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WIDOW(ER)'S PENSION FOR SAME-SEX COUPLES
(PENSIÓN POR VIUDEZ A PAREJAS DEL MISMO SEXO)

CASE: *Amparo en Revisión 750/2018*

REPORTING JUDGE: Javier Laynez Potisek

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: January 9, 2019

KEY WORDS: right to equality and non-discrimination, right to social security, right to protection of the family, widow(er)'s pension, same-sex couples, sexual orientation, gender identity, domestic partnership, conforming interpretation.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 750/2018*, Second Chamber, Javier Laynez Potisek, J., decision of January 9, 2019, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-11/AR%20750-2018.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo en Revisión 750/2018*, Mexico.

SUMMARY OF THE *AMPARO EN REVISIÓN* 750/2018

BACKGROUND: On August 8, 2017, TRF filed a voluntary jurisdiction case before a Mexico City court, to prove the domestic partnership between him and GENA, a worker insured with the Mexican Social Security Institute [Instituto Mexicano del Seguro Social] (IMSS). On January 8, 2018, TRF asked IMSS to grant a widower's pension due to the death of his domestic partner who was an insured worker; however, the authority denied him the pension based on article 130 of the Social Security Law. TRF filed an *amparo indirecto* lawsuit arguing the violation of the rights to equality and non-discrimination and to social security and indicating that article 130 of the Social Security Law made a distinction based on sexual orientation and, therefore, was discriminatory. The judge granted the *amparo* ordering IMSS to disregard the distinction and, consequently, revoke the determination on the pension and issue another one deciding on that benefit. A *recurso de revisión* was filed. The court hearing the case decided to transfer it to this Court so the constitutional issues raised could be analyzed.

ISSUE PRESENTED TO THE COURT: Whether article 130 of the Social Security Law violates the fundamental rights to equality and non-discrimination, protection of the family and social security, set forth in various articles of the Federal Constitution and the international treaties and any effects generated by this.

HOLDING: The Court decided to grant the *amparo* for the following reasons. Sexual orientation and gender identity are "suspect classifications" referred to in article 1 of the Federal Constitution, and therefore no rule, decision or practice, by state authorities or private parties, may diminish or restrict in any way the rights of a person on the basis thereof. Thus, the States must adopt all the measures necessary to ensure access, under equal conditions and without discrimination based on sexual orientation and gender identity, to social security and other legally recognized social protection measures. In addition, since the right to protection of the family includes all family models, this Court considered that article 130 of the Social Security Law was unconstitutional, because it conditioned the right to be granted social security's benefit of a widow(er)'s pension on a heterosexual-based family model that denied homosexuals access

to that right. In this regard, the legislative measure generated an unequal treatment and was based on concepts that do not recognize other forms of affective relations, which materialized the discrimination. Finally, a conforming interpretation could not be made since it was not just a matter of accessing the social security benefits through the granting of the widower's pension, but of eliminating the state of discrimination generated by the provision. Thus, not only should the pension be granted, but since the unconstitutionality of the article has been demonstrated, its application in the future against TRF must be excluded.

VOTE: The Second Chamber decided this case by the unanimous vote of the five justices Margarita Beatriz Luna Ramos, Alberto Pérez Dayán, Eduardo Medina Mora Icaza, José Fernando Franco González Salas and Javier Laynez Potisek.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=242555>

EXTRACT OF THE *AMPARO EN REVISIÓN* 750/2018

p.1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of January 9, 2019, issues the following decision.

BACKGROUND

On August 8, 2017, TRF filed a voluntary jurisdiction case before the Superior Court of Justice of Mexico City, where on November 16, 2017, the court hearing the case approved the steps taken to prove the domestic partner relationship between him and GENA, a worker insured with the Mexican Social Security Institute (IMSS).

p. 1-2 On January 8, 2018, TRF asked IMSS to grant him a widower's pension due the death of his domestic partner who was an insured worker; however, on January 23, 2018, he was denied the request based on article 130 of the Social Security Law (LSS) which considers, in the case of marriage and domestic partnerships, only persons opposite the beneficiary's gender.

p. 2-3 TRF filed an *amparo indirecto* lawsuit. He considered that the refusal to grant the widow(er)'s pension for reasons related to sexual orientation violated the rights of equality and non-discrimination; that article 130 of the Social Security Law contains suspect classifications, since it makes a distinction based on a person's sexual orientation, and therefore strict scrutiny must be applied to examine its constitutionality in light of the principle of equality; that the provision violates the constitutional mandate of protection of the family, understood as social reality, which means that protection must cover all its forms and manifestations in society, including same-sex couples; and that the right to social security extends its coverage to workers and their family members in the conditions the law indicates.

p. 3,5 The District Judge issued a decision granting the *amparo* ordering IMSS to disregard the distinction referred to in article 130 of the Social Security Law and, consequently, revoke the determination issued with respect to the widower's pension and instead issue another one deciding according to law with regard to that benefit; this is on the understanding that

while the protection reached the responsible authorities involved in the issuance and approval of the legal provision challenged, this did not imply that they engaged in any specific act in fulfillment of the decision granting protection.

- p. 5-7 The Chamber of Deputies of the Congress of the Union and the affected party each filed *recursos de revisión*. The adjudicating Circuit Collegiate Court decided to transfer the case to this Court for it to analyze the constitutional issues raised by the appellants. This Court admitted the appeals and ordered the creation and registration of the case file.

STUDY OF THE MERITS

- p. 8 The summary of the grievances set forth by the appellant authority indicates that: i) the distinction made in the challenged provision is justified because if the pension is granted to same-sex couples, the Institute's budget would be negatively affected; ii) when a distinction is made between equal objective and factual situations, even though it is subject to strict scrutiny, the power of the Congress to legislate on any matter, including social security, must be taken into consideration; iii) marriage and domestic partnerships between same-sex couples have gradually evolved over the years but, under Mexican law, the legal basis of the family continues to be marriage.

The affected party argues that: i) the District Judge failed to rule on the unconstitutionality of the challenged provision since it only took up the specific act of application and ii) the risk survives that this rule will be applied against him again.

To answer the grievances, this Court considers it necessary to ask a few preliminary questions, and for that purpose certain arguments of the *Amparo en Revisión* 710/2016 are reviewed.

I. Principle of equality and non-discrimination

- p. 8-9 This principle is set forth in article 1 of the Federal Constitution, which has been interpreted by this Court to mean that equality —as a constitutional principle— underlies the entire structure of the legal system and, therefore, constitutes a limit on the powers of the State according to which care should be taken not to generate parity among all individuals —

formal or legal equality—, nor material or real equality, but rather any different treatment must be reasonable.

p. 9-10 Thus, although the legislator has configurative freedom to create the legal system (adhering to the constitutionally established powers), that power is not unlimited; on the contrary, to create legal norms, constitutionally recognized human rights must be heeded and particularly the principle of equality and non-discrimination, given its transversality in the legal system, and therefore, in the creation of a law, the legislative branch must firmly ensure that those constitutional mandates are complied with.

p. 10 The principle of equality is linked to non-discrimination since when there is a duty to equal treatment —both material and formal—, discrimination, exclusion or preference of one person over another based on subjective elements whose regulatory establishment is discretionary and unjustified is prohibited, as happens with the so-called “suspect classifications”.

The “suspect classifications” have been defined as the constitutionally prohibited factors of discrimination, such as those motivated by ethnic or national origin, gender, age, disabilities, social condition, health conditions, religion, opinions, sexual preferences, civil status or any other that offends human dignity and aims to cancel or diminish people’s rights and freedoms.

p. 11 In a constitutional state under the rule of law such as ours, and as stipulated by article 1 of the Constitution, public authorities must act at all times in defense and protection of human rights, which means the bodies that draft laws or regulations must not only use terms or formulas that are neutral, but also incorporate language that is inclusive and proscribes any hint of discrimination in its reading and application.

p. 13-14 Sexual orientation and gender identity are in the so-called “suspect classifications”; therefore, no rule, decision or practice of internal law, whether by state authorities or private parties, may diminish or restrict, in any way, the rights of a person based on their sexual orientation or preferences.

II. Right to social security

- p. 14 Article 123, part A, section XXIX of the Federal Constitution establishes social security as a fundamental right of workers, which is intended as protection from contingencies (such as those related to health, or even death), or for future certain events (such as the retirement of the worker), in order to guarantee a dignified life, with all that implies; therefore, it is not a free or generous concession; rather, social security and the various aspects it involves are managed continuously, permanently and over time during the active life of the worker with the worker's constant contributions during his or her productive work. The rights composing the social security of the workers cover not only those insured, but also their family members (with certain rules and modalities), and therefore this right cannot be reduced or restricted for them either.
- p. 16 In this regard, the States should adopt all the legislative, administrative and other measures necessary to ensure access, under equal conditions and without discrimination based on sexual orientation or gender identity, to social security and other legally recognized social protection measures which may include those derived from labor benefits.

III. Right to family

- p. 18 When deciding the *Acción de Inconstitucionalidad 2/2010*, the Plenary of this Court interpreted the right to family in light of marriage equality and concluded that article 4 of the Constitution protects not only families formed by the union of a man and a woman, but also other forms of family, such as those formed by persons of the same sex, or single parent families or any other form that denotes a similar tie, in an effort to recognize modern life and existing plurality; in other words, the family is a social and dynamic concept and its protection should comprehend all types of families, disregarding a particular stereotype or model, and therefore the right to family established in article 4 of the Federal Constitution includes all forms of family—resulting from a marriage or free unions between persons of the same or different sex, with a father or a mother and children, or any other

form—, since the common element is the existence of emotional and sexual ties, identity, solidarity and mutual commitment of those who wish to have a life in common.

IV. Review of constitutionality of article 130 of the Social Security Law

p. 20-21 It can be concluded that the intention of the legislator was to distinguish between the sex of the subject to whom the rule applies, becoming a form of discrimination. The manner in which it is drafted prevents other types of family models from being introduced such as those resulting from marriages or domestic partnerships between persons of the same sex, in which a man (insured worker) is originator of the widower's pension in favor of his male spouse or domestic partner (as happens in this case), or those between a woman (insured worker) and her surviving female spouse or domestic partner.

p. 21 In this regard, this Court considers that article 130 of the Social Security Law limits the right to the granting of social security's widow(er)'s pension to a family model in which the persons –whether married or in a domestic partnership– must be the opposite sex. The article distinguishes between groups that are in equal circumstances—a marriage or domestic partnership— based on their sexual preference, i.e., whether they are heterosexual or homosexual couples, denying the latter the right to social security's widow(er)'s pension in the same terms it is granted to the former, which distinction is based on a suspect classification of people's sexual preferences, and is therefore unconstitutional.

p. 23 Thus, there is no constitutionally acceptable reason for blocking that right. The authorities responsible for satisfying social security rights are obligated to recognize the ties generated between spouses or domestic partners and, therefore, to grant the corresponding benefits, and are not allowed to deny them based on sexual preference or the sex of those persons. That would be unjustified discrimination based on suspect classifications, which is constitutionally prohibited.

As stated, this Court considers that article 130 of the Social Security Law violates the fundamental rights of equality, non-discrimination and social security set forth in articles 1, 4 and 123, part A, section XXIX, of the Federal Constitution.

- p. 23-24 Although the authority has stated that the distinction is motivated by IMSS' budgetary issues, it did not provide any support for that assertion. The appellant simply stated that granting widow(er)'s pensions to same-sex couples would cause financial hardship for IMSS preventing it from performing its responsibilities but did not provide any evidence to support this claim.
- p. 24-25 This Court considers that the grievance of the appellant authority that same-sex marriage and domestic partnerships have been gradually evolving over the years but that in the Mexican legal system the legal basis of the family continues to be marriage is unfounded.
- p. 25-26 Furthermore, based on the decision in the *Amparo en Revisión* 710/2016, the Second Chamber of this Court considers that a conforming interpretation in the case of discriminatory rules has no constitutional grounds since the obligation to redress the affected party entails not only the granting of a widower's pension as a result of the ties he had with his domestic partner, but also that the questioned rule cease to generate the mentioned discrimination.
- p. 26 Thus, this Court considers that a conforming interpretation of this provision is not possible since the rule would continue to exist in its discriminatory drafting which is contrary to article 1 of the Constitution and the Mexican State's obligation not to discriminate based on sexual preference; this is because such obligations cannot be met through an interpretation that changes the basis and content of the challenged provision but does not change the discrimination it generates.
- p. 26-27 If it is considered that a rule is discriminatory –as occurs in this case–, a conforming interpretation does not redress the differentiated treatment generated, since what the persons discriminated against want is the cessation of the constant impact generated and the express inclusion in the regime in question; in other words, it is not just a matter of accessing the social security benefits through the granting of the widow(er)'s pension, but of eliminating the state of discrimination generated by the message transmitted by the rule. In that regard, the complainant expressly seeks legal equality and non-discrimination regarding the concept of domestic partnership and the rights to a widower's pension since

his deceased domestic partner was insured under IMSS. In addition, a conforming interpretation would imply that this Constitutional Court ignores or does not know that the legislator violated the positive obligation to draft legal texts free of any form of discrimination.

- p. 27-28 However, the affected party's argument is well-founded in one part and unfounded in another. The unfounded part lies in the claim that the *amparo* judge established in the now appealed decision that "... *such Arabic numeral is unconstitutional*", which is to say that the judge clearly noted that the drafting of the provision is unconstitutional, thus the affected party is incorrect that its constitutionality was not analyzed.
- p. 28-29 Having demonstrated the unconstitutionality of article 130 of the Social Security Law, it is clear that the defect of unconstitutionality results from the rule itself, and therefore it should not be applied again in detriment of the complainant (unless the defect is corrected) and for that reason, the acts applying that rule also must be revoked; however, in this case, although the judge rightly concluded the unconstitutionality of the challenged rule and invalidated the specific act of application, he did not make any ruling that the unconstitutional provision cannot be applied again until the defect is remedied.
- p. 29-30 While the documents provided by the authority show that the affected party was in fact granted the enjoyment of the widower's pension requested, this was done in compliance with an *amparo* decision which was *sub judice*. Therefore, if in addition to challenging the denial of the widower's pension contained in the specific act of application, the affected party also claimed the unconstitutionality of the rule on which such rejection was based, it is clear that even though the pension originally denied has been granted, the discriminatory effects generated by the terms of article 130 of the Social Security Law survive.
- p. 31 Therefore, this Court determines that, in addition to the effects specified in the appealed decision, the constitutional protection also has the effect of excluding the affected party from the present and future application (to his detriment) of the challenged article, until the

unconstitutional defect is corrected and, as a result, the effects of the granting of the *amparo* in the terms expressed are modified.

DECISION

For the reasons explained, the *amparo* decision should be modified regarding its effects and the constitutional protection granted to the affected party according to the terms of the appealed decision and of this final decision.