Case SU-480/97

Reference: File T-119714, T-120933, T-124414, T-123145, T-120042, T-123132, T-122891.

Plaintiff: N.N.

Second Instance Tribunal: The Civil Chamber of the Supreme Court of Justice and other tribunals.

Topics: Right to life and right to health.
General System of Social Security in Health (pre-existing conditions, medicine, HPE).
Financial balance between the contributions to the system of social security-health.
Relationship Doctor-Patient-HPE.
Relationship between the State, government entities and the persons in charge of social security.
Access to the System
Non-tax based contributions

to the System of Social Security and Health.

Justice Rapporteur: Dr. ALEJANDRO MARTÍNEZ CABALLERO

Santafe de Bogota, D.C., Twenty five (25) of September of nineteen ninety-seven (1997)

The Full Chamber of the Constitutional Court, with Justice Antonio Barrera Carbonell presiding, and composed of Jorge Arango Mejia, Eduardo Cifuentes Muñoz, Carlos Gaviria Díaz, José Gregorio Hernández Galindo, Hernando Herrera Vergara, Alejandro Martínez Caballero, Fabio Morón Díaz y Vladimiro Naranjo Mesa,

IN NAME OF THE PEOPLE

AND

BY MANDATE OF THE CONSTITUTION

Has delivered the following,

JUDGMENT

Presented in *tutelas* T-1119714, 120933, 124414, 123145, 120042, 123132, 122891

filed by patients with AIDS, the first one against the entity “Health Colmena” and the other writs against the Institute of Social Security.

The selection chamber decided to reproduce the records T-123145, T-120042, T-120933, T-123145, T-124414 and T-122891 within the record T-119714, given that the records presented a coincidence in the facts and in the principal right for which protection is claimed by the writ of *Tutela*. It was decided by the Full Chamber that the pronouncement would be made in the Chamber of Unification.

The names of the plaintiffs will be kept confidential, because of their request and because there are reasons to do so.

I. BACKGROUND

1.1.1 Those who submitted the writ against the Institute of Social Security (I.S.S), T-124414, T-120042, T-122891, T-120933, T-123145, 123132, focus their request on the provision of protease inhibitors, and on the quantity and regularity of their provision, as these drugs serve to improve the quality of life, the duration of life and the biological capacity of the human body. It is stated in some of the requests that "the physician that is treating them said it was necessary to begin the treatment with protease inhibitors"; however, there is no record of this in T-122891 (where the writ of *tutela* was not granted). In T-123132 there is evidence that the protease inhibitors were not prescribed, but the writ of *tutela* was granted. In T - 124414, where the writ of *tutela* was also not granted, there was no prescription, so the patient, on behalf of herself and her son, went to the ISS to request the antiretroviral. This is why the Coordinator of the FTS/HIV/AIDS program of the San Pedro Claver Clinic affirms that "there is no record of the doctor that is treating the patient ordering the protease inhibitors"; in T-123145 the doctor again did not order them and the writ of *tutela* was also unsuccessful. However, on the contrary, there is evidence in other records that the physician indeed ordered them: in T-120933 this caused the writ of *tutela* to be granted in the first instance, through judgment of 22 November 1996 of the Administrative Tribunal of Cundinamarca, but it was not granted in the second instance. The *tutela* of case T-

120042 was also granted.

1.1.2 In some of these writs of *tutela*, it was requested that the Director of the San Pedro Claver Clinic allow the continuation of the sessions attended by the petitioner in one of the auditoriums of the hospital. These sessions were suspended by an internal decision of the hospital.

A group of carriers of the HIV virus and their families formed the group called Club of Happiness, and starting from a few years ago they had met regularly in an auditorium of the San Pedro Claver Clinic, with the purpose of sharing knowledge, experiences, setting guidelines on how to live better and to help mitigate the impact of the disease. The club came to have 150 people attending for this kind of group therapy. The club was subsequently impeded and then forbidden to use the facilities of the clinic for these meetings.

Because of this situation, the group began disintegrating, as finding another place for their meetings was difficult. This affected, according to the plaintiffs, their right to association and a very important way to overcome the illness: therapy through communication. One of the affected says that the prohibition was due to the fact that they received a speech from someone linked with ABBOT laboratories, who had spoken to them about some medicine and that hence "in the I.S.S they believed that the person of the above mentioned laboratory was impelling us to place the writs of *tutela* demanding the protease inhibitors". In support of the above request, a briefing by the Department of Health on its national program to prevent and control sexually transmitted diseases and AIDS states that: "*self-help support groups have had vital importance in what is considered to be the world strategy against AIDS*".

1.2. At the same time, a health user of Health Colmena, in the T-119714, initiated the action requesting the antiretroviral prescribed by his doctor (zidovudina and zalcitavina). In the declarations chapter, he discusses other medicines, but he focuses his writ on how necessary those medicines that were not provided by the H.P.E were for his

health. According to Health Colmena's National Director of Supplementary Medical Services, these two antiretrovirals did not at the time appear in the list of essential and therapeutic medicines of the Mandatory Health Plan (although they currently do), in accordance with Decree 1938 of August 5, 1994. This was addressed to the user, and dated October 4, 1996.

The practical problem lies, therefore, in the refusal to provide those medicines because they did not appear in the manual authorized by the Ministry of Health, which affects, in the view of the plaintiff, the right to life, to equality and to dignity.

On the other hand, Health Colmena, among many arguments, emphasized that the social security services in health, in terms of coverage, conditions and efficiency, depend on the global policies of the State set forth in the Mandatory Health Plan (MHP) and if there are medicines that are not included in this plan, the writ of *tutela* should not be addressed against the administrative entities but against the executive.

First of all, it is necessary to clarify that in Agreement 53 of February 13, 1997, the Ministry of Health included new medicines in the list for treatment of HIV-AIDS: didanosine, indinavir, lamivudine, pentamidine, ritonavir, trimethoprim, zidovudine. Among them the ritonavir and indinavir are listed, which, as it has been reported to the Court, are two protease inhibitors; and zidovudine which is one of the two antiretroviral drugs expressly indicated in the request of *tutela* against COLMENA.

JUDICIAL DETERMINATIONS

The initial judges took different positions, at both first and second instance, in respect to the writs individually considered.

2. The case against Health Colmena

2.1 Regarding the writ of *tutela* filed against HEALTH COLMENA, the Superior Tribunal of Santafe de Bogota, Civil Chamber, delivered its decision on October 29, 1996 granting the *tutela* and ordering the Health Promoters Entities (HPE) to deliver to the patient the "antiretroviral and other medications that the physician of that entity that is treating the patient has prescribed".

The President of Health Colmena opposed the decision of the Tribunal, because although he admits that it is necessary to protect the patient, and Colmena has provided the prescribed medicines to the patient, he argues that the cost of the medicines that do not appear in the official list must be covered by the State and not by the HPE, based on good faith. He also affirms that, anyhow, the above mentioned entity has:

"the right to charge against the State for the cost of the medicines that they eventually will have to keep providing to the petitioner".

2.2.1 The Supreme Court of Justice, on 12 December 1996, modified in part the decision, because while it confirmed the protection that should be given to the patient, providing him through Health Colmena the abovementioned medicines, it added the right on the part of COLMENA "to the corresponding economic reimbursements for that supply, reimbursements that should be carried out by the State - Ministry of Health - through the corresponding fund, within 45 days after the presentation of the bill".

2.2.2 Even if what was decided was a favourable response to the economic reimbursement claim by the HPE, and that in a written address to the Constitutional Court by the president of HEALTH COLMENA a confirmation of the judgment of the Supreme Court of Justice was requested; in other submissions the inclusion of other medicines in the list of the Mandatory Health Plan made in 1997 was questioned and a judgment of the Supreme Court of Justice was contested, which is not the subject matter of this review.

3. As for the writs of *tutela* filed against the INSTITUTE OF SOCIAL SECURITY

None of the judgments protected the right to association and the right to free development of personality, with respect to the continuity of the meetings of the Club of Happiness in the auditoriums of the San Pedro Claver Clinic.

But, with regard to the delivery of drugs, as mentioned above, the judicial positions are dissimilar:

3.1. The writ of *tutela* was not granted:

T- 124414. First instance judgment of November 26 1996, Court 12 of Family of Santafe de Bogota, did not grant the tutela; second instance decision, issued on February 10 of this year by the Family Chamber of the Superior Tribunal of the Judicial District of Bogotá, confirmed the first instance decision.

T-122891. First instance Judgment of November 22, 1996, 40 Civil Municipal Court did not grant the *tutela*; second instance decision on January 22 of the present year, the Civil Court 24 of the Circuit of Santafe of Bogota confirmed the decision.

T-123145. First instance judgment of November 20, 1996, delivered by the Civil Chamber of the Superior Tribunal of Santafe of Bogota did not grant the *tutela*; second instance decision, delivered by the Civil and Agrarian Chamber of Cassation of the Supreme Court on January 24 of the present year, confirmed the decision, although it clarified the following in the reasons for the judgment:

> *"The Court finds that it would be reasonable to revoke the decision and to grant the tutela in order for the entity to proceed to do a scientific evaluation, with participation of the physician that is treating the patient, for the purpose of determining the feasibility of continuing the treatment with the protease inhibitors" "However, the judgment that was contested will be maintained because the ISS proceeded to the prescription and provision of the*

abovementioned medicines. This may be deduced from what was presented during the course of the impugnation, thus the reasons that led to this complaint disappear".

3.2 The writ of *tutela* was granted:

T-120042. It was ordered that the ISS "after the execution of health exams required by the science and medical technique, should provide to the patient-plaintiff the protease inhibitors required because of his current health situation, unless there is justifiable medical advice of a doctor to the contrary and with the medical advice of the doctor that is treating the patient". This judgment was issued on November 29, 1996 by the Labor Chamber of the Superior Tribunal of Judicial District of Santafe de Bogotá.

T-123132. On 18 November 1996, the Superior Tribunal of the Judicial District of Santafe de Bogota, the Civil Chamber, ordered ISS to "do the viral load test, liver and kidney function tests, in order to determine whether or not the protease inhibitors should be provided in the amount and frequency that is prescribed by the treating physician". The Supreme Court of Justice, Civil Cassation and Agricultural Chamber, on 24 January 1997, confirmed this decision.

3.3 *Tutela* granted in first instance, but not in the second instance

T-120933. On 22 November 1996, the Second Section of the Administrative Tribunal of Cundinamarca ordered ISS "to provide to the petitioner the entirety of the prescribed treatment to fight against the HIV/AIDS virus, which affects him". But, in the second instance the decision was revoked by the Council of the State, on 13 December 1996.

4. Economic impact of a prescribed medicine that does not appear in the list

The core issue raised by the entities which provide the service is not if the medicine prescribed by the doctor should be provided or not (this has been accepted by the HPE when the user has no delay in his payments and his life is at stake); the central issue is <u>who should assume the costs and finance</u> the medicines related to catastrophic illnesses,

like AIDS, when the abovementioned medicines are not included in the lists approved by the government.

The problem that is raised is whether the constitutional duty of the State may be complied with through the auto-financing of the HPE, or if, on the contrary, since there are HPEs that operate within the compensation scheme (this means that an important part of what they receive from the user – everything that exceeds COP$ 14582 monthly for the affiliated user, and an additional COP$ 14582 for every beneficiary – directly goes to the Solidarity and Guarantee Fund], those HPE may request the refund of the value of the medicines that do not appear in the list but that they provide to the patient. The practice is that the National Security Council, through the Compensation Sub-account, will cover the refund, or, if there is a lack of resources in the sub-account, the refund will be done with the amount of money that is permitted in the national budget for "payment of judgments", while the National Council of Social Security authorizes the corresponding budgetary transfers.

The HPEs allege that, since they compensate the above mentioned Fund, they should not be obliged to provide medicines excluded from the list prescribed by doctors without scientific justification, particularly at a time in which, according to the HPE, the health system is in crisis because the budgets that supported the auto-financing collapsed (due to: unemployment growth; minimal wage increases; evasion of contributions; and, especially, the absence of balance of the costs due to inflation and the growth of the UPC). The existence of the crisis led to the President of the Guild ACEMI, to make a requisition that appears in the file:

> *"We must ensure that they all assume their real responsibility:* ***users*** *must pay allowances for drugs that are not included in the MHP, if they have the capacity to do so, and also they must not evade the payments.* ***Doctors*** *must rationally prescribe medicines within the MHP and they should prescribe medicines that are not in the MHP only if based on proven scientific reasons. In this case they must go before the National Security Council and do the relevant requisitions, so if it is the case, the list of drugs or the list of procedures is modified, and*

> *funding may be sought in order to cover the new costs of the MHP. The* ***HPE*** *must provide a drug or procedure, even if it is not within the MHP, if the life of the patient is in danger, having the right to the corresponding refund; the* ***public HPE****, as the ISS, should compensate; the* ***public PSI*** *should comply with the provisions of the Government in terms of rates. The* ***State must also assume its responsibility****, so if the user has no capacity to pay and is in arrears, or even if he is not but the medication or procedure are not set forth in the decrees that limit the Plan, the State must make the refund respecting the clear rules of the game, because the Solidarity Fund has the capacity, with the authorization of the Council, to make these payments."*

The issue of the imbalance of the system and the high cost of AIDS treatment is clear in the cases and among the numerous elements of the judgment it is worth highlighting:

4.1 Calculation of the cost of the antiretroviral treatment in accordance with the Ministry of Health

> *"In the global context, advanced research has been developed regarding the treatment of the patient infected with the human immunodeficiency virus (HIV +). Since some time ago, antiretroviral medicines (inhibitors of transcriptase and proteases) have been available on the market, and it has been demonstrated in several studies that these medicines have a therapeutic effect that lowers the viral load of the patient with AIDS. A direct relation between this viral load and the presentation of symptoms related with the disease has been found. This effect is, from the medical point of view, a great development for the patient since it reduces the progression of the disease and improves his/her quality of life.*
>
> *According to the information master file of the Ministry of Health, around 17,000 patients for the year 1996 were found to have been infected with HIV+ (including asymptomatic patients and patients with the syndrome (AIDS) in Colombia. The attributable mortality during the year of 1996 was 3,000 patients, and for this year it is expected that around 1,000 patients will be*

diagnosed with the disease; this will give a total of 15,000 patients with HIV /AIDS for the entire Colombian population (37,407,188 inhabitants).

*"**Average treatment cost***

To calculate the demand and the average cost of treatment with antiretroviral drugs for the patients infected with HIV in the contributory scheme, we departed form the following suppositions:

a) The protocol treatment to be used is the one recommended by the experts who gathered at the workshop convened by the Ministry of Health, national program for prevention and control of STD-AIDS in October 2 1996. The protocol contains three drugs in all the schemes: Two transcriptase inhibitors and a protease inhibitor. ***Consequently, the scheme type or basic scheme that is adopted is one that combines the above mentioned medicines and provides them to all the patients infected by HIV, symptomatic and asymptomatic.***

b) The Technical Advisory Committee of Medicines, in session on 23 January 1997, recommended the inclusion of anti-retroviral drugs in the list of drugs of the MHP, those medicines are: as transcriptase inhibitors the zidovudine, didanosine and lamivudine; and as protease inhibitors the indinavir and ritonavir. With those medicines up to six treatment options can be made by combining three of them; the most recommended by the AIDS program is the combination of zidovudine, lamivudine and indinavir.

c) Due to the existence of four or more sources of information regarding the prices of these drugs, different options were constructed for three of them: the Colombian Association of Cancer Patients (ACEC), the ISS and the National Fund for Drugs with High Social Impact. A fourth scenario was created with the lowest prices on the market by combining information from the above mentioned sources.

PROTOCOL	Cost alternative			
	ACEC *Unknown information*	**ISS** *Commercial information*	**National Fund** *Unknown information*	**Combination** *Different sources*
By mixing three /year	9,408,000	8,884,800	8,082,000	7,245,600

"Average per capita cost"

a) For the calculation of the per capita cost an option for the total population of the contributory regime members was created, according to the information provided by the national program for the prevention and Control of STD-AIDS, the AIDS program of the ISS and the affiliation of the contributory regime data reported to the Ministry of Health - sub department of the HPE.

b) Then an option with the cost of hospitalization of patients who developed AIDS was designed using data of the ISS - branch Valley, which reports an average of two (2) hospitalizations per year per patient with AIDS and an estimated cost average per hospitalization of $8,500,000 COP for the year of 1996 and that in the present analysis was adjusted by 21% for the year of

1997.

c) *Finally, it was calculated the per capita cost of antiretroviral treatment using the lowest cost /year using the different prices of the market with their respective discounts to scale.*

d) *When comparing the per capita costs from table III (three) and IV (four) we found a difference between hospitalization costs and the costs of the anti-retroviral treatment being that these last ones were $1,175,950 COP lower than the first.*

"Effective demand by HIV patients (+) in the contributory scheme 1997 (Table II)

	COLOMBIA TOTAL	***HPEs***	***ISS***	***CONTRIBUTORY TOTAL***
POPULATION	*37,600,000*	*3,671,759*	*9,319,654*	*12,991,413*
HIV (+) REGISTER	*15,439*	*1,508*	*4,877*	*6,385*
HIV (+)*SYMPTOMATIC*	*7,546*	*737*	*2,975*	*3,712*

"Cost of hospital treatment in the contributory scheme 1997 (Table III)

SYMPTOMATICS (SIDA)	***Nº patients***	***Hospitalization cost***	***Total Cost/year***	***Per capita Cost***
ISS	*2,975*	*$10,341,937*	*61,534,527,551*	*$6,602,66*
OTHERS	*737*	*$10,341,937*	*15,241,756,687*	*$4,151,08*

HPE				
TOTAL	*3,712*		*76,776,284,239*	*$5,909,77*

"Cost of antiretroviral therapy in the contributory scheme 1997

(Table IV)

PATIENTS HIV (+)	***Nº patients***	***Annual Cost/patient***	***Total Cost/year***	***Per capita Cost***
ISS	*4,877*	*7,245,600*	*35,336,791,200*	*$ 3,791,64*
OTHER HPE	*1,508*	*7,245,600*	*10,923,953,557*	*$2,975,13*
TOTAL	*6,385*	*7,245,600*	*46,260,744,757*	*$4,560,87*

"Conclusions

- *The use of antiretrovirals in the treatment of HIV/AIDS is clearly recognized by experts (as is supported in the recent academic literature on the topic), as it decreases the progression of the illness.*

- *The use of antiretrovirals decreases the viral load, which is directly related to the onset of symptoms, the appearance of complications and symptoms are an integral part of the syndrome as such.*

- *The use of antiretrovirals improves the quality of life of those who are infected"*

4.2 Explanation of the Ministry of Health on financing

Regarding the operational aspect of financing of the drugs that do not appear on the list, the Health Minister made this clarification:

"... They cannot be financed by the resources of the Solidarity and Guarantee

Fund, because each sub-account has by law a special designation, this destination is as follows:

Sub-account of solidarity. The resources of this sub-account are intended to allow the affiliation of the poor and vulnerable people to the subsidized scheme of the system of social security in health, through co-financing the corresponding subsidies (UPC).

Sub-account of promotion aims to finance the activities of education, information and promotion of health and secondary and tertiary prevention of disease, in accordance with the priorities set forth by the National Council of Security in Health.

The sub-account of compensation aims to allow the operation of the compensation in the contributory scheme of the General System of Security in Health. The operation of compensation is understood to be the procedure by which the resources that the system allocates to the health promoter entities, in order to ensure the provision of health services to their members and also beneficiaries of the system, are deducted from the collected contributions in accordance with the provisions of article 204 of the Law 100 of 1993.

The sub-account of catastrophic and accidental risks of transit insurance aims to ensure comprehensive care to victims who have suffered damage to their physical integrity as a direct consequence of traffic accidents, terrorism and catastrophic events. It is highlighted that these catastrophic events do not include diseases of high cost or catastrophic diseases. Consequently, no resources of the Fund may be used to address the case in question.

It is important to remember that both the resources designated for social security as, in general, the resources allocated to finance healthcare as a public service by the State, are limited. Allocating a large portion of them to support the expenses of only one person leads to the breach of articles 11, 13 and 49 of

the National Constitution, because it goes against the interests of the community as a whole. The resources would be quickly exhausted in the coverage of a minimum number of users, which would mean that access to the services of promotion, protection and recovery of health could not be guaranteed to every person.

For all of the above, we reaffirm that the HPE, are required to provide attention to their affiliates and to ensure their treatment. This includes the medicines that the patient requires, the cost of which must be assumed through the reinsurance that the HPE must acquire with the corresponding part of the UPC, which is the part that ensures coverage of the economic risk resulting from the attention to the affiliates that are affected by diseases of high-cost management." (Emphasis added).

Also, the Department of Health presented numerous reasons to justify the amendments to the list of medicines made in February 1997.

4.3 Explanation of the Treasury Department

At the same time, the Ministry of Treasury, in a communication addressed to the Supreme Court said that there are three elements that determine the financial balance of the General System of Social Security in Health:

"Contents of the compulsory health Plan." This plan ensures the system's members a comprehensive package of services (promotion, prevention, treatment, rehabilitation and medications, accepted by medical science at a global level, which meet the criteria of proven effectiveness to resolve or improve the conditions generated by the disease, and security to not put in danger the life and integrity of patients).

This plan responds to all health problems without any kind of discrimination by age or gender and respects the principles of efficiency, solidarity and

universality required by the National Constitution and developed by Law 100 of 1993.

It is important to clarify that while responding to all health problems included in the plan, there are legal and financial limitations that make necessary the selection of those procedures, activities, interventions and medications that combine elements of greater efficiency and lower costs for the whole population. This ensures, with limited resources, the access of the entire population affiliated to the health services.

In consequence, the Mandatory Plan has restrictions, because the resources of the system are not unlimited and must guarantee the principle of equity, which allows everyone to have access to the same services, independent from their capacity to pay.

Unit of payment by capitation (UPC). UPC is the value that the system recognizes for each Member by way of insurance premium, which is differential and varies according to the age. The National Council for Health and Social Security set forth in the agreements a national average that is the basis on which the annual increment is to be determined . This implies that the weighted value will vary for each HPE depending on the ages of its affiliated population.

In the beginning this UPC was estimated based on assumptions of the structure of the age-range of the affiliated population, but it was modified by the National Council of Social Security in Health in 1997 (after two years of operation of the system), based on real information about the structure of the currently affiliated population. An UPC that covers every affiliated person, in addition to the co-payments should finance the mandatory health plan of participants in the system. This balance must be kept inside each HPE.

- *Rates charged by institutions providing health services for the attention of the MHP, as mentioned previously.*

As a conclusion it is important to call attention to the fact that not only do the rates have an impact on the cost of the MH but it is also influenced by the definition of its content. The search for new technologies, the emergence of medicines of recognized and proven effectiveness and the behaviour of the demand for services that the affiliates make, affect the cost of the MHP, and should be taken into account in order to preserve the financial balance of the current system, and its sustainability over the medium and long term."

4.4 Opinion of HPE

This is considered in numerous decisions referred to by the case. It is worthwhile to highlight what is said about the adequacy of the unit of payment by capitation (UPC):

"2 º The increase of the UPC in the health sector, responded to the simple application of article 172, second paragraph of law 100 of 1993 under which: ***"the value of co-payments and the unit of payment by capitation (UPC) shall be reviewed at least once a year, before the next budgetary period. In the event that the UPC had not been reviewed at the beginning of the year, this will be automatically adjusted in an equal proportion to the percentage of increase of the minimum wage approved by the national Government of the immediately preceding year"****.*

As it is known by this Corporation, the minimum wage increase for the year 1997 was 21.02 %. In this sense and considering that the UPC was not reviewed during the year 1996, the automatic enforcement of Law 100 in the Article 172 applied, i.e. an increase the UPC by the same percentage as the increase of the minimum wage for the year 1997. IT IS THE SECOND TIME THAT THIS PROCEDURE HAS OCCURRED BEFORE ANNUAL REVIEW OF THE UPC COULD TAKE PLACE."

In the opinion of the HPE, the balance of the system has not been maintained.

LEGAL CONSIDERATIONS

A. Competence

The Full Chamber of the Constitutional Court is competent to review the judgment of the writs of *tutela* based on Article 86, second subsection, and Article 241 paragraph 9 of the Constitution in combination with Articles 33, 35, and 42 of the Decree No. 2591 of 1991. Also, the review is done by virtue of the selection of the above-mentioned writs, in accordance with the rules of procedure of this Court regarding the distribution of cases, and with the determination to deliver a judgment unifying these writs.

B. Main topics to be treated

To define the specific issues that led to the presentation of the writs of *tutela* (whether the use of medicines that are not included in the official list of medicines may be prescribed; and in the event that this may be done, whether the HPE can charge the State for the money invested in those medicines) it is essential to make a brief comprehensive and informative description of the legal situation of the right to health in Colombia, within the context of a social state of law. This requires a description of the features of our social security system, and the rights and obligations that arise from it. The arising relationships that must exist between: the State and the entities of the social security and healthcare Systems; between the patient and the State; between the patient and the doctor: and between the patient and the HPE; will also be analysed. In another chapter the constitutional jurisprudence that protects the patient in general will be reviewed, particularly that relating to the AIDS patient to whom the physician's of the HPE prescribes antiretrovirals, which are not included or were not included in the lists proffered by the Ministry of Health. In the final part we will review the jurisprudence relating to the obstacles to the meetings of self-help support groups for people that suffer from AIDS that were used by the clinic and whether or not they breach fundamental rights.

1. SOCIAL SECURITY IN THE SOCIAL STATE OF LAW

The implementation of the public service of Social Security is based on a regulatory system that is composed not only of Articles 48, 49, 11, 366 of the Constitution but also by other sets of rules, as long as they are not contrary to the Constitution. All of these standards contribute to the accomplishment of entitlement rights as an active objective of the State. In other words, abstract law is materialized through rules and practical procedures that make it effective.

This means that if it is assumed that social security is located within the constitutional principles of material equality and the Social State of Law, it is understood that the rules set forth in laws, decrees, resolutions, and agreements are not aimed to restrict the law (with the exception of legal limitations that do not affect the essential core of the right), but are directed toward the optimization of normative development, for these constitutional rights to be effective to the greatest extent. Therefore, in order to deliver the decision that finalizes every writ of *tutela* related to health, it is essential to take into account the rules that the legislature has developed in Law 100/93, Book II (art. 152 s.)[1], and in the decrees, resolutions and agreements. The important thing is to see that the unity of the principles and rules inform the system and this should be taken into account by the judge of *tutela.*

2. WHEN CAN HEALTH BE CONSIDERED AS A FUNDAMENTAL RIGHT?

According to the jurisprudence, the right to health may be protected through a *tutela* writ as a right derived from the right of life[2]. It is not an autonomous fundamental right. From this right, arises the correlative duty of the State of "organizing, directing and regulating the provision of health services to residents and of sanitation in accordance

[1] Law 100/93, was developed to date through regulatory decrees 218, 20 resolutions, 59 agreements of the National Council of Social Security in health; and integrates, in addition, with the Act legislative No. 1 of 1995 (which added article 357 of the C.P.), with Law 269 of 1996 (which regulates article 128 of the C.P:, for providers of health services in entities of public law); with the law 344 of 1991 on rationality of spending., and by act 10 of 1990.

[2] See jurisprudence Nº T-271/95, Magister Rapporteur: Alejandro Martínez Caballero

with the principles of efficiency, universality and solidarity" (art. 49 C.P.) These three principles are also outlined in Article 48 of the Constitution, which establishes the instrumental mechanism to make the right to health a reality. That instrument is Social Security as a public service that is by nature mandatory and indispensable for every inhabitant of Colombia.[3]

Consequently, social security becomes a fundamental right when it is protecting life, because people have RIGHTS TO A CONCRETE THING, and that concrete thing is the right to social security, as this right contributes to protecting life, hence it belongs to the so-called "entitlement rights".

> *"The social right to health and social security, as with the other social, economic and cultural rights, are translated into services under the charge of the State, that undertakes as its function to ensure the material conditions without which the real enjoyment of both life and freedom would be an utopia or its consecration merely rhetorical. Notwithstanding the substantial and teleological affinity that these rights have with the right to life and to liberty - as for example the fact that through those rights the Constitution supports, complements and continues its role of safeguarding to the maximum degree such higher values – the demands arising from them cannot be met if the economic and democratic process is not respected."*[4]

This means that the right to health and the right to social security are entitlement rights in the strict sense that for their effectiveness they require budgetary rules, procedures and organization, that make the public service possible and optimizes its efficacy. They also serve to maintain the balance of the system. They are protected as fundamental rights if the right to life of the person who requests the writ of *tutela* is in risk.

To address this issue the Constitutional Court[5] stated the premises of the public service of social security in health:

[3] The three principles are features of the system
[4] SU- 111/97, Magister Rapporteur: Eduardo Cifuentes Muñoz.
[5] Case T-114/97, Magister Rapporteur: Antonio Barrera Carbonell.

"*The objectives of social security system in health are specified in the need to regulate the provision of this essential public service, creating the conditions for access of the entire population at different levels of care (E/CN.4/1998/L.100/93, art. 152)".*

These objectives respond to a programmatic approaches formulated by the Constitution of 1991, as they establish the responsibility of the State in the provision of health care as an inalienable right to social security (art. 49) in its condition of public service with a mandatory character"

Therefore, there must be a correlation between the constitutional law and the obligation of the State to provide it.

3. OBLIGATION OF THE STATE

Law 100 of 1993, Article 154, points out that one of the phases of the intervention of the State is the establishment of basic healthcare, which is mandated to be provided for free, in accordance with Article 49 of the Constitution that states: "the law shall indicate the terms on which the basic care for all inhabitants shall be free and mandatory". So, the basic characteristics of the system are set out in Article 156 of the law and Article 165 ibid summarizes the concept as follows:

*"**Article 165. Basic care.** The Ministry of Health shall define a basic plan that complements the actions foreseen in the compulsory level of health of this law and associated environmental sanitation actions. This plan shall consist of those interventions that are directly addressed to the community or those that are addressed to individuals but have high externalities, such as public information, education and promotion of health, control of consumption of tobacco, alcohol and psychoactive substances, nutritional supplementation and family planning, the school deworming, the control of the vectors and national campaigns of prevention, early detection, and control of contagious*

diseases such as AIDS, tuberculosis and leprosy, and tropical diseases such as malaria.

The provision of the plan of care will be free and mandatory. "The financing of this plan will be guaranteed through fiscal resources from the national Government, supplemented with resources of local authorities." (emphasis added)."

4. TRANSFER OF THE OBLIGATION TO INDIVIDUALS

Within the Organization of the General System of Social Security in Health, the Constitution in Articles 48 and 49, and the Law 100 of 1993, allow the existence of health promoter entities, of a private nature, that provide the services in accordance with the delegation that the State makes to them.

*"**Article 177. Law 100. Definition.** The health promoter entities are entities in charge of the membership, and the registration of affiliates and the collection of contributions, by delegation of the Solidarity and Guarantee Fund. "Its basic function is to organize and to ensure the provision of the Mandatory Health Plan to the members, directly or indirectly, and pay, within the terms set forth in this law, the difference between revenues from the contributions paid by its members and the value of the corresponding units of payment by capitalization to the Guarantee and Solidarity Fund, contained in title III of this law."*

And Article 179 establishes:

***Article 179. Field of action of health promoter entities.** To guarantee the provision of the Mandatory Health Plan to its members, health promoter entities will directly provide or will contract with the health providing institutions, the services, and the professionals. To rationalize the demand for services, health promoter entities may adopt patterns of recruitment and*

payment such as capitation, protocols or fixed global budgets, in such a way that they encourage activities of promotion and prevention and the control of costs. Each health promoter entity must offer to its affiliates several alternatives of health provider institutions, unless the restriction of the offer prevents this, in accordance with the regulation that is issued by the National Council of Social Security on health in this matter.

PARAGRAPH. *Health promoter entities will seek risk-pooling mechanisms between members, between companies, guilds or associations or by geographical settlements in accordance with the regulations issued by the national Government.*

That delegation of the provision of the service of health made by the State to health promoter entities, as stated in the article, has the aim to provide the Mandatory Health Plan (MHP) that includes comprehensive care for the population affiliated in phases of education, information and promotion of health; and the prevention, diagnosis, treatment, and rehabilitation of the disease, including the provision of essential medicines in its generic presentation (art. 11 1938 Decree of 1994). And the same Decree, (in its article 3, paragraph (b)-) says that this right is for members of the contributory scheme and the obligation corresponds to the HPE.

4.1 Plans

The 1938 Decree of 1994, Article 3, establishes that such schemes are:

"**Article 3.On the Types of Plans.** Services and recognition of the Plan of Benefits are organized into six subsets or health care plans which are as follows:

a) *Basic Health Care Plan. B.C.P. It is a plan of free character, provided directly by the State or by private persons under contract with the State that contains actions in public health such as: information and education for health, some actions of primary prevention and early diagnosis on people with pathologies,*

and with risks with high externalities, or on communities in the case of endemic and epidemic diseases. Since the beginning of the General Social Security in Health system, all the inhabitants of the national territory must benefit from the B.C.P.

b) *Mandatory Health Plan. M.H.P. It is the set of services of health care and the financial compensations to which a member of the contributory scheme is entitled if she/he needs them. It is also composed of the same set of services, which it is obliged to provide to its members as a health promoter entity authorized to be part of the System. Its contents are defined in the present Decree and the way of provision of the service is standardized and regulated by handbooks of procedure and guides of comprehensive care issued by the Ministry of Health.*

c) *Mandatory Health Plan of the Subsidized Scheme. M.H.P.S.S. It is a transient category that identifies a set of services that simultaneously creates a right of access for members to the subsidized scheme, and the obligation of the health promoter entities, the Solidarity Companies of Health and other entities that manage the resources of the subsidy to meet the demand for those health services. During the period 1994-2001 this Plan will be progressively extended to match the contents of the MHP. The content of the Plan and its way of provision will be governed by the Decree of the scheme of subsidies and the same handbooks of procedures and guides of comprehensive care referred to in paragraph (b) of this article. The subsidized plan will also temporarily offer comprehensive coverage to the maternity leave and during the first year of life, for those people with more limited resources, program that will be called the Program of Assistance Maternal and of Child P.A.M.C.*

d) *Health Care Complementary Plans. H.C.C.P. They are sets of health services contracted through prepayment, that guarantee medical attention in the event of required activities, procedures or interventions that are not included in the Mandatory Health Plan; or that guarantee additional or different conditions of*

lodging or technology or any other characteristic for the provision of a service included in the MHP and described in the Handbook of Activities, Interventions and Procedures, which may be offered by M.H.P.S.S or by entities that without becoming H.P.E. wish to do so, only if they comply with the requirements set forth in the regulations for the prepaid medical companies.

e) *Care of Accidents at Work and Occupational Disease C.A.W.O.D. The General System of Social Security in Health will ensure health care required in cases of occupational accidents and occupational diseases, through the Administering Entities of Occupational Hazards. For costs arising from these accidents, the M.H.P.S.S to which the worker is member will provide the insurance and the M.H.P.S.S will charge against the administering entity in the form and conditions laid down in the regulatory Decree 1295 of June 1994. Disability, compensation and other economic entitlements shall be paid by the administering entity of the C.A.W.O.D.*

f) *Care of Accidents of Traffic and Catastrophic Events. The General System of Social Security in Health by charging to the sub-account for catastrophic risks and the Solidarity and Guarantee Fund, guarantees to all the inhabitants of the national territory health care for traffic related injuries based on the rules governing the compulsory insurance of traffic accidents and with charge to the insurer of the vehicle that caused the accident or the FONSAT as the case may be. In addition, it guarantees payment to the H.P.I. for the health care of people, arising from natural disasters, terrorist acts with bombs and other explosive devices and other events approved by the National Social Security Health Board; and the payment of compensation in accordance with its rules of procedure. Benefits required and not covered by SOAT-FONSAT shall be paid by the corresponding H.P.E. if they are included in the M.H.P or a complementary Plan of health acquired by the affiliate. "However, it can not be enjoyed at the same time and for the same reason as the recognition of compensation and disability."*

Accordingly, the System of Social Security in Health has two different schemes through which people can have access to the service. These schemes are related with the possibilities and requirements of affiliation and financing: the contributory scheme, which belong to people that have work, in the public or private sector, and their families; and the subsidized scheme, to which the poorest section of the population are members.

Decree 1938 of 1994, outlined the set of activities, procedures, supplies, and awards that the system must provide to people, which in turn is achieved, using six sub-assemblies or defined plans taking into account the form of participation of members and which gives rise to the basic care plan required, to the subsidized health plan, to the health care complementary plans, to the Care of Accidents at Work and Occupational Disease, and to the Care Plan of Accidents of Traffic and Catastrophic Events. This arises from Article 3 of Decree 1938 of 1994, which forms a normative unit with Article 4 that contains a glossary of definitions; with Article 5 that indicates the content of the plan, setting for the specific case of AIDS "activities of prevention, early detention, control, and surveillance"; with Article 11 that refers to the comprehensive care of the MHP; and with Article 15 that contains a sub-rule of exclusions and limitations of the plan that should be applied as long as it is not against the Constitution, otherwise the exception of unconstitutionality should be applied as we will see in the course of this judgment when examining letter "g" of Article 15 (of the Decree 1938/94)[6].

Concluding: the State and the HPE are obliged to provide basic health care plan, especially they must provide the mandatory health plan and the mandatory health plan of the subsidized scheme, within the parameters set out by the State.

These plans include family coverage (Art. 163 100 law) for the spouse or permanent partner, children under the age of 18 of the family who are financially dependent on the family, or those who are under 25 years and that economically depend on the affiliate.

[6] The Court in numerous opportunities has mentioned the exception of unconstitutionality as for example: C-434/92, C-479/92, T-401/92, T-421/92, T-422/92, T-425/92, T-468/92, T-490/92, T-576/92, T-582/92, T-612/92, T-614/92 , C-175/93, C-593/93, T-425/93, C-281/94, T098/94, T-302/94, T-384/94, T-450/94, T-206/94, T-006/94, T-178/94, T-117/95, T-355/95, T-382/95, T-279/95, Auto 024/95, C-069/95, T-063/95, C-309/96, C-037/96, T-669/96, Auto 66/96, T-123/96, T-150/96.

In the absence of spouse or partner and children with the right to coverage, the coverage may be extended to the parents of the member not retired and that economically depend on the member.

The Contributory scheme is composed by: people linked to the scheme through the contract of employment; public workers, pensioners and retirees and self-employed persons with the capacity to pay.

The Subsidized scheme is composed by: people that due to their inability to pay the total amount of the contribution are subsidized in the contribution by the general system.

5. ONE OF THE MAIN OBLIGATIONS: TREATMENT

Paragraph 11 of Article 4 of Decree 1938 of 1994 defines treatment as "all those activities, procedures and interventions aimed to modify, alleviate or get rid of the disease, immediate or consequential effects that alter the normal labor, family, individual and social functioning of the individual". This is one of the main obligations of the health care plans.

Since in this judgment the specific case of AIDS patients must be analyzed, we must take into account Resolution 5261of 1994 of the Ministry of Health:

> ***Article 17. Treatment for ruinous or catastrophic illnesses.*** *For the purposes of this Handbook those treatments are defined as the treatment that are used in the management of ruinous and catastrophic diseases that are characterized by a low cost-effectiveness in the modification of the prognosis and represent a high cost.*

The following treatments are included:

> *a. Treatment with radiotherapy and chemotherapy for cancer.*

b. *Dialysis for chronic renal failure, renal, heart, bone marrow and cornea transplant.*
c. *Treatment for AIDS and its complications.*
d. *Surgical treatment for diseases of the heart and the central nervous system.*
e. *Surgical treatment for congenital or genetic diseases.*
f. *Surgical treatment for major trauma.*
g. *Therapy in intensive care unit.*
h. *Joint replacements.*

PARAGRAPH. *Described treatments will be covered by some mechanism of insurance, and they will be subject to minimum periods of contributions, with the exception of the initial attention and urgent patient stabilization, and its management must adhere to comprehensive care guidelines defined for this purpose. (emphasis added).*

That AIDS is a catastrophic illness is set forth in Resolution 5261 of 1994:

Article 117. *Pathologies of catastrophic type. CATASTROPHIC diseases are those that represent a high technical complexity in their management, high cost, low occurrence and low-cost effectiveness in their treatment. The following procedures are considered within this level:*

-Renal transport
-Dialysis
-Neurosurgery, nervous system
-Cardiac surgery
-Replacement joint
-Management of the great burning
-Management of the major trauma
-Management of HIV-infected patients
-Chemotherapy and radiotherapy for cancer
-Management of patients in intensive care unit

7. RELATION STATE-HPE

It is necessary to affirm that once the provision of the public service of health is delegated to a particular entity, this entity occupies the place of the State in a very important manner, as it is the provider of a public service. However, this does not preclude the entity from aiming to obtain a legitimate profit. This is the how the system is designed. But, the important thing is to be conscious of the fact that what is collected does not belong to the HPE, neither is it part of the budget of the State or of the budgets of territorial entities; those revenues belong to the General System of Social Security in Health, it is, then, a “parafiscal contribution”. For such a reason, the Court cannot be indifferent to the structural balance of the National System of Social Security in Health, to the mandatory plan of health of the subsidiary scheme, and to the principles of universality and solidarity. The observation of these precepts is one of the purposes of the Social State of Law: the solution of the unsatisfied needs in health (Art. 366 C.P).

Within the organization of the system in Colombia, a Unit of Payment for Capitation (U.P.C) has been recognized for every HPE.

The system is based on the HPE receiving contributions in accordance with the so-called UPC. The National Council of Social Security in Health will establish the value of the UPC periodically.

UPC means a value per capita established depending on the epidemiological profile of the relevant population, on the risks covered, and on the costs of the provision of the service under average conditions of quality, technology and hospitality (Article 182 of Law 100 of 1993). Currently, in 1997, the value of the UPC is $14,582,00.

But what would happen if the same State permits the progressive devaluation of the UPC? In certain manner, the initial rules of the game would be altered, because this would necessarily impact the financial balance of the HPE and of the system itself.

In the relation State-HPE, the co-contractor seeks that what is manifestly beyond what is foreseen, implying a right to ensure the maintenance of the financial balance of the contract or the restoration of the equation if it is altered. This equation, equivalence or equality of the relationship, cannot be altered at the time of the execution, and from that point there is a duty on the administrator to place the co-contractor or concessionaire under the conditions of providing the service, work, provision, that is threatened by events that are beyond the control of the parties. It is not a "co-contractor insurance" against deficits or exploitation, but a reasonable equivalence between burdens and advantages of the parties[7].

For Marienhoff, the equation or financial balance of the contract is "*the means by which unusual, unforeseen, and extraordinary circumstances, which arise after the conclusion of an administrative contract, but that are temporary or transitional, alter the financial equation to the detriment of the co-contractor. This determines the obligation of the State to assist him/her so that he/she can comply or continue to carry out the contract.*"

That balance is part of the State-HPE relationship. But there is another point:

7.1 Resources of the System

It could be said that the Social Security System in Colombia is mixed.

Members of the contributory scheme must contribute through contributions that will be paid at a rate of 8% by the employer, and of 4% by the worker. This means that the system receives 12% of the total salary of the worker (Art. 204, Law 100).

The social security provided by the HPE has its support in the TOTALITY of the

[7] Diez Manuel María, the higher costs of public works, R.A.D.A number 4, Buenos Aires, November 1972, pp.13.

incomes of the contributory scheme.

Therefore, parts of such a scheme are:

(a) the compulsory contributions of members, with a maximum of 12% of the insurable earnings, which may not be less than the minimum wage.

(b) Moderated contributions, shared payments (Article 27 of Decree 1938 of 1994), rates, and the bonuses of the users are also entered to these contributory scheme(s) .

(c) Also, the contributions of the national budget.

The important thing for the system is that the resources arrive and are used for the proper function of social security. These resources have a parafiscal character.

Parafiscal resources are considered "public resources, that belong to the State, although they are intended to benefit the specific group, guild, or sector which provided the levies,"[8] this is why they are invested solely for the benefit of these groups. This means that the previous contributions made by the users of the health system, as well as (as stated above), all kinds of fees, co-payments, bonuses and similar, and the contributions of the national budget, are public money that the HPE and the Solidarity and Guarantee Fund manage. This does not mean at any moment that this money may be confused with the assets of the HPE, or with the national budget of territorial entities, because that money is exclusively related to circumstances of attention of the affiliate. For this reason, in Judgment C-179/97, Magistrate Rapporteur Fabio Moron, stated:

> *"In the previous regime such contributions had support and under the rule of the Constitution of 1991, there is no doubt that pension funds, government*

[8] Case C-152/97, Justice Rapporteur: Jorge Arango Mejía.

agencies that have as function the recognition and payment of pensions, and public and private HPE, that receive contributions from companies and workers "manage parafiscal resources. Therefore, in any case, those funds may be used for purposes different than those provided for in the legal system, and to administer them it should be take into account the specificity of its function."

If contributions from the national budget and contributions of participants in the social security system are parafiscal resources, their administration will be separate from the budgetary and administrative norms governing the fiscal resources that arise from taxes and fees, unless specifically ordered by the legal system (as it is the case of the general status of recruitment, Article 218 of Law 100 of 1993). Therefore, the budgetary norms of the organs of the State may not be applied to those resources, because the State is a mere collector of those resources that have a specific purpose: to satisfy the needs of health. As a result of this, the national or territorial entities that participate in the process of management of these resources cannot confuse them with their own resources, and should accelerate their delivery to their legitimate recipients. Neither the HPE may consider parafiscal resources as part of their own resources; Article 182 of the Law 100 of 1993 orders:

*"**Article 182.- On the incomes of Health Promoter Entities.** Contributions that are collected by the HPE belong to the general system of social security health.*

For the organization and guarantee of the provision of the services included in the mandatory health plan to each affiliate, the general social security health system will recognize to each health promoter entity a per capita value, that will be called the unit of payment by capitation - UPC -. This unit will be established depending on the epidemiological profile of the relevant population, on the risks covered, and on the costs of providing the service at the average level of quality, technology and hospitality, and will be defined by

the National Council of Social Security in Health, in accordance with the technical studies of the Ministry of Health.

***PARR- 1**.-Health promoter entities will administer social security resources originating from contributions of participants in the system of accounts, independent of the rest of the incomes and assets of the entity."*

Since they are ordered by law, it is necessary to add:

7.2. Location of the Resources

As it was explained, health promoter entities receive one unit, UPC, by each beneficiary. The other resources go to the Solidarity and Guarantee Fund (art. 219, Law 100 of 1993).[9]

Supposedly, the HPEs are the largest contributors of the above mentioned fund, without exception. But, in reality, only private HPE make contributions.

The partial compensation of the funds or entities of the public sector that became HPE was explained by the need of those entities to obtain adequate information regarding incomes and affiliations, information that is required to make a correct differentiation between the funds that are due to the collection of contributions,

[9] ***ART. 218. Creation and operation of the Fund**: the Solidarity and Guarantee Fund is created as an account ascribed to the Ministry of Health that will be managed by ENCARGO FIDUCIARIO, without juridical personality nor a group of workers of its own. The abovementioned in accordance with what is set forth in the general statute of contratación of the public administration that is set forth in article 150 of the Political Constitution:*

The National Council of Social Security in health will determined the criteria of use and distribution of its resources.

***ART. 219. Structure of the Fund.** The fund will have the following independent subaccounts:*

a) Of internal compensation of the contributory regime;
b) Of solidarity of the regime of subsidies in health;
c) Of health promotion, and
d) *Of the insurance of catastrophic risks and transit accidents, in accordance with article 167 of this Law.*

and other payments. Evidently, lack of information creates confusion and affects the system, and precludes a proper characterization of the system. The delay in the information may be explained because there is a transfer from the coverage of the affiliated to the family-coverage, however this has a limit and, a reasonable limit should be this, it cannot be later than 31 October of 1997, because this judgment can only be published in that month. This limit coincides with the term of four years, which should be counted from the moment in which Law 100 of 1993 entered into force, as it was established by Article 4, Decree 1890 of 1995.

To conclude, in order to assure the effectiveness of the right to health it is necessary that the Social Security System operates efficiently. Therefore, the prescriptions on the operation of the Solidarity Fund must be complied with, and accordingly, all HPE without exception, must comply with the functions set forth in Article 178, number 5 of Law 100 of 1993.

Additionally, the system is at this moment altered in the SOLIDARITY SUBACCOUNT because of the following reasons:

Article 221 of Law 100 of 1993 indicates that for the financing of the SOLIDARITY SUBACCOUNT (fundamental pillar of the System) in years 1994, 1995 and 1996, the State had to take from the national budget, at least, the equivalent to "one point of the contribution of solidarity of the contributory regime" (art. 221, Law 100 of 1993) and the State has not done this.

In 1997, in accordance with Law 334 of 1996, this contribution was diminished to half a point and, despite this reduction, the payment has not been done. These omissions affect the WHOLE system because:

- Users do not receive adequate treatment
- Doctors and PSI do not receive punctual payments
- Doctors do not receive fair payments
- This becomes an unfair treatment of HSE because it is required to comply, while the State does not comply.

In other words, agents that participate in the system are affected by the disturbance of the balance. Therefore, in order to guarantee the effective protection of their rights (and particularly of the patients that filed the *tutelas*), orders must be given aimed at achieving and maintaining the due balance, and, moreover, if the ISS has complied with its obligations, this aspect will be taken into account when establishing whether it is possible or not to request from the State the refund of the investments.

8. Relations patient-HPE-State

When life is at stake, the HPE must facilitate the treatment that the doctor that is treating the person prescribes, and the necessary medicine must be provided.

The Court has ordered that the treatment that the doctor prescribes to the patient that suffers from AIDS must be provided in its totality. In the long consideration, in judgment T-271 of 1995 (M.R Alejandro Martinez Caballero), it was indicated that the failure to comply with the treatment affected the right to life and to health.

> "*As was stated in another part of this decision, infection with the Human immunodeficiency virus places the one that suffers from it in a state of permanent deterioration with grave consequences for their life, because the virus attacks the immune system of the organism leaving it unprotected against any condition that, eventually, causes death.*"

Several judgments order the provision of the antiretroviral that is prescribed by the doctor that is treating the patient that suffers from AIDS. And, in general, when life is at stake, it has been expressly said through case T-224 of 5 may of 1997, that the treatment prescribe by the treating physician must be fulfilled (Magistrate Rapporteur: Carlos Gaviria Diaz).

It is worth noting that the Court has indicated that to cure is not only to defeat the

disease, it can also include: relieving it, relieving pain, or increasing life expectations. The ill person is not condemned to abandon himself to death, setting aside a treatment, because it is useless against the certainty of the unavoidable final denouement. On the contrary, the ill person has the right to keep recovery expectations, to see relief from her/his disease, if so he/she wishes, because life is a dynamic occurrence that must be enjoyed from its beginning until its end. Accordingly, a person has the right to demand the respect of the remaining phases of his life.

The prescribed medicines by the treating physician must be essential, with generic presentation, unless only branded ones exist (Article 23 of Decree 1938/94).

Another norm of Law 23 must be added, because it is related to the writs that motivate this decision, regarding the exigency not to deprive the "incurably" ill of treatment:

> *"Article 17. – The chronic nature or incurability of the disease does not constitute a ground for the physician to deprive a patient of assistance."*

One of the stages of the treatment is the prescription of medicines, the aforementioned law indicates:

> "*Article 33. – Medical prescriptions should be made in written form, in accordance with the norms on the subject that are in force."*

This last disposition implies, among other things, this obvious conclusion: that it can only be prescribed medicines that have health authority approval in Colombia, with generic presentation, unless the only ones that exist are those with a registered brand.

Moreover, this aspect is developed in Resolution 5261 of 1994 of the Ministry of Health that sets forth the handbook of activities, interventions and proceeding of

the M.H.P.; Article 13 "prescription and deliverance of medicines", where, among other things, it is indicated that "the prescription must include the medicine's name in its generic form."

All these rules are compiled in Decree 1938 of 1994. Precisely, Article 23, paragraph 4 of this decree, makes reference to medicines prescription, and it is stated that it must be done in written form, by the authorized health staff, this excludes deliverance of medicines for self-medication and it is only permitted that prescriptions are issued by "professional staff authorised" to prescribe."

Medicines that are included on the official list must be delivered by the HSC; but if the life of the patient is at stake, it does not matter if they are on the official list. Therefore, article 15.g of Decree 1938 of 1994 is not applicable in those cases.[10]

Only if the determination comes from the treating physician, that is, from the physician hired by the HSC and that is ascribed to it and treating the patient, must the prescribed treatment to the ill person be provided by the corresponding HSC.

When the medicines that are prescribed in the afore mentioned conditions are not part of the list of medicines that the Health Ministry or the corresponding entity creates, the affiliating entity, even in those cases, must provide them; as it was stated in decision T-271/95:

> *"The Chamber is aware that the negative of the sued party is grounded on juridical norms of lower level than the Constitution that prohibits the deliverance of medicines that are not part of the official approved catalogue. The Court neither ignores the grounds of budgetary character that leads to the creation of a restricted and strict list, nor challenges the scientific studies of diverse order that are the base for the elaboration of*

[10] Article 15 of Decree 1938 of 1994 contains the exclusions and limitations of the M.H.P, among them; in the literal it is established: "Medicines or substances that are not expressly authorized in the Handbook of Medicines and Therapeutics."

> *the list, or the rigour of those who are in charge of the selection process. However, returning to the precedent issues, the Court ratifies that the duty to take care of the health of the patient and preserving his life is a priority, and the patient falls in the vacuum if he is denied to receive the treatment prescribed by the physician. It should not be ignored that the institution of social security has acquired a compromise with the health of the affiliate, health that in this case is understood as a right connected with life and that the duty to protect the life has a comprehensive nature because it is not limited to avoid any interference, but it imposes, additionally, "an active function that seeks for its preservation the use of all existing institutional and legal methods" (Case T-067 of 1994. M.R Jose Gregorio Hernandez Galindo). This obligation is more demanding and serious, depending on the location of the object of protection in the system of values that the Constitution sets forth, and human life, as it was noted, is a supreme value in Colombian juridical order and the point of departure of every right. In case T-165 of 1995 the Court affirmed: "Always when human life is threatened in its essential core, through an injury or imminent and grave menace, the Social State must immediately protect the affected person, to whom his unbreakable core is recognized. Thus, the complete juridical order is at the service of the person that is the end of law" (M.R. Vladimiro Naranjo Mesa).*

The aforementioned means that the patient-HPE relation implies that the treatment must be provided by persons that have a contractual relation with the corresponding HPE, that is the physician because only the treating physician that is linked to the HPE may prescribe the medicine that the HSC must provide. If the medicine is part of the official list, is essential, and is generic, unless only registered brands exist, the date of issue of the decree or agreement that sets forth the list of medicines is irrelevant, and, if the life of the patient is at stake, the HSE has the obligation to provide the indicated medicine, even if it is not on the list. It is not possible to act contrary to the preservation of the patient's life and justify this action under the argument that it is an obligation of the State due to its omission in

including the required medicine. To oblige the patient to initiate an administrative procedure against entities of the State, in order to have access to a prescribed medicine, is to place in peril the life of the ill person. The State may not be ordered to the provide medicine when the patient is affiliated to a HSC that, it is repeated, has the duty to provide the medicine when the life of the person is at stake. This celerity for the provision of health service, in the case of AIDS, is due to the fact that it appears in the basic health plan.

In case T-125/97, reaffirming ancient jurisprudence, it was considered that omission in the provision of medicines that are not included in the official list may breach the right to life and, is the duty of HPE to take care of health and to preserve patients' lives, or, if the contrary occurs, the HPE has not complied with its duties.

The user that has the right to this service may demand this right from the HPE to which they are affiliated, so the entity that is in charge of the provision of the service gives content to the right that has this characteristic.

9. Can the HPE charge the State for those medicines that are not a part of the list?

HPEs allege that the provision of the medicine that is not listed is excluded from the agreement authorized by the State to provide health services to a particular person. They indicate that in those cases it can be charged to the official entity; they allege as an equity argument the impairment of the UPC. At the same time, the Ministry of Treasury answers that the system does not only have the UPC, but, additionally, HPEs receive rates and co-payments. This means that the financial equilibrium is based on the HPE's real income. This subject will be examined:

Paragraph of article 5 of Decree 1938 of 1994 expressly says:

> *"Paragraph. For the affiliates to the General System of Social Security in Health through the contributory regime, individual actions of diagnosis,*

treatment and rehabilitation of diseases subject to epidemiological surveillance, such as AIDS, sexual transmission diseases, tuberculosis, leprosy, cholera, tropical diseases such as malaria, leishmaniasis and dengue, will be the responsibility of the HPE and they will be financed with the capitated payment unit." (emphasis added)

This means that the norm includes within the UPC AIDS' treatment:

"Article 38. –On the assurance of the treatment for ruinous or catastrophic diseases: health promotion organizations should establish an assurance mechanism in order to guarantee economic risk coverage, derived from the coverage to affiliates that are affected by diseases of high cost in their treatment, diseases that are defined as catastrophic or ruinous ones by the Mandatory Health Plan.

Paragraph 1. Treatments for catastrophic diseases of high cost are classified and indicated in the following. The Ministry of Health may extend or reduce this list.
a) Treatment with chemotherapy and radiotherapy for cancer;
b) Organ transplantation and dialysis for chronic renal failure;
c) Treatment for AIDS and its complications;
d) Medical-surgical treatment for patients with major trauma;
e) Treatment for the patient in an intensive care unit for more than five days;
f) Surgical treatment for heart disease and central nervous system;
g) Surgical treatment for genetic diseases or congenital;
h) Joint replacements.

Paragraph 2. The National Government will define the form and conditions for the functioning of the insurance fund for catastrophic diseases.

Paragraph 3. The insurance fund for catastrophic diseases will cover the cost of the treatment for each pathology that is described with a ceiling for each

> *event each year. The user should cover expenditures that exceed this value. This may be done as a modality of complementary plans. All the above mentioned should be done as it is ruled by the National Government." (Emphasis added)*

These two articles (5 and 38) create a harmonic whole with article 3 of the same decree, which was already transcribed.

However, since it is a contractual relation, the HSE only has the specified obligations. The State has delegated within specific rules, therefore, if the situation goes beyond what is agreed, it is fair that the medicine provided to save the life is paid, through charge, by the State. Moreover, regarding AIDS, Article 165 of Law 100 of 1993 (already transcribed) includes this disease within the basic health care plan. But, from where will the money be obtained? It has already been said that there is a Solidarity and Guarantee Fund that is inspired by the constitutional principle of SOLIDARITY, then the money should be taken from this fund. However, since the Fund has different sub-accounts, it will be wisest to do it from the "health promotion" sub-account (art. 222 of Law 100 of 1993). Furthermore, charges should be done based on the celerity principle, because information should be computed. Therefore, if there is settlement of accounts, this does not constitute a reason for a delay, but on the contrary, the debt should be paid faster.

HPE present a further objection: both before and after the new list, the context of the system has been the same (automatic increase of the CPU, existence of the same norms regarding reinsurance), and the extension of the list is unfair. If HPE presents objections against this norm, it is through the administrative-contentious jurisdiction that the legality or illegality of what is set forth in the administrative act should be determined; through this jurisdiction it will be analyzed if there was a reason to make a new list. Fundamental rights cannot go unprotected because of the discussion on the legality of an administrative act. Since Agreement 53 of 1997 added what was stated in Decree 1938 of 1994 regarding the list of medicines, the Agreement is completely applicable while is not declared illegal. This is why the

argumentation submitted by the health promotion organization is not acceptable for the *tutela*. Constitutional principles are set forth in the Constitution of 1991, that aim to guarantee healthcare, access to the services of promotion, protection and recovery of health. On the one hand, issuing of the above mentioned agreement by the Council of Social Security seeks to give direct compliance and full realization of the Constitution, regarding health protection. On the other hand it is clear that article 172, numeral 5 of Law 100 of 1993 states the faculty of the Council of Social Security to issue the Agreement. Accordingly, the norm prescribes that the Council of Social Security in Health will have the following functions:

"To define essential and generic medicines that will be part of the Health Mandatory Plan"

Therefore, health promoter entities may not argue an "illegality exception". Of course, this aspect of legality is determined by the administrative-contentious jurisdiction, through a writ, but it cannot be done through an exceptional mechanism, in the *tutela.*

10. CONTINUITY IN HEALTH SERVICE

HPE provides services to its affiliates and beneficiaries that make contributions, respecting the rules of the minimum contribution-periods. Since health service is a public service, the principle of continuity acquires particular relevance. Problems may arise when, usually because of an employer's fault, there is retardation in the payment of the contributions during a period of time that is no longer than six months (case in which time in the system is lost), in that situation it is not possible to say that the user is withdrawn from the system. In Judgment C-179/97 it was said:

> *"In accordance with the exposed postulations, the jurisprudence of the Constitutional Court regarding the writ of* tutela *of fundamental rights has been clear in affirming that conflicts between the enterprises that do not pay*

the legally required contributions to the social security system and the enterprises that are in charge of providing that service, may not affect the worker that requires those services or that request the recognition and payment of pensions. This is so because in order to achieve the payment of the legally required contributions the entities have legal writs at their disposition.

These jurisprudential criteria are applicable to the constitutional test that is now being made by this Court. It would be not just and not juridical to oblige the worker to endure the consequences of the breach of a [civil aviation] enterprise that refrained from paying the contributions, especially when workers, in good faith, believed that once they comply with the legal requirements, they will have access to the pension paid by [Caxdac]"[11]

The importance of good-faith is also established in judgment T-059/97:

"Moreover, if the beneficiary is not the one who is in charge of making the discounts from the wage in order to pay the health service company, he is covered by the theory of appearance or belief to be acting in accordance with law: 'error comunis facir ius'."[12]

In the case of necessity, there is also flexibility regarding delay in the payment of contributions:

"*Moreover, if it is taken into account, on the one hand, the urgency of the medical treatment and, on the other hand, the fact that the Plaintiff does not have economic resources to assume the cost of the treatment and the medicines that their case requires, it is clear that they must be exonerated from the payment set forth in the regulation, because of their condition of poverty due to the low income that they receives. In the conditions of their illness and within the limitations characteristic of this circumstance, the*

[11] Justice Rapporteur: Fabio Moron Diaz.
[12] Case T-059/97, Justice Rapporteur: Alejandro Martinez Caballero

> *salary of the Plaintiff is not sufficient to defray any additional costs and, especially, the one that requires the additional payment to accede to the above-mentioned social security services in health."*[13]

It is clear that the HPE is not unprotected if the omission is attributable to the employer. The Court, in case C-179/97 that has the authority of *res judicata*, stated that the employer's entity "in its character of retainer and administrator of public resources" has the pertinent legal writs of enforcement. This means that the HPE may claim to the employer that they have breached theirs obligations, not only the contributions that they owe but also the investment that was made when they were in default. It must be clarified that when the amount in default is due to an independent worker that directly pays their contributions, they lose the right to health care during the default, unless they are within the parameters of the subsidized regime.

11. RELATIONSHIP PATIENT-DOCTOR

The patient has the autonomy to accept, or not, the treatment that his doctor prescribes when there is informed consent.

In case T-477/95 it was explained what is understood by informed consent in the jurisprudential perspective that has been accepted by this Court and that was developed in that case in these terms (M.R Alejandro Martínez Caballero):

> ***"For the emergence of a juridical relation between a doctor and his patient, an agreement of wills regarding the provision of services is required.***
>
> *The contractual or tort obligation of the doctor towards the human being that he is going to treat, with the aim to achieve his CURE*[14] *is a provision of*

[13] Case T-114/97, Justice Rapporteur: Antonio Barrera Carbonell.
[14] The Constitutional Court has understood by CURE not Only the defeat of the disease, but also its relief.

services[15] that produces "best efforts" rather than obligations to ensure results, an obligation that is within the scope of the consent; consent is considered to be the agreement of wills in respect to a juridical object.

It is clear that this subject has been controversial; it has been affirmed that Latin juridical tradition tends to admit the "paternalist" discretionary decision of the doctor, while the Anglo-North-American tradition gives relevance to the patient's informed consent. This last position implies that the treatment may not be performed without the agreement of the user, a criterion that has an ancient precedent in John Locke's attempt to theoretically ground the new social order on the argument that nobody may harm another person in his life, health, liberty or property; and he stated that primary qualities are those that may not been separated from the body (including the "figure") and that in the alterations that the body suffers, those qualities remain as they are. This grounding characteristic of this materialist-empiricism has gained prominence in the subject that we are discussing: the agreement of the patient; and this criterion was also important in French materialism. This is why the "consentiment éclairé" or clear agreement rises from the theoretical fount of "common sense" (bon sens) that is so characteristic of Locke.

Secondly, regarding autonomy, in case T-271/95 it was stated:

"It is not strange, on the view of this Chamber that in situations as the actual one, the principle of personal autonomy which is also stated in the right that is set forth in Article 16 of the Constitution, has a special application, not only because if there is no life the performance of such autonomy will be impossible, but also because through the development of the faculty of self-determination it is guaranteed to the person the power to take, without

[15] For professor José Alejandro Bonivento, "The Main Civil Contracts", p. 448, this form of delivery of professional services is positioned within the provisions in article 2144 C. C. and is mandate.

> *strange or undue interference, the decisions regarding the subjects that are of his interest. This takes special importance in individual life and health related matters. The Court, in a different case, protected the decision to reject a non-desired treatment, by denying a* tutela *that had the objective of to obliging a person that suffered from a grave illness to accept the acts of her doctors (Case T-493 of 1993. M.R. Dr. Antonio Barrera Carbonell). In a later case the Court stated that "every one is free to decide whether it is or not important to return to good health" (Case C-221 of 1994. M.R Dr. Carlos Gaviria Diaz). Therefore, at first instance, it is logical to conclude that the person that, as an exercise of her autonomy, expresses her will to undertake a palliative treatment that she thinks is favorable, should be respected in her decision, just as the decision of the subject that is opposed to the treatment should be respected. There is only one difference between both cases, and that consists of the fact that in one of the cases the abstention is sufficient, whereas in the other, a positive conduct addressed to safeguard health and life is required. "*

Accordingly, this conclusion emerges: after the informed consent is given, for a catastrophic diseases such as AIDS, or other diseases where life is at stake, essential medicines are prescribed in the form of generics, unless only registered-brand medicine exists, the patient is free to accept them or not, and if they accept those medicines, they have the right to receive that drug on the part of the HPE, under the condition that it is prescribed by the treating doctor.

Thus, it is established that the doctor that is treating a patient that suffers from AIDS may prescribe drugs that are not on the official list of medicines, and that the HPE must deliver those drugs.

11. On the self-help support groups.

The importance of these groups in the treatment of AIDS is well known. It is prudent not to disturb the operation of communitarian associations that are composed of AIDS carriers and their families. If the topic is proposed from the

perspective of the therapy, it is necessary to have proof that the groups act as a complement of the therapy, and not that they are disturbing it. This is so because the judge may not order a treatment that has not been prescribed by the doctors that are leading the treatment of the patient. This means that for the constitutional effects of this *tutela*, what is relevant is the guarantee of the "access to the services of promotion, protection and recovery" (Article 49 National Constitution). If, additionally, the State regulates this situation by issuing a rule that optimizes the right by giving importance to the "counseling", that optimization is allowed due to Decree 1543 of 1997, as will be seen in the next chapter. There, it will be concluded that based on this rule it is not possible to block the operation of groups where patients with AIDS and their families participate with the aim to be part of the activities that the norm designate as "counseling".

C. Concrete cases in the *tutelas* that are being considered

1. Since the Club of Friendship is a self-help support group that allows a life in conditions less tough for AIDS carriers, and the ISS disrupted the schedule of the meetings that were being held in the San Pedro Claver Clinic, it should be concluded that since the entry into force of Decree 1543 of 12 June of 1997, those meetings must be permitted to continue. And it should be added that doctors are the ones who give their advice on whether self-help support group contribute to the therapy of the patients that presented the writ of *tutela*. If the group contributes to the treatment, the ISS will make viable the occupational activity to facilitate the meetings within the technical definition that Article 2 of Decree 1543 of 1997, which gives the definition: COUNSELING: "a set of activities performed with the aim to prepare and confront a person with their knowledge's, their practices and their conduct before and after the executions of diagnosis proofs…".
2. Regarding the request to provide medicines that are prescribed by the doctor who is treating the patient, when the life of the patient is at stake, even if the drug is not part of the official list of medicines, the existing jurisprudence will be reaffirmed that an order through a *tutela* that a prescription by a doctor to provide an essential medicine in its generic presentation, unless the medicine is

only produced in an specific brand should be complied with. It is clear that if there is not a medical prescription, and there is only a wish of the patient, the *tutela* may not proceed.

Since on 13 of February of 1997 the list of medicines that should be provided to AIDS patients was added to the MHP, therefore, *a fortiori*, the antiretroviral that should be given to those patients are the ones that are part of that list, and in this respect, the prescription must be certain.

Regarding the right of the HPE to claim for the money invested in the retrovirals that have been provided to the patients, a distinction should be made: the I.S.S may not require that the State use the Solidarity Fund to pay the money for a drug that is not a part of the list, because the I.S.S has not complied with what must have been paid to the Fund ("nemo auditur propiam turpitudinem allegans"), but, on the contrary, HEALTH COLMENA may require from the State the money for the medicines that, at the moment of their deliverance to the patient, were not part of the official list, as was explained. Thus, it is reaffirmed the jurisprudential issue that is part of case T-114 of the present year, with the addition of the already explained importance of the paid weeks to the system.

At the same time, orders and preventive advice will be given to maintain the financial balance of the system, because, otherwise, what is set forth in Articles 48 and 49 of the Political Constitution cannot be realized.

This is why the ISS ordered to repay its debts. It is reasonable that the ISS start this compensation at the end of the next month, which means that the date will be fixed at October 31. It is not a subject matter of the writ of *tutela* to determine what will happen with past debts, as there are other remedies to claim those rights. Regarding the amount of money that the State should pay to the Sub-account of Solidarity, as was explained when Article 221 of Law 100 of 1993 was analyzed, and Law 344 of 1996, the Ministry of Treasury is the entity that should make that payment from the national budget as soon as possible, because that omission alters

the balance of the system.

Based on the above mentioned reasons, the Seventh Chamber of the Constitutional Court, administering justice on behalf of the people and by the authority provided by the Constitution

RESOLVES

FIRST. TO CONFIRM the judgment delivered by the Labour Chamber of the Superior Tribunal of the Judicial District of Santafe de Bogota, of 29th November 1996, as it granted the *tutela,* ordering the ISS to provide inhibitors of protease (T-120) that the doctor that was treating the patients ordered, and based on what is stated in this case regarding the minimum paid weeks to the system.

SECOND. TO REVOKE the judgment delivered by the Council of the State the 13 of December of 1996 that did not grant the tutela as stated in file T-120933, and in its place, to confirm the decision of 22 of November of 1996 delivered by the Second Section of the Administrative Tribunal of Cundinamarca that ordered the ISS to provide to the Plaintiff the prescribed treatment to fight against the HIV/AIDS that affected the patient, bearing in mind what was stated regarding the paid weeks into the system.

THIRD. TO CONFIRM the decision delivered by the judge of first instance (Court 40 Civil Municipal of Santafe de Bogota, of 22 November of 1996) and of second instance (Court 24 Civil of the Circuit of the aforementioned city, of 22 January, 1997) in the scope of case T-122891, as they did not grant the *tutela* because there was no written prescription provided by the doctor that was treating the patient ordering the antiretroviral.

FOURTH. TO REVOKE the decision of the Supreme Court of Justice, of the Civil and Agrarian Cassation Chamber, of 24 of January of 1997, and in consequence the decision of first instance of 18 November of 1996 delivered by the Superior Tribunal

of the District of Santafe de Bogota, that provided the *tutela*, because there is no order of the doctor that is treating the patient providing the antiretroviral to the person that filed the T-123132.

FIFTH. TO CONFIRM the decision of the Civil and Agrarian Cassation Chamber of the Supreme Court of Justice, of 24 of January of 1997, and consequently to confirm the decision of the first instance delivered by the Civil Chamber of the Superior Tribunal of the District of Santafe de Bogota of 20 November of 1996, as the *tutela* was not provided, but, because there was no prescription provided by the doctor that was treating the patient prescribing the medicines requested by the person (T-123145).

SIXTH. TO CONFIRM the judgment of 10 February of 1996 of the Chamber of Family of the Superior Tribunal of the District of Santafe de Bogota, and the decision of first instance of 26 of November of 1996 delivered by the Court 12 of Family of the abovementioned city, as the claim to order antiretroviral that had not been prescribed by the doctor of the patient was denied.

SEVENTH. TO CONFIRM the decision of the Supreme Court of Justice of 12 December 1996 T-119714 that granted the *tutela* and consequently modified the decision of first instance delivered by the Civil Chamber of the Superior Tribunal of Santafe de Bogota. The decision of the Supreme Court of Justice ordered to SALUD COLMENA, HPE, to provide the plaintiff with the antiretroviral and the other medicines that his doctor prescribed. It is confirmed that the decision recognizes the right of COLMENA to the refund for the medicines that were provided, in accordance with the considerations of the present judgment. It should be taken into account what was stated in the considerations of this judgment regarding the minimum paid weeks into the system.

EIGHTH. A PREVENTIVE ADVICE is made to the Institute of Social Security and to Health Colmena to provide the essential medicines that are prescribed by the doctor in the form of generic drugs, unless there are only medicines of registered brand available. Even if those medicines are not part of the list of medicines set forth by the

Government, only if the life of the patient is at stake and taking into account the number of weeks paid into the system.

NINTH. A PREVENTIVE ADVICE is made to the National Council of Social Security to ensure that the UPC reflects the real value of the cost of the service, so the financial balance of the co-contractor is not disturbed.

TENTH. IT IS ORDERED that the Institute of Social security before the 31 of October 1997, through the relevant measures, pay to the Guarantee and Solidarity Fund, if it has still not done so, everything that should be paid in accordance with what is stated in the considerations of this judgment.

ELEVENTH. IT IS ORDERED that the Ministry of Treasury deliver the amount of money due to the subaccount of Solidarity, as it is ordered by Law 100 of 1993, article 221, and Law 344 of 1996.

TWELVE. IT IS REVOKED the decisions taken in *tutelas* T-122891, T-123132, T-120042 regarding the rejection of the *tutela* to the members of the Club Happiness that requested that the San Pedro Claver Clinic provide them one of their locations for their meetings. In its place, their claim is GRANTED, and it is ORDERED that the ISS facilitate the meetings of the Club of Happiness as they have been doing and in accordance with what was stated in the considerations of this judgment.

THIRTEENTH. Through the Secretary it will be delivered the releases that are set forth in article 36 of Decree 2591 of 1991.

FOURTEENTH. The name of the plaintiffs will be kept confidential.

Notify, Communicate, and Publish in the Gazette of the Constitutional Court. Send copy to the Ministers of Work and Social Security, Health, Treasury and Public Credit, and to the Superintendent of Health.

ANTONIO BARRERA CARBONELL

President

JORGE ARANGO MEJÍA

Justice

EDUARDO CIFUENTES MUÑOZ

Justice

CARLOS GAVIRIA DÍAZ

Justice

JOSÉ GREGORIO HERNÁNDEZ GALINDO

Justice

HERNANDO HERRERA VERGARA

Justice

ALEJANDRO MARTÍNEZ CABALLERO

Justice

FABIO MORÓN DÍAZ

Justice

VLADIMIRO NARANJO MESA

Justice

MARTHA VICTORIA SACHICA DE MONCALEANO

General Secretary