



## SPANISH CONSTITUTIONAL COURT

Cabinet of the President  
Press Office

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#### THE TC CONFIRMS THE 1994 SOCIAL SECURITY ACT REQUIREMENT OF A MARRIAGE BOND FOR ENTITLEMENT TO A PENSION FROM A DEAD SPOUSE

**The Plenary Meeting resolves the appeal lodged by a citizen whose partner, with whom he had lived for over forty years, had died before legal marriage between persons of the same sex**

The Plenary Meeting of the Spanish Constitutional Court has declared constitutional the legal provision where by previous marriage is necessary for pension entitlement in the event of death of a spouse. The Court's analysis, rejecting an internal unconstitutionality issue filed by the Plenary Meeting itself in order to resolve an appeal for constitutional protection lodged by a citizen whose partner died in 2002, involves a legal scenario preceding legal marriage between persons of the same sex, as it affects Article 174.1 of the 1994 Social Security Act (as worded further to the 1998 reform). The judgment includes the particular dissenting vote of the Vice President of the Court, Adela Asua, and of judges Fernando Valdés Dal-Ré, Juan Antonio Xiol and Luis Ignacio Ortega, who acted as Reporting Judge.

The internal unconstitutionality issue was filed by the Plenary Meeting in order to resolve an appeal for constitutional protection lodged in 2004 by a citizen who was denied entitlement to pension from a dead spouse due to not being married at the time his partner died, in August 2002. The appellant claimed that he was unable to meet this condition, foreseen in the challenged precept, because at the time homosexuals could not yet legally marry. Therefore, the appellant considered that the Act infringed Art. 14 of the Spanish Constitution (CE) as it discriminates *de facto* homosexual partners on the grounds of gender.

According to the Plenary Meeting, the change in the legal framework resulting from the 2005 reform of the Spanish Civil Code, which legalised same-sex couples, has not affected internal unconstitutionality issues. In fact, in order to resolve the original appeal for constitutional protection, it is necessary to first determine the constitutional relevance of the 2002 rules, which applied to uphold non-entitlement to pension for the death of a spouse.

The judgment states that, according to the Court's case-law in judgment 198/2012, "*configuration of marriage as a union that is only possible between members of the opposite sex was decided by the Legislator in accordance with the Constitution; however, this does not mean that it is the only constitutionally accepted configuration of marriage as an institution*".

Within its "*broad margin of appreciation*", the Plenary Meeting adds, the Legislator conceived a pension for the death of a spouse "*not as an institution merely used to compensate a fall in income suffered by the surviving partner, but to compensate said damage in the context of a family backed up by a previous marriage*". As a result, "*homosexual de facto couples were not entitled to a pension because they freely decided not to marry, when they were able to do so, thereby not complying with legal requirements and having to face the consequences*". And "*homosexual*

*partnerships were excluded from the sphere of protection because the configuration of marriage at the time – which later changed- was based on a classic or traditional configuration (...)* The judgment recalls that repeated case-law of the European Court of Human Rights indicates “*that a differentiated treatment to homosexual relations fell within the State’s legal margin of appreciation*”.

“*Therefore, it is the Legislator*”- never the Court acting as a retrospective regulator of positive law, entailing obligations for payments from public funds- “*Which should decide, further to changes in society, when a pension due to the death of a spouse should be extended to other situations and to what extent*”, the Plenary Meeting affirms. “*The Legislator did this later*”, the judgment adds “*By regulating marriage between homosexuals (...)*” and extending the benefit of the widow’s pension “*subject to certain limits and conditions, to all stable de facto couples unions, both heterosexual or homosexual*”.

Once the internal constitutionality issue was settled and applied to the case at hand, the TC resolved in another judgment to deny constitutional protection to an individual who was claiming a pension for the death of his partner, based on the fact that the rules in force in 2002, analysed in the legal context applicable then, did not breach the right to equality and non-discrimination on the grounds of gender. “*Despite rejecting this appeal*”, the Plenary Meeting states “*We must add that (...) the applicant is still entitled to request recognition of the benefit regulated therein, subject to complying with all other legal conditions*”. This second judgment also includes the particular dissenting votes of Asua, Valdés and Xiol, as well as that of Ortega, who acted as Reporting Judge.

The judges who sustain a particular dissenting vote declare that both the unconstitutionality issue and the appeal for constitutional protection should have been granted. In their opinion, “*discrimination does not arise because the rule deals differently with married people and those who form a freely and voluntarily constituted de facto partnership*” but because in this case “*there is no freedom to choose whether or not to marry, insofar as, until the coming into force of the Act 13/2005, of 1 July, which modifies the Spanish Civil Code on the subject of the right to marry, same-sex marriage was not feasible*”. According to the judges, the judgment should have taken into consideration whether the regulation of pension for a deceased spouse in force in 2002 was based on “*discriminatory criteria depending on sexual orientation*”, as it established a condition which, at the time, could not be met by homosexuals.

Madrid, 18June 2014.