



CONSTITUTIONAL COURT OF COLOMBIA

Notable Judgements on vulnerable and disadvantaged groups



INTRODUCTION

Since its establishment in 1991, the Colombian Constitutional Court has become a powerful institution protecting the fundamental rights of vulnerable and disadvantaged groups in the country. According to the Political Constitution it is entrusted to the Court: *“The safeguarding of the integrity and supremacy of the Constitution”*. In such a capacity, it has developed an avant-garde guardianship of the fundamental rights of the people never seen before in the country. The Colombians trust their Constitutional Court as the last resort and ultimate protector of justice and human rights. People belonging to vulnerable and disadvantaged population have found, for the first time, a reliable resource of constitutional and legal protection for their rights not found before in such a lucid and strong way.

The Court hereby presents its second edition of the most notable judgements regarding the protection of the rights of vulnerable and disadvantaged groups. In accordance with the four thematic axes of the *XV Annual Conference of the Constitutional Jurisdiction: Diversity and Inclusion*, to be held in January of this year 2021 in the city of Pereira, the following topics have been taken as a criterion to lead the selection of the Court’s decisions for this document, i.e., I. HUMAN RIGHTS, GENDER EQUALITY, AND INTERSECTIONALITY; II. RECOGNITION OF THE RIGHTS OF ETHNICALLY DIFFERENTIATED PEOPLES; III. NATURE, BIOCULTURAL RIGHTS, AND DEVELOPMENT; IV. DIVERSE SOCIETY. RIGHTS OF PEOPLE WITH DISABILITIES.

2 It is, consequently, for the Constitutional Court of Colombia, an honor to present to the general public its second edition of the most notable judgements regarding the protection of the rights of the vulnerable and disadvantaged groups, expecting it will help to understand the judicial developments that this institution of Justice has set to lead to a more just and inclusive society.



THEMATIC AXIS 1: HUMAN RIGHTS, GENDER EQUALITY, AND INTERSECTIONALITY

Decision C-117/18

Equality and equity for women on tax matters

The case. A citizen requested the constitutionality review of the provision that taxed sanitary napkins and tampons with Value Added Tax – VAT at a rate of 5%. The petitioner claimed that the constitutional principles of equality, equity, and tax fairness were violated by the law. He added that women’s sanitary products are basic necessity items, and, therefore, should be exempt from any tax.

Decision. The Court ruled the Unconstitutionality of the challenged regulation on the basis that these products were exclusively used by women, therefore, taxing them implies an unjustified burden to the detriment of women compared to other taxpayers. In addition, being these goods irreplaceable, economically disadvantaged women face an unfair additional barrier, compounded by the fact that women, in general, are at a disadvantage due to lack of financial independence and of equal opportunities with respect to their male partners. The Chamber, consequently, ordered that these products be exempt from VAT.

Decision SU-479/19

Victims of sexual violence

The case: The Court decided two joint legal actions filed against judicial decisions to agree on plea bargains entered into the defendants and the prosecutors as part of the respective criminal procedures for sexual violence – SV. Specifically, in one of the cases, the prosecuting body recognized that the marginalization of the accused was a punitive mitigation circumstance that led to a reduction of the sentence. This benefit was granted disregarding the condition of cognitive disability of the victim, who, in addition, used to live in a property owned by the defendant.

The decision: The Court granted protection to the rights of the victims to due process, access to the administration of justice, and the right to be part of the criminal process since its beginning. In opinion of the Forum, the decision that approved the preliminary agreement made the following errors: i) The circumstances of marginalization of the accused were not proven in the process; and ii) it failed to apply the gender and disability approach when assessing the case. That is so because the ruling did not carry out any analysis regarding the way in which the crime had been committed. It did not consider either that the aggressor had taken advantage of the cognitive and motor disability condition of the victim, as well as persistence in sexual harassment after the commission of the crime. Consequently, the Court annulled the orders that had approved the preliminary agreements.

Decision SU-599/19

Registration as a victim of a woman who was forcibly recruited in the guerrillas, sexually assaulted, and violently compelled to displace

The case. The plaintiff alleged that the Special District for the Care and Reparation of Victims (Spanish short UARIV), ignored the plaintiff's fundamental rights by denying her registration as a victim of the internal armed conflict, due to her requesting beyond the legal terms set up in Act 1448 of 2011. The petitioner alleged that the decision of the special agency did not consider events of *force majeure* and prevented her from petition her registration on due time.

Decision. For the Court the terms for the registration were suspended until the event of force majeure ended. It was resumed afterwards, allowing the claimer to be included in it. Besides, doing so is the only way to protect the number of her rights that were violated such as: medical care, family life and unity, adequate food, education, housing, among others. Accordingly, the Court GRANTED the protection and ordered the corresponding authorities to register the petitioner as a victim, and provide her with all the required appropriate health care services.

Decision T- 366/19

Gender discrimination

The case. The petitioner filed a legal action on behalf of his daughter based on the need of protection of her fundamental rights to equality, non-discrimination on grounds of sex, human dignity, recreation, and access to culture. The action was filed against the Colombian Soccer Major Division, the Bogotá Soccer League and others, as a result of the sanction and exclusion from the 2018 Pony Soccer League tournament of the children's team to which the girl belonged, considering the existence of "irregular performance" that involved his participation in a team made up exclusively of men.

Decision. The Court protected the fundamental rights to equality, non-discrimination based on gender, human dignity, recreation, and sport, the higher interests of children and adolescents, the respect for their legitimate trust on established requirements and procedures, and due process in favor of the minors. The Chamber concluded that the exclusion of the children from the soccer tournament did not find support on any of the rules of the tournament or of the International Federation of Association Football —IFAF. The Court also declared that the ban on mixed teams had been based on sexist and discriminatory stereotypes of the practice of sport by women. As a result, it ordered the registration of the team in the 2019 soccer tournament, as well as the public apologies for the incurred discrimination.

Decision T-398/19

Public policy regarding support for menstrual hygiene of homeless women

The case. The plaintiffs acted as unofficial agent of a homeless woman who was facing financial difficulties to the extent that it forced her to make use of unhealthy measures to take care of her menstrual period. They asked the Court to protect her fundamental rights and, consequently, ordered the District Secretary of Health, to supply her with the appropriate menstrual blood absorption products. They based their request on the principle of human dignity, sexual and reproductive rights, and the fundamental right to appropriately manage menstrual hygiene.

Decision. The right of homeless women to appropriately handle their menstrual hygiene is guaranteed by the constitutional principle of human dignity and the sexual and reproductive rights. Their protection should be guaranteed at all times. As a result, the Court GRANTED the protection of the abovementioned rights, and ordered the district authorities to take positive actions to provide adequate hygiene material to the homeless woman, as well as to set appropriate facilities to carry out the change, privately and decently. It also ordered the district authorities to educate her about menstrual periods and how to manage them. The protection was also extended by the Court, to all women living on the streets, by ordering the District Secretary to implement a public policy that involves the implementation of a contingency plan, and concrete actions aimed at the supply of suitable absorbent material for women living on the street. Finally, the Court exhorted all the regional entities facing situations involving homeless female population, to review, design, or update their public policies in the matter.

Decision SU-080/20 Redress for domestic violence against women

The case. The plaintiff, a victim of domestic violence, claimed the violation of her fundamental rights by the judicial decision that decided the appeal against the ruling in a special process of divorce involving the legal effects of a Catholic marriage. That decision denied to condemn the defendant to pay the maintenance obligation, despite finding him guilty of outrages, cruel treatment, and physical abuse. The denial was based upon the fact that the petitioner had the financial capacity to cover her subsistence and, therefore, she did not need the mentioned food quota.

Decision. The Court analyzed whether in a divorce, when the cause of outrages, cruel treatment, and physical abuse is considered proven, the family judge must rule on effective remediation. The Chamber concluded that it is feasible to order the reparation of damages in the processes of divorce and special cessation of civil effects of a Catholic marriage when the cause of domestic violence is proven. The protection invoked was GRANTED and the questioned judicial authority was ordered to open an incident of reparation in which the costs are specified and assessed.



THEMATIC AXIS 2:
RECOGNITION OF THE RIGHTS OF ETHNICALLY DIFFERENTIATED PEOPLES
(As of 1991)

Decision SU-123/18

Exploration and exploitation of hydrocarbons in view of the protection of environment and mandatory prior consultation with indigenous communities

The Case. The Awá community “La Cabaña”, located in the Putumayo Department, filed a legal action against the Ministry of the Interior, the National Environmental Licensing Authority, and the Colombia Energy Consortium as a consequence of the exploration and exploitation of hydrocarbons carried out by said consortium in the stewarded lands of the indigenous community. They claimed that said extractive activity had not been the object of agreement with this group for almost a decade and had caused serious environmental impacts.

Decision. The Court decided that the fundamental rights to the environment had been violated by the activities of the consortium, which also lacked mandatory prior consultation with the Awá. The activity regarding non-renewable resources generated an undue impact on the environment. This has led to an imbalance of loads and benefits of the ecosystem. As a result, the oil exploitation has deteriorated the life of “*La Cabaña*” community and its cultural structure as follows: (i) the contamination of rivers that the community used to fish and for human consumption; (ii) the mortality of local fauna that was used to feed the community; (iii) the deterioration of flora and vegetation, which were used to make the medicinal plants that are essential for practicing traditional medicine; (iv) the decrease in air quality derived from the pollution that arose from the passage of tank cars that transport oil. Ultimately, all these situations represented factors that undermined the right to health of the community from the pollution they generated to the environment. As a consequence, the Court issued a series of orders led to protect the environmental rights of the Awá community and its stewarded lands.

Decision C-480/19

Discrimination of Afro-Colombian, Palenque, and Raizal communities

The case. Two citizens filed a legal action requesting the constitutionality review of a regulation that indirectly restricted the production by the Afro-Colombian, Palenque, and Raizal communities of traditional and ancestral alcoholic beverages for their own consumption and for the exercise of traditional medicine. The regulation allowed doing so only to indigenous communities.

Decision. The Court decided to include Afro-Colombian, *Palenque*, and *Raizal* communities within the authorization to produce distilled liquors that have a traditional and ancestral meaning. In his opinion, these communities are holders of inherent rights so that their spiritual, cultural, ancestral, medicinal expressions, etc., are protected by the Constitution. These peoples have alcoholic beverages, such as *biche*, which are part of their cultural identity, their traditional medicine, and their customs, similar to that of indigenous communities. Excluding the plaintiff communities from the possibility of producing alcoholic beverages, which have a cultural, ancestral or traditional meaning, implies an undue interference with their rights.

Decision T-172/19

Right of association of the Wayuu people and their registration with the Ministry of the Interior

The case. The Association of Traditional *Shipia Wayúu* Indigenous Authorities and 65 other traditional indigenous authorities, filed a legal action against the Office of Indigenous Affairs, Roma People, and Minorities of the Ministry of the Interior. They requested the protection of their constitutional rights to their indigenous culture, identity, customs, and traditions, and association, allegedly violated by the governmental office by imposing on them excessive bureaucratic formalities which prevent them from being legally recognized members of their own communities.

Decision. The court considered that the formal requirements to register the indigenous people and the demand that their leaders be democratically elected, ignore the concept of “traditional authority” that is recognized according to their tradition by kinship presuppositions - elder man by maternal blood line - and the concurrence of qualities for the exercise of authority, but it is not chosen through democratic mechanisms.

Based on that, the Chamber concluded that the aforementioned requirements do not correspond to the traditions and customs of the *Wayúu* indigenous people, and therefore, violate their rights to cultural identity, participation, autonomy and association.

Consequently, the invoked protection was GRANTED and a series of orders were issued to enforce the protection of the rights of the indigenous community.

Decision T-365/20

Ethnic and cultural diversity of indigenous people deprived of liberty

The case. A citizen who is a member of an indigenous community filed a legal action, as an inmate of a Penitentiary and Prison Establishment of Valledupar, against the director of said detention center. The plaintiff considered that his fundamental rights to diversity, ethnicity, equality, and cultural identity were violated by the refusal of the administration to authorize the entry of the *ayú* and *poporo*, handcraft items linked to artisanal customs of the members of the Arhuaca indigenous community, to which he belongs.

Decision. The Court upheld the plaintiff’s fundamental rights to diversity and ethnic and cultural identity, equality and human dignity. The Forum considered that the denial of the entry of the handcrafted artifacts by the Director of the prison had violated the fundamental rights of the plaintiff due to the following: (i) the plaintiff was a subject of special constitutional protection, since he was a member of the Arhuaca indigenous community; (ii) the use of the coca leaf has been widely recognized as a valid and legal indigenous tradition, protected by the Constitution; and (iii) the banning by the prison authorities implied the violation of the fundamental right to diversity and ethnic and cultural identity of the inmate. Consequently, the Chamber ordered the entity in question to authorize the entry and use of the *ayú* and *poporo* within the prison in which the actor was deprived of liberty.



THEMATIC AXIS 3: NATURE, BIOCULTURAL RIGHTS, AND DEVELOPMENT

Decision T-294/14

Construction of sanitary landfills

The case. Peasant and indigenous communities of the *Zenú* people filed legal action against the national and local environmental authorities, the local public utility company, and the Ministry of the Interior in view of the environmental consequences suffered by the actors due to the construction of the Cantagallo landfill.

Decision. The Court determined that the fundamental rights of the environment to a dignified life of the plaintiffs were violated, because the construction and location of a sanitary landfill entails an undue environmental imbalance which must be restored. The Forum concluded that the defendant entities violated the fundamental rights to prior consultation and to recognition and subsistence as indigenous peoples of the members of the Venado community, by refusing to both, certify their presence in the area, and to carry out mandatory consultation before the granting of the environmental license and the start of construction of the Cantagallo landfill.

Decision T-622/16

Biocultural rights of the Atrato river

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The case. Ethnic communities, by means of legal action, requested the Court to order the authorities to stop the intensive and large-scale use of various methods of mining extraction and logging by means of heavy machinery and the use of highly toxic substances such as mercury in the Atrato River, Chocó. They claimed that the river's watersheds, swamp, wetlands, and tributaries have been suffering irreversible contamination. They added that this scenario also becomes a risk for health, as well as for the development of cultural and vital activities of the communities in the region.

Decision. The Court granted the motion, and declared the Atrato River, its basin, and tributaries as entities subject to rights, such as to protection, conservation, maintenance, and restoration by the State and also by the ethnic communities. The degree of environmental deterioration and the importance of the tributaries for the plaintiff group, led the Court to further develop and extend the principle of protection of rights also in favor of natural resources, like the river in question. The Forum, consequently, determined that the National Government has the duty to perform legal guardianship and representation of the rights of the river. It also ordered to implement measures to restore the environmental damage caused.

Decision T-325/17

Fundamental right to water

The case. A citizen filed a legal action against the municipality of Rio Negro, Santander and the owners of a *hacienda*, alleging actions of the defendants that led to the dried up of the Lebrija river, a tributary which they use for their livelihood through artisanal fishing. The petitioner asserted that the owners of the hacienda closed off the water sources, unduly appropriated the nearby wetlands, and dried up the swamp.

Decision. The Court concluded that the fundamental rights to water, food security, life in decent conditions, and work of the members of the fishing community had been violated. It also asserted that the community were formed by members of vulnerable groups, mostly children and older adults, whose rights to a dignified existence should be protected. Consequently, it ordered the environmental authority to carry out a process of identification of the actors who had participated in deforestation, construction of gardens, diversion of water courses, and desiccation of water sources in the area in which the ranch extends, in view of the remediation of the rights of the actors. A detailed set of orders for that purpose were issued by the Court.

Decision T-063/19

Collective ownership and inherent steward rights of the land

The case. The indigenous community *Andoque* of the municipality of *Aduche* in *Puerto Santander, Amazonas*, filed legal action against the National Government, so that within the so-called *Amazon Vision program*, the pertinent judicial guidelines established to protect their right were followed. The plaintiffs claimed their steward rights over their ancestral lands, and to be consulted on every action taken thereof. The mentioned program is executed by the Government with financial support of several public international entities, and aims at the reduction of emissions coming from deforestation in the Amazon.

Decision. The Court granted protection of the fundamental rights of the plaintiff community to prior consultation based on the recognition of their ancestral inherent rights to steward these lands. In addition, the Chamber found that the execution of the *Amazon Vision program* implied a distribution of environmental burdens, by manipulating ecosystem resources within the community's territory in the Amazon biome. Therefore, ordered the authorities to guarantee the adoption of policies and/or legal instruments for the preservation of these biodiverse areas, and in this way avoid a serious impact on the environment.



THEMATIC AXIS 4: DIVERSE SOCIETY. RIGHTS OF PEOPLE WITH DISABILITIES

Decision C-149/18

Education rights of children and adolescents with disabilities

The case. The Court reviewed, as per a citizen request, the constitutionality of regulations related to access to education for people with disabilities, in which a “special” or “specialized” education treatment is established. In the plaintiff’s opinion, these provisions promoted the segregation of this population from the conventional educational system. The actor claimed that this exclusive educational modality, violated the fundamental right to education, to equality, and non-discrimination, as well as the comprehensive and harmonious development of minors with disabilities.

Decision. The Court ruled the constitutionality of the regulations, provided that the special education: i) is an exceptional, temporary and/or partial or parallel measure, in relation to the general supply of education; ii) is prior to making sufficient and adequate reasonable accommodations; and iii) must have the interdisciplinary professional support, the consent of the involved person and/or their guardians, and the academic community. The Forum considered that the special offer of education is an alternative and reasonable measure, which must be understood within the broad concept of inclusion in the educational system of people with disabilities. It represents, therefore, a means to guarantee access to education for people with sensory, physical, and/or cognitive disabilities.

10 Decision T-468/18

Custody and care of children by mothers with disabilities

The case. The Court reviewed the legal action filed by a woman with a disability, who was separated from her minor child because, in the opinion of the minor protection authorities, the mother cannot satisfactorily comply with her duties as a mother, given her cognitive limitation and housing conditions, which hindered the integral development of the child.

Decision. The Court protected the fundamental family rights of the plaintiff and her son not to be separated and, consequently, ordered the Family Defender to perform adequate support to the plaintiff to overcome the specific barriers that the mother may have in this regard. The Court found that the administrative and judicial authorities failed to comply with their duties, since they did not guarantee the fundamental rights of the child involved and his best interest, which consisted of staying together with his mother. The authorities’ duties also involve the assistance to the plaintiff and her child so that they can develop a normal family life.



Decision T-451/19

Right to adequate housing for persons with disabilities

The case. A 79-year-old woman filed a legal action against the local authority that denied her the right to sell a property acquired with monies from a housing public subsidy. She requested the authorization to sell because access and exit from the assigned house involved the use of stairs, which affected her health. It was so as she presented a physical limitation that prevented her from using the stairs autonomously. Her request was denied on the grounds that her health problems were not caused by living in said property, and it was not a force majeure or fortuitous event.

Decision. The Court upheld the rights to equality, to special protection of persons with disabilities, and to a decent housing in favor of the petitioner. It affirmed the duty of the government to eliminate physical, sociological, or legal obstacles that prevent the effective enjoyment of decent and adequate housing. It also warned that, as to people with disabilities, the duty of government does not end with the physical and legal delivery of the assigned property, but rather it is as well obliged to ensure that the housing meets sufficient standards of physical accessibility that make it possible for the beneficiary to use it with no detriment to her health. Therefore, it ordered the local authorities to identify and provide the petitioner with alternatives to ensure effective enjoyment of housing. To do this, it could: (i) relocate her to another property; (ii) eliminate access barriers; or (iii) authorize the sale or lease of the property.

Decision T-607/19

Rights of children and adolescents with disabilities

The case. The plaintiffs, on behalf of his minor daughter (hearing and speech impaired), claimed that her rights were ignored by the ICBF (child protective services agency). The father said that for no reason, her daughter was referred by the school counselor to the defendant agency and it, in turn, sent her to an emergency foster home for alleged mistreatment at home. The foster home sent her back to an ICBF's special unit for minors. The petitioner argued that the family is being split by the arbitrary decision of the defendant agency.

Decision. The Court emphasized that the condition of the minor made her a particularly vulnerable person who should be specially protected by the authorities. Although the Court did not find proof of mistreatment at home, it did not find either irregular procedures followed by the defendant agency. But it noticed that the girl had not received appropriate treatment for her condition until the age of 13, when the school noticed it was required. Due to this, the proper protection of her rights should be guaranteed at all times, and therefore, special attention and oversight over her treatment and circumstances should be performed permanently. Accordingly, the Court DENIED the plaintiff's motion and issued several orders to authorities involved aimed at the protection the girl's rights.



Decision C-048/20

Insufficient law coverage of measures regarding the use of service dogs for persons with disabilities

The case. The Court heard the claim of unconstitutionality presented by several citizens against the regulation that authorized service dogs to owners or holders with visual impairment in certain places. In the plaintiffs' opinion, said provision violated the principle of equality since it excluded from the benefit people with disabilities other than visual disabilities who also required the company of an assistance canine to enter public places.

Decision. The Court decided that the challenged provision was in accordance to the constitution, provided that it also includes the assistance canines to any person with any type of disability who so requires. The Forum concluded that the Legislator had incurred in a relative legislative omission, by not considering the universe of people with disabilities, ignoring the special protection envisaged by the law in favor of any member of that population. It also clarified that the legislature had neglected the duty to promote positive actions in favor of all the members of this population. The omission had generated: (i) a situation of discrimination against those who were not considered as beneficiaries of the regulations; and (ii) the breach of the purpose of the demanded regulation, that is, to allow the accessibility of people with disabilities to places open to the public.

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