

Effectiveness of the protection action to guarantee the provision of health services to Venezuelan migrants in the department of Chocó, 2016-2021

Efectividad de la acción de tutela para garantizar la prestación de los servicios de salud a los migrantes venezolanos en el Chocó (2016-2021)*

Eficácia da ação de proteção para garantir a prestação de serviços de saúde aos migrantes venezolanos no departamento de Chocó, 2016-2021

DOI: <https://doi.org/10.21803/penamer.17.34.622>

Abstract

Introduction: This article analyzes the tutela action as an effective tool that allows the protection of the right to health of Venezuelan migrants in Chocó, in addition to studying how the migration of Venezuelans to this department has implied a high demand in the provision of essential services, such as the health service, a provision that has some notable shortcomings in its normal functioning and that has been exacerbated by the high demand generated by the attention to the migrant population. **Objective:** To establish the normative tools available to Venezuelan migrants to make their right to health effective through the analysis and synthesis method. **Methodology:** Qualitative-descriptive, based on a review of electronic journals, articles in scientific journals, as well as consultation of official State pages on the chosen topic. **Conclusions:** The tutela action is a suitable mechanism used by Venezuelan migrants to protect their right to health, in addition to the Temporary Statute of Protection for Venezuelan Migrants (ETPV) as a tool that allows direct access to health services and prevents this right from being undermined.

Keywords: Migration; Judicial process; Conventionality control; Venezuelan migrants; Right to health; Tutela action.

Resumen

Introducción: Este artículo analiza la acción de tutela como herramienta eficaz que permite la protección del derecho a la salud de los migrantes venezolanos en el Chocó, además de estudiar cómo la migración de venezolanos a este departamento ha implicado una alta demanda en la prestación de servicios esenciales, como es el servicio de salud, una prestación que tiene unas notables falencias en su funcionamiento normal y que se ha agudizado por la alta demanda que genera la atención a la población migrante. **Objetivo:** Establecer las herramientas normativas con las que cuentan los migrantes venezolanos para hacer efectivo su derecho a la salud a través del método análisis y síntesis. **Metodología:** Cualitativo-descriptiva, basada en una revisión de diarios electrónicos, artículos en revistas científicas, así como consulta de páginas oficiales del Estado sobre el tema elegido. **Conclusiones:** La acción de tutela es un mecanismo idóneo utilizado por los migrantes venezolanos para amparar su derecho a la salud, además del Estatuto Temporal de Protección para Migrantes Venezolanos (ETPV) como herramienta que permite el acceso directo a los servicios de salud y evitar que este derecho sea menoscabado.

Keywords: Migración; Proceso judicial; Control de convencionalidad; Migrantes venezolanos; Derecho a la salud; Acción de tutela

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¿Cómo citar este artículo?

Asprilla; E., Domínguez; J., Espinosa; J. y Palacios; Y. (2024). Efectividad de la acción de tutela para garantizar la prestación de los servicios de salud a los migrantes venezolanos en el Chocó (2016-2021), *e#*:622. 17(34), DOI: <https://doi.org/10.21803/penamer.17.34.622>

* Este artículo es resultado del proyecto de investigación "La efectividad de los medios de control para garantizar la prestación de los servicios de salud a los migrantes venezolanos en el departamento del Chocó, Colombia, 2016-2021", adscrito al Grupo de Investigación en Derecho, Sociedad y Medio Ambiente (GIDSMA) y el Grupo de Investigación de Ciencias Jurídicas (GICLU) de Universidad Tecnológica del Chocó Diego Luis Córdoba (UTCH), adscritos a Vicerrectoría de Investigaciones, Centro de Investigaciones Socio-Jurídicas de la Facultad de Derecho. Proyecto financiado en el marco de la convocatoria de estímulos para la financiación de proyectos de investigación científica y tecnológica de los grupos de investigación reconocidos por el Ministerio de Ciencia, Tecnología e Innovación (MinCiencias) en 2022.



Resumo

Introdução: Este artigo analisa a ação tutelar como uma ferramenta eficaz que permite a proteção do direito à saúde dos migrantes venezolanos em Chocó, além de estudar como a migração de venezolanos para este departamento implicou uma alta demanda na prestação de serviços essenciais, como o serviço de saúde, uma prestação que tem algumas deficiências notáveis no seu funcionamento normal e que foi exacerbada pela alta demanda gerada pela atenção à população migrante. **Objetivo:** Estabelecer os instrumentos normativos de que dispõem os migrantes venezolanos para tornar efetivo o seu direito à saúde, através do método de análise e síntese. **Metodologia:** Qualitativo-descriptivo, baseado na revisão de revistas electrónicas, artigos em revistas científicas, bem como na consulta de páginas oficiais do Estado sobre o tema escolhido. **Conclusões:** A ação tutelar é um mecanismo adequado utilizado pelos migrantes venezolanos para proteger seu direito à saúde, além do Estatuto de Proteção Temporária para Migrantes Venezolanos (ETPV) como ferramenta que permite o acesso direto aos serviços de saúde e evita que esse direito seja prejudicado.

Palavras-chave: Migração; Processo judicial; Controlo de convencionalidade; Migrantes venezolanos; Direito à saúde; Ação de proteção



Introduction

This article analyzes the tutela action as an effective tool that allows the protection of the right to health of Venezuelan migrants in Chocó, in addition to studying how the migration of Venezuelans to these departments has implied a high demand in the provision of essential services, such as health services, a service that has notable deficiencies in its normal functioning and that has been exacerbated by the high demand generated by the attention to the migrant population, which causes deficiencies in care and a systematic violation of the right to health.

The situation of Venezuelan migrants in the Colombian territory, from the perspective of the protection of human rights, specifically the guarantee of the right to health, has given rise to failures in the provision of health services represented in the exponential growth of the use of mechanisms such as the tutela action, which evidences the recurrence of the Colombian State and, therefore, of Chocó in the violation of guarantees conventionally protected by the Inter-American System for the Protection of Human Rights (SIPDH) in relation to the development of the migration regulation policy.

In this regard, first, the Colombian experience with the Venezuelan migratory crisis will be analyzed; second, the right to health in Colombia and its guarantee to Venezuelan migrants will be studied; third, the right to health in Chocó and its guarantee to Venezuelan migrants will be analyzed; fourth, the provision of health services to Venezuelan migrants in Chocó will be examined; fifth, access to the administration of justice for migrants will be studied as a means of guaranteeing the right to health; sixth, the right to health in Colombia and its guarantee to Venezuelan migrants will be analyzed; and sixth, the right to health in Colombia and its guarantee to Venezuelan migrants will be analyzed; fifth, it will study access to the administration of justice for migrants as a means of guaranteeing the right to health; sixth, it will address the Temporary Protection Statute for Venezuelan Migrants (ETPV) in Colombia and the guarantee of the right to health through conventional migratory regularization; and seventh, it will offer the conclusions and proposals of this research.

Methodology

In order to achieve the objective, a qualitative-descriptive methodology was used, based on a review of electronic journals, articles in scientific journals, as well as consultation of official government pages on the chosen topic.

Colombian experience of the Venezuelan migration crisis

The Organization of American States (OAS, 2020) described the current Venezuelan migrant and refugee crisis as an unprecedented human disaster in the region. For their part, in accordance with the experience of the United Nations, some human rights organizations positioned the term complex humanitarian emergency to thus refer to the situation experienced in Venezuela, which gives rise to consider the massive human rights violations due to the economic collapse, the deficiency in public services and the general violence present in the State as some of the main causes of this migratory crisis ("The humanitarian situation in Venezuela continues to deteriorate", 2019).

This situation has led to forced migration from Venezuela and has constituted a significant



a survival strategy to preserve and protect fundamental rights, such as life, personal freedom, health, food, among others, especially for vulnerable populations such as children, adolescents, the elderly, women, Afro-descendant and indigenous peoples, people with disabilities, people living in poverty or disease and the LGTBIQ+ (lesbian, gay, trans, bisexual, intersexual and queer) community ("Situación de Venezuela", n. d.).

Faced with the challenge of migration and given the geographical conditions, Colombia has taken in a large part of the Venezuelan migrant population, exceeding 2.2 million (Morales Soler, 2022), followed by Peru, Chile, Ecuador and the United States ("Refugees and migrants from Venezuela exceed four million: UNHCR and IOM," 2019). Among these countries, what is happening in Colombia is striking, due to the fact that it is a State that presents its own humanitarian crisis with a figure of more than 7.7 million internally displaced persons, according to the Office of the United Nations High Commissioner for Refugees, resulting from the armed conflict. Despite this, and in contrast to the restrictive migration policies and legislation of other countries, the Colombian State has promoted some favorable regulations for migrants and established regularization and temporary reception policies, adapting human rights treaties as part of the block of constitutionality. This has led to normative adaptations in terms of reception formulated as a regulatory precedent for the other nations of the Americas in the creation of reception regulations ("Las cifras de desplazamiento forzado en el mundo alcanzan un nuevo máximo y confirman una década de incrementos", 2022).

The right to health care and its guarantee for Venezuelan migrants

In the Colombian State, the right to health is a fundamental right that must be respected, protected and guaranteed to each person within its territory (Echavarría, 2012), in accordance with the provisions of Articles 48 and 49 of the Political Constitution of Colombia (1991), which establish the duty of the State to guarantee social security, health and environmental sanitation to the inhabitants of the national territory. In addition, Article 366 states that the protection of the right to health is a public service inherent to the essential purposes of the State (Cruz, 2010).

These constitutional mandates are developed through Law 100 of 1993 and Law 1751 of 2015, which create the Comprehensive Social Security System and regulate the fundamental right to health, respectively (Peña Restrepo, 2022). This right is characterized by a rich jurisprudential development of the Constitutional Court, highlighting Ruling T-121/15, which exposed in relation to the right to health the implication of timely, effective, quality and equal access to all services, facilities and goods required to guarantee it (Campo Hincapié et al., 2014).

In addition to the above, it is appropriate to bear in mind that, according to Article 168 of Law 100 of 1993, initial emergency care is mandatory for all public and private entities that provide health services to all persons, regardless of their socioeconomic status, without the requirement of any formality (Niño Reyes and Lozano Navarrete, 2008).

Provision of health services in Chocó to Venezuelan migrants

Chocó has a weak provision of health services in Colombia, as evidenced by the fact that



the only second level hospital, the San Francisco de Asís, has been intervened on several occasions. According to Blandón Mena (n. d.), "the health system of the department of Chocó is in an absolutely critical state, and its structural flaws, as recent history has shown, cannot be solved by a centralized intervention", a situation that is palpable, since its inhabitants have to be referred to clinics and hospitals in other departments of the country for tertiary care.

The reality shows that inequality in health and quality of life persists in Chocó, with opportunities for social and economic development below the national average. It is estimated that about 10% of the department's population is undocumented and it is projected that only 25% have effective medical services. The lack of qualified medical human resources becomes an obstacle to accessing health services, since, if one looks at the national figure for the number of doctors per capita, 1.35 doctors per 1,000 inhabitants, the ratio for the Chocoan people is one doctor per 5,000 inhabitants. The health care of the population is characterized by being mainly passive and assisted, free demand, mainly reactive and sickly, which translates into higher operating costs of the system and higher opportunity costs for the population, which is especially aggravated by the lack of an adequate organization and functioning, i.e., an articulation of the network of services. These shortcomings, together with the scarcity of jobs and opportunities for socioeconomic development, explain, to a large extent, the existence of health and quality of life indicators below the national average, thus illustrating the need to establish differentiated health measures adapted to a specific population in wild and dispersed environments, and if this happens with Chocoanos, the situation with Venezuelan migrants is more complex (Pan American Health Organization [PAHO], 2010).

According to the Colombian legal system, it can be deduced that when a migrant suffers a health condition and this is an emergency, health services must be provided (López Guerrero, 2012), without any denial by the entities providing the service, as ratified by the Constitutional Court in Ruling T-403/19.

A factor such as "irregular migratory status limits access to health care and particularly affects people in highly vulnerable conditions, such as pregnant and lactating women, people with chronic diseases and young people with sexually transmitted infections" (Rodríguez Rodríguez, 2022, p. 136). However, not all health conditions can be classified in the aforementioned profiles or be called emergencies, and it is in this sense that difficulties have arisen for migrants (Toledo Curbelo, 2005), who, in addition to being in a state of vulnerability, are prevented from accessing the health services they need.

The Colombian State and, of course, Chocó, in accordance with its constitutional order, international conventions and treaties and respect for the principle of universality, has the duty to guarantee the right to health of migrants who arrive in the territory in a vulnerable condition (Niño Reyes and Lozano Navarrete, 2008), as a State guarantor of human rights and the principle of human dignity. In addition, because as inhabitants of the national territory they should be covered under the General Social Security System in its contributory or subsidized regimes, according to their economic conditions and degree of social vulnerability (Salazar Patiño and Patiño López, 2021).

As for the subsidized regime, which is accessed through the survey of the Identification System (Sistema de Identifi-



In order to be able to apply for the health subsidy and subsequently be affiliated to the health service providers (EPS) (Mejía Mantilla, 2005), it should be pointed out that the access of Venezuelan migrants to these benefits implies that they must have a valid identification document for foreigners, which is accessed through procedures that require economic resources that Venezuelan migrants do not have, in addition to special permits, which were not issued in Venezuela due to the cessation of activities resulting from the crisis in that country, together with the rupture of diplomatic relations between the Colombian and Venezuelan States (Quintana Bermúdez and Antequera Contreras, 2020).

In relation to the failure to provide effective health services to migrants, it should be noted that in Colombia, and therefore in Chocó, this may represent a transgression of the Convention's obligations, since the Inter-American Court of Human Rights (IACHR), in cases such as Guachalá Chimbo et al. v. Ecuador, has established that "the right to health refers to the right of every person to enjoy the highest level of physical, mental and social well-being. This right encompasses timely and appropriate health care in accordance with the principles of availability, accessibility, acceptability and quality. In addition, in the case of Hernández v. Argentina, it is stated that the State's compliance with its obligation to respect and guarantee this right must give special care to vulnerable and marginalized groups.

In the case of Chocó and, in general, of the Colombian State, in the case of Venezuelan migrants, the situation of violation of rights may be presented in a double sense, since not only has effective access to health services been made impossible for them, but also their special condition of vulnerability has been ignored by making bureaucratic demands that are impossible to meet (Zúñiga Escalante, 2015).

Access to the administration of justice for migrants as a means of real guarantee of the right to health

The protection of human rights through judicial mechanisms is internationally supported by the American Convention on Human Rights, which in Article 25 establishes the right to judicial protection for all persons without distinction, alluding to an injunction against acts that violate their fundamental or human rights recognized by the Constitution, the law or the Convention itself (Rodríguez Rescia, 1998).

At the local level, the right of action and access to the administration of justice has constitutional support in Article 229 of the Political Constitution of Colombia (1991), which establishes that the State has the duty to guarantee access to the administration of justice for everyone (Fajardo Sánchez, 2006).

Under the aforementioned postulates, Article 86 of the Constitution has established a tool for the protection of fundamental rights: the tutela action. With applicability in the event of violation or threat thereof by an authority or an individual, also including the protection of the rights contemplated in international treaties and conventions on human rights (Hernández-Arteaga, 2021), according to the block of constitutionality, empowering every person the ability to file it, without distinction of age, nationality or immigration status in the territory (Hernández-Arteaga, 2021).



(Political Constitution of Colombia, 1991, art. 86).

Despite the fact that in Colombia there is no regulation that explicitly recognizes care beyond emergencies for persons not affiliated to the General Social Security System (Lopera-Medina, 2016), jurisprudence has identified especially vulnerable profiles that require care, thus generating the protection of rights and ordering the issuance of authorizations for treatments and medications (Legal Option, 2022) in favor of pregnant mothers (Constitutional Court, Ruling SU677/17, 2017), children and adolescents (Constitutional Court, Ruling T-090/21, 2021), and patients with serious, catastrophic or high-cost diseases (Constitutional Court, Ruling T-436/20, 2020). Beyond this, "the Constitutional Court noted that initial emergency care for foreigners residing in Colombia who are in an irregular migratory situation may include treatment for catastrophic diseases when requested by the treating physician as urgent" ("Atención en urgencias de migrantes irregulares puede incluir tratamiento para enfermedades catastróficas", 2022).

The tutela action, given its characteristics, is considered the ideal mechanism available to migrants to activate the jurisdictional apparatus and safeguard the right to health in the event of a possible impairment (Rincón Rubiano, 2019), without limitations in relation to their migratory status, whether transit, residence or permanence. In this regard, the Constitutional Court in Ruling T-314/16 emphasizes that the postulate of access to the administration of justice is rooted in the Constitution and must be guaranteed to every person, regardless of the existing link with the Colombian State, by the fact of being a person, ignoring reasons of citizenship or nationality. Similarly, the tutela action enjoys conventional protection before the Inter-American Court of Human Rights (case of the Ituango massacres v. Colombia).

In Colombia, it is frequent that citizens have to go before judges so that they can safeguard the fundamental right to health with the provision of timely, efficient and quality services, leaving much to be desired of the service provided, in attention to the figures provided by the Constitutional Court in response to a right of petition, between 2018 and March 2021, foreigners filed about 4000 tutela actions, almost seven daily, of which 80% (3164) demanded this right. This situation exposes the fragility that the National Health System has presented in the effective provision of this essential service to Colombian citizens and, even more, burdensome for the migrant population that is not foreseen within it. In view of the lack of an adequate provision of health services to the migrant population, a large number of tutela actions have been filed as a means of protection and demand for the safeguarding of this fundamental constitutional precept (Morales Castillo, 2021).

It is important to contextualize that it is not possible to determine the origin of the petitioners in terms of the nationality of the petitioner, since it is only established whether the petitioner is a national or a foreigner. Despite the problems of precision, it can be speculated that the greatest use of this legal mechanism responds to the migrant population from Venezuela, given the health needs that these citizens have presented upon arrival in Chocó. In Colombia, between 2018 and March 2021, the main reasons for which tutela actions were filed by the foreign population were to claim the timely practice of a medical procedure with 1199, continuity in the provision of the service with 954, comprehensive treatment with 549, affiliations with 532 and medical diagnosis with 443. In short, the figures have demonstrated the insufficiency of the protection of the right to health of migrants; even more alarming turned out to be the need to resort to the constitutional action of tutela to generate guarantees (Legal Option, 2022).



In the Colombian State, the social context of attention to this population sector has configured factual precepts of massive use of the tutela action in different circumstances in relation to the same right. In this regard, it is possible to declare the existence of an unconstitutional state of affairs, a theory developed by the jurisprudence of the Constitutional Court, in which certain criteria have been established for its proceeding, such as:

- A detailed observation not of the specific case in question, but of the social reality that is being presented, that is, the state of affairs that occur socially and whether their treatment or search for a solution is contrary to the constitutional postulates that govern the social rule of law.
- When a repeated and constant violation of fundamental rights is observed, affecting a multitude of people, the solution of which requires the intervention of different entities.
- Order remedies that cover not only those who resort to the tutela action to obtain the protection of their rights, but also other persons in the same situation, but who have not exercised this means of control as a guarantee of the harm suffered by the violation of the fundamental right to health (Martínez Cantillo, 2021).

In the face of the systematic circumstances of violation of fundamental rights by State institutions and the clamor of citizens and migrants (Habermas, 2010), through the use of mechanisms such as the tutela action, the absence of an active attitude of the administrators of justice as subjects called to apply the law has been evidenced, that allows "a form of interpretation and application of the law by legal operators" (Mejía Turizo and Pérez Caballero, 2015) from a pro-person vision, from an activism that authors such as Campos Bernal (2012) consider "a manifestation of judicial will that seeks to safeguard legislative omissions". Which for the specific case are presented in the real impossibility of generating normative bodies capable of originating a real adaptation of citizens of Venezuelan nationality to the Colombian health system.

In this factual and legal scenario, the international responsibility of the Colombian State may be compromised by not complying with the standards of effective legal remedies established by the Inter-American jurisprudence (Nogueira Alcalá, 2009), since in the case of Ríos Avalos et al. v. Paraguay it was stated that those remedies that, due to the general conditions of the country or even due to the particular circumstances of a given case, are illusory, cannot be considered effective. Under these conditions, there is a clear breach of the Colombian State's treaty obligations (Gelman v. Uruguay). Similarly, in the case of López Mendoza v. Venezuela, it was stated that "the Court has understood that for an effective remedy to exist, it is not enough that it be provided for by the Constitution or the law or that it be formally admissible, but that it must be truly suitable.

The Temporary Statute of Protection for Venezuelan Migrants: guaranteeing the right to health through conventional immigration regularization

The current situation of Venezuelan migrants in Colombia has a reference point for a solution in 2021 when a complementary mechanism to the International Protection Regime for Refugees was created.



In addition, Decree 216 of 2021, which establishes the Temporary Protection Status for Venezuelan Migrants (ETPV) that operates under the Single Registry of Venezuelan Migrants (RUMV) and subsequently the issuance of the Temporary Protection Permit (PPT), valid for ten years until May 30, 2031, implemented by the Special Administrative Unit of Migration Colombia through Resolution 971 of 2021. This has made it possible to fill the existing gaps based on the migratory reality and the State's response capacity in institutional, social and economic matters, favoring the temporary migratory regularization of these migrants, facilitating timely access to public services and other rights inherent to their personality, as well as facilitating the integration of this population into the Colombian State's Comprehensive Social Security System.

The Ministry of Health and Social Protection (MinSalud) highlighted that in the health sector, through the strategy of insurance and active search of migrant population for affiliation, it has managed to increase affiliations to the Integral Social Security System, from 306,601 registered migrants affiliated in 2020 to 738,349 affiliates as of May 2022. As of December 2022, it is expected that 945,169 migrants will be affiliated to the General Social Security Health System (SGSSS), which is 78.1% of the expected goal for 2022.

According to Moreno (2021), more than 1,500 Venezuelan migrants benefited from the delivery of the PPT by entities such as Migration Colombia and the Office of the United Nations High Commissioner for Refugees (UNHCR) in Chocó. In this way, migrants will have access to health, education, housing, among others.

In short, the ETPV represents a normative precedent in migratory regulation, which was praised by the Secretary General of the United Nations, António Guterres, as "an important act of solidarity, which will allow approximately one third of the five million Venezuelan refugees and migrants in the region to formally access services and contribute to the Colombian economy". The UNHCR and the International Organization for Migration (IOM) praised these initiatives. The High Commissioner, Filippo Grandi, expressed that "it is an emblematic humanitarian gesture for the region, even for the whole world" ("UN praises Colombia's decision to give temporary protection to the 1.7 million Venezuelans residing in the country", 2021). Likewise, IOM Director General António Vitorino indicated that "the regularization of Venezuelan refugees and migrants in Colombia through the very generous adoption of the temporary protection status is fundamental to facilitate their socioeconomic integration and access to the National Health System" ("IOM and UNHCR applaud Colombia's decision to regularize refugees and migrants from Venezuela", 2021).

Conclusions

The Venezuelan migratory crisis has led to a situation of vulnerability and systematic disregard for the human rights of Venezuelan migrants in Chocó and Colombia, to the point that in order to access health services this population has had to resort to the administration of justice in search of protection. In this sense, several normative instruments have been generated in favor of the protection of this population, one of them has been, undoubtedly, the tutela action as a mechanism to protect the rights of this population.



This has allowed Venezuelan migrants to have access to health services, which at first sight had been denied to them. Secondly, another instrument that emphasizes the regularization of their migratory status in order to favor access to public services, including access to health services.

Consequently, the Colombian State has applied an unprecedented conventional control by creating the ETPV, which has become a precedent of migratory regularization, the first of its kind in the region. This instrument, through a flexible migratory regularization process, allows the protection of the human rights of this population, correcting the transgressions presented by the rigorous migratory system, being adopted under the Venezuelan social reality and establishing itself as the basis of a new perspective in favor of the human guarantee in the face of the migratory crises present in the American region.

In view of the above and the emphasis placed by the SIPDH on the construction of legal processes of adaptation and guarantee of rights under the so-called control of conventionality, as well as the existence of the legal-social dynamics of the different States of the Americas, which demand the construction of a nucleus of rights guarantees, capable of generating a standard of protection and care for people beyond the strict borders of the States, the use of the ETPV is proposed as a standard, under the inspiration of its spirit of guaranteeing and protecting the human rights of the migrant, through the flexibility of migratory regularization and the concept of safeguarding human dignity, as a vulnerable subject according to the circumstantial reality of the State of origin. This results in the timely implementation of an *ius commune*, or common migratory law, that allows to address the problems common to the States of the Americas that are members of the OAS and that have accepted and ratified the American Convention on Human Rights (Von Bogdandy, 2015).

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