

DECISION 288 DE 2010 (AUTO)

Jorge Iván Palacio Palacio

In October 30, 2009, the governments of Colombia and the United States entered an executive agreement on “*international cooperation and technical assistance in defense and security*” under which the citizens and military of the latter were granted several privileges and immunities. Additionally, the agreement allowed the establishment of several US military bases in Colombian territory.

A group of citizens filed a constitutional complaint against the executive agreement, claiming that it was inconsistent with articles 150-16, 189-2, 224 y 241-10 of the Constitution. They submitted that, due to the nature and extent of the obligations undertaken by virtue of the agreement, it should have been approved through the ordinary procedure for the adoption of a treaty. Specifically, they claimed that the agreement should have been approved by the Colombian Congress and should have been reviewed by the Constitutional Court. However, since none of the aforementioned steps were followed, the plaintiffs asserted that the agreement was unconstitutional.

In addition, the plaintiffs submitted that the executive agreement was contrary to article 173-4 of the Constitution, as it lacked Senate approval for authorizing the transit of foreign troops through Colombian territory.

Thirdly, the plaintiffs claimed that the executive agreement breached the national sovereignty principle enshrined in article 9 of the Charter, as it established a strategy of “shared defense” that undermined Colombia’s ability to independently and autonomously protect its own interests.

The Court noted that the crux of the matter revolved around the legal nature of the challenged agreement. Hence, it drew a line between treaties (or international agreements) and executive agreements. With regards to the latter, the Court signaled that executive agreements were “a *legitimate and valid mechanism to enhance international cooperation*”. However, the Court strongly stressed that executive agreements “*cannot serve as means to acquire obligations that may exceed or surpass those previously undertaken by virtue of an international agreement.*” Thus, the Court stated that “*if a so called executive agreement entails the undertaking of new obligations, or obligations not comprised within previous international agreements, it cannot be deemed as such but rather, it must be understood as a true treaty that must be subject to approval of the Congress and review by the Constitutional Court.*”

In that sense, the Court found that the agreement on “*international cooperation and technical assistance in defense and security*” between Colombia and the United States was not an executive agreement. Indeed, the Court noted that even though previous treaties shared the same objectives of the challenged agreement, none of them dealt with military and defense matters. Moreover, the Chamber pointed out that the following subjects, *inter alia*, were nowhere to be found in any previous agreement, whereas they were considered essential in the challenged one: (i) Unlimited access to Colombian military bases; (ii) Establishment of an immunities and privileges regime for US citizens in Colombia; (iii) Freedom of transit for US military vessels, aircraft and terrestrial vehicles in Colombian territory (iv) Unlimited right to bear arms.

Additionally, the Court stressed that, despite the fact that the challenged executive agreement was not contained in a law, it did have jurisdiction to review it. Indeed, the Court stated that “*it is implied in the concept of rule of law that no act can fall outside the scope of judicial review.*” Furthermore, the Court explained that “*since the Constitution is the highest form of law, no measure can escape its control.*”

Thus, the Court held that the executive agreement on “*international cooperation and technical assistance in defense and security*” was unconstitutional, as it had been approved without going through the ordinary process of adoption by the Colombian Congress and had not been reviewed, *ex officio*, by the Constitutional Court. As a result, the Court ruled that the agreement was null and void and thus, could not be enforced in Colombia.