

Constitutional Claim Decision C-370 de 2006.

Opinion of the Court: Justices Manuel José Cepeda Espinosa, Jaime Córdoba Trivino, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Álvaro Tafur Galvis and Clara Inés Vargas Hernández.

Separated Opinion: Justices Jaime Araújo Rentería, Alfredo Beltrán Sierra and Humberto Antonio Sierra Porto.

A group of citizens, members of NGOs groups, accused for unconstitutionality *Ley 975 de 2005*. This bill of the Congress provides rules regarding the reintegration of members of illegal armed groups to contribute effectively to achieving national peace, as well as provisions on humanitarian agreements. The bill, commonly known as "Justice and Peace" contains justice mechanisms "alternative penalties" in the field of transitional justice processes. In essence, the bill allows criminals who confess their crimes related to illegal armed group membership, receive a benefit. This benefit consists in the standard penalty imposed is replaced by an alternative penalty of between five and eight years in prison. The alternative penalty depends on the fulfillment of conditions related to the clarification of the facts and the realization of the rights of victims.

The main topics of the unconstitutionality lawsuit were: (i) the existence of irregularities in the legislative process of some of the rules of the bill; (ii) use the bill to grant the members of illegal armed groups a judicial pardon, without the procedural requirements for it. In turn, this pardon is contrary to the State's duty to investigate and punish crimes, especially main violations of human rights; and (iii) the inadequacy of measures taken to satisfy the rights of victims of these crimes.

On the first aspect, the Court showed that two of the accused rules, over to general reductions of penalties and the crime of sedition on formation of guerrilla or paramilitary groups, were contrary to the Constitution. This is because they had not been discussed and approved in accordance with the rules of legislative procedure, in particular the *principio de consecutividad*.¹

On the second position, the Court ruled that the bill was not a kind of pardon or amnesty. Indeed, the bill provides rules about investigation and punishment of crimes. Only allows, in order achieving objectives constitutionally valid as the national peace through ending the armed conflict, replacing the ordinary punishment for an alternative.

To solve the other issues, the Court presents a theoretical framework about the constitutional obligations and international law rules on the protection of the rights of victims of gross human rights violations. In addition, the Court

¹ The *principio de consecutividad* (principle of consecutiveness) is a rule of Colombian legislative procedure. According to this principle, each matter of a bill draft into the Congress should to be debated and voted by the commissions and the full session in the Senate and the Chamber of Representatives.

discussed the juridical debate between the satisfaction of those rights and possible limitations by transitional justice norms in the context of internal armed conflict in Colombia.

Based on its own Court's precedents and rules founded in other judicial decisions, adopted by Inter-American Court of Human Rights, the Court discussed several topics that informed adjudication. First, the Court named the pursuit of peace as a complex legal entity, as a collective right, an essential purpose of the Colombian state and a constitutional value. Therefore, the State had the authority to provide reasonable transitional instruments, justified and proportionate, even limiting other constitutional guarantees, in order to achieve peace. However, such limitations could not be based on the understanding of peace as an "absolute value". Instead, the peace achievement should be compatible with the main aspects of the Rule of Law, in particular the rights of victims.

About the rights of victims and based on the same theoretical frame, the Court rules that this rights had complex and could not be reduced in an indemnity for the damage caused. Instead, include the right to know the truth about the facts of the crime, the right to justice, i.e. that the criminals will be prosecuted, judge and punished; and the right to damage compensation (moral and economical), and the guarantee of non-repetition of criminal acts.

Specifically, the Court rules as victims' rights (i) the State's obligation to investigate, prosecute and punish crimes, particularly those that involving serious violations of human rights, respect which there is international agreement banning their impunity, (ii) linking the rights of victims with respect for human dignity, (iii) the right of victims to have a prompt and effective judicial remedy for the satisfaction of his constitutional rights to truth, justice, reparation and guarantee of non-repetition, (iv) the right of victims to reparation contains measures of restitution, compensation and rehabilitation, (v) the right of victims to the non-repetition of crimes involving the disbandment of illegal armed groups, the repeal of laws and special courts, the recognition of the inviolability of *habeas corpus*, and the dismissal of public servants who make links with or support illegal armed groups, as guerrillas and paramilitary groups.

The Court found that the settlement of the claim depended on the balance between the pursuit of peace and the rights of victims. This is because all regulation of transitional justice involves the tension between these extremes. Thus, for each legal rule must determine if tended to fulfill a purpose according to the Constitution, if the measure was suitable to meet that purpose, and if the rule's application is compatible to, both: pursuing of national peace and the rights of the victims.

Based on this methodology, the Court rules specific topics about the constitutionality of the bill. Among the most important decided by the Court are the following:

1. The alternative punishment is a mechanism aimed at achieving peace, which is consistent with the Constitution. Also, do not violate the right of victims to justice, because includes the investigation, prosecution and punishment of crimes, through the ordinary adjudication. The alternative penalty is a benefit subject to controls and requirements related to the satisfaction of the rights of victims.

2. The guarantee of non-repetition means that the convicted does not repeat any criminal offence. In addition, the offender is required to collaborate effectively in protecting the rights of victims. Therefore, the entitlement to benefit from the alternative penalty depends on compliance with those obligations.

3. The right of the victims to know the truth means that the responsible declare, freely and voluntarily, the facts relating to all crimes he committed as a member of illegal armed group. The omission or concealment of crimes should result in the inability to give the benefit of the alternative penalty. This is because such actions are clearly contrary to the protection of the rights of victims and reconstruction of historical truth and memory. The satisfaction of the right to the truth means, in the same way, that the rules for granting benefits not discriminate against certain crimes. Thus, the rule that the grant of benefits to the release kidnapped people, should also extend to the information on the whereabouts of forced missed persons.

4. Victims should have the sufficient and appropriate legal remedies to participate in the various stages in the investigation, prosecution and punishment of the offenders. These resources include legal assistance by the State. Furthermore, these procedures must be issued within a reasonable time, sufficient to adequately investigate the behavior, and prompt in order to satisfy the rights of victims.

5. The right to justice for victims means that the criminal sanction of imprisonment is made after sentencing by the judge, and in a regular prison. Then, is unconstitutional computing as part of the sentence as long as the offender was in a "zone of concentration."² This is because the entering to these areas is voluntary and the zone is not operates under the regular prisons regulations.

6. The reparation of victims is mainly a responsibility of the offenders. These criminals must respond with their assets, both legal as illegally obtained. Moreover, while human rights violations are carried out by illegal groups, i.e. organized criminal structures, responsibility for the repair is jointly and severally liable among its members. The State also has responsibility for the

² According to *Ley 782 de 2002*, the "zonas de concentración" (zones of concentration) are areas of the territory, agreed by the Government and spokesmen of illegal armed groups, in processes of dialogue, negotiation and signing of peace accords. In these areas do not apply warrants for arrest issued against members of these groups, during the peace process.

reparation of victims, but in a subsidiary and competing with those responsible. State responsibility can not be limited to budget availability.

7. The international law of human rights gives the condition of victim to those directly affected by the crimes and their families. Usually, international decisions have extended the degree of crime impact to parents and siblings, being the minimum acceptable for the recognition of victim status. So, rules that arbitrarily limit below this minimum recognition are unconstitutional.