H90 XXXIV APPEAL – "Hospital Británico de Buenos Aires v. National Government (Ministry of Health and Social Welfare)" – CSJN – 13/03/2001

Supreme Court:

-I-

Courtroom II of the Federal Social Security Court denied the special petitions brought by the representative of the Office of the Public Prosecutor and by the National Government (Ministry of Health and Social Welfare), against the judgment of pages 225-226. It held that the petitions reiterate assertions already stated in questioning the holding of the lower court, and that they express disagreement with the judgment, regarding – in both cases – foundations that are tied to questions of fact, proof, and common and procedural law. Finally, that the serious institutional allegations were not proven true in the case, given that neither the basic institutions of the republican system of government nor the principles and guarantees sanctified by the National Constitution are at issue (see p. 296).

Against said decision, the petitioner raises a complaint for reasons that essentially repeat those stated in the principal complaint. It points out that the denial failed to rule on the federal question proposed (Reporter pgs. 128-143 of the respective volume).

-II-

The relevant matter here is that the lower chamber vacated the holding of the prior court and upheld the special petition lodged by the Hospital Británico de Buenos Aires against the State (Ministry of Health and Social Welfare), by which the petitioner sought to declare Law 24.754 unconstitutional, understanding it to be contrary to the guarantees consecrated by arts. 14, 17, 28 and 33 of the National Constitution.

To so decide, the court held that the questioned law obliged the prepaid medicine entities to cover institutional coverage risks, like those derived from drug addiction and illness resulting from the HIV virus, which implicated an increase in the cost of the contracting that places the borrowers in an unfavorable situation to compete with entities like the social welfare agencies, recipients – it emphasized – of state funds and of a virtually captive clientele.

Said imposition – it held – illegitimately infringes on the freedom to contract and to undertake a lawful activity, since it does not involve the supervision by the State of a risky entity or activity, but rather impacts the structural content of private medical coverage contracts, under the pretext of health promotion that, by means of the public hospitals and the subsidized social welfare agencies, could be realized without detriment to the rights of individuals and of the medical organizations, which fulfill their social function based on their own premises of running of a business.

In opposition to such an understanding, the appellant submitted a petition pursuant to art. 14 of Law 48 (pgs. 242-261), which the court denied, citing pgs. 282-295, which gave rise to this complaint.

-III-

The complainant maintains principally – after stopping to examine the common, formal and proper requirements of a special petition – that the articulated remedy is admissible when – it argues – the wisdom of a federal regulation has been raised, in this case Law 24.754, to which it adds that the holding has serious institutional ramifications, since it can affect the provision of health services, damaging a system structured around the shared responsibility of the State, social agencies and prepaid medical entities.

The complainant alleges, furthermore, arbitrariness, as the judgment was issued by an incompetent tribunal, given that the plaintiff – it assures – is not covered by Laws 23.660 and 23.661; and for not being a reasonable derivation of current law, departing from the evidence of the case and failing to examine the content of the invoked regulations as the basis of the raised defenses, which violates – it states – the guarantees of due process and trial defense incorporated by art. 18 of the Fundamental Law.

In this vein, the complainant emphasizes the failure of the movant to demonstrate the proprietary damage that the application of this regulation causes, at the same time that it diminishes the importance of a "captive market of members …" for the social welfare agencies, given the possibility of free choice recently provided by the law. It emphasizes that while it is true that they receive State subsidies, they pay tariffs strictly according to regulation, while the prepaid medicine entities can determine prices without having to

necessarily limit themselves to a percentage of the member's salary. The complainant emphasizes – by stressing the public goal of Law 24.754, committed to even at the international level – that the alleged unreasonableness of the content requires the establishment of, at least approximately, the cost of the obligations that the law imposes, and in absence of that, the petition should be denied; particularly, in the expedited and abbreviated framework of a special amparo petition requesting a declaration of unconstitutionality. It stresses what it considers the reasonable regulation of property and contractual freedom, in relation to rights such as those of life, health and physical integrity (arts. 14 and 28 of the Supreme Law); and the absence of manifest arbitrariness or unlawfulness, upon which the admission of this abbreviated remedy is based (art. 43 of the National Constitution and Law 16.986).

-IV-

Although the questions introduced by the appellant have been made under the pretense that the judgment made arbitrary assumptions, in the assumption of institutional impact as much as of a strict federal question, the truth, as I understand, is that by way of its proposition it primarily defends the constitutionality of Law 24.754, declared invalid by the higher court. Therefore, I consider that the submitted petition is admissible whenever, if the validity of a regulation issued by Congress is raised as a legal matter, the judgment has been contrary to the same, defended – I reiterate – by the appellant here (art. 14, sec. 1, of Law 48), which does not prevent – with respect to the allegations made of arbitrariness – the eventual evaluation of the non-federal aspects that are inseparable from the federal issue, bearing in mind the range of criteria that the right to a trial defense invoked by the complainant requires (art. 18 of the National Constitution).

-V-

In this respect, it is appropriate to note that Your Excellency has indicated repeatedly that the special amparo petition is a process to be used in sensitive and extreme situations in which, for lack of other suitable or apt means, the safeguarding of fundamental rights is endangered. For this reason – it has been emphasized – its lodging requires very particular circumstances characterized by the presence of arbitrariness or manifest illegality and the

demonstration, additionally, that the resulting concrete and serious crime can only be eventually remedied by turning to the urgent and expeditious means of the amparo petition (see Judgments: 306:1453; 308:2632; 310:576, 2740; 311:612, 1974, 2319; 312:262, 357; 314:996; 316:3209; 317:164, 1128; 320:1617, among others).

This criteria has not changed with the passage of the new art. 43 of the National Constitution, as it reproduces – in what is relevant here – art. 1 of Law 16.986, imposing identical requirements for its legitimacy (see Judgments: 319:2955 and, more recently, P.475, L.XXXIII, "Prodelco v. P.E.N. s/ amparo", judgment of 7 May 1998). From the former we infer that this construction is sustained upon the basis of a harm – actual or potential – whose determination or indetermination the claimant must justify and put into evidence, to which the remaining requirements are added, specified in the previous mechanisms; at this point, it is important to emphasize, the legitimacy of the amparo petition and the declaration of unconstitutionality here coincide.

In this case, however, according to my understanding, the unlawful harm to the constitutional rights of the petitioner – upon which basis the lower court has declared the invalidity of the mechanism at issue by considering the coverage for diseases like A.I.D.S. and drug addiction an exorbitant cost – does not support in the least a provisional or approximate estimation of the eventual damages. This is true, so long as the initial filing – as the trial court judge stressed (see p. 190) – does not include, not even as a minimum requirement, an estimate of the probable eventual increase of the costs of the provided medicines, as, according to the allegation, that increment would place these companies virtually at the margin of the market.

To the contrary, this sustains the view – I emphasize unproven – that the H.I.V. virus and drug addiction are situations “that are unsusceptible to all calculations of probability, involving immense risks, that is to say, impossible to measure…”, putting them in the same category as war, nuclear accidents, earthquakes or floods (Reporter p. 37, see reverse side). Such characterization of these illnesses led the petitioner to suggest an analogy between the prepaid medicine services and the insurance contracts, with a view to – at least – the technical rules that govern them, claiming that the inclusion of drug dependency and A.I.D.S. among the required benefits inherent in these health areas discredits the quality of

"contingency" that characterizes, in general, the covered diseases, given that, in contrast to covered diseases, drug addiction and AIDS – it said – are more closely a product of human action, of the self-harming conduct of the patient.

All of the preceding, however, is clearly inconsistent with the evidence later added by the petitioner itself at pgs. 123-128 and 130-133, which reveals the existence of certain guidelines – some of them official – that, eventually accompanied by an average estimate of the number of patients to assist, would permit – them or others – to appreciate if, in effect, the inclusion of these required benefits, compromises – as the lower court asserted – the business survival and integrity of the plaintiff. In the absence of that, the assertions in this sense, as much of the hospital as of the judge, are dogmatic, giving on the contrary conjectural opinions more than statements concerning established harms, such that, frankly, there are no indications in this case of serious issues that permit the proper appreciation of this question (see consideration 11 of the opinion of Judges Belluscio and Bossert in the above-cited "Prodelco…" -Judgment: 321-1252).

As a direct consequence of the preceding, I judge that there is a lack of support for the assertions of the lower court with respect to the violations of property, contractual freedom and the exercise of a lawful activity of the petitioner, such that, in the conditions previously described, it is not possible to legitimately consider whether the regulation is manifestly unreasonable or arbitrary, harmful to those rights, whose evidence requires the legal and constitutional norms inherent to the legitimacy of a special amparo petition, especially in cases like the present which is being used to pursue a declaration of unconstitutionality of a regulation.

It is important to emphasize, however, that even admitting proof of the existence of harms does not necessarily prevent a conclusion favorable to the legislative conduct, as Your Excellency has repeatedly indicated that the examination of the reasonableness of laws concerning their constitutionality must be performed within the terms of the regulations themselves and not based on the results obtained in their application, as that would amount to valuing their merit on extraneous factors (see Judgments: 311:1565 and their citations, among many).

-VI-

Notwithstanding the preceding and in the case that Your Excellency does not share the previous considerations and judges it necessary to enter into an examination of the matter – attending particularly to the case's pronouncement by which it declared a law issued by the National Congress unconstitutional – I consider it necessary to point out that the question here is limited to determining whether Law 24.754 – which extended to the prepaid medicine entities the obligation imposed on the social welfare agencies by Law 24.455 – is contrary to the order established by the Constitution, as has been declared in the case by Chamber II of the Federal Social Security Court (pgs. 225-225).

In this respect it should be noted that, going beyond the step of considering the rights of life and of health as implicit constitutional guarantees, art. 75, sec. 22, of the Magna Carta – which conferred constitutional rank to numerous international human rights documents – explicitly introduced – by, for example, art. 12, point 2, item c, of the International Covenant of Economic, Social and Cultural Rights (see Law 23.313) – the State obligation to adopt the measures necessary for the "prevention, treatment and control of epidemic, endemic, occupational and other diseases…" (Reporter, additionally, arts. 25, paragraph 1, of the "Universal Declaration of Human Rights"; IX of the "American Declaration of Rights and Duties of Man" and 10 of the "San Salvador Protocol", in particular, its ap. 2, items b, c and d; among other international law materials).

I consider that it is in that framework that it is necessary to place regulations such as Laws 24.455 and 24.754, the latter opposed for what it does to constitutional regularity; and in this framework, likewise, precautions such as those of Law 23.798 should be considered, which, it is important to note, declares the fight against A.I.D.S. "a national interest (see Judgment: 319:3040).

The preceding regulations, like others regarding health and health care, I understand come to constitute the legislative expression of the assumption by the National Government of those agreements regarding subjects that for their proximity to the rights of life and personal dignity should be understood to be unique in the code, while additionally – I insist – the constituent members left it established by means of art. 75, sec. 22 of the

Fundamental Law as part of the last reform (Your Excellency has noted that the right to life "is the first natural right of the human being, predating all positive legislation, and is recognized and guaranteed by the National Constitution and the laws…" – Court Reporter: 302:1284; 312:1953, among others).

It furthermore remains highlighted in the legislative procedure. Particularly, in the commentary of Mr. Senator Salum who, while defending the project, emphasized the advantages of the same regarding the equalizing of benefits among members of social agencies and prepaid medicine entities (also included), a perspective that he presented as an imperative of responsibility and social solidarity and as a vital contribution against the discrimination that people infected with human retroviruses suffer. He placed the project, similarly, in the framework of art. 42 of the Fundamental Law, relating to the defense of consumers and users of goods and services (see parliamentary record: Session of the Honorable National Senate of 28 November 1996).

In a similar vein, the opinion of Representative Banzas de Moreau, who by alluding to the moral responsibility of the entire society in the treatment of A.I.D.S., lamented that a substantial part of the health system is located at the margin of the fight against the epidemic; defending, moreover, the necessity of reducing the expenditures of the State in this area based on the fact that, even though 40% (forty per cent) of the H.I.V.-affected rely on social agencies or prepaid medicine companies, responsibility is primarily allocated to the State (see parliamentary record Session of the Honorable House of Representatives of the Nation of 20 November 1996. Motion of order and floor debate). This question was dealt with by the complainant by emphasizing the implementation of a system based on responsibility shared among the State, the social agencies and the prepaid medicine entities, attacking what it deemed the ignorance of the cited design's judgment.

The previous considerations are appropriate given that they make it possible to place, moreover, this question in the framework of the constitutional law that focuses on the problem of "reverse discrimination" ("affirmative action" in North American constitutional language), about which the National Congress is concerned with "…Legislating and promoting means of positive action that guarantee the true equality of opportunities and treatment and the full enjoyment and exercise of the rights recognized by this Constitution

and by the current international human rights treaties…", regarding groups traditionally discriminated against like – for example – the disabled (art. 75, sec. 23, of the Magna Carta). In this area, I am guided by the conviction that it is not unlikely that the legislators have tried with their "… means of positive action…" to reach the situation of those that, affected by pathologies like A.I.D.S. or drugs, find themselves in danger of becoming disabled (the trial judge made a similar declaration – see pgs. 187-188).

All of this, certainly, must be examined in a context that does not lose sight of the fact that although in principle the activity that these prepaid medicine entities assume has commercial characteristics (arts. 7 and 8, sec. 5, of the Commercial Code), it cannot be ignored that, as indicated in a recent ruling – S.C. E.34, L.XXXV, "Etcheverry, Roberto E. v. Omint Sociedad Anónima y Servicios", of 17 December 1999 – they tend to protect the guarantees of life, health, safety and integrity, by which they acquire a host of obligations that exceed or transcend the mere business field.

In this respect, Your Excellency has repeatedly indicated that our Supreme Law has not recognized absolute rights of property nor of liberty, but rather limited by their regulations in the form and to the extent that the Congress, in using its legislative powers deems it appropriate in order to ensure the well-being of the Nation, fulfilling in this way, by means of legislation, the noble goals expressed in the preamble (Judgments: 311:1565 and 315:952). And furthermore that the State has powers to intervene by way of regulating the exercise of certain industries and activities by restricting or channeling them; all those restrictions and regulations enacted for the general and permanent interests of the community clearly fit in this framework, with no hurdle other than art. 28 of the National Constitution (see Judgments: 311: 1565, and its citations, and 315:222, 952; 318:2311; 319:3040, among various other precedents of Your Excellency).

And the right to health – which is not a theoretical right, but rather one that must be examined in close conjunction with the problems that emerge in social reality, to achieve its genuine scope – inevitably enters as much into private relationships as semipublic ones, a correlate which results in regulations like the one analyzed that attempt, in exercise of regulatory authority (arts. 14, 28 and 75, sec. 18 and 32, of the National Constitution), to recognize a new reality that identifies new institutional actors in this field– the prepaid

medicine entities – and recent or potential pathologies.

When intervening by regulation – Your Excellency has admitted – the fact that an activity begins primarily as a private one and transforms in the course of its evolution to one that affects important long-term regulatory interests can be taken into consideration; the Tribunal has assented to this opinion, and has even indicated, in hypotheticals more extreme than this one, that their analysis is clearly not the task of the tribunals of justice (see Judgments: 315:952).

I opine that the obligations imposed by the regulatory network being examined should be understood as an aspect of that redefinition, whose constitutional irregularity, I repeat, has not been duly proven and is far from being, in my view, clearly shown, as – on the other hand – the complainant has repeatedly stressed (Your Excellency has strongly indicated that a party seeking a declaration of the unconstitutionality of a regulation must clearly demonstrate that it would be contrary to the Supreme Law – see Judgments :315:952 and its citations).

Within this framework I understand, as a consequence, that Law 24.754 – without prejudice to that expressed by its location in art. 75, sections 22 and 23, of the Magna Carta – has been issued as an exercise of State police power that, in accordance with numerous rulings of the Highest Tribunal, "is justified by the necessity of the defense and consolidation of the moral, health and collective interest or the economic interest of the community…" (see Judgments: 308:943 and their citations, among others).

The petitioner's argument based on liberty of contract adds nothing to the above. And to the above-expressed it should be added that, since the time of the precedent noted in Judgments: 136:161, the Tribunal has adopted a broad conception regarding police power ("broad and plenary"), instead of a restricted or literal one ("narrow or literal"). At that time it emphasized, moreover, that the legitimacy of the restrictions on property and individual activities that are proposed to secure community order, health and morality cannot be objected to in principle, but rather in scope. Later, upon inquiring about the validity of a law modifying an unfulfilled contract, it indicated that it is "when the greater interests of the community require…", clarifying that mere contracting does not give the rights

established in the convention an acquired character contrary to the law of public order…" (Judgments: 224:752 and its citations). Similarly, the precedent of Judgments: 172:21, wherein the Court, in summarizing jurisprudence of the Supreme Court of the United States of America, stated that "…The Constitution does not guarantee the unlimited privilege to run a business or conduct it as one pleases. Certain businesses can be prohibited and the right to direct a business or practice a trade can be conditioned…".

-VII-

On another matter, I should also point out that I do not see evidence of harm at the level claimed the petitioner, as it implicitly expresses by comparing its situation with that of the social welfare agencies, in light of that envisaged by Laws 24.455 and 24.754.

This is so, as said by Your Excellency, because the regulatory distinctions for assumptions that are considered different are valid in so much as they are not arbitrary, that is to say, they are not the result of an intentionally unjust persecution or undue benefit, but rather of an objective reason to discriminate, even though they are based on opinion (see Judgments: 311:1565 and their citations; 315:222, 952 and their citations; and that expressed by the rules of art. 75, sec. 23 of the National Constitution).

In light of this principle, it does not appear unreasonable that Law 24.754, upon extending to the prepaid medicine companies the obligation imposed by Law 24.455 to the social welfare agencies, does not include the subsidies to which arts. 1 and 5 of the last rule refer. Strictly speaking, their origins are not totally analogous. Thus, as the lower court judge noted, the social agencies – in contrast to the prepaid systems – are not able to freely fix their rates, which consist of fixed percentages of the incomes of their members. On the other hand, the social agencies are becoming more like the prepaid systems, beginning with the possibility of freely choosing a social agency, which will place the latter in a situation of competing with each other. Said circumstance, however, does not justify the petitioner's argument, since it discredits its statements regarding the captive clientele of the former, as the lower court judge appropriately emphasized (p. 191). On the other hand, the question can hardly be evaluated under ideal market conditions when competence is perfect and the status of all consumers is equal, and can, appreciated from this perspective, discredit all

intent to reassign in a socially equitable manner its resources, a question that – as was expressed – cannot be understood apart from the desire of the authors of Law 24.754 nor, in a previous plan, of the parliamentary members of 1994 (see art. 42 of the National Constitution).

And, as Your Excellency has indicated in the already cited "Ercolano…", if to justify the exercise of police power it is necessary that in each case the well-being of each and every one of the habitants of the nation is implicated, it would not be possible to ever regulate individual activity or the use of property, since the direct benefits of each law or ordinance reach but a limited part of the population, even when in conjunction they tend to ensure the well-being of all (Court Reporter: 136:161).

The preceding, I hasten to stress, does not mean failing to recognize that obligations like those at issue, established by law, as part of that which can be considered a policy of health ("health policy"), entail charges or debits for a sector of society, but rather affirm that when it comes to entities obligated by the right to health, it is incumbent on them to comply with reasonable regulations that the organs of the state issue and, in my understanding, in this case there has been no demonstration that the means provided by Law 24.754 are not related to the pursued objectives, nor that they are disproportionate with respect to them. As a consequence, it is not appropriate to treat as a legal matter for courts the opportunity and convenience of the measures taken or the wisdom of the choice in methods used, given that Your Excellency has rejected that the courts can substitute their own criteria of convenience and economic or social efficiency for that of the Congress to declare the constitutional validity of laws (Court Reporter: 311:1565 and their citations; 312:222, 952, among others).

As was said some time ago, "…It is not the responsibility of the judiciary to decide the wisdom of the other public branches in their choice of the measure used to avert that critical situation, nor of the consequences to the economic order that may arise from the application of the law. It is the judiciary's duty only to make decisions regarding the constitutional powers of congress to restrict the right to use and dispose of property involved in the challenged law…" (see Judgments: 136:161). Or as the Supreme Court of the United States of America indicated in precedents recalled by the Tribunal, "…We have said innumerable

times that the legislature is the first judge of the necessity of such sanction, that all possible presumptions are in favor of its validity and that even when the Court has a contrary opinion to the wisdom or soundness of criteria of the law, it should not be annulled unless it clearly exceeds the legislative power…" (Judgments: 172:21).

-VIII-

In conclusion, I wish to emphasize that I share in the judgment issued by the lower court judge that, in addition to being inaccurate, it is at the least shocking and inappropriate to insinuate that A.I.D.S. is an illness contracted by people who voluntarily expose themselves to risky and reprehensible behavior (p. 191), an argument that, putting aside the emphasis of the petitioner and even disregarding the argument's dogmatic nature, involves, in the end, an objection to the merit of the measure, a question – as has been explained – that is outside the competence of the tribunals.

-IX-

As a result of the above-expressed, I believe that Your Excellency should uphold the complaint, formally declaring the special petition admissible and vacating the ruling to the extent it regards the material of the petition.

Buenos Aires, 29 February 2000.

SIGNED: NICOLAS EDUARDO BECERRA

Buenos Aires, 13 March 2001.

Regarding the proceeding: "Appeal brought by the defendant in the case Hospital Británico de Buenos Aires v. National Government (Ministry of Health and Social Welfare)", for a decision on its legitimacy.

Considering:

1) That Chamber II of the Federal Social Security Court, by vacating the holding of the previous court, upheld the amparo suit brought by the Hospital Británico de Buenos Aires against the National Government (Ministry of Health and Social Welfare) and declared Law 24.754 unconstitutional, which law extended to the prepaid medicine companies the coverage of required benefits established for the social welfare agencies in Law 24.455

regarding risks originating from drug addiction and the HIV virus. In opposition to the ruling, the defendant filed the special petition, whose denial led to the present complaint.

2) That the lower court determined that the obligation imposed by Law 24.754 implied a higher cost in the price of a private prepaid medicine contract and the adaptation of these entities to aims not contemplated by the plans of traditional covered medicine, which placed them in an untenable position of competing against social agencies receiving state funds and having a virtually captive clientele. The court deemed that this implied a serious harm – of exorbitant economic cost – for the prepaid medicine companies and their members, damaging the right of equality and of the principle of contractual freedom.

3) That, similarly, the court determined that Law 24.754 did not constitute a reasonable regulation of police power as it transferred the particular obligations appropriate for the State that should be satisfied by the provision of benefits through public hospitals or social welfare agencies, without diminishing individual rights and those of medical organizations that, as with the plaintiff, were established for economic ends. It added that this case was not about the fact that the State envisions itself obligated to supervise or control some entity or certain risky activity for citizens, but about the effect on the structural content of private contracts for medical coverage.

4) That this Court has indicated that the party interested in a declaration of a regulation's unconstitutionality must clearly demonstrate in what manner it is contrary to the National Constitution, creating in this way a burden. It is necessary to specify and prove with certainty in the proceedings the damage resulting from the provision's application, which has not been accomplished in the case at hand (Judgments: 307:1656 and their citations).

5) That, in effect, in this case the plaintiff did not show, as was necessary, a calculation even approximating the eventual increase in the costs of the medical benefits, nor does it mention – based on official statistical data – some number of people likely affected or of resulting drug consumers requiring attention who would be placed – as it asserts – at the margin of the market.

6) That, in this sense, the appealed ruling suffers from arbitrariness in that it contains false foundations, as it is insufficient to maintain in the abstract arguments concerning the

freedom of contract, the impact of the structural content of private medical coverage contracts and the "exorbitant economic cost" arising from the application of the law, without considering in the present case the lack of proof on the part of the plaintiff and of the concrete harm that the challenged law caused it, an unavoidable prerequisite for obtaining a declaration of a regulation's unconstitutionality.

For these reasons, and the concurring judgment of Mr. Attorney General, the special petition is deemed admissible and the appealed judgment is without effect and as further substantiation is unnecessary, the demand of the amparo petition is rejected (art. 16, second part, of law 48). With costs. Return the deposit. Join the petition to the principal complaint and, as is appropriate, return it.

SIGNED: JULIO S. NAZARENO - EDUARDO MOLINE O'CONNOR - CARLOS S. FAYT (according to his opinion)- AUGUSTO CESAR BELLUSCIO (according to his opinion) - ENRIQUE SANTIAGO PETRACCHI (according to his opinion) - ANTONIO BOGGIANO - GUILLERMO A. F. LOPEZ - ADOLFO ROBERTO VAZQUEZ (according to his opinion).-

OPINION OF MESSERS MINISTERS DOCTORS DON CARLOS S. FAYT AND AUGUSTO CESAR BELLUSCIO

Considering:

1) That in opposition to the ruling of Chamber II of the Federal Social Security Court that, upon vacating the holding of the lower court, upheld the amparo petition brought by the Hospital Británico de Buenos Aires against the National Government (Ministry of Health and Social Welfare) and declared Law 24.754 unconstitutional, which law extended to the prepaid medicine companies the coverage of required benefits established for the social welfare agencies in Law 24.455 regarding risks originating from drug addiction and the HIV virus, the defendant filed the special petition whose denial gave rise to the present complaint.

2) That the appellant's injuries have been the object of adequate treatment in the report of Mr. Attorney General, whose foundations and conclusions this court shares for the most part and which are referred to for the sake of brevity. In this regard, it is worth adding that

even when it is understood that the amparo demand overcomes the test of formal admissibility for the sought after proceeding (art. 43 of the National Constitution and Law 16.986), the objections of constitutional nature against Law 24.754, on which the plaintiff's submission was based and which were admitted in the appealed judgment, are insufficient to demonstrate that the challenged law is unreasonable or produces a harm to the superior rights invoked, a question that has been duly considered in the referenced report.

Therefore, with the scope indicated, the special petition is declared formally admissible, the appealed judgment is vacated and, as further substantiation is unnecessary, the amparo demand is denied (art. 16, second part, of Law 48). Each party to bear its own costs in view of the particulars of the case. Add the petition to the principal complaint and refund the deposit. Notify the parties and return the files.

SIGNED.: CARLOS S. FAYT - AUGUSTO CESAR BELLUSCIO.-

OPINION OF MR. MINISTER DOCTOR DON ENRIQUE SANTIAGO PETRACCHI

Considering:

1) That Mr. Attorney General formulated an adequate summary of these proceedings in chapters I, II and III of his report, to which we refer for the sake of brevity.

2) That, in the first place, it is necessary to address the question relating to the arbitrariness of the ruling, because if this assumption were true there would be no judgment strictly speaking, according to the precedents of this Court (Judgments: 312:1034; 317:1155, 1413, 1454 and 1845 and 318: 189, among others).

3) That, given the above-expressed, it is necessary to refer to the terms of chapter V of the report mentioned in consideration 1, which are deemed to be incorporated by reference for the sake of brevity. In effect, from these terms come the dogmatic character of the lower court's statements and its lack of probative support, which require disqualification of the judgment.

4) That, as a result, it becomes unnecessary to consider the other questions raised in the proceedings.

Therefore, with Mr. Attorney General having passed judgment, the complaint is upheld, the

special petition is declared formally admissible, the appealed judgment is vacated and, as further substantiation is unnecessary, the amparo demand is denied (art. 16, second part, of Law 48). Each party to bear its own costs in view of the particulars of the case. Join the petition to the principal complaint and refund the deposit. Notify the parties and return the files.

SIGNED: ENRIQUE SANTIAGO PETRACCHI.-

OPINION OF MR. MINISTER DOCTOR DON ADOLFO ROBERTO VAZQUEZ

Considering:

1) That Mr. Attorney General provides an adequate summary of these proceedings in chapters I, II and III of his report, to which we refer for the sake of brevity.

2) That the special petition is formally deemed admissible as the wisdom and application of a federal regulation (Law 24.754) is within the judiciary's purview and the decision presently under review has been unfavorable to the wishes of the appellant. It is worth remembering the doctrine that provides that in its task of clarifying regulations of the indicated nature, this Tribunal is not limited by the positions of the court nor of the appellant, but rather it is incumbent on the court to reach a decision on the disputed point (art. 16, Law 48), according to the interpretation that it properly determines (Judgments: 310:2682).

3) That first, we must address the petitioner's assertion that the HIV virus and drug virus addiction are situations "that are unsusceptible to all calculations of probability, involving immense risks, that is to say, impossible to measure…", putting them on the same level with war, nuclear accidents, earthquakes, or floods (Court Reporter p. 37, reverse side).

Similarly, its statement regarding the existence of an analogy between the prepaid medicine services and the insurance contracts, with respect to the technical rules by which they both are governed, by way of which it attempts to include drug dependence and AIDS among the required benefits inherent at these levels of health, distorts the "contingency" nature that characterizes, in general, the covered pathologies, given that, in contrast to these illnesses, those are more a product of human action, of self-inflicted harm by the patient.

4) That although it is logical for the prepaid medicine entity to stress the similarity between the contracts it signs and those of the insurer, this does not justify its argument on the matter of AIDS not being able to be considered a "contingency".

In effect, this Court in Judgments: 320:1294, opinion of Judge Vázquez, held – despite referring to the social welfare agencies – that the concept of insurance is applicable, which is extendable due to its significant juridical, economic, and operative similarities to the prepaid medicine companies.

On that occasion, it was specified that a health insurance benefit was at issue (Law Reporter 23.660 and 23.661); to which it was added that art. 4 of Law 23.660 gives them responsibility as insurance agents as they are named ANSAL (Law 23.661), which stands for "National System of Health Insurance, with the scope of social security and the aim of securing the full enjoyment of the right to health for all the nation's inhabitants, without social, economic, cultural or geographic discrimination. Insurance is organized within the framework of an integrated conception of the health sector…", and art. 2 states: "…the insurance will have as its fundamental objective…"; id. art. 3 "the insurance will adapt its actions…".

Moreover, it is necessary to mention that the prepaid medicine contract as much as the insurance contract is bilateral, expensive, conditional and automatically renewable.

However, the conditional aspect does not disappear if AIDS is included in the coverage that the business entity must provide, as there is no basis to deny the uncertainty that one can suffer from this disease.

Furthermore, it is true that the AIDS characteristics are special and that some people are more susceptible, but this last fact is not exclusive to HIV as in all diseases it is possible to identify groups with higher risk without that affecting its contingent nature.

5) That the terms of the company's rebuke and the sanction it utilized deserve to be addressed separately, as from them one can infer their intent to show that it is a virus that is contracted only by drug addicts and people who engage in specific sexual conduct, which in addition to implying ignorance of other situations that can lead to the contagion – such as transfusions, surgical operations, etc. – reveals a serious prejudice that leads to

discrimination.

6) That on another matter, the drop in profits alleged by the petitioner to reject the inclusion of the required benefits from coverage is without merit.

This is so because the petitioner did not even minimally demonstrate how the profit margin is affected, that is to say that it failed an unavoidable requisite in the test of economic harm that it invokes.

7) That from the previously indicated and that expressed by this Court in the case E.34.XXXV "Etcheverry, Roberto Eduardo v. Omint S. A. y Servicios", date of the decree – opinion of Judge Vázquez – that the principal characteristic of the prepaid medical contracts is the savings – consisting of verified and anticipated payments over the course of time – the patients protect themselves from future risks in their life and/or health, the opposition of the company with respect to that ordered by Law 24.754 appears to merely be an intent to unilaterally alter its role in the equation leaving its counterpart – members with AIDS – in an onerous and unsatisfactory position.

One cannot deny that the "long duration" contracts create many challenges that are inherent in their nature, and it is neither reasonable nor justified that the companies ignore and deny them without a solid basis, as is taking place in the case at hand.

8) That given the expressed, it is necessary to address the assertion of the lower court that the examined law violates constitutional rights such as all lawful industries' right to property and equality, and the plaintiff's argument that it is the State that has the exclusive responsibility to protect the natural right of health of the Nation's inhabitants.

9) That for this reason, it is essential to mention preliminarily that to mark the occasion of the last constitutional reform, the State assumed numerous human rights responsibilities when it incorporated an important group of treaties that it enumerated in art. 75, sec. 22. The right to health is contemplated in the America Declaration of the Rights and Duties of Man, which establishes that all people have the right to have their health protected by public health and social measures related to nutrition, clothing, accommodation and medical assistance, corresponding to the level that public and community resources permit; the Universal Declaration of Human Rights that in art. 25 provides that every person has

the right to a standard of living adequate to ensure the person and his or her family's health and well-being, in particular food, clothing, housing, medical assistance and the necessary social services; and the International Covenant of Economic, Social and Cultural Rights, which prescribes that among the measures that the States Parties must adopt to ensure the full effectiveness of the right of every person to enjoy the highest possible level of physical and mental health include "the prevention, treatment and control of epidemic, endemic, occupational and other diseases" (sec. c) and, "the creation of conditions which would assure all medical service and medical attention in the event of sickness".

Given the above, it is necessary to differentiate the simple interest from the legal interest and the subjective right.

Note that to exercise the subjective right to health it is necessary to undertake an activity that leads to the goal of completing and contributing to the State's provision of the possibilities described in the discussed terms.

In the situation given in this case, it has been demonstrated that the personal initiative of the individual who subscribes to a prepaid medicine system or becomes a member of a social agency grants such a right, making the State not responsible for providing benefits directly but rather monitoring and controlling the insurers to ensure they fulfill their obligation.

10) That in complying with the described framework, this Tribunal reaffirmed in recent rulings the right to the preservation of health – understood as part of the right to life – and emphasized the pressing obligation that the public authority has in guaranteeing this right with affirmative actions, without prejudice to the obligations that the local jurisdictions, social welfare agencies or prepaid medicine entities must assume (Judgments: 321:1684 and 323:1339, majority and concurring opinions and report of Mr. Attorney General of the Nation to whose foundations we refer).

11) That it was precisely the need to make effective the rights contained in the referenced international covenants (concerning principally life, health and personal dignity) that drove the legislature to issue Law 23.798, which declared the fight against AIDS a national interest and later – to fulfill this objective – the Laws 24.455 and 24.754 that established the coverage of the required benefits related to the risks derived from drug addiction and the

HIV virus contagion for the social agencies and prepaid medicine companies respectively.

12) That it is appropriate to mention that from the text of the parliamentary debate that preceded the issuance of Law 24.754, it is clear that one of its objectives was to put an end to the inequality that was observed not only between the beneficiaries of the social welfare agencies and the prepaid medicine companies, but also the inequality noted between the subscribers of different companies in this latter group.

Likewise, the reference made to the moral responsibility of the society as a whole in the treatment of AIDS and the necessity to reduce the expenses of the State is noteworthy.

13) That this Court in addressing the case E.34.XXXV "Etcheverry", above-cited, opinion of Judge Vázquez, showed respect for the norm at issue that represents an instrument to which the law turns in order to balance medicine and economics, since it considers the delicate interests at play – the psychophysical integrity, health and life of people – whereas furthermore, beyond their incorporation as companies, the prepaid medicine entities have as a duty a transcendental social function that is above any commercial question.

14) That the law to fight against AIDS – and Laws 24.455 and 24.754 – were passed as an exercise of the State's police power (art. 67, sections 16 and 28 of the prior Constitution, currently, art. 75, sections 18 and 32), which manifests itself in the form of restrictions on constitutional rights and guarantees and is imposed without regard to the wishes of the individuals (Judgments: 319:3040).

15) That the State is authorized to intervene by means of regulation in certain industries and activities in order to restrict or guide them in the measures taken to protect and consolidate public health, morals and public order (Judgments: 318-2311), to which should be added that this Tribunal has repeatedly said that constitutional rights are not absolute, but rather are limited by the laws that govern their exercise (Judgments: 268:364, among many others).

16) That under the current circumstances, it is appropriate to conclude that the court, by ruling as it did, disregarded the remainder of the judicial code and resorted to strictly commercial criteria forgetting completely the significance that health has for people and ignoring that it is in light of the previous premises that it should apply hermeneutical rules

in relation to Law 24.754.

For those reasons and Mr. Attorney General's report, the complaint is upheld, the special petition is formally declared admissible and the appealed judgment is revoked. With costs. Join the petition to the principal complaint and combine it with the deposit. Notify the parties and return the file.

SIGNED: ADOLFO ROBERTO VAZQUEZ