



COLOMBIAN CONSTITUTIONAL  
COURT ON:  
**HIV CRIMINALIZATION, SEX  
WORK, ABORTION, SAME SEX  
MARRIAGE AND DRUGS**



## Introduction

The 1991 Constitution enumerates a strict and precise series of functions entrusted to the Constitutional Court including: (i) the judicial review of laws and treaties on procedural and substantive grounds; (ii) the judicial review on procedural grounds of constitutional amendments; (iii) the overseeing of the executive branch in regards to decrees and executive actions taken during times of exception, all of which are part of the Courts abstract review; and (iv) as the institution in charge of fundamental rights adjudication regarding the revision of decisions made by lower courts pertaining to the protection of rights through the acción de tutela or concrete review.

One of the most important innovations of the 1991 Constitution was the tutela, a sort of individual complaint, writ of protection of fundamental rights or “constitutional injunction”, which enables any person, whenever her fundamental rights are being threatened or violated by a public authority or, in exceptional cases, by private citizens or entities, to file a lawsuit before any judge. The tutela has become widely popular as it has eliminated economic and time barriers in the access to justice, by empowering every citizen to file a constitutional-based injunction before any judge. The tutela is an instrument created with the objective to guarantee a more expedite and inclusive judicial procedure to protect fundamental rights, by which any person without any qualified standing can ask any judge to protect their fundamental rights. The decision regarding such protection must be delivered within 10 working days following the filing of the constitutional injunction.

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<sup>1</sup> Former Justice Manuel Jose Cepeda has summarized the jurisdiction of Court in light of article 241 of the Colombian Constitution as follows: “According to Article 241 of the Colombian Constitution, there are four mechanisms of access to the Court: (i) the public unconstitutionality action (actio popularis); (ii) ex-officio control of certain types of provisions, mainly presidential decrees of states of exceptions, laws summoning a constitutional referendum or a Constituent Assembly, laws approving international treaties, and statutory laws; (iii) review of bills as an arbiter, whenever Congress overrules a presidential veto in constitutionality issues; and (iv) discretionary review of any tutela judgment issued by any judge in the Country. The first three trigger abstract judicial review. The fourth triggers judicial review in concrete cases”.

## Introduction

Pertaining its functions of judicial review, particularly in the field of constitutional amendments and laws, the Court's jurisdiction originates from the filing of 'a public action of unconstitutionality' (*actio popularis*). This mechanism, which has been established as a fundamental political right by which any citizen can question any of the above-mentioned norms without a qualified standing, is characterized by the minimum requirement of substantive argumentation considering the *pro actione* principle. In contrast to systems of concentrated and abstract constitutional review where only certain organs of the state can bring claims of unconstitutionality, the Court implements a mixed system in which there is a concentrated and abstract control entrusted to the Court, but its adjudication is diffuse and concrete, so that any authority can stop acquiescing to the norm declared unconstitutional.

With this in mind, it should be noted that the 1991 Constitution broadened the access to the public action of unconstitutionality. This has made the Court the main forum in which national issues regarding the rights included in the above-mentioned Constitution are decided. Heavily debated matters such as the restrictions to the right to life, and the right of all citizens to develop their own personal identity (rights to privacy and autonomy) have allowed the Court to hand down various landmark judgments since its creation. Within this context, this document presents some of the most relevant and recent decisions in which the Court has discussed the limits to individual liberty, autonomy and privacy among issues concerning matters like: (i) HIV criminalization and other protections; (ii) sex work; (iii) abortion or *voluntary interruption of pregnancy*; (iv) rights of same sex couples to marriage; and, (v) personal drug possession and consumption.

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<sup>2</sup> See article 16, 1991 Colombian Constitution.

### **DECISION C-248 /2019. Actions which could lead to the transmission of HIV or Hepatitis B**

Decision C-248 of 2019 examined the constitutionality of a legal provision which provided criminal responsibility for people who, after being informed of having HIV or Hepatitis B (HBV), carried out actions which could lead to the transmission of these viruses to others by means of blood, semen, or any organ donation. The law punished this action with 6 to 12 years in prison.

Holding: The Court declared the unconstitutionality of this provision after considering that it breached the principles of equality and free development of one's personality.

Rationale: In its analysis, the Court applied a strict equality test on the basis that the population living with HIV and HBV were entitled to special protection under the Constitution, due to the historical discrimination against them. As a result, the Court held that the norm provided an unjustified differential treatment to those living with HIV and HBV, compared to those that endured other sexually transmitted diseases (STDs), notwithstanding they all shared similar risks of transmission.

Finally, the Court identified other measures that were effective in preventing the spread of STDs but were not as restrictive of other rights and, thus, were consistent with the right to equality, as they did not discriminate any group based on the mentioned condition. Regarding the violation of the right to free development of one's personality, it held that it nullified sexual rights.

Observations: Justice Antonio José Lizarazo Ocampo filed a dissenting opinion. Justices Gloria Stella Ortiz Delgado, Diana Fajardo Rivera, Carlos Bernal Pulido, Alejandro Linares Cantillo and José Fernando Reyes Cuartas filed concurring opinions.

### **DECISION T-376/2013. Discrimination against people who live with HIV**

In Decision T-376 of 2013, the Court examined a case of a convicted felon that requested the protection of his rights to life and personal integrity against the penitentiary center where he paid his sentence. The claimant stated that due to his condition of having HIV, was transferred to another prison where he, along with other inmates, were subject to physical aggression.

Holding: The Court granted the protection (*amparo*) and ordered the criminal judge to examine alternative measures that could be adopted (i.e. domiciliary incarceration), in order to guarantee the claimant's rights.

Rationale: In this decision, the Court examined whether people living with HIV, as a group, could be considered in a situation of manifest vulnerability and, as such, demanded the special protection of the State in the terms of Article 13 of the Colombian Constitution (equality clause). The Court concluded that, indeed, people living with HIV were entitled to special protection, due to the stigma and subsequent discrimination tied to such reality. Additionally, the Court reaffirmed that convicted felons had the right to be provided with medical services. Finally, the Court censured the decision to transfer the Claimant to another prison, which was taken by the director of the Penitentiary Center.

## DECISION T-033 OF 2018. Work discrimination against people who live with HIV

Decision T-033 of 2018 examined the case of a nurse whose contract with the Health Secretary of Cali had not been renewed based on alleged discrimination, due to her condition as an HIV-carrier. The claimant requested the protection of its fundamental rights to life, work and social security.

Holding: The Court granted the protection (*amparo*) and ordered the Defendant to reincorporate the claimant to his usual activities, as well as to abstain from terminating the contract.

Rationale: The Court found that the claimant, in several occasions, had requested his protection from labor harassment, with no effective response from the defendant. Indeed, the Court reaffirmed that persons living with HIV were, in fact, subjects of a special protection from the State due to historical discrimination against them, and according to that, in cases where a reasonable doubt exists, regarding the discrimination of an individual living with HIV, the rule of *onus probandi* has to be altered and, thus, the defendant from an alleged violation has the burden to prove that he had acted under the law.

It concluded that *prima facie*, there was evidence of non-renovation of the contractual relationship between the claimant and the defendant due to reasons of discrimination. Consequently, it was protected the employment stability.

Observations: Justice Alejandro Linares filed a dissenting opinion.

### **DECISION T-629 OF 2010 Unilateral termination of labor contract of a pregnant woman**

Decision T-629 of 2010 dealt with the revision of a *tutela* which was filed by a pregnant sex worker against the owner of the bar where she worked. The claimant alleged infringement of the rights to work, social security, equality, due process, health, as well as the rights of her unborn baby for unilateral termination of her labor contract. The claimant requested her immediate reincorporation to her usual activities in the bar, which included waitress services as well as the payment of all due compensation.

Holding: The Court granted the claimant the protection to equal treatment under the law, non-discrimination, work, social security, human dignity, and minimum vital income to the claimant. Therefore, it determined that: (i) the Defendant was obliged to reincorporate the claimant to her usual activities –within a 48 hour period-; (ii) the Defendant had to pay the claimant the salary that was due since the date of the unilateral termination; (iii) the Ombudsman was responsible for warranting the performance of the decision; and (iv) the Social Protection Ministry, the administrative authorities of the District and the National Police must take action towards achieving the full protection of the rights of sex workers.

## Sex Work

Rationale: The Court reaffirmed previous decisions<sup>3</sup> that had established a special protection from the State towards minorities or groups of people in circumstances of discrimination because of their vulnerability, in order to fully realize the right to equal treatment under the Law, as provided in Article 13 of the Constitution (equality clause). Specifically, the Court determined for the first time that prostitution, in cases where there was no coercion was sex work and that sex workers were a group that demanded special protection from the State. Regarding the specific case, the Court determined that the protection was to be granted on the basis that: (i) the unilateral termination of the labor contract occurred while the claimant was pregnant; (ii) the circumstance of the pregnancy was known by the defendant; (iii) the termination was motivated precisely by such circumstance; (iv) there was no proof of the existence of an authorization by the Work Inspector to end the labor contract; and (v) the termination caused a breach of the right to receive a minimum income.

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<sup>3</sup> See article 16, 1991 Colombian Constitution.



### **DECISION T-736 of 2015 Protection of the fundamental rights to have equality under the Law, freedom to develop one's personality, work, due process and to receive a minimum income**

Decision T-736 of 2015 reviewed a judicial decision adopted by a judge from Yopal, Department of Casanare. This decision denied the protection of the fundamental rights of the claimant, and specifically the right to equality under the law, freedom to develop one's personality, work, due process and minimum income. The claimant, who was the owner of a sex workers bar, a mother and responsible of two grandsons, requested the protection of her rights which were allegedly breached by the Mayor, the Municipal Council and the Police Inspector for the decision to close the establishment, in response to Territorial Ordinance Plan (Plan de ordenamiento territorial).

Holding: The Court granted the protection to the claimant and ordered the Mayor of the municipality: (i) to relocate the establishment of the claimant in order to ensure the continuity of the commercial activity; (ii) to adopt all the measures in order to guarantee that high-impact commercial activities comply with the existing Territorial Ordinance Plan; (iii) to verify and ensure that new or existing premises could run its business in the municipality; (iv) to offer the claimant, in case that she did not wish to relocate her establishment, a labor alternative that ensured her right to a minimum income; and, (v) to design a public policy which included labor alternatives to sex workers, as well as an accompaniment to ensure the knowledge and full-exercise of their rights. Additionally, the judicial providence ordered the Municipal Council to take into consideration the criteria set forth in the decision, in order to achieve a better and adjusted legal framework.

## Sex Work

Rationale: The Court restated that sex workers were a marginalized group which required special protection from the State. Particularly, the decision determines that the measures adopted by the Mayor, the Council and the Police Inspector were carried out without the adoption of necessary mitigation activities, in violation of the principle of legitimate confidence, and of the right of the claimant to work and to receive a minimum income. In that terms, the measure of closure violated the sex worker rights and turned disproportionate and unreasonable.

Observations: Justice Jorge Ignacio Pretelt Chaljub filed a dissenting opinion.

### **DECISION T-594 OF 2016 . Sex workers protection of their rights to work, personal integrity, due process, free locomotion, non-discrimination and the right to be free from any violence.**

Decision T-594 of 2016 studied a *tutela* case filed by two sex workers against the Defense and Work Ministries, the Metropolitan Police of Bogotá, the Mayor of Bogotá and the Ombudsman. The claimants requested the protection of their rights to work, personal integrity, due process, free locomotion, non-discrimination and the right to be free from any violence. The *tutela* was filed after the claimants, along with other 13 women that worked in a “tolerance zone” located in Bogota, were physically attacked and apprehended by a group of the Metropolitan Police of Bogota, allegedly, due to their condition as sex workers.

Holding: The Court partially granted the protection holding that: (i) the claimants’ rights to freedom of locomotion and their rights to personal integrity were violated; (ii) the Metropolitan Police of Bogota was banned from adopting the *public space recuperation program*; (iii) the Mayor of Bogota was ordered to enact policies directed towards providing labor alternatives to sex workers and towards instructing the Metropolitan Police on the importance of treating sex workers with respect and in accordance to their human dignity; (iv) the Work Ministry was ordered to present a regulation project that promoted the respect for the rights of sex workers; and (v) the Ombudsman had to brief the Constitutional Court with respect to the compliance of the decision.

Rationale: The Court held that the right to freedom of locomotion imposed both negative and positive obligations on the State, that it was a precondition of the exercise of other fundamental rights (education, work and health), and that limitations to this right had to comply with the principles of *reasonableness* and *proportionality*. Additionally, and in accordance to what was provided in Decision T-629 of 2010, the Court reaffirmed that sex workers demanded a special protection from the State in order to fully realize the right to equal treatment under the Law, as provided in Article 13 of the Constitution.

## Sex Work

When analyzing the conduct of the Metropolitan Police, the Court reminded that measures that *prima facie* were designed to protect the rights of the community —such as the *public space recuperation program*—, could, nonetheless, result in violations of fundamental rights when they were executed in a way that did not attend the principle of proportionality. Therefore, the Court concluded that the measures executed by the Metropolitan Police were disproportionate, violating the rights of the claimants to be treated with dignity and to not be discriminated by their physical appearance or by the work activity they develop.

### **DECISION SU-062 OF 2019 Owners of a sex work bar challenged the legality of the order issued by a Municipality.**

Decision SU-062 of 2019 dealt with a claim *via tutela* filed by the owners of a sex work bar, to repeal the administrative order of the Municipality that determined the sealing of their business premises.

Holding: The Court denied the *amparo* for the following arguments: (i) the claimants' rights to due process had not been violated; (ii) the rights to work and to free development one's personality had not been breached; and (iii) the right to equality was respected.

Rationale: In reviewing the procedural argument presented, the Court held that the administrative act deciding the appeal of the decision that ordered the closing of the establishment was legal, as it was duly notified to the claimants.

Turning to the substantial arguments, the Court reaffirmed that sex workers must be respected in their right to work. However, it held that such rights did not render the closing of the establishment unconstitutional. Instead, the Court found that, in this case, there had been no violations of any of the fundamental rights alleged by the claimants, since the decision to order the closing of the prostitution establishment had been exclusively based on an incompatibility between the legally permitted uses of the land –which constituted public order norms–, and the commercial activities carried out by the claimants. Furthermore, the Court asserted that the claimants could very well undertake the same activities in another place within the same Municipality if they complied with the provisions regarding the use of land. This, led the Court to concluded that Municipalities have the right to determine the areas in which prostitution establishments could and could not operate.

Observations: Two justices, Reyes Cuartas and Fajardo Rivera filed dissenting opinions.

### DECISION C-355 OF 2006. Provision criminalizing abortion

Decision C-355 of 2006 was the result of an action of unconstitutionality presented by several citizens before the Constitutional Court against a legal provision criminalizing abortion on all grounds, which was contained in the Criminal Code. The actors' argument was twofold: (i) the criminalization of abortion, as conceived by the law under review, unreasonably limited the fundamental rights of the pregnant mother, specially their rights to human dignity, free development of personality, of equality and the right to life of the mother; (ii) international human rights provisions –which form part of the constitutionality bloc–, together with the interpretations set by the chief interpreter bodies of these instruments, were being breached.

Holding: The Court deemed that a blanket ban on abortion was unconstitutional, and proceeded to decriminalize three situations in which women should be guaranteed their constitutional right to opt for abortion. These situations are: (i) rape or pregnancy without consent; (ii) fetal malformations incompatible with life; and (iii) a pregnancy threatening the life and health of the mother.

Rationale: The Court began by recognizing the wide margin of discretion enjoyed by the legislative branch to determine matters within the framework of criminal law (i.e. determining punishable conducts and the type and severity of the sanction). However, when turning to the analysis of the principles and rights in tension, the Court noted that human dignity constitutes a principle of paramount significance in the Colombian legal order that helps delineate the personal sphere enjoyed by each person. Even more, together with the right to health, these two institutions stand as limits to the legal framework of Congress in criminal law matters. Yet, the Court's principal argument was that the norm under review was not consistent with the spirit of the 1991 Constitution. In effect, it observed that while the Constitution is based in the coexistence of different constitutional principles and values, the provision implied the absolute supremacy of the rights of the *fetus* over those of the mother. A more flexible approach, on the contrary, would lead to a balance between the protection of both the rights of the fetus as well as those of the pregnant mother.

## Abortion

Observations: Justices Rodrigo Escobar, Marco Gerardo Monroy and Álvaro Tafur filed dissenting opinions. Justices Jaime Araújo and Manuel José Cepeda filed concurring opinions.

### **DECISION T-209 OF 2008. Voluntary pregnancy interruption**

Decision T-209 of 2008 dealt with a case of a minor that wished to interrupt her pregnancy. For such purpose, the claimant alleged that she had been sexually assaulted. The health care provider in charge of conducting the procedure denied the procedure on the basis of conscientious objection. The claimant requested the protection of her fundamental rights, as well as the compliance by the healthcare provider of Decision C-355 of 2006.

Holding: The Court granted the protection to the fundamental rights alleged by the claimant as well as her reproductive rights –albeit the pregnancy was not, at the moment of the decision, in a stage that made it possible to interrupt it–, and decided: (i) to concede damages to the minor which had to be fully paid by the health care provider; (ii) to communicate the decision to the Ombudsman in order to assist the claimant in the judicial process; and (iii) to communicate the decision to the Health Ministry in order to investigate the facts of the case and adopt the corresponding sanctions.

Rationale: The Court reaffirmed the holding of Decision C-355 of 2006 and stated that it was within the scope of the reproductive rights of women, to decide whether or not to interrupt the pregnancy. In such cases, the National Health System has to provide all the means and assistance to ensure such right. The Court also established that, in relation to the conscience objection, such a right was not absolute and that only persons (i.e. the doctor that faced the medical procedure) could validly, based on religious reasons, claim such objection. Nonetheless, the Court concluded that when a conscience objection was claimed, the doctor, as well as the health care provider had the responsibility to refer the patient to another health care provider capable of carrying out the procedure.



### DECISION T-301 OF 2016. Right to Voluntary pregnancy interruption

Decision T-301 of 2016 reviewed a case of fetus malformation (hydrocephaly) and a claim of *tutela* made by the claimant to protect her fundamental right to voluntarily interrupt the pregnancy. The claimant, who had a pregnancy of over 25 weeks, did not achieve her right to IVE since her case was remitted to different hospitals, which lengthened the process. In the end, the claimant entered into labor and gave birth to the child.

Holding: the Court denied the protection on the basis of the inexistence of constitutional right to protect (since the child had already born) but decided to: (i) concede damages to the claimant; (ii) order the health care provider to medically assist the child and procure him with all the relevant health assistance needed; (iii) order the health care provider to afford the claimant all the necessary psychiatric and psychological treatment; (iv) prevent the health care provider of its duty to attend promptly the requests pertaining to cases of voluntary interruption of pregnancy.

Rationale: The Court reaffirmed previous decisions that related to the fundamental right to voluntarily interrupt the pregnancy and reproductive rights and stated that, in cases where the birth had already occurred, although such right had ceased to exist, the Court could nonetheless<sup>4</sup> examine the facts of the case and decide differently with respect to previous judges' decisions (in exercise of constitutional jurisdiction). In this sense, the Court stated that, within the context of Decision C-355 of 2006 and the regulations that followed, every actor involved in the process of a voluntary interruption of pregnancy should act within the scope of the actions and steps necessary to guarantee such fundamental right.

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<sup>4</sup> Colombian Constitutional Court, decisions C-355 of 2006, T-209 of 2008, T-946 of 2008 and T-841 of 2011.

## Abortion

The Court further clarified that the right to voluntarily interrupt the pregnancy was not equivalent to the medical procedure, since the women has the right to: (i) receive adequate and sufficient information as to her options and alternatives; and (ii) accede to medical, psychiatric, psychological and social work services.

Observations: Justice Gabriel Mendoza filed a dissenting opinion.

### DECISION SU-096 OF 2018 women's fundamental right to voluntary interruption of pregnancy

Decision SU-096 of 2018 took a further step in protecting women's reproductive autonomy. The Claimant, which had more than 24 weeks of pregnancy at the moment of filing the *tutela*, had been previously diagnosed with a malformation of the fetus, and doctors considered that the fetus had serious motor and cognitive disabilities, which could affect his life expectancy.

Holding: The Court denied the protection on the basis of the inexistence of a constitutional right to protect (since the medical procedure was in fact practiced by means of a provisional measure granted by the Circuit Judge), but upheld the claimants reproductive rights and decided: (i) to exhort Congress to enact effective legislation in order to overcome the barriers that impeded the access to the voluntary interruption of pregnancy; and (ii) to order the Public Health Ministry to regulate the access to such right, and to issue legal provisions and decrees thus allowing to overcome the existence of administrative barriers.

Rationale: The Court reaffirmed women's fundamental right to voluntary interruption of pregnancy, in the same line established by Decision C-355 of 2006. The decision, nonetheless, provided further considerations with respect to the following aspects: (i) it reaffirmed the right of women to be provided with a clear and timely medical diagnoses; (ii) it ordered the duty to eliminate the barriers that women face while accessing to this procedure; (iii) it exhorted Congress to regulate the matter in the exercise of its legislative powers; (iv) it concluded that the determination of certain cases which require medical certification was justified due to the fact that medical professionals should act in accordance with their own professional ethical standards, in addition to the free and informed decision of the pregnant woman; and (v) it concluded that minors were legally apt to determine abortion, so long as they were free to develop their own personality.

Observations: Justices Carlos Bernal, Cristina Pardo and Luis Guillermo Guerrero filed dissenting opinions. Justice Alejandro Linares filed a concurring opinion.

### **DECISION C-075 OF 2007 patrimonial effects of the community of life only between a man and a woman**

Decision C-075 of 2007 dealt with a lawsuit that requested the unconstitutionality of Article 1 of Law 54 of 1990, which provided the existence and patrimonial effects of the community of life only between a man and a woman. The claimant alleged that such narrow definition of the legal provision breached the constitutional right of equal protection and treatment under the Law.

**Holding:** The Court declared that Article 1 of Law 54 of 1990 was constitutional but in accordance with the understanding that the protection included same-sex couples.

**Rationale:** The Court recognized the capacity of same sex couples to engage in *de facto* marital unions, a regime formed out of the permanent cohabitation of unmarried couples with a “singular community of life” for more than two years. This decision constituted a decisive ground for the Court to expand the rights of same-sex couples in *de facto* marital unions over the following years, including the recognition of health coverage and retirement pensions, in the same terms as heterosexual couples, as well as social security benefits and housing subsidies for low income families.

**Observations:** Justice Jaime Araújo Rentería filed a dissenting opinion. Justices Jaime Córdoba Triviño, Nilson Pinilla Pinilla, Rodrigo Escobar Gil and Marco Gerardo Monroy Cabra filed concurring opinions.

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<sup>5</sup> Colombian Constitutional Court, decision C-811 of 2007.

<sup>6</sup> Colombian Constitutional Court, decision C-336 of 2008.

<sup>7</sup> Colombian Constitutional Court, decision C-029 of 2009.

### **DECISION C577 OF 2011. marriage as a solemn contract between a man and a woman.**

Decision C-577 of 2011 studied a claim of unconstitutionality against article 113 of the Civil Code which defines marriage as a solemn contract between a man and a woman.

Holding: The Court held that even though same sex couples' *de facto* marital union could be recognized, this recognition was insufficient and that the deficit of protection had not yet been overcome by the legislative branch. Therefore, as they should be given the possibility to enter into a marital contract to perfect its union, the Court exhorted Congress to legislate on this particular matter and fixed a two-year period to do so (until July 20<sup>th</sup>, 2013). If, upon the expiration of such term, Congress had not enacted a law, then the Court ruled that competent public notary or judges were authorized to formalize such agreement following the respective request.

Rationale: The Court started by analyzing the concept of "family" and whether it was constitutionally valid to interpret that only heterosexual couples could fit into this description. For the Court, the fact that "family" was defined in Article 42 of the Constitution as a relationship between a man and a woman product of marriage, or by the voluntary and responsible decision to conform it, was not incompatible with the social reality that imposed that there were many types of families. The Court reasoned that, through an evolutionary approach and interpretation, it could be stated that social reality had shown many types of families (i.e. monoparental). Thus, beyond the economic protection that same-sex couples had, which was reaffirmed in the terms of decision C-075 of 2011, the Court found that there was no valid constitutional argument that justified that the same sex couples could not voluntarily formalize a union and constitute a "family". Additionally, the Court noted that any type of discrimination had to be closely analyzed and that in this case it was notorious that a consistent and prolonged type of discrimination had occurred against same-sex couples, which had to be compensated.

Observations: Justice María Victoria Calle Correa filed a dissenting opinion.

## DECISION T-717 OF 2011 recognition of a de facto marital union in a hereditary process.

Decision T-717 of 2011 reviewed a *tutela* case against a judicial decision that denied the recognition of a *de facto* marital union in a hereditary process. The Claimant –the partner who was not recognized as the spouse of the deceased– alleged a violation of his fundamental right to due process.

Holding: The Court granted the protection and decided to: (i) reverse de judicial decision and declare it without any legally-binding effects; and (ii) return the file to the Judge of the proceedings in order to execute the pending procedural steps. The judge of the proceedings should bear in mind that, in order to declare the existence or not of a *de facto* marital union, no specific evidence could be demanded.

Rationale: After reviewing the compliance of the strict standard upon which a *tutela* can be filed against a judicial decision, the Court concluded that the judge of the proceedings had misinterpreted and misapplied Law 54 of 1990, which provided that a *de facto* marital union could be established without recourse to any specific evidence (i.e. a public deed formalized before a notary public).

### DECISION SU-214 OF 2016 Same sex couples denied right to execute a marital contract

Decision SU-214 of 2016 studied several claims of same-sex couples which were allegedly being denied their right to execute a marital contract in order to perfect its *de facto* marital union by public notaries and judges throughout the country.

Holding: The Court decided to grant the protection of multiple claimants' rights to free development of personality, family protection and due process (in those cases where judges had declared void the execution of marital unions after July 20<sup>th</sup>, 2013). Based on the above, the Court considered that the decision had *inter pares* effects amongst the group of people that were being denied the right to formalize their union. The Court also declared that those unions and marriages that had been executed after July 20<sup>th</sup>, 2013 were completely valid.

Rationale: In this decision, the Court revisited its 2011 ruling and held that there was no legitimate reason to allow a differential treatment between heterosexual and same sex couples. As a result, it ordered judges and notaries to validate the same type of *marriage contract* recognized by the Colombian Civil Code to same-sex couples' marriages in the country.

Observations: Justices Luis Guillermo Guerrero Perez, Jorge Ignacio Pretelt Chalhub and Gabriel Mendoza filed dissenting opinions. Justices Alejandro Linares Cantillo, Jorge Iván Palacio Palacio, Gloria Stella Ortiz Delgado and María Victoria Calle Correa filed concurring opinions.

### **DECISION C-221 OF 1994. Possession and consumption of the personal dose of certain narcotics.**

Decision C-221 of 1994 dealt with a constitutional action that pursued the declaration of unconstitutionality of two provisions (section j) of Article 2 and Article 51 of Law 30 of 1986, which prohibited the possession and consumption of the personal dose of certain narcotics.

Holding: The Court declared the unconstitutionality of the legal provisions insofar as they criminalized the possession and use of narcotic drugs, and imposed penalties such as arrest and mandatory psychiatric treatment, measures that were inconsistent with the provisions of the Colombian Constitution, particularly the right to autonomy.

Rationale: According to this ruling, the law may only impose upon individuals a given type of behavior when it affects others, and not with regards to conducts that exclusively concern those individuals alone, because personal conducts are protected by the right to personal autonomy. Thus, in this decision, the Court understood free development of the personality as an individual right, based upon the Western notion of individual autonomy. In other words, by applying the rule that states that the right to free development of one's individual personality can only be constitutionally restricted when it affects others, the Court struck down the criminalization of the possession and consumption of the personal dose of drugs. The Court argued that if the State finds it desirable to reduce drug consumption, then in order to avoid violating the Constitution, it should resort to education, which is a less restrictive alternative.

Observations: Justices José Gregorio Hernandez Galindo, Hernando Herrera Vergara, Fabio Moron Díaz and Vladimiro Naranjo Mesa filed joint dissenting opinions.



### DECISION C-491 OF 2012. Unconstitutionality of the expression “carry” drugs.

Decision C-491 of 2012 reviewed two lawsuits that pursued the unconstitutionality of the expression “carry” drugs included in Article 11 of Law 1453 of 2011, as a normative element of the crime of drug trafficking, fabrication or carriage. Such expression was not conditioned, as the previous norm did, to the personal dosage destined towards consumption by an individual. The Claimants considered that this Article contravened human dignity, freedom to develop one’s personality, and promoted discrimination amongst drug-consumers.

Holding: The Court declared the constitutionality of Article 11, but considered that it should be interpreted in the sense that the crime described in Law 1453 of 2011 could not include the personal dosage of drug-consumers.

Rationale: In reaching this conclusion, the Court took as precedent Decision C-221 of 1994, as well as Decisions 23609 of 2007, 28195 of 2008 and 31531 of 2009 issued by the Criminal Chamber of the Supreme Court of Justice. For the Court, it was evident that the concept of *personal dose* that was omitted in the article under revision could be read in two ways: either the article criminalized drug consumers who consumed the *personal dose*, or it was an omission that did not purported such criminalization. The Court considered that the second interpretation had to be banned, since concluding it would signify a breach to the principle of proportionality and of the prohibition to exceed regulation in criminal matters. Additionally, it considered that drug-consumers must not be criminalized since the whole phenomenon was a matter of public health.

Observations: Justice Gabriel Eduardo Mendoza Martelo filed a dissenting opinion.

### DECISION T-124 OF 2014. protection of the minor's rights to health and social security

Decision T-124 of 2014 reviewed a *tutela* case where the claimant, the legal guardian of a minor that suffered from psychiatric symptoms due to his problem with drug-consumption, requested the protection of the minor's rights to health and social security. The *tutela* was filed against a health care provider that had refused to provide the service of rehabilitation to the minor under the argument that the Mandatory Health Plan did not include such service.

Holding: The Court granted the protection of the minor's rights and requested the health care provider to procure, within 48 hours, the service of rehabilitation in a suitable center, as well as all the medical assistance needed to reinstitute the patient's health. In addition, the Court ordered the District Health Secretary of the Department of Casanare to design, implement and execute a public policy whose objective was to prevent and inform of the consequences of drug-consumption.

Rationale: The Court remembered that the treatment of mental disorders associated with drug-consumption was inherently related with the right to healthcare and towards self-determination. As such, the Ministry of Health had to include such health issue in the Mandatory Health Plan. Additionally, the Court considered that, in light of the fact that the case involved a minor, the solidarity principle had to be hoisted in a manner that not only the family of the minor, but that society as a whole, had to adopt conducts towards guaranteeing the minor's health.

### **DECISION C-253 OF 2019. consumption of alcohol and drugs in public areas, places open to the public, or that being private transcend to the public sphere**

Decision C-253 of 2019 studied the constitutionality of two legal provisions from the National Police Code which prohibited the consumption of alcohol and drugs in public areas, places open to the public, or that being private transcend to the public sphere, as allegedly it violated the right to autonomy.

Holding: The Court declared the unconstitutionality of these provisions, which were part of the National Police Code, after considering that they imposed significant restrictions to the right to autonomy and, more particularly, the right to free development one's personality, in accordance with the precedent established by decision C-221 of 1994.

Rationale: This decision was reached after conducting a *proportionality* test, that questioned whether the general prohibition: (i) pursued a legitimate constitutional principle; (ii) constituted an ideal mean for achieving such goal; (iii) whether it was necessary, insofar as no other less-harmful, with the same effectiveness, could be executed; and (iv) the measure was proportionate between the constitutional costs and benefits obtained. After conducting such test, the Court considered that the general prohibition of consumption in public spaces was not proportionate.

Observations: Justice Carlos Bernal Pulido filed a dissenting opinion. Justice Alejandro Linares Cantillo filed a concurring opinion.