federal District
<b>CCQR</b>	Civil Code for the State of Quintana Roo
<b>CCSC</b>	Civil Code of the State of Coahuila
<b>CPL</b>	Cohabitation Partnership Law
<b>CPS</b>	Civil Pact of Solidarity
<b>CRCSC</b>	Criminal Code for the State of Coahuila
<b>DOMA</b>	Defense of Marriage Act (United States)
<b>ECHR</b>	European Court of Human Rights (Council of Europe)
<b>FCC</b>	Federal Civil Code
<b>FCCP</b>	Federal Code for Civil Procedures
<b>FCRC</b>	Federal Criminal Code
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IMSS</b>	Mexican Institute of Social Security <i>(Instituto Mexicano del Seguro Social)</i>
<b>LAFD</b>	Legislative Assembly of the Federal District
<b>LCM</b>	Law on Civil Matrimony
<b>LFR</b>	Law on Family Relationships
<b>LGBT</b>	Lesbian, Gay, Bisexual and Transgender
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender and Intersex
<b>LITR</b>	Law on Income Tax Return
<b>LLRX</b>	Law and technology resources for legal professionals
<b>MexCon</b>	Political Constitution of the United Mexican States
<b>NCHR</b>	National Commission for Human Rights
<b>OAS</b>	Organization of American States
<b>OGFD</b>	Official Gazette of the Federal District
<b>OJF</b>	Official Journal of the Federation ( <i>Diario Oficial de la Federación</i> )
<b>PAN</b>	National Action Party ( <i>Partido Acción Nacional</i> )

<b>PRD</b>	Democratic Revolution Party ( <i>Partido de la Revolución Democrática</i> )
<b>PRI</b>	Institutional Revolutionary Party ( <i>Partido Revolucionario Institucional</i> )
<b>SCJN</b>	Supreme Court of Justice of the Nation (Mexican Supreme Court) ( <i>Suprema Corte de Justicia de la Nación</i> )
<b>SJF</b>	Judicial Journal and Gazette of the Federation ( <i>Semanario Judicial de la Federación y su Gaceta</i> )
<b>SSL</b>	Social Security Law
<b>U.S.</b>	United States of America
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>WHO</b>	World Health Organization

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### ADDITIONAL NOTES

**1** All bible passages were cited from: *The Holy Bible. New International Version.* USA: The Zondervan Corporation, 1995-2010. They are available online and updated as of September 24, 2013. URL = <<http://www.biblegateway.com/>>

**2** Mexican Laws and their amendments can be found online on the website of the Chamber of Deputies (*Cámara de Diputados*).  
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**3** Unless otherwise specified, all translations into English have been made by the author of this dissertation.