

Judgment T-760/08 on the Right to Health

I. CASE

Judgment T-760/08 July 31, 2008

II. JURISDICTION

Second Review Chamber of the Colombian Constitutional Court

III. THEMATIC FOCUS

- Right to health
- State obligations regarding programmatic rights
- Progressive rights
- Culpability of state omissions

IV. NATURE & CONTEXT OF THE CASE

1. Procedural History

Twenty-two plaintiffs brought individual *tutelas* (claims of unconstitutionality) against health insurance companies and state agencies responsible for health care delivery oversight in their local municipal judiciaries. While the claims the plaintiffs brought were diverse, each concern situations in which the right to access to health was denied. The Constitutional Court consolidated the 22 cases and decided them together.

2. Parties

Twenty-two individual plaintiffs v. State administrative health agencies (Departamento Administrativo Distrital de Salud, Entidad Cooperativa Solidaria de Salud, la Secretaría de Salud del Departamento del Cesar), and six different health care service providers.

3. Date

July 31, 2008

V. SUMMARY OF THE CASE

1. Background and summary of the facts

This judgment addresses 22 *Tutelas* (claims of constitutional violations) relating to systemic problems in the health system. The Court also addresses the resolution of a series of structural flaws in the health system. Violations claimed in the *tutelas* include state's failure to timely reimburse health care providers; access to health services in conditions of integrality; access to

high cost health services and treatments of catastrophic illnesses, such as diagnostic exams; access to the health services for minors; access to health services when they require travel and living in places distinct from that in which the person resides; freedom of choice of the healthcare provider, access to health services contemplated in the obligatory health plan (POS), dependent upon copayments; access to health services not included within the POS.

2. Core issue(s)

Whether the regulatory failures of the health care delivery system presented through the joined cases represent a violation of the constitutional obligations of state authorities to respect, protect, and fulfill the right to health and its effective enjoyment (p. 2)

3. What was the decision? Holding & Outline of the Court's Decision

- Court ruled that the State fails to protect the right to health when it allows some people to be denied **access to those services covered by the obligatory health plans that are already financed.** (p. 12 # 4.4.5.1.1)
- **The State's maintenance of incentives and disincentives that do not promote the effective enjoyment of the right to health and its failure to adequately monitor healthcare access and delivery have allowed for the "continuation of this unjustifiable situation of constant and repeated violations of the right to health of people on the part of many of the entities responsible for ensuring the provision of the services."**
- Everyone has the constitutional right not to be denied access to health services, so the **provision of the health services cannot be conditioned on the payment of a sum of money when the individual lacks the financial ability to pay.** (p. 12 # 4.4.5.1.1)
- There must be an **"adequate guarantee of the flow of resources, which is necessary to ensure that everyone actually enjoys the highest attainable standard of health, given the budgetary, administrative and structural constraints that exist."** (#6.2)
- Health care providers have a constitutional right to recover the costs not financed through the per capita payment units. To guarantee the right to health of users, which depends on the timely flow of resources in the system, the reimbursement procedure must be clear, precise and agile. (#6.2)
- Towards the end of progressively realizing universal coverage for all, Court ordered Regulatory Commission:
 - "to adopt a program and timetable for the gradual and sustainable consolidation of the benefit plans of the contributory regime and the subsidized regime taking into account: (i) the priorities of the population according to epidemiological studies, (ii) the financial sustainability of the expansion of coverage and its funding by the UPC and other sources of funding for the existing system." (p.31)

- Towards the end of progressively unifying system, court ordered that unification program:
 - “(i) provide the definition of mechanisms to streamline access to health services for users, ensuring that the needs and health priorities are met without impeding access to required health services, (ii) identify the disincentives for the payment of contributions by users and (iii) plan for the necessary measures to encourage those with economic capacity to actually contribute, and to ensure that those who move from the subsidized regime to the contributory regime can return to the subsidized regime swiftly when their income decreases or the socioeconomic situation deteriorates.” (p. 31)

4. Key Points

- Court recognizes that *tutela* (constitutional court action) is permissible means to assert claims of state omissions implicating right to health where right to life or personal integrity is at issue:
 - “claims regarding state neglect of obligations arising from the right to health, even though they had a programmatic character and realization was progressive, were directly susceptible to protection through the tutela, as they constituted obligations upon which the rights to life or personal integrity, for example, depended. (p.4, #3.2.4)”
- Court affirms that the right to health is a fundamental social right implied in the right to “a life of dignity,” and its fulfillment requires guaranteeing the provision of the health services (p. 4, #3). These public policies must allow for public participation:
 - “The programmatic and progressive aspect of a constitutional right allows its holder to legally demand at least the existence of a public policy, aimed at ensuring the effective enjoyment of the right, which includes mechanisms for stakeholder participation.” (p. 6 #3.3.14)
 - “the constitutional obligations of programmatic character, derived from a fundamental right, are violated when the entity responsible for guaranteeing the enjoyment of a right does not even provide a program or a public policy that would permit the progressive advancement in the fulfillment of its corresponding obligations” (p. 5 #3.3.13)
- Court defines state’s obligation to **fulfill** the right to health:
 - “requires States to take appropriate legislative, administrative, budgetary, judicial or other measures towards the full realization of the right to health.” (I) For the Committee, the obligation to fulfill (facilitate) “in particular requires that the States adopt positive measures that permit and assist individuals and communities to enjoy the right to health.” (ii) States are also obligated to fulfill (provide) a specific right enshrined in the Covenant “in cases where individuals or groups are

unable, for reasons beyond their control, to exercise that right themselves by using means at its disposal.” (iii) The obligation to fulfill (promote) the right to health “requires the States to undertake activities to promote, maintain and restore health to the population.” (p. 5 #3.4.2.9.3.)

5. What was the court’s reasoning in reaching its decisions?

- State violated previously imposed obligations to progressively realize universal coverage and unification of health system. Law 100, enacted in 1993, required the progressive unification in the contributory and subsidized regimes to enable all Colombians to be covered by the health system by 2001. At the date of this decision, the state failed to follow through with its obligations to progressively realize these goals:
 - “no program realized that defines specific goals for the progressive rapprochement of the two plans nor a timetable that would support such a goal, setting clear deadlines for the accomplishment of each step. In other words, **there now exists a violation by the State of its constitutional obligation of progressive fulfillment consisting in the unification of the obligatory benefit plans to guarantee the right to health on equal terms. While it is an obligation of progressive fulfillment, the State currently violates the minimum degree of compliance as it has not adopted a plan, with its own timetable, to advance the unification of the benefit plans.**” (p. 19 #6.1.2.1.1)

6. What evidence did the court use to substantiate its decision on issues related to resources?

- Need to allocate resources depends on urgency of situation:
 - “The Court does not find that the positive aspects of a law are always subject to a gradual and progressive protection. When the failure to meet the minimum obligations places the holder of the right to health in imminent danger of suffering unreasonable harm, such holder can immediately claim the judicial protection of the law. **The approach suggested by the case law to determine when such a situation applies is one of urgency**”
 - “Some of the obligations that arise from a fundamental right and that have a programmatic character, **are to be carried out immediately, either because they require a simple action of the State, which does not require additional resources** (e.g., the obligation to provide information of their rights to patients before undergoing a medical treatment), **or because, despite the need to mobilize resources required, the severity and urgency of the case requires an immediate state action** (e.g., the obligation to take appropriate steps to ensure

health care for every baby during his or her first year of life—art. 50, Political Constitution). **Other obligations of programmatic character derived from a fundamental right are carried out progressively, because of the complexity of the actions and resources required to guarantee the effective enjoyment of these protective aspects of the right.**” (p 5, #3.3.6.)

- Constitutional court precedent delineating standards health services essential for a “life of dignity:”
 - **“As the fundamental right to health is limited, the benefits plan need not be infinite but can be circumscribed to cover the health needs and priorities determined by the competent authorities in light of the efficient use of scarce resources.** Consequently, the Constitutional court has on numerous occasions denied services solicited through tutelas. For example, the Court has denied cosmetic services. Although obesity can in the long run have consequences for the health of a person, every individual has the obligation of taking care of his own health and therefore trying to prevent the diseases that arise from being overweight. Only when obesity reaches a level where it poses definite and potentially irreversible dangers to a person’s life and personal integrity does the prescribed surgery acquire constitutional relevance which has led to tutelas being conceded. The same applies to dental care, as healthy and complete teeth are desirable but are far from necessary to preserve the life or personal integrity of a person or to permit a life of dignity. The Court has even agreed that the benefits plan can exclude fertility treatments. (p. 7 # 3.5.1)
 - Other examples of cases in which treatments and services have been denied include eyeglasses and refractive eye surgery, cosmetic treatments, fertility treatments, alcoholic rehabilitation/detoxification, prostheses, gastric bypass surgery, dental services, certain allergy treatments. (p. 8 # 3.5.2)
 - Examples of situations where court found state *did* have an obligation to ensure coverage: bone marrow transplant and treatment for hemophilia (p. 19 #6.1.2.1.2)
- Expert opinions regarding urgency of service and whether essential to protect right to dignified life:
 - **“The scientific opinion of the physician is the main criterion to determine whether a health service is required,** but is not the exclusive criterion. In the Health System, the person responsible for deciding when someone requires a health service is the physician, as the physician is able to decide based on scientific criteria and because he knows the patient. Constitutional jurisprudence has held that the relevant opinion to be used is that of the physician attached to the entity responsible for ensuring the provision of the service. Therefore, in principle, the protection of tutela will often be denied when it is invoked without such an opinion. **Constitutional jurisprudence has protected the right to health through the tutela when the service is required according to the**

attending physician, but not when the service is merely useful and the attending physician recommends its use.” (p. 10 #4.4.2.)

7. Relevant national/international norms in which the decision was based.

- International Covenant on Economic, Social and Cultural rights (ICESCR)
- General Comment No. 14 (2000) of the UN Committee on Economic, Social and Cultural Rights (on the right to health)
- Art. 50, Political Constitution of Colombia

8. Cited Case Law

- Corte Constitucional, sentencia T-597 de 1993
- Corte Constitucional, sentencia T-379 de 2003
- Corte Constitucional, sentencia T-227 de 2003
- Corte Constitucional, sentencia T-881 de 2002
- Corte Constitucional, sentencia T-328 de 1993