

Case SU-256/96

**Reference:** File T-83734

**Plaintiff:** Germán Humberto Rincón Perfetti - Colombian league for the fight against AIDS

**Second Instance Tribunal:** Chamber of Criminal Cassation of the Supreme Court of Justice

**Topics:** Right to work, right to social security, right to equality, right to dignity and right to health of asymptomatic carriers of the HIV virus.

**Magistrate Rapporteur:** Dr. VLADIMIRO NARANJO MESA

Santafe de Bogotá, D.C., Thirtieth (30) of May nineteen ninety-six (1996)

The Full Chamber of the Constitutional Court, composed of magistrates Jorge Arango Mejía, Antonio Barrera Carbonell, Eduardo Cifuentes Muñoz, Carlos Gaviria Díaz, José Gregorio Hernández Galindo, Hernando Herrera Vergara, Alejandro Martínez Caballero, Fabio Morón Díaz and Vladimiro Naranjo Mesa -President of the Chamber-.

Has delivered the following,

## JUDGMENT

In the process of the writ of *tutela* number T-83734, advanced by Mr. XX (the name of the plaintiff is omitted in order to protect his privacy) against the Corporation Gun Club, the Institute of Social Insurance and Doctor Alvaro Erazo Murra.

### I. BACKGROUND

In accordance with the provisions of article 86 of the Political Constitution and article 33 of Decree 2591 of 1991, the Selection Chamber of the Constitutional Court chose the writ of *tutela* of the aforementioned reference, for the purpose of its review.

In accordance with article 34 of the Decree 2591 of 1991, this Selection Chamber proceeds to deliver the following judgement.

#### 1. Request

Mr. German Humberto Rincón Perfetti, representative of the Colombian league for the Fight Against AIDS, acting as legal representative of the Plaintiff, Mr. XX, filed before the Criminal Chamber of the Superior Court of the Judicial District of Santafe de Bogotá D.C. a writ of *tutela* against the Corporation Gun Club, the Institute of Social Insurance and Doctor Alvaro Erazo Murra. The petition sought to safeguard the Plaintiff's fundamental rights to human dignity, equality, privacy and work, enshrined in articles 1, 13, 15 and 25 of the Political Constitution.

## 2. Facts

The legal representative affirms that the Plaintiff worked in the Corporation Gun Club since March 16, 1992, earning a salary of approximately 230,000 pesos, which included the base salary and the so-called 'commissions by conventions' represented by sums of money received for matrimonial services and special meetings held at the Club.

He also says that the Plaintiff attended the medical service that Dr. Alvaro Murra Erazo was giving in the facilities of the Club. The Doctor ordered him to take the HIV test (Human Immunodeficiency Virus), causal agent of AIDS (Acquired Immunodeficiency Syndrome), which was taken by the aforementioned doctor in the San Pedro Claver Hospital on the 28<sup>th</sup> April, 1994. The legal representative also affirms that, 'When the doctor saw the positive result of the test, he advised the Plaintiff that he SHOULD RESIGN FROM THE GUN CLUB CORPORATION and that he would speak with the manager Mr. Joaquin Ricaurte so that he would give him a recommendation that would serve him as reference for another work.' (Capital letters of the legal representative of the Plaintiff).

He also argues that on the 28<sup>th</sup> of April, 1994, the manager of the Corporation Gun Club, Joaquin Ricaurte, called the Plaintiff to his office and made him sign a letter that had been previously prepared, in which it stated that the Plaintiff had applied for a remunerated license for the period of thirty days, in order to take a few medical examinations.

He then states that on the 3<sup>rd</sup> of May, 1994, the Plaintiff submitted a letter to the director of the San Pedro Claver Hospital, in which he reported that Dr. Erazo made a suggestion that he should quit his work in the Corporation Gun Club. It also said that once doctor Erazo learned of the aforementioned communication, he called Mr. XX to his medical office and there "Dr. Erazo made the Plaintiff sign on a few blank sheets of paper, taking advantage of the depression that he was experiencing for being an HIV carrier and exercising pressure over him." Nevertheless, he affirms that this day the plaintiff was in the company of Mr. Arturo Torres, who passed himself as his brother. He entered the office and took the sheets, which, after a struggle, turned into pieces (attached copy of the pieces of the letters). This incident was made known to the Court of Medical Ethics by means of a letter on the 5<sup>th</sup> May 1994, signed by Mr. XX.

Later, the representative of the plaintiff said that the Corporation Gun Club awarded him another paid leave for a month from 1<sup>st</sup> of June 1994. During this time, he said that the Plaintiff went to the Office of the Ombudsman, where his case was heard. The Office helped him to write a letter to the Corporation Gun Club, through which it is stated that the fact of being a carrier of the AIDS virus did not imply any risk, and in addition the letter expressed his disagreement with the additional paid leave periods granted to him.

The legal representative argues that at that time, the plaintiff went to the Colombian League against AIDS, and hired their professional services. Thus, the Plaintiff and his attorney met with the lawyer of the Corporation Gun Club who made the plaintiff an economic offer as a kind of 'compensation'. The offer was rejected by the Plaintiff. On the 1st of July 1994, the date in which Mr. XX's stipendiary license ended, he received a letter containing directives from the Club in which they informed him that his contract of employment was terminated.

The representative affirms that on August 3, 1994 the Plaintiff went to the Tenth Labor Court of the Circuit of Santafe of Bogotá D.C., and conciliated his labor differences with the representative of the Gun Club Corporation. Regarding this, the representative affirms: "Nevertheless, in this *sui generis* conciliation the Court allowed an unlawful agreement, that is that the first day of each month the Corporation should pay the amount of \$170.000 COP. I affirm that this payment is unlawful because the law establishes that when a labor relation comes to an end, all the economic benefits must be immediately paid".

The representative maintains that once he had knowledge of the above-mentioned conciliation he communicated with the representative of the Corporation Gun Club. The representative affirms that "he had compromised that in one year they would renew the payment for another year and this will be repeated subsequently". However, once the period provided in the agreement was completed, the Plaintiff went before the manager of the Club, with the hope of receiving some form of economic support, and the manager of the Club told him that they did not have any type of responsibility for him.

Finally, the representative argues that Mr. XX has not been able to get employment, since in some companies such as Wimpy and the hotel chain Forte Travelodge they have requested that he take an HIV test, which, in accordance with article 22 of Decree 559 of 1991, is illegal. He also affirms that the Plaintiff is currently in a very difficult economic situation, and the illness that he suffers from has begun to deteriorate his health.

### 3. Claims

The legal representative requests that the Corporation Gun Club and/or whom it may concern, be ordered to continue the monthly basic payments that were paid to the Plaintiff for a period of one year (conciliation) and two months (period of paid leave) with the law increases, until the Institute of Social Insurance (I.S.S) assumes the invalidity pension". The representative also requests the Corporation be ordered to continue paying the contributions to the I.S.S until this entity assumes the pension of the Plaintiff. He also requires the Court to advise the I.S.S to refrain from violating the confidentiality of the medical histories of its patients, and to require the I.S.S, jointly with Dr. Alvaro Erazo Murra, to pay the resulting damages caused to Mr. XX. Finally, the representative requires the Court to transfer to the Office of the Inspector General of Colombia a copy of the proceedings, in order to investigate the conduct of the Tenth Judge of Labor of the Circuit of Santafe of Bogota, and to request to the Distrital Secretary of Health and the Department of Health to investigate the company Wimpy and Forte Travelodge "for asking for the HIV test as a prerequisite to enter the company".

The legal representative of the Plaintiff enclosed the writ of *Tutela* with the documents listed below:

-Writing undated, signed by the Plaintiff, in which he makes a summary of his precarious economic situation.

-Photocopy of the medical certificates of incapacity issued by the Institute of Social Insurance, for the months of June and July 1995.

-Photocopy of the record of the public hearing of conciliation celebrated on the third (3) of August 1994, between Mr. XX and the representative of the Corporation Gun Club before the Tenth Judge of Labor of the Circuit of Santafe of Bogota.

-Photocopy of the letter dated twenty-nine (29) of April 1994, addressed to the Manager of the Corporation Gun Club, whereby the Plaintiff requested stipendiary license for a period of thirty (30) days, counted since the second (2) of May of the same year. The above mentioned letter is not signed by the Plaintiff, and it shows the seal of the management of the Club.

-Photocopy of the medical form of the twenty-eighth (28) of April 1994, signed by Dr. Alvaro Erazo Murra, in which he ordered the Plaintiff to take the “Western blot” exam, to confirm the results of the HIV test.

-Photocopy of the authorization (undated) signed by Mr. XX, whereby he authorizes the Institute of Social Insurance to administer the HIV Elisa test on him.

-Photocopy of the letter dated third (3) of May 1994, addressed to the director of the San Pedro Claver clinic, by which the Plaintiff alleges that Dr. Erazo Murra insinuated that he should give up his job at the Gun Club Corporation.

-Photocopy of the letter dated fifth (5) of May 1994, signed by Mr. XX, by which he informs the director of the San Pedro Claver clinic that the incident occurred in the clinic of Dr. Erazo Murra, on the third (3) of May 1994.

-Photocopy of fragments of an illegible letter.

-Photocopy of the letter dated first (1) of June 1994, by which the Plaintiff requested the Manager of the Corporation Gun Club a stipendiary license valid from the first (1) of July 1994.

- Photocopy of the letter from the Plaintiff to the Director of the Gun Club, dated twentieth (20) of June 1994, expressing that “It has not been his initiative to request the referred licenses and, that the communications dated April 29 and June 1 of the current year were signed under duress as <YOU DID NOT WANT TO HAVE PERSONS SUCH AS MYSELF THAT CARRY THE HIV virus WORKING IN THE PROPER CHORES OF THE CLUB GIVEN THAT OF COURSE, IT MIGHT GENERATE DISTRUST AND RISKS FOR THE AFFILIATES AND ITS GUESTS>”. (Capital letters by Plaintiff). Also, Mr. XX expressed in this letter that his intention was to return to work after the first (1) of July 1994, and that he did not wish for the company to continue to grant him stipendiary licenses, because this could lead to a case of an absence from work for more than 180 days, and this could imply that they could give him a pension for a non-professional illness, an event that he wanted to avoid.

- Letter (undated) in which the Chief of Wages and Benefits of Wimpy Colombia Ltd. indicated the requirements for admission to the company.

## **II. JUDICIAL ACTION**

### **1. First Instance**

1.1 By order dated Ninth (9) of August 1995, the Criminal Chamber of the Superior Court of the Judicial District of Santafe of Bogotá D.C., assumed knowledge of the present action of *tutela* and requested the Corporation Gun Club and the Institute of Social Insurance to provide “the information related to the facts contained in the writ of *tutela*.”

In compliance with the above, the following documents were raised:

- Letter dated eleventh (11) of August 1995, signed by the Manager of the Gun Club Corporation, in which he reports that the Club declared Mr. XX's contract of employment to be unilaterally terminated". It also affirmed that the stipendiary license was requested by the Plaintiff and that his membership to the I.S.S was suspended once his contract of employment was terminated.

- Letter 001418 dated fourteenth (14) of August 1994, by means of which the manager of the Clinic San Pedro Clavel sends to the *a-quo* an authentic copy of the clinical history of the actor.

- Letter 31880 (undated) signed by the Coordinator of the Section of Affiliation and Register of Cundinamarca Sectional of the Social Insurance Institute, by which the Coordinator informs that Mr. XX was affiliated to the Social Insurance Institute entity from the 29<sup>th</sup> of August, 1988 until the 25<sup>th</sup> of January, 1992, under the employer number corresponding to Mr. Hector Fabio Dueñas; from the 21<sup>st</sup> of April, 1992 to the 1<sup>st</sup> of July, 1994 under the employer number corresponding to the Gun Club Corporation; from the 22<sup>nd</sup> of August, 1994 to December 1994, under the employer number corresponding to Wimpy Colombia LLC., and as a self-employed worker from the 1<sup>st</sup> of September until December 1994.

### ***1.2 Brief submitted by the representative of the Corporation Gun Club***

Through the memorial dated fifteenth (15) of August 1995, the legal representative of the Corporation Gun Club requested that the writ of *tutela* filed by Mr. XX should be denied, under the argument that the conciliation made on August 3, 1994 between the Corporation and the Plaintiff before the Tenth Labor Court of the Circuit of Santafe of Bogota D.C. made transit to *res judicata* and therefore its effects could not be modified through a writ of *tutela*.

### ***1.3 Sworn Statement by Mr. XX.***

On the sixteenth (16) of August, 1995, the Criminal Chamber of the Superior Court of the Judicial District of Santafe of Bogota D.C., received the testimony of the Plaintiff, in which he affirms that the termination of his contract of employment with the Corporation Gun Club was due to the fact that he was a carrier of HIV virus, because, as he says, after being attended by Dr. Erazo Murra, who was simultaneously employed at the I.S.S and at the Foundation Gun Club, the directors of the Gun Club Corporation became aware of his illness and they began to grant him the stipendiary licenses without him requesting them, and then they fired him.

The Plaintiff also argued that both the representative of the Corporation Gun Club and its manager promised to renew the agreement that they came to in the conciliation that took place before the Tenth Labor Court of the Circuit of Santafe of Bogota D.C., "until there was a remedy or my death should take place", but on the day that he went to receive the last check agreed in the said conciliation agreement, the manager told him that he saw him in a very good state of health and that he did not have any responsibility "that means that they have not fulfilled the promise made to me".

On the other hand, the Plaintiff said that he is currently being treated at the Health Centre of Paiba of the I.S.S, of his own account, because the monthly contributions are being paid as a self-employed worker.

### ***1.4. Sworn Statement by Mr. José Arturo Torres Garcia***

Mr. José Arturo Torres, who stated to be a personal friend of Mr. XX, recounted once again that the incident occurred in the clinic of Doctor Alvaro Erazo Murra on the fifth (5) of May 1994.

### ***5. Sworn Statement by Dr. Alvaro Erazo Murra***

Dr. Alvaro Erazo Murra stated that between the years of 1993 and 1994, he provided a medical consultancy to the Gun Club Foundation, which is independent of the Club, but has the financial support of the partners of the Corporation.

He also stated that he attended the case of the Plaintiff, to whom he ordered to take the HIV virus test, and as the results came back positive, he ordered the Plaintiff to take the confirmatory test called the “Western blot”; however he said that the results of such test never came into his hands.

Dr. Erazo also argues that he never suggested to Mr. XX that he resign from his job at the Gun Club Corporation, neither did he tell the directors of that Club that he suffered from the HIV virus, as it is information covered by professional secrecy; “the patient, I think, that with a little bit of emotional imbalance started to inform all of his ex-colleagues, from the institution where he worked, that he was an AIDS carrier”. Faced with this situation, he argues that he strongly urged the Plaintiff to keep his condition confidential; “the only thing that he could say was that the impact of being allegedly positive was unbalancing him mentally. On the basis (sic) of this mental imbalance, he managed to give him a month of rest to see if it was possible that he would recover mentally, but at no time was the underlying disease mentioned”.

On the other hand, he argues that the patient came to his office and brought him a letter (which was annexed to the file) in which it was said that the physicians of infectious diseases of the San Pedro Claver Clinic insinuated that he should sue, but “that he was not capable, because the treatment that I had given him was good and I assisted him in his emotional instability”.

Finally, Dr. Erazo submits that the facts narrated by the Plaintiff, concerning the incident in his office on the 5<sup>th</sup> of May, 1994, are completely false.

### ***1.6 Judgment of first instance***

By an order dated twenty-fourth (24) of August, 1995, the Criminal Chamber of the Superior Court of the Judicial District of Santafe of Bogotá D.C., resolved to protect in a provisional manner, to avoid an irreparable harm to the fundamental rights of life and health of Mr. XX. Accordingly, it ordered the Gun Club Corporation, within the non-renewable term of five days “to assume again all the medical health services required by the Plaintiff (...) by the term required by the competent judicial authority to decide definitively, the labor dispute”. It also noted that the Plaintiff should initiate the corresponding labor action within a period of four months.

In first place, states the aforementioned judgment, it is not feasible to protect the right to labor of the Plaintiff. This is because even though the Gun Club Corporation terminated the employment contract with the Plaintiff unilaterally and without just cause, the *tutela* judge cannot invade the Labour jurisdiction, which is the competent jurisdiction for settling these kinds of conflicts.

For the Criminal Chamber of the Superior Court of Santafe of Bogotá D.C, and referring to the conciliation celebrated between the Plaintiff and the representative of the Gun Club Corporation, “this was a procedure skillfully used by the company, not only to get rid of the sick worker, but to evade its responsibility regarding the health status in which they fired Mr. XX, setting aside his

health, life and, in general, his social security which are inalienable rights”. Thus, and based on the judgment of the first (1) of December 1994 of the Supreme Court of Justice, M.R. Dr. Nilson Pinilla, the Court considered it appropriate to protect, in a provisional manner, the rights to life and health of Mr. XX.

In second place, and given the contradictions arising from the statements of the Plaintiff and Dr. Erazo Murra, the *a-quo* argues that it is not possible to say that the Social Insurance Institute or the aforementioned doctor have violated the right to privacy of Mr. XX. This is why it did not proceed to protect that right.

Judge Soledad Cortés de Villalobos dissented from the decision of the Chamber, since she considered that the Gun Club Corporation assumed the consequences of firing the Plaintiff without just cause, by paying 12 monthly installments amounting to a total of 2,040.000 and therefore “it goes against all logic that although that period has already ended, the Company is obligated, through the brief and summary procedure of *tutela*, to assume the cost of the medical services required by the Plaintiff. The Plaintiff’s claim is not logical. Since the labor relations between the Plaintiff and the Company have ended, the latter will have to assume the costs of particular doctors as the I.S.S only provides health services to workers of its affiliated companies.” She also argues that the Criminal Chamber forgot that the disease of the Plaintiff is not of a professional nature, and therefore the consequences of such a disease must be assumed by the I.S.S and not by the employer.

On the other hand, she argues that “if the Gun Club was entitled to unilaterally terminate the contract, assuming the costs caused due to the absence of a just cause for doing so, as it occurred in this case, she does not find which labor process Mr. XX could file against the entity. Moreover, no controversy could arise from a unilateral termination of the contract, if all possible differences which could remain were settled by virtue of the conciliation to which the parties came, and on which essentially there is no objection by the worker. This is proven by the fact that the worker did nothing during one year to question before the labour justice the conciliation agreement, if the agreement did not satisfy his pretensions”.

Finally the Judge points out that “with regard to Mr. XX it cannot be said that his right to health is not protected as the provisions of Decree 559 of 1991, by which the laws 09/79 and 10/90 were regulated (sic) partially, provide for the prevention, control and alertness of contagious diseases, especially relating to the infection of the Virus of Human Immunodeficiency (HIV) and the Syndrome of Acquired Immunodeficiency (AIDS).

Decree 559 declares that no health worker or health institution may refuse to pay the requisite attention required by the person infected with HIV, or sick with AIDS, because the persons and entities of public and private character that give health services, are obliged to give integral attention to those who are infected by HIV and to the AIDS patients, or in possibility of being so, in accordance with the level of complexity that fits them, under conditions of respect for their dignity, without discriminating against them, and subject to the aforementioned decree and to the technical administrative standards and epidemiological surveillance norms issued by the Ministry of health (arts. 8 and 31 disc. 559/91)”.

The judgment of the Criminal Court of Superior Court of Santafe of Bogota D.C., was opposed by the representative of Mr. XX and by the representative of Corporation Gun Club Corporation.

## 2. Second Instance

Through Providence dated tenth (10) October 1995, the Criminal Cassation Chamber of the Supreme Court of Justice decided to overturn the impugned judgment, and instead decided to deny the protection of the fundamental rights invoked by Mr. XX.

In the opinion of the *ad-quem*, the asymptomatic condition of the Plaintiff allowed him to access a new job in the company Wimpy Colombia LLC., which affiliated him to Social Insurance from August to December 1994, after which Mr. XX continued to be affiliated under the status of self-employed worker, a status which allowed him access to medical care services, and eventually gave him the right to claim the disability pension for common risk. Accordingly, it was considered that there was no irreparable injury that allowed the temporary *tutela* of the rights to life and health of the Plaintiff.

Finally, it was said that the claim in the writ differed from agreements made during conciliation between Mr. XX and the Gun Club Corporation, rendering it inadmissible, given that the conciliation was approved by the Tenth Labor Court of the Circuit of Santafe of Bogotá D.C., by an order dated third (3) of August 1994; a decision that by legal mandate does transit to *res judicata*. Hence, it concludes that the *tutela* is inadmissible against judicial orders. For this reason it denied the requested protection.

### **3. Evidence collected by the Constitutional Court**

In order dated seventh (7) of March ninety-ninety-six (1996), the Ninth Chamber of Revision of the Constitutional Court requested the Gun Club Corporation of Santafe of Bogotá to indicate in writing and through a legal representative, the exact reasons as to why it decided to lay off from its staff plant worker Mr. XX.

By memorial dated 14<sup>th</sup> March 1996, the Gun Club Corporation proceeded to answer to the order submitted by the Constitutional Court, and clarified that the decision to lay off Mr. XX from its staff plant "...was guided by the need to avoid a risk of infection to his closest co-workers, since the functions that the actual Plaintiff was exercising at the moment of knowing that he was a carrier of the HIV could generate the contagion of those co-workers". It also added that the functions carried out by Mr. XX within the Club, were related directly to handling a battery of kitchen and cutting materials, "... functions that bring with them the risk of slight or serious injuries, the contact of such implements with the blood of the worker and the later manipulation of those tools by the personnel in charge of its habitual use..."

For the legal representative of the Gun Club Corporation, the decision to lay off the worker of the institution was the surest way of ensuring the health of other workers in the plant, since it was not possible to relocate the employee to another charge due to the absence of job vacancies and due to his mediocre labor performance in the previous year. He attaches the manual of functions of the Club, copies of the memorandums sent to the worker that contain three suspensions that were imposed on him for disciplinary reasons and a copy of the employment contract.

## **III. CONSIDERATIONS OF THE COURT**

### **1. Competence**

In accordance with the provisions of Articles 86 and 24, number 9<sup>th</sup> of the Constitution and 31 to 36



of Decree 2591 of 1991, the Ninth Chamber of Review of the Constitutional Court is competent to review the decision of *tutela* of the reference.

## 2. The matter

### 2.1. *Non-discrimination regarding those suffering from AIDS and carriers of the HIV virus*

The socialist state of law, in contrast to the classical liberal state, does not limited itself to recognize fundamental rights, but instead it founds its legitimacy on the effectiveness and enforcement of such legally protected goods; this is why it promotes and protects them as unconditional and universal rights. In the contemporary State, the existence of “ghettos”, as once they existed with individuals of any race or carriers of diseases like leprosy, is unthinkable. Historic changes have reevaluated the concept of “untouchables”, which has consequently made the principle of equality stronger. The degree of civilization of a society is measured, *inter alia*, by the way it contributes with the weak, the sick and in general with the most needy people and not, on the contrary, by allowing their discrimination or elimination.

It is true that the disease of AIDS has become in our time a serious scourge for humanity; the risk of its spread is very large, given that until now science, despite the notable efforts made, has failed to find the formula for its healing. However, on the other hand, it has been extensively demonstrated by medicine that this disease is contagious only through directly sexual contact or through blood transfusions, and not by other means. Moreover, according to the opinion of medical science, it has been demonstrated that coexistence with AIDS patients, absent of the situations mentioned above, in no way implies risk of contagion; the virus is not transmitted through the air, water or other elements. However, it is clear that, due to the lack of information and campaigns to raise public awareness, AIDS patients, and even healthy carriers of HIV, are subject to social and labor discrimination, not only in Colombia but in the rest of the world.

The State cannot allow such discrimination, for two essential reasons: firstly, because human dignity prevents that any subject of law should be subject to discriminatory treatment. Discrimination, *per se*, is an unfair act and a state of law is based on justice, the principle upon which social order is built.

Secondly, the right to equality, in accordance with Article 13 of the Constitution, involves the inalienable duty of the State to provide special protection to those who are in a position of inferiority. This Court has already pointed out, as guiding criteria of equality, the principles of proportionality and reasonability. Proportionality means establishing the adequacy between the need and the protective measure; reasonability searches the prudential criterion for keeping a balance and avoiding at all costs absolute arbitrariness, unfounded discretion, and above all, discrimination.

Therefore, the Court sees the need to recall that a simple carrier of the HIV virus or a person that is indeed suffering from AIDS is a human being, and therefore a holder, in accordance with article 2 of the Universal Declaration of Human Rights, of all the rights proclaimed in international human rights texts. They should not be subject to any kind of discrimination, or any arbitrariness by reason of his/her situation. It would be illogical that a person suffering from an illness could be treated in any way that could be harmful to his/her physical, moral, or personal integrity.

This was the position of our Legislator when enacting laws 09 of 1979 and 10 of 1990, whose regulatory decree 0559 of 1991 established in article 22 the prohibition to demand evidence for HIV

for access or to stay in work activity, with the clear purpose of preventing discrimination of asymptomatic individuals infected with this virus. Likewise, and with the same spirit, article 35 provides that workers are not required to report to their employers their situation as infected with the virus.

## ***2.2. The conciliation regarding fundamental rights***

Conciliation operates only in cases where the essential core of a fundamental right is not at stake. This in itself is essential and inalienable. This means that fundamental rights, as being inherent in the individual, are necessary and not contingent, which makes them indispensable. Therefore, it would not be coherent that a State that is founded on equality and human dignity would allow that a person could disassociate from a right that is reasonably inalienable and imprescriptible.

The tradition of human rights, since the Virginia Declaration of Rights in 1776 until today, is unanimous in pointing out that there exists, inherent to all humans a core of rights, so fundamental, that they must be protected. It would be an absurd result to imagine that a man would accept to being reduced to the status of slave, and that this decision would be allowed by the State. It is thus absurd to assume that a person can accept an agreement contrary to his/her dignity or to his/her right to equality.

In connection with the inalienability of fundamental rights in conciliation or transaction agreements, the Court has established that in such agreements it is not possible to validly dispose of those rights:

Thus, referring to the right to life, and the possibility of disposing of such a right as an exercise of free will, the Court has said that "every human right is a good that cannot be subject to renunciation or transfer". (Sentence T-374, 1993, M.P. Dr. Fabio Moron Diaz).

In the same statement, it was expressed that the protection of the right to life of minors requiring medical assistance could not be impeded by the existence of a prior contractual transaction. On this occasion, the Court said:

"A contractual transaction involving the right to life does not forward the same level of freedoms to the contracting parties as a contract transaction for other purposes usually enjoys. It is determined that it is impossible to negotiate the protected right under article 11 of the Charter, because a contract with that object will give to it an illicit character, as provided by civil law"

Reaffirming the aforementioned jurisprudence, the Court believes that the conciliation procedure carried out between the parties is not a sufficient argument to allege the inadmissibility of the *tutela* writ. Negotiations regarding inalienable rights such as equality, dignity, health, and social security should be regarded as ineffective when its intention is to obtain the abdication of a fundamental right. However, in these circumstances, the victim can validly retain the paid amounts for the sole purpose of compensating the material damages caused by the injury.

Finally, Article 53 of the Constitution establishes that labor law takes into account, among other fundamental principles, the one that grants the power to "compromise and reconcile on uncertain and dubious rights". From this it follows that, *contrario sensu*, rights that do not hold such quality (uncertainty and dubiousness), and even more so regarding fundamental rights there is no such

possibility. The same article provides, in a strict form, that "the law, contracts, agreements and labor agreements cannot undermine freedom, dignity, or the rights of workers".

### ***2.3 Is there an absolute freedom to terminate an employment contract unilaterally, for any reason?***

The representative of the Corporation alleges that the asymptomatic carrier of the HIV is not sick because, according to medical science, the consequences of the disease have not taken effect on him, which means, that the disease has not developed, even though he is in obvious risk of developing it. This has also been recognized by law. Indeed, the Decree 559 of 1991 defines an asymptomatic carrier as the "person infected by the human immunodeficiency virus, who presents no symptoms or signs of illness".

Hence, the representative concluded that, as the worker is asymptomatic, he is not sick and therefore he "is subject to general labor standards, and in this sense his employer may terminate the labor contract, as it may with a disabled worker, because it should not be so that the fact of having this condition implies the obligation for the employer to preserve in perpetuity his charge".

Regarding this point, it is necessary to clarify that although labor legislation treats as unlawful a dismissal that is based on a ground not included in the list of grounds justifying the unilateral termination of the labor contract by the employer which is incorporated in the Substantive Labor Code. This cannot lead to the conclusion that paying compensation for unfair dismissal gives license for injuring fundamental rights of the worker, in this case the rights to dignity, equality, non-discrimination, labor, health and social security.

In the case under consideration, the violation of these rights causes an obvious prejudice, which is not repaired by a simple payment of compensation.

Every human act is backed by sufficient reason. This hypothesis is only provided for in cases of mental alienation. Any job dismissal requires that reasons be given for the decision; even those that by law are considered "without a just cause" or unjustified. In this case it is evident, as it can be seen from the evidentiary material presented, in particular the communication of March 14 of 1996, signed by the legal representative of the Gun Club Corporation, that the motivation of terminating the employment contract of the Plaintiff was that he was infected with the HIV virus.

The Court considers that even though the worker in such a situation can be removed from his job and that the employer does not have the "obligation to preserve the worker in perpetuity in his current position", the worker cannot be fired only because he is infected with the HIV virus. This motivation involves a serious social segregation, a kind of medical apartheid and a lack of knowledge of citizen equality and the right to non-discrimination (Article 13 C.P.). This obviously violates these fundamental rights, as well as the right to dignity.

As the purpose of the Constitutional Court is to protect the fundamental rights recognized by our Constitution, it cannot refrain from making a statement regarding a legal situation, in this case the unilateral termination of the contract, motivation, in which, involves a blatant violation of the rights that the Court intends to protect. This is an issue that is clearly within its jurisdiction.

Further, civil law deems that an immoral or unlawful cause voids the manifestation of free human will. Similarly, in the case that concerns us, a juridical situation based on a reason that is in itself

harmful to fundamental rights, may not have legal effects. This is so because those effects are the manifestations of the violation of the aforementioned rights.

Therefore, the Court estimates that the dismissal motivated by the consideration that the worker is an asymptomatic carrier of the HIV virus, cannot be endorsed by the State as it undermines the rights to dignity, to equality, to work, to health and to social security. Thus, an absolute freedom to unilaterally conclude a labor relation for any motive does not exist. If this motive turns out to be harmful to fundamental rights, it constitutes an unlawful act and not a juridical situation that may be recognized as legal.

In the recent reasoning contained in judgment C-079 of 1996 (M.R. Dr. Hernando Herrera Vergara), the Court declared the constitutionality of Article 7.15 of the Decree 2351 of 1965, in relation to the just cause that assists the employer to terminate the employment contract when there is a “contagious or chronic illness of the worker, which has no causal connection with the profession of the worker , as well as any other illness or injury that incapacitates him to work, and where healing has not been possible in a hundred eighty days”, the Corporation considers necessary to clarify that the situation *de facto* that appears in the case *sub-examine*, is not exactly the one that regulates the norm that was declared constitutional.

Clearly, the *de facto* situation that regulates Article 7.5 of the Decree 2351 of 1965, is the one in which the worker is "sick", whereas in the present case the Plaintiff is not. As it has been said, a healthy carrier of the HIV virus is a “person infected with the virus of human immunodeficiency, who presents neither symptoms nor signs of illness” (Decree 559 of 1991). In this case the fact that the worker is a healthy carrier of the virus does not give the employer the right to unilaterally terminate the contract alleging the just cause of the Number 15 of the Decree 2351/65.

The justification for the existence of the aforementioned just cause for dismissal, is based on the fact that the employment contract is a bilateral one, and that the law admits that an illness that is not curable in one hundred and eighty days, prevents the worker to fulfill his obligations, in which case it is just to authorize the employer to terminate the contract in order to avoid an unjustified damage to the latter; this without prejudice of the services and legal and conventional compensations derived from the illness.

Likewise, the concept of an ‘asymptomatic carrier’ does not fit within the principles regulated by Decree 2351 which relate to “chronic or contagious illness”. Firstly, because the situation of being a healthy carrier of the HIV virus is not qualified as an “illness”; and secondly, to validly terminate a contract of employment, an illness must satisfy the definition of “contagious“ which must be understood as an illness that causes a considerable danger of transmission in the ordinary circumstances of the labor relation. The current evidence in medical science mentions that this does not happen with the HIV virus, which is only contagious via direct sexual relations, or via blood inoculation, situations that are foreign to labor regular relations.

In order to terminate a contract of employment on the grounds of ‘illness’ the disease must be ‘contagious’, that is that the disease carries a considerable danger of transmission in the carrying out of employment duties.

On the basis of the above arguments, it is necessary to conclude that in the present case, the consideration that there may be room for a fair dismissal under the protection on the grounds of Article 7.1 of the Decree 2351/65 declared as constitutional by this Court it is not applicable

It is different in the case of the worker suffering from AIDS, who indeed fulfills the assumptions mentioned in the commented norm, and who can therefore be dismissed by taking this cause as the ground for termination.

#### ***2.4. Admissibility of the present action as it is lodged against a particular entity***

It is up to the Court to consider whether the present writ of *tutela*, filed against a private law entity, the Gun Club Corporation, is admissible. The issue of the admissibility of the writ against the Institute of Social Insurance and Dr. Alvaro Erazo Murra, will be addressed later.

The writ of *tutela* is established to claim for the immediate protection of the fundamental rights that have been violated or threatened by the action or omission of a public authority. Article 86 of the Constitution provides that it may also be filed against individuals for acts or omissions when they are “entrusted with providing a public service, or whose conduct may affect seriously and directly the collective interest or in respect of whom the Plaintiff may find himself/herself in a state of subordination or vulnerability.”

Further, Article 42.4 of Decree 2591 of 1991 specifies that the writ of *tutela* will proceed against the acts or omissions of individuals “when the request is filed against a private organization, against whom it had effective control or it was the real beneficiary of the situation which led to the action, or if the Plaintiff has a relationship of subordination or defenselessness with such an organization”.

The Corporation Gun Club has relied on three provisions in Article 86 of the Constitution regarding admissibility of the writ of *tutela*:

*“Relations between individuals run, as a general rule, at a level of equality and coordination. Private activity that affects the collective interest, serious and directly acquires a pathological connotation, which strips all of its legitimacy, especially in a Social State of law based on the principle of solidarity and prevalence of the general interest. On the other hand, the equidistance between individuals is suspended or broken when some of them are entrusted with providing a public service, or when, for other reasons, they have social power, they can virtually place others in a state of subordination or defenselessness. In these events, it is logical that the law establishes that the writ of tutela is admissible against individuals that, taking advantage of their relative superiority or forgetting the social purpose of their functions, they violate the fundamental rights of the other members of the community (art. 86 C.P.). The idea behind tutela, which is simply to control the abuse of power, is predicated on individuals that use it in an arbitrary manner”<sup>1</sup>. (Italics out of the original text).*

The *sub judice* writ filed against the Gun Club Corporation is admissible due to the Plaintiff’s relationship of subordination *per se* with the private organization against whom it is filed. Whilst the Plaintiff was no longer employed by the Defendant at the time of application, the Court holds that the writ is admissible as the alleged discrimination occurred during the process of his termination.

#### ***2.5 Scope of the social solidarity duty in the specific case***

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<sup>1</sup> Constitutional Court, Chamber Third of Review, Judgement T-251/93, 30th of 1993. M. R.: Dr. Eduardo Cifuentes Muñoz.

Aware of their ‘duty under the principle of social solidarity, the Gun Club Corporation understood it should compensate the damages caused to the Plaintiff after dismissing him without any consideration of his fundamental rights to dignity, equality, work, health and social security.

As the only category of discrimination was health, the Gun Club Corporation agreed on a compensation that would allow the worker to continue to be affiliated with the ISS. The Gun Club Corporation interpreted that its social solidarity duty was fulfilled this way, a conclusion which was taken from Article 10 of Decree 559 of 1991. The representative of the Corporation affirmed that: “it is precise to say that the law, in this case Decree 559 of 1991, has already established the essential content of the social solidarity duty of employers towards their workers that are carriers of HIV: to adopt the necessary measures to reasonably ensure the maintenance of the health of the workers”. (Emphasis not added). And moving forward in its interpretation, he concluded that this duty was not unlimited either in terms of time or in terms of resources, and the term and amount agreed with the worker was estimated as a just limitation of the social solidarity duty.

This Court does not share this limited view of the above-mentioned duty as neither the Constitution nor the law have set limits to it, instead it must be decided on the nature of each case. In the case that concerns us, social solidarity must go much further, respecting in first place the dignity of the worker, that is, the right to non-discriminatory treatment due to every person by the mere fact of being human; and in the second place equality at work, understood here as the recognition of equal labor rights in regard to other persons that are employed under similar circumstances. All of these rights, and the correlative social solidarity duty, could only have been respected by keeping the employee in his current position, or – if it was considered as an inconvenience for him to remain in the position in which he was employed – by moving him to another equal or better position within the organization.

Accordingly, when the Gun Club Corporation found out the medical situation of its employee it should have deployed its social solidarity duty by keeping him in his position, and if it had any fear for the hypothetical possibility of contagion, given the labors that the employee performed, they should have provided him with alternative employment within the organization. Especially taking into account that it is an employer who had that possibility, because it had a relatively wide employment structure in which it could have been able to find another place suitable for the level of training of the worker.

This was the alternative that respected the dignity, the good name and the right to equal treatment of its employee, as well as his legitimate right to work and therefore to ensure the right to health and social security.

The principle of sufficient reason set out in Article 95 of the Constitution places the construction of human solidarity over the competition to survive. That is, that instead of rejecting those who are in an ostensible situation of weakness, it is a positive duty of every citizen, imposed categorically by the Constitution, to provide help to those who suffer from a need, with humanitarian measures.

Humanitarian actions have existed since ancient times, inspired by religions and philanthropic societies towards compassion, which today provides the framework for international humanitarian law. In the case *sub-judice*, the solidarity or humanitarian element, the respect of the implied fundamental rights was, it is insisted, to maintain the worker in his current employment or to move him to a similar one that implied less hypothetical risk.

The evident lack of compliance with the social solidarity duty by the Gun Club Corporation

violated, as it has already been said, the fundamental rights to equality, to dignity, to non-discrimination, to work, to health and to social security of its employee.

The dismissal and the subsequent conciliation on inalienable rights put the Plaintiff in a helpless situation regarding his right to health and social security. Article 48 of the Constitution establishes social security as a constitutional right, which, despite its social and economic nature, cannot be waived. With respect to the same, the Court has said:

*For the active or retired worker, social security is an inalienable constitutional right. For its effectiveness the State and the individuals must concur". (Constitutional Court, ruling T-287/95, M.P. Dr. Eduardo Cifuentes Muñoz).*

The constitutional protection of the right to social security is granted by virtue of its direct relationship with another fundamental right<sup>2</sup>, in this case health, a guarantee that would not be possible without the protection of the first one.

In this case the unfair dismissal, the violation of the dignity and the equality of the worker, violated his rights to labor stability, to health and to social security.

## ***2.6 Effective protection of the violated rights***

The Court does not recognize the re-instatement of the Plaintiff to his former employment as adequate restitution of his unrecognized rights because such a request has not been formulated by the Plaintiff, and secondly, the reinstatement of the worker in his previous job will not compensate the damage done to his dignity. On the contrary, the knowledge of his medical situation by his employers and colleagues may turn into a situation that could be rather risky for his own rights.

Therefore, the Court considers that the effective way to protect the rights of the Plaintiff is to enable him to regain access to social security as a means of preserving his health. This is why his immediate affiliation to the I.S.S is ordered on the account of the respondent until another employer assumes it.

On the other hand, the impossibility to protect the right to work through the reinstatement determines the need to order in abstract the compensation of the resulting damages caused, in accordance with Article 25 of Decree 2591 of 1991, whose provisions as it will be seen below, are fulfilled in the present process.

## ***2.7. Confirmation of the legal requirements to order compensation for damages via tutela. Exceptional character of the case.***

As it has been highlighted by jurisprudence, the primary purpose of the *tutela* writ is to achieve, in a preferential and expedited way, the certain and effective protection of fundamental rights when they are subject to violation or threat.

In granting the writ of *tutela*, the judge must respect the purpose of the Constitution and ensure the essence of it is confirmed in the admissibility of the writ of *tutela* and in orders granted to protect the violated rights.

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<sup>2</sup> Cfr. Constitutional Court, Judgment C-408/94.

Therefore any additional determination such as an order for compensation of damages in favor of the victim becomes auxiliary to the purpose of the writ and, as understood by the Court, entirely exceptional.

Article 25 of Decree 2591 of 1991 establishes the possibility of compensation for damages resulting from a breach of the rights protected by *tutela*. This was declared enforceable by the Court through judgment C-543 on October 1, 1992 (M.R. Dr. José Gregorio Hernández Galindo) on the basis that the Article establishes the ordering of damages as a natural consequence of an unjustified damage, ‘which cannot be in a form other than compensation by the one who caused it’.

In the opinion of the Court, the task is to repair by judicial order, the resulting damage caused if it is necessary to ensure the current and effective protection of the compromised right. This implies that the ordering of damages in the writ of *tutela* is extremely exceptional, which must be appreciated by the judge in their consideration of the strict requirements of the law.

As expressed by the aforementioned judgment, the proper rules of due process must be observed.

The Court reaffirmed judgment T-095 of 4 March 1994 (Chamber Fifth of Review), which found that, ‘It is only possible to order compensation if the *tutela* is granted’, *i.e.*, that such auxiliary determination can occur only if the principal claim is successful, if the judge has found admissible the action, and if he/she has concluded that the factual and juridical reasons evaluated by him/her lead him/her to deliver an order of immediate compliance that will guarantee the applicability of the constitutional principles in the specific case.

It is also necessary to consider the judgment by this Court in T-403 of 14<sup>th</sup> of September, 1994 (M.R.: Dr. José Gregorio Hernández Galindo), regarding the explicit requirements that must be fulfilled so that the exceptional figure of compensation in cases of Article 86 of the Constitution may be considered as valid:

*“But not always is that a writ of tutela is successful, it must be followed in the same judgment by an order of the judge establishing compensation in abstract of the caused damages”.*

*“As several ordinary means to reach this assignment exist, the mentioned legal norm is of strict interpretation.”*

*“In other terms, the compensation by route of tutela is **exceptional**.”*

*“For it to proceed it is indispensable that the affected person has no other judicial remedy. This requirement does not refer to the defense of the fundamental right invoked but to the possibility to obtain compensation for the damage, as already emphasized it the recently mentioned judgment of the Court”.*

*“Consequently, if, considering the circumstances of the case, the Plaintiff has the possibility of trying the ordinary action directed to obtain compensation for the damages that have been caused, the action of tutela is not the suitable judicial way for it, despite its success”.*

*“The violation of the right must be manifest and the consequence of a clear and undeniable arbitrary action.” It is not enough therefore, that the objective fact of a fundamental right is*



*affected or endangered, but it is required that the disregard of the law is evident and that the subject has actively breaching the constitutional mandates, through his discretion, with an obvious abuse of his power”.*

*“Compensation must be necessary in the specific case to ensure the effective enjoyment of the right. This is what justifies, in an exceptional manner, that the compensation be sought and ordered within the tutela procedure, given that, repeatedly, the main objective of the institution is to ensure that the standards of the Constitution regarding fundamental rights will be respected. To make use of the writ with the only intention of obtaining the compensation for damages would be equivalent to disfiguring it”.*

*“As the Court already established in its ruling C-543 of 1<sup>st</sup> of October, 1992, the judgment in abstract is not appropriate except on the assumption that, in that area, the rules of due process have been fully met, since such constitutional guarantee is applicable to all judicial and administrative proceedings. The process of tutela, although summary and preferential, should be submitted with full compliance to the general provisions enshrined in Article 29 of the Constitution, which has not been or could not have been excluded insofar as it is a fundamental right. If in a specific process such requirements are violated, the superior judge and if it is the case, this Court have the authority to revoke the corresponding judicial decision”.*

*“Therefore, the judgments of tutela which contain orders of damages in abstract are not admissible if the person against whom the writ is brought has not enjoyed the right to defense, the opportunity to challenge the evidence presented against him and the possibility of enforcing the ones in his favor”.*

In this regard, it is worth recalling what was exposed by this Court in sentence T-375 of 7<sup>th</sup> September, 1993:

*“Due process, which is based on the presumption of innocence, which has to be nullified by the State to make possible a condemnation, is fully applicable and enforceable in constitutional terms when it comes to processing and deciding on writs of tutela, especially if one of the consequences of granting this action is to impose on the entity (...) or to an officer or employee an economic sanction. This can only come from satisfying the minimum requirements as set out in the law that damage has been caused as a result of the causal relationship existing between the injury and the act or omission in particular. It is essential to establish after following due process, that the person or entity which against the judgment is issued, is responsible”.*

*“The compensation that is ordered in abstract must be addressed to compensate the emergent damage caused, understood as 'prejudice or loss' as set out in Article 1614 of the Civil Code. The Plaintiff argues that “it has not been able to lease the property”, however under the definition in Article 25 of Decree 2591 of 1991 this does not apply since this legal norm should not be understood as lost profit, profit or benefit that is no longer reported, such as the present case.*

*“To the above mentioned, one must add that if the judge of tutela, based on the viability of the condemnation 'in genere' according to the legal prerequisites discussed, decrees it, he/she must establish exactly what the damage consisted of; what is the reason to consider that compensation is indispensable for the effective enjoyment of the fundamental right; what is the fact or act that gave place to the damage; what is the causal relationship between the action of the agent and the damage caused; and which are the bases that the Administrative Contentious jurisdiction or the competent judge will have to bear in mind, depending on whether the condemnations are against the administration or against individuals, in determining the exact value of the compensation”.*

The case that is now under consideration, perfectly fits within the parameters and requirements already explained, and therefore, given the special characteristics of this case, the ordering of the payment of compensation is necessary. This compensation will be enacted in this judgment in the terms that will be explained further.

Indeed, in the case under consideration, the victim lacks any other judicial remedy because he is neither the holder of the writ for reinstatement, nor of the one that will declare void the dismissal, because those writs are enshrined in the Labor Act only for precise cases that do not include the present case.

The violation of his fundamental rights, in particular those of labor, honor and reputation, is manifest and is the consequence of a clear and indisputable arbitrary action. Furthermore, the obvious threat to his right to life due to the difficult circumstances since the dismissal and the public disclosure of the existence of a disease that, for today's society is seen as a stigma, from which he does not continue to suffer, claims an urgent moral and material redress that allows him to continue to live with dignity.

### ***2.8 The action as directed against the IIS and Dr. Álvaro Erazo Murra***

In accordance with the second subsection of Article 25 of Decree 2591 of 1991, in cases in which the ruling approving the *tutela* orders in abstract compensation for emerging damages, the condemnation "will be against the entity on which the defendant depends and jointly against another party, if it is considered that the other party has also mediated for his part, fraud or serious negligence, all this without prejudice to other administrative, civil or criminal responsibility".

The Court determines that it is mentioned in the records that Dr. Álvaro Erazo Murra was linked to the I.S.S and simultaneously to the Gun Club Foundation, and that this connection allowed in an imprudent manner the medical information of the Plaintiff to be known by the Gun Club Corporation, thus violating the privacy of his medical history. The imprudent action of Dr. Murra, by virtue of what it is established in the second subsection of Article 25 of Decree 2591 of 1991 referenced above, binds the ISS. Accordingly, the operative part of the present judgment will order the I.S.S to restore the employment of the Plaintiff and at the appropriate moment, to recognize him the corresponding invalidity pension.

Additionally, the Court confirms the Plaintiff's request for an investigation of Dr. Alvaro Erazo Murra's conduct in the present case, request that has already been filed before the Court of Medical Ethics. For that purpose the Court will send the Court of Medical Ethics a copy of this judgement.

### ***2.9 Terms of application of Article 25 of Decree 2591 of 1991 in the present case***

Based on the already explained grounds, the Gun Club Corporation and the I.S.S will be condemned in abstract to compensation for the emerging damaged caused to the Plaintiff XX due to the violation of his fundamental rights, in the form that is set forth below.

The Court considers that in the field of fundamental rights, the resulting damage may only be ordered by the judge when the full exercise of the violated rights is not possible, under the conditions described in Article 25 of Decree 2591 of 1991. Insofar as it refers to the fundamental rights to work and to social security, as in the case under consideration, the fact that the Plaintiff was placed, due to the circumstances outlined in this judgment, in a situation of evident difficulty to obtain stable employment, makes it impossible for him to fully exercise the right to work.

To determine the value of the emerging damages, the Court shall act in the following way:

1. The compensation that will be exclusively paid by the Gun Club Corporation will correspond to the material damages, which are duly verified and have a direct causal link with the violations of fundamental rights subject to protection.
2. From the total amount of the compensation shall be deducted the amount of money that the ex-worker XX received as consequence of the conciliation before the Tenth Court Labour of the Circuit of Santafe de Bogota signed on 3<sup>rd</sup> August, 1994.

The liquidation of the penalty *in genere* will be done by the competent judge of the ordinary courts, a process that should be done with strict observance of the procedural terms, pursuant to the following grounds:

3. Based on the prudential perspective of the judge, the value of the subjective moral prejudice caused to the Plaintiff shall be fixed, in accordance with the parameters laid down in Article 106 of the Criminal Code.

On the other hand, given that the right to social security is inalienable (Article 48 of the Political Constitution) and that its violation is attributable to the I.S.S. for the reasons previously stated, in order to protect the Plaintiff's enjoyment of that right, it is ordered that from the date in which he acquired the character of a symptomatic AIDS patient, that I.S.S will proceed to recognize the corresponding invalidity pension in accordance with its regulations and provisions set forth on the matter in Act 100 of 1993 and other concordant and complementary regulations. Given the compensatory nature of this pension, under the terms of Article 25 of Decree 2591 of 1991, there will be no place to the substitution of the pension in case of death of the beneficiary.

In addition, in the event that the Plaintiff is currently not affiliated to the I.S.S., the Gun Club

Corporation and the Institute will restore his affiliation, under the same conditions he had on the date that the dismissal occurred. Consequently, the Corporation and the Plaintiff will pay the value of the contributions to the I.S.S in the proportions laid down in the Law 100 of 1993 and its regulatory decrees.

### ***2.10 Additional claims of the Complainant***

The additional claims of the Plaintiff intend that copies be sent to the competent authorities to investigate the Tenth Labor Judge of the Circuit of this city and Wimpy and Forte Travelodge companies. This Court considers that for this claim, the Plaintiff has other remedies that allow him to formulate such requests.

On this basis, the Full Room of the Constitutional Court, administering justice on behalf of the people and as mandated by the Constitution,

### **RESOLVES:**

**FIRST: TO REVOKE** the decision of the Criminal Chamber of Cassation of the Supreme Court of Justice dated 10 October 1995 and in the alternative, **TO GRANT** the tutela protection to the rights to equality, dignity, work, health and welfare of Mr. XX (the Plaintiff).

**SECOND: TO CONDEMN** in abstract the Gun Club Corporation to the payment of compensation for the emerging damage caused to Mr. XX (the Plaintiff). In order to proceed to the aforementioned penalty, **TO ORDER** to the Criminal Chamber of the Superior Court of the Judicial District of Santafe de Bogota that within the parameters set out in the considerations of this Judgment, to make orders of *the exact value of the compensation* in abstract, process that should be in strict observance of the procedural terms. From the above compensation shall be deducted the amount that was recognized and paid by the Gun Club Corporation in the conciliation procedure which took place before the Tenth Court of Labor of the Circuit of Santafe de Bogota, signed on 3<sup>rd</sup> of August, 1994.

**THIRD: TO ORDER** the immediate affiliation of the Plaintiff to the I.S.S., under the same conditions it had on the date that the dismissal occurred. The Corporation and the Plaintiff will pay the value of the contributions to the I.S.S in the proportions laid down in Act 100 of 1993 and its regulatory decrees.

**FOURTH: TO ORDER**, the recognition of the invalidity pension, which may not be substituted, from the date in which he acquires the character of a symptomatic AIDS patient,

**FIFTH: TO SEND** copies of this judgment to the Tribunal of Medical Ethics, to make a judgment within its competence.

**SIXTH: TO ORDER** that, with the intention of protecting the privacy of the Plaintiff, his name is omitted in any publications or reviews of this judgment.

**SEVENTH: TO PUBLISH** by the secretariat the publications covered by Article 36 of Decree 2591 of 1991, for the purposes referred in that article.

Copy, Notify and Publish in the Gazette of the Constitutional Court and Comply.

**CARLOS GAVIRIA DIAZ**  
President

**JORGE ARANGO MEJIA**  
Magistrate

**ANTONIO BARRERA CARBONELL**  
Magistrate

**EDUARDO CIFUENTES MUÑOZ**  
Magistrate

**JOSE GREGORIO HERNÁNDEZ GALINDO**  
Magistrate

**HERNANDO HERRERA VERGARA**  
Magistrate

**ALEJANDRO MARTINEZ CABALLERO**  
Magistrate

**JULIO CESAR ORTIZ GUTIERREZ**  
Magistrate

**VLADIMIRO NARANJO MESA**  
Magistrate Rapporteur

**MARTA VICTORIA SACHICA DE MONCALEANO**  
Secretary General