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Case SU-1167/2001

Reference: File T-432862

Plaintiff: Esteban Reinoso - Colombian Petroleum Company.

Magistrate Rapporteur: Dr. EDUARDO MONTEALEGRE LYNETT

Bogota, D.C., 6 of November 2001.

In furtherance of its Constitutional and legal attributions, the Full Chamber of the Constitutional Court has delivered the following:

JUDGEMENT

In the process of the revision of the decision adopted by the First Labor Court of the Circuit of Cucuta, in the process of the writ of *tutela* number T-83734, advanced by Esteban Reinoso against the Colombian Petroleum Company (ECOPETROL).

I. BACKGROUND

Facts

Doris Fabiola Reinoso Barroso is the daughter of Esteban Reinoso, a Colombian Petroleum Company (ECOPETROL) pensioner, who enjoyed medical assistance services covered by the said company. Ms Barroso is a beneficiary of her father, due to her financial dependence on him because, despite being an adult, she suffers from paranoid schizophrenia.

On April 8, 1999, Lina María Reinoso Barrosos, the daughter of Doris Fabiola Reinoso,

was born. As a result of this birth, the medical assistance service of Doris Fabiola Reinoso was suspended. On January 27, 2000, in response to the request raised by Esteban Reinoso, the Colombian Petroleum Company indicated the reason why his daughter was excluded from the medical service:

> "There is a presumption that since Doris Fabiola has a child; her financial dependency on you ceased to exist. This is so because someone different from her father, Esteban Reinoso, is watching after her expenses, because we assume that she has created a family with the father of the child."

On February 10, 2000, the father of Doris Fabiola told the Defendant that his daughter did not constitute a new family and moreover, that they did not know who the father of the child was:

> "May I respectfully express, that my daughter has not constituted a new family because we do not know who the father of the child is. Due to her mental condition, we have not been able to find it out."

On December 12, 2000, Esteban Reinoso filed a writ of *tutela* against the Colombian Petroleum Company, arguing that the refusal to maintain the beneficiary status of Doris Fabiola (his daughter) violates her constitutional rights to life and to health because her stability and health depend on the continual provision of medicine. He also considers it contrary to the Constitution that the child Lina María Reinoso has also been excluded from this service. He alleges that on several occasions he went to the Defendant who never considered his arguments.

The Judge of first instance asked the Institute of Legal Medicine to conduct a "forensic-psychiatric assessment". The report submitted by an expert concludes the following:

> "The patient DORIS FABIOLA REINOSO BARROSO, suffers from a Paranoid Schizophrenia of chronic evolution.

> This clinical condition prevents the patient from determining for her self, her behavior at the time of the exam.
>
> She is not in a condition to dispose of her property.
>
> She is not in the capacity to provide herself with primary basic needs.
>
> She must have permanent specialized psychiatric treatment" (emphasis in the original).

Through the memorial submitted to the first instance judge on January 15, 2011, the company set out its position on the lawsuit claims. Firstly, it indicates that Doris Fabiola Reinoso's father is pensioned and that he is affiliated with the Social Security. Secondly, it indicates that she is covered by the Colombian Petroleum Company (ECOPETROL) as a beneficiary during the duration of her disability. The company considers that it was the duty of the father to include her within his family unit.

Regarding the disaffiliation of Doris Fabiola and the letter submitted by her father on February 10, 2000, the Company argues that:

> "As it is evident in the prior letter, **at no moment**, were the allegedly tragic circumstances in which Mrs. Reinoso Barroso got pregnant informed to us; nor could any interpretation of this letter allow us to infer the situation that Doris Fabiola Reinoso was in. This is the reason why we did not have to change our idea regarding her situation and it was natural to think that with her daughter's birth, she was dependent on the father of the child. Accordingly, as established by law, the medical services would be in charge of the latter.
>
> It is clear, that in my position as chief accountant of the Company, I have to ensure the proper use of public capital funds that are represented in the stock participation of ECOPETROL. As this is a delicate matter, I cannot justify

> expenses that affect the financial balance of the company and, as expressed in the following section, there is no rule that prescribes that I should cover the health service of the grandchildren of the pensioners of any of the branches of the Colombian Petroleum Company ECOPETROL"

Finally, the Company argues that there is no proof that supports the facts mentioned in the letter of 10 February 2000. Therefore it is evident that there is no "clarity regarding the financial dependency" of Doris Fabiola Reinoso.

Judgment subject to review

In the judgment of January 15, 2001, the First Labor Court of the Circuit of Cucuta, denied the claims of the writ of *tutela.* In the view of the judge, the issue under consideration is of a clear legal character, because it discusses whether, under current regulations, the Plaintiff's daughter is entitled to the care services claimed. Furthermore, only through ordinary processes is it possible to carry out the proofs that are required in order to resolve the process in question.

II. CONSIDERATIONS OF THE COURT

Competence

1. In accordance with the provisions of Articles 86 and 241, numeral 9th of the Constitution and 33 - 35 of Decree 2591 of 1991, the Chamber is competent to review the decision of *tutela* of the reference.

Legal Issue

2. In the Plaintiff's view, the sued company should have restored the status of affiliated beneficiary to his daughter, having proved that she has not formed a family and therefore her financial dependence upon him has not ceased to exist. The Plaintiff also considers that the Respondent has the obligation to assist his grandson (son of his invalid daughter), whose existence is the result of an unwanted sexual relation. These

allegations are supported in the jurisprudence of the Constitutional Court which in several occasions has established that, because of reasons of connection, the right to health has a fundamental character; which is evident in the present case because of the imminent necessity to restart his daughter's medical treatment (due to her suffering from chronic schizophrenia).

The Respondent considers that the mere statement that the daughter of the pensioner has not formed a family and that the father of the child is unknown is not sufficient to overcome the presumption that, having a child, the father will take care of the woman and the minor. Furthermore, the Respondent argues that there is no norm that obliges ECOPETROL or its subsidiaries to assist the grandchildren of their retirees.

The judge considers that in the present case there is no constitutional issue since the case is about rights of legal hierarchy.

It is for the Court to answer two different issues. On the one hand, whether it is constitutionally valid to suspend the health service of a person characterized as a beneficiary and who depends financially on the affiliate, by the mere fact that, whenever a woman has a child she will form a family and that the father will cover the family needs. On the other hand, the Court has to determine whether the sued company, if the previous issue is answered in a negative way, has the obligation to take care of the grandson of the affiliate, or whether that obligation should be assumed by the pensioner as a consequence of the financial dependency of the daughter, her disability and the fact that his grandson is the product of an unwanted sexual relation.

Discriminatory treatment and reiteration of jurisprudence.

3. Discriminatory positions are usually hidden under legitimate conducts. In general, discriminatory acts are manifested exclusively through spoken acts that, by their own nature, have a meaning associated to the ordinary use of language in a given area or within a certain community. Thus it is extremely complex, if not impossible, to identify discriminatory acts in some occasions (most of the time).

In previous cases, this Court has recognized these circumstances in which discriminatory acts are manifested. In the case T-098 of 1994[1], this Court maintained that:

> "11. A discriminatory act is conduct, attitude or treatment that pretends – consciously or unconsciously – to annul, to dominate or to ignore a person or group of persons, frequently appealing to social or personal preconceptions or prejudices, and which results in the violation of their fundamental rights."

This association of discriminatory conduct with preconceptions or prejudices has special consequences in relations between persons and institutions, whether public or private, because the discriminatory act is usually confused with institutional praxis. The discriminatory act is made socially legitimate by the support lent to it by couching the act itself in ordinary language. In this connection, the Court added:

> "The unequal and unjustified treatment that is often presented in the language of norms or in institutional or social practices, and which is confused with the lifestyle of the community, constitutes a discriminatory act. These acts are contrary to the constitutional values of human dignity and equality, because they impose a burden on the person that is neither legally nor morally required."[2]

The above explains the difficulty of demonstrating the occurrence of a discriminatory act; "that is the reason why it is appropriate that the burden of proof of the inexistence of discrimination lies with the authority that issues or applies a legal disposition, and not with the party that alleges the violation of his right to equality, especially when the classification of a person becomes suspicious for being related with the elements expressly indicated as discriminatory in light of constitutional law"[3].

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[1] M.R. Eduardo Cifuentes Muñoz.

[2] Case T-098 de 1994.

[3] Idem.

Accordingly, in several instances discriminatory acts will not be explicit in the message, but in the implicit sense of the affirmations, norms, and other speech acts in consideration.

4. The defendant argued that it was presumable that the pregnant woman would form a family and therefore that her financial dependence with respect to the parents would cease. This affirmation would be based on reality, as it is possible to agree that it is reasonable to expect that whoever "has a child with a woman, has the obligation to take care of her and her son". This conception, however, entails a clear discrimination against woman.

The freedom of a woman is not reduced with pregnancy. The option of pregnancy does not create obligations towards the father except the obligation to take care of the child they have in common. The father does not have the obligation to take care of the woman. She is as responsible as the father of achieving their livelihoods –not in vain, article 25 of the Constitution establishes that, without gender distinction, work "is a social obligation". Neither does pregnancy imply the obligation to form a family. On the contrary, as it is prescribed by article 42 of the Constitution, the family is the result of a "responsible decision", not the legal effect of having a child.

The exercise of a woman's sexual autonomy cannot be reduced to an instrument or a means to obtain conformation of families, or for procreation. On the contrary, since sexual autonomy is a manifestation of individual freedom, which is equally recognized in men and women, the meaning given to the exercise of such autonomy will be determined individually, by their life project. From such exercise of sexual autonomy it cannot be derived, *prima facie*, reciprocal obligations. But, in cases in which the **decision** is to form a family, this voluntary act will produce the consequences established by law. Likewise, the obligations towards children that arise as a consequence of the relationship do not extend to the other participant of the relationship. The holder of the rights is the minor, not one of the parties of the relationship. Similarly, pregnancy does not transform automatically, and *ipso jure*, the meaning that the participants of the relationship have given to their sexuality. This choice is, once again, independent and individual.

Consequently, to assume, that because of the pregnancy, the woman is creating a family with the father of the minor, implies the maximum reduction of a woman's autonomy. This position denies to a woman the possibility of exercising the right to sexual autonomy, because the voluntary character of her sexuality disappears, to become a mere fact. In sum, woman becomes a thing.

In this sense, the idea behind the argument of the Respondent is the assumption of a woman's weakness. Pregnancy, it must be clarified, is not a disease. It is, arguably, a "shared risk" that corresponds to the persons who establish relationships involving sexual acts. Since it is a "shared risk", necessarily, the full capacity of woman has to be assumed, and not her weakness in the participation of her relationship. Though pregnancy is a choice for both woman and man, it places the woman in a position that makes her worthy of special care (Constitution, art. 43), and it does not impair her from carrying out her project of life and does not reduce her in the labor sphere. Her reduction, her weakness, is not a fact but the result of social projection of prejudices. That is, the result of a discriminatory act.

Therefore, the reasons brought by the defendant are contrary to the Constitution, because they are based on (and are an expression of) a discriminatory attitude against woman.

5. The legal issue in the present case has already been analyzed by this Court. In the case T-1642 of 2000[4] the Court made the following reasoning:

> "2.5. Because of its similarity with the present case, the criteria developed in the transcribed jurisprudence, are applicable to the situation subject to examination. It follows, for the Chamber, that the rights of the Plaintiff to equality and to free development of personality were clearly violated. In fact:

[4] M.R. Jairo Charry Rivas.

- The thesis adopted by the company cannot be accepted, as it establishes that a daughter, by the mere fact of being a mother, acquires financial independence to the point that she is excluded from the familial group. That hypothesis is not supported in reality if it is considered that, at least in principle, that fact may mean a burden for a single mother because it implies a new responsibility that aggravates her financial situation.

As established in ECOPETROL policies, the consequence of being a mother is that the benefits acquired as a daughter of a company employee are suspended. That suspension is a sanction that will doubtlessly affect the right of that person to free development of personality, that is to say, the possibility to make her own decisions regarding her life.

Thus, the scope of the aforementioned policy is inconsequential to the benefits that the Plaintiff perceives to have emerged due to her connection with the family group and her financial situation rather than because of her condition as a mother. As this situation can never be an excuse to exclude a woman from the exercise of her fundamental right.

The Court rightly said in that case that, "a woman has the same rights as a man does and she cannot be exposed to losing her legal benefits as a consequence of the legitimate exercise of her freedom (…), the legal norm that associates the free and legitimate individual option to marry or to be in a common-law marriage, the risk of loosing a legal and consolidated right turns into an arbitrary interference in the field of privacy and self-determination which violates the free development of her personality without any justification, since public interest has no relation with the decisions".

It cannot be argued, as the Company did, that the Plaintiff has formed a new independent family because, as it is evident from the facts of the allegations that have not been refuted by the company, she is still part of her father's family and still depends on him financially. Following the policies of the Company, she will not be independent at least until she finishes college or

until she is 25 years old; nor is it effectively proven that she has financial independence because we insist that the fact of having a child does not mean the formation of a new family.

The Court has considered as can be read in case C-870/99, which has been transcribed, that a person by the mere fact of getting married does not acquire financial independence; thus, these circumstances do not justify the loss of the right to survivor pension to the degree that if a law establishes a determination in such sense, it would be flagrantly unconstitutional.

Similarly, it can be affirmed that the fact that the daughter of a pensioner or worker of ECOPETROL becomes a mother does not imply that she has formed a family, or that she has achieved her financial independence in order to assume the responsibility for the maintenance of herself and of her child. Hence, it must be admitted that the Plaintiff has not formed an independent family and that not only does she continue to be part of her father's family, but also that she depends on that relationship at least until she finishes college.

Furthermore, the Court is of the opinion that the dignity of a pregnant woman and the duty of special protection exists (Constitution, Art. 43), "… because her state, respectable in itself, far from constituting a ground of rejection, demands for a kind public attitude towards the prompt presence of a new life, circumstances that furthermore makes the future new mother a person of special vulnerability".

Case T-393/97 adds:

"The Court finds, moreover, that pregnancy creates an inalienable right, subject to protection and defense: the right to be a mother, which is undoubtedly a fundamental right".

"It has to be added that women, in the abovementioned conditions, have also the fundamental right to the free development of personality, to their privacy,

to education and to receive equal treatment from their peers, because discrimination based on pregnancy lacks justification".

"It is clear that those rights deserve protection from the State and that the writ of tutela *is the adequate mechanism for their effectiveness, taking into account the insensible, uncomprehending and incomprehensible position of the sued educational centers that is reflected in the conduct that violated those rights".*

2.6. In conclusion no constitutionally or legally valid reason exists to establish an unequal treatment between persons that are in the same situation – to be children of workers or retired people of the same company. This is so because every son or daughter is entitled to enjoy the same benefits without being subject to discrimination based on their personal considerations or decisions that belong to their internal forum, such as to have a child, since it is prohibited by the Constitution (Art. 13)."

The position of the Court in that decision does not contradict the position on this occasion. It is focused on the unconstitutional restriction on the right to free development of personality, since the threat of losing health benefits reduces the real options to develop someone's life plan. Likewise, supported on the jurisprudence of this Court, the conclusion is that there is no reason that marriage should imply financial independence and as a consequence maternity does not imply it either. In summary, the Court reaches the same conclusion as this decision: the reasons for the suspension of the service imply a violation of equality and a restriction of personal autonomy.

6. The conclusion of this analysis is the impossibility of the Company to suspend the service for the reasons raised by it. However, there remain two issues to consider. Firstly, the absence of evidence that proves financial dependence and secondly, the fact that the service is exclusively provided to the children that depend financially on their parents.

As it has been pointed out by this Court (Case SU-111 of 1997) it is generally for the legislator or contractual agreements (as a collective agreement) to define the conditions for the provision and access to health services within the scope of Constitutional canons. Hence, in principle (as it is not the object of the present debate) there is no Constitutional issue on restricting access to health to the financially dependent sons or daughters. This implies that the company has the right to deny the service whenever it is proven that the beneficiary son or daughter is not financially dependent on their parents. The restriction that the Court has set forth exclusively refers to the unconstitutionality of the argument that pregnancy indicates cessation of financial dependence. Thus, while the absence of financial dependence is not demonstrated, the Company is obliged to continue providing medical care to the Plaintiff's daughter.

Impossibility of extending contractual obligations: Health protection of the grandchild

7. Health care is an obligation of the State (Constitution, Art. 49). Thus, it is for the State to define conditions for access and coverage of health care, and to guarantee the provision of the service. The existence of contractual agreements does not affect the existence of this primary obligation of the State. For this reason it is not for the constitutional judge to modify conditions of care and access contractually agreed to, unless these entail the violation of related fundamental rights.

Health benefits that are provided to the retirees of ECOPETROL and its subsidiaries are of a conventional character. Therefore, it is not possible to extend it to persons other than those included under the agreement and the benefits incorporated therein. Thus, since there is no norm that obliges the Colombian Petroleum Company (ECOPETROL) to extend health services to the grandchildren of its pensioners, (nor has its existence been proven, the burden of which is upon the Plaintiff), the Court cannot dispense such extensions.

8. This solution does not imply that the grandchild is not protected. Article 44 of the Constitution establishes that in first place it is upon the family to protect children.

Only when the family is unable to provide such protection is it for the society or the State to provide such protection. The Court has already ruled in this regard:

> *"... by the will of the Constituent family, society and the State participate jointly and concurrently in the support to the growth, formation, protection and development of Colombian children. Despite this, the family is called to act preferentially to achieve that objective, with the help of the others, through the obligations that have been attributed to them in the legal system. Similarly, within the family community, even if all the people that are part of it are responsible for the application of the principle of solidarity in order to effectively protect and assist the children, its realization is subject to distribution, the respective parents having the main responsibility of its compliance through the exercise of parental rights…"*[5]

In relation to health, the Court has also determined that the family has the primary obligation of assistance[6]. This obligation, in respect of children, is reinforced by Constitutional mandate: "[t]he rights of children have priority over the rights of others" (Constitution, Art. 44).

In accordance with the abovementioned, and taking into account the health conditions of Doris Fabiola Reinoso; the health care of Lina Maria Reinoso Barroso lies with her grandfather, Esteban Reinoso. If he was financially incapacitated due to his condition of pensioner without having the capacity to cover his granddaughter's necessities, he may have requested the State to assist him in the protection of the fundamental rights of the child. However, that circumstance, the absence of resources, has not been proven in this process and is the reason why this writ of *tutela* does not succeed.

III. DECISION

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[5] Case T-182 de 1999.

[6] Case T-209 and 851 of 1999, among others.

In merit of the considerations, 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 First Labor Court of the Circuit of Cucuta dated 15th of January 2001 and alternatively, to grant the *tutela* for the violation of the right to equality of Doris Fabiola Reinoso Barroso.

SECOND. To order the COLOMBIAN PETROLEUM COMPANY to, in the term of 48 hours, restore the medical services of Doris Fabiola Reinoso Barroso.

THIRD. To order that the Secretariat implement Article 36 of Decree 2591 of 1991.

ALFREDO BELTRAN SIERRA
President

JAIME ARAUJO RENTERIA
Magistrate

MANUEL JOSE CEPEDA ESPINOSA
Magistrate

JAIME CORDOBA TRIVIÑO
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