Case SU-623/2001

Reference: File T-361534

Writ of *tutela* lodged by Cesar Augusto Medina Lopera vs. Comfenalco H.S.C *[Health Service Company, for its acronym in Spanish]*.

Magistrate Rapporteur: Dr. RODRIGO ESCOBAR GIL

Bogotá, D.C., fourteenth (14) of June two thousand one (2001).

The Constitutional Court, in plenary session, in exercise of its constitutional functions and with the previous fulfillment of the legal requirements, legal and regulatory procedures, has delivered the following:

JUDGEMENT

As part of the reviewing process of the decision delivered by the Ninth Civil Municipal Judge of Medellin to the writ of *tutela* filed by Cesar Augusto Medina Lopera against Comfenalco H.S.C.

This file was selected for review *via* resolution of 20 September issued by the Selection Chamber Number Nine and distributed to the Third Chamber of Revision.

In accordance with Article 34 of Decree 2591 of 1991 and with Agreement 01 of 1997, that added the Rules of Constitutional Court, the Full Chamber, in ordinary session of 17 January 2001, decided to review the present file.

I. Precedents

1. Facts

1.1 On 30 March 2000, Mr. Cesar Augusto Medina Lopera (the Plaintiff) filed a writ of *tutela* against Comfenalco H.S.C (the Respondent) before the Ninth Civil Municipal Court. In the view of the Plaintiff, the Respondent violated his rights to health and to social security, as well as his rights to equality and to free development of the personality by denying him membership as a beneficiary of the Social Security System.

1.2. The Plaintiff affirms that on 12 January 2000, he asked Comfenalco H.S.C., to register him as a beneficiary of the Health Social Security System, as a life partner of John Jairo Castaño Suescun – contributor of the aforementioned H.S.C. He asserts that although he submitted all the documents required by Comfenalco H.S.C on 15 January 2000, including the affidavit oath declaration signed by two witnesses, which states that he has lived with Mr. Castaño Suescun since 1994, Comfenalco H.S.C notified to the Plaintiff that his request for membership was denied.

1.3. The Plaintiff states that through a written communication issued on 19 January 2000, John Jairo Castaño, the contributor, asked the directors of

Comfenalco H.S.C to inform him in writing of the reasons that were taken into account when the decision was made to deny the application for membership of his life partner. The Plaintiff states that on 1 February the entity responded that in accordance with the Constitution and the legal norms, a common law marriage may only be asserted if the union is between heterosexual people. Accordingly, the right to membership to health services as a beneficiary of a life partner cannot be extended to individuals of homosexual unions.

1.4. After receiving this communication, the Plaintiff asked the judge for a writ of *tutela* in order to secure the protection of his fundamental rights and, consequently, to order the H.S.C. to accept his membership as beneficiary of the Health Social Security System.

1.5. The legal representative of Comfenalco Antioquia, Program H.S.C states that it is incorrect that the fundamental rights of the Plaintiff were violated. They claim that Comfenalco H.S.C acted in accordance with the law. In this regard the representative affirms the following:

> "Currently, Mr. John Jairo Castaño Suescun is a member of Comfenalco H.S.C. Program, in the Contributive General System of Health Social Security of which he has been a part since 22 February 1999. From that moment on he has been a contributor to Comfenalco as an employee of Yolanda Ríos Alzate in which time he has never listed anyone as beneficiary, and he is able to work."

Article 26 of the Decree 806 of 1998, which regulates Law 100 of 1993, sets forth guidelines about who can be eligible members of the contributive regime. Among these persons are beneficiaries of a contributor with the capacity to pay, stated in Article 26.2 as 'the members of the familiar group of the contributor, in

accordance with the regulations of the present decree'. In this respect, Article 34 of the aforementioned decree regulated the coverage of the Mandatory Health Plan for the benefit of the family group of the contributing member, and expressly said that 'when there is no spouse, the life partner may be affiliated as beneficiary only if the union has lasted more than two years."

The legal representative of the Comfenalco H.S.C reaffirms that, in accordance with the Constitution and with Law 54 of 1990, it may not be asserted that there was a common law marriage between the contributing member and his homosexual partner. This is because such a union may only be attributed to recognized unions between heterosexual partners. Consequently, the legal representative for the company requests that judge of *tutela* deny the requested protection.

2. Judgment subject to review.

2.1. The Ninth Civil Municipal Judge of Medellin denied the requested constitutional protection through the judgment of 22 June 2000. In his Honor's opinion,

"It is a mistake to affirm that the relationship between Mr. CESAR AUGUSTO MEDINA LOPERA and Mr. JOHN JAIRO CASTAÑO SUESCUN may be considered to be similar to the one between permanent life partners,[1] since neither society, nor law, nor the jurisprudence of our country has considered such a relationship to fit this category. A homosexual union is only a way to be and to behave, but in no manner is it similar to the category that the Plaintiff wishes to apply i.e. that of a common law marriage... Consequently, it is not possible to grant the same rights and obligations of a relationship that is

[1] Note of the translator: permanent life partners of the common law marriage.

regulated by law, to a situation that, so far, has not been regulated."

In order to support his position, the Judge quoted several norms, including Article 162 of Law 100 of 1993, which makes reference to family coverage,

> "… Norms indicate what must be understood by family coverage. A mandatory health plan will have family coverage, and consequently, it will include the spouse or the permanent life partner of the affiliated member whose union has lasted more than two years"

This *tutela* was selected for revision, and it was assigned to the Third Chamber of Revision.

3. Proofs requested by the Chamber of Revision of the Court.

3.1 In the decision of 23 November 2000, the Third Chamber of Revision required the National Council of Social Security and the Minister of Health to inform the Court about certain aspects of the General System of Social Security in Health. Specifically, these entities were requested to illustrate to the Court what kind of membership to the General System of Health may be granted to a person who, despite being financially dependent on an existing member and is unemployed, cannot be affiliated to the system as beneficiary of the contributor. This was demonstrated using the legal norms that regulate this matter. The entities were requested to indicate whether the socio-economic conditions of these persons, or the socio-economic- level to which they belong, are a criteria that determines their affiliation/membership to the General System of Social Security in Health.

3.2. In the response of 29 November 2000, the Chief of the Juridical Office and Legislative Support of the Minister of Health affirms that for a person to be affiliated to the Contributory Regime of the General System of Social Security in Health, she/he must meet the criteria set forth in Articles 34 and 40 of Decree 806 of 1998, which was complemented by Articles 1 and 2 of Decree 047 of 2000. The Chief indicated that:

> "… if the analysis of the degree of kinship that exists between the person [who aims to be affiliated as the beneficiary] and the person on whom she/he financially depends in that moment, leads to the conclusion that it is not possible to affiliate the person as a beneficiary or as an additional person to the contributory regime, there is no other alternative than concluding that the system will take care of her/him as an associate." (emphasis not in the original)

Moreover, the Chief of the Juridical Office and Legislative Support of the Minister of Health affirms that if the unemployed person, due to her/his financial dependence, lives in higher socioeconomic conditions than those characterised by strata 1, 2 and 3:

> "… she/he cannot be part of the subsidized regime, as she/he will be included in the legal limitations. Therefore, the person must demonstrate that due to her/his unemployment she/he is financially dependent on the family member that has given her/him support and protection in this situation, and that because of her/his financial incapacity, she/he cannot contribute to the System as an independent, so the survey of the SISBEN may be modified"

Finally, the Chief of the Juridical Office affirms that given the event that this person should not be affiliated to the contributory regime or to the subsidized regime of the General System of Social Security in Health,

> "… the only possible alternative is to take care of the person as an associate, in public institutions and in private ones that have a contract with the State through the competent territorial entity and with the resources from subsidies to the offer."[2]

II. CONSIDERATIONS AND GROUNDS

1. Legal Issue.

The main legal issue that the Court will address in this case is whether the right to health, to social security, to equality and the free development of personality are violated when a person is excluded from accessing the contributory regime of social security in health as a beneficiary of his/her contributory homosexual partner with whom she/he lives.

2. The extension of social security coverage and the right to equality in the Political Constitution.

Social security is considered in our Political Constitution as a prestational right[3] that, at first, is not fundamental, and accordingly it is not subject to protections

[2] Original draft presented by magistrate Manuel Jose Cepeda Espinosa is adopted up to this point.

[3] *Note of the translator*: 'prestational rights' are rights that the government is obliged to protect on behalf of its citizens (such as the right to health care) and if they are unable to access these rights through their own means, the government must provide them. 'Prestational rights' are those that the government is obliged to take positive actions to protect rather than abstain from infringing them and are usually categorized as "second-generation human rights"

through the writ of *tutela.* However the *tutela* of the right to social security is thus admissible whenever the violation of the right to social security implies a threat or a breach of fundamental rights, and when the fundamental rights may be restored through the protection provided by the right to social security. In those cases, the jurisprudence of the Court has affirmed that the right to social security becomes fundamental when it is connected to a fundamental right. This connection between fundamental rights and non-fundamental rights allows the constitutional judges to extend the scope of protection of the writ of *tutela.*

In the present case, the Plaintiff considers that his right to social security has been breached as a consequence of H.S.C denying his request of affiliation as a beneficiary of his partner. Therefore, the Court considers that it is pertinent to rule on the relationship between social security and equality in our Political Constitution in order to determine if denying the affiliation of a person as beneficiary implies a breach of his/her rights to social security and equality.

Social security is a mandatory public service that is also a subjective right and as such, the non-derogable right to social security is guaranteed to every citizen. The determination of the content, the scope of the right, and the extension of the coverage of the public service are mainly established by law and are based on express constitutional mandates (Political Constitution Article 48). However, the State has constitutional obligations and restrictions as decision-maker. Some of these are characteristic of a public service, such as the extension of the coverage and other general restrictions applicable to the whole activity of the State such as the prohibition of discrimination.

These prohibitions and obligations are not only applicable to the law-giver and to the State entities that are in charge of ruling on the matter, but are also applicable to those who provide a service regardless as to whether it is a private person or it is the State, even though certain differences do exist.

However, it is necessary to take into account that the right to social security requires a legal development that allows for the benefits between the population to be properly distributed. The need to develop constitutional regulation regarding social security has lead the Court to affirm that social security is an integrated normative system whose complexity cannot be ignored *prima facie*, by the constitutional judge. Regarding this matter, the Constitutional Court in judgment SU- 480/97, stated that:

> "if we depart from the fact that social security is within the constitutional principles of material equality and the legal social state, it may be understood that the rules expressed in laws, decrees, resolutions and agreements do not exist to limit the right to social security but to allow the normative development addressed towards the optimization of the right, so that those constitutional rights may be effective (unless legal limitations do not affect the essential core of the right).
>
> This is the reason why, in order to issue the mandate that finalizes every writ of *tutela* related to health, it is imperative to take into account the normative rules that the legislator established in Law 100/93, Book II (Article. 152 and it's subsequent Articles) and in decrees, resolutions and relevant agreements. The important thing is to bear in mind that the unity of principles and rules inform the system, and this must be taken into account by the judge of *tutela*."

The necessity of such legal and administrative regulation requires distinguishing between two different moments: first, the creation of the regulation that establishes criteria which will be grounds for judging the distribution of the services and benefits of the system among the population. The creation of this regulation is the responsibility of the State. Secondly the moment of implementation, in which the criteria previously defined in the regulation are

applied.

Some of the specific restrictions and obligations that are imposed on the legislator in the establishment of the criteria that regulates the system of social security are derived from specific constitutional principles on social security. Thus, legal regulation made by the State regarding access to social security must take into account principles of efficiency, universality and solidarity as established by law (Political Constitution Article 48).

Universality implies that the coverage must be gradually extended to a greater part of the population and that, within the process of extending coverage of persons who can be covered by one of the schemes, the discrimination against specific groups of the population cannot be accepted as constitutionally valid. Therefore, for example, the decision of an entity not to affiliate a person to the health security system based on her/his sexual orientation clearly constitutes a violation of the right to equality. However, this does not mean that sexual orientation should become a criterion for deciding to whom the coverage of the service of social security in health should be extended.

The criteria on which the coverage of the service is progressively extended are multiple and, although constitutional norms limit them; other factors, such as economic or demographic considerations must be considered by the law-maker in the first instance. Within the scope of this analysis, the law-maker should determine which social groups require coverage, with greater urgency, so that the distribution of benefits could be achieved in accordance with proven social needs.

In this regard, the Court in its Judgment C-714/98 (M.R. Fabio Moron Diaz)

affirmed that:

> "[a]ccordingly, the public service of social security, in the view of the Court, should be provided in accordance with the principles of efficiency, universality, equality, unity and participation in a progressive manner, with the aim to cover the entire Colombian population. Therefore, the normative content of Law 100 of 1993 and other complementary norms should be interpreted by taking into account this specific conceptual framework. Consequently, in the view of this Court, the organization of the integrated social security system is the responsibility of the legislator. The direction, coordination and control of the integrated social security system will be the responsibility of the State whose basic objectives are to guarantee economic and health benefits to those who are currently employed, or have sufficient economic capacity to be affiliated to the system, or are part of one of the groups of the subsidized population. Further it is the responsibility of the State to guarantee the complementary social services. Therefore, **access to the system, for the population of dependent or independent workers, is conditional on the precise terms that the legislator sets forth, through the pertinent legislation.**" (emphasis not in the original)

In accordance with the above, factors such as financial incapacity, or indigence, or the high risk of suffering health problems may and should be taken into account by the law-maker when extending the service of social security. Thus, the protection of the right to social security in health, when connected with fundamental rights, is admissible when the constitutional judge can verify, among other things, that a legislative omission regarding the duty to protect the less favoured population exists.

The problem in determining the legislative duty to identify and to protect certain groups of the population, as well as judging the criteria on which this task should be founded necessarily leads to the analysis of the issue of equality in the field of social security.

The judgment made by the constitutional judge regarding the criteria established by the legislator must take into account the specific background of the problem of distribution of health services. This means that the legislative decision not to include certain social groups that have historically been marginalized (in this case, homosexual life partners) in the assignment of certain benefits does not necessarily entail a violation of the right to equality. This is true of the decision not to allow a homosexual life partner to be affiliated as a beneficiary of their life partner within the contributory regimen of social security in health.

This is due to the fact that the situation of marginalization or rejection in which a group of the population may be found does not entail *per se*, the obligation of the State to compensate the group through the assignation of certain social benefits whilst setting aside the grounds or conditions for the discrimination. In cases of social discrimination, it is mandatory that the constitutional analysis also consider the criterion that should have been taken into account, in order to include a specific group as beneficiary of the service. Living in partnership with another is adequate to protect rights that are alleged to have been breached, them being equality, social security, freedom to development of the personality and health.

In the field of social security, the multitude of criteria that the legislator may take into account implies that the analysis of the constitutional judge should be less strict. This is because there are considerations of financial, budgetary and demographic character that also imply the necessity to responsibly increase the

coverage, so that the continuity of the service can be assured. In Judgment C-613/96 (M. R. Eduardo Cifuentes Muñoz), the Court decided to apply a soft test of equality and said that:

> "… the definition of the content of prestational rights is a task that corresponds to the legislator and that is performed in regard of legal, political and budgetary considerations that, are in principle, beyond constitutional control. Only in cases where a law establishes discriminatory treatment in a prestational right, or breaches specific constitutional mandates, may the Court formulate the corresponding reproach. Only in those specific events, the configuration of such rights, or the manner in which they have to be paid, or the requirements that are established to have access to those rights, are issues that lie within the scope of action of the legislative power."

Therefore, the legislator should assure that the sector of the population that is financially active may permanently assume the constitutional burden that lies upon them because of the principle of solidarity, and that the system has the necessary resources to accommodate such an approach. There is specific difficulty that results from weighing diverse elements that help in the creation of the social security regime as well as the delicate management of incertitude regarding the evolution of the economic and demographical variables that should be taken into account in order to assure continuous and progressive coverage of social security. This implies a broad power of legislative configuration: once groups that have greater and more urgent needs are identified, the legislator may determine which of these groups will receive its protection taking into account the limitation of the system. In this regard, the Court, in Judgment SU-225/98 affirmed that:

> "[d]eference towards representative organs does not endorse abuse of power, which exists, when for example, the responsible authority in a manifest manner, disregards the mandate of action ordered by the Constituent or when an unjustified delay produces manifest violations of the dignity of the human person. It is important to underline that a **clause establishing that injustices be eradicated implies that the organs of power have freedom of discretion that must be based on available resources and the most adequate and suitable mechanisms. In other words, these organs have the power to legislate and to govern themselves. The scope of this power should be as wide as possible, however it is dependent on the historical context in which the organs are exercising this power.** However, regarding the priority and the necessity of compliance with effective measures, any organ of power may declare itself free, because in these matters the constitutional order has limited the competence of the constituted organs by relating them to a function that in terms of the Constitution is peremptory." (Emphasis not in the original).

The decision to extend coverage towards another group is not in itself a violation of the right to equality of other groups that were not beneficiaries at a specific moment. This Court, through Judgment C-098/96 declared the constitutionality of some expressions of Law 54 of 1990, although they did not include homosexual couples within the regime of protection of some *de facto* marital unions and of permanent couples. In that judgment/case, the Court accepted that the limited measures of protection that are established through legislative activity do not breach the right to equality by not including at the same moment all marginalised groups, even if they are in similar situations. The Court said:

> "Hypothetically speaking, even if we admit the term suggested by the Plaintiff (domestic partnership) to compare heterosexual *de facto* relationships with homosexual life partnerships, we should conclude that they are persons that

> belong to minority groups or groups discriminated by society. This is so even if we do not take into account the clear differences that separate the two types of partnerships found in Article 42 of the Political Constitution. Therefore, with no aim to justify or to perpetuate the existent injustices, **it does not seem reasonable to subordinate the solution of the problems of a class or group of persons to the simultaneous solution of the problems of other groups. Nor does it seem reasonable to automatically extend a measure that protects a group of persons over those that are not protected by the legal norm, even if they are facing an injustice of a similar kind.** If the legislator should act in that manner, solutions will be more expensive and more politically questionable, and at the end all unprotected and weaker groups will suffer more, as they will see as remote the real possibilities of progress and vindication of their rights. (Emphasis not in the original)

However, as the legislator did extend the coverage to heterosexual *de facto* relationships, it would be possible to affirm that the legislative decision not include the contributing member's homosexual life partner as a beneficiary of the contributory regime of social security is discriminatory. Accordingly, the discrimination will involve differential treatment of homosexuals based on their sexual orientation. Nevertheless, this affirmation cannot be accepted for several reasons. Firstly, as it was already mentioned, the progressive extent of coverage of social security health services is based on the necessity to guarantee the continuity of the service; that is to say, it has a valid constitutional purpose. Thus, the decision of the constitutional judge to extent coverage towards a specific social group will entail disregarding the task of legislative consideration when fundamental rights such as the right to a life with dignity are not in danger. Secondly, even though sexual orientation is an individual choice and a manifestation of the right to freedom of personal development that must be respected and protected by the State, it is not constitutionally comparable to the concept of family stated in the Constitution. Therefore the constitutionally

protected definition of family and the differences between *de facto* relationships and permanent homosexual life partnerships makes it impossible to judicially compare them. This Court in Judgment C-098/96 established that:

> "It has been indicated in this judgment that there are elements of heterosexual common law marriages that are not in homosexual life partnerships, besides the obvious difference of how they are composed, which is therefore sufficient to affirm that they are different. Heterosexual *de facto* relationships, which are considered to form a family, have their "integrated protection" guaranteed and especially, that a "woman and man" have equal rights and duties in the relationship (Political Constitution Articles 42 and 43). This is not a necessarily protected characteristic in homosexual life partnerships."

The Court has endorsed the possibility to exclusively protect the members of the family of the contributory member as beneficiaries of the contributory regime of the social security health system. This is justified not only by the progressiveness that characterizes the extent of the coverage of the service, but also because family is the object of integrated protection of the Constituent and because males and females should have equal rights and opportunities. Thus, this establishes another constitutionally valid purpose of the decision not to include the permanent homosexual couples of the affiliated to the contributory system of social security in health as beneficiaries of it.

Moreover, bearing in mind the difference between the constitutional concept of family and the one of a homosexual life partnership, it is possible to ask if even despite this, the different treatment between these two different groups is proportional and justified. In this regard, it is appropriate to affirm that in our society there are different kinds of relationships that share many characteristics

of family relationships, such as domestic partnerships, or unions made through effective or sexual connections. However, this does not imply that they have the right to receive social benefits from the State. Neither coexistence, nor the union through a diversity of emotional links that are equally valid and respectable constitute title to acquire the right to affiliation as beneficiary of the contributory regime of social security in health. The exclusion of such relations or of some of their characteristics, as criteria to benefit certain persons within the contributory regime of social security of health does not entail a disregard or a segregation of the persons that opt for any kind of effective relationship or of coexistence; nor does it imply an obstacle to the free development of his/her personality.

Finally, it is important to affirm that the legislator's decision to use the family criterion as grounds to include the beneficiaries of the main affiliate within the contributory regime is not in contradiction with the principle of universality that underlies the system of social security in health. Homosexual couples are not being excluded based on their sexual orientation as there are other means to become an affiliate of the system. Besides the possibility of becoming part of the system as beneficiary of the contributory regime, any person can be affiliated as an independent worker, if he/she has the capacity to pay. If he/she does not have that capacity, he/she can be affiliated to the subsidized regime; and if the person does not fulfill the requirements to be in any of those categories, he/she can be part of the system regardless his/her sexual orientation.

The development of the principle of universality without exclusions grounded on the sex of persons has been realised through the creation of the contributory and subsidized regimes, and the provision of mechanisms of public assistance during the period of transition in order to achieve the equal coverage of the whole population and the equalization of the plan of benefits. It is well known and accepted that due to the circumstances; universality is a point to arrive at and not a point from departure for the access to the System of Social Security in Health.

Therefore, it would be inaccurate to affirm that discrimination exists when access to the contributory regime in health is denied through this particular mechanism of affiliation that, as was already explained, implies the notion of family that cannot be disregarded. This is so because the couple evidently can access the system through any of the mechanisms that the law regulates, within the contributory regime, subsidized regime or public assistance (as part of the system of social security in health)

The law does not deny access to health services grounded on the "sexual orientation of a person", which will imply a manifestly discriminatory treatment, rather the law merely establishes that the chosen form – "as affiliate beneficiary of his/her homosexual partner contributor", is not the ideal mechanism to be part of the system. It is for this reason that it is not possible to make any consideration on equality (Article 13).

Furthermore it cannot be accepted, as it was already explained, that the idea of progressiveness of universality implies any kind of discrimination against a group of the population. Even if it is true that universality is imperative, this principle entails a regime of transition based on well-founded criteria of reasonability that does not allow, due to the financial limitations of the system, that every person has access to the provision of the same services and to identical coverage of guarantees and benefits. Despite this, the principle does not permit excluding anyone from the system of social security in health.

Affiliates to the contributory regime are those persons that have economic capacity to pay the contributions. On the contrary, the affiliates to the subsidized regime do not have this capacity, and it is because of this that their assurance is made through the complete or partial payment of one unit for subsidized capitation, with fiscal resources or with solidarity contributions through a co-financing regime of national or territorial level. It is clear that, in principle, it is not possible to offer an integrated coverage of the health plan to the people

affiliated to this regime, because the available financial resources mainly come from the transfers to the municipalities that are called "*participation of municipalities in the nation's current income*" and that will be progressively increased, year-by-year. This also occurs with the resources that come from Cusiana and Cupiagua, assigned by Law 100/93 to health subsidies.

In accordance with this regime, once the potential beneficiaries are identified, a process of "*selection of the beneficiaries for the affiliation to the regime*" will be started. Potential affiliates to the regime will be the ones that are indicated below. For these purposes, mayors of the municipalities or districts should create a list following a rigorous order of priorities, due to the scarce resources. It cannot be forgotten that the criteria of selection of the potential beneficiaries of subsidies is mainly due to consideration of budgetary character. In this vein, it is important to note that the persons that are indicated below should be prioritized in the list that the mayor will create, in strict order as follows:

First population of rural areas, then indigenous population and finally urban population. Within this order, priority will be:

Population that belongs to levels 1 and 2 of the SISBEN,

Indigenous communities through census lists, and

Other special populations: abandoned children, homeless, artists, authors and composers.

Within each of the aforementioned groups of population, the potential beneficiaries will be prioritized as follows:

Pregnant women and children that are less than five years,

Population with physical, mental and sensory limitations,

Population of the third age,

Women householders, and finally

The other part of the population that is poor and vulnerable.

Within the outlined population and following the mentioned order of priorities it is worthy to make a brief reference to the people classified in levels 1 and 2 SISBEN. Level 1 refers to families that are in situation of extreme poverty, that is to say, the ones that have two or more Basic Needs Unsatisfied (BNU), and/or that have a familiar income that allows them to buy only one basic food basket, defined by the DANE.

People of level 2, are those who are in situation of poverty, that is to say, those who have one Basic Need Unsatisfied and/or that have a familiar income that allows them to buy one basic food basket and other basic goods.

At this point it is worthy to note that the other levels of the SISBEN do not have Basic Needs Unsatisfied, but they have very reduced familiar incomes, *i.e*, familiar incomes equal to three, four, thirteen or more times the value of the basic food basket, they will be respectively classified in level 3, 4, 5 and 6 of the SISBEN; levels that are not included as potential affiliates to regime of the abovementioned lists.

Level 3, 4, 5 and 6 of the SISBEN correspond to a significantly wide part of our population, largely composed of autonomous workers, or informal independent workers, who for the moment will not be affiliated to the subsidized regime; the aggravating circumstance being that they will not be members to the contributory regime since they do not have sufficient incomes to be affiliated to this regime as

independent workers (incomes equal to two minimum wages is the minimum requirement).

How are these persons protected? These persons will be considered 'associates' to the system of social security through mechanisms of public assistance. That is, they will have access to those entities that have contracts with the State (subsidies to the offer) and where a recuperation fee will be charged based on her/his socio-economic level (Decree 806/98, Article. 49, Agreement 77/97). However, in accordance with Article 47 of Agreement 77/97, the mayor may opt for the extension of the beneficiaries of the subsidies to level 3 of the SISBEN, or for the extension of the contents of the POS-S to the existing members, so its content becomes equivalent to the POS of the contributory regime (with the previous recommendation of the Territorial Council of Social Security in Health).

This may be done once the municipality achieves the assurance of the totality of beneficiaries identified through SISBEN as members of Levels 1 and 2, and if the resources that must be allocated to subsidies for the demand allows it, without using the resources of the FOSYGA.

It is clear that law does not exclude any person from the access to the system of social security in health, does not discriminate against anyone for her/his sexual orientation because everybody receives the services that the system offers through any of the outlined regimes (contributory, subsidized or as associate to the system, the latter while their affiliation is achieved).

However , if in reality there is a wide group of persons – those that are incapable of paying cannot have access to the contributory regime and unfortunately cannot actually and temporarily have the affiliation to the subsidiary regime. As they do not

classify within the planned survey targeting – SISBEN 1 and 2 –, they are not excluded from the system because we insist they may accede as associates to the system, regardless of their sexual orientation. It is true that Law 100/93 sets forth that "*... from the year 2000, every Colombian should be part of the system through contributory or subsidized regimes*...", but mandatory principle, has not been able to be strictly complied with because of technical, operative or financial structural reasons.

The issue that is raised is: that since at present there is an important percentage of the population that is an associate of the system and that is unable to access to one of the existing contributory or subsidized regimes. If an exclusion exists for reasons that are not related with sexual orientation, is there discrimination against the majority (being heterosexual *de facto* partners) in order to favour a minority through a judicial decision that determines the access of these persons through one of the mechanisms that is not foreseen by law? (This means that persons of this minority would be registered in the system as homosexual beneficiaries of the contributor as part of the family group.). It would be granting privileges to a minority group of persons based on their sexual orientation that does not correspond to a recognized social priority through the formal legislative structure.

In this sense, it is pertinent to note that the contributory regime in Article 40 establishes the concept of additional members: "*... When an affiliated contributor has other persons, different from the ones established above, who economically depend on him/her and are younger than 12 years or that have a kinship to the third degree of kinship, she/he could include them in her/his familiar group, if he/she pays an additional contribution equal to the corresponding value of the Capitated Payment Unit. This is based on the age and gender of the additional person registered in the familiar group as established by the National Council of Social Security in Health. However, the affiliated contributor should guarantee at least one year of affiliation of the depending member and, consequently, the payment of the corresponding UPC...*" (Underline not in the text). Articles 1 and 2 of Decree 047 of 2000 support this disposition.

This disposition seeks the extent of the coverage through the contributory regime including in the family group persons who are related with the contributor through links different to those of kinship, marriage and *de facto* marital union. The disposition **exclusively** requires the economic dependence of the beneficiary on the contributor, but restricts the access to those below 12 years because of the fundamental character of the right to social security and the health of children (Political Constitution Article 44). Should eliminating the requirement of age and allowing the access to the contributory regime to a wider number of persons, of which homosexual couples would be found, be the way to extent the coverage without breaching clear constitutional mandates? The extension of this mechanism of affiliation to other social groups is a task that obviously lies with the legislator, as it has been indicated above.

3. Concrete case: applicability of the normative system of social security by the sued H.S.C.

In the present case, the H.S.C denied the affiliation of the Plaintiff as a beneficiary of the contributory regime of the social security system in health. At the stage of determination of whether a person fulfills the requirements to access the system of social security in health, health promotion organizations must respect the dispositions set forth in the regulation that is in force, without restricting the parameters defined in the regulatory norms. Therefore, if the decision of the entity to deny the affiliation is based on criterion that are not established in the normative and integral system of social security, the entity will be breaching the legality principle.

Accordingly, the Court will analyse in the present case if current regulation entitles homosexual couples to be subscribed as beneficiaries of the main affiliates in the contributory regime if they have lived together for more than two years. In this case it is not necessary that the law explicitly establishes the kind of

relations or social groups that were not included as beneficiaries of the contributory regime. This is in accordance with the abovementioned considerations, the decision of determining the extent of the coverage implies a positive action by the State which establishes priorities between social needs of an undetermined number of groups and sectors of the society, based on a multiplicity of criteria.

Article 157.1 of Law 100 of 1993 establishes who will be affiliated to the contributory regime of social security in health. It says:

> *"There will be two kinds of affiliates to the General System of Social Security on health:*
>
> *1. Affiliates to the System through the contributory regime are those persons that are partly linked to it through a labour contract, public servants, pensioners and retired people and independent workers with the capacity to pay. These persons should be affiliated to the System based on the norms of the contributory regime contained in Chapter I, Title III of this Law."*

Additionally, Article 160 establishes the duties of the affiliates to the contributory regime. Number 2 of this Article sets forth that the affiliation of the family to the system is one of these duties.

> *"ARTICLE 160. Duties of affiliates and beneficiaries: The following are the duties of the affiliates and beneficiaries of the General System of Social security in Health:*
> (…)
> *2. To affiliate oneself and his/her family to the General System of Social Security in Health."*

Article 162 that defines the mandatory plan within the scope of the regime of benefits that affiliates receive makes reference to the purposes of the coverage and says:

> *"Article 162. Obligatory Health Plan: The General System of Social Security in Health creates the conditions of access to an Obligatory Health Plan so that every inhabitant of the national territory can be covered before the year 2001. This plan will allow* ***the integral protection of families,*** *pregnant women and disease in general, the phases of promotion of health and prevention, diagnosis, treatment and rehabilitation for every disease; and it will be based on the intensity of the use of the system, the levels of attention and complexity that are defined."*

Furthermore, when defining the meaning of familiar coverage, Article 163 of Law 100 of 1993 indicates:

> "*ARTICLE 163.* ***Familial Coverage:*** *The Obligatory Health Plan will have familial coverage. In this sense****, the beneficiaries of the system will be the spouse or the permanent couple of the affiliate when their union has lasted more than two years****;* sons or daughters of any of the spouses younger than 18 years of age who are part of the family and that economically depend of the affiliate; sons or daughters older than 18 years of age with a permanent disability or those under 25 years, who are exclusively dedicated to their studies and who economically depend on the affiliate. *If the affiliate has no spouse or permanent life partner, or sons and daughters with rights, the familial*

> *coverage could be extended to the parents of the affiliate if they are not pensioners and if they economically depend on the affiliate.*
>
> *PARAGRAPH 1. The National Government will rule over the inclusion of sons and daughters that, due to their permanent disability, are part of the familial coverage.*
>
> *PARAGRAPH 2. Every child born after this Law entered into force will automatically be the beneficiary of the health promotion organization to which his/her mother is affiliated. The General System of Social Security in Health will pay to the Health Promotion Organizations the corresponding Capitated Payment Unit, in accordance with the established in Article 161 of this Law."*

Moreover, Article 202 defines what the contributory regime is, and says:

> "*ARTICLE 202- Definition:* ***The contributory regime is a set of norms that rules the affiliation of individuals and families to the General System of Social Security in Health,*** *when such an affiliation is done through the payment of an individual and familial contribution, or through a previous economic contribution directly financed by the affiliate or between the affiliate and his employer."*

As we can see, the legal dispositions that determined the beneficiaries of the affiliate to the contributory regime of social security continuously make reference to the concept of family, and within the family they include "*the spouse or the permanent couple of the affiliate when their union has lasted more than two years".* A simple reading of the title of the article – "familial coverage" –, shows that the expression 'permanent couple' presupposes a familial coverage

and, therefore, a heterosexual relation. To confirm this, it suffices to quote the definition of the concept of family given by the Constitution in Article 42:

> *"Article 42. The family is the basic nucleus of society. It is formed on the basis of natural or legal ties,* ***by the free decision of a man and a woman to contract marriage or by their responsible resolve to comply with it***."

Thus, it is clear that in the present case, the sued H.S.C, by denying the affiliation of the Plaintiff, correctly applied the dispositions that regulate the necessary conditions to accede to the contributory regime of social security in health. The conduct of the H.S.C did not constitute a discriminatory and arbitrary interpretation of the norms that are in force. Therefore, the H.S.C did not violate the right to equality of the Plaintiff.

Furthermore, this Court considers that there was not a breach of other rights as alleged by the Plaintiff. On the one hand the right to health cannot be protected since the Plaintiff does not affirm that he is suffering from a disease, and the decision of the H.S.C not to affiliate him does not constitute an omission of the provision of a health service since the Plaintiff did not require it. Further, the right to free development of personality has not been breached since affiliation, as beneficiary, to the contributory system of social security in health is not a condition for its exercise.

Therefore, the Full Chamber of the Constitutional Court, administering justice on behalf of the people and as mandated by the Constitution,

RESOLVES

FIRST. – TO DENY the *tutela* for the protection of the rights to equality, to social security, to health and to free development of personality of Cesar Augusto Medina Lopera. Accordingly,

TO CONFIRM the judgment of the Ninth Civil Municipal Judge of Medellin in the process of the reference of 20th June 2000.

SECOND. – TO PUBLISH by the Secretariat the publications covered by Article 36 of Decree 2591 of 1991, for the purposes referred in that Article.

Copy, Notify and Publish in the Gazette of the Constitutional Court and Comply.

ALFREDO BELTRAN SIERRA

President

JAIME ARAUJO RENTERIA

Magistrate

MANUEL JOSE CEPEDA ESPINOSA

Magistrate

JAIME CÓRDOBA TRIVIÑO

Magistrate

RODRIGO ESCOBAR GIL

Magistrate

MARCO GERARDO MONROY CABRA

Magistrate

EDUARDO MONTEALEGRE LYNETT

Magistrate

ALVARO TAFUR GALVIS

Magistrate

CLARA INES VARGAS HERNÁNDEZ

Magistrate

MARTHA VICTORIA SÁCHICA MÉNDEZ

Secretary General

[1] Original draft presented by magistrate Manuel Jose Cepeda Espinosa is adopted up to this point.

[2] *Note of the translator*: 'prestational rights' are rights that the government is obliged to protect on behalf of its citizens such as the right to health care and if they are unable to access these rights through their own means, the government must provide them. 'Prestational rights' are those that the government is obliged to take positive actions to protect rather than abstain from infringing them.