

Judicial Branch of the Nation, Case number 31.777/96  
**"Viceconte, Mariela Cecilia vs the State Ministry of Health and Social Action- re: Constitutional Protection under Law 16,986"**. Chamber V of the Federal Chamber of Constitutional and Administrative Proceedings

Buenos Aires, June 2, 1998.

AND IN VIEW OF; WHEREAS:

I. The petitioner initiated her appeal for protection so that the State is ordered to:

a) take all actions necessary to complete the production unit for the Candid 1 vaccine - against Argentine Hemorrhagic Fever - at the "Dr. Julio Maiztegui" National Institute of Viral Diseases, thus ensuring its immediate supply to the entire population that could potentially be affected by the Junin Virus; and

b) to implement a campaign for ecosystem restoration in coordination with the proper public areas.

II. The trial judge, on pp. 258/265 back, rejected the petition filed, ordering that each party pay its own costs.

In its resolution, it understood that in accordance with the outcomes of the report on pp. 97/125, the defendant realized the contingencies that were being taken to produce the Candid 1 vaccine in the country and that, consequently, it was not notified that the Court could apply this aspect of the petitioner's claim, since it would constitute a legal decision lacking in any factual basis to support it;

that the vaccine requested for supply was still in the research phase and, consequently, the power to authorize its supply was outside the jurisdiction of the courts and exclusive to the administrative authority;

that in accordance with the provisions of Law 16,463, the vaccine could not be dealt with as a medicinal product, since the substance was at the experimental stage of a fledgling process, and that it would therefore constitute the imposition of unlawful behavior for the Executive Branch to order the immediate supply of the above mentioned Candid 1 vaccine; and that in respect of the implementation of a campaign for ecosystem restoration, the instrument of constitutional protection was inadmissible as this required complex evidence that exceeded the limited framework of this abbreviated process.

III. That in light of this decision, the National People's Ombudsman (pp. 266/271 back) and the petitioner (pp. 279/288) filed appeals.

On pp. 291/294 back, responses to the notifications granted were given.

The opinion of the Prosecuting Attorney of the Chamber appears on pp. 311/back.

The certification and documentation gathered on occasion of the court inspection provided for in the ruling stated on p. 313 were inserted on pp. 346/361.

IV. It cannot be overlooked that Article 43 of the revised Argentine Constitution provides that all

persons may file appeals for protection promptly and swiftly, provided that no other appropriate legal avenue is available "against all acts or omissions of public authorities or private persons that currently or imminently injure, restrict, affect or threaten, in a way that is manifestly arbitrary or illegal, the rights and guarantees recognized by this Constitution, a treaty or a law".

V. Article XI of the American Declaration of the Rights and Duties of Man, enshrined in the Constitution in Paragraph 22 of Article 75 of the revised Constitution, provides that every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

Article 25 of the Universal Declaration of Human Rights, also enshrined in the Constitution, provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.

Article 12 of the International Covenant on Economic, Social and Cultural Rights, also enshrined in the Constitution, recognizes that the steps to be taken by the States Parties to achieve the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health shall include those necessary for: the improvement of all aspects of environmental and industrial hygiene (para. b), the prevention, treatment and control of epidemic, endemic, occupational and other diseases (para. c); and the creation of conditions which would assure to all, medical service and medical attention in the event of sickness (para d).

VI. Judicial power and authority is not exhausted in the event of omission of effective and efficient law enforcement (Rulings: 248:291; 249:37), and before any formal ruling is made it is appropriate to adhere to the principles enshrined in the Argentine Constitution which arise from the need to serve the common good, which in turn shall be understood as the set of social conditions that enable the most complete and expedient fulfillment of the community and each of its members (Rulings: 296:65).

VII. The Supreme Court of Justice of the Nation ruled that the Preamble to the Argentine Constitution "already contains expressions with regard to general well-being, an overriding object in which the preservation of health must certainly figure as an unquestionable priority" (cfr. Rulings: 278:313, whereas 15).

The High Court also ruled that the overriding goal of the Argentine Constitution, as expressed in its Preamble, is to achieve general well-being, in the sense that justice must be served in its most complete form; which is to say that social justice, which currently consists of the intersubjective activity of members of the community and the resources thereof being organized with a view to ensuring that all of its members share in the material and spiritual goods of society. The Court also stated that the principle of *in dubio pro justitia socialis* [when in doubt, in favor of social justice] is enshrined in the Constitution and that laws must be interpreted in favor of those who, in the event of their

enforcement, would obtain or be inclined to achieve well-being, which is to say, living conditions in which human beings are able to develop in an entire dignified manner (Judgments 289:430).

VIII. The declaration of rights stated in the Argentine Constitution does not merely indicate the intention of the state to recognize the existence of individual rights, but rather is a firm commitment undertaken by the state to establish and fulfill all necessary legal provisions to this end, which is to say, it has committed itself to organizing all services and benefits provided for therein (cfr. Hauriou, Maurice, "Principles of public and constitutional rights" (Principios de derecho público y constitucional), 2 ed., Instituto Editorial Reus, Madrid).

In this respect, it is of note that, through its enshrinement of rights, declarations and guarantees, the constitutional system establishes the general bases that protect human beings and, through legal provisions to this end, safeguards general well-being. Thus, the central tenant of the legal system shall be the individual, from before his birth until after his death (Judgments: 316:479, opinion of Barra and Fayt).

The so-called "social rights" set forth in Article 14 bis of the Constitution and stated in the Declarations and Covenants mentioned in the foregoing differ greatly from traditional liberties in their nature. These "social rights", - undeniably including the right to health - no longer grant individuals a right to act, but rather grant them the powers to claim certain benefits from the state when the latter has put such a service in place (cfr. Hauriou, André, Gicquel, Jean y Gélard, Patrice, "Derecho constitucional e instituciones políticas", Ed. Ariel, Barcelona, 1980; also, Hübner Gallo, Jorge Iván, "Panorama of Human Rights", p.18, Editorial Universitaria de Buenos Aires, Buenos Aires, 1977).

IX. In the case under study, the fundamental issue at stake is the right to life, the most basic natural human right that exists in positive law, clearly recognized and guaranteed in the Argentine Constitution and in law.

Whereas some human rights are scrupulously provided for in law, others are notable for their vagueness. Difficulties are caused by the lack of systematization of legislation and, from a different perspective, by scientific and technical progress, which generates both risks and potential improvement in health and general well-being (Rulings: 302:1284, opinion of Frías and Guastavino).

X. The common good, which is the ultimate goal of organized society, is achieved through ends that can only be met by the state, such as National Defense or the enforcement of Justice. However, there are other means the state also provides, which are contributory in nature insofar as their scope is not exclusively of the state, although this can still determine the actions of individuals or other bodies (cfr. Rulings 305:1524, opinion of Bargallo). Educational, cultural and health prevention fall into this category.

However, when - in a given case - it is

not provided that individuals or private institutions shall meet the healthcare needs of the public - for economic or commercial reasons - the conclusion must be drawn that it is incumbent upon the state as guarantor to provide the resources necessary to tackle disease promptly and effectively (this Chamber, in "Alcalá, Cristina Beatriz vs Ministry of Health and Social Action", March 9, 1998).

XI. In view of the documentation attached to these proceedings and the positions adopted by the parties, the following is not up for debate:

a) that Argentine Hemorrhagic Fever (AHF) is an endemo-epidemic disease (cfr. pp. 3,5 of the leaflet attached to pp. 44:45, and others);

b) that the most comprehensive protection against Argentine Hemorrhagic Fever or *mal de los rastrojos* ("stubble disease") is provided through the application of the Candid 1 vaccine (cfr. p. 351, First paragraph), which has an approximate effectiveness rate of 95.5% (p. 361).

c) that the World Health Organization has vouched for its efficacy and that the Argentine Ministry of Health and Social Action authorized its application in 1991 through Resolution 100 (p. 351, Paragraph 6); that, to date, the entirety of the Candid 1 vaccine has been produced by the Salk Institute under contract with the United States of America Department of Defense. Approximately 320,000 doses of this vaccine have been purchased, with an available stock of 80,000 doses (p. 326), a quantity which is insufficient to immunize the 3,500,000 inhabitants of the endemic zone (p. 351, Para. 7 and p. 23, Para. 3).

d) that in view of the fact that the disease is exclusive to Argentina, that there are no plans to produce the Candid 1 vaccine abroad, and that - in view of the number of individuals to be vaccinated - the production of the vaccine is not a commercially attractive proposition, the availability of the vaccine to the population living in the endemic zone is subject to progress being made in the Candid 1 production project at the laboratories of the "Dr. Julio Maiztegui" National Institute of Viral Diseases (cfr. p. 23, Para. 3).

XII. The records make clear that the state, acting through the Ministry being claimed against, has made a commitment to produce the above mentioned vaccine to combat Argentine Hemorrhagic Fever.

The resolution before us concerns a decision over whether the defendant has met its obligations promptly, or whether it has instead fallen into omissions to the detriment of the right to health of the population potentially affected by the above mentioned disease.

XIII. The Candid 1 vaccine production project was initiated in Argentina in 1991, with 80 percent of production and quality control production being in place by 1997 (p. 101), leaving only the building works and the equipping of the production laboratory to be completed (p. 100).

Despite the statements made in the

petition (p. 122) to the effect that the 1997 budget provided for a special item entitled "completion of the equipping of this Institute to this end", the instrument on pp. 346-361 and the court inspection of December 12 of this year both indicate that the above mentioned Institute was far from ready to produce the vaccine referenced.

In fact, once the building work had been complete, there still remained the acquisition and installation of the apparatus necessary for production, with a further validation process also required (operations control), which - according to the schedule attached to p. 359 - could just about be completed during the first quarter of 1999, with an estimation given that - if there were no setbacks - the nationally produced Candid 1 vaccine would be ready for release by the end of that year (p. 337).

XIV. It is worth clarifying that the circumstances of the case before us do not infer that valid legal and regulatory procedures were avoided in order to obtain authorization for the vaccine from a proper state agency, which would fall outside the jurisdiction of the courts.

XV. The report submitted on October 2, 1996 by the Director of the "Dr. Julio Maiztegui" National Institute of Viral Diseases indicates that "there has been no investment made during the past two years" to ensure the readiness of the vaccine production unit, work which was halted as a result (p. 35). This information is verified by the newspaper clipping attached by the defendant to p.115, which mentions the announcement by the Ministry of Health that an item relating to said Institute was to be included in the 1997 budget to enable the resumption of the initiative.

XVI. On account of the fact stated that the preservation of community health is one of the priority objectives of the organized community under the rule of law, we can draw the following conclusions:

a) given the commitment made by the state to the production of the above mentioned vaccine to combat Argentine Hemorrhagic Fever, the inhabitants of the zones affected and the National People's Ombudsman are entitled to petition for the due fulfillment of this commitment;

b) although special budgetary items aimed at resuming the project were provided for in the 1997 budget, there had been preceding periods when the project had been halted due to the lack of investment, which resulted in the postponement of the ultimate goal, which is to say, localized production of the Candid 1 vaccine;

c) the gravity of the disease, in addition to the large number of people at risk of contracting it in the endemic zone (an estimated 3,500,000 people), makes it absolutely necessary that maximum efforts are employed by the proper authorities for the completion in the shortest time possible of all relevant tasks, works and acquisitions to ensure the production of the Candid 1 vaccine in the country.

d) given that the schedule on p. 359 was produced by the "Dr. Julio Maiztegui" National Institute of Viral Diseases, and on account of the fact that the fulfillment thereof is beyond the powers of said body, which is instead dependent on the political, budgetary and administrative decisions of authorities superior to the

defendant, it is not beyond reason to sustain that the filing of proceedings remains relevant, and that as a declaration in this respect cannot therefore be declared null and void.

XVII. In view of the foregoing, it is deemed appropriate to sustain this aspect of the filed petition for constitutional protection, and to order the state - the Ministry of Health and Social Action - to comply, in full and without delay, with the schedule, a copy of which is attached to p. 359, with personal responsibility being assumed by the Ministries of Health and Social Action, and Economy and Public Works and Services in their respective areas of competency, with a further obligation on the part of their subordinate agencies to meet all appropriate legal and regulatory deadlines.

XVIII. On the other hand, the elements of the defendant's petition relating to the implementation of a campaign for ecosystem restoration in coordination with the relevant public areas, chiefly encompassing the conservation of affected areas of natural scrubland, the habitat of the pampas cat, and of the hard lands suitable for the natural existence of barn owls, birds of prey and natural rodent hunters, is inadmissible.

Indeed, the supporting documentation provided by the plaintiff does not provide unequivocal evidence - within the scope of this appeal for protection - that the actions stated produce the effects claimed therein. Any decision in this respect, insofar as it falls within the competency of the justices, would require a greater wealth of information and evidence that not only gives a detailed description of the current situation, but also provides an outlook of the situation's development and the potential impact of the actions taken and planned.

In fact, there is a notable contradiction in stance between the petitioner and the defendant in relation to the practice of "plowing up to the wire fence". The petitioner opposes the action because it claims this would lead to the elimination of the "hard lands suitable for the natural existence of barns owls, birds of prey and natural rodent hunters" (p. 13), whereas the recommendation given to health bodies is to "plow up to the edge of the wire fencing" (pp. 40 and 44-18).

A further lack of agreement exists in relation to the velvet grass. The petitioner claims that this should be conserved because it forms part of the natural habitat of the pampas wildcat (p. 15), whereas the defendants believe that the places where rodents build their nests should be kept weed-free (pp. 40 and 44-15).

This does not imply therefore that the court would offer a definitive ruling on the propriety or otherwise of these measures, but rather, in view of the proven efficacy of the Candid 1 vaccine and the lack of any clear evidence for admitting the other positions stated, it would exceed the jurisdiction of this court to consider any extension of the scope of these proceedings through the course of action intended.

In view of the foregoing, it is deemed appropriate to partly sustain the petition for constitutional protection initiated, and consequently to order:

- a) that the state - the Ministry of Health and Social Action - comply with the timeline, a copy of which is attached to p. 359, in full and without delay, with personal responsibility being assumed by the Ministries of Health and Social Action, and Economy and Public Works and Services in their respective areas of competency, with a further obligation on the part of their subordinate agencies to meet all appropriate legal and regulatory deadlines;
- b) that the President of the Nation and the Chief of the Cabinet of Ministers be notified of this judgment in the appropriate memo;
- c) that the National People's Ombudsman be entrusted to follow up and monitor the fulfillment of the above mentioned timeline, without this causing a hindrance to the corresponding right of the petitioner in this respect; and
- d) without prejudice to the foregoing that the defendant inform the court of its fulfillment of the timeline mentioned in point a) within ten (10) days of having been notified hereof. Each party shall bear its own costs in both instances in view of the judgment reached and the novelty of the issue at hand.

It is ordered that it be recorded, notified in person to the Ministries of Health and Social Action, and Economy and Public Works and Services, and returned.

MARIA JEANNERET DE PÉREZ CORTES ALEJANDRO J. USLENGHI  
GUILLERMO PABLO GALLI  
Fernando Lodeiro Martínez (Secretary)