

## **DECISION T-283/11 Protection to the facto marital unions and the rights for same-sex couples.**

In this decision, the Constitutional Court repeated its case law regarding to the difference between de facto marital unions and marriage. However, the Court stated that the fact that they are not equal bonds, does not mean that the same rights, guarantees and burdens can be granted by the legislator to the members of either one union or the other, particularly, in relation to marital property, since the two unions are based on a decision taken freely by individuals to live together with a spirit of staying together, support themselves, help themselves, among others.

On the basis of this standard of equal treatment that should be given to the members of a relation based on a contract of marriage as well as the unions made without fulfilling the formalities that a marriage demands, this Court, while acknowledging that the two institutions are diverse, has started over the years to eliminate from the legal system all those rules or interpretations that based on a mere legal bond, have introduced differences between one union and the other, particularly, in relation to the legal treatment accorded to a spouse and a permanent companion, for the recognition of rights, prerogatives, benefits and burdens. The Court has done this on the basis that these differences have the effect of creating discrimination, which is something that is explicitly prohibited by the Colombian Constitution of 1991.

Following the same reasoning, the Plenary Chamber then decided to analyze the legal nature of marital portion which is provided for in the article 1230 of the Civil Code and dates from 1873. The Court concluded that the aim of this rule in modern times is to ensure the spouse should be able to enjoy a part of the estate of the person with whom he/she was living with, if the estate he owns after the dissolution of the marital relationship is less than the one he would have under marital portion, as a means of compensating and balancing the burdens implicit in a decision of sharing life together.

On the basis of this aim, the Court concluded that there was no valid reason to state that this protection of marital property cannot be also granted to the surviving permanent spouse, who without having formalized his/her relationship, constructed a common life project, he /she also showed solidarity and provided care and support, just as a spouse does; All of them are enough arguments to extend that protection to de facto marital unions. The Court questioned the marital portion *because* it was only granted to someone who had a marriage bond. In this sense, the Court warned that to be entitled to the marital portion, you must prove through convenient evidence that you are the surviving spouse, that is, the two years of cohabitation required by Law No. 50 /94, as amended by Law No. 979 /05.

Likewise, the Court has been taking into account the previous case law about de facto unions for same-sex couples, for example, the decision C-075 /07 in which it was recognized the legal status of same-sex couples and emphasized that denying them the protection of marital property that was provided to heterosexual marital unions, was contrary to their dignity and their right to free development of their personality; this leads to discrimination which is expressly prohibited by the Colombian Constitution. The Court concluded that it shall be also possible granting

the right of marital portion to same-sex couples, because of being a protection of marital property.

In both initiatives, the Court considered that, ideally, the legislator, within the framework of the Social Rule of Law, structured around the separation of powers and in the exercise of his freedom of definition, should have made provision for all the civil effects resulting from de facto unions and the rights for same-sex couples, having as a legal basis the democratic principle and being careful not to create regrettable discriminations based on nature of the legal bond; In this sense, the legislator should have complemented or modified various provisions of the Civil Code. However, the absence of regulation has generated discriminatory treatments between the spouses and permanent partners, as well as between same-sex couples. In this respect, the Constitutional Court as guardian of the supremacy of the Colombian Constitution cannot fail to study and declare this situation, particularly given that the legislation quoted predates the Colombian Constitution of 1991. In this spirit, the Court without disregarding its role and maintaining the powers that the Colombian Constitution confers to it, urges Congress to legislate in a systematic and orderly manner on de facto marital unions and same-sex couples, in such a way that in the future there are legal solutions to solve the varied disputes and claims that may arise from the recognition of rights carried out by this Court.