

FILE N.º 2945-2003-AA-TC

LIMA

AZANCA ALHELÍ

MEZA GARCÍA

JUDGEMENT OF THE CONSTITUTIONAL TRIBUNAL

In Lima, on the 20th day of April of 2004, the First Chamber of the Constitutional Tribunal, with the presence of Judges Alva Orlandini, Gonzalez Ojeda and García Toma, issues the following Judgment:

CASE

The extraordinary appeal filed by Miss Azanca Alhelí Meza García against the Judgment of the Third Civil Chamber of the Superior Court of Lima, with 270 pages, dated August 13th, 2003, which was declared founded, partially, the *amparo* claim.

BACKGROUND

In August 13, 2002, the appellant filed an amparo claim against the Peruvian State, represented in this case by the Ministry of Health, requiring the granting of comprehensive medical service for her condition as an HIV/AIDS patient that will include a) the constant provision of the necessary medicines for the treatment of HIV/AIDS, that will have to be provided through the program of the Hospital Dos de Mayo, and b) the implementation of periodical exams, as well as CD4 tests and viral load, pursuant to the request of the treating physician and/or when urgent necessity requires it.

She claims that since the date on which she was diagnosed with HIV/AIDS (1996), the State has not complied with the provision of comprehensive treatment, prescribing only medicines for minor treatments; she also claims that since she doesn't have the appropriate economic sources to deal with the high cost of treatment for the disease, which has worsened since her diagnosis of thyroid cancer, the State is required to comply with its obligation to address the health of the general population, as it has provided to the tuberculosis, yellow fever and patients of other diseases, pursuant to the principle of dignity of the person, the protection of their rights to life and health, and their right to comprehensive medical service for HIV/AIDS, in accordance with Article 7 of Law N. 26626.

The Public Prosecutor in charge of the judicial affairs of the Ministry of Health answers the claim requiring it to be declared inadmissible, arguing that in the present case there has not been found a violation or concrete threat to any right. She also notes that, although the rights established by article 1º paragraph 1), article 2, of the Constitution, in connection with the respect to the dignity of the person, as well as life and physical integrity, are fundamental rights of obligatory compliance, this does not imply an obligation of the State to provide healthcare services or medicines to the appellant or any other person, the only exception being the case of expectant mothers infected with HIV/AIDS and every child born to an infected mother, pursuant to article 10 of the Supreme Decree N.º004-97-SA, Law Regulation N.º26626; adding that, pursuant to article 7º and 9º of the Constitution, the right to health and the national health policy constitute programmatic rules that represent only an action plan of the State, rather than a concrete right.

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The Forty-Third Specialized Court of Civil Matters in Lima, upheld the claim on October 29, 2002, arguing that Law N.º26626 establishes that persons with HIV/AIDS have the right to comprehensive medical treatment, and therefore it is not permissible to claim that just the expectant mothers infected with HIV/AIDS and every child born to a mother infected have the right to antiviral treatment, even more when limited to rights established by law and not via a regulation.

The judgment under appeal, revoking the appealed one, declares founded, in part, the claim, considering the situation of the complainant (family mother, diagnosed with cancer, without the economic resources and family protection) must be equated with the provisions of article 10º of the Supreme Decree N.º004-97-SA.

LEGAL FOUNDATIONS

Petition

1. The purpose of the present claim is for the Peruvian State to grant comprehensive medical service to the appellant through the constant supply of necessary medicines for the treatment of HIV/AIDS, as well as conducting periodical exams and CD4 tests and viral load that the treating physician requires.
2. The appellant states that it is the obligation of the State to provide comprehensive care to protect her health, since it is mandated by article 7º and 9º of the Constitution, as well as article 7º of Law N.º26626, Law of the National Plan to combat HIV/AIDS and ETS, which the State is not complying with, creating a risk to her life.
3. On the other hand, the Public Prosecutor of the Ministry of Health, on behalf of the State, has noted that the free distribution of medicines to every HIV/AIDS patient within the country is not recognized in the legislation and, for that, it would have to enable a budget allocation pursuant to the National Health Policy.

Rights protected by the *amparo* claim

4. The *amparo* claim is a constitutional procedure that aims to protect the rights established in article 24º of Law N.º23506 (Law of Habeas Corpus and *Amparo*). On the other hand, article 25º of the aforementioned rule, in accordance with the Constitution of 1993, specifies that the *amparo* claim is not applicable in case of the rights prescribed by the eleventh final and transitory provision of the current Constitution, since it established that the dispositions of the Constitution that requires new and bigger public expenses are applied progressively.
5. This provision refers to the requirement of the named economic and social rights – *this is the case of the right to health evoked by the appellant*- that, while mediate obligations of the State, require a process of implementation of social policies so that citizens can enjoy them and exercise them fully, in which case, the legislator has established that its invocation via *amparo* claim is not in place.
6. Even if in our legal framework the right to health is not included within the fundamental rights established in article 2º of the Constitution, it is recognized in the chapter of the economic and social rights provided in articles 7º and 9º of the Constitution, this Tribunal, as well as our Colombian homolog, considers that when the infringement upon the right to health compromises other fundamental rights, such as the right to the life or the physical

integrity and the freedom of personal development, this right acquires the character of a fundamental right and, therefore, its violation deserves protection via an amparo claim (*STC N.º t-499 Colombian Constitutional Court*).

7. Notwithstanding the above, given the peculiarity of the present case, because it involves free-of-charge, comprehensive medical treatment for the benefit of the appellant, it is appropriate for this Court to rule on the nature of economic and social rights, such as the right to health and its parallel violation with other rights. In the same way, it is pertinent to analyze the State's obligation with respect to assistance matters – in the case of health benefits – pursuant to article 7º and 9º, the eleventh final and transitory disposition of the Constitution, in accordance with article 2.1 of the International Covenant on Economic, Social and Cultural Rights, and article 26º of the American Convention on Human Rights.

Economic and social rights: programmatic rights?

8. As the Constitutional Court noted in the judgment of the case of Roberto Nesta Brero and more than 5,000 citizens against the Presidency of the Ministries' Counsel (File N.º 008-2003-AI/TC), the Peruvian State, defined by the Constitution of 1993, has the basic characteristics of a Social and democratic State under the rule of law, in which two basic aspects are required: the existence of budgets to achieve minimum material conditions, and State identification with the goals of social content (*Fund. Jur. 12*).
9. This vital minimum seeks to guarantee an equity of opportunity at every social level, as well as neutralize the situations that are discriminatory and that violate human dignity; thereby achieving minimum material conditions of existence should prompt State intervention and society jointly to achieve this end.
10. This is where social and economic rights are needed, also known as rights of benefit, such as social security, public health, housing, education and other public services, because they represent the social purposes of the State through which the individual can reach his full self-determination.

It must be understood, therefore, that when it comes to *exigency*, we are referring to the right to require the State to adopt adequate measures for the achievement of social purposes, because social rights are not legally subject to sanctions by themselves, and it is necessary for the budget to support their execution.

Now, social rights shall commonly be understood as the protective faculties aimed at benefitting those groups with accidental characteristics that differentiate them in connection with another cultural factors, or who are disadvantaged by economic and social reasons, this is, in a position or location depreciated in their living standards, in discordance with human dignity.

Marcial Rubio Correa [Study of the Political Constitution of 1993, Tome 2, Lima: Editorial Fund of the PUCP, 1999, page 9] points out in this regard that “rules are issued by the State to ensure certain conditions of human beings in a society together, and benefits that the State regulates and [that] in some cases should be provided directly to people, generally when they do not have the capacity to provide them for themselves”.

11. However, it is not a mere programmatic rule of *mediate efficacy*, as has been indicated traditionally to differentiate them from civil and political rights of *immediate efficacy*, as it

its minimum satisfaction is an indispensable guarantee for the enjoyment of civil and political rights. In this way, without education, health and dignified life quality in general, it would not be possible to talk about freedom and social equality, which makes both the legislator and the administration of justice recognize them jointly and interdependently.

On this regard, Germán Bidart Campos [Teoría general de los derechos humanos. Buenos Aires, Astrea, 1991, page 335] observes that “social rights are not different from individual rights, but they consist of an enlargement of its scope.” Essentially, every human right constitutes an integral unique and indivisible complex, in which the different rights are necessarily interrelated and are inter-dependent among each other.

In this sense, Jorge Adame Goddard [Derechos fundamentales y Estado. Instituto de Investigaciones Jurídicas N. °96, México 2002, page 70] argues that “social rights are benefits [...] for the State to adopt determined economic and social policies addressed to certain mandatory purposes. Therefore, instead of speaking of a right to work, to education and to an appropriate level of dignified life or to health, reference should be made to a right of requiring the implementation of adequate measures to achieve those purposes. What are called ‘rights,’ in reality, are the purposes for which the policies of the State must adopted.”

12. Even the effectiveness of social rights requires a minimum of State action, through the establishment of public services, as well as society by contributing taxes, since every social policy needs a budget allocation, it is also true that rights cause concrete obligations to be met, for States must adopt constant and efficient measures to progressively achieve the full effectiveness of equal conditions for the totality of the population.
13. In this sense, social rights must be interpreted as real guarantees of the citizen before the State, with a vision that seeks to reevaluate the legal efficacy of the constitutional mandates, and, thus, the validity of the Constitution. Then, in some cases they have been raised as solidarity duties that involve not only the State obligations, but the entire society (Adame, Jorge Goddard. Op.cit. pp.59-85).
14. The recognition of these rights implies, then, to overtake the programmatic conception, perfecting the social mandates of the Constitution, as well as the State obligation, in which quantifiable measures are imposed to guarantee the enforceability of the right (*José Luis Cascajo Castro. La tutela constitucional de los derechos sociales. Cuadernos y Debates N°5. Madrid. 1998. Page 53*).
15. This new vision of social rights allows us to recognize, in its essential content, the principles of solidarity and respect for human dignity, which, in turn, constitute fundamental cornerstones of the social rule of law under the State.

The principle of solidarity

16. Without doubt, in any form of community life, it is necessary that this be put in place and organized in connection with a shared purpose and whose accomplishments, in some way, cover all persons.

This is the reason why, when the so-named social rights are perceived as essential purposes of the entire political community, it can be concluded that every person or intermediate group has to govern their co-existential relations under the principle of solidarity.

Solidarity involves creating an ethical and common nexus, which links those who make up the political community. It expresses a normative policy aimed at the exaltation of the feelings that drive men to assist each other, making them feel that society is not something external but inseparable.

The principle of solidarity promotes compliance with a set of duties, namely:

- a) The duty of all members of a community to contribute activity to the achievement of common purposes. In this orientation, it is referred to the necessity of a plurality of conducts (public positions, citizens' duties, etc.) in favor of the social group.
- b) The core duty of the political collectivity to adequately redistribute the benefits provided by its members; without any reduction of the responsibility to adopt necessary measures to reach achieve social purposes.

The principle of human dignity

17. Starting from the Kantian maxim, human dignity implies respect for man as a purpose on himself, a premise that must be present in every State plan of social action providing a constitutional base to its policies, because in the social State, respect for dignity refers to essentially achieving a better quality of human life.

Therefore, from a jurisdictional base, no analysis can be developed without verifying the respect to human dignity, in the State performance and in the particular's performance.

18. This Tribunal considers mistaken the argument of the State's defense when it indicates that the right to health and the national policy of health constitute programmatic rules that represent an action plan by the State, more than a concrete right. It must be reminded, then, that every public policy is born of concrete objective obligations that have as a primary purpose the protection of the rights taking as a base the respect to human dignity, and that in the case of budget execution for social purposes, this cannot be considered as an expense but as a social investment.

For this reason, to argue that social rights are reduced to a political responsibility between constituent and legislator, is not only naïve about the existence of such a link, but also a blatant distortion as to the meaning and consistency with the Constitution. (*Morón Díaz, Fabio. La dignidad y la solidaridad como principios rectores del diseño y aplicación de la legislación en materia de seguridad social. Anuario de Derecho Constitucional. CIEDLA. Buenos Aires. 2000. Page 668*).

19. The principle of dignity irradiates in equal magnitude all the rights, the civil and political, as well as the economic, social and cultural, since the maximum efficiency in the valuation of human being can only be accomplished throughout the protection of the different kinds of rights in a mutual and coordinated manner.
20. Under this principle, the State will not only act with respect for the individual's autonomy and fundamental rights as limits to its intervention – *negative obligations*-, but also shall provide, at the same time, the minimum channels for the individual to achieve the development of his personality and the free choice of his life plans – *positive obligations*-.

21. The Constitutional Court has already indicated that there is no possibility of realizing the freedom if its establishment, and formal guarantees are not accompanied with some minimum existential conditions that make possible its real exercise (*García Pelayo, Manuel. Las transformaciones del Estado contemporáneo. Madrid: Editorial Alianza. 1980, page 26*), which suppose the existence of a group of principles that are used by the political institutions.
22. It is undeniable that in the case of persons diagnosed with HIV/AIDS who suffer this disease, it is unrealistic to recognize a state of freedom or personal autonomy when the lack of the economic resources – as it is the case of the appellant – does not allow them to pay for their treatment and assume the consequences of this disease with dignity.

Only throughout adequate and continuous treatment can the physical and psychological manifestations of this disease be reduced, achieving in many cases the normal development of the patient's activities so that they are not affected greater than in cases where health care is almost null. It is in the latter case where dignity, freedom, and the individual's autonomy are being affected as consequence of the worsening of the health and the risk for life of the patient, with these individuals becoming a certain kind of social pariah, which in no way can be accepted from a constitutional point of view.

The economic and social rights such as the duty of solidarity

23. As has been established, the modern conception of social rights implies that they not only constitute positive obligations of the State, but an obligation of all society; because of this, the doctrine has begun to call them duties of solidarity (*funding argument 13, supra*).
24. In a democratic and just society, responsibility for the care of those in need does not lie only with the State, but with each individual in their social contributor role. Thus they take on more meaningful legal sanctions for failure to fulfill these duties, for example, the sanctions that are imposed for the failure to pay taxes, as it is through them that the collection and availability of a budget for the execution of social plans is guaranteed.
25. As clearly stated by Jorge Adame (Op.cit. page 82), to recognize social rights as solidarity duties serves in turn for each individual to focus his maximum efforts to obtain the goods that represent social rights, thus overtaking the paternalist view that the satisfaction of = needs is fulfilled by the State. For this Tribunal, obtaining welfare and a dignified standard of living is a common duty, of the society and the individual and the State, but not exclusively of the State.

Right to health and its inseparable relation with the right to life

26. Currently, the notion of a social and democratic State mandates the benefit of insurance of the minimum possibilities that make life dignified and, under these circumstances, the promotion of these conditions is imposed mainly on the public powers. Life, then, cannot be understood only as a limit on the exercise of the power, but fundamentally as an objective that guides the positive performance of the State. Said mandates benefit the realization of justice that endorses the principles of human dignity and solidarity and transfers the reduced framework of legality with the classical notion of the State under the rule of law. Now the State is committed to investing in the primary resources to develop the

necessary tasks to enable it to meet the social order to guarantee the right to life, freedom, security and private property.

27. Our Constitution of 1993 has determined that the defense of the human person and respect of his dignity are the supreme purpose of the society and the State; the individual is conceived as a superior value, and the State is obliged to protect him. Compliance with this supreme value implies full observance of the right to life, because this law is its projection; it is the greater connotation and stands in the ontological condition for the enjoyment of other rights, as the exercise of any right, prerogative, faculty or power become meaningless or becomes useless in the lack of physical life of a person for whom these rights can be recognized.
28. Health is a fundamental right for its inseparable relation with the right to life, and their link is irresolvable, since the presence of a disease or condition can lead to death or, in any case, diminish the quality of life. Therefore, it is evident that there exists a need to proceed with actions to care for life, to attack the manifestations of any disease and obstruct its development or diminish its effects, trying, wherever possible, to provide the means that permit the patient to develop his own personality within his social environment.

The right to health includes the right of every human being to maintain normal, organic functionality, both physically and mentally, and to restore himself when there is some disturbance in the organic and functional stability of his being, which implies, therefore, a conservation action and another of recovery; actions that the State must protect trying to get every person, every day, to have a better life quality, for which it must invest in the modernization and the strengthening of all the institutions in charge of the provision of health care, and must adopt policies, plans and programs in this direction.

Right to Health

29. The appellant maintains that is the duty of the State to provide comprehensive treatment for HIV/AIDS – a disease that was diagnosed in 1996 – invoking the provisions established by articles 7° and 9° of the Constitution, developed in article 7° of Law N.°26626, Law of the National Plan to fight against HIV/AIDS.
30. Health can be understood as the harmonious functioning of the body both in the physical and psychological aspects of the human being. Is evident that, as such, it constitutes an essential condition for development and is essential for achieving individual and collective welfare.

As such, health implies the enjoyment of the normal functional development of our body, which has motivated the World Health Organization (WHO) to estimate that said concept is not limited to be associated with the lack of a disease, but also with the recognition of a healthy physical and mental condition.

When article 7 of the Constitution makes reference to the right to the protection of health, it recognizes the right of the person to reach and preserve a state of physical and psychological fulfillment. In this way, the person has the right to be provided with the social and sanitary measures relating to food, clothing, housing and medical service, at the level permitted by the public resources and the solidarity of the community.

Said right must be approached from three perspectives, as follows: the health of every particular person, within a family and community context.

For these reasons, public health services are of vital importance in a society, for they depend not only the achievement of higher levels of quality of life, but, in the efficiency of their provision, the life and integrity of patients are involved.

31. Is evident that, in the case of the appellant, her serious health condition imminently compromises her life, since as it is stated on page 48 of the Tribunal's file, to diagnose HIV/AIDS, the content of the CD4 in the blood must be lower than 100 mm³; in her case, the level of CD4 is of 37 mm³, a lot less than the referred average, and this, for the characteristics of the disease, represent a risk for the patient of getting another additional disease, since the body does not have enough defenses to protect itself; a situation that gets worse by the fact of suffering thyroid cancer, as stated on pages 7 to 13.
32. As stated previously, social rights, such as public health, cannot be required in the same way in all cases, since it is not about specific benefits, since they depend on budget for execution; otherwise, each individual could legally require the State to provide a job or a specific provision of housing or health at any moment.
33. Consequently, the judicial claim of a social right will depend on such factors as the severity and the reasonableness of the case, its link or effects on other rights, and the available State budget, provided that concrete actions can be proven for the implementation of social policies.

The sense of the eleventh final and transitory disposition of the Constitution of 1993

34. The defense of the State, in its letter of April 13, 2004, contends that the eleventh final and transitional disposition that states: "*The provisions of the Constitution that require new and major public expenses apply progressively*", observes the principle of budgetary legality for public expenses, so that the State would not be able to comply with the request of the appellant, as this expense is not budgeted.
35. With respect to this, this Tribunal considers that even when the budget of the Republic is based on the rule of law, and when the execution of expenses that are not approved by the Annual Budget Law is inadmissible, this is not an argument that is sufficiently strong when faced with the threat or violation of rights, since this is the case in which, *without involving major resources from that already budgeted, the same can be addressed giving priority to concrete situations of major emergency and severity, as in the present case.*

In consequence, we consider that the budget revenues cannot be understood literally as a goal in itself, forgetting its status as a means to achieving State goals, with the purpose of giving maximum attention to the protection of the citizens' rights.

36. The political reality of recent years has revealed how corruption in the use of the public resources indirectly affects attention from rights like education, health and housing. Because of this, the progressivity principle of expenditures referred to in the eleventh final and transitional disposition cannot be understood with an undetermined character and, in this way, serve as frequent argument for inaction of the State, since, for this Tribunal, the progressivity of expenditures is not exempt from setting reasonable deadlines, nor from

establishing concrete and constant actions of the State for the implementation of public policies.

37. As stated in the eleventh final and transitional provision of our Constitution, it is in accordance with article 2.1. of the Covenant on Economic, Social and Cultural Rights, which requires States to adopt measures up to the maximum of the resources they have to achieve, progressively, the full effect of the rights recognized by the Covenant, among them the right to health. It is evident that the Peruvian State cannot be exempt from this obligation, or assume it as management ideal, as it is a mandatory obligation to be complied with, even if in a progressive way, always accompanied by concrete actions and reasonable deadlines.
38. This was stated by this Tribunal in previous judgments, indicating that economic, social and cultural rights whose realization lies the key to the common good, cannot appear as one mere declaration of good intentions, but as a commitment of society provided by clear and realistic goals. Along these lines, it is stated that the progressive realization of human rights over a given period cannot be interpreted to eliminate all the meaningful content of the obligations of the State established by the international conventions (*Bernales Ballesteros, Enrique. In: El enfoque de los derechos humanos en las políticas públicas. Comisión Andina de Juristas. Lima, 2004*).
39. Accordingly, as constitutional judges, without questioning the health policy, *per se*, we consider it necessary to analyze the performance of the State in the present case, since it was alleged that the violation of the Complainant's rights endangered his own life. Even if it is true that in the case of developing countries, as ours, it is difficult to require immediate attention and execution of the social policies for the entire the population, this Tribunal reiterates that such justification is valid only when concrete actions of the State for the accomplishment of results are observed; otherwise, a lack of attention would become unconstitutional by default.

On legal aspects related to the rights to intellectual property rights (TRIPS) and public health in developing countries

40. While the issue is not directly derived from the petitions of the claim, this Tribunal considers it convenient to reach a decision on the aspects related to intellectual property rights recognized in international agreements; as well as on the exceptions formally established and recognized in several international documents in the framework of the World Trade Organization (WTO), of which Peru has been a member country since 1995. Indeed, when it is noticed a difficulty in meeting national goals related to public health, with the consequent violation of the law itself and of the right to life of citizens – specifically in cases related to diseases like HIV/AIDS, tuberculosis, malaria and other epidemics – it has been established, through the Ministerial Declaration of DOHA of November 14, 2001 relative to DOHA Declaration on the TRIPS Agreement and public Health, that while the protection of intellectual property is important for the development of new medicines, the concern regarding their effect on prices cannot be left aside; and in this way, the agreement on the protection of intellectual property would not mean that member countries are obstructed from taking the necessary measures to protect public health and, in particular, promote medicines for all.
41. In this regard, given the difficulties in the provision of essential medicines for the treatment of diseases like HIV/AIDS, it is recommended that the Peruvian State, in its health policy

regarding the prevention and protection against HIV/AIDS, and as a subject of rights and duties as a member country of the WTO, uses to the maximum the provisions and measures through a flexible interpretation of the treaty on intellectual property protection, of course within the margins established by the DOHA Agreement, that will allow the fulfillment of its stated objectives in its health policy.

42. It is important to remember, then, that in the framework of the DOHA Agreement, it was agreed that the member countries that are less developed – as it is our case – are not obliged, with respect to the pharmaceutical products, to implement or apply sections 5 and 7 (regarding patent matters) of Part II of the Agreement on Trade-Related aspects of Intellectual Property Rights, or to enforce the rights provided in these sections until January 1, 2016, without prejudice to new extensions.

Budget execution in the case of social, economic and cultural rights as State investment

43. It is important that, with respect to the present case, the Tribunal leave clear its position on the implementation of social policies to the maximum realization of the rights that are involved and, in this sense, believes that it is responsibility of the State to prioritize the collection and distribution of the budget in such plans.
44. It is important that budget execution of social policies no longer be seen as a mere expense and start being thought of, better, as a social investment in order to comply with a community objective. Only when all the citizens enjoy minimum welfare guarantees will they be able to realize their life plans successfully and, consequently, provide a better contribution to society as a whole, achieving, thus, further development as country.
45. Social investment in cases such as the present is not limited to the attention of persons already infected with HIV/AIDS, seeking to alleviate the effects of the disease, in a way that such individual continues socially contributing as per his capacities, but there must be a higher focus on the prevention stage of the disease, through sexual education programs and public information about the consequences, both on the person and on society.

The provision of treatment for the HIV/AIDS patients according to the national legislation

46. The Constitution of 1993, in its articles 7° and 9°, establishes that everyone has the right to the protection of health, in the family and community, as well as the duty to contribute to its promotion and defense, being the State's responsibility to determine the national health policy, as well as create legislation and supervise its implementation.
47. Through the Law of Constitutional Development N.° 26626, the Ministry of Health was appointed as the entity in charge of the elaboration of the National Plan to Fight HIV/AIDS and sexually transmission diseases. In this law, the principles that regulate the Fight Plan are established, highlighting, among them, article 7° of the aforementioned rule, in which it recognizes the right to comprehensive care and benefits, as each cases requires, of every person living with HIV/AIDS.
48. Comprehensive care of an illness – as has been established by law – must be understood as the continuous provision of all medical requirements (exams, medicines, etc.) to overcome its consequences; therefore, this Tribunal does not share the arguments of the Ministry of Health prosecutor, when, invoking a regulatory disposition, stated that only infected

expectant mothers and the children born from infected mothers will receive antiviral treatment for free.

Law N°28243, published on June 1, 2004, modifies Law N.º 26626 establishing that comprehensive healthcare is continuous and constant, indicating that the benefits are progressive for antiretroviral treatment, with priority given to persons in situations of vulnerability and extreme poverty.

This disposition is in accordance with the principles of justice and fairness in the rule of law, since obviously the satisfaction of needs must focus as a priority on those who cannot cover themselves when they are in extreme poverty.

From this perspective, the Ministry of Health has initiated a campaign of free antiretroviral treatment for low-income patients affected with HIV/AIDS, which represents one of the first actions that has been being taken to fulfill the right to comprehensive care that these people require.

49. In accordance with the aforesaid in this judgment, social rights, such as public health, do not represent an specific benefits by themselves, because they depend on the availability of resources of the State; this, however, can in no way justify prolonged inaction, as established in the previous arguments, as it will cause a constitutional omission.

It is necessary then, to recommend concrete actions by the State for the satisfaction of these rights, through legislative actions or policy execution, as has been observed in this case, to the extent that the Ministry of health is implementing concrete actions for the execution of the Plan to Fight against HIV/AIDS.

50. Thus, the Tribunal concludes granting legal protection to a social right, as is the right to health, because, in this case in particular, the conditions so merit.

This judgment in favor of the appellant is founded not only on the potential violation of the right to life, but for reasons based on the legislation of the matters subject to this review for the maximum protection of HIV/AIDS patients, through the promulgation of Law N.º 28243, that modifies Law N.º 26626; moreover, when currently a campaign of antiretroviral treatment free of charge has been promoted for patients in conditions of extreme poverty, a group to which the appellant belongs, as she has in her favor an injunction issued by the Inter-American Commission on Human Rights (*pages 23-75 of the Tribunal's File*).

For these reasons, the Constitutional Tribunal, with the authority conferred by the Constitution of Peru,

DECIDES,

1. To declare ACCEPTED the claim of amparo.
2. To order that the appellant is considered in the group of patients who will receive comprehensive treatment for HIV/AIDS, by the Ministry of Health, which will include the provision of medicines and the correspondent analysis, as stated by the physicians of the treating hospital and under its responsibility.

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3. To urge the authorities to comply with the provisions of article 8° of Law N.° 26626, having to consider as a priority investment in the budget to implement the Plan to Fight AIDS.
4. To order that the direction of the treating hospital inform this Tribunal, each 6 months, on the way in which it is carrying out the appellant's treatment.

To be publicized and served.

SS.

ALVA ORLANDINI
GONZALEZ OJEDA
GARCÍA TOMA