

Legal memo

Mexico City, August 4, 2022

Polyamory: its recognition by the courts establishes legal precedents

The recent ruling of the State of Puebla, recognizing polyamorous relationships, has captured public attention in Mexico. While this ruling is not definitive, it gives a glimpse of how the courts are interpreting the law based on social realities.

What is Polyamory?

The Royal Academy of the Spanish Language defines polyamory as that "erotic and stable relationship between several people with the consent of all of them"¹. Likewise, other sources warn that it can be understood as the affective, sexual and emotional bond that three or more people maintain with each other, with the same or similar conditions commonly attributed to couples, namely, commitment between the contracting parties, durability and stability. The particularity of this practice is that everything occurs simultaneously between more than two people.²

There has been a broad debate for several years on the recognition of polyamory versus traditional monogamy. In this regard, a recent study del Journal of Sex and Marital Therapy³ revealed that **one in five adults in the United States has practiced consensual non-monogamy** at some point in his or her life, demonstrating that, although there is increasing talk of open relationships and polyamory, society still prefers tradition over this new type of practice. However, should the prevalence of the traditional necessarily rule over the free will of those who opt for an unconventional relationship such as polygamy? In this regard, **the courts have already ruled.**

Background

Although the ruling issued by a court of the State of Puebla on May 21, 2022, regarding the recognition of polyamorous relationships has made the news in Mexico, the truth is that this discussion has already been going on for some years in other courts in the region, in addition to the existence of precedents somewhat related to this topic issued by the highest constitutional court.

In Colombia, a homosexual polyamorous relationship where the three partners cohabited for more than seven years led to the recognition of such relationship after the death of one of them and the lawsuit of the surviving spouses to collect the pension of the recently deceased. Thus, in April 2014, after the insurer refused to pay the pension in equal parts to the two partners of the deceased man, the courts of that South American country ruled on the matter.

¹ Royal Academy of the Spanish Language. Available at: <https://dle.rae.es/poliamor>

² Portal El Mundo, "What is Polyamory and how does it differ from an open relationship? Available at: <https://www.elmundo.es/yodona/parejas/2022/02/18/620cbeb7fdddf64108b45b8.html>

³ Haupert ML, Gesselman AN, Moors AC, Fisher HE, García JR. Prevalence of Experiences With Consensual Nonmonogamous Relationships: Findings From Two National Samples of Single Americans. J Sex Marital Ther. 2017 Jul 4;43(5):424-440. doi: 10.1080/0092623X.2016.1178675. Epub 2016 Apr 20. PMID: 27096488.

The claim was filed for recognition as a polyamorous relationship in order to have access to the pension of the deceased cohabitant, proving the requirement of cohabitation required by Colombian law at the time of death for more than 5 years, through several statements before a Notary Public and several witnesses, as well as press reports about them, accounting for 10 years of cohabitation of the polyamorous relationship. **The Colombian courts concluded that the polyamorous relationship was enshrined in Article 13 of Law 797 of 2003 of that country**, based on the premise that the discussion did not revolve around the fact that it was a homosexual relationship, **but that it was a relationship of three people.**

Although the Colombian legal system enshrines marriage and monogamous cohabitation, the Colombian judiciary concluded that, although the Colombian Constitutional Court had not previously referred to this type of non-traditional families, it should be interpreted according to the social realities and the ways in which the family is presented de facto, including foster families or same-sex couples composed of two or more people. Consequently, this argument led the court to accredit the quality of beneficiaries for the purpose of collecting the pension, due to the existence of simultaneous cohabitation between the three spouses⁴.

In this regard, although Mexico has not addressed the recognition of polyamorous relationships from a judicial standpoint, **the Supreme Court of Justice, similar to the Colombian courts, has already ruled in the past on the right to free development in affective relationships of a matrimonial nature.** In this regard, the highest court, through its First Chamber, determined that **sexual freedom is an expression of the right to free development of personality, which consists of the capacity and possibility to decide autonomously**, without coercion or violence and with full consent, about the persons, situations, circumstances and times in which one wishes to engage in erotic-sexual behavior.

The above determination stems from a case in which a man sued his wife and another person in order to obtain compensation for the moral damages suffered due to the affectation of his feelings, affections, decorum, private life and his human rights of honor and reputation, due to the infidelity he suffered during his marriage. The defendants had a sexual relationship, from which a daughter was born who does not have a biological link with the affected party, a fact that they concealed, making him believe for more than twenty-two years that he was the father. The **Supreme Court established that marriage does not grant a right or coercive power over the body and the acts of the consort in the sexual sphere**, since to accept it would affect human dignity itself, since, even within marriage, the couple retains the power to decide on the exercise of their sexuality, since they are owners of their bodies and have free decision to use it for the purpose of sexual pleasure, assuming the consequences that this behavior will bring to the marital relationship.⁵

Consequently, **the jurisprudence of the highest Mexican court is consistent with the judicial criteria of Colombia, with respect to respect the right to free development of the person**, giving rise to the possibility that **polyamorous relationships may eventually be recognized in Mexico**, under this same line of argument.

The judgement

Recently, the Eighth District Judge in Civil, Administrative, Labor and Federal Matters of the State of Puebla issued the Amparo Ruling in the amparo lawsuit number 1227/2020⁶, recognizing

⁴ Case 050013105 - 007 - 2015 - 01955. Seventh Labor Court of the Circuit of Medellín and Labor Chamber Court of Medellín, Colombia, June 2019.

⁵ Amparo Directo en Revisión 183/2017, dated November 21, 2018. Supreme Court of Justice of the Nation, First Chamber; Speaker: Norma Lucía Piña Hernández.

⁶ Amparo 1227/2020, dated May 21, 2022. Eighth District Judge in Civil, Administrative, Labor and Federal Matters of the State of Puebla.



polyamorous relationships, **after affirming that it is discriminatory not to be able to marry or live with more than one person in cohabitation, since it violates the sexual preferences of those who seek to form a polyamorous family.** Thus, it declared unconstitutional articles 294 and 297 of the Civil Code for the State of Puebla and, therefore, **the constitutionality of polyamorous relationships.**

The lawsuit resolved by the Puebla court had its origin in the claim of the interested party regarding the referred articles for being discriminatory, violating Article 1 of the Political Constitution of the United Mexican States, concerning sexual preference, since monogamy is the preference to establish a sexual-affective relationship with only one person, while polyamory or polygamy is the preference to relate with two or more persons in a simultaneous and consensual manner. In this sense, **the court warned that establishing that marriage and concubinage may be entered into exclusively between two persons, excludes other sexual preferences, such as the case of relationships composed of more than two persons simultaneously,** which constitutes a violation of the human right to equality and non-discrimination, enshrined in the fifth paragraph of article 1 of the Constitution, which categorically prohibits discrimination on the basis of sexual preference.

The ruling considers that **human rights must be recognized when they conduct themselves according to their sexual orientation and are linked in stable relationships and with full knowledge of this situation by all those involved in a sentimental relationship,** sustained, primarily, in the bonds of affection, sexual, identity, solidarity and mutual commitment of those who wish to have a life in common. Without the need to pigeonhole them in legal figures that go against these principles.

Conclusions

The ruling of the District Court **seeks to adopt criteria related to equality, non-discrimination based on sexual preference and, above all, the recognition of the right to free development of personality as a fundamental right.** It is worth mentioning that the Supreme Court of Justice has already established criteria in this regard. **Although this resolution is not definitive, it gives a glimpse of the way in which the courts are interpreting the law based on social realities.** In this regard, the Colombian precedent referred to above is a good example of this, since it based its resolution on the protection of social realities that need legal recognition for the protection of the rights of the persons involved in them.

Finally, it should be reaffirmed that, despite being sensitive issues due to their idiosyncratic complexity, it is imperative to consider that legal criteria should prevail and not moral prejudices. Citing the highest Mexican constitutional court, "sexual fidelity is a legal duty of a very personal nature and of an essentially moral content, for which reason its observance cannot be coercively demanded".

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