

# Approaches to the Concept of Family under the Colombian Legislation

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*Abstract* -The present article contemplates a revision of the concept of "Family", mainly in the national and foreign doctrine, in the comparative law and in the Colombian jurisprudence. In addition, the evolution of the concept over time is studied, from the family made up of natural and legal ties to the concepts that emerge in contemporary society. This exercise is carried out within the framework of the research project "Effectiveness of the preliminary reconciliation in maintenance obligations - 2014 and 2015 - at the Conciliation Centre of the Central Unit of the Valle del Cauca UCEVA" in Tuluá, Valle del Cauca, Colombia.

*Key words:* Family, Relationship, filiation, consanguinity, Affinity, Polygamy, marriage

## 1. Introduction

The family as the essential nucleus of the societies of the world, must have gone through the different epochs that they have made of the universe, the reality that we can demonstrate today. From primitive man, to the one that has evolved and inhabits the earth in these times, this being has found a particular way to configure its environment, which among other things involves the construction of a family, as this has facilitated the satisfaction of emotional needs such as love, understanding, solidarity and physical needs such as procreation, as well as those demands that have arisen due to evolution. Thus, the family represents an example of the union between a man and a woman (although this structure has recently changed, as noted below) for the construction of a permanent home and economy, which offer the possibility of satisfying tastes and needs, among other aspects.

In nations such as Colombia, the family is a fundamental entity that has allowed the construction of a society, which over time has had to modify its conceptualization, since the notion

of an entity constituted by natural links coming from contemporary society has not been enough; therefore, it has had to add another dimension, formed by legal ties. In the framework of the evolution that has marked the course of the different societies, with special reference to the Colombian, the question arises about whether societies, in terms of the definition of family, manage to collect in their doctrine and law, all the factors, elements and qualities that the modern family contemplates today. Therefore, the present text focuses on the analysis of the concept of family, based on national and foreign doctrine, comparative law and Colombian jurisprudence. For this, it was resorted to the pre-established jurisprudence, endorsed by the Constitutional Court and other high courts; as well as the consultation of virtual databases, the Néstor Grajales library of the Valle del Cauca Central Unit, Google Academic, among other sources, which offered information about the concept of the term family in Colombian culture and in other foreign.

The previous considerations allow to affirm that by means of an exhaustive search method and of study, it was possible to obtain a lot of information, the same one that is expressed in the present text whose purpose is to unravel the notion of family throughout the Colombian history, as well as the current concept of said entity that other foreign companies have built.

The methodology outlined for the construction of this article, first, as noted, involved the sources listed above, sources that contemplate the definition of the family in Colombia and other societies. In second measure, another reference used as it was said, was the jurisprudence of the

## 2 Problem Formulation

### 2.1 The Family in Colombian Doctrine:

According to Castán (in Gómez, Piedrahita. 1992. Pg. 3), the word family, comes from the voice family, by derivation of *famulus*, word that comes from the osco *famel*, which means servant and possibly from the *sánscritovama*, home or room; for which it was understood as such the group of people and slaves that live with the owner of house.

For Sánchez (quoted in Gómez, Piedrahita. 1992. Pg. 7,8), the family is "an ethical institution, natural, founded on the conjugal relationship of the sexes, whose individuals are ligated by bonds of love, respect, authority and obedience; an institution necessary for the conservation, propagation and development, in all spheres of life, and of the human species". The Family, according to the Colombian Constitution, is understood as: "the fundamental nucleus of society" (Constitution, 1991, art. 42). Therefore, as Guío (2009. Pg. 66) states: the family is constitutionally recognized as the most important institution in the Colombian legal system, which, given to its nature as a changing social entity over time, and because of the historical, political, social and economic circumstances prevailing around it, it is recognized as the core of society".

Colombian high courts, which emphasizes Colombia's own society and its evolution. The last change in this matter is also highlighted, regarding the coverage of the law for same-sex couples, and its integration into the family's legal framework, allowing them to access the benefits offered by law and justice, given its recognition as a new way of forming a family. Thus, in relation to what has just been stated, the evolution of the concept of family in Colombian jurisprudence, which has granted rights to another family group made up of same-sex couples, stands out in the exercise carried out. currently have the same rights and obligations as the heterosexual couple, being applicable to these law 54 of 1990.

On the other hand, for Hernán Gómez Piedrahita, there are two types of family: The Legitimate family, "the one that is born of marriage and is constituted by parents and legitimate children, and the Natural Family, "which has its origin in the mere affective community life between parents and children, but which is not legally protected by law". (Gómez, 1981, pp.12-13). Monroy conceptualizes the family from a more legal perspective: "In the broadest sense, the family is made up of persons united by family legal bonds that have their origin in marriage, filiation and kinship. But, even today, the concept of family derives from the mere intersex union that constitutes the natural family or in fact formerly called concubinage". (Monroy, 2009, p. 1).

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Pérez Royo (1997) in Jiménez Morales notes that "every family, a natural and fundamental element of society, is the central unit in charge of the primary social integration of the child", deserving of a contextualized spatial-temporal constitutional conception, with direct preference, giving this macro right its essential nature, so that it radiates its fundamental right. (Jiménez, 2018, p. 44)

According to Cañon Ramírez (1887-1994, pp. 11-12) the family has been defined from different points of view, as follows: Sociological: He affirms that the family is but "a group of at least two people of different sexes, psychologically developed, who engender and educate a new generation that, in turn, will engender and educate the following: that is, the same "eternal structure of socialization that must be contemplated without dispensing with special and temporal concreteness"... Religious: The family is a community of life, love and people. For the Catholic Church, the family comes from marriage and constitutes "more than a juridical, social and economic community, a community of love, life and solidarity, irreplaceable for the teaching and transmission of cultural, ethical, social, spiritual and religious values essential for the development and well-being of its own members and of society". (JOHN PAUL II, Charter of the Rights of the Family. Church Documents, No. 94, p. 7). Juridical: from the juridical point of view, there have been various forms and criteria for conceptualizing the family; for some, the family should take precedence, for others, authority, for some, the vocation of succession, for others, the economic aspect and, for the author, love and affection.

## 2.2 Foreign Doctrine:

Although the Dictionary of the Royal Academy of the Language contains a dozen or so definitions of "family", three of them could be said to have theoretical elements common to the spirit of the present document, namely: 1. Set of ancestors, descendants, collateral and related of a lineage, 3. Children or descendants (Dictionary of

the Spanish Language-2017). Vidal Taquini (quoted in Leone, 2009, p. 3), affirms that the family is defined in Argentine law as those people united by legal ties, to the extent and extension determined by law, that arise from marriage and from legitimate, illegitimate and adoptive filiation. For Tamburrino, (1978, p. 7), the family is "the fundamental social nucleus, based on ties of blood and offspring, formed by singular subjects whose legal position is determined and qualified by their belonging to this group. According to Konstantinov: (1963, p. 110) "The family as the cell of society includes the relations between man and woman and between parents and children. Material, economic, legal, ideological and moral relations. The family plays an indispensable role in the reproduction of one of the most important conditions of social life: the population: the family, according to Sánchez, according to its integration: "An extended family is understood to be one that brings together all relatives and persons with recognized ties as such. The concept was used as a synonym for bloodline family. Civil ties, marriage and adoption, by conferring kinship status, extend the concept beyond consanguinity. It includes different nuclei or homes, with different characteristics: from organizations in which members of three generations live together and collateral, to single-parent homes. (Sánchez, 2008, pg. 15)

According to the jurist Jean Carbonnier (1961, p. 7), the family is "an elementary grouping composed of individuals connected by virtue of a sociological reality of which the sexual union, the fact of procreation and the descendants of a common parent take place". For Villalobos (1974, p. 8) the family is a social group made up of the father, mother and children who live with them: and the broad concept that takes into account not only the family ties that are interwoven within the aforementioned nuclear family, but also extends to other relatives, sharing a home with them". In Carmona's version (2008, p. 8) "The Family is not only a basic social group of people related to each other by blood, marriage or kinship, which provides its members with protection, companionship, security and socialization, and which typically includes a father, a mother and children, but, from this point

of view, the structure and the subjective component is extended to the group of individuals who although not having family ties, they live together as such". According to Macías (2008, p. 45), the family is understood as: "a group of persons united by kinship, whether by blood, marriage or adoption, which live together for an indefinite period of time; and, they constitute the basic unit of society". 229) considers that "The family is the primary group of society made up of all those people who are united by family ties, marriage or de facto unions; provided with basic principles for their formation and development, both in their physical and psychological aspects. The family is the place where man knows human, social, moral, cultural and even religious values and, based on them, learns to relate socially. This instance is a meeting place between family needs and social initiatives. On the one hand, the family is a relational system in which each of its members is differentiated, but, as a system, it goes beyond its individuals and harmonizes them with each other.

### 2.3 The Family in Colombian Jurisprudence:

The de facto marital union corresponds to one of the legitimate ways of constituting the family, which is not created by marriage alone. The free union of men and women, "even though they have no blood or formal contractual links with each other", must be protected by the State and society, since it is the origin of the family institution (Judgment C-098 of 1996). Judgement C-660 of 2000 states that "The recognition the National Constitution gives to the family as the basis of nationality because of its natural tendency to unity, affinity, coherence and stability, does not allow, on the contrary, it prohibits the use of coercive mechanisms to impose the permanence of the couple". On the other hand, in Judgement C-798 of 2008), the reporting magistrate, Jaime Córdoba Triviño, affirms that the concept of the family is not reduced to that of a man and a woman. The term "or" stated in Article 42 of the Political Charter suggests that it is also formed by the responsible will to shape it without distinguishing between the sexes. Therefore, de facto marital unions must have the same rights and obligations as marriage,

for both heterosexual and homosexual couples. Thus, the Court has determined that the family is the essential nucleus of society. A clear example of the above statement is that contained in Judgment C-577 of 2011: "The Court has indicated that, as the family is "the fundamental nucleus of society, the different States have warned of the need to provide it with a material substratum that would enable it to satisfy its basic needs so that it can emerge and develop without trauma" and, likewise, "they have warned of the need to provide it with preferential legal protection".

Similarly, Judgment ST-606 of 2013 establishes that "the constitutional protection of the family is not restricted to those formed by virtue of legal or consanguinity bonds exclusively, but also to those that arise de facto or as the so-called foster families, in accordance with a substantial and non-formal concept of family, in which continuous cohabitation, affection, protection, mutual aid and respect consolidate de facto family nuclei, which the law cannot ignore or discriminate against when it comes to the recognition of rights and prerogatives of those who make up such families".

The Constitutional Court affirms that the family in general is: "that community of people related to each other by natural or legal bonds, which bases its existence on love, respect and solidarity, and which is characterized by the unity of life or destiny that inextricably links its closest members". Likewise, the Court pronounces itself with respect to other types of families, which have arisen in society such as: **de facto family** made up of foster parents and children, has been defined by constitutional jurisprudence as those born out of relationships of affection, respect, solidarity, understanding and protection, but not out on the basis of consanguinity or legal ties; **foster family**, understood as those family relationships in which people are not united solely and exclusively by legal or natural ties, but by de facto situations, which arise by virtue of the bonds of affection, solidarity, respect, protection and assistance (Ruling T-070 of 2015). Another definition of family stipulates that this is a sociological institution derived from the nature of the human being, "the whole community benefits

from its virtues, as well as being harmed by the conflicts that arise from it". Among its essential aims are life in common, mutual help, procreation, support and education of children. (Ruling T-292 of 2016).

## 2.4 Other concepts related to the family

### 2.4.1 Filiation

According to Suárez (1992, p.4), the word filiation is a word that further clarifies the concept of family. Thus, filiation is assumed to be "a legal status that the law assigns to a given person, deduced from the natural procreative relationship that binds him or her to the other. On the other hand, filiation is understood as "a legal state which originates from the fact of birth: that is, the legal status which the law grants to the child in relation to his or her parents and to the parents in relation to the child". Gómez Piedrahita (quoted in Parra Benítez, 2008) considers that the affiliation in this section, as in the previous one, is of special significance. For Jossierand it has two meanings, one broader, the other more accurate. Generally speaking, filiation refers to all the rings of the chain that link a person to his or her ancestor, even the most distant; but, in the most common sense, which is ours, it refers only to the relationship of a child with his or her immediate parents, with his or her father and mother; this relationship takes the name of filiation when considered from the child's side, and that of paternity or maternity if one places oneself in the point of view and on the parents' side". (1952, p. 212). For Zanoni (1998, p. 283). Filiation is: "the set of legal relationships determined by paternity and motherhood, linking fathers with children within the family".

### 2.4.2 Children and filiation

According to the Digest (Roman law), "with the word child we understand all descendants," meaning that every descendant of a person is a child. Dors et al. (1968, p. 852); another definition states, "The offspring from father to son; or the quality one has as a child in relation to another person who is his or her father or mother". Escriche (1977, p. 602).

### 2.4.3 Kinship as an element of the Family

It is a bond that links people with each other, it is a link that gives rise to different kinds of it. In fact, there is a consanguinity, affinity or political and, also, adoptive kinship. (García, 2011, p. 238). Once the concept of the family is approached, it can be identified that in any concept of this institution there is an element that, for many, is often unknown; however, it is of great importance to analyze the concepts related to kinship, since without this element, there would not be an initial link for the establishment of a "family". In this sense, Fernando Vélez understands kinship as "the legal relationship that exists between two or more persons" (Vélez, 1981, p. 577). For Antonio de Ibarrola, kinship is "the bond existing between persons who come from one another or have a common author or the one established by civil or canon law". (Ibarrola, 1978, p. 75). Manuel Somarriva explains that kinship is "the family relationship that exists between two people". (Somarriva, 1963, p. 10). Hernán Gómez Piedrahita believes that "kinship arises not only from consanguinity, but also from affinity and adoption". (Gómez, 1992, p. 26). Relationship is, on the other hand, a bond that links people with one another, a bond that originates different kinds of relationship. In fact, there is a kinship of consanguinity, of affinity or political and, also, adoptive. (García, 2011, p. 238). "Relativity as the set of legal ties that unite the components of the same family; therefore, there are parental ties between parents and children, between siblings, between cousins, etc.". (Castillo, 2000, p. 31). For Aubry and Rau (1897, p. 1). The bond of kinship that exists between the father or mother and the child is called paternity or maternity, from the the father or mother perspective, and filiation when the bond is considered from the children's perspective.

Furthermore, with regard to Colombian legislation, article 35 of the Civil Code provides as follows: "blood relationship. it is the relationship or connection that exists between people who descend from the same trunk or root, or who are united by the bonds of blood. (Law 57, 1887, art. 35).

## 2.5 Concept of Family in Colombian Law

In Colombia, we find the "family" determined in article 874 of the Civil Code, which states the following: "The family includes the wife and children, both those who exist at the time of incorporation and those who come after, and this notwithstanding that the user or inhabitant is not married, nor has recognized any child at the date of incorporation; it also includes the number of servants necessary for the family; it also includes the persons who on the same date live with the inhabitant or user, and at their expense; and the persons to whom they owe food" (Law 57, 1887, art. 874). It equally involves members of the household who are related to each other to a certain degree, by blood, adoption or marriage. The degree of kinship used to determine family boundaries will depend on the intended uses of the data, and therefore it cannot be accurately defined on a global scale. (United Nations, 1967). In the Political Constitution of 1991 (Art. 42), the family is assumed as the fundamental nucleus of society. It is constituted by natural or legal ties, by the free decision of a man and a woman to marry or by the responsible will to be part of it. According to the Universal Declaration of Human Rights, (1948, art. 16) "The family is the natural and fundamental element of society and is entitled to the protection of society and the State".

Although Act No. 1098 of 2006 (Children and Adolescents Code) does not expressly define the concept of the family, article 1 of the Code enshrines the purpose of the statute: to guarantee children and adolescents their full and harmonious development so that they may grow up in the family and community in an atmosphere of happiness, love and understanding. According to Law 1361, 2009, art. 2, the family is the fundamental nucleus of society. It is constituted by natural or legal ties, by the free decision of a man and a woman to marry or by the responsible will to marry.

## 2.6 The Family in Comparative Law

The family can be treated according to two broad perspectives: as a group and as an institution, both mutually complementary; the family as a

group implies recognizing it as a plurality of people who are closely linked and who occupy different roles (father, mother, children, etc.). The family as an institution refers to the fulfillment of society's needs that contribute to its development and sustainability. (Catholic University of Argentina, 2014, p. 7) Alberdi, (1999); Jelin, (1998); Rivas, (2007); Yanagisako, (1979) and Gonzales (2015, p. 90) agree that: "Families are complex social units, with a wide structural, cultural and economic diversity, where the individuals involved perform sexual, economic, reproductive and socializing functions, presenting in practice such variability that it is not always easy to classify them.

Because, in legislation such as that of Spain, there is no specific definition of family, authors such as Inés Alberdi (1999, p. 6) state that, in Spain, "to constitute a family, marriage or filiation, known as relations of affinity and consanguinity respectively, must take place. The legal texts do not define a family model, but according to the mutual relations and obligations of the members, it is felt that the legislator considers the nuclear family units, which are the simplest, formed by the matrimony and its unmarried children".

In Brazil, the family entity is recognized as a stable union between men and women and the rights and duties between the spouses are established, as well as equality between them. The State provides assistance to prevent domestic violence, highlights the duty of the family, society and the State to ensure that children and adolescents have the right to life, health, food, education, respect, coexistence in the family and community, as well as protection against discrimination, exploitation and violence. Similarly, the State regulates the respect for the elderly, their right to life, their dignity and their participation in the community in general, with a high level of protection for society. Linares (2012, pp. 64-65)

In Ecuador, the State recognizes and protects the family as the fundamental unit of society, based on the equal rights and opportunities of its members, protecting marriage, maternity and family assets. Linares (2012, pp. 64-65)

In Cuba, it is stated that "the socialist concept of the family is based on the fundamental consideration that it constitutes an entity in which social and personal interests are present and closely intertwined, since, as an elementary cell of society, it contributes to the development of the family and plays an important role in the formation of new generations and, as a centre for the relations of life in common between men and women and their children and between all of them and their relatives, it satisfies profound human, emotional and social interests of the individual". (Cuban Family Code, 1975, p. 1-2.)

In Nicaragua, for its part, "The family is the fundamental nucleus of society and is entitled to protection by society and the State. It is integrated by a group of natural people with different capacities, abilities and skills, united by the marriage or stable de facto union between a man and a woman and kinship ties. Likewise, families headed by single mothers, single fathers, widows, widowers, divorced people, grandparents, grandmothers, as well as other family members exercising parental authority, shall enjoy the same protection and have the same duties and rights of solidarity, respect, tolerance and good treatment as set out in this Code". (Family Code of Nicaragua, 2014, art. 37)

## 2.7 Theories about the origin of the family

Fustel in Varela Escobar (p. 1-2) states that for Spiritualist Theory the family is a religious and natural community. Religious, because the rites, the worship rendered to the dead, the union of relatives before the domestic altar, constituted the essential foundation that gave life to the family. On the other hand, natural, because its existence was the result of a constant practice of the beliefs and customs of the people, who, without the need for pre-constituted artifices, united people in order to form the family". Morgan quoted by Varela Escobar (pp. 2-3) as stating that for Evolutionary or Materialistic Theory, the family is the active element; that it passes from a lower to a higher form, as society evolves from a lower to a higher degree. Starting from the previous concept, according to materialistic theory, the decisive factor in history is, in short, the production and reproduction of immediate life.

## 2.8 Family Classes:

For García, "The nuclear family is the family formed by parents and children. The extended family is the one determined by those individuals who come from a more or less close common lineage and who maintain relatively frequent relationships. The polynuclear family is made up of several nuclear families, and is made up of different generations. The extended nuclear family is the nuclear family that we have seen, with other kinds of relatives added to it. The incomplete family is made up of only one member of the marriage, such as a widowed spouse, with or without children, or a divorced spouse. The polygamous family is composed of the husband with several wives and their children. This type of family is not allowed in European or Western law. (García, 2011, p. 239). For Varela Escobar, there are currently different types of families according to their constitution; it should be noted that according to theories such as the materialist or the evolutionist, in ancient times there were other types of families, which, the last author quoted, specifies as follows:

### 2.8.1 The Promiscua Family or Hetaerism,

characterized because people's sexual relations had no prohibitive rules of any kind. There was complete freedom to perform the carnal act, even between parents and children in a very natural way, since the empire of instinct and animality prevailed: "Two forms of marriage emerged from the above: Polygamy, which "allowed a man to lie down with several women; the second allowed a woman to accept many men carnally. The result of polygamy was that"...It would not make known the true fatherhood of the child".

### 2.8.2 Consanguineous Family

After the period of promiscuity, Varela states that "...the consanguineous family emerged within the marriage of groups, characterized by the exclusion of carnal relations between parents and children in order to give way to respect for consanguinity. The consanguineous marriage was the marriage of groups, classified by generations." This is how the family was

classified as follows: "...all the grandparents were grandmothers' husbands and the children of - these grandparents - another generation - were also spouses to each other. The same thing happened with the children of those who formed another generational group." In conclusion, "...this inbred family was really a domestic community made up of generational conjugal groups..."

It is also established in this type of family that "...one group of women married another group of men, but these and the wives descended from different trunks, as noted because promiscuity was no longer permitted."

### 2.8.3 Syndyasmian family

According to Varela, "the man sexually united to several women, within his condition of polygamist, but he chose one as his favorite lover who demanded total fidelity during as long as the marital union lasted. The wife's infidelity caused severe punishment." This transitory union by couple, which distinguished this type of family, was gradually strengthened as a manifestation of natural selection in family organization.

### 2.8.4 Monogamous Family

Varela affirms that this type of family arises because: "when the conjugal union by couples had general acceptance and full social force, even if it was transitory, the marriage by groups disappeared. The union of a man and a woman who constituted the monogamous family emerged. As in this form of human organization there was no longer polygamy that prevented the exact fatherhood of the child." "...as the son had already met his father on this occasion, the laws of succession were enshrined by which the son could inherit his father's property."

According to Barato, there are different types of families, like this: The Nuclear family, which is defined as "the elementary, simple or basic family. It is the group formed by a man, a woman and their socially recognized children. The Composite Family: "...is a family group made up of nuclear families or by parts of them. From an anthropological point of view, it is the extension of the primary family. The Joint Family: "This

family organization is typified when two or more primary families, linked by the maternal or paternal bond, unite". Extended Family: "It is a kind of joint family that lives scattered. The members of the extended family do not live in the same house even though they carry out common activities." The Clans: "a very large grouping of different members supposedly descended from a common ancestor and which is permanently symbolized in different ways". Biological Family: family relationships, based on genealogy in order to define them or simply on sexual relations. (Barato, 1985, p. 48, 49, 50) On the other hand, according to Belluscio quoted in (Monroy C. 1993. p. 1), "in the broad sense, the family is the group of people with whom there is a legal bond of a family order; in the narrow sense, the family includes only the paternal nucleus of a child; in the intermediate sense, the family is the social group made up of people who live in a house, under the authority of the lord of the house".

## 3 Problem Solution

### 3.1 The Family in Couples of the Same Sex

Jurisprudence: The C-577 judgment of 2011 states that "the idea of the heterogeneity of family models allows us to move from a static perception to a dynamic perception of the family, where the individual, throughout his or her life, can integrate different configurations with their own functions. Thus, a married woman with children who divorces experiences the model of an intact nuclear family; then, when the break-up occurs, she forms a single-parent household; later on, she can form a new family nucleus (assembled family) and, upon the death of the spouse or partner, she again moves through the single-parent family originated by widowhood', what has been termed a complex chain of family transitions'. In Ruling C-577 of 2011, it is stated that, according to the social reality, it is necessary that changes in the regulations arise, one of these changes has been the one of homosexual couples that at a certain moment, emerges as a little recognized figure and therefore it used to be omitted at the time of legislating. At present, due to the movements of those minorities, which have made it necessary for the Courts to pronounce



themselves, it has been specified that those subjects who are part of a relationship and who have a certain sexual orientation different from that of the majority, fully enjoy the same rights as the majority. The Court states the following in these circumstances: "the democratic principle cannot support a majority consensus that relegates homosexuals to the level of second-class citizens" and that the principle of equality is radically opposed to the subjugation by law, for reasons of sexual order, of a minority that does not share the sexual practices of the majority". Apart from the approach to homosexuality from the perspective of the individual person and from the point of view of the traditionally unprotected minority group, the consideration of the same-sex couple has recently been consolidated in the jurisprudence, "since today, together with the heterosexual couples, there are - and are valid options in the light of the higher order - homosexual couples", whose effective existence implies, as in the case of the heterosexual couples, "an intimate and particular relationship between two people, based on affection, of an exclusive and singular nature and with a clear vocation to remain.

However, couples of the same gender simply enjoy benefits or rights that the law has very specifically granted to such couples.

It is necessary to mention that the Court in its attempt to grant equal conditions to homosexual and heterosexual couples, created a type of contract, which is contemplated in Sentence C-577 of 2011. "With regard to the interpretations of article 42 of the Constitution, it is sufficient to recall that the Court has reconsidered, which has led it to recognize the family made up of the stable homosexual couples and to maintain that constitutionally there is a requirement to overcome the proven protection regime by introducing a legal figure that allows homosexual couples to opt for a solemn contractual form of constituting their union, different from the de facto union that, although it is currently at their disposal, is not sufficient to overcome the deficit noted in this judgment".

Suppose, then, that with the existence of the contract to formalize the union between same-sex couples, it will have given the members of these

relationships the opportunity to have access to the same rights as heterosexual couples. However, the idea that in Colombia, there are several ways of constituting a family, one of which is the Marital Union de Facto, cannot be omitted.

In Sentence C-075 of 2007, articles 1 and 2 of Law 54 of 1990 were partially sued "by which de facto marital unions and the patrimonial regime between permanent partners are defined", partially modified by Law 979 of 2005; under the argument that it generated a vacuum when contemplating that this figure of the Marital Union was only expressly applicable to heterosexual couples. The Court determined that, despite the existence of pronouncements by this corporation regarding couples formed by homosexual subjects, it is evident that there are still absences from the norm, also called "legal gaps", whenever we can also analyze cases such as adoption by homosexual couples.

In Ruling C-683 of 2015, the following articles of Law 1098 of 2006 are demanded: LEGAL EFFECTS OF ADOPTION, 64, numeral 5. If the adopter is the spouse or permanent companion...; ARTICLE 66. OF THE CONSENT, "...or is the child of the spouse or permanent companion of the adopter". ARTICLE 68. REQUIREMENTS FOR ADOPTION, numeral 3. Together the permanent companions 5. 'The spouse or permanent partner, the child of the spouse or partner...'. On the other hand, the following articles of Law 54 of 1990 were also sued, Article 1. De facto Marital Union, is the one formed between a man and a woman, who, without being married, make a permanent and unique community of life. Likewise, and for all civil purposes, the man and the woman who are part of the de facto marital union are called permanent partners. The aforementioned articles pertaining to de facto marital union norms and to the Code of Childhood and Adolescence were prosecuted since the petitioners considered that these norms excluded and generated inequality with regard to same-sex couples. The Corter decided to declare the conditional enforceability of the contested rules, to the effect that 'by virtue of the best interests of the child, same-sex couples forming a family are also covered by their scope of application'. Thus, the constitutional order does

not exclude that children may be adopted by same-sex couples forming a family" It can be stated that Ruling C-577 of 2011 provided coverage by extending the exercise of the rights of heterosexual couples to homosexual couples; however, the result was not so positive, since what this judgment provided for same-sex couples was simply an unnamed civil contract, which would provide coverage of specific rights. But it should be clarified that the contract we are talking about did not extend all the guarantees enjoyed by a heterosexual couples.

The foregoing is based on COMMUNICATION No. 17 dated April 28, 2016, SU. 214 OF 2016, which states that: "The Chamber also considered that the unnamed contracts, through which it was intended to solemnize and formalize unions of persons of the same sex, do not make up for the protection deficit identified in Ruling C-577 of 2011". Under the terms of article 113 of the Civil Code, the celebration of a civil marriage generates various personal and property legal effects, which are not present in an unnamed civil contract, generating discriminatory treatment between heterosexual and same-sex couples.

In Ruling C-683 of 2015, the articles of Law 1098 of 2006 are demanded, which are listed below: ARTICLE 64. If the adopter is the spouse or permanent partner...; ARTICLE 66. OF THE CONSENT, "...or who is the child of the spouse or permanent companion of the adopter". ARTICLE 68. REQUIREMENTS FOR ADOPTION, paragraph 3. The permanent companions together: 5. 'The spouse or permanent partner, to the child of the spouse or partner...' On the other hand, the following articles of Law 54 of 1990 were also sued: Article 1. It is called the de facto Marital Union, formed between a man and a woman, who, without being married, make a permanent and unique community of life. Similarly, and for all civil purposes, the man and woman who are part of the de facto marital union are called permanent partners. The aforementioned articles pertaining to de facto marital union norms and to the Code of Childhood and Adolescence were sued because the petitioners considered that these norms excluded and generated inequality with regard to same-sex couples. The Court resolved to declare

the conditional enforceability of the impugned rules, in the sense that "by virtue of the best interests of the child, same-sex couples forming a family are also included within their scope of application". Consequently, the constitutional system does not rule out the possibility of children being adopted by same-sex couples forming a family" It can be stated that Judgments C-577 of 2011 covered the exercise of the rights of heterosexual couples, to homosexual couples; however, the result was not so positive, since what this sentence provided for same-sex couples was simply an unnamed civil contract, which would provide coverage of specific rights. But it should be clarified that the contract we are talking about did not extend all the guarantees enjoyed by a heterosexual couples. The foregoing is based on COMMUNICATION No. 17 dated April 28, 2016, SU. 214 OF 2016, which states that: 'The Chamber also considered that the unnamed contracts, by means of which it was intended to solemnize and formalize same-sex unions, do not make up for the protection deficit identified in Judgment C-577 of 2011'. Under the terms of article 113 of the Civil Code, the celebration of a civil marriage generates various personal and property legal effects, which are not present in an unnamed civil contract, generating discriminatory treatment between heterosexual and same-sex couples.

For the purpose of: (i) to overcome the protection deficit recognized in Judgment C-577 of 2011, in relation to same-sex couples in Colombia; (ii) to guarantee the exercise of the right to marry; and (iii) to protect the principle of legal certainty in relation to the marital status of individuals, the Court extended the effects of its Unification Judgment to peers or the like, that is, to all same-sex couples who, after June 20, 2013: (i) they have gone before the country's judges or notaries and had been refused a civil marriage on the grounds of their sexual orientation; (ii) who have entered into a contract to formalize and solemnize their marriage, without the name and legal effects of a civil marriage; (iii) having entered into a civil marriage, the National Civil Status Registry has refused to register it; and (iv) thereafter, they formalize and solemnize their marriage by civil marriage.

Similarly, the Court declared that civil marriages between same-sex couples, celebrated in Colombia after June 20, 2013, enjoy full legal validity, as they comply with the plausible constitutional interpretation of Judgment C-577 of 2011. For the Court, the judges of the Republic who celebrated civil marriages between same-sex couples, acted in accordance with the precise terms of the Political Constitution, in accordance with the constitutional principle of judicial autonomy, provided for in article 229 of the Constitution and international human rights treaties, and also warned the judicial authorities, notary publics and registrars of the country's civil status, and public servants that the unification decision has a binding character.

Notwithstanding, it is correct to affirm that this unnamed contract referred to above does not fully comply with the protection of all the rights and guarantees of same-sex couples; despite the fact that Judgment C-577 of 2011 establishes these contracts as a conduit through which rights are covered, and it is this same sentence the one that leaves other relevant legal aspects in same-sex couples in the background, such as the possibility of adopting children. This type of controversy in relation to adoption by homosexual couples is evident day after day in Colombian society, which is why the controversy and the rights violation of the complainant is brought up here and it is established in Judgment T-276 of 2012. It states that the petitioner, in spite of having completed the legal procedure and having been granted all the pertinent permits as an adopter, had his rights to due process and family unity violated, since after the adoption of the two minors, the petitioner, when carrying out the process to leave the country with the objective of establishing himself with the minors in the United States; the children, who were already in the petitioner's custody, were taken from him and it was established through various ICBF communications that both children were in a "presumed threatening situation" since the petitioners had not reported their sexual orientation at the time of the adoption. However, through an extensive process in which third parties such as the Jewish Child Care Association of the United States were involved, the children were able to establish themselves abroad in the

company of the complainant. The complainant had to file a guardianship action for the violation of the rights to due process and the family unit, since ICBF determined that the latter represented a threat to the children simply because the sexual orientation of the adopter had not been informed during the adoption process.

#### 4. Conclusions

We can conclude that, according to article 42 of the Colombian Constitution, the family is the fundamental nucleus of society. It is constituted by natural or legal ties, by the free decision of a man and a woman to marry or by a responsible will to marry. This definition leads us to prescribe what family is for some Colombian authors, who conceive it as a social conglomerate, where people are linked to each other through legal ties; this nexus implies love, obedience, respect, solidarity. It is also specified that the family is formed by natural ties, which is currently called a *de facto* marital union under the regulations of Law 54 of 1990, later amended by Law 979 of 2005. It is important to note that for some Colombian authors today, the family is not only the one made up of father, mother and children, but also their relatives linked to them by blood ties; this last version is called the extended family.

There are also different conceptions of the term family, from sociological, religious, and legal perspectives.

The evolution of the family concept in Colombian jurisprudence is also highlighted, which has granted rights to another family group made up of same-sex couples, who currently have the same rights and obligations as the heterosexual couples, with Law 54 of 1990 being applicable to them.

Colombian jurisprudence has unified criteria with respect to the family as the basic unit of society, which deserves special protection by society itself and the State. In this order of ideas, in countries such as Spain, a specific definition of family is not stipulated. In fact, for authors such as Inés Alberdi, the family must be established through marriage or filiation, ties known as relationships of affinity or consanguinity; in any

case, the legal texts do not define a family model, but conceive it as an institution made up of a man and a woman who constitute a marriage and by their children. This conception of family is closely linked to the form of family described by some Colombian authors as the nuclear family. Likewise, in other foreign legislations such as Ecuador, the family is preserved and recognized as the fundamental cell of society. In Brazil, the family constituted by natural or legal ties is recognized; it enjoys State benefits and is protected from domestic violence. For their part, socialists see the family as one that is deeply linked to a social interest in the pursuit of common development.

Therefore, it can be said that the family continues to be the central axis of a community, while it is responsible for training future citizens with values and principles to contribute to the development of a dignified and progressive society.

#### References:

- [1] Alberdi, I. *La nueva familia española* (Vol. 10). Madrid: Taurus. 1999.
- [2] Aubry M. M. y Rau, G. *Cours de Droit Civil Francais*. Paris, France: Ed. Librairie Joseph Gibert. 1905.
- [3] Barato, S. *Familia y Comunidad. Universidad Santo Tomas*. Bogotá. Pág. 48, 49, 50. 1985.
- [4] Cañón Ramírez, P., A. *Derecho Civil. Familia*. Tomo II. Editorial Presencia LTDA. Pág.11-12. 1887-1994.
- [5] Carbonnier J. *Derecho Civil, Situaciones Familiares y Cuasi-familiares*. Barcelona-España Editorial Bosch. Volumen II. 1961. Pág. 7.
- [6] Carmona Pérez, A. L. *Obligación alimentaria: estudio jurídico-social de la pensión alimentaria provisional*. (Tesis de Licenciatura en Derecho). Universidad de Costa Rica. Costa Rica. 2008. Pág. 8.
- [7] Castillo Rugeles J. A. *Derecho de Familia*. Santa Fe de Bogotá. Editorial Leyer Ltda. 2000. Pág. 31.
- [8] Código de Familia de Cuba. *Código de Familia*. Ley 1289 del 14 de febrero de 1975. 1975. Pág. 1-2.
- [9] Código de Familia de Nicaragua. Art. 37 *Concepto e integración de la familia*. Ley 870 del 24 de junio de 2014. 2014. Gaceta No. 190.
- [10] Congreso de Colombia. *Por medio de la cual se crea la Ley de Protección Integral a la Familia*. 03 de diciembre de 2009. (Ley 1361 de 2009). Diario Oficial No. 47.552.
- [11] Congreso de Colombia. *Código Civil Colombiano*. 26 de mayo de 1873. (Ley 57 de 1887).
- [12] *Constitución Política de Colombia* (Const.) (1991). 2da. Ed. LEGIS.
- [13] *Constitución política de Colombia* [Const.] (1991) Artículo 42 [Titulo II]. Trigésima Segunda Edición Ed. Leyer.
- [14] Corte Constitucional, La Sala Cuarta de Revisión. Expediente T-5.273.833. (MP. Gabriel Eduardo Mendoza Martelo). 2 de junio de 2016.
- [15] Corte Constitucional, La Sala Octava de Revisión. Expediente T-3873716. (MP. Alberto Rojas Ríos). 02 de septiembre de 2013.
- [16] Corte Constitucional, La Sala Octava de Revisión. Expediente T-4.534.989. (MP. Martha Victoria Sáchica Méndez). 18 de febrero de 2015.
- [17] Corte Constitucional, La Sala Primera de Revisión. Expediente T-4236830. (MP. María Victoria Calle Correa). 04 de julio de 2014.
- [18] Corte Constitucional, Sala plena. expediente D-10371. (MP. Jorge Iván Palacio Palacio). 04 de noviembre de 2015.
- [19] Corte Constitucional, Sala Plena. expediente T- 4.167.863 AC. (MP. Alberto Rojas Ríos). 28 de abril de 2016.
- [20] Corte Constitucional, Sala Plena. expediente D-6749. (MP. Marco Gerardo Monroy Cabra). 03 de octubre de 2007.
- [21] Corte Constitucional, Sala Plena. expediente D-6362. (MP. Rodrigo Escobar Gil). 07 de febrero de 2007.
- [22] Corte Constitucional, Sala Plena. Demanda N° D-911. (MP. Eduardo Cifuentes Muñoz) .07 de marzo de 1996.
- [23] Corte Constitucional, Sala Plena.. Expediente D-2645. (MP. Alvaro Tafur Galvis). 08 de junio de 2000.

- [24]Corte Constitucional, Sala Plena.. expediente D-6947. (MP. Clara Inés Vargas Hernández). 16 de abril de 2008.
- [25]Corte Constitucional, Sala Plena.. Expediente D-8367 – D-8376. (MP. Gabriel Eduardo Mendoza Martelo). 26 de julio de 2011.
- [26]Derechos Humanos, D. U. *Declaración universal de derechos humanos*. Derechos Humanos. 1998. Art. 16.
- [27]*Diccionario de la Lengua Española* (Actualización 2017). Concepto de Familia. Extraído de <http://dle.rae.es/?id=HZnZiow>
- [28]El Congreso de la República. *Por medio de la cual se crea la Ley de Protección Integral a la Familia*. Diario Oficial No. 47.552. (Ley 1369 de 2009, art. 2). 03 de diciembre de 2009.
- [29]Engels, F. *El origen de la familia, de la propiedad privada y del Estado*. Ediciones Akal. 1924.
- [30]Escriche, J. *Diccionario razonado de legislación y jurisprudencia*. C-H Tomo II. Paris, Francia. Ed. Temis. 1977.
- [31]Fuente Linares, J. C., & Javier, F. *La protección constitucional de la familia en América Latina*. REVISTA IUS (México), 2012. pág. 64-65.
- [32]García-Presas, I. *El derecho de familia en España desde las últimas reformas del Código Civil*. 2011. Pág. 238.
- [33]García-Presas, I. *El derecho de familia en España desde las últimas reformas del Código Civil*. 2011.
- [34]Giuseppe Tamburrino, *Lineamenti del nuovodiritto di famiglia italiano*. 2ª Ed, Torino, UTET, 1978, pág. 7.
- [35]Gómez Piedrahita H. *Introducción al Derecho de Familia*. Bogotá. Ediciones Librería del Profesional. 1981. Pág. 12-13.
- [36]Gómez Piedrahita H. *Derecho de Familia*. Santa Fe de Bogotá. Editorial Temis S.A. 1992. Pág. 26
- [37]Gómez Piedrahita, H. *Derecho de Familia*. La Familia. Ed. Temis. Santa Fe de Bogotá. 1992. Pg. 3, 7,8.
- [38]González, A. *Violencia intrafamiliar. Memorias del Seminario de FICOMI*, Universidad Pedagógica Nacional, México, Distrito Federal. 1997.
- [39]Gonzálvez, Torralbo., H. *La Producción Científica Sobre La Familia En Chile: Miradas Desde La Antropología Feminista*. La ventana [online]. vol.4, 2013. pág. 90.
- [40]Guío Camargo, R. E. *El concepto de familia en la legislación y en la jurisprudencia de la Corte Constitucional colombiana*. 2009.
- [41]Ibarrola, A. *Derecho de Familia*, México, Editorial Porrúa, 1978, pág. 75.
- [42]Jiménez Morales, C. R. *La Familia*. Redimensionamiento del Contenido Esencial de su Concepto. Editorial LEYER. Bogotá. 2018. Pág. 22, 37, 44.
- [43]Josserand, L. *Derecho civil*, Tomo I. Ediciones jurídicas Europa-América, Buenos Aires, Ed. Bosch Editores. 1952.
- [44]Konstantinov, F. V. *EL Materialismo Histórico*. México. Editorial Grijalbo S.A. 1963. pág. 110.
- [45]La Corte Constitucional, La Sala Octava de Revisión. expediente T-706697. (MP. Álvaro Tafur Galvis). 12 de junio de 2003.
- [46]La Corte Constitucional, La Sala Séptima de Revisión de tutelas. expediente T-3'242.483. (MP. Jorge Ignacio PreteltChaljub). 11 de abril de 2012.
- [47]La Corte Constitucional, Sala Plena. Expediente D-7177. (MP. Jaime Córdoba Triviño). 20 de agosto de 2008.
- [48]Leone, C. P. *Derecho de familia*. 2009. Pág. 3. Recuperado de [http://www.reflexioncientifica.com.ar/09\\_GI\\_RC\\_033.pdf](http://www.reflexioncientifica.com.ar/09_GI_RC_033.pdf)
- [49]Macías Carmigniani M. *La Familia Ecuatoriana*, Editorial Universidad Santiago de Guayaquil, Guayaquil-Ecuador. 2008.
- [50]Monroy Cabra M. G. *Derecho de Familia, Infancia y Adolescencia*. Duodécima Edición. Librerías Ediciones del Profesional Ltda. Bogotá – Colombia. 2009. Pág. 1.
- [51]Monroy Cabra, M. G. *Derecho de Familia y de Menores*. 3ª Edición. Librerías Jurídicas Wilches. Bogotá. 1993.Pág. 1.
- [52]Naciones Unidas. *Principios y Recomendaciones Relativos a los Censos de Población de 1970*, No. 44, Nueva York. 1967.
- [53]Parra Benítez, J. *La Filiación en Derecho de Familia*. Bogotá, Colombia. Leyer. 2008.
- [54]Sánchez, C. *La familia: concepto, cambios y nuevos modelos*. Revista La Revue du REDIF, 2 (1), 15, 22. 2008.

- [55]Somarriva M. *Derecho de Familia*. Santiago de Chile. Editorial Nascimento. 1963. Pág. 10.
- [56]Suárez Franco, R. *Derecho de Familia. Filiación*. Régimen de los incapaces, Temis, 2ª edición, 1992, 1992. pág. 4.
- [57]Universidad Católica de Argentina. *La Familia Como Bien de la Sociedad*. Observatorio de la Deuda Social de Argentina. 2014. 1ra Edición. Buenos Aires.
- [58]Valencia Zea, A. *Derecho Civil. Derecho de Familia*. Tomo V. Edición 6ta. Editorial Temis. Bogotá. 1988. Pág. 9
- [59]Varela Escobar, H., J. *Derecho Constitucional General*. Universidad Central del Valle del Cauca-Material Académico. Pág. 1-5.
- [60]Vélez, F. *Estudios Sobre el Derecho Civil Colombiano*, Vol. I. Actualizado y aumentado por Jairo López Morales, Bogotá, Ediciones Lex, .1981., Pág. 577.
- [61]Villalobos Odio, M. *Motivos y Consecuencias del Incumplimiento del deber alimentario para la familia y la intervención del trabajo social*. (Tesis de Licenciatura). Universidad de Costa Rica. Costa Rica. 1974. Pág. 8.
- [62]Zanoni, E. *Derecho Civil*, Tomo II, Buenos Aires. Ed. Astre. 1989.