



Case T-760/08

Corte Constitucional [C.C.] [Constitutional Court], Sala Segunda de Revisi3n julio 31, 2008, M.P.: Manuel Jos3 Cepeda Espinoza, Sentencia T-760/08 (Colom.).

Country: Colombia

Region: Americas

Year: 2008

Court: Constitutional Court

Health Topics: Health care and health services, Health systems and financing

Human Rights: Right to due process/fair trial, Right to health, Right to life, Right to social security

Facts

In 1993, Colombia passed Law 100, a broad national healthcare reform act that attempted to improve delivery of health services in Colombia by utilizing public and private insurers ("Health Promoting Entities," or EPSs) as substitutes to purchase health care for insured patients. To this end, the law established a two-tier system of benefits: (1) a contributory regime (POS) for those formally employed or earning more than twice the minimum wage, and (2) a subsidized regime (POSS), which includes approximately one-half of the benefits in the contributory regime.

However, after a decade of its implementation, the regulatory framework failed to provide applicable services, as evidenced in a striking increase in tutela actions, or appeals for legal protection. A study by the Human Rights Ombudsman Office found that approximately 56.4% of the actions of tutela (appeals for legal protection) presented between 2003 and 2005 were brought to demand access to health services that were included within the obligatory health plan.

In this case, the Court analyzed 22 joined tutelas (appeals for legal protection)--20 brought by individuals and two brought by insurance companies--to determine whether regulatory failures represented a violation of the constitutional obligations of the competent authorities to respect, protect, and fulfill the right to health and its effective enjoyment. Specifically, these actions represented diverse situations in which the access to the required health services was denied and invoke the protection of the right to health, specifically, the access to needed health services relating to systemic problems in the health system.

Decision and Reasoning

All joined tutelas were ruled in favor of the claimants. EPS were directed to provide the requested services.

The Court held that right to health obligations of "programmatic character" are violated when the entity bearing the responsibility to ensure the enjoyment of the right does not provide the program or public policy necessary for progressively fulfilling its obligations as dictated by the right. The Court recognized that the fundamental right to health is limited to the health needs and priorities determined by authorities based on "the efficient use of scarce resources." In this manner, tutelas can be granted in cases where the person faces irreversible effects on his/her life and personal integrity.

The Court held that under the Constitution of Colombia and the CESCR General Comment No. 14 related to the right to health (among other national and international instruments), the right to health warranted: access to quality, timely, and effective health services; a health system that guarantees access to health services; the right to be affiliated with a health system; the right to "judicial notice" of adequate and necessary information on how to access health services.

The Court found that the State must take necessary measures to ensure sustainable universal coverage. To this end, the Court ordered the Ministry of Social Protection to report to the Second Review Chamber and the Attorney General of the Nation and the Ombudsman, on the number of actions of tutela brought in order to protect the right to health, specifically concerning the legal issues described in this order.

The Court also found that failure to adopt a plan, with its own timetable, to advance the unification of benefit plans constituted a violation of the State's constitutional obligation under the right to health. To guarantee the enjoyment of the right to health, the Court ordered the relevant authorities (namely, the Ministry of Social

Protection, the Regulatory Commission on Health and the National Council on the Social Security in Health) to take the necessary steps, within their powers, to overcome the failures of regulation in the benefit plans, ensuring that their contents "(i) are defined in a clear way, (ii) are fully up to date, (iii) are unified for the contributory and subsidized regimes, and (iv) are timely and effectively delivered by the EPS." The Court set annual timelines for the fulfillment of these orders.

Decision Excerpts

"The orders that we impart are framed within the system conceived by the Constitution and developed by Law 100 of 1993 and its posterior norms, as it would exceed the competence of the Court to order the design of a distinct system, as that is a decision for the legislature. The orders will require the legally competent organs to adopt the determinations that will enable them to overcome the failures of the regulation that have resulted in failures to protect the right to health, as evidenced by the actions of tutela that have been brought with increasing frequency for several years." / "Las Órdenes que se impartirán se enmarcan dentro del sistema concebido por la Constitución y desarrollado por la Ley 100 de 1993 y normas posteriores, puesto que excederá a la competencia de la Corte ordenar el diseño de un sistema distinto, puesto que dicha decisión compete al legislador. Las Órdenes se impartirán a los Órganos legalmente competentes para adoptar las determinaciones que podrán superar las fallas de la regulación que se han traducido en una desprotección del derecho a la salud evidente en las acciones de tutela que se han presentado cada vez con mayor frecuencia desde hace varios años..." (Section 2.2)

"The right to health has a strong positive dimension, although it also has negative dimensions [â€¦] the state, or its people, could violate the right to health, either by omission, such as by failing to provide a health service, or by an action, such as engaging in conduct which results in damage to a person's health." / "El derecho a la salud tiene una marcada dimensión positiva, aunque también tiene dimensiones negativas. [â€¦] el Estado, o las personas, pueden violar el derecho a la salud, bien sea por una omisión, al dejar de prestar un servicio de salud, o bien por una acción, cuando realizan una conducta cuyo resultado es deteriorar la salud de una persona." (Section 3.3.1)

"The programmatic and progressive aspect of a constitutional right allows its holder to legally demand at least (1) the existence of a public policy, (2) aimed at ensuring the effective enjoyment of the right, (3) which includes mechanisms for stakeholder participation." / "En conclusión, la faceta prestacional y progresiva de un derecho constitucional permite a su titular exigir judicialmente, por lo menos, (1) la existencia de una política pública, (2) orientada a garantizar el goce efectivo del derecho y (3) que contemple mecanismos de participación de los interesados." (Section 3.3.14)

"For the Committee, the ICESCR recognizes that states have three types of obligations derived from the recognized rights: obligations to respect, obligations to protect and obligations to fulfill." / "Para el Comité, el PIDESC reconoce que los estados tienen tres tipos de obligaciones, derivadas de los derechos reconocidos, obligaciones de respetar, obligaciones de proteger y obligaciones de garantizar." (Section 3.4.1)

The Committee indicates that the obligation to respect â€œrequires that States refrain from interfering directly or indirectly with the enjoyment of the right to health.â€• / "El Comité indica que la obligación de respetar 'exige que los Estados se abstengan de injerir directa o indirectamente en el disfrute del derecho a la salud.'" (Section 3.4.2.9.1)

"The obligation to protect â€œrequires that the States take measures to prevent third parties from interfering with the implementation of the guarantees provided for in Article 12' (ICESCR, 1966). [...] The obligation to fulfill 'requires States to take appropriate legislative, administrative, budgetary, judicial or other measures towards the full realization of the right to health.â€• / "La obligación de proteger 'requiere que los Estados adopten medidas para impedir que terceros interfieran en la aplicación de las garantías prevista en el artículo 12' (PIDESC, 1966) La obligación de cumplir â€œrequiere que los Estados adopten medidas apropiadas de carácter legislativo, administrativo, presupuestario, judicial o de otra índole para dar plena efectividad al derecho a la salud." (Section 3.4.2.9.2)

"In order for essentially everyone to access health services, the State is responsible, under the Constitution (art. 49 CP), to satisfy the following requirements: (i) organize, (ii) direct and (iii) regulate the provision of health services; (iv) establish policies for the provision of services by private entities, and exercise (v) monitoring and (vi) oversight; (vii) establish the respective powers of the national and local authorities, as well as members of the public, and (viii) determine their respective roles and responsibilities on such terms and

conditions outlined in the law." / "Para que efectivamente toda persona pueda acceder a los servicios de salud, al Estado le corresponde, por mandato constitucional (art. 49, CP), cumplir las siguientes obligaciones: (i) organizar, (ii) dirigir y (iii) regular la prestación de los servicios de salud; (iv) establecer las políticas para la prestación de los servicios por parte de entidades privadas, y ejercer (v) su vigilancia y (vi) control; (viii) establecer las competencias de la Nación, las entidades territoriales y los particulares, y (ix) determinar los aportes a su cargo en los términos y condiciones señalados en la ley. Así pues, es obligación del Estado establecer el Sistema; definir qué entidades y personas lo pueden integrar, y qué labores puede desempeñar cada uno; cómo pueden los particulares participar en la prestación de los servicios y en qué términos; así como también, establecer quienes aportan al Sistema y en qué cantidad esto es, definir el flujo de recursos del Sistema." (Section 4.1.3)

"The State fails to protect the right to health when it allows for the fact that the majority of violations show obvious disregard for said right, which impedes access to those services covered by the obligatory health plans." / "El Estado deja de proteger el derecho a la salud cuando permite que la mayoría de violaciones sean claras irrespetos a dicho derecho, en los que se obstaculiza a las personas el acceso a servicios contemplados en los planes obligatorios de salud, ya financiados." (Section 6.1.4.1.2)

"[I]t is not for the Constitutional Court to establish the manner in which the system must overcome the flaws that prevent the public administration from having the institutional capacity that would enable it to take appropriate and necessary measures to guarantee the population a higher level of health, given the available resources. However, it is a function of the Constitutional Court to impart the orders necessary so that the competent bodies adopt these corrective measures, if they have not already done so or are not in the process of doing so, in accordance with the constitutional mandate, as soon as possible." / "[N]o compete al juez constitucional establecer cuál es la forma en que se deben superar los defectos que le impiden a la administración pública contar con la capacidad institucional que le permita adoptar las medidas adecuadas y necesarias para garantizar efectivamente a la población el mayor nivel de salud posible, habida cuenta de los recursos disponibles. No obstante, es función del juez constitucional impartir las órdenes necesarias para que los órganos competentes para adoptar estos correctivos, si no lo han hecho o no lo están haciendo, de acuerdo al mandato constitucional, los tomen lo más pronto posible." (6.2.3.1)

"For over a decade people have had to resort to the action of tutela to resolve disputes so that the judiciary resolves disputes that could have been heeded off in a general way by the competent regulatory bodies. This is a clear indication about the flaws in the regulation of the health system, which in turn is the basis for general orders we adopt to correct such problems. For this reason, the decisions of regulatory bodies to comply with this ruling must necessarily lead to a result that will facilitate people's access to health services and eventually reduce the proportion of tutelas filed." / "Durante más de una década las personas han tenido que acudir a la acción de tutela para que la justicia resuelva controversias que habrían podido ser dirimidas de manera general por los órganos competentes de regulación. Este fenómeno constituye un claro indicio acerca de las fallas en la regulación del sistema de salud, lo cual a su vez es el fundamento de las órdenes generales atinentes a corregir dichos problemas. Por esta razón, las decisiones que adopten los órganos de regulación encaminados a cumplir la presente sentencia deben necesariamente conducir a un resultado que facilite el acceso de las personas a los servicios de salud y que eventualmente disminuya la proporción de tutelas presentadas para ello." (Section 9)