



Colombian Caravana UK Lawyers Group
promoting access to justice
and protecting human rights

COLOMBIA CARAVANA 2012

Judges at Risk

Report of the judge delegates of the Colombia Caravana

Monitoring visit 25 August to 1 September 2012



Colombian Constitutional Court, Bogota

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Introduction

The participants in the first two Caravanas of 2008 and 2010 were, for the most part, practising lawyers. The 2012 Caravana included two senior judges, from Canada and the Netherlands. This section of the Caravana's 2012 Report has been prepared by them.

The strengthening of human rights and – in relation to that – of the position of lawyers is intertwined with access to justice and, ultimately, the independence and quality of the judiciary and its members and the respect in which the judiciary and court orders are held by the executive and legislative branches. A duty of respect is laid down in many international treaties, as, for example, in paragraph 1 of the United Nations *Basic Principles on the Independence of the Judiciary*:

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

For this objective to be accomplished, it is essential that civil servants, the military and police officers obey court orders.

Over the years there have been many reports of serious incidents which have threatened and undermined the position of judges in Colombia. For that reason, it was decided to broaden the perspective of the Caravana to include a focus on the judiciary. Two judges participated in the 2012 Caravana: Carol Huddart, a recently retired Justice of the British Columbia Court of Appeal, Canada, and Peter Ingelse, Justice in the Amsterdam Court of Appeal and President of the Netherlands Enterprise Court, a division of the Amsterdam Appeal Court. Carol Huddart participated as a representative of Lawyers' Rights Watch Canada, an association which promotes the rule of law, with special emphasis on advocacy rights endangered by state action or inaction, in Canada and abroad. Peter Ingelse represented *Rechters voor Rechters* (Judges for Judges) a Dutch foundation which advocates for colleagues in foreign countries who are under threat because of their work.

The two judges participated both in general meetings and in specially organised meetings with local judges and judicial authorities, in Bogota and in Cali:

- On 27 August 2012: meeting with the Council for the administration of the Cali courts and with a number of lawyers;
- On 27 August 2012: meeting with Beatriz Eugenia Libreros, Judge in the Cali criminal court;
- On 28 August 2012: meeting with the President of the Cali Superior Court, the Vice-President, and the Presidents of all the court's divisions - labour, commercial, civil, family, criminal, land;
- On 31 August 2012: meeting with the criminal division of the Supreme Court in Bogota, President Javier Lapata Ortiz and Magistrado Fernando Castro Caballero.

During these meetings the judges had open and frank discussions about all topics they wanted to raise. All participants had the opportunity – and most of them took it – to make statements and ask questions. Most of the questions were answered in a way that was clear and sufficiently specific. The participating judges think that reliable information was exchanged during these meetings.

This part of the Caravana's Report reflects both the findings of the two judges and those of other participants who attended these meetings or other meetings in which attention was drawn to the position of the judiciary. Some additional information comes from published international reports.

Findings

In all regions visited by the Caravana serious concerns were raised about the lack of respect for the judiciary and the levels of impunity and challenges to access to justice which follow from this. Judges across Colombia face stigmatisation and threats. The judges explained that their decisions are frequently treated with contempt, particularly by government and local authorities. Hopes that denigration and persecution of jurists would end under the presidency of Juan Manuel Santos have not been realised. Their experience has been that the persecution has been getting worse.

Across the country, judges described three key problems affecting their independence and their ability to guarantee justice:

- their authority and their decisions are undermined by negative statements by government and local authorities
- their decisions are often not implemented or followed, and
- they face frequent threats; judges had been killed.

Threats, intimidation and murder of judges

In its annual report 2010, Chapter IV on Colombia, the Inter-American Commission on Human Rights reported that it had received information about threats and intimidation against judges.¹ The United Nations Special Rapporteur for the Independence of judges and lawyers, Gabriela Carina Knaul, pointed out that more than 300 '*actores judiciales*' had been murdered in the preceding 15 years.² She stressed the seriousness of the fact that the majority of these crimes had not been investigated adequately and there had been few prosecutions or convictions. The Special Rapporteur said that she had had private interviews with various judges, prosecutors and lawyers who had received death threats.³ During 2010, the Inter-American Commission on Human Rights granted three precautionary measures in favour of officials linked to the administration of justice, Justices of the Supreme Court Yeses Ramírez Bastidas and Sigifredo Espinosa Pérez, and criminal Judge María Stella Jara Gutiérrez, alleging they had been the targets of threats or intelligence activities relating to criminal trials under their jurisdiction.^{4 5}

¹ Annual report 2010 of the Inter-American Commission on Human Rights,

<http://www.cidh.oas.org/annualrep/2010eng/Chap.IV.COLOMBIA.doc>, nr 223 (p 410).

² Human Rights Council. Special Rapporteur's Report on the Independence of Judges and Lawyers, Sra. Gabriela Carina Knaul de Albuquerque e Silva, Visit to Colombia, A/HRC/14/26/Add.2, April 16, 2010. para. 53.

³ Human Rights Council. Special Rapporteur's Report on the Independence of Judges and Lawyers, Sra. Gabriela Carina Knaul de Albuquerque e Silva, Visit to Colombia, A/HRC/14/26/Add.2, April 16, 2010. para. 54.

⁴ See MC 221/09 - María Stella Jara Gutiérrez and her son, MC 157/09 - Yesid Ramírez Bastidas and MC 243/10 - Sigifredo Espinosa Pérez and his family at: <http://www.cidh.oas.org/medidas/2010.sp.htm>.

Caravana delegates were told of four Judges who had been murdered in the previous three years.

- José Fernando Patiño Leaño, single sentencing Judge of Fusagasugá was killed on 22 March 2010.⁶ He had been in charge of major trials of drug smugglers, guerrillas and paramilitaries.
- Judge Diego Fernando Escobar Mineral, a Judge of the Medellin criminal court, who had spent 19 years in the judiciary, was killed while waiting for a taxi on 22 April 2010.⁷
- Judge Gloria Constanta Gaona was killed in Saravena (Arauca) on 22 March 2011. According to the information available, Judge Gaona had been in charge of complicated criminal proceedings relating to drug trafficking, as well as the case of a massacre of three children, for which an Army second lieutenant was being detained.⁸
- Judge Jorge Alberto Restrepo Gonzalez, who served as a municipal Judge for 39 years, was shot dead in the centre of Medellin on 19 July 2012.⁹

According to the Consejo Administrativo in Cali, judges and their families are frequently threatened because of their work in both criminal and civil matters. The President of the Council explained that 6 out of 25 criminal court trial/first instance judges benefit from special protection measures, for themselves and their families, because of such threats. The President of Corte Superior in Cali informed us that all magistrados of that court benefit from 'total protection'.

One concrete example: Judge Libreros has been a criminal court Judge in the Circuit Court of Cali for 21 years. She served as a specialist Judge from 2003 – 2008. She had dealt with a case against a FARC member who was accused of an attempt to assassinate a lawyer. Following the hearing of evidence, a prosecutor who had not conducted the trial appeared to ask for an acquittal and the release of the accused. In 2008, Libreros found him guilty and sentenced him to 40 years in prison. The sentence was confirmed on appeal in 2009. A request for reconsideration of the conviction was rejected. On April 30, 2010 the police informed Judge Libreros that they had received reliable information that the convict had serious plans to have her killed. She was then allowed protection (armoured car, bullet proof vest, bodyguard and protection for her child to and from school). In December 2011, her car was shot as she was driving on a road she used regularly (although she frequently varied her route). Her armoured car protected her.

⁵ IACHR annual report on HR 2010, p 410 nr 224.

⁶ Annual report 2010 of the Inter-American Commission on Human Rights, <http://www.cidh.oas.org/annualrep/2010eng/Chap.IV.COLOMBIA.doc>, nr 224 (p 410).

⁷ Latin American Herald Tribune 22 April 2010: <http://www.laht.com/article.asp?CategoryId=12393&ArticleId=355828>

⁸ The annual report of the Inter-American Commission on Human Rights 2011, p 38 nr 124.

⁹ Colombia reports 20 July 2012: <http://colombiareports.com/colombia-news/news/25172-envigado-judge-murdered-son-injured-in-shooting-.html>

Lack of respect towards and negative statements about judges and their decisions

Under the Uribe presidency, local and national authorities frequently criticised judges, like lawyers, and depicted them in a very negative manner. Public denigration of judges for their decisions has continued under the current presidency, including by President Santos himself. He has not honoured his promise to stop his criticism, nor has he publicly expressed support for the judiciary as an institution. He has continued – albeit less frequently – to denigrate the judiciary and those of their decisions that did not please him.

A clear departure from President Santos' initially more restrained behaviour is the case of Judge Juan de Dios Solano of the Bucaramanga Superior Court in northern Colombia. On 21 April 2011 Judge Solano heard a *habeas corpus* application in the case of Jose Marbel Zamara Perez ('Chuco'), and after due consideration of the facts and relevant legislation (Law 1095 of 2006 and Article 28 of the Colombian Constitution), he ordered the immediate release of Mr. Perez. On the following day, President Santos criticised his decision and said that there were some 'rotten apples' in the judiciary who must not be allowed to overshadow the work of justice. Mr. Perez, who is alleged to have been the bodyguard of fallen FARC leader 'Mono Jojoy,' was detained again. The appearance of political interference is further increased by the unusually rapid investigation of Judge Solano's conduct, ordered by the President. This investigation resulted in Judge Solano being charged with *prevaricato por acción agravado*, contrary to criminal law 599 of 2000 (aggravated abuse of authority). Judge Solano, who is still sitting as a judge, now faces both criminal and disciplinary procedures. The final ruling in the Perez/Solano criminal case was suspended because of a judges' strike, discussed later in this report¹⁰.

To protect his reputation as a member of the judiciary, Judge Solano presented a request for a *tutela*¹¹ in respect of President Santos' remarks. In the first instance hearing of the *tutela* the Tribunal Superior de Distrito Judicial de Bucaramanga, Sala Civil - Familia found in his favour. However, that court's order was in turn set aside by the Sala Civil - Familia de la Corte Suprema de Justicia, on 13 July 2012.

Judge Solano received death threats but had been granted only the minimum level of security measures, with police visiting his house once a day and Judge Solano advised to call police if he was in danger.

The stigmatisation and prosecution suffered by Judge Solano threatens the independence of the judiciary in the whole of Bucaramanga. Judges from this part of Colombia are now said to be unwilling to grant *habeas corpus* orders to those who are detained in any case, regardless of merit,

¹⁰ We are informed by an observer to the sentencing proceeding that, on February 27th 2013, Judge Solano was declared guilty of aggravated perversion of the course of justice for having failed to examine relevant documents before granting *habeas corpus*. He was sentenced to 48 months under house arrest, dismissed from his office, prohibited from occupying any public office for 80 months, and required to pay a fine equivalent to "66.66 minimum salaries." The prosecutor, the Public Ministry, and Judge Solano have appealed the decision. Judge Solano has announced his intention to bring a *tutela* for breach of his constitutional right to due process.

¹¹ The constitutional guarantee of the right of every person to judicial protection of their fundamental rights through an effective remedy.

due to their perception of the risk of criminal and administrative prosecution they may face as a consequence.

The Caravana has sent a letter to President Santos to express its deep concern about his 'rotten apple' statement and his other interference with this case.

The Antioquia branch of ASONAL (*Association Nacional de Funcionarios y Empleados de la Rama Judicial* - National Association of Professional Employees of the Judicial Branch) reported frequent intimidation by authorities. Judges have been named as alleged guerrilla members, including by some institutions/authorities. According to ASONAL the attacks on judges by President Uribe are continuing under President Santos and becoming more frequent.

Another indication of disrespect for the judiciary comes from authorities at all governmental levels. Both the members of the Consejo Administrativo in Cali and the members of the Superior Court of Cali emphasised that court decisions – if unfavourable to the authorities – are simply not implemented. In most cases, time consuming enforcement procedures become inevitable. This applies particularly to pension and social security cases. Even though the same decisions are made over and over again, the authorities do not respect them. This refusal of governments at all levels to comply with court orders and to apply previous decisions to similar facts obviously is – to say the least – not very efficient and – unsurprisingly – one of the main causes of the congestion in the courts and the delays in proceedings. As a consequence of this non-compliance, 95% of all judicial cases in the labour and execution divisions involve a governmental authority as one of the parties.

Judges are prosecuted because of their decisions

As seen in the case of Judge Solano, judges sometimes face criminal or disciplinary prosecution because of their decisions in both criminal and administrative proceedings. Many judges adjudicating politically sensitive *habeas corpus* or interim release applications are said to have been targeted with investigation or disciplinary actions.

Examples:

- A Judge who issued “a condena” against General Arias Cabrerias (who was alleged to have been involved in crimes against humanity and forced disappearances) was disqualified. President Santos said that the judicial order did not have to be obeyed. He publicly declared that “the judges should ask forgiveness of the great army”. ASONAL has asked for protection measures for Judges in proceedings against military personnel but they were not provided.
- Judge Alberto Navallez of Medellin granted house detention to a prisoner in a very delicate state of health who was medically certified as risking his life if his imprisonment was continued. In an administrative disciplinary proceeding, the judge was suspended. While he was subsequently reinstated to his position awaiting a final ruling, he has been left at serious risk without adequate protection.

A representative of ASONAL also informed the delegation that in the last two years, some 500 judges who had granted economic, cultural or social rights (ESCR) under a *tutela*, had been investigated.

An example: currently a judge faces 40 disciplinary proceedings and a criminal charge for *prevaricato* for orders which he justified under international human rights law.¹² In Cartagena, the delegates heard about the case of Judge Arney Payarez, presiding over a *tutela*, whereby a group brought an action against *La Caja Nacional de Provision Social (CANAAL)*, the state body which administers civil servants' pensions. The Judge entered a default judgment against CANAAL in December 2006. It took four years to enforce the judgment, which was eventually achieved by freezing CANAAL's bank accounts and issuing an arrest warrant for the head of the relevant department in CANAAL. When the story broke in the news, Judge Payarez was removed from his post by *El Consejo Superior de la Judicatura*, the state launched a disciplinary inquiry into his conduct and he was removed from office.

Various

Particularly with regard to the Cali Courts: In 2008 a bomb destroyed the Palace of Justice. Since then the courts have been scattered throughout Cali in 17 buildings, some in very dangerous areas and most unsuitable or inadequate for judicial work. In particular, oral hearings have been affected, requiring judges, prosecutors and defence counsel to travel from court to court. This causes many problems for the judges' day-to-day work and its organisation and greatly impedes the work of both prosecutors and defence lawyers, who are sometimes required to be at different places at the same time. The already heavy caseload has grown considerably. This inadequacy of court facilities has added to the problems caused by a shortage of about 60 judges within the jurisdiction of Cali Corte Superior and by the failure (or refusal) of government officials to obey court orders.

The courts in general are facing many challenges:

- the introduction of the accusatory system of criminal procedure: e.g. oral proceedings
- a shortage of prosecutors and public defenders
- insufficient education and training for judges, prosecutors and defence lawyers on the new procedures as well as recent substantive statutory changes.

The members of the Supreme Court with whom we spoke confirmed that there are still problems with the disciplinary chamber of the *Consejo Superior de la Judicatura* – despite the UN Rapporteur's finding that this body was open to political interference. This is a consequence of the reform of the justice system, designed to give the public a say in it. The Supreme Court judges consider the appointment process to have introduced political party influence, with resultant undermining of the independence of the *Consejo* and of judges.

The tension between government and judiciary was also evident in discussions about judicial salaries. The members of the Superior Court of Cali emphasised that the salaries of first instance judges (*juces*), are low and that the government is doing little to change that. This is particularly noticeable

¹²ASONAL Sectional President

for the many judges who have to pay part of the cost of their own protection necessitated by their performance of their duties. This tension resulted in a judicial strike in October 2012 to support the judiciary's demand for more and better salary guarantees as well as a larger budget for the judiciary. According to the President of the Corporation of Judges and Magistrates, Maria Pilar, there is a huge gap between lower level *jueces* and higher level *magistrados*, a problem that has not been addressed for almost twenty years. As a result of the strike, 90% of the country's judicial hearings were suspended and only the most urgent hearings were held. In November a settlement was agreed. However it took until December before the strike was completely over.

Analysis and conclusions

From the findings mentioned above, it follows that Colombian judges currently work under very difficult circumstances:

- Judges face serious death threats. Some are killed. Protection is often non-existent, inadequate or too costly.
- Governmental authorities make negative statements about the judiciary and its members' decisions. Even the President denigrates them by word and action.
- Court orders are not implemented and not followed by the authorities.
- Judges are persecuted because of their decisions.
- Judges have to work under other difficult circumstances: heavy backlogs, low salaries.

Of course physical attacks on judges and their families are the most striking of this list. It is almost impossible to continue trying and deciding cases correctly and truly independently if one knows that his or her physical integrity, even his or her life or that of a family member, is at stake. How do you open-mindedly, independently and without prejudice, decide to take land from an illegal armed group and give it back to *reclamantes* – or, for that matter, decide *not* to take that land – if the judge has to venture into the regions with no office and without adequate protection?

It is essential to counter this issue with more resources. At a minimum, steps must be taken:

- to improve the protection of judges at risk and to remove the burden of the cost of their protection from them and
- to investigate all cases of threats or attacks against judges and their families and to prosecute the perpetrators.

However, the other difficulties listed above are perhaps even more important and more destructive to the functioning of the judiciary and its independence. After all, these specific difficulties show a serious lack of respect for judges, their decisions and the judiciary as an institution fundamental to a democracy. The failure to abide by judicial decisions gives a clear message that the decisions and the Judges need not be taken seriously. Denouncing judges for their decisions stigmatises the judiciary and its work. This way, governmental authorities not only do not show the people the importance of the judiciary and the rule of law but instead, they cultivate an atmosphere in which other authorities and the people copy this attitude of disrespect and in which criminals and paramilitary groups readily resort to threats and, even worse, acts of violence. When the President exemplifies this attitude, he

seriously undermines the position of the judiciary and creates a dangerous circle. The rule of law is weakened when by appropriate comment it could be strengthened.

We understand that – fortunately – the executive and legislative branches no longer consider the judicial branch their enemy, but to date even the President has not given evidence of his full support for the rule of law. So it is unsurprising that lower authorities persist in their disrespectful behaviour, and provide the public with reason to disregard the rules laid down in their country's Constitution and by its Congress. Thus the circle keeps on turning.

We do not expect the authorities to be happy with each and every judicial decision, but there are legal remedies to disagreement, by way of appeal. In a meeting with officers of the Presidential program for human rights, one of the officers, when confronted with the threats and denigrating statements against judges and the case of Solano in particular, confirmed that it was not the government's intention to stigmatise judges in specific cases and that it certainly would not happen again. That was good to hear. However she also argued:

We are aware that we have to be independent/maintain independence in the face of judicial decisions, but some decisions go beyond the framework of legality.

The issue is complex but this comment shows that the officer misses an essential point. Even if a decision goes 'beyond the framework of legality', it must be respected until it is overturned on appeal for legal or factual error. So, even if the decision of Judge Solano was wrong, his judgement should be respected unless and until it is reversed on appeal. Denunciation of the judge, his reasoning and his order is not acceptable in a democratic country seeking to be governed by the rule of law rather than brute force.

We think it is of paramount importance that all governmental authorities demonstrate, by their words and actions, respect for the judiciary in general and for judicial decisions and orders in particular. They have to make sure that from now on, they implement and follow judicial decisions (unless they appeal successfully) and that negative statements indeed 'will not happen again'. Moreover we think that the President should take the lead in this. He should not only declare that he will refrain from negative statements, but to break the circle he now should explicitly give his positive support to the judiciary and the rule of law.

Of course judges make mistakes and even sometimes abuse their powers. As mentioned there is a remedy against these faults: appeal. No judge should face criminal charges for doing what he or she perceives to be his or her duty. In an extreme case disciplinary proceedings should be possible. However, it appears that resort is had to this remedy too often and too easily and for illegitimate reasons, such that it has become a tool to be used against an independent judge rather than a support for that independence and protection for the community against a rogue judge who might misconduct himself or herself in office.

We support the opinion of the Supreme Court that the best way of ensuring the proper discipline of Judges without affecting their independence is to return discipline of judges to the judiciary.

Recommendations

We strongly recommend

- that the protection of judges at risk be improved and that the burden of costs of that protection be taken from them
- that all threats or attacks against the physical integrity of judges and their families be investigated with appropriate resources and the perpetrators prosecuted promptly
- that the disciplining of judges be returned to the judiciary
- that the President explicitly and publicly reiterate his commitment to a more respectful attitude towards the judiciary in words and deeds
- that the President not make any further negative statements about judges or the judiciary
- that the President explicitly support the judiciary as a partner and one of the essential powers in Colombia, thus breaking the circle
- that the President seek to ensure that all governmental authorities assume the same attitude, including the principle that the decisions of Judges – as a rule – should be implemented and followed and that dissatisfaction with any judicial decision should not give rise to, or provide reason for, negative statements but rather to acceptance or an appeal.

We think that such an approach could be effective. Simply telling people not to threaten or not to kill is not realistic and will not work. But political decisions *can* be taken, if one has the true intent to do so. If one would reject this proposition as being unrealistic, that would be the end of politics as well as the rule of law, in favour of an endless power struggle, where brute force reigns.



Caravana judges meeting with the Superior Court of Cali. Participants: the President of the Superior Court of Cali, the Vice-President, and the presidents of all court's divisions (labour, commercial, civil, family, criminal, and land).

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