Scope of the normative reforms in Right Sucesoral following the Charter of 1991 according to pronouncements of the Constitutional Court*

Alcance de las reformas normativas en derecho sucesoral a raíz de la Carta Constitucional de 1991 según pronunciamientos de la Corte Constitucional

Alcance das reformas normativas no Direito das Sucessões à raíz da Carta Constitucional de 1991, segundo os pronunciamentos da Corte Constitucional

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Abstract

This paper focuses on to answer the following question: What has been the scope of the regulatory reforms in the field of law sucesoral from the year 1991? Taking as reference the pronouncements of the Constitutional Court relating to the matter, for this is expected describe what resolved in the pronouncements selected, in the interests of providing the scholars of the right sucesoral a compendium of the theme.

Keywords: Law sucesoral, The regulatory reforms, Judgments of constitutionality.

Resumen

En este artículo se pretende contestar la siguiente pregunta: ¿Cuál ha sido el alcance de las reformas normativas en materia de Derecho sucesoral a partir del año 1991? Tomando como referente los pronunciamientos de la Corte Constitucional relacionados con la materia, para ello se espera describir lo resuelto en los pronunciamientos seleccionados, en aras de proporcionar a los estudiosos del Derecho sucesoral un compendio de la temática.

Palabras clave: Derecho sucesoral, Reformas normativas, Sentencias de constitucionalidad.

Resumo

Neste artigo se pretende responder à seguinte pergunta: Qual foi o alcance das reformas normativas em matéria de Direito das Sucessões a partir do ano de 1991? Tomando como referências os pronunciamentos da Corte Constitucional relacionados com a matéria; para isso espera-se descrever a decisão nos pronunciamentos selecionados, de modo a proporcionar aos estudiosos do Direito das Sucessões um compêndio da temática.

Palavras-chave: Direito das sucessões, Reformas normativas, Sentenças de constitucionalidade.

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Introduction

To think about succession because of death in Colombian legislation is to make a journey towards the end of the nineteenth century, when the Colombian Civil Code comes into force - the year 1873 - and is located mainly in the third book of this codification, which regulates the succession by cause of death and donations among the living, in the development of what is contemplated in article 673 of the same legislation - *but in the second book "Of the goods"* - where the ways of acquiring dominion are contemplated. And it is to travel to that time because, in spite of the social and cultural changes that have occurred in Colombia since its entry into force, the matter concerning the succession by reason of death from the point of view of the substantial right has not been the object of structural modifications or significant through legislation.

However, with the entry into force of the Constitution of 1991, being the Constitution norm of rules (Article 4) and being hierarchically at a level higher than the law-type rules, the validity of all pre-existing rules in the law legal basis, are subject to respect for constitutional principles and postulates, so that by means of constitutional actions of citizens who consider the right to equality as violating certain provisions of the Civil Code, including those relating to equality of children, the equality of spouses and permanent partners to claim a spousal portion, to the rights of same-sex couples to claim inheritance rights, the Colombian Constitutional Court has ruled (Judgments C-075 of 2007 and C-283 of 2011)[1] complementing In this way rules of the third book of the Civil Code, just to cite an example, will be referred to articles 1230 to 1238 relative to the marriage portion.

Thus, the presuppositions that regulate succession because of death as a way of acquiring the domain have been updated in function of the defense of constitutional rights, but not in structural modifications to what it represents itself, the partition of the patrimony of a deceased.

In the same sense, Colombian successor law has its origins in Spanish civil law, both substantively and procedurally, followed by the Chilean Civil Code of Don Andrés Bello, as is clear from what has been said by the teacher Pedro Lafont Pianetta-laws all of which drank from the influence of Napoleon's Civil Code of 1804:

> "... The legislation precedent to the civil code, with minor variations that do not contemplate the dominant conception of the form of hereditary legislation (generally extrajudicial) of the Spanish legislation, continued applying in our territory until the initial

1 See Judgments such as C-075 of 2007, C-283 of 2011, among other.

> issuance of the civil codes of the Sovereign states and the subsequent adoption of the Bello Civil Code, but throughout the country, which (as well as those) as we shall see, reiterate that orientation ..." (Lafont, 1993, pp.12-13).

As stated above, the Colombian Civil Code was adopted in 1873 -of the Civil Code of the Great Santander of 1853, when the legal regime corresponded to that of the Federated States- and since that date has retained the very essence of the laws that gave rise to it.

The following are briefly mentioned the laws that have modified, subrogated, repealed, supplemented some of the articles of the third book (Articles 1008 to 1442 of the Civil Code)[2] of the Civil Code in relation to succession because of death and that today remain valid:

- Law 57 of 1887, article 1021.
- Law 153 of 1887, article 1022.
- Law 95 of 1890, articles 1083,1132.
- Law 8 of 1922, article 1068.
- Law 45 of 1936, articles 1242, 1253.
- Decree 2820 of 1974, articles 1026, 1330, 1331, 1379.
- Law 29 of 1982, articles 1040, 1043, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1240.
- Decree 902 of 1988, which authorizes the process of succession by notary.
- Law 1564 of 2012, by means of which the General Code of the Process is issued and other dispositions are dictated.

That is to say of a total of 434 articles, have been objecting of modification, subrogation, derogation, complementation a total of 27 articles corresponding to 6 %.

In this way, one of the ways of acquiring the domain regulated in the Colombian normative system is succession by cause of death, this means that when the owner of the domain right dies, his rights and obligations transmissible will be transferred to his heirs or legatees[3]. This practice is in principle the essence of the inheritance law, not inconsistent, the particular conditions of the offender, make that a special normative analysis must be carried out to define, in the light of the law, what those rights will be, what those obligations and who will give life to that successor cause.

Methodology

The methodology is qualitative (legal) and the type of investigation is theoretical of descriptive scope since it is proposed to evidence what have been the modifications introduced by the Constitutional Court in the utterance of

2 Articles 1008 to 1442 of the Civil Code.

3 Legatees do not represent the offender in such a way that the obligations of the offender are not imposed by law, their responsibility is subsidiary and they may be charged in the testamentary clause in which the assignment is made, however, only will be imposed by those who voluntarily decide to accept the legatee.

sentences with the incidence in the right successoral.

Results

In Colombia most of the legislation that contemplates the right of inheritance is contained in the third book of the Civil Code, although to apply what is described there, it is necessary to complement with some of the legal institutes contemplated in the three remaining books. As with the Code of Civil Procedure, today the General Code of Process.

Now, with the issuance of the Constitutional Charter of 1991, some citizens have instituted constitutional actions denouncing the unenforceability of several norms of the normative order, with the so that the Constitutional Court, pursuant to article 241 et seq. Of the Constitution, interprets the norms demanded and establishes the conformity or nonconformity with the Political Constitution, precisely because the same article 4 of the Constitution establishes that the constitution is norm of norms and there can be no rule in force in the order that does not know what is contemplated in the constitutional text, thus, a series of decisions have been adopted that have influenced the way in which the successor rights are interpreted and resolved, just to mention some examples can see the following judgments:

Year	Sentence N°
1994	C-105 (Article 1016; 1025; 1236; 1242; 1259; 1261; 1266; 1277 CC) C-266 (Article 1022 N° 1; 1068 N° 16)
1995	C-352 (1051 CC) C-422 (1051 CC)
1996	C-114 (verbatim article 8 from Law 54 of 1990) C-174 (423, 1016, 1025, 1026, 1040, 1045, 1046, 1054, 1230, 1231, 1232, 1233, 1234, 1235, 1237, 1238, and from Penal Code Decree-Law 100 of 1980, article 263 first numeral) C-660 (Article 1135 of CC)
2000	C-641 (1226 (partial), 1241, 1244, 1245, 1250, 1253 (partial), 1255 (partial), 1258, 1261, and 1274 from Civil Code). C-1264 (first subsection of article 125 of Civil Code).
2001	C-814 (articles 89 and 90, Decree 2737 of 1989) C-1111 (Article 1042 CC)
2003	C-065 (Article 1068 CC) C-230 (Article 1068 CC) C-430 (Article 1266 CC) C-901 (Article 625 CPC)
2004	C-1029 (Article 1068 CC)
2005	C-101 (Article 1134 CC)
2006	C-398
2011	C-283 (Article 1016; 1045; 1054; 1226; 1230; 1231; 1232; 1234; 1235; 1236; 1237; 1238; 1243; 1248; 1249; 1251; 1277 CC) C-577
2012	C-238 (Article 1040; 1046; 1047; 1233 CC)
2013	C-513 (Article 1133 CC) C-529 (Article 1133 CC)
2014	C-552 (Article 124 CC) C-683 (Article 487 CGP)

Source: Own elaboration

These have been in charge of adjusting and complementing some provisions of the legal system that are understood to infringe the rights of persons that may affect their right to equality, not to discrimination, free development of the personality, to form a family, among others.

Discussion

The judgments mentioned above have complemented the inheritance rights contemplat-

ed in articles 1008 and following of the Civil Code, mainly against the conception of legitimacy, legal and rights to access the assets of the inheritance.

The following sentences are presented with the arguments and decisions adopted by the Constitutional Court.

In the case of judgment C-105 of 1994, the Constitutional Court considers that the legitimate expression contained in articles 61; 222; 244; 260; 422; 457; 537; 550; 1016; 1025; 1236; 1242; 1253; 1259; 1261; 1266; 1277, violates the right to equality. In spite of the above, it is necessary to mention that in the case of succession since the enactment of Law 29 of 1982, all children, understood as marital, extramarital, adoptive, are equal before the law, and therefore have the same right to claim the property of the estate, except testamentary provisions that improve, within the terms of law, any of the children or descendants of the deceased. The declaration of unenforceability of the term legitimate in such rules is equated with a child, or descendant of a marriage, opens the field for all children and descendants of the offender, regardless of the status of a child, extramarital or adoptive child, adapting civil legislation to the criteria of non-discrimination enshrined in article 13 of the Political Constitution by family origin, as well as the provisions of article 42 of the Political Constitution that recognizes the family formed in contractual relationships, as well as the one formed by de facto situations.

Similarly, in the case of Judgment C-266 of 1994 where the plaintiff considers that the first paragraph of article 1022 and paragraph 16 of article 1068 of the Civil Code violate the right to equality insofar as they regulate: heritable incapacity and inability to be a witness in a solemn testament, excluding only the Catholic religion, notwithstanding that the Colombian State is a Laic State.

Thus, the Court declares the feasibility with respect to the articles demanded to be considered as fulfilling the purposes for which they were created, that is, to maintain the independence of the testator, who in a conscious, autonomous, independent and free of vices of consent grant the testamentary act.

Next is Judgment C-352 of 1995[4], in which the Constitutional Court resolves a Constitutionality with respect to articles 1040 (partial) and 1051 partial of the Civil Code, in as much as they consecrate the possibility that the brother's son is heir, but does not allow the uncles to be heirs in the causes of the nephews.

Part of the Court that with the issuance of the Civil Code, the initial content of article 1049 called to inherit the legitimate collater-

4 In the same sense, Judgment C-422 of 1995 of the Constitutional Court, in which it is decided to be resolved in Judgment C-352 of 1995 on the same matter.

als, while with the reform of Law 153 of 1887, the appeal was up to the tenth degree of consanguinity. However, in the year 1935 with the issuance of Law 60 was reduced to the fourth degree of consanguinity and on the other hand, Law 29 of 1982 retained even the children of the brothers.

Furthermore, in Judgment C-114 of 1996, the Constitutional Court ruled on the claim of unenforceability brought by a citizen who considered that the expression "or death of one or both partners" enshrined in article 8[5] of Law 54 of 1990, violated articles 5, 13 and 42 of the Political Constitution.

Due to the peremptory nature of the term indicated in the norm, the Constitutional Court clarifies in that judgment, that this term is of prescription and not of expiration, making reference to the implications of suspension of prescription indicated in the article 2541 in favor of the people indicated in the first ordinal of article 2530 of the Civil Code. Clarifying the Court that there is no interruption of expiration, noting that the suspension of the partition and the suspension of the prescription "make the term of one year is sufficient for the heirs of one of the permanent partners to assert the rights that recognize them the first paragraph of Article 6 of Law 54" (Constitutional Court, C-114 of 1996). In the judgment, the Constitutional Court declared the enforceability of all article 8 of Law 54 of 1990.

The main argument of the Constitutional Court for 1996 is that between the conjugal society and the patrimonial society there are differences of a normative character that are not contrary to the Constitution and that it is the duty of the Congress to reduce these differences by legislative means.

Furthermore, in Judgment C-174 of 1996, the Constitutional Court studied the constitutionality of articles: 423, 1016, 1025, 1026, 1040, 1045, 1046, 1054, 1230, 1231, 1232, 1233, 1234, 1235, 1237, 1238, of the Civil Code and the then current Penal Code, Decree-Law 100 of 1980, article 263 numeral first. "The Constitutional Court cannot create equality between those whom the Constitution itself considered different, that is, between the spouses and the permanent companions" (Constitutional Court, C-174 of 1996).

The Court understood in the year 1996 that the reciprocal rights and obligations between spouses were greater than those imposed on permanent partners, providing that only the legislator was competent to assign a hereditary vocation to the surviving permanent partner. Finally, the Court decides in the ruling that the

5 "The actions to obtain the dissolution and liquidation of the patrimonial society between permanent companions prescribe in a year, from the physical and definitive separation of the companions, the marriage with third parties or the death of one or both partners. Paragraph. The prescription referred to in this article shall be interrupted with the filing of the claim".

Civil Code rules demanded do not violate the constitutional text.

In Judgment C-660 of 1996, the Constitutional Court ruled on the constitutionality of Article 1135[6] of the Civil Code:

Given the developments jurisprudence in relation to the free development of personality, personal autonomy, freedom of conscience, and even against the right to privacy, it was not very easy to decide if imposing these types of conditions by the testamentary way was or was not in accordance with the legal order.

The first considerations made by the Constitutional Court are to respect the freedom recognized in the constitutional legal system, for this, it is asked if the condition contemplated in the Civil Code is mandatory or if it is a prohibition, or simply corresponds to a suggestion, which the Court considered at that time that the condition: "only determines the state of affairs that must occur in order to give rise to certain legal effects. If the assignee wishes that such effects are produced, logically he will have to try to fulfill the stipulated condition; but it will never be imposed as an obligation" (Constitutional Court, C-660 of 1996).

In such a way that the choice of the conditional assignee is left freely to choose their civil status or to freely choose a particular profession or to freely choose a particular profession or to increase its conditional assignment, according to their free will[7].

In the same sense, the Court reflects on the freedom of the testator to impose this type of conditions on testamentary clauses, arguing that the private autonomy of the testator is backed by constitutional guarantees envisaged in Articles 13 and 16 of the Political Charter, as well as by constitutional rules that guarantee the autonomy of the will in accordance with articles 14, 42, 333, *ibidem*.

In application of the aforementioned case concrete, the Constitutional Court considered that it was the legislator who authorized the testator in development of his right to property and private autonomy of the will to dispose freely of the fourth portions of free disposal and fourth of improvements, the latter limiting the contemplated in article 1253 of the Civil Code. Finally, the Constitutional Court declared enforceable Article 1135 of the Civil Code.

It also has Judgment C-641 of 2000, in

6 The condition of marrying or not marrying a particular person and to embrace any state or profession, permitted by law, even if it is incompatible with the state of marriage, will be worth it.

7 Indeed, the moment a person accepts a conditional testamentary assignment, he voluntarily self-limits himself, in the exercise of his right of freedom. Then, he alone will have to decide whether or not he fulfills the condition imposed by the testator to obtain the economic benefits derived therefrom (Constitutional Court, C-660 of 1996).

which the Court pronounces a claim of unconstitutionality against articles 1226 (partial), 1241, 1244, 1245, 1250, 1253 (partial), 1255 (Partial), 1258, 1261, and 1274 of the Colombian Civil Code.

The defendant provisions supported by the arguments of Judgment C-660 of 1996, except for the expression "natural" contained in article 1253 of the Civil Code, in accordance with the provisions of Judgment C-595 of 1996 in those Articles 39 and 48 of the Civil Code were declared unenforceable in relation to illegitimate kinship[8].

The following is followed by Judgment C-1264 of 2000, in which the Constitutional Court rules on the constitutionality of the first paragraph of article 125[9] of the Civil Code.

In order to decide on the petition of the plaintiff, the Court questions the concept of an inter vivos donation contract[10], and from there, it maintains that the power to revoke mentioned in the standard is subject to acceptance by the Judge of knowledge, this in accordance with the provisions of article 1487 of the Civil Code.

Given the above arguments, the Court found that the provisions of the norm demanded, does not limit the legal capacity of the child, nor the validity of marriage, nor affects the state Civil society of the same, therefore, maintained at the time that such a rule was not contrary to the provisions of Article 14 of the Political Charter. Based on these arguments, the Constitutional Court declared "the first paragraph of article 125 of the Civil Code in relation to the charges formulated" (Constitutional Court, C-1264 of 2000).

"In Judgment C-814 of 2001, the Constitutional Court rules on the constitutionality of articles 89[11] and 90[12] (partial) of Decree-Law

8 "Finally, as regards article 1253 of Civil Code, subrogated by Law 45 of 1936, article 24, the Corporation believes that this provision is in accordance with the superior legal order, except for the expression "natural", of the first paragraph of said rule, which will be declared unenforceable because it conforms with The jurisprudence of this Corporation, especially Judgment C-595 of November 6, 1996, MP Jorge Arango Mejía, who declared articles 39 and 48 of the Civil Code, which regulated illegitimate kinship, to be unenforceable, enshrines equality of treatment and rights among legitimate, extramarital and adoptive children, established by article 1 of Law 29 of 1982, a provision that was subsequently raised to constitutional rule by subsection 6 of Article 42 of the Constitution. That being so, the term illegitimate given to a relative has no purpose within the legal order provided by the Political Charter of 1991, characterized by that jurisprudence that recognizes, on an equal footing, the family constituted by "natural or legal bonds" (Article 42, paragraph 1 of the COP). Then it is not seen how the non-existence of the marriage gives rise to an "illegitimate consanguinity", being understood as unlawful. Thus, in the operative part of this sentence, the word "natural" will be removed from the legal world, from the first paragraph of article 1253 subrogated by article 24 of Law 45 of 1936" (Constitutional Court, C-641 of 2000).

9 The ascendant, without whose consent the descendant had married, may revoke for this cause the donations which he had made before the marriage.

10 He was contemplated in the Civil Code in articles 1143, 1194, 1199, 1200; as opposed to the provisions of articles 1469 and 1470 ibid.

11 It may be adopted who, being able, has reached the age of 25, is at least 15 years older than adoptable and guarantees physical, mental, moral and social suitability to provide an adequate and stable home to the child. These same qualities will be demanded of those who adopt them together. The adopter who is married and not separated from the body can only adopt with the consent of his or her spouse unless the latter is absolutely incapable of granting it. This rule shall not apply with respect to age, in the case of adoption by the spouse in accordance with the provisions of article 91 of this code.

12 They may jointly adopt:

2737 of 1989, "Code of Minors", in force at that time.

The plaintiff considered that requiring the adopter "moral suitability" according to the wording of the first standard was not in accordance with a pluralistic and liberal state, and the same was said by the plaintiff that such a requirement was an additional burden imposed on those who wished to welcome this legal figure to be parents.

Partial against article 90 of the Code of Minor occurred in relation to the requirement to be conformed the adoptive couple by a man and a woman, excluding from that legal alternative to homosexual unions.

In making the analysis concludes the Constitutional Court, that *prima facie* the aspects of the norms demanded to show that there is a lack of knowledge of what is regulated by article 13 of the Political Constitution, as regards discrimination on the basis of sex. Moreover, in making an analysis of the protected family form in article 42 in accordance with the prevalence of the superior interest of the minor contemplated in article 44 constitutional, understanding that there was a tension between the two rights mentioned, inclining the balance in favor of which the Court understood at the time as the best interest of the child. Finally, the Constitutional Court finally stated that the respondent parties were in compliance with the provisions of the Political Constitution.

In Judgment C-1111 of 2001, the Constitutional Court studied and resolved an unconstitutionality claim against article 1042[13] of the Civil Code. The plaintiff contended that the norm claimed is unknown to the preamble and Article 13 of the Constitutional Charter, inasmuch as it treats those who are the same as different. This is because there are events in which all the descendants who make a presence in a successor case do so in their capacity as representatives of the children who are immersed in some of the grounds referred to in Article 1044 of the Civil Code. Faced with this eventuality, that is, when all that happen, they do it by right of representation, being all grandchildren of the cause, receive different quota, in application of the provisions in the article demanded.

To resolve the petition, the Constitutional Court, analyzes the legal institute of the right of representation in its very essence, concluding

1. The spouses
2. The couple formed by the man and the woman that shows an uninterrupted coexistence of at least three (3) years. This term will be counted from the legal separation of bodies if, with regard to those who make up the couple or one of them, an earlier marriage bond is in force.

13 "Those who succeed by representation inherit in all cases by strains, that is to say, that whatever the number of children who represent the father or mother, take between all and by equal parts the portion that would have been the father or mother represented.
"Those that do not happen by representation happen in large numbers, that is, they take between them and by equal parts the portion to which the law calls them unless the same law establishes a different division."

ing that, the protected equality in such an institute makes reference to the strains, where all the strains that make presence in the successor cause receive, regardless of the number of Heads of the representatives. In these circumstances, the Court decides that the accused rule does not violate the constitutional text and declares its enforceability.

In Judgment C-065 of 2003, the Constitutional Court pronounces on the constitutionality of paragraphs 5, 6 and 7 of the Constitution. Article 1068[14] of the Civil Code, on the grounds that they violated the rights to equality and good faith of persons with physical disabilities, putting them at a disadvantage vis-à-vis other people. Evidently, when the rule was issued, it had a legitimate purpose, since at that time there was no account with the scientific and technological advance that has allowed those who suffer from this type of limitations to fully develop their abilities and therefore the legislator then considered that such persons could not testify on the granting of a solemn act of the will[15].

Based on the foregoing, the Court declares the unconstitutionality of paragraphs 5, 6 and 7 of article 1068 of the Civil Code, as contrary to the provisions of articles 13, 47 and 54 of the Political Constitution.

With respect to numeral 13 of article 1068 in relation to the inability to be witness the spouse of the grantor of the will, the Court understands that it is in accordance with the Law, being in accordance with the provisions of articles 501, 1053, 1056, 2170 of the Civil Code And 906 of the Commercial Code, in order to comply with autonomy and independence in the grantor of the testamentary act.

In Sentence C-230 of 2003, the Constitutional Court pronounces with respect to the constitutionality of numeral 8[16] of article 1068 of the Civil Code, considering the that the accused norm violates articles 13, 14, 21 and 28 of the Political Constitution. The arguments of the sentence revolve around the concept of inability to testify, highlighting the interest of the legislator in the suitability of the witness, especially against the unilateral legal act of the will. Declining the conditional condition of the defendant provision, conditionality subject to the duration of the custodial sentence.

In Judgment C-430 of 2003, the Constitutional Court ruled on the constitutionality of

14 "Article 1068. They cannot be witnesses in a solemn will, granted in the territories: (...) 5. The blind; 6 The deaf; 7. The dumb ones; (...)".

15 The Court cites the history of the judgments as C-401 of 1999 in which it was declared unconstitutional paragraphs 5, 6 and 7 of article 127 of the Civil Code that prohibited them from being witnesses to witness and authorize a civil marriage.

16 "Article 1068. They cannot be witnesses in a solemn will, granted in the territories: (...) 8. Those condemned to any of the penalties designated in article 315, number 4, and in general, those who by an enforced sentence were disqualified to be witnesses ...".

numeral 5[17] of article 1266 of the Civil Code. To resolve the case, the Court focused on four specific issues: a) private property; b) the right of inheritance; c) the autonomy of the will; d) the limited right to test.

The Court maintains that articles 15, 16 and 42 of the Political Constitution guarantee individual freedom, the right to personal dignity and that family relationships must be based on equality of rights and duties of The partnership and reciprocal respect of all its members, giving priority to personal freedom over the particular considerations of the testator, favoring arbitrariness, in such a way that declared the impossibility of numeral 5 of article 1266 of the Civil Code and was inhibited to pronounce on the Subsection 2 of clause 5 of article 1266 of the Civil Code for substantive ineptitude of demand.

In Judgment C-901 of 2003, the Constitutional Court ruled on the petition of partial unconstitutionality of numeral 2 of article 625[18] of the Code of Civil Procedure[19]. Thus, the Court maintains that the interpretation that is made "in the processes of liquidation of a conjugal partnership because of a religious judgment, once the transfer of the demand has run and when it is not presented together, to propose the previous exceptions: lack of jurisdiction (number 1), lack of competence (number 2), lack of the plaintiff or respondent (number 4), incapacity or improper representation of the parties (number 5), not presented proof of the quality of the spouse (number 6), ineptitude of the demand (number 7) and pending suit (number 10). This is because the very nature of such prior exceptions is in line with the legal nature of the action that is brought.

Finally, the Constitutional Court refrains from pronouncing itself on the norm demanded because it considers that the shareholder did not adequately support were violations that the defendant rule represented for the Constitutional Charter, specifically, is inhibited by the ineptitude of demand.

In relation to Judgment C-1029 of 2004, the Constitutional Court ruled on the claim of un-

17 "Article 1266. A descendant cannot be disinherited except by some the following causes: (...) 5. For having committed an offense to which any of the penalties designated in number 4 of article 315 has been applied, or for having abandoned to the vices or exercised infamous benefits; unless it is proved that the testator did not care for the education of the disinherited. The ancestors may be disinherited by any of the first three causes."

18 "Settlement on the verdict of ecclesiastical judges. Either spouse may request the liquidation of the conjugal partnership dissolved by an ecclesiastical sentence if accompanied by an authentic copy of the same, and the marriage certificate with the record of having taken note of it. For the settlement, the following rules will apply 2. The defendant can only propose exceptions other than the previous ones contemplated in paragraphs 1, 2, 4, 5, 6, 7 and 10 of article 97. It may also propose as a previous exception the judged thing, and that the marriage was not subject to the community system of goods. (...)"

19 "... is actually the product of a simple grammatical mistake made by the extraordinary legislator of 1989, which included the inclusion of the adverb "alone" instead of the adverb, used by the original version contained in Decree 1400 of 1970 and taken up by the subcommission drafting Decree 2282 of 1989".

constitutionality of numeral 15[20] of article 1068 of the Civil Code. In order to resolve the defendant, the Court reiterates the pronouncements it has previously made on the occasion of the claims to other numerals of article 1068 of the Civil Code, reiterating its position to the extent that what is intended with such inability to be a witness is "Freedom and autonomy of the will of the testator, as well as the impartiality of the witness in the act whose refinement contributes", finally declaring the constitutionality of the numeral demanded.

In Judgment C-101 of 2005, the Constitutional Court studied the constitutionality of article 1134[21] Of the Civil Code, it is noteworthy in the present case that the plaintiff is a delegated defender for constitutional matters of the Ombudsman's Office, considering that the aforementioned rule contains negative discrimination pretenses against women, by requiring them through a conditional testamentary clause, to remain in singleness or widowhood, to access a testamentary assignment of part of the assets of the estate[22].

In addition to violating the right to equality, the defendant norm violates the right to free development of the personality enshrined in Article 16 of the Constitutional Charter, as well as the right to form a family enshrined in articles 42 and 43 The Political Constitution. Article 16[23] of the Universal Declaration of Human Rights, Article 17[24] of the American Convention on Human Rights.

Finally, the Constitutional Court, with a statement by Judge Alfredo Beltrán Sierra, states that the norm cited is unenforceable, as it violates The constitutional rights to equality, to the free development of personality, to freely forming a family. The Court clarifies that the rights of the testator to make conditional testamentary assignments are respected, as established in Article 1128 of the Civil Code. Finally, in front of this same sentence, it is important to mention that there was a rescue of the vote by Judge Rodrigo Escobar Gil.

In Judgment C-398 of 2006, the Constitutional Court studied the constitutionality of ar-

20 Article 1068 of the Civil Code: "You cannot witness a solemn will, granted in the territories: 15. Those who have with another of the witnesses the kinship or relations discussed in Nos. 12 and 14; (...)".

21 The foregoing articles do not preclude the provision of a woman's subsistence while she remains single or widowed, thereby leaving her a right of usufruct, use or habitation, or periodic pension.

22 In order to evidence discrimination against women which historically has submitted to the woman, the actress cites bibliographical references such as those contained in Chapter V of Emile de Juan Jacobo Rosseau, the exposé by Kierkegaard in the Diary of a seducer, as told by Shopenhauer in Historys of Ideas on woman. It also cites judgments of the Constitutional Court where it ruled on negative discrimination, namely: T-098 of 1994, T-624 of 1995, T-326 of 1995, T-026 of 1996, C-309 of 1996, C-410 of 1996, C-622 of 1997, C-082 of 1999, C-112 of 2000.

23 "Men and women, starting at full age, are entitled, without any restriction on grounds of race, nationality or religion, to marry and found a family, and enjoy equal rights as to marriage, during the marriage and in the event of dissolution of marriage".

24 "The right of men and women to marry and to found one family if they have the age and the conditions required for it by domestic laws, insofar as they do not affect the principle of non-discrimination established in this Convention".

ticle 41[25] of Law 153 of 1887, to the counting of the terms of prescription regulated by the civil legislation. It is necessary to clarify that this sentence is analyzed because the article 1321 of the Civil Code, which regulates the action of petition for inheritance, contemplates some terms of prescription to make the action effective and of course to account for such terms must be taken into account the provisions of article 41 of Law 153 of 1887. In the specific case, the plaintiff considered that the exception of article 41 that allows to opt for a norm already repealed and continue to meet the terms of prescription or start counting the terms with the new rule that generally diminishes them is contrary to the prevalence of the substantive right over the procedural right regulated in article 228 of the Political Constitution as well as contrary to the right to equality, enshrined in article 13 *ibídem*.

Front of the violation of due process the Court that the standard ordered is issued by the legislator starting from when they begin to count the terms of prescription taking into account the superior principles. Finally, the Court declares the of the standard demanded.

In Judgment C-283 of 2011, the Court Constitutionality of articles 1016, 1045, 1054, 1226, 1230, 1231, 1232, 1234, 1235, 1236, 1237, 1238, 1243, 1248, 1249, 1251, 1277 of the Civil Code[26].

Arriving the Court the conclusion that the "Conjugal portion" as a forced assignment is a guarantee for the surviving partner, irrespective of the legal nature of the bond that gave rise to community life. Resolving the Court that the rules demanded are in conformity with the constitution "provided that it is understood that the conjugal portion in them regulated have the permanent partner" (Constitutional Court, C-283 of 2011).

Finally, in the face of the deficit of protection against same-sex couples, the Court retakes the postulates of Judgment C-075 of 2007 and extends the rights to receive marriage portion to same-sex couples. Likewise, in the second paragraph of this decision, again urges the Congress of the Republic to legislate in a systematic and orderly manner in relation to matters related to material unions in fact and against same-sex couples.

In Judgment C-577 of 2011, the Constitutional Court studied the constitutionality of

25 Article 41. "The prescription initiated under the rule of a law, and which has not yet been completed at the time of the promulgation of another that modifies it, may be governed by the first or the second at the will of the prescriber, but the last prescription shall not begin to count until the date on which the new law has begun to be governed".

26 The juridical problem that the Court raised in the instant case was: "to determine whether the rules of the Civil Code that recognize the existence of an offense against the principle of equality, as enshrined in Articles 5, 13 and 42 of the Constitution. Favoring surviving spouses the possibility of claiming the "conjugal portion," a faculty that is not recognized for permanent companions".

Article 113 of the Civil Code. On this occasion the Constitutional Court is concerned with analyzing a group of lawsuits that have been instituted independently against Article 113, reviewing in each of them the arguments that support them and grouping according to meeting points the arguments of the front to constitutionality or unconstitutionality.

In order to begin the analysis of whether or not the norm demanded with the Constitutional Charter, the Court initiates the reflections based on article 42 of the Political Constitution, analyzing of this: (I) determine their scope in relation to the family and marriage, (II) to specify whether it gives rise to the different types of family, (III) to establish whether same-sex couples respond or not to the notion of family and, if applicable, (IV) to determine whether it is the subject of constitutional protection and (V) if so, what is the scope of that protection and who is called to offer it" (Constitutional Court, C-577 of 2011).

The Court bases its analysis on establishing the concept of family that has been accepted by constitutional doctrine, citing judgments in which this situation has been analyzed, concluding that in contemporary Colombia there are families formed by a man and his children, a female head of family and their children, as well as people who do not have blood ties, as in the events in which it is necessary to replace the family of origin with one that such functions, the Court concludes that: "the concept of family cannot be understood in isolation, but in accordance with the principle of pluralism, because in a plural society, there cannot exist a single concept and exclusive family, identifying the latter only with that arising from the marriage bond".

An additional legal problem that Is analyzed in the judgment and that touches the center of the debate regarding the possibility that Article 113 of the Political Constitution facilitates negative discrimination against same-sex couples is the following:

> "It corresponds to the Court in order to determine whether, although heterosexual marriage and gay couples are family types, there is a constitutional mandate to apply to same-sex couples who wish to form a family and to solemnize their union, place to the heterosexual family arisen from the expression of the consent in which the marriage is made".

In this way, the Court resorts to the conception of family that has been developed in the course of the sentence and to an interpretation close to the literalness of the Article 42 of the Political Constitution to maintain that the constitutional protection that is made of marriage as a contractual link is related to the couple formed by a man and a woman, while the possibility of forming a family is left open in the

norm without special mention being made of it being exclusive to heterosexual couples[27].

In conclusion, the Court decides in its decision to declare the norm demanded (Article 113 of the CC) and, in the light of the exhort to the Congress of the Republic, the Court gives a peremptory period of two years, in order to that this legislation on the deficit of protection generated by the absence of inclusive legislation in favor of same-sex couples.

Finally, it was established that after the term in silence, same-sex couples "will be able to go before a notary or competent judge to formalize and solemnize their contractual relationship" (Constitutional Court, Judgment C-577 of 2011).

The term set by the Court passed in a legislative silence so that same-sex couples have come before the courts of Notary or Judge to solemnize their contractual relationship, being assumed by these officials as a contract of solemn union with clauses and commitments specific, under the figure of the unnamed contract. Notaries and judges have not accepted it as a marriage contract since it is nominated and the law has established requirements that given the sentence, same-sex couples - in the absence of specific legislation - do not meet.

Judgment C-238 of 2012, the Constitutional Court studied the constitutionality of articles 1040, 1046, 1047, 1233 of the Civil Code. The charges of the plaintiff revolve against the violation of the right to equality of both heterosexual couples and homosexual couples, as opposed to the expression "spouse" contained in the norms in question. Thus, the Court - in coherence with previous rulings promulgated by the same corporation - argues that both marriage and marital union give rise to family, there are aspects that differentiate them and aspects that make them similar, and must analyze whether in the specific case the similarities must be recognized or if an unequal treatment granted by the legislator is justified[28].

Thus, in the specific case, the Court finds a deficiency of protection that lacks objective and reasonable justification given that what sustains the demanded inheritance right is not the contract of marriage, but rather the family relationship, a broader concept in which

27 "The Constituent Party foresaw the evolution of the family institution, but at the very moment of drawing up the Charter it did not specifically took into account options such as homosexual marriage, since, without prejudice to other types of family, it limited itself to giving it a special expression in the constitutional text to a current reality at that time and even today, and in accordance with which marriage is one of the forms to which, more assiduously, people who want to form a family, a form historically linked to the couple formed by a man and a woman, a feature that literally was incorporated in the Constitution" (Constitutional Court, Judgment C-577 of 2011).

28 It mentions in this judgment cases in which it has recognized the similarities with decisions such as C-1033 of 2002, where it authorized the payment of the food quota referred to in article 411 of the Civil Code, Judgment C-527 of 2007, on affiliation to the health regime, Judgment T-932 of 2008, on survivors' pension, Judgment C-096 of 1998 on economic rights, among others.

the different forms of the family mentioned in Judgment C-577 of 2011 are incorporated.

In this regard, the Court decides that the hereditary vocation contemplated in articles 1040, 1046, 1047 and 1233 of the Civil Code, are feasible in the understanding that includes the spouse, the permanent partner of different or the same sex.

In Judgments C-513 and 529 of 2013, the Constitutional Court studied the constitutionality of article 1133 of the Civil Code.

The juridical problem analyzed in the sentence revolves around determining whether there is a violation of the right to equality, to form a family and to the free development of personality when contemplating in a testamentary clause the condition of remaining in a state of widowhood to receive a testamentary assignment.

The first thing the Court does is a review of judgments in which the right to the free development of personality has been addressed, concluding from these that it is not possible for the legislator to establish norms that limit a right or as intimate of the personal life of the individual as it is the free and voluntary faculty of forming a family.

Subsequently, it analyzes the scope of testamentary provisions governed by the Civil law, for this reiterates the Court the postulates of Judgment C-660 of 1996 in the analysis of the private autonomy of the will of the testator[29], which changed the resolution of the Court against the article 1134 of the Civil Code, which was collected in Judgment C-101 of 2005.

As well it cites the Court In which it has declared unenforceable social security rules which made it impossible for the beneficiary to enter into new marriages: Judgments C-309 of 1996, C-182 of 1997 and C-464 of 2004.

That the fundamental right to the free development of the personality is a constitutional prerogative that has a wide sphere of protection, which shelters in a special way the power that every citizen has to decide on the way in

29 The law allows the will of the deceased to be manifested through the will, that is, in a solemn unilateral juridical act, by means of which determines the distribution of the property left at death. Recall that the power of the testator to dispose of his property is not unlimited because, for the will to be valid, the successor orders established in the law must be respected. Thus, on the half of the goods, in the field of legitimate, its faculty is practically limited to reiterate the provisions of the law. Already in the fourth of improvements, his competence expands, since he can decide which one, or which of the descendants will improve his assignment, offering them a greater patrimonial expectation. Finally, it is on the fourth remaining part of the property, called fourth of free disposition, on which the testator can fully exercise his autonomy of the will.
Now: considering that the allocations that belong to this last portion are not forced, it explains why, as stated above, they may be subject to condition. The power conferred by the civil law upon the testator to subject the assignments to the condition is a clear recognition of the autonomy of the will, which allows him to perform some acts that only produce effects in the events that he wishes. In the case of this type of assignments, the testator manifests the will of someone to be heir or legatee as long as the condition imposed is fulfilled. It may then be concluded that the legislator limits the autonomy of the will of the testator, in such a way that it is only possible to establish conditions for the fourth of improvements and the one of free disposition.

which it wishes to constitute a family, because such a choice forms part of the essential nucleus of such a right and cannot give in order to guarantee the authority of the deceased to impose testamentary conditions, "since that right is subject to limits, one of them and of great significance, the right to self- To be determined in life according to their own convictions" (Constitutional Court, Judgment C-513 of 2013). Finally, it declares the unenforceability of Article 1133 of the Civil Code.

It is necessary to clarify that in Judgment C-529 of 2013, the Court refers to what was resolved in Judgment C-513 of 2013. In Judgment C-552 of 2014, Constitutional Court studied the constitutionality of article 124[30] of the Civil Code. The Court decides two different actions against the same article, in which the defendants considered that the defendant article violated the right to equality (13 CP) to the free development of personality (16 CP), freedom of conscience (18 CP), the right to the family (42 CP), the right to property (58 CP).

The legal problem that will be solved in the present lawsuit is raised, namely:

> "If the supplanting of the will of the testator by the Law for the imposition of a civil sanction, disregards the rights to autonomy and family privacy of the testator (15 PC) and unjustifiably restricts the right to free development of the personality of the offspring that at the time of marriage requires authorization for being a minor (16 CP)?" (Constitutional Court, Judgment C-552 of 2014).

Before this legal problem, the Court should consider whether such a provision violates the Political Constitution in any of the individual rights enshrined therein, taking into account additionally the aim pursued by the rule demanded, considering whether this rule pursues some purpose, constitutionally protected.

So that in terms of succession, disinheritance requires for its validity, the fulfillment of a series of formal requirements, such as that it is only done through testamentary clause, for any of the valid grounds contemplated in the Civil Law (among other requirements).

However, the article respondent contemplates an exception to the rule mentioned above, against the possibility of disinheriting by way of testamentary, supplementing such absence of granting a will with a legal presumption of 50% disinheritance both by the ascendants in whom the possibility of granting the permission to contract nuptials as by the ancestors of these relapsed.

30 If he has not reached his age, consent of an ascendant, being obliged to obtain it, may be disinherited not only by that or those whose consent was necessary to him but by all other ascendants. If any of them die without making a will, the offspring shall not have more than half of the portion of the property that would have corresponded with him in the succession of the deceased.

Finally, the Court decides to declare the expression "if any of these dies without making a will, the offspring shall not have more than half of the portion of the property that may have corresponded to him in the succession of the deceased".

In Judgment C-683 of 2014, the Constitutional Court studied the constitutionality of Article 487 of the General Code of the process. From the sentence are extracted several elements of interest for this investigation that are presented below for further illustration. The plaintiff filed four counts against the defendant rule, however, the Colombian Constitutional Court, when studying the action, summarized them in three counts[31].

Notwithstanding mentioning three charges, the Court found that the approach to the claim was not clear with respect to all charges and resolved to rule alone against those pertaining to vices per unit of matter and ignorance of the right to equality, with two problems Legal entities[32]. In reviewing the legal problems analyzed by the Colombian Constitutional Court, it is considered that these do not deal with the substance of the problem, which is that the legislator creates a procedural legal framework "distribution of assets in life" to be applicable the rules that they regulate the succession by reason of death, without there being coherence between the created norm and the legal institutes proper to the Successor Law.

Continuing with the constitutional sentence, the Colombian Constitutional Court study the two related charges, declares the norm feasible, considering that does not violate the aforementioned constitutional articles, for which, of course, the Court limited itself to solving the plaintiff's propositions, without delving deeper into the issues that are the sub-

31 (...) The violation of the principle of unity of matter is accused (Article 158) considering that the figure of the partition in life is of a substantial nature because it involves the creation of a way of acquiring the domain additional to those established in article 673 of the Civil Code, reason why it could not be regulated by a procedural law like the General Process Code. (...) Regarding the very figure of the partition of life heritage introduced by article 487 of Law 1564 of 2012, there is a violation of articles 13, 29, 42, 58 and 228 of the Constitution. In this context, the new instrument is considered to be prejudicial to the rights of children who, at the time of the partition, have not consolidated their paternal subsidiary relationship and future third parties (eg creditors) by depriving them of the possibility of defending their rights (Article 29), affecting their private property (Article 58), because their inheritance is divided between the heirs who are recognized at the time of partition - and, therefore, violating the right to equality must prevail among all members of the family (articles 13, 42). Considering the above, it is argued that the figure of partition in life is opposed to substantive law because it affects the rights of certain subjects to favor jurisdictional decongestion (Article 229). (...) With regard to the request for termination that the provision foresees for persons who prove a legitimate interest is alleged a violation of the rights to equality, due process and access to the administration of justice of the children who at the time of the partition have not consolidated their paternal-filial relationship and of the future interested third parties. The applicant considers that the request for the termination of the partition is a more complex remedy, which it prescribes in a shorter term in relation to other similar actions (Articles 13, 29 and 228) and, in addition, the children who have not been born or have not been recognized (article 13).

32 The two legal problems were: 1) Is the principle of unity of matter unknown (article 158) because of the figure of the partition of wealth in life, of a substantial nature, in a procedural law such as the General Code of Procedure? 2) Does the figure of partition of wealth in life preserve the rights to equality (articles 14, 42) of the children who at the time of the partition have not consolidated their paternal-filial relationship and of the future interested third parties by not foreseeing the participation of such subjects on an equal footing with other persons in a process that may affect their assets?

ject of the research problem proposed in this investigation.

Conclusions

Since the issuance of the constitutional charter of 1991, it has begun to speak of a constitutionalization of law, being understood in a simple way in the form as the rights and duties enshrined in the Political Charter, permeate each and every one of the existing legal institutes; to which the successor law has not been extraneous and that is why in this work some excerpts of the arguments and decisions adopted by the Constitutional Court are presented when they face the situations in which the standard type rights enshrined in the third book of the Civil Code and the rights of constitutional rank.

A first conclusion reached by the reader will be to show in the first pronouncements the timidity of the Court against the recognition of rights, giving a look at certain articles in the 1990s and another look at the same articles in the 2000s, mainly regarding the rights of marriages and marital unions in fact, the Court being respectful of the tri-division of power and relying on the diligence of the legislature to respond to the needs of a changing society that demanded attention to their daily problems.

With the passage of time and before the absence of legislative developments that give answer finds the Court that the permanent claims of the citizens do not have an echo in the legislative and begins to make respectful petitions to urge the legislature to legislate on the matter.

Subsequently, the Court in its judgments begins to give some deadlines for the legislature to resolve the regulatory gaps in recognition of rights and finally assumes an active position indicating what should be done before the recurrent silence of the legislature.

In the same way, it has been shown that it was through Constitutional Sentences that rights to receive inheritance and to receive conjugal portion to heterosexual and homosexual couples with marital de facto union were recognized, being it clear the intention to equate their patrimonial rights in matter of inheritance law to those traditionally and legally recognized to couples that have a marriage contract.

The imposition of limitations on the testamentary power to make conditional assignments in which it was required to embrace a particular profession as well as to remain in a state of widowhood (sic) in the pronouncements of the 1990s did not find violations of fundamental rights and in the pronouncements of the year 2000 were declared unconstitutional, as being against the free choice of a profession, freedom of conscience, free per-

sonality development, rights of constitutional rank.

The rights to disinheritance with the own standards of the legal institute, that is, that is only viable when stipulated by testamentary clause (in a validly granted will) in which it is established that Is disinherited with indication of the percentage of disinheritance and mention the cause contemplated in articles 1266 and following of the Civil Code. In such a way that the legislative sanction contemplated in article 124 of the Civil Code, which was intended to be equivalent to the legal institute of disinheritance, leaves the legal order.

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