A 186 L. 34 – "ASOCIACION BENGHALENSIS ET AL. V. MINISTRY OF HEALTH AND SOCIAL WELFARE – FEDERAL ON AMPARO LAW 16986" CSJN - 01/06/2000

NATIONAL ATTORNEY GENERAL'S OFFICE

- I -

At pages 2-17, the Benghalensis Association, et al., in their capacity as non-governmental entities that undertake activities against the Acquired Immune Deficiency Syndrome, filed a special petition (amparo) to require the National Ministry of Health and Social Welfare to meet its obligation to assist, treat and rehabilitate patients with AIDS and, in particular, provide medicine, in accordance with arts. 14, 20, 43 and 75, sec. 22 of the National Constitution, and Law 23.798 and its corresponding Regulation 1244/91. They claimed that Law 23.798 declared the fight against AIDS a national interest, and established that the Ministry of Health and Social Welfare, as an intermediary of the Subsecretary of Health, is the Law's Enforcement Authority and is obligated to provide the necessary medicine and reagents.

They affirmed that, according to national and international studies, the interruption of the treatments reduces the effectiveness of the drugs that have already been administered to patients and, finally, they asked that as a precautionary measure, the medicine and reagents that had been required by the provincial, municipal programs and any other person be ordered to be provided.

- II -

At pages 207 – 210, the trial court judge agreed to the precautionary measure, and informed the Ministry of Health and Social Welfare (Secretary of Resources and Health Programs and the Program to Fight Against Human Retroviruses –AIDS/STDs) that it must acquire and provide, to each one of the country's healthcare providers, the reagents and medicine included in the 13 May

1994 Basic Handbook and those approved by the ANMAT (National Administration of Medicine, Food and Medical Technology) during 1995 and 1996.

- III -

The Federal Government, at pages 238 – 252, in answering the required report in accordance with Art. 8 of Law 16.986, requested the denial of the special petition because, it assured, the Minister always complied with Law 23.798, in so far as this law only obligates it to administer a central program in which other similar programs developed by local orders are an important part.

The government alleged that the plaintiffs did not have legal standing, as they did not claim a violation of a concrete right and, with respect to the provision of medicine, the National AIDS Program envisages a distribution mechanism by means of external providers -- top health officials of the provinces and the City of Buenos Aires. Accordingly, the Ministry is not the only party responsible, as the other providers have the exclusive right to act upon the request of their patients, within their budgetary restraints, and that, moreover, the Enforcement Authority always provided, through the National Program, the medicine required by different jurisdictions.

Finally, the government asserted that it negotiated the funds necessary for the financing of the Program and that the budget is an institutional act not subject to the control of the judges.

- IV -

At pages 554 – 559, the trial court judge upheld the special petition and ordered the Federal Government (Ministry of Health and Social Welfare) to fulfill its obligation to assist, treat and, in particular, provide regular, timely and continuous medicine to the ill in the nation's hospitals and health care clinics.

To reach this conclusion, the judge ruled that art. 43 of the National Constitution recognizes the legal standing of the associations with respect to incidental collective rights in general. Particularly in the case at hand, it is necessary, as a legal requirement – Law 23.798 – to preserve the privacy of the affected to avoid any marginalization or humiliation.

The judge added that said law declared as a national interest the detection, research, diagnosis and treatment of Acquired Immune Deficiency Syndrome and that the Enforcement Authority of the law is the Ministry of Health and Social Welfare, through the Subsecretary of Health, so that the State is responsible for the provision of medicine, drugs and reagents, as the problem presented by AIDS does not stop with the person who suffers from it but rather its contagious effects spread to the entire society.

The judge held that, in the present case, the State did not fulfill its duty to fully provide the medicine, including the drugs approved by ANMAT in 1996 (SAQUINAVIR, RITONAVIR and INDINAVIR), and that, while it is true that the provision of those medicines is carried out by way of the care centers of the patient's jurisdiction in accordance with ratified conventions, one cannot interpret the duty as a transfer of responsibility by the Ministry to other jurisdictions. In this regard, the performance expected from the Ministry, as the primary agency responsible for care of the sick, is that it must anticipate the need and send, at the appropriate time, the new batch of medicine to the care provider of the respective jurisdiction to be provided to the patient upon request so that there is no interruption in the treatment.

The judge noted that the defendant's arguments are contradictory in that, on one hand, the defendant says that it properly fulfills its obligations and, on the other, tries to minimize them by contending that it only administers the National Program, of which all the provincial jurisdictions

and the City of Buenos Aires are a part that, in turn, contribute to support the costs and the responsibility for the various measures.

With respect to the funds that are assigned to the program to fight AIDS, the judge said that (s)he was not informed and was unable to determine the total that the Ministry estimated in the 1996, 1997 and 1998 fiscal years, but that from the transcript of the statements of the Secretary of Resources and Health Programs in the defendant's filing, the programs are not carried out regularly, especially pertaining to the purchase of medicine. Furthermore, the Ministry did not prove any fact that would allow one to conclude that the care providers that were supplied medicine in the required quantities did not satisfy the patients' demands and that, even under such a hypothetical situation, the Ministry is not exempted from responsibility.

The judge held moreover that from the reports provided by the National Pediatrics Hospital "Prof. Dr. Juan P. Garrahan" (pages 212 – 213), the Coordinator of the AIDS Program of the Secretary of Health of the City of Buenos Aires Municipality (pages 314 – 333, particularly pages 314 and 331 – 333), the General Hospital of Acute Care "Juan A. Fernández" (pages 423 – 424), the Hospital of Clinics "José de San Martín" (page 394), the National Hospital "Prof. A. Posadas" (pages 342 – 390), and the Ministry of Health of Buenos Aires Province, through the Coordinator of the STD and AIDS Program of that Ministry (pages 505 – 548), it is clear that the defendant did not fulfill its obligation, as National Enforcement Authority, to diagnose, assist and treat those affected by the disease, including its related pathologies, in violation of art. 1 of Law 23.798, placing in grave risk not only the affected patients but the entire community.

- V -

At pages 586 – 588, the Federal Court of Appeals, Federal Administrative Court (Chamber 1) upheld the ruling of the trial court. To reach this decision, the judges confirmed that the parties have legal standing as the special petition can be brought against "any form of discrimination" by the "affected party, the public defender and the associations that work towards those goals", within which they are registered and authorized to function. With respect to the exhaustion of other procedural remedies, they noted that in the lower court, the complaints to the Ministry of Health and Social Welfare (conf. pages 132 – 136) aimed at regularizing and guaranteeing the provision of necessary medicines and reagents for the assistance and treatment of patients were verified.

The court declared that, in accordance with the constitutional mandate to protect life and health (cf. Preamble, arts. 14, 14 revised, 18, 19 and 33) and in compliance with the covenants of constitutional rank and Law 23.798, the Federal Government has the specific obligation to fight acquired immune deficiency syndrome through programs that aim to detect, investigate, diagnose and treat the disease, and to prevent, assist and rehabilitate; in particular when, as in this case, the entire community is potentially in danger. In short, the failure by the State to fulfill, or its poor performance in fulfilling, its duty to provide the medicine constitutes an omission that borders on a violation of the human rights recognized in the National Constitution, to which this special petition appears, in principle, an adequate judicial remedy.

- VI -

At pages 591 – 607, the Federal Government submitted a special petition upon determining that the decision violated the right to property and the principles of trial defense, of division of power and supremacy of the laws (arts. 17, 18, and 31 of the National Constitution).

It asserted that the first of those principles was violated by an erroneous interpretation of Law 23.798 and that, in the current case, a direct and immediate relation exists with the constitutional right to health of the entire population. The government maintained that the decision raises serious institutional issues because the questioned decision exceeds the mere individual interests of the parties and directly affects the community, as the lower court failed to consider the true scope of Law 23.798 and the need to harmonize it with the budget law, and that it affects the politics of health for which the Ministry is responsible within the framework of the law and its responsibility for administering credit allocated by the National Budget. In particular, the government complains about the implications that the decision may have on its future responsibilities and its impact on the legitimate interests of the national economy.

The government argued, as well, that the judgment was arbitrary because the judges failed to address questions brought to its attention, arbitrarily interpreted applicable law and departed from the written evidence of the case and the existing law, as they did not examine the content of the invoked norms that were fundamental to the defenses presented, and required the Ministry to be the exclusive provider of medication via institutional means that are independent of it.

The government asserted that the petitioners have no legal standing, given that they did not show what interest they are defending or who the affected patients are, and further argued that there is no judicial case as no injury, restriction, disturbance or threat of a constitutional right has been demonstrated. It affirmed that, on one hand, art. 1 of Law 23.798 contemplates the treatment, detection, research, diagnosis, prevention, assistance and rehabilitation of the illness and its related pathologies and, on the other, art. 4 envisages that the health authorities must

develop programs aimed at fulfilling the tasks described by art. 1 and administer the resources necessary for their implementation. Regarding these regulations the lower court inferred, erroneously, that the Ministry is exclusively obligated to provide the medicine, to the exclusion of the other health jurisdictions, failing to note that the respective health authorities in each jurisdiction are responsible for implementation. Moreover, as the National Constitution and the Provincial Constitutions envisage the right to health, the responsibility is shared by the local States.

The government explained that the health system of our country is a federal system, as the responsibility of the provincial States has not been delegated to the federal government and, in this sense, the provincial constitutions have reaffirmed their local character. Thus, the health care providers depend on the provinces and municipalities. In this particular case, if the provinces do not send the necessary information on time and in the correct form, they make the proper implementation of the AIDS program difficult or even impossible, as there is no Federal Government responsibility. In that regard, the lower court's ruling unjustifiably freed the provinces of their primary obligation to assist, as it only required the National Enforcement Authority to implement the law. Art. 21 reinforces this interpretation by establishing that the expenditures required for the implementation of art. 4 will be paid by the Federal Government and by the respective budgets of each jurisdiction. Moreover, the Ministry always complied with the requirements of Law 23.798 "within the ascribed budget, with available funds and application to the Program" and all the country's health jurisdictions must furnish the means to accomplish its execution and administer the resources for its financing and implementation, without prejudicing the Ministry's task of administration, technical assistance and coordination.

The National AIDS Program, with respect to laboratory tests and the provision of medicine, established a mechanism that is implemented by external providers – independent of the Federal Government – comprised of the highest health authorities of the provinces and the City of Buenos Aires. On this basis, they carry out their duties to the Program and satisfy, though the hospitals and health centers of each jurisdiction, the needs of the sick.

In sum, the lower court, by ordering only the defendant to provide the drugs to all the registered patients, ignored Law 23.798, which obligates the providers to provide medicine; Law 24.455, which requires the social welfare programs to provide coverage; and, finally, Law 24.754, which extends the obligation to the system of prepaid medicine companies.

The government maintained, finally, that the budget is an institutional act not subject to judicial control, as the contrary would mean contradicting the principle of division of powers and, moreover, because it cannot directly and immediately affect rights of third parties.

- VII -

At page 614, Chamber 1 of the Federal Court of Appeals, Federal Administrative Court, granted the special petition by finding the scope and interpretation of a federal regulation debatable and denied it was arbitrary, in response to which the Ministry submitted the complaint before Your Excellency.

- VIII -

Based on the aforementioned, an opinion is required, firstly, regarding the legal standing of the plaintiffs to make the present special petition in defense of their interests and of their clients. In this regard, art. 43 of the National Constitution expressly recognizes that parties potentially different from those affected directly can legitimately lodge an expedited amparo

action, among others, associations, for an act or omission that, actually or imminently, injures, restricts, alters or threatens in an arbitrary or illegal manner, rights recognized by the Constitution, a treaty or a law, including those of collective impact.

In this regard, the Public Ministry has submitted that the National Constitution, by virtue of the reform introduced in 1994, contemplates new mechanisms to protect users and consumers and, for that purpose, widened the spectrum of legitimate parties who can file an action, which traditionally was limited to those who were named parties of an individual subjective right (*in re* S.C.A.95 L.XXX "Asociación de Grandes Usuarios de Energía Eléctrica de la República Argentina v. Buenos Aires, Pcia. de et. al on declarative action", 29 August 1996) and accordingly, under such rulings, Your Excellency denied an exception to the lack of standing in its ruling of 22 April 1997.

I believe it appropriate to clarify that the articles of association of the petitioners, Benghalensis Association, Desdica Foundation, Foundation for Womens' Studies and Research (FEIM), Intilla Civil Association, Foundation R.E.D., Foundation CEDOSEX (Center for Sexuality Documentation), Argentina Foundation to Assist Children with AIDS, and the Civil Association S.I.G.L.A., provide that their goal is to fight AIDS and, as a consequence, they have legal standing to submit a special amparo petition against the State for alleged failure to comply with Law 23.798 and its respective regulation.

As such I think that their legal standing is established, not only in the vague interest that they comply with the Constitution and the laws, but in their character as named parties of a collective right to protect health by endeavoring to prevent, assist and rehabilitate the sick that suffer from Acquired Immune Deficiency Syndrome and its related pathologies, in addition to

the law that helps them fulfill one of the purposes of their creation which, in this case, is the fight against AIDS.

Without prejudice to the above, and as Your Excellency has maintained in "Consumidores Libres Cooperativa Limitada de Provisión de Servicios de Acción Comunitaria on amparo", in the ruling of 7 May 1998, the incorporation of general or widespread interests into constitutional protection, in no way diminishes the requirement to show how such rights have been violated by an unlawful act or why a serious threat that it may happen exists, as is necessary to make the special petition viable. In effect, as clarified by the Court, "the requirement that the Judiciary intervene in the hearing and deciding of 'lawsuits' (art. 116 of the National Constitution), with the scope that this Tribunal has repeatedly granted to this expression, has not been an object of reform, in such sense. Thus, for much time this court has indicated that said 'lawsuits' are those that concretely pursue the determination of a dispute between adverse parties." Furthermore, Your Excellency added that "from another perspective, it should be pointed out that the protection that the new constitutional text grants to the general interests does not prevent verifying whether these interests, notwithstanding their complex definition, have been violated by an unlawful act, or are in danger of being so threatened."

In this regard, it should be recalled that the Tribunal has declared that, whenever the petition is not one of mere consultation, nor a merely speculative inquiry, but rather responds to a case that seeks to guard against the effects of an act in the making that attributes illegitimacy and damage to the federal constitutional system, it constitutes a suit as defined by the Fundamental Law (conf., among others, 310:606, 977 and 2812).

In my view, it is feasible to conclude that, in the lower court, a contentious case took shape, as defined by art. 116 of the National Constitution and art. 2 of Law 27, to trigger the exercise of jurisdiction, whenever a concrete, actual and imminent injury exists due to the failure to provide reagents or medicines (in contrast to situations in which other people find themselves) and, in particular, when related to the consequences of failing to detect or assist the virus carriers, the infected and the sick or interrupting their treatment.

- IX -

Furthermore, I believe that the special petition is properly admissible, as by way of its submission it has injected into the trial the interpretation of federal regulations, and the final decision of the lower court is contrary to the right that the appellants argue is established in those regulations.

- X -

Regarding the applicable law of this matter, it is worth noting, in my view, that the life of individuals and its protection – particularly the right to health – constitute a fundamental good in itself that, in turn, is essential for the exercise of personal autonomy (art. 19 of the National Constitution). The right to life, more than a right not enumerated in the terms of art. 33 of the National Constitution, is an implicit right, as the exercise of the expressly recognized rights necessarily require it. In turn, the right to health, particularly when it concerns serious illnesses, is intimately related with the first and with the principle of personal autonomy (art. 19 of the National Constitution), as a seriously ill individual is not in a condition to freely choose his own life plan, a basic principle of autonomy.

Furthermore, the right to health, from the regulatory point of view, is recognized in the international treaties at the constitutional level (art. 75, sec. 22 of the National Constitution), among them, art. 12, sec. c of the International Covenant on Economic, Social and Cultural Rights; sec. 1, arts. 4 and 5 of the American Convention on Human Rights, Pact of San José, Costa Rica; and sec. 1 of art. 6 of the International Covenant of Civil and Political Rights, extending not only to an individual's health but also to collective health.

The State should not only abstain from interfering in the exercise of individual rights but should also have, moreover, the task of providing positive benefits in such a manner that the exercise of those rights does not become illusory. In this regard, the legislature passed Law 23.798, whose art. 1 declared the fight against Acquired Immune Deficiency Syndrome a national interest, intending by this the detection and research of its causal agents, the diagnosis and treatment of the disease, its prevention, assistance and rehabilitation, including that of its related pathologies, as well as the measures to avoid its spread, and art. 4 places obligations on the State, among them, the development of programs aimed at fulfilling the actions described in art. 1 by allocating the resources for its finance and implementation. Moreover, the task of promoting the training of human resources, facilitating the development of research activities, applying methods that assure the effectiveness of the highest quality and safest requirements, and implementing the information system that is established for the detection of the virus and its antibodies in human blood destined for transfusion and production of plasma or other blood derivatives of human origin for therapeutic use.

These principles lead to the conclusion that the State has the obligation to provide the reagents and medicines necessary for the diagnosis and treatment of the disease. Even more, art.

8 of the law expressly recognizes the right of carriers, the infected, or the sick to receive adequate assistance.

- XI -

Therefore, we must analyze whether Law 23.798 imposes such obligations with exclusivity to the Federal Government, or in concurrence with the local States.

On one hand, the National Ministry of Health and Social Welfare, through the Secretary of Health, is the Enforcement Authority of Law 23.798, and on the other hand, the same art. 3 provides that "its execution in each jurisdiction will be the responsibility of the respective health authorities whose aim will be able to pass complementary rules that they consider necessary for the best fulfillment of the same and its regulation." Moreover, the law expressly recognizes for the local authorities, among others, the following powers: establish and maintain current the information of their areas of influence corresponding to the prevalence and incidence of carriers, those infected and those ill (art. 11); apply sanctions – acts or omissions that involve an infringement of the preventive rules of this law and its corresponding regulations – (art. 17); and, finally, verify compliance through inspections or report requests, through which they will be able to require the assistance of the public or request a search warrant from the competent judges (art. 20).

For its part, art. 3 of the issued regulation of the law (decree 1244/91) establishes that the Ministry of Health and Social Welfare must secure the collaboration of the provincial health authorities and similarly that the complementary regulations that are issued must be consistent and their criteria uniform. Finally, it adds that the Ministry of Health and Social Welfare, through the Subsecretary of Health, and the top authorities of the provinces and the Municipality of the

City of Buenos Aires are considered health enforcement authorities. With respect to the expenditures that complying with the law requires, art. 21 expressly states that they "will be paid by the Federal Government, attributed to general income and by the respective budgets of each jurisdiction."

Nevertheless, as Your Excellency has maintained, it is the task of the interpreter to examine the true sense and scope of the law through a careful and in-depth examination of its terms that evaluates the reality of the rule and intent of the legislature, because whatever the nature of the rule, there is no method of interpretation better than that which considers the law's final aims (Judgments: 308:1861). In effect, the Court has said that the substance of the rule is the spirit and goal of the law (Judgments 312: 1614; 313:1293, among others) and that the first source to determine that will is its text (Judgments: 308:1745; 312:1098; 313:254). Finally, it is worth remembering that "beyond what the laws appear to say literally, it is appropriate in interpretation to inquire into what they say legally, that is to say, in connection with the other rules that make up the legal system of the country, to find harmony and consistency among them and, particularly, with the principles and guarantees of the National Constitution" (Judgments: 308:1118).

Art. 3 of the law is clear in that it establishes that the Enforcement Authority is the National Ministry of Health and Social Welfare, without affecting the power of the respective health authorities in each jurisdiction to implement it in compliance with art. 1, which declares that the fight against AIDS is a national interest. In my opinion, it is necessary to distinguish between the two levels of implementation of the law in question: on one hand, the Enforcement Authority, primary party responsible for fulfilling the law's requirements of prevention,

assistance and rehabilitation of the ill. To this end, the national legislature created a unique system that it declared of national interest whose fulfillment, as a consequence, is the responsibility of the Federal Government. On the other hand is the level of the local authorities that, in exercising their responsibilities recognized under the law, can issue complementary rules but that, even in that event, the National Enforcement Authority – National Ministry of Health and Social Welfare – is responsible for ensuring that the criteria of those rules are consistent and uniform (conf. art. 3 of regulatory decree). Additionally, when the Executive Power, by way of a regulatory decree, affirms that the health enforcement authorities are the National Ministry of Health and Social Welfare and the top authorities of the particular provinces and the Municipality of the City of Buenos Aires, it is an express reference to compliance with the decree. In effect "they are considered current health enforcement authorities …." This is reasonable as the decree anticipates questions not included in the law, such as the incorporation of AIDS prevention in primary, secondary and tertiary school programs (cf. art. 1 of regulatory decree).

While it is true that the expenses required to comply with the law should be paid by the Federal Government and by the respective budgets of each jurisdiction, that does not mean that the Federal Government has delegated to the local States its responsibility, as National Enforcement Authority, to implement a system to fight AIDS, which was expressly declared a national interest. Therefore, even when the reagents or medicine are distributed by the local implementing bodies, the Federal Government is responsible for compliance with the law in regard to third parties, without prejudice to the responsibility that has been designated for the

provincial jurisdictions or private institutions (social welfare programs or prepaid medicine systems).

Accordingly in my opinion, the State's responsibility, as Enforcement Authority that designs the medicine distribution plan, should not be only to provide medicine, but rather it should also monitor the plan to achieve full compliance, assuring the continuity and regularity of medical treatment. Art. 3 of the law recognizes that the Minister of Health and Social Welfare can act in any part of the country to effect compliance with the law.

- XII –

Regarding the argument about judicial control with respect to the Ministry's budget and its implementation, in my opinion it plays no part in the case at hand, as the appellant erroneously contends, because the judges limited themselves to requiring the Federal Government to comply with Law 23.798 and its regulatory decree, consistent with the rights provided by the National Constitution, above and beyond the wisdom of the means employed by the legislature or Ministry of Health and Social Welfare.

- XIII -

By virtue of the above, I hold that the appealed ruling should be confirmed in the matter of the special petition.

Buenos Aires, 22 February 1999

NICOLAS EDUARDO BECERRA

Buenos Aires, 1 June 2000

Regarding the proceeding: "Asociación Benghalensis et al. v. National Ministry of Health and Social Welfare – re/ amparo law 16.986"

Considering:

That the questions discussed in the special petition submitted by the Ministry of Health and Social Welfare have been adequately resolved in the Attorney General's report (p. 618-623 reverse side), to which we refer for brevity. Accordingly, the special petition partially conceded at p. 614 is deemed formally admissible, and the appealed sentence is upheld. With costs. Notify the parties and return the file.

JULIO S. NAZARENO (dissenting)- EDUARDO MOLINE O'CONNOR (per his opinion)- CARLOS S. FAYT (dissenting)- AUGUSTO CESAR BELLUSCIO - ENRIQUE SANTIAGO PETRACCHI (dissenting)- ANTONIO BOGGIANO (per his opinion)- GUILLERMO A. F. LOPEZ - GUSTAVO A. BOSSERT - ADOLFO ROBERTO VAZQUEZ (per his opinion).-

OPINION OF MR. VICEPRESIDENT DOCTOR DON EDUARDO MOLINE O'CONNOR AND MR. MINISTER DOCTOR DON ANTONIO BOGGIANO

Considering:

1) That Chamber I of the Federal Court of Appeals, Federal Administrative Court, sustained the ruling of the trial court, and by upholding the special amparo petition submitted by the Benghalensis Association and other non-governmental entities that undertake activities against the AIDS virus, required the Federal Government – Ministry of Health and Social Welfare – to fulfill its obligation of assistance, treatment and especially provision of medicines – regularly, in a timely fashion, and continuously – to those with this disease who are registered in the nation's public hospitals and health care providers.

2) That, to so decide, the court determined that the plaintiffs had sufficient legal standing to submit the present petition based on arts. 5 of Law 16.986 and 43 of the National Constitution in

so far as they establish that a special amparo petition can be submitted against any form of discrimination by the associations that work towards those goals and in the scope in which they are registered and authorized to function. The court added that Law 23.798, which declares the fight against AIDS a national interest, provides that the health authorities must develop programs aimed at detecting, diagnosing and treating the disease and administering the necessary resources to finance the programs, which should be paid by the Federal Government and the respective budgets of each jurisdiction. The court understood that the failure or poor performance of the State in its obligation to provide medicine for the treatment of the disease constituted an omission that violated the rights to life and health recognized by the National Constitution and by the human rights treaties (art. 75, sec. 22).

3) That against this ruling the defendant submitted the special petition that was partially granted with respect to the interpretation of the regulations of Law 23.798 and denied with respect to the claim of arbitrariness, which led to the present complaint.

4) That the federal remedy is justified in as much as it has challenged the wisdom and application of a rule of federal nature – Law 23.798 – and the decision in the case has been adverse to the desire of the appellant.

5) That the Ministry of Health and Social Welfare complained that the associations that brought this special amparo action lacked true legal standing to submit it. The Ministry contends that the lower court erroneously interprets Law 23.798 to exclusively require the Federal Government to provide medicine, ignoring in this way the requirements of arts. 3 and 21 of the regulation in question, which also place responsibility on the provinces for the required implementation and expenses of the program to fight AIDS. The Ministry adds that the health system in our country

is federal and shared, and that there is a joint responsibility among the Federal Government, the provinces and the municipalities. It emphasizes that the Federal Government fully complies with the requirements of the law within the assigned budget. It points out that the court interferes in a question that affects the sphere reserved to the Executive Branch, as the law authorizes the Executive to provide the appropriate and advisable measures for implementing the program discussed in the proceeding. In sum, the Ministry asserts that the lower court, by requiring only the defendant to provide drugs to all the registered patients, ignored Law 23.798, which requires health care providers to provide the medicine; Law 24.455, which obligates the social welfare programs to provide coverage; and, finally, Law 24.754, which imposes a significant requirement as well on the prepaid medicine systems. Finally, the Ministry argues that the decision-making affects the credit distribution system for public health policy assigned by the budget, which is an institutional act not subject to judicial control.

6) That when the scope of a federal legal norm is at issue, the Tribunal is not limited in its ruling by the arguments of the parties but rather it is incumbent on the Court to issue a ruling on the matter at issue (Judgments: 308:647; 314:1834; 318:1269, among others).

7) That the petitioners have legal standing to bring the present action because, as was shown during the proceedings, there are patients in need of medicine that must be provided (p. 338) and similarly, the object of the claim – provision of medicine – is contemplated within the objectives of the statutes. Under such circumstances, the requirements under art. 43 of the National Constitution become relevant in so far as it recognizes legal standing for parties potentially different from the directly affected (Judgments: 320:690; 321:1352) and the dispute at hand constitutes a “case or controversy” in the terms indicated by the jurisprudence of this Court that

requires that the determination of a disputed right be between concrete adverse parties. (Judgments: 275:282; 308:1489; 313:863, among others).

8) That the preeminent intention that inspired the passage of Law 23.798 was the protection of public health. Indeed the intention of the legislature was clearly manifested during the parliamentary debate (Judgments doctrine: 182:486; 296:253; 306:1047) in which it was expressed: "the growth of the number of cases in relation to the time appears to signal for Argentina the establishment of an epidemic with characteristics similar to those of the northern hemisphere … Thus prophylactic measures to control the expansion of the disease in our environment must be adopted" (Record of Senate Chamber Sessions, 1 June 1988, p. 861) (Judgments: 319:3040).

9) That this Court since its origin has understood that the Federal Government is obligated to "protect the public health" (Judgments: 31:273) as the right to health is understood as part of the right to life, which is "the first natural right of the human preexisting all positive legislation that, obviously, is recognized and guaranteed by the National Constitution." (Judgments: 302:1284; 310:112). The Preamble of the National Constitution is understood in this same light, which provides that "when finding expressions referring to the general welfare, preservation of health must be the indisputable priority and the primary objective" (Judgments: 278:313, considering 15).

10) That, beginning with the constitutional reform of 1994, the right to health has been expressly recognized as a constitutional priority in art. 75, sec. 22. In this vein, art. XI of the American Declaration of the Rights and Duties of Man establishes that every person has the right to have his or her health protected by public health and social measures related to nutrition, clothing,

housing and medical assistance that correspond to the level permitted by public and community resources. Art. 25 of the Universal Declaration of Human Rights provides that every person has the right to a living standard adequate to assure the person, and his or her family, health and well-being, in particular medical assistance and necessary social services. Art. 12 of the International Covenant of Economic, Social and Cultural Rights established that among the measures that State Parties must adopt to assure full implementation of the right of a person to enjoy the highest level of physical and mental health possible, must be the prevention and treatment of epidemic, endemic, occupational and other types of diseases, and the fight against them (sec. c) and the creation of conditions that assure everyone medical assistance and medical services in case of illness.

11) That, in a recent ruling, this Tribunal required the Autonomous City of Buenos Aires to provide intensive therapy to a minor – for a longer period than contemplated in the adhesion contract signed with the prepaid medical service – in a public hospital. The Tribunal ruled that art. 20 of the Constitution of the Autonomous City of Buenos Aires was applicable; it guaranteed the right to comprehensive health and established that public health expenditures are a social investment priority (Judgments: 321:1684).

In such circumstances, it is inferred that the protection of the right to health, according to this Court, is an urgent obligation and top investment priority of the Federal Government.

12) That, in this context and before interpreting how the responsibilities of the Federal Government and the provinces in complying with Law 23.798 should be distributed, it is necessary to determine the standard of treatment that the regulation in question establishes, as responsibility could be misattributed without first establishing the level required for the legal

system to appropriately fulfill its responsibility to the people affected by acquired immune deficiency syndrome.

13) That, in this regard, if art. 4 of Law 23.798 is limited to generally providing that the Federal health authorities, applying methods that assure maximum quality and safety, must develop programs that aim to detect, investigate, diagnose, treat, prevent and rehabilitate, and should allocate the resources for their financing and implementation, art. 8 establishes the true scope of those treatments by signaling that the infected have the right to "receive adequate assistance".

14) That from this fact it is possible to reasonably conclude that for the treatment to be adequate it should be administered continuously and regularly, particularly keeping in mind the risks associated with interrupting the provision of medicine for those suffering from the consequences of HIV/AIDS.

15) That, in such circumstances, the lower court's criticism of the Federal Government for its omissions was justified, as the conduct consisted precisely in not fulfilling its obligation to assist, treat, and provide medicine – regularly, in a timely manner and continuously – to those patients registered in the hospitals and with the health care providers of this country who suffer from the consequences of this disease.

In this regard, the appellant's grievances do not successfully weaken the informative evidence supplied in the proceedings which the judges found valuable in the case and correspondingly that the appellant did not comply with the responsibility to provide adequate treatment imposed by Law 23.798.

16) That with respect to whether this obligation is found exclusively to be the duty of the Federal Government or a concurrent duty with the provinces, this Tribunal shares the line of argument

indicated in point XI of the Federal General Attorney's report, and we refer to its basic points for brevity, which concludes that, noting the importance of art. 1 of the law that declares the fight against AIDS a national interest, the Federal Government as the authority that must apply the law (art. 3) is responsible for the fulfillment of said regulation in the entire territory of the Republic, regardless of whether the expenses that the implementation requires must be paid by the Federal Government or the budgets of each jurisdiction (art. 21).

17) That, therefore, the appellant's attempt to free itself from its responsibility by asserting that the provinces prevent the implementation of the program to fight AIDS by not sending the necessary information in a timely fashion and proper form to give adequate attention to the ill lacks reasonableness, when it is the Federal Government that is responsible for ensuring the continuity and regularity of medical treatment.

18) That, moreover, even if the position of the appellant were accepted, it does not show in what fashion the obligations that the ruling imposes exceed those to which it should be obligated if Law 23.798 is interpreted in the sense it advocates. Indeed, the appellant does not assert that the challenged ruling requires it to provide medicine in excessive quantity or with more frequency than its own authority allows, in compliance with legal regulations and abiding by the planned budgetary limitations, nor that the criterion that it favors results in fewer expenditures.

19) That, in this regard, the special petition never refers in the least to what quantity of patients was found in treatment at the time of the petition's submission, how many of them were anticipated to have been treated by the Ministry of Health's programs, nor what amount of patients were registered in the different health care providers of each jurisdiction.

20) That, finally, it is important to note that the appellant's criticism that the appealed ruling ignored Laws 24.455 and 24.754 lacks even a minimal basis as the appealed ruling does not assert, either explicit or implicitly, that the defendant is responsible for providing the benefits that the regulations require.

Accordingly, and in concurrence with the report of the Federal Attorney General, the appealed ruling is upheld. With costs. Notify the parties and return the files.

FDO.: EDUARDO MOLINE O'CONNOR - ANTONIO BOGGIANO.-

OPINION OF MR. MINISTER DOCTOR DON ADOLFO ROBERTO VAZQUEZ

Considering:

1) That the ruling of Chamber I of the Federal Court of Appeals, Federal Administrative Court, upheld the decision of the lower court that recognized the special petition submitted by Asociación Benghalensis, et al. and ordered the Ministry of Health and Social Welfare to assist and treat those patients who suffer from the consequences of the HIV/AIDS virus, and additionally provide medicine regularly, in a timely manner and continuously.

2) That to so decide, the lower court considered, first, that the petitioners had legal standing to petition for the remedy they sought, as art. 43 of the National Constitution envisages a petition that can be filed against "any form of discrimination" by the "affected, the public defender and the associations that work towards those goals", within the scope in which they are registered and authorized to function.

3) That the court similarly considered that the plaintiff's position was improved because the complaint to the Federal Government aimed to require the Government to correctly fulfill its duty in accordance with current law, given that its obligations clearly arise from law 23.798.

It cited art. 1, which declares the fight against acquired immune deficiency syndrome a national interest, aimed at protecting public health through programs that detect, investigate, diagnose and treat the disease, as well as its prevention, assistance and rehabilitation; and art. 4, which establishes that the health authorities must develop programs aimed at implementing the actions described in art. 1 and must allocate the resources for their finance and implementation, to be "paid by the Federal Government, attributable to 'general income', and by the respective budgets of each jurisdiction".

The court further added that the Government's obligation to protect public health was a consequence of a constitutional imperative (Preamble, arts. 14, 14 revised, 18, 19 and 33) and compliance with covenants of constitutional rank (National Constitution, art. 75, sec. 22; Universal Declaration of Human Rights, arts. 3 and 25; American Convention on Human Rights, Pact of San José, Costa Rica, art. 4; International Covenant of Economic, Social and Cultural Rights, art. 12).

4) That in opposition to this ruling, the Federal Government – Ministry of Health and Social Welfare – submitted a special petition (p. 591 – 607) that was partially upheld by the court (p. 614).

5) That the special petition is formally accepted as it challenges the wisdom and application of a regulation of federal nature and the relevant decision of the lower court is adverse to the appellant's interests. It is important to remember the doctrine that provides that when clarifying regulations of the type indicated, this Tribunal is limited neither by the positions of the lower court nor of the appellant, but rather that it is incumbent to produce a ruling on the disputed point (art. 16, law 48), according to the interpretation that it properly confers (Judgments: 310:2682).

6) That the Ministry of Health and Social Welfare explained that its aim in filing its petition was not to stop providing medicine, but rather for this Tribunal clarify the true scope of the law with respect to the division of responsibility to each of the different jurisdictions.
It added that the provinces are an integral part of the system and are indispensable for an efficient implementation of the current regulation. At the same time it emphasized that the right to health is not only contemplated in the National Constitution but also in the provincial constitutions, from which one can infer that the actions aimed at its protection constitute a shared responsibility with the provinces – including the obligation to practically implement measures in the fight against HIV/AIDS.

Similarly it asserted that the responsibility of the provinces regarding health was not delegated to the Federal Government and the public health system of our country is a shared federal system in which the health care providers (hospitals and health centers) do depend not on the Federal Government but instead on the provinces and municipalities.

It later argued that Law 23.798 provides that the Federal Government cannot control the development of the hospital networks outside its competency and that there is no adequate assistance system that would permit compliance with the ruling of the lower court.

In another vein, the appellant argued that the case has important institutional ramifications, as the decision-making affects the politics of health undertaken within the framework of the specific law as well as the organization of the distribution of credit assigned by the National Budget.

7) That before any examination, it is necessary to analyze the viability of the special amparo petition at the lower court level and whether the present associations have legal standing to bring it.

It is appropriate to mention that the amparo is the simplest and briefest judicial proceeding to genuinely protect the rights sanctified in the Magna Carta. In this sense, this Court has said repeatedly that it "has as its objective an effective protection of rights" (Judgments: 321:2823).

In the current case, the denounced act (failure to provide required medicine for AIDS patients in a timely manner) was not denied by the Ministry of Health, although this omission could be imputed to it.

It is appropriate to remember that the rights that the plaintiff associations consider damaged are: the right to life, to people's dignity, security and integrity.

Similarly, the right to health contemplated in our Magna Carta in accordance with the incorporation of the international treaties referred to in art. 75, sec. 22, as well as the American Declaration on the Rights and Duties of Man that establishes that all people have the right to have their health protected by sanitary and social measures related to the provision of clothing, housing and medical assistance, corresponding to the level permitted by public resources and those of the community; the Universal Declaration of Human Rights, which in art. 25 provides that every person has the right to a living standard adequate to assure the person, as well as his or her family, health and well-being, and in particular the food, clothing, housing, medical assistance and social services necessary; and the International Covenant of Economic, Social and Cultural Rights, in art. 12, prescribes that among the measures that the States Parties must adopt

to assure the full implementation of the right of every person to enjoy the highest possible level of physical and mental health should be "…the prevention, treatment and control of epidemic, endemic, occupational and other diseases;" (sec. c), and "the creation of conditions that would assure to all medical service and medical attention in the event of sickness" (sec. d).

It is proper to add to this list the impact on the quality of life of the population infected by the HIV virus, given that the lack of respect of the right to health (physical, mental and emotional health) leads inexorably to this consequence.

Of everything stated, we conclude that the filing of the special petition appears appropriate for the immediate protection that should be provided.

8) That in connection with the legal standing of the petitioners, it is necessary to note that this Tribunal, in Judgments: 321:1352, held that the National Constitution – arts. 42, 43 and 86 – recognizes standing to bring an amparo action for parties potentially different from those directly affected.

In this sense, the second paragraph of art. 43 of the National Constitution – added during the 1994 reform – determines that "the affected party, the public defender and the associations that work towards the following goals, registered in accordance with the law, which will determine the requirements and forms of their organization, can submit this action against any form of discrimination related to the rights that protect the environment, competition, the user and consumer, as well as the rights of collective impact in general."

9) That one can clearly conclude, therefore, that one of the situations that the constituent member considered is that in which the effect of the implicated rights, by its nature, entails consequences that impact all those in the same category. It is thus necessary to emphasize that the offenses

referred to in art. 43 of the National Constitution have an expansive effect; hence it is sufficient that they violate or fail to recognize certain rights of one individual of a group because the violation surely has a bearing on the others.

The above-expressed does not imply denying legal standing to each of the patients, but rather makes possible, in view of the peculiar nature of the affected rights, the right of one or a number of associations to exclusively control the lawsuit.

In the present case, it was determined that there is a group of people inevitably associated with being infected by the HIV virus. The lack of timely and proper medicine appears to be a harm that injures their most profound feelings, convictions, etc., in addition to an eventual or immediate violation of their basic rights, depending on each particular case.

10) That given the above-expressed and keeping in mind that there still is no law to determine the requirements of registration and organizational form of the associations, it is appropriate to accept the plaintiffs' amparo petition, given that according to the established objectives in their statutes and registration laws with the Supervisory Board of Corporate Entities, they protect those suffering from AIDS by safeguarding rights like the rights to life, health and dignity, and the advancement of the common good.

11) That in the context indicated and before dealing with the following *thema decidendum*, it should be noted that the National Constitution makes the federal government responsible for providing those things that will lead to the nation's prosperity, the advancement and welfare of all the provinces, consistent with the noble aim contained in the Preamble of promoting the general welfare, a duty that is given to the Federal Government (Judgments: 321:1052), and that the national legislature can pass laws concerning intraprovincial activities that aim to promote

the general welfare that exceed those limitations, and can do so in the manner necessary to meet those ends (Judgments: 239:343; 257:159; 270:11).

12) That the previously expressed is relevant, given that the preeminent purpose that inspired the passage of Law 23.798 was the protection of public health (Judgments: 319:3040).

It should not be forgotten that the AIDS epidemic is not confined to one province in particular or certain provinces, but rather affects the entire territory of our country.

13) That the title of the law is "Acquired Immune Deficiency Syndrome (A.I.D.S.). Declaration of National Interest – The Fight against AIDS".

Art. 1 of the law declares "the fight against the Acquired Immune Deficiency Syndrome is of national interest, meaning by this the detection and research of its causal agents, the diagnosis and treatment of the disease, its prevention, assistance and rehabilitation, including of its related pathologies, as well as the measures to help avoid its spread, the most important being the education of the population."

14) That the resulting review shows the intent of the legislature to make the fight against HIV one of public nature as well as safeguard certain basic values to ensure social solidarity.

The doctrine of this Tribunal – found in Judgments: 306:1047 – drives the analysis of the parliamentary debate over Law 23.798, where it was expressed that "Given the properties of the virus, as a causal agent of the disease, its long period of incubation, and the large amount of mutations to which it is subject, it is difficult to foresee in a short time period the development of adequate prevention systems. Therefore, preventative measures should be adopted that are likely to control the spread of the disease in our environment" (Record of Senate Chamber Sessions, 1/6/88, p. 861).

15) That art. 3 of the regulation at issue provides that "The requirements of current law will be applicable to the entire territory of the Republic. The Enforcement Authority will be the National Ministry of Health and Social Welfare, through the Subsecretary of Health…"

It is appropriate to indicate that this decision to leave in the hands of the Ministry of Health and Social Welfare – as an exercise of its police power – the supervision and control of the law's enforcement, emphasizes that the objective that inspired its passage is the consolidation of good health of the entire nation.

16) That the previously stated does not imply ignoring that the execution of the law "in each jurisdiction is the responsibility of the respective health authorities whose purposes should dictate the complementary rules that are considered necessary for the best implementation of the same and their regulations" (final part of art. 3). This principle is reinforced by art. 20, which provides that all the provincial health authorities are authorized "to verify their compliance and their administrative regulations through inspections and/or requests for information as they deem pertinent, etc." and art. 4, which orders them to develop programs aimed at their fulfillment, promote the training of human resources, further the development of the activities described in art. 1, etc.

17) That to understand the role assigned to the provinces by Law 23.798, it should be recalled that the institutional operations of our federal government require an organic structure (central federal government and member states), which in many cases have shared interests in the same matter and thus require adequate coordination of functions.

In this sense, this Court has said that the provinces can approve procedural laws that implement the underlying laws issued by the federal government (Judgments: 320:89), and also

that considering the federal form adopted by the Constitution, the rule – and not the exception – is the existence of shared jurisdictions between the federal government and the provinces (Judgments: 310:2733).

18) That the articles of Law 23.798 should be interpreted while keeping in mind a sense of reconciling all the regulations with each other and harmonizing them with the rest of the legal code (Judgments: 300:1080. among others).

In accordance with that and the expressed in previous sections, it follows that the parties directly and primarily responsible for the adoption of the measures declared in arts. 3, 4 and 20 (indispensable for AIDS patients to be able to receive dignified attention, which includes the timely provision of necessary drugs) are the local governments.

The Federal Government, for its part, although it did not eradicate the disease – given that when medical science is involved the "result" has relative value – it established the baselines to fight the disease and it committed itself to organizing the efforts to achieve eradication. This is to say that it assumed a task of coordinating the implementation of the National Program to Fight against AIDS.

One can conclude, therefore, that in cases in which there is a concrete and proven failure to fulfill the responsibilities of the local governments (e.g., failure to provide the medicine in a timely manner and proper form), the Federal Government should respond directly to the victims.

However, its obligation in such cases is subsidiary to those responsibilities of the provinces, and there is no obstacle preventing it from subsequently making a relevant complaint to the provinces.

19) That the expressed reasoning is consistent with the objective that Law 23.798 seeks, which is to establish an efficient system that guarantees the protection and recuperation of AIDS patients.

Although the right to health is reaffirmed as independent, it is derived from the right to life and it is not just a requirement to refrain from harm but rather it entails the provision of benefits and requires acts by different levels of government, as specified in the text of the law. This is so because the fight against AIDS is a theme – common among them all – that requires adequate and efficient treatment aimed at furthering the principles of social security, to which revised art. 14 of the National Constitution confers an integral nature, and at assuring due respect to human rights and fundamental liberties – indispensible elements of every democracy –.

20) That, as can be seen, this Court must shed light on the regulation at issue and determine the role of the Federal Government in achieving goals such as the improvement of good health in accordance with the highest principles established in the Magna Carta and the international treaties. This is not a simple task as Law 23.798 addresses a question of multiple facets, which are susceptible to varied interpretations, among other reasons, for the possibility of direct and effective participation by the provinces in decisions of national scope.

21) That consistent with this line of thought, the arguments of the Ministry of Health and Social Welfare were the result of a foreseeable interpretation of the regulation, given the breadth of its requirements and the various forms of police power that can be manifested when it is concurrently enforced (arts. 104 and 107 of the National Constitution).

22) That the above-expressed leads to preliminarily uphold, as dictum, that we cannot in principle affirm that the Federal Government employees have acted fraudulently or are guilty in the carrying out of their duties, or that they acted without concern, with carelessness, apathy or

criminal intent, because they did not disregard the law as if it did not exist nor did they improperly delay its implementation, but rather they interpreted it in a way that was debatable but not arbitrary or unfounded. For that reason and the parts of the National Attorney General's report consistent therewith, the special petition is deemed admissible and the appealed judgment is upheld to the scope indicated. With costs. Notify the parties and, as appropriate, return the files.

ADOLFO ROBERTO VAZQUEZ.-

DISSENT OF MR. PRESIDENT DOCTOR DON JULIO S. NAZARENO AND OF MESSRS. MINISTERS DOCTORS DON CARLOS S. FAYT AND DON ENRIQUE SANTIAGO PETRACCHI

Considering:

That the special petition, partially granted at p. 614, is inadmissible (art. 280 of the Federal Code of Civil and Commercial Procedure). Therefore, after hearing the arguments of Mr. Attorney General, it is denied. With costs. Notify the parties and return the file.

JULIO S. NAZARENO - CARLOS S. FAYT - ENRIQUE SANTIAGO PETRACCHI.//-