Colombian Caravana UK Lawyers Group

promoting access to justice
and protecting human rights

COLOMBIA CARAVANA 2014

Judges at Risk continued

Report of the judge delegates of the Colombia Caravana

Monitoring visit August 23 to August 31, 2014

Introduction

The IV International *Caravana* Delegation of Lawyers to Colombia visited Colombia from August 23 to August 31, 2014. About 70 members from 12 countries, including five judges, visited seven regions: Bucaramanga, Buenaventura, Cali, Cartagena, Medellín, Pasto and Santa Marta. The judges, from Canada, the UK, the US and the Netherlands, concentrated on Bucaramanga, Cali and Medellín. They held meetings with colleague judges, with NGO's and with authorities. In Bogota they had – among others – a meeting with the President of the *Sala Penal* of the Supreme Court.

All delegates in Bogota

The 2012 Report of the judge delegates of the Colombia Caravana

In our 2012 report we found that Colombian judges had to 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.*

And we concluded with recommending:

– *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 cycle,*
– *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 thought that such an approach could be effective. Simply telling people not to threaten or kill is not realistic and will not work. However, 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.

Findings in 2014

General

During our 2014 visit the judge members of the Caravana received information that court judgments are still frequently subject to disparaging comments by public officials and still are often not implemented. Moreover, we were told that judges are sometimes subject to prosecution and/or investigation by the *Consejo Superior de la Judicatura* (Superior Council of the Judiciary) because of their judgments in Human Rights cases. Our special attention was drawn to insufficient resources, heavy backlogs and the difficult working conditions of judges[1] in general.

Medellín representatives from ASONAL (*Asociación Nacional de Funcionarios y Empleados de la Rama Judicial* - National Association of Professional Employees of the Judiciary) explained that – compared to the Escobar period during which killings and disappearances of judicial workers were commonplace – they now feel that they have a greater freedom and independence to render decisions they consider to be justified, even if they are controversial. However, many problems with respect to the independence of the judiciary and administration of the law remain. They identified the following problems:

a. Congestion in the system.
b. A people shortage – prosecutors, judges and administrators.
c. Lack of criminal investigations which lead to impunity for offenders and inability of the judiciary to direct action by the prosecuting authorities.
d. Lack of defence lawyers.
e. No specialist judicial panels for Land and Paramilitary cases.
f. Limited availability of IT – generally only in the big cities.
g. Large number of victims who seek redress for a variety of situations and for whom the legal process and access to justice has desperately failed them. These include people dispossessed of their land and homes by virtue of forced evictions (6 million displaced

[1] In this report we do not distinguish between judges and magistrates.

persons is a figure accepted by the Colombian Government[2]), victims of sexual discrimination and domestic violence against women, political persecution and discrimination against Afro – Colombian and indigenous communities.

h. Vulnerability of judicial employees and prosecutors.

i. Lack of respect for judges, criticism of their decisions by Government and media.

j. Physical risk to judges given the 'hostile' environment in which they often practice. Difficult cases involving the interests of criminal, paramilitary and industrial groups – e.g. in land restitution matters – and the lack of adequate personal protection poses risks to the genuine independence of judicial decision making. Six judges in the Medellín area have been granted protection but this was considered inadequate.

k. Regressive Law Reform proposals re the *tutela* and military justice. One successful development for 'victims' had been the use of the *tutela* from the Constitutional Court. This empowers an individual to take legal action to enforce constitutional rights to challenge administrative actions. The *tutela* has been widely used by victims seeking to enforce their rights. It was reported, for example, that over 200,000 cases for humanitarian aid had been filed but there were too few lawyers to assist claimants in what we were told were 50 new applications a week. The Government is now proposing to reduce the scope for the *tutela,* which would significantly reduce the redress currently available to victims of conflict. These proposals are opposed by the ASONAL. On the other hand Government seeks to strengthen and broaden the jurisdiction of cases which will be subject to the much more restricted and private processes of the military justice system. This would be outside the control of the courts and it was considered that this would effectively grant greater impunity to offenders. The proposals are strongly opposed, including by the Fiscalia office, and were the subject of debate in Congress during our visit.

Insufficient resources, backlogs

A recurring theme in what judges reported was that they have important responsibilities but limited resources. They reported: poor court facilities, temporary contracts for many judges and members of the judicial branch on whom judges depend, limited technology, limited support staff for the heavy work load and need for greater resources for preparation and investigations. The lack of judicial resources becomes especially clear in the land restitution

2 Colombia at the Crossroads, Caravana report 2014, p.12

process, which is outlined in the Victims and Land Restitution Law (*Ley de Víctimas y Restitución de Tierras*, Law 1448/2011).

The Victims and Land Restitution Law was introduced in 2011 to assist victims of the armed conflict and it enables some displaced people to return home and reclaim their land. They will generally have been displaced as a result of the armed conflict and paramilitary activity and frequently have been disposessed of their homes for many years. There is a 2-stage process whereby claims are initially made to the Land Restitution Unit (URT), which investigates claims to title to the land. In practice this may take many years to complete particularly if the land is still in territory affected by conflict. The URT will then refer the case to a judge/ magistrate to determine whether title to the land has been proven. If the court is satisfied, the claimant's name will then be registered with title. There is no provision for the judge to punish those who have unlawfully taken the land and the process is extremely slow with no guarantee at the end that the claimant will, in practice, be able to recover his land or be awarded compensation. In the Medellin región compensation had only been granted in 35 of the 935 cases where it was claimed.

Judicial resources are also very limited in dealing with these cases. In Antioquia, which is a region badly affected by land displacement claims, there are only six judges that can deal with land restitution cases. At present, in the Medellin region, there are 15,000 cases at the administrative stage that will still then need to be considered at the judicial stage. In Antioquia alone more than 11,000 requests were made to the URT but only 583 of those were finalised. Their workloads are already so heavy that it is taking them a long time to work through all their cases. Due to the controversial nature of these cases, the judges and magistrates are concerned about their own personal protection. They are only provided with one car and two bodyguards for every three judges/magistrates. Travelling together in this way puts them at greater risk of being attacked. The judiciary we spoke to compared the allocation of security measures to those that are given to senators, who each get their own car and bodyguard. The judges thought that they were at a greater risk than politicians and although they reported that they are not yet directly experiencing pressure from mining companies and other interest groups, land restitution is still a hostile and controversial issue. Both judges and magistrates have many enemies because of their work.

The Justice and Peace Law[3] cases show the same picture: in Medellín two magistrates are dealing respectively with 50 and 74 cases, each of them complicated. There are about 6,000 cases in the pipeline and any one case might have thousands of victims. Judges in those cases also complain that they are unable to direct further investigations themselves to establish the full facts. They have to refer back to the *Fiscalia* with no guarantee that anything will be done. The Justice and Peace Law might be a useful instrument to achieve conciliation and justice, but it is not being used to full effect.

The backlogs and the limited resources were confirmed by the President of the *Sala Penal* of the Supreme Court (see below). In fact, this situation gives impunity to and protects offenders, particularly the serious ones. We were told that the powers behind the para-militaries, who are widely known and include politicians and business people, are not being investigated or prosecuted by the *Fiscalia*.

In 2009 the government took measures to address the backlogs. According to an account of the Bucaramanga branch of ASONAL at that time, a backlog of five million cases all over Colombia existed. A number of 3000 new judges were appointed. However, these appointments were temporary. Between 2009-2013 the backlog was reduced to three million cases. Until now, this project has been partly successful. But the temporary judges did not receive proper training. Despite this, their appointments will become permanent in 2016.

It is clear that without sufficient resources, the judicial system is not functioning effectively – it does not achieve the purpose for which it exists, which is to resolve disputes peaceably and fairly. As a consequence, there is widespread impunity for criminal offenders. We were repeatedly told that whilst many of the laws may be good and progressive on paper, they fail miserably in their implementation. Without additional resources, the victims are being seriously let down; the system is failing them.

Threats and physical risks

We did not receive concrete information about threats or mistreatment over the last two years. In itself that, of course, is something to be satisfied with. However, judges still do not *feel*

[3] The 2005 Justice and Peace Law regulates the procedures to be followed for demobilized members of illegal armed groups and establishes judicial benefits (including reduced sentences of five to eight years) in return for truth telling, reparations to the victims, and a promise not to return to lawlessness.

safe, as they are often concerned about their personal protection, which constantly falls short of what is required. It is recognised by the Government - and the Supreme Court – that the courts function in a society in conflict. To maintain the independence of the judiciary it is therefore imperative that judges at all levels be provided with adequate protection when dealing with controversial and politically charged cases. Our reports suggest that this is not happening. Too often judges say they feel isolated and threatened and that existing protection measures are clearly inadequate. Unless judges feel safe, there is a real risk that they will tailor their decisions to reduce any danger to themselves.

Pressure and disparaging comments by authorities and the media

A Bucaramanga judge whom we interviewed stated that judges and their decisions are often strongly attacked in the press and that they are treated very disrespectfully by the police. This judge also explained that the *Consejo Superior de la Judicatura* has started to investigate all judges who issued decisions favourable to (former) guerrillas. This policy was confirmed by other sources. As a judge – the Bucaramanga judge told us – one has to work under the constant pressure that a dissatisfied party, whether it be the defendant, victim or prosecutor, will institute an investigation leading to disciplinary sanctions or the criminal charge of *prevaricato* (perversion of justice).[4] This offense carries a possible penalty of eight years in jail. It is obvious that such investigations put an enormous pressure on a judge's independence.

A Medellín judge who wanted to investigate a top level politician told us that his files disappeared from his office. Subsequently, he was the target of false allegations and defamatory comments.

According to an ASONAL account, judges are under constant pressure by the executive and legislative branches and by the media. This weakens their independence.

The Solano case

In our 2012 report we mentioned the Solano case.[5] On April 24, 2011, Judge Juan de Dios Solano of the Bucaramanga Superior Court in northern Colombia released Jose Marbel Zamara Perez ('Chuco') on a *habeas corpus* application. President Santos criticized the

[4] Article 413 of the Criminal Code provides that any public officer that issues – amongst others – a decision that is "manifestly againstthe law" will be punished with a minimum of three years and a maximum of eight years of imprisonment.

[5] Judges at Risk, Caravana report 2012, p 5.

decision saying that there were some "rotten apples" in the judiciary. Judge Solano's decision and the remarks of the President resulted in various proceedings. Judge Solano instituted a *tutela* against the President seeking *amparo* (protection of his fundamental rights). A criminal case and a disciplinary case were also initiated against Judge Solano. The decisions in the *tutela* case and the criminal and disciplinary cases were all appealed. Also, there was an appeal of Judge Solano's original decision to grant *habeas corpus.*

Part of the Caravana 2014 mission was to investigate the Solano case. Two of the participating judges visited Judge Solano at his home in Bucaramanga where he was still under house arrest. According to Judge Solano, he was removed from office by the *Consejo Superior de Judicatura* in the disciplinary case and – in February 2013 – convicted of *prevaricato* in the criminal case. Judge Solano appealed both decisions and the appeals were still pending when we met with him. Recently we learned that the Supreme Court upheld the conviction in the criminal case on February 18, 2015, although it substituted a finding of *prevaricato* simpliciter for the trial court's finding of aggravated *prevaricato*. The Appeal Court also substituted a jail sentence for the house arrest. This report, however, will only focus on the libel case.

On May 30, 2011 the Superior Court of the Judicial District of Bucaramanga granted the *amparo* (protection) requested by Judge Solano in the *tutela* case and ordered the President to rectify the statements that he made on April 24, 2011 within 48 hours. The President did not comply with this order but appealed it. Six weeks later, on July 13, 2011, the Supreme Court in Bogota quashed the order and dismissed Judge Solano's application.

The Supreme Court cited a recording of the statement by the President[6]:

> *We understand that in every institution there are rotten apples, there are people who do not work in the same spirit and with the same dedication as the majority of people. I want to point out, of course, that this does not cast a shadow over the workings of the justice system in general. But tomorrow I am going to request that the Superior Council*

[6]Translation from the Spanish, which reads as follows.

> *Entendemos que en toda lnstitución hay manzanas podridas, hay gente que no trabaja con el mismo espíritu y con la misma dedicación que la mayoría de la gente. Yo quiero, por supuesto, señalar que esto no ensombrece la labor de la justicia en general. Pero sí le voy a pedir mañana al Consejo Superior de la Judicatura que tome las medidas del caso, porque ese tipo de situaciones no se pueden presentar.*

> *of the Judiciary take the necessary steps so that this type of situation will not happen again.*

In the course of reversing the lower court decision against the President, the Supreme Court determined that the President's statement did not specifically refer to Judge Solano, and that the President did not give an opinion about his decision. Instead, according to the Supreme Court, the President announced his intention to submit the matter to the competent authority and that the "metaphoric use" of "rotten apples" does not, in and of itself, affect the fundamental rights of a person, nor is it an attack on the prestige of an institution. The Supreme Court therefore did not find a "serious violation" of Judge Solano's fundamental rights. The Court denied the *amparo* sought by Judge Solano and quashed the judgement of the Superior Court that granted it.

This decision gives rise to several observations. It is hard to accept that the comments of the President, did not refer to Judge Solano and his decision. The "metaphoric use" of "rotten apples" is rather clear and the words are obviously expressed in relation to "this case" in order that "this type of situation" (i.e. people – here: judges – "not working in the same spirit and with the same dedication as the majority of people" – again: judges) would not happen again. Still, the conclusion of the Supreme Court is that it did not find a "serious violation" of fundamental rights.

However, the criteria applied by the Supreme Court are not used by the people, including governmental and local authorities who have to implement or carry out judgements, and – importantly – the colleagues of the judge whose decision gave rise to the President's comments. The judgment of the Supreme Court does not alter the fact that the President's comments denigrated the work of a member of the judiciary. The Supreme Court also noted that "the higher in the hierarchy one functions, the greater the deliberation required." The President disregarded this principle in his communication to the people, instead of encouraging them – as he should – to pay respect to judges and their judgments.

As mentioned, we know by now that the Supreme Court upheld Judge Solano's conviction because of *prevaricato*. However, this does not make any difference in the discussion about the President's statement. The President made his disparaging statement long before any independent court investigated the matter and any decision upon that investigation was rendered.

The Caravana delegates in Cali met a judge from that city, a Second Criminal Court Judge in the Municipality of Cali. He told us that disciplinary measures were taken against him and that a criminal procedure was opened against him, only because of a decision he rendered as a judge. From the documents regarding the disciplinary measures the following occurred. The judge dealt with a case concerning J.M.P.Q., who was charged with possession and trafficking of fire arms. The judge confined him with house arrest. On 13 February 2015, the judge was discharged from office for 12 months and received a fine of 49.266.720 Colombian Pesos [which, at the time of writing, equals 18.500 Euros] because he *"did not respect / comply with, and within his sphere of competence, comply to the constitution, laws and rules."* According to the disciplinary decision, J.M.P.Q. had been convicted a few years earlier and therefore the house arrest was not acceptable under Colombian law and he should have been sent to prison. The sentence of J.M.P.Q. was later overturned and he was sentenced to 30 months imprisonment. The judge recently requested the annulment of the disciplinary measures, but this was denied.

Cases like those of Judge Solano and the judge from Cali raise the question of whether the prosecution of judges, because of their decisions, is acceptable as a regular remedy. Of course, if there is a clear abuse of power, such a response is justified. However, the threat of prosecution and removal from office can severely affect judicial independence. Other countries certainly have provisions like Article 413 of the Colombian Criminal Code, which make it a crime to abuse a position of power. As the President of the Criminal Panel of the Supreme Court stressed to us, no one is above the law, judges included. However, with respect to judges, the section, referring as it does to decisions, is very broad. It reads as follows.

> *Prevaricato por acción. El servidor públicio que profiera resolución, dictamen o concepto manifiestamente contrario a la ley, incurrirá en prisón de tres (3) a ocho (8) años (...) multa de cincuenta (50) a doscientos (200) salarios mínimos legales mensuales vigentes (...), e inhabilitación para el ejercicion de derechos y funciones públicas de cinco (5) a ocho (8) años (...).*

In English:

> *Perversion of Justice by an act. Any public official who promulgates any resolution, order or concept that is manifestly against the law is liable to imprisonment for a*

period of between three (3) to eight (8) years (…), a fine of fifty (50) to two hundred (200) of the minimum salary by law in force at the time (…), and disqualification from exercising any public office or functions from five (5) to eight (8) years (…).

Everything depends on how the provision is implemented. As threat of prosecution chills judicial independence, we will continue to follow cases like those of Judge Solano and the judge from Cali.

Information from the Supreme Court

The president of the *Sala Penal* of the Supreme Court, with whom we had the honour to speak, denied that – generally speaking – judges are threatened or pressured by any authority. And certainly, he said, the recent situation has improved and is not alarming any more. It has to be taken into account that conflict and violence still reign in Colombia. This indicates that the situation in Colombia might be worse than elsewhere and that judges have to work under some risk. That risk is inherent to the work judges do, the president of the *Sala Penal* explained, and it is also possible that there is more pressure in isolated areas. When threats are reported, the judge will be protected. When a certain court case is particularly risky, it is possible to transfer the case to a court in the main city of the relevant area or to Bogota More protection is available in these places.

The president of the *Sala Penal* also firmly denied that judicial decisions are often not implemented. Only if the decision in a certain case is not according to the law, as a result of corruption, there might be an exception.

The president confirmed that delays are a serious problem. The caseload is too large. This is the number one problem, especially in criminal cases and in human rights cases. It can take 15 to 20 years until a case is finally resolved.

The president of the *Sala Penal* explained that it indeed happens that a judge is convicted and imprisoned because of corruption or abuse of power. A judge can be brought to court because he commits a crime, not because he has a legal opinion. According to the president, a judge who works properly will never work under pressure because of a fear for disciplinary or penal measures.

Constitutional Court and Consejo Superior de la Judicatura

We tried to visit the Constitutional Court and the *Consejo Superior de la Judicatura* and to interview one or more of their members, but unfortunately this could not be arranged.

Law reforms

We are very concerned about pending proposals to limit the Constitutional rights – the *tutela* procedure – and divert some contentious judicial functions from the normal courts to the military justice system.

Analysis and Conclusions 2014

Our clear conclusion from what we learned in this Caravana is that the judiciary is not provided with sufficient resources. As a consequence, it cannot carry out its task adequately and effectively. Additional resources are essential. New judges should be appointed with guarantees for their independence and should have a proper training. We realize that this puts a heavy task on the government and on the budget. Here, we suggest that some assistance in improving the administration of the system – for example, introduction of IT, or development of specialist courts might be achieved with outside help. Such assistance could come from the EU and other countries anxious to assist Colombia in its efforts to improve its strong and independent judicial system.

The other information that we received during the 2014 Caravana was more equivocal than in 2012. This could, of course, be the result of an improvement of the situation. The words of the President of the *Sala Penal* of the Supreme Court suggest that there is less reason for concern. However, there are too many reliable sources that confirm that judges are still the target of negative remarks by authorities, that their judgments are not respected and implemented, and that they are investigated criminally or subject to disciplinary measures because of their work. In this respect not everything that the President of the *Sala Penal* said is particularly reassuring. When the president of the *Sala Penal* allowed that some decisions are not implemented "as a result of corruption", one wonders who makes that decision. Does the executive branch determine for itself before any appeal what decisions it considers corrupt? This is what President Santos appeared to do in the Solano case.

The President of the Sala Penal's observation that a judge who works properly will never work under pressure out of fear of disciplinary or penal measures is similarly not reassuring. Whether or not a decision is favourable to former guerillas seems to be a relevant factor in the decision of the *Consejo Superior de la Judicatura* to start disciplinary investigations against a judge. It is possible that this is the consequence of the reform of the justice system that, as we mentioned in our 2012 report, introduced political party influence in the nomination of the members of the *Consejo*. That reform, according to the Supreme Court members we interviewed in 2012, undermined the independence of the *Consejo*. As far as we know, that reform has not been reversed. In any case, there cannot be any doubt that an investigation policy in which the merits of the decisions play an important role is not acceptable.

We have to add that the possibility of being investigated because of one's legal opinion threatens judicial independence. Under those circumstances, the dangerous cycle we mentioned in our 2012 report persists. This can only be effectively removed by demonstrating that everyone, particularly public authorities, respects the judiciary and its work without reservation. This certainly should be done by those whose previous actions or words may have suggested a lack of respect for the judiciary. That is why we think it appropriate that the President of the Republic and the *Consejo* should confirm these principles at every opportunity to remove any public perception that the judiciary is not respected. Even if the President and the *Consejo* are not responsible for creating the impression that the judiciary is not held in respect, by strongly affirming their respect for the judiciary and its work, they would fulfil their responsibility to promote the proper functioning of the rule of law.

The fact that violence reigns in Colombia is no reason to relativize the foregoing. On the contrary, there is all the more reason to support the position of the judiciary. Although the decisions of judges from time to time may displease the public or the authorities, the rule of law and the respect for the judiciary is of paramount importance for peace.

Here we would like to emphasize that we in no way intend to imply that judges should not be investigated for disciplinary, or even criminal, misconduct. There are also reports of corruption within the judiciary. There cannot be any doubt that corruption and abuse of power should be addressed.

We conclude that it is still necessary to draw special attention to the position of judges and to the importance of their independence and their position in the division of powers.

Recommendations

After due consideration, we conclude that we have to maintain all the recommendations of the 2012 report, quoted at the beginning of this report. In addition, we want to recommend that the judiciary be provided with sufficient resources in general, but particularly in Land Restitution cases and cases under the Justice and Peace Law. Summing up, we recommend:

- *that an analysis be made of the needs of the judiciary to carry out its task properly, in terms of personnel, staff, training, premises, IT and all other resources,*
- *that funds be allocated to meet those needs,*
- *that the protection of judges at risk be improved and that the burden of the cost 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 government explicitly and publicly affirm its commitment to a more respectful attitude towards the judiciary in words and deeds,*
- *that the government desist from any further negative statements about judges or the judiciary,*
- *that the government explicitly support – without reservation – the judiciary as a partner and one of the essential powers in Colombia.*

In 2012, we thought, and we still think that such an approach could be effective. Political decisions *can* be taken if one has the true intent to do so.