

**JURISPRUDENCE ANALYSIS DEPARTMENT**D.J. 11/24/2000  
SUMMARY NO. 2013-7SECOND SECTION  
SEPTEMBER 12, 2000**AGRAVO REGIMENTAL<sup>1</sup> AS PART OF RECURSO EXTRAORDINARIO<sup>2</sup> NO. 271.286-8  
RIO GRANDE DO SUL**

AUTHOR:	MIN. CELSO DE MELLO
APPELLANT:	MUNICIPALITY OF PORTO ALEGRE
ATTORNEY:	CANDIDA SILVEIRA SAIBERT
APPELLEE:	DINA ROSA VIEIRA
ATTORNEYS:	EDUARDO VON MUHLEN ET AL
ATTORNEYS:	LUIS MAXIMILIANO LEAL TELESKA MOTA ET AL

S U M M A R Y : PATIENT WITH HIV/AIDS - FINANCIALLY DESTITUTE PERSON RIGHT TO LIFE AND TO HEALTH - FREE ACCESS TO MEDICATIONS AS A CONSTITUTIONAL DUTY OF THE GOVERNMENT (Federal Constitution, Articles 5, header, and 196) - PRECEDENTS (Supreme Federal Tribunal) - REQUEST FOR APPEAL DENIED.

**THE RIGHT TO HEALTH REPRESENTS AN UNDENIABLE CONSTITUTIONAL CONSEQUENCE OF THE RIGHT TO LIFE.**

The subjective right to health represents the undeniable judicial prerogative guaranteed to the general public by the Constitution of the Republic (article 196). This translates as a constitutionally mandated right, and by such authority proscribes that, in a responsible manner, the Public Authority, whomever constitutes such position and has the power to implement appropriate social and economic policies must provide and guarantee its citizens, including those carrying the HIV virus, universal and equal access to pharmaceutical assistance and medical-hospital access.

In addition to qualifying as a fundamental right applicable to all people, the right to health represents an undeniable constitutional consequence of the right to life. The Public Authority, whichever institution is deemed responsible for such role in the Brazilian federal system, must not show itself indifferent to such public health problems, so as to avoid the risk of adopting, even if by censurable omission, unconstitutional behavior.

**THE NEW INTITUTIONALIZED LAW'S INTERPRETATION MUST NOT BECOME AN UNENFORCED CONSTITUTIONAL PROMISE.**

<sup>1</sup> A type of recourse available in the Labor Tribunal where a legal action, such as a motion for summary judgment, taken by the other party is challenged.

<sup>2</sup> An appeal brought to the Supreme Federal Tribunal that challenges the prior decision issued by the local or state small claims court.

The institutionalized nature of the rule described in article 196 of the Political Letter - that applies to all political institutional entities that compose the Brazilian federalist scheme, must not become an unenforced constitutional promise. Such principle is important in order to avoid the risk that the Public Authority will defraud the people's fair expectations and illegitimately substitute compliance with this non-delegable chore by way of an irresponsible act of government infidelity that violates the very principles that govern the Fundamental Laws of this Nation.

**FREE DISTRIBUTION OF MEDICINES TO PEOPLE IN NEED.**

Judicially recognizing the legal validity of programs that distribute free medication to people in need, including people carrying the HIV/AIDS virus, validates the fundamental principles of the Constitution of the Republic (article 5, header, and 196). It also represents, to its maximum extent, an action taken in reverence and in solidarity with the peoples' right to life and to health, especially of people that possess little more than a consciousness of their own humanity and of their essential dignity. Precedents of the *Supreme Federal Tribunal*.

J U D G M E N T

The Ministers of the Second Section of the Supreme Federal Tribunal have reviewed, recorded and discussed these court documents and in conformity with the trial minutes and the typographical notes, unanimously agree to deny the request for *agravo regimental*.

Brasilia, 12 September 2000

NERI DA SILVEIRA - PRESIDENT



CELSON DE MELLO - AUTHOR

Second Section  
September 12, 2000

**AGRAVO REGIMENTAL AS PART OF RECURSO EXTRAORDINARIO NO. 271.286-8  
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S U M M A R Y

**MINISTER CELSO DE MELLO - (AUTHOR):** In relation to the appeal timely filed by the Municipality of Porto Alegre against the decision, published by me, is summarized as follows:

**"AIDS/HIV. FREE DISTRIBUTION OF MEDICINES TO PEOPLE IN NEED. LEGISLATION COMPATIBLE WITH THE CONSTITUTIONAL RIGHT TO HEALTH** (Federal Constitution, Article 196). **PRECEDENTS OF THE SUPREME FEDERAL TRIBUNAL.**

The legislation that assures people in need, who also carry the HIV virus, the right to free medication related to the treatment of AIDS requires, under the constitutional mandate, that the Public Authority guarantee to its citizens universal and equal access to health services and treatment.

In addition to qualifying as a fundamental right that applies to all people, the right to health also represents an undeniable constitutional consequence of the right to life. The Public Authority, whichever institution is responsible for such role in the Brazilian federal system, must not show itself indifferent to such public health problems, so as to avoid the risk of adopting, even if by censurable omission, unconstitutional behavior.

The subjective right to health translates the constitutionally mandated right, and through its authority proscribes that, in a responsible manner, the Public Authority (federal, state or municipal authority), whomever constitutes such position, has the power to implement appropriate social and economic policies that provide and guarantee that the objectives proclaimed in article 196 of the Constitution of the Republic are properly carried out."(RE 271.286-RS, Author Minister CELSO DE MELLO)

The decision under review, that did not acknowledge the *recurso extraordinario* requested by the appellant, maintains the opinion published by the local Justice Tribunal based on article 196 of the Constitution of the Republic. Such opinion found the appellant and the state of Rio Grande do Sul, under the joint duty to provide medication and necessary treatment to AIDS at no cost, to cases that involve financially destitute patients that also carry the HIV virus (pp. 560-568).

The party which is now the appellant, since it has challenged the lower court's decision, claims that such decision should be revoked, mostly due to the arguments that follow, to the extent that they apply to this appeal (pp. 572-573):

" (...)By condemning the municipality of Porto Alegre to provide medication to those who are ill with AIDS, in the opinion under review, the lower court violated article 167, I, of the Federal Constitution that prohibits initiating programs that are not included in the approved annual budget.

It established in such opinion that the inexistence of municipal regulations regarding the costs associated with the distribution of exceptional medication does not imply negligence. Further, the Federal Constitution determines that the Executive Power has the burden of providing laws which establish an annual budget and that such laws should contain a budget for social security, in accordance with paragraph III, section 5, article 165 of the Constitution of 1988.

Therefore, when the opinion was published under law 9.323/96, which establishes costs associated with purchasing AIDS medications should be financed by funds from the Social Security of the Union, the States and the Municipalities, it failed to consider that such law contains in article 2, of the same code, a note that it is effectively just a regulatory norm. If this were not the case, the federal law would violate article 165, paragraph III and section 5, paragraph III of the Federal Constitution of 1988."

In addition, the appellant, further argues that by failing to observe "a competent divisor mechanism for the proper operation of health services, like a financial budgeting process, [the decision under review] conflicts with the federalist principle of separation of powers, as well as the sole paragraph of article 198 of the Federal Constitution that divides such budgeting, action and health service responsibilities to the three federal branches" (p. 574).

Since I am not swayed by the arguments made by the party which is now the appellant, I submit the present request for appeal to be reviewed by this Section.

This is the summary.

## O P I N I O N

**MR. MINISTER CELSO DE MELLO - (AUTHOR):** I UNDERSTAND THAT, considering the reasons contained in the judgment I published, the requested appeal by the appellant is inadmissible.

I acknowledge, by the unquestionable and legitimate judicial and constitutional judgment of this case and especially based on article 196 of the Constitution of the Republic, that the Municipality of Porto Alegre and the State of Rio Grande do Sul, jointly bear the obligation to provide, at no cost, medications which are necessary to the treatment of AIDS, in cases where the patient carrying HIV is also financially destitute.

Therefore, this appeals court holds that by maintaining the decision proffered by the Justice Tribunal of the State of Rio Grande do Sul, this decision would have disrespected the laws written in article 167, I of the Federal Constitution.

Such argument is inadmissible because a mere allegation of disrespect to the aforementioned constitutional principle is inadequate on its own to legitimize a *recurso extraordinario*. This is true because in the event that such argument claiming constitutional transgression is relevant, under such perspective, at best, the indirect conflict with the text of the Constitution is insufficiently clear to

justify utilizing the supreme appeal (RTJ 105/704 - RTJ 127/756 - RTJ 132/455).

To that effect, it is sufficient to examine this opinion currently under review in order to confirm the following assertion (p. 371):

*"Lastly, the public purchasing request is not necessary to acquire the medication, because medication is provided in emergency or public calamity situations, during which time such urgent conditions may pose a greater harm or threat to public security. These reasons further weaken the argument that a budget for such situations is inexistent."*

It goes without saying that additionally, the decision currently under review, notably the allegation of the offense to articles 2 and 198, sole paragraph, both of the Federal Constitution, would conflict with the jurisprudence affirmed by the Federal Supreme Tribunal with regards to the specific topics at issue.



It is important to note that such arguments, made and now repeated by the appellant, were already previously dismissed in successive decisions issued by the Judges of this Second Section, in other identical cases that have emerged in the process of analysis (**Ag 232.469-Rs**, Author Min. MARCO AURELIO - **Ag 236.644-RS**, Author Min. MAURICIO CORREA - **Ag 238.328-RS (AgRg)**, Author Min. MARCO AURELIO - **RE 273.042-RS**, Author Min. MARCO AURELIO).

With regards to the essence of this controversy, it is important to note that the appeal requested by the Municipality of Porto Alegre reveals itself as inadmissible, especially in light of the constitutional mandates inscribed in article 196 of the Constitution of the Republic, which states:

*"Art. 196. Health is a right granted to all and is the State's duty. It is guaranteed through social and economic policies that aim to reduce health risks and other dangers and to provide universal and equal access to acts and services for the public benefit, protection and rehabilitation." (emphasis added)*

In reality, the political constitutional requirements described in article 196 of the Fundamental State Law consists of a duty to guarantee and secure, to all, protection and health. It represents a factor associated with an imperative action of social solidarity demanded from the Public Authority, whichever institutional branch acts in this role within the federal system.

In this case, the imperative nature of such constitutional obligation's implementation demerits the request for appeal.

I emphasized in the decision published during my Presidency in the Federal Supreme Tribunal, in a similar context to the present issue (Pet. 1.246-SC), the dilemma between protecting the inviolable right to life and health, that qualifies as a subjective right guaranteed to all by the Constitution of the Republic (article 5, header and article 196) and the prevalence of the State's financial interests, which is against such fundamental prerogatives. I understand that once this dilemma is determined, the ethical and judicial reasoning impose on the judge only one option. Such option is that which promotes the unalienable respect to human life and health, most notably one which provides access, by local legislative authority, to programs that distributes medicine at no cost, with the purpose of serving those in need.

In reality, judicial recognition validating the legality of programs aimed to distribute medicines at no cost to those in need, including those who carry the HIV/AIDS virus, made effective the fundamental principles of the Constitution of the Republic (articles 5, header, and 196). This judicial act represented, to the maximum extent applicable, an action that upheld and was in solidarity with an appreciation for people's lives and health, especially of those that have little and possess little, other than a consciousness of their own humanity and essential dignity.

It is important not to lose perspective of the fact that the subjective right to health represents the undeniable judicial prerogative guaranteed to the general public by the Constitution of the Republic. It translates the constitutionally mandated right, and through its authority proscribes that, in a responsible manner, the Public Authority, whomever constitutes such position, has the power to implement appropriate social and economic policies that provide and guarantee its citizens, including those that carry the HIV virus, universal and equal access to pharmaceutical assistance and medical-hospital access.

The programmatic essence of the rule proscribed in article 196 of the Constitution, whose constituents include all political entities that compose, at the institutional level, the Brazilian federal organization (JOSE CRETELLA Junior,

"Commentaries to the Constitution of 1998", vol. VIII/4332-4334, item no. 181, 1993, Forense Universitaria) must not convert itself into an unenforced constitutional promise. This is true in order to avoid the risk that the Public Authority will not comply with the duties fairly imposed on it by the people, and illegitimately substitute the accomplishment of such imperative duties, with an irresponsible act of governmental infidelity, as determined by the Fundamental Law of the State.

This context gives rise to the Public Authority's very important duties to implement health services and to promote in favor of the communities and people, the preventative and rehabilitative services that based on public policy, have as an aim to make viable and consecrate the goals proclaimed in article 196, of the Constitution of the Republic.

The fundamental principle included in the right to health, represents, in the context of basic human rights' historical evolution, one of the most relevant expressions of the real or consecrated liberties. It imposes on the Public Authority an active, positive duty and such duty can only be achieved when such governmental institutions adopt policies directed at promoting full compliance with the principles ordered by such constitutional text.

In this manner, the Public Authority's duty is more than a positive assertion regarding social rights. It translates as a necessary stage in the process of constitutionally affirming and later converting such rights into an undeniable judicial principle. (JOSE AFONSO DA SILVA, "Constituent Power and Popular Power", p. 199, items Nos. 20/21, 2000, Malheiros). The Public Authority bears the burden to designate an institutional vehicle, to confer the real effectiveness of such basic prerogatives, in order to provide to the people, in the event of unjustifiable noncompliance with this statutory obligation, an organized system of guarantees aiming to achieve, by means of such government entities, compliance with this duty imposed on them by the Constitution.

It is therefore insufficient for the State to merely proclaim formal recognition of such right. To reach beyond the scope of a simple constitutional declaration, it becomes essential that such right be integrally respected and fully guaranteed. This is especially true in the case in which a right, such as the right to health, qualifies as a judicial prerogative that involves a citizen's power to demand that the State implement positive obligations imposed on it by the constitutional order.

It is important to highlight, finally, that the right to health's critical nature made the legislative author qualify, as a principle of public relevance, health actions and services (Federal Constitution, article 197), in order to legitimize the powers of the Health Department and of the Judiciary in case the state agencies stop respecting the constitutional mandate, arbitrarily frustrating its purpose judicially and socially, whether by intolerable omission or by any other unacceptable type of deviant governmental behavior.

All such considerations, that reaffirm the inability to censure the local Tribunal's opinion, lead me to repeal the request for appeal argued by the Municipality of Porto Alegre as inadmissible. Especially since the very relevant situation is considered, that the opinion under review is in accordance with the cited jurisprudential order within the ambit of the Federal Supreme Tribunal (RE 236.200-Rs, Author Min. MAURICIO CORREA RE 247.900-RS, Author Min. MARCO AURELIO, Author Min. MOREIRA ALVES - RE 267.612-RS, Author Min. CELSO DE MELLO, for example):

"ADMINISTRATIVE. STATE OF RIO GRANDE DO SUL. ILL PERSON CARRYING HIV VIRUS, UNDERPRIVILEGED AND WITHOUT THE RESOURCES TO ACQUIRE MEDICATION NECESSARY FOR TREATMENT. DUTY IMPOSED ON THE STATE UNDER THE OPINION. ALLEGED VIOLATION OF ARTICLES 5, I, AND 196 OF THE FEDERAL CONSTITUTION.

The decision was based on the main principles of law (article 1 of law 9.908/93) through which the State of Rio Grande do Sul became compliant with the norms of article 196 of the Federal Constitution and implemented a medication distribution program to those in need, therefore nullifying the violation of the referenced constitutional principles. Appeal denied (RE 242.859-RS, Author Min. ILMAR GALVAO - emphasis added).

"PATIENT WITH HIV/AIDS. FINANCIALLY DESTITUTE PERSON. RIGHT TO LIFE AND TO HEALTH. PROVIDING MEDICATION AT NO COST. CONSTITUTIONAL DUTY OF THE STATE (FEDERAL CONSTITUTION, ARTICLES 5, HEADER AND 196). PRECEDENTS (FEDERAL SUPREME TRIBUNAL).

The subjective right to health represents the undeniable judicial prerogative guaranteed to the general public by the Constitution of the Republic (article 196). It translates the constitutionally mandated right, and through its authority proscribes that, in a responsible manner, the Public Authority, whomever constitutes such position and has the power, to implement appropriate social and economic policies, provide and guarantee its citizens, including those that carry the HIV virus, universal and equal access to pharmaceutical assistance and medical-hospital access.

The programmatic essence of the rule proscribed in article 196 of the Constitution, whose constituents include all political entities that compose, at the institutional level, the Brazilian federal organization, must not become an unenforced constitutional promise. This is true in order to avoid the risk that the Public Authority fails to comply with duties fairly imposed on it by the people and illegitimately substitutes compliance such imperative duty, with an

irresponsible act of governmental infidelity, as determined by the Fundamental Law of the State.

Once the legislation edited by the State of Rio Grande do Sul (substantiated in Laws No. 9.908/93, 9.828/93 and 10.529/95) institutes programs to distribute medication to those in need at no cost, it validates the fundamental principles of the Constitution of the Republic (article 5, header, and 196) and represents, to its maximum extent, an action taken in reverence to and in solidarity with the peoples' right to life and to health, especially of those that possess little more than a consciousness of their own humanity and of their essential dignity. Precedents of the Supreme Federal Tribunal. (RE 232.335-RS, Author. Min. CELSO DE MELLO - emphasis added)

"AIDS/HIV. DISTRIBUTION OF MEDICATION AT NO COST TO PEOPLE IN NEED. LEGISLATION COMPATIBLE WITH CONSTITUTIONAL HEALTH LAW NORMS (FEDERAL CONSTITUTION, ARTICLE 196). PRECEDENTS OF THE SUPREME FEDERAL TRIBUNAL.

The legislation that guarantees people in need and those who carry the HIV virus access to the distribution of medicines to treat AIDS qualifies as an act that validates the constitutional duty imposed on the Public Authority to guarantee to its citizens universal and equal access to health acts and services. Precedents (Supreme Federal Tribunal).

In addition to qualifying as a fundamental right that applies to all people, the right to health represents an undeniable constitutional consequence of the right to life. The Public Authority, whichever institution is responsible for such role in the Brazilian federal system, must not show itself indifferent to public health problems, under risk of adopting, even if by censurable omission, unconstitutional behavior.

The subjective right to health represents the undeniable judicial prerogative guaranteed to the general public by the Constitution of the Republic (article 196)." (RE 273.834-RS, Author Min. CELSO DE MELLO)



With that said, for the reasons contained herein, and considering further, the aforementioned precedents, I deny the present request for appeal, maintaining, in consequence, the decision proffered by me on pp. 560-568.

This is my opinion.

A handwritten signature in black ink, consisting of a stylized initial 'L' followed by a long horizontal line.

September 12, 2000  
Second Section

**AGRAVO REGIMENTAL AS PART OF RECURSO EXTRAORDINARIO NO. 271.286-8**  
**RIO GRANDE DO SUL**

O P I N I O N

**MINISTER MARCO AURELIO** - Mr. President, I am in agreement with the Minister-Author, declaring a decision that is in accordance with what I have previously proffered and with my published opinion as cited by your Excellency, that was adopted unanimously by the members of this Section to form a single voice:

*The decision published by the initial Court, written by Appeals Judge Juraci Vilela de Sousa, is in accordance with the Letter of the Republic. First, it is understood that the object of the previous debate and decision was not whether the state law was cited to conclude that the state, and the municipality, have a duty to provide medications to those in need. The principle stated in article 196 of the Letter of the Republic makes it immediately clear that "health is a right given to all by the State, that must be guaranteed through social and economic policies that aim to reduce the risk of disease and other problems and provide universal, equal access to acts and services in order to promote, protect and rehabilitate." The reference to "State" cited in the principle, is broadly interpreted to include the Federal Union, the states, the Federal District and the Municipalities. This is so because there is one unified health system whose budget, under the terms of article no. 195, should be funded by the Union, State, Federal District and Municipal social security funds, as well as from other sources. The header suggests, as guidance, that the decentralized nature of health acts and services should instead aim integrate the regions and hierarchies under a single direction within each sphere of government. It is insufficient to provide constitutional*

parameters for immediate efficacy creating a duty to provide exceptional medications to those in need, like those related to the treatment of Acquired Immune Deficiency Syndrome (AIDS), considering the nature of the activity accepted as an uncontroversial fact, as noted in the opinion under review. The Municipality of Porto Alegre has the responsibility, based on specific certificates, such as the various agreements made in connection with the implementation of the Unified Health System, to receive State funds for such purposes. On the other hand, as noted in the opinion, the lack of municipal regulations regarding distribution does not release the municipality from its duty. The decree does not allow the municipality to reduce the right protected by law. The State (as a category) is also responsible for the activities that initiate within its domain, including education, health and public security, which should in theory be covered by the taxes paid by its citizens. It is time to focus on the state's greater objective, to provide a happy, secure life with the minimum comforts needed to obtain the greatest values related to human dignity.

3. For the reasons stated *supra*, reaffirming, once again, that instead of conflicting with articles 196, 197 and 198 of the Federal Constitution, the opinion in question is in perfect agreement with such laws. I acknowledge the request in this appeal and reject it on the merits (pp. 70 and 71).

This is my opinion.

SECOND SECTION

**ABSTRACT OF THE MINUTES****AGRAVO REGIMENTAL AS PART OF RECURSO EXTRAORDINARIO NO. 271.286-8**

PARTY:	RIO GRANDE DO SUL
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**Decision:** The section denied the request to the appeal unanimously. Second Section, September 12, 2000.

Presidency of Minister Neri da Silveira. In attendance, Ministers Celso de Mello, Marco Aurelio, Mauricio Correa and Nelson Jobim.

Assistant Attorney General of the Republic, Dr. Raimundo Francisco Ribeiro de Bonis.

Carlos Alberto Cantanhede  
Coordinator