

THE JUDICIARY AND THE RIGHT TO HEALTH

GILMAR MENDES •

First of all, I would like to convey my gratitude for the kind invitation to speak at this event. I am very pleased to have the opportunity to visit your beautiful and important University to address such an urgent issue as the right to health.

The world has been following very closely the current debate in the United States regarding President Obama's initiative to call on Congress to push forward on health reform. This has been a central subject in this country's political agenda for the last year, dividing opinions in the Senate, the House, the Democratic and Republican parties, the media and in every household in America. As such, this issue has been presented in the United States mainly as a discussion concerning how the general welfare is best promoted, or, in Ronald Dworkin's vocabulary: as a matter of policy.

Focusing on the relation between the "The Judiciary and the Right to Health", this event differs from – and complements – this debate, since Courts generally make decisions of principle rather than policy. Decisions about what rights people have under a constitutional system.

This will certainly be the focus of the different panels that will take place today and tomorrow. I look forward to hear my eminent colleagues talk about their views on this topic and to learn more about different experiences regarding "access to medicines" (Panel 1), "vulnerable populations and access

• Chief Justice of the Supreme Court of Brazil; President of the National Council of Justice of Brazil; Professor of Constitutional Law for graduate and undergraduate degree programs at the University of Brasília Law School (UnB); Holds a Master of Laws degree from the University of Brasília Law School (1988), with the thesis *Controle de Constitucionalidade: Aspectos Políticos e Jurídicos*; a Master of Laws degree from the University of Münster, Federal Republic of Germany (RFA) (1989), with the thesis *Die Zulässigkeitsvoraussetzungen der abstrakten Normenkontrolle vor dem Bundesverfassungsgericht*; a Doctor of Laws degree from the University of Münster, Federal Republic of Germany (RFA) (1990), with the thesis *Die abstrakte Normenkontrolle vor dem Bundesverfassungsgericht und vor dem brasilianischen Supremo Tribunal Federal*, published in the periodical *Schriften zum Öffentlichen Recht*, Duncker & Humblot Press, Berlin, 1991 (the Portuguese translation was published with the title *Jurisdição Constitucional: o controle abstrato de normas no Brasil e na Alemanha*. 5th Edition. São Paulo: Saraiva, 2005, 395 p.). Founding member of the Brasília's Institute of Public Law (IDP). Member of the Board of Advisors for the "Anuario Iberoamericano de Justicia Constitucional" – Centro de Estudios Políticos y Constitucionales - Madrid, Spain. Member of the Brazilian Academy for Literary Law. Member of the International Academy of Law and Economics (AIDE).

to health determinants” (Panel 2) and “health systems and the judiciary” (Panel 3).

As a Professor of Constitutional Law and the Chief Justice of the Supreme Court of Brazil, I think that my opportunity to speak here today should not focus on my political beliefs on what kind of policies should be developed by the government in order to promote the right to health, but on my knowledge of the institutional experience of the Supreme Court of Brazil on adjudicating this constitutional right.

Unlike the American Constitution, the Brazilian Constitution, enacted in 1988, expressly assures (article 196) that the right to health is: (i) granted to every person, (ii) a duty of the State, (iii) effectuated through socio-economic policies, (iv) aimed at reducing risk of diseases and other maladies (v) ruled by the principle of universal and equal access (vi) to actions and services that promote, protect and recover ones health.

In Brazil, interpretation of this article has caused great division both in academia and in the Judiciary. Antagonistic theses struggle to define “if”, “how” and “in what measure” the constitutional right to health embodies a subjective right of a public nature to positive actions by the State that may be enforced by the Judiciary.

In this regard, as the top organ of the Brazilian Judiciary, the Supreme Court of Brazil plays the important role of interpreting the Constitution and ensuring that rights and guarantees declared in the constitutional text become an effective reality. The Constitution enshrined the Supreme Court as the highest judicial authority in the Country and gave it final word in all matters regarding constitutional interpretation in concrete as well as in abstract cases.

In fulfilling this mission, the Court has met the increasing demand from society with a deep commitment to the realization of fundamental rights, shouldering the great political and economical responsibility of applying a Constitution full of fundamental rights and guarantees of individual and collective character. A task that can be especially complex in cases concerning

socio-economic rights, which are declared in the Brazilian 1988 constitutional text by directly applicable legal norms.

In a country like Brazil, where access to basic socio-economic rights is not yet granted to millions of people, the generosity of the Framers of the Constitution conveyed the perspective that the Constitutional State is also a space for the synthesis and proclamation of hopes that have been historically forgotten.

A stable democratic regime can only be the fruit of sustained economic development and of the establishment of an environment where economic prosperity goes hand-in-hand with ample social integration. The fulfillment of the social agenda introduced by the Constitution must be understood as a precondition for the achievement of a full-fledged democracy.

It is necessary to recognize that we are faced with a situation where unfavorable social indicators are really disturbing. In this context, implementing the social agenda heralded by the Constitution is not a simple task, but it is one to which the Supreme Court of Brazil has dedicated its best endeavors.

Applying the socio-economic rights declared in the Constitution demands, above all, realism and pragmatism in the interpretation of the constitutional text, which manifests itself impeccably in the very idea of “thinking what is possible”, in the exercise of the arduous task entrusted to the Court by the Constitution of reconciling multiple expectations of the fulfillment of rights.

In this perspective of institutional analysis, the Court has proved to be a key-player in the enactment of the promises of the 1988 Constitution, and this is why “thinking what is possible” and the very limit of what is financially feasible are ideas that must be always kept in mind.

But, although always kept in mind, determining “what is possible” and the “limit of what is financially feasible” is a particularly difficult task when the conflict in hand is one between, what the Public Administration believes to be its material possibilities and the demands for human dignity, health and,

ultimately, life. A conflict that Brazilian judges, in general, and the Supreme Court, specifically, are called upon to resolve in almost a daily basis.

To this effect, faced with the immense responsibility of harmonizing the jurisprudence concerning the constitutional right to health, the Supreme Court has very recently decided to carry out public hearings in which this polemic issue was debated.

During this period (April 27-29 and May 4-7, 2009), the Court turned itself into a true forum for reflection and argumentation with the participation not only of scholars and representants of different organs from the Public Administration, but also of several sectors of the civil society.

Public hearings are a very good example of the Court's firm belief that judicial review must be exercised in a way that is fully compatible with other democratic institutions. If one of the main sources of the Court's democratic legitimacy comes from the strength of its arguments, it's evident that the Court must be open to hear the different arguments from all sectors of society, especially in cases concerning the adjudication of socio-economic rights.

In this way, openness from the Court is necessary not only because the adjudication of socio-economic rights is a very complex issue, involving an immense amount of factual information about the real necessities of people and the actual possibilities of the Public Administration to fulfill them, but also, because in this kind of cases, rulings by the Court may have an immense effect into the obligations of the Public Administration and in the lives of people.

To allow participation in a process that directly affects them is, in the belief of the Court, not only a useful instrument for the full appreciation of such complex issues, but, more than that, a democratic necessity.

The result of this particular public hearing was a better understanding of the complex reality that involves adjudicating the constitutional right to health, reflected in the unanimous decision by the Court in a recent case

I had the honor of Reporting, which established guidelines for the adjudication of the constitutional right to health by the Brazilian Judiciary.

As a direct result of the facts presented in the public hearings, it was established that, in the Brazilian reality, the issue of adjudicating the right to health does not generally involve the question of judicial interference in political choices. Our experience is that, usually, claims do not involve demands that the judiciary act to suppress “legislative omission” – lack of legislation needed to operate a certain constitutional provision –, but that a policy already created by the competent legislative and executive authorities be effectively implemented.

This Supreme Court precedent established a procedural approach to the adjudication of the constitutional right to health that should be followed by all other judges confronted with such type of cases:

The first fact that must be considered is the existence of a public policy that contemplates what is needed by the plaintiff. (1) If there is such a public policy, guaranteeing its implementation is the duty of the judiciary; (2) if there is no such a policy the judicial authority must distinguish cases in which (a) there is “legislative omission”; (b) there is a administrative decision not to provide the medical act or pharmaceutical demanded by the plaintiff; (c) there is a legislative forbiddance of dispensing such treatment.

The legal prohibition of providing a pharmaceutical not registered in the competent Agency is a recurrent example of legislative forbiddance of dispensing a treatment that directly relates to the issue of “access to medicines” – an issue to be debated on the first panel. In such cases, according to the Brazilian Supreme Court, registering a pharmaceutical is a guarantee to the public health and a legal requirement to provide a specific treatment.

A different scenario is the existence of an administrative decision not to provide a specific treatment. In such cases it is important to differentiate (i) when there is a public option for an alternative treatment, (ii) from when there is no public option of treatment for a malady.

In this regard, the Brazilian Supreme Court has established that, if there is an alternative treatment provided by the Administration, this is a policy decision that should be respected by the judiciary, unless there is proof that the alternative treatment provided is ineffective or inappropriate for the patient's specific situation.

If there is no public option of treatment for a malady, there must be a differentiation between (ii.a.) experimental treatments and (ii.b.) new treatments that have not yet been tested by the Brazilian public health system. Participation on experimental treatments is regulated by scientific rules and, as such, the judiciary cannot order inclusion of a patient in this kind of program. The situation in which new treatments are not provided by the public health system is a different one. In this case, it may be that the health of an individual or a group may be harmed by reason of bureaucracy, causing an unlawful difference between treatments available to private patients and the ones available to people that depend on the public health system – a problem related to the issue of “vulnerable populations and access to health determinants”, to be debated on the second panel. If this is the case, and there must be sufficient proof – which may be an impediment for granting injunctions – adjudication of the constitutional right to health allows the judiciary to order the public health system to provide the needed treatment.

In this way, this paradigmatic decision recognizes that elaborating socio-economic policies aimed at the concretization of the constitutional right to health, invariably means distributive choices that are typical political options, and, at the same time, establishes the competence of the Judiciary to act in such cases, not as a substitute of the democratic lawmaker, but in its constitutional role, as an enforcer of public policies designed and enacted by the Legislative and Executive branches.

Moreover, according to this decision, the right to health must be understood as a constitutional right that possesses, at the same time, individual and collective character. This means that any individual right to a concrete medical act or a specific pharmaceutical is conditioned by the necessity that the public health system, as a whole, functions adequately. Guaranteeing one

person's right to health must not have consequences that endanger the collective right to of the entire community. This must be demonstrated on a case by case basis and the burden of proof of such systemic malfunctioning must be on the shoulders of the Public Administration.

It has been a guideline established by the Brazilian Supreme Court to carefully strive to avoid any negative interference in the activities of the Legislative. The Court has full understanding that it is not its duty to take the place of the lawmaker, or to restrict the free exercise of political activity, which is of essential importance to the Constitutional State.

The democratic lawmaker and the constitutional jurisdiction play equally relevant roles in contemporary constitutional States, as the interpretation and application of the Constitution are tasks entrusted to all branches of Government, as well as to society at large.

In Brazil, it can be said that the Powers of the Republic are prepared and mature for an intelligent political dialogue above party lines.

In conclusion, it is the constitutional established task of the Supreme Court of Brazil to interpret the Constitution, bringing forth, in the development of such activity, necessary constitutional evolution, turning, in this way, the constitutional promises of the 1988 Constitution into concrete reality, but, at same time, always respecting the independence of the Legislative and Executive branches and the actual possibilities of the government to comply with the rulings of the Court.