

Wilson Pinzón v. the Mayor of La Calera, Constitutional Court, 2001

Petitioner files a writ of protection (*acción de tutela*) on behalf of his minor son, who attends the nursery school *Jardín Infantil Departamental La Calera*. He states that this educational institution is situated one block from a police station and a military base of the Colombian Army. The police station is opposite the military base. Besides attending this day care center, the house where his son lives is only separated from the police station and the military base by another house.

Petitioner says that the municipality was taken over by guerrillas on July 19th, 1994, when the police station was completely destroyed by an attack with firearms and the office of the Caja Agraria bank was set on fire. On July 27th, 1999, a second guerrilla attack was launched, and residents fled with their children to more remote locations in order to avoid danger.

The following day, the petitioner requested the mayor of the municipality to move the police station “to a more appropriate and less-residential location outside the urban zone...” The mayor responded to those requests stating that this issue was not under his purview and that “securing the lives of individuals was not a responsibility of the Municipal Government but of the military forces” (folio 9), that the property which housed the police station did not belong to the municipality and that no objections had been raised when the police station was relocated.

In response, the petitioner pointed out that public deed No. 182 dated March 8th, 1996 (folios 27-29) proved that the police station is located in a property owned by the municipality. He added that while residents did not object when the police station was inaugurated in a residential area, their opinion was never sought.

The petitioner also expressed concern over the statements made on television by the FARC spokesman, Raúl Reyes, who recommended Colombian authorities to locale police stations outside the urban areas of municipalities, as the members of such organization had been instructed to attack police stations in the first place.

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IV. FINDINGS OF THE CHAMBER

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2.1 The State has an obligation under the Constitution to protect the rights and the lives of individuals - Description of duties of the police forces:

Article 2, paragraph 1, of the Constitution establishes that the essential purpose of the State is to guarantee the effective enjoyment of the rights enshrined therein. In turn, article 11 provides that the fundamental right to life may not be violated. Also, in its second paragraph, article 2 lists the purposes for which authorities have been instituted, including in the first place the obligation to protect the lives of individuals.

In order to achieve those purposes, the constituent assembly deemed it necessary to organize a public force (art. 216), made up by the military and the police. The police force is created as a civilian organization within the sphere of the national government. Its primary purpose is to maintain the conditions necessary for the exercise of rights and freedoms and to ensure that the inhabitants of Colombia live in peace.

However, although the Constitution conceives the police as a civilian institution with preventive functions—as opposed to the military forces—, in the current socio-political situation in Colombia, characterized by widespread instability and violence, this classification does not always portray the reality or allow the police to perform the service it is expected to provide. Therefore, in previous cases, the Colombian Constitutional Court has recognized that the police force is in a “grey area” halfway between the military and the civilian spheres.

...as a result of the current state of affairs of the Colombian conflict, the police force may not be classified as an entirely civilian institution from a legal standpoint, because in certain regions of the country instability has grown to the point that police officers and their workplaces are often chosen as military targets by the guerrillas. ...

2.2 People's solidarity is a necessary condition for an adequate police service.

Clearly, in order to live together, individuals must fulfill certain social responsibilities... This duty of solidarity, in terms of the service provided by the police, justifies imposing certain burdens on private individuals, insofar as the location of police stations is part of a strategic plan to allow authorities to make the most of available resources and provide an effective service for everyone.

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2.3 Limits on the duty of solidarity:

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However, the duty of solidarity does not require private individuals to indiscriminately take any risk which could undermine their rights. In such case, the State would abdicate its role as

guarantor of those rights, suggesting that no oversight of administrative measures is possible because their purpose is legitimate.

On the contrary, the fact that the State is subject to the rule of law also means that the mechanisms by which it pursues its constitutional goals should be monitored. The problem does not lie in determining when the principle of general interest should prevail over any consideration of subjective rights. Instead, the extent of the duty of solidarity should be defined to establish what can be reasonably expected from private individuals when the service provided by the police poses a risk to the population. The prevalence of the general interest is not a constitutional rule with a single legal consequence, but rather a principle that, as such, may be taken into consideration.

The burdens that a government may place on private individuals by virtue of the prevalence of the general interest are enforceable insofar as the private interest infringed is incompatible with the needs of the service. Even though private individuals must accept certain burdens required for the provision of any public service, the State has an obligation to minimize inherent risks, so that individuals do not bear an unnecessarily heavy burden. This is particularly true in cases where the risk threatens people's lives and physical integrity. Claiming that life and other rights can be guaranteed by policing alone is not enough. Those responsible for the administration of the police service should take all necessary actions to minimize the risks involved and, at the same time, bring the needs of the service more closely in line with a fair distribution of public burdens.

In all cases, even when the needs of the service may not be harmonized with subjective rights or interests, burdens should be necessary, reasonable and proportionate. A burden will be necessary if the measure at issue is required for an appropriate provision of the service. Of course, the government has significant latitude in this regard, as it usually has the information and resources to identify the needs for the service and the means available to provide it. Reasonability should be the defining criterion for weighing the legal interest pursued or protected against the legal interest undermined by the burden. Needless to say, this assessment should be made taking into account the hierarchy established in the Constitution. The proportionality assessment seeks to guarantee that the burden does not impinge too much on the rights, expectations and other interests of those who bear it. In other words, only the sacrifice that is strictly necessary should be made to achieve the objective.

The most important aim of international humanitarian law is the protection of civilians in times of conflict, based on two fundamental principles: the principle of distinction between combatants

and civilians, and the principle of proportionality. And the Colombian Constitutional Court has repeatedly held, from early on, that such principles are part of the “constitutional block.”

With these principles in mind, under the current state of affairs in the country, the police forces, both in practice and in law, occupy a “grey area” halfway between the civilian and the military sectors; it is an armed State force involved in counterinsurgency activities, and as such its members can be classified as combatants. Therefore, on the understanding that the police are part of the combatant population, and that despite the risks to civilians resulting from ongoing attacks against this armed force the State cannot renege on its obligation to fulfill this role, we can only conclude that the State must take actions to minimize such risk. In other words, strictly “military” operations, as well as all other activities conducted by State armed forces, should only pose the minimum possible risk to the civilian population. On this point, article 13 of Additional Protocol II to the Geneva Conventions of 1949 ... establishes the minimum protection provisions for the civilian population and, to guarantee this protection, affirms the principle of distinction between civilians and combatants...

“ARTICLE 13. Protection of the civilian population.”

“1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.”

“2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

“3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.” ...

As part of the protection of civilians against the dangers arising from military operations, covered under subsection 1 of this article, the State should take specific measures to guarantee that the risk posed to civilians is the minimum necessary to ensure an effective performance by the police forces. The notions of efficiency and risk are variables that should be assessed based on the second principle that we mentioned, the principle of proportionality. Taking into account such principle, the need to establish police stations in accessible locations from where services can be

provided to the whole population should not entail an excessive risk for those who live in the vicinity.

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2.7 Concluding observations

With the above considerations in mind, we can conclude that in these cases the admissibility of *tutela* actions is conditioned on a sufficient showing that the threat represents an imminent risk to the life and personal integrity of an individual or group, because of the current scale of historic guerrilla attacks in a certain geographical location, and the specific circumstances of the person requesting the injunction. However, failure to establish the existence or imminent occurrence of a risk within the term of the *tutela* action does not mean that the risk is not real. Even when the judge acts with the utmost diligence and performs all necessary tests to establish the seriousness of the risk, the constitutional term may turn out to be insufficient, as the analysis of all elements involved can often exceed the investigative capacity of the *tutela* judge and, therefore, impinge on their capacity to offer protection. However, administrative authorities, and in particular entities responsible for intelligence activities and safeguarding the security of individuals, have the necessary means and infrastructure to establish whether a guerrilla attack is imminent and the degree of exposure of those who live in the vicinity of police stations.

Irrespective of the admissibility or inadmissibility of the *tutela* action, executive authorities should assess these risk situations in many of the country's municipalities, and take such measures as may be necessary to minimize the threat. Only efficient and sufficient planning, prevention and correction efforts can guarantee the effective enjoyment of the rights to life and personal integrity in the context of a climate of widespread violence that pervades many parts of the country. In such cases, the prompt and responsive actions of the *tutela* judge would be inadequate to deal with the scope and nature of the issue of insecurity.

3. The case in question

In the *tutela* proceedings before this Court, ...the guerrillas have launched attacks against police stations which left several police officers and civilians injured and caused significant structural damage. In addition, according to the report by the Ministry of Defense, both municipalities are of strategic interest to the guerrillas and there is presence of several FARC fronts or blocs. This situation was further compounded by the statements that one guerrilla commander made on television, claiming that police stations were targets of guerrilla attacks and should be relocated.

These events underscore that at present ... police stations in La Calera... are potential targets of FARC attacks, and the means by which such attacks are carried out pose a significant risk to the buildings and the lives and personal integrity of the population in the vicinity.

...Taking into consideration the particular circumstances of the petitioners seeking protection, this differential analysis rests on a question of fact, i.e., the defenselessness of minors in nursery schools, and a question of constitutional law, resulting from the prevalence of the rights of children over those of other people. The prevalence of the rights of children also means, in turn, that the legal interest to be protected by sacrificing these rights should be of a superior constitutional value. Only then can protection be denied. At the same time, to the extent that the threat does not pose an imminent risk to the life or physical integrity of the children whose protection is sought by the *tutela* action, the decision to grant protection may not be grounded in the prevalence of those rights.

While one case concerns the protection of a group of children whose rights take precedence over those of other people (Colombian Constitution, art. 44), the other seeks to grant protection to families which despite the special protection afforded to them by the State (Colombian Constitution art. 42) are not in the same position of evident vulnerability as the minors in the nursery school. In fact, the evacuation and, in general, the effective protection of approximately 330 minors who attend the two nursery schools in the area near the police station in the municipality of La Calera will not be possible in the event of an attack. Even if appropriate preventive measures are taken to conduct an evacuation or safeguard the children, the headmasters of the institution do not have the necessary tools to protect their lives, and minors are under no obligation to bear the burden of such a great risk...

The inability to cope with the consequences of a guerrilla attack as a reason to prevent this burden from being placed upon those living in the vicinity of a police station has been recognized in the rulings of this Court:

“First, it is worth highlighting that solidarity can only be expected from an individual who is in a position to assume it. The circumstances of the person expected to take the burden should be considered in every case.”

“Therefore, if we consider that, because of their physical and psychological conditions, as well their lack of experience, children cannot defend themselves from an attack as adults would - especially acts as serious as those under analysis- it would be unreasonable to expect a minor to

run the risk of losing his life, all the more if this risk can be avoided or mitigated; and this is one of the greatest responsibilities of the State and society in general, as has been established, inter alia, in article 44 of the Constitution.”

“The duty of solidarity of minors does not go far enough to expect them to accept that the place where they receive education becomes a battlefield and that they could be caught in the crossfire, considering that children, because of their defenselessness, can only be victims and should not become heroes in the context of an armed conflict.” (added emphasis) SU-256/99 (reporting judge José Gregorio Hernández Galindo)

To the extent that a group of minors in a school or nursery are not capable of coping with the risk of a guerrilla attack, and considering also that the professors and headmasters have no means to protect them either, the probability of a guerrilla attack represents an imminent threat to the defenseless children who attend a nursery located near a police station.

In addition, because the rights of children are involved and these rights have prevalence over the rights of other people, the level of protection should be greater. Article 44 of the Constitution recognizes the duty of the State to provide special protection to children from all forms of physical violence. In this way, public administration can only be released from the obligation to provide special protection when it can prove conclusively that such protection may compromise a legal interest of higher constitutional value than the rights of children.

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For the reasons stated... this Court AFFIRMS the decisions rendered on September 12, 2000, which granted the protection requested...

Wilson Pinzón and others v. the Mayor of La Calera, T-1206/01, Constitutional Court of Colombia, November 16, 2001.