

DRAFT

Viceconte, Mariela Cecilia
v.
Argentinian Ministry of Health and Social Welfare

Poder Judicial de la Nación
Causa no 31.777/96

June 2, 1998

I . Plaintiff initiated her lawsuit based on constitutional claims requesting the federal state to:

- a) invoke all necessary measures to complete the production of the Candid 1 Vaccine, which protects against the Hemorrágica Fever in Argentina, in the Dr. Julio Maiztegui National Institute of Viral Illnesses, and to assure its immediate distribution to the entire population which is potentially affected by the Junin Virus; and
- b) implement, in coordination with the competent public agencies a campaign to restore the ecosystem.

II . The circuit court denied the claim, at fs 258/265vta, and imposed court costs for the order.

In order to resolve the case the court found that:
According to the defendant's report on pages 97/125, the defendant gave an account of the steps that were taken to produce the Candid 1 Vaccine in the country and, consequentially the trial court ruled that it was not able to address this aspect of the plaintiff's complaint, because it lacks judicial authority to render a decision pertaining to this aspect;

the the matters regarding the vaccine, which is in a stage of investigation, does not belong to the competence of the judicial courts, but rather, it is an admistrive authority matter.

according with law 16.463, the circuit court could not decide upon a medical experimentation, which was a very incipient process and, therefore, it would be

contrary to the law to order the executive branch to administer the vaccine immediately; and

with regards to the implementation of a campaign to reestablish the ecosystem, this request is too complex on an evidence basis and thus exceeds the limited framework of this current constitutional remedy requested by the plaintiff

III. After the circuit court rendered its decision, the ombudsman(fs. 266/271vta.) and the plaintiff (fs. 279/288) filed their appeals.

At pages 291/294vta., responses to the writ of notice.

At pages 311/vta., the judgment of the District Attorney of the chamber.

At fs. 346/361, minutes and documentation requested in the judicial recognition arranged in the order of fs. 313.

IV . It must be taken into account that Article 43 of the new Argentinian Constitution provides that any person shall file a propmt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of hte public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that he act or omission is based on an unconstitutional rule.

V . Article XI of the American Declaration of the Rights and Duties of Man which the constitutional hierarchy was stipulated to in Article 75, section 22 of the new text of the Carta Magna--provides that all persons have the right to have their health preserved by sanitary and social measures with regards to nourishment, clothing, housing, medical assistant, corresponding to the level permitted by public and community resources.

In Article 25 of the Universal Declaration of Human Rights--also with constitutional hierarchy--provides that all persons have the right to an adequate level of life which secures as soon as his or her family, health and well/being and especially nourishment, clothing, housing, medical assistance and necessary social services.

Article 12 of the International Covenant for Economic, Social and Cultural Rights--which also has constitutional hierarchy in the Carta Magna--established

that the states should adopt an effective plan to ensure the right of all persons to enjoy the highest level possible of physical and mental health, and should take into account: the improvement in all aspects of the work hygiene and of the environment, the prevention and treatment of epidemics, endemics, professionals and other nature and fight against them and the creation of conditions that secure medical assistance and medical services in the case of sickness.

VI . The function of the courts is not to exhaust the letter of the law with forgetfulness of the effectiveness and efficacies realized from the law (Fallos: 248:291; 249:37) and the law should pay attention to the formal criteria, to the force of the constitutional principles of the Argentinian Constitution and arise to the necessity to provide a good public, considering this as a whole of the conditions of the social life that makes it possible to the community that each one of its members succeeds of his or her own perfection. (Fallos: 296:65).

VII . The Supreme Court has said that in the Preamble of the Constitution "expressions have already been found referring to the general well-being, preeminent objective in that, certainly, it has been calculated, with indisputable priority, the preservation of the health." (confr.: Fallos: 278:313, considerando 15°).

Also, the "Alto Tribunal" declared that the preeminent objective of the Constitution, according to its preamble, is to obtain the general well-being, which signifies to say that the highest expression of justice is the social justice, which contained current in order the activity subjective of the members of the community and the remedies which are counted with views to fight that all and each one of its members participate with good spirits and materials of the civilization. In addition, it signaled that the constitution has the principle that when there is doubt, favor the social justice and the law should be interpreted in favor of those applying with this interpretation they obtain or stretching to attain the well-being, that is the living conditions which is possible for human being to develop with his or her dignity. (Fallos 289:430).

VIII. The declaration of rights effected in our National Constitution is not only a declaration of the will of the State that recognizes the existence of individual rights, but also is an obligation of each state that obligates it to dictate the necessary norms and to honor them, which is to say, that it assumes an obligation to organize services. (confr.: Hauriou, Maurice, "Principios de derecho público y constitucional", 2° ed., Instituto Editorial Reus, Madrid).

One might emphasize, in the sense, that the constitutional system, to devote the rights, declarations and varieties, establishes the general basis that protect human personality and, XXX protection (guidance) of the general well-being. Hence, the central axis of the juridical system sea would the person as soon as such, from birth until after his death. (Fallos: 316:479, voto de los Dres. Barra y Fayt).

The calls "social rights" established in Article 14 of our Carta Magna and the designations in the declarations and covenants referred to above have a character very different than the traditional liberties. These "social rights"—which certainly includes the right to health – do not already constitute for the individual the right to act, but apabilites to claim services determined on behalf of the State who this service was organized. (confr.: Hauriou, André, Gicquel, Jean y Gélard, Patrice, "Derecho constitucional e instituciones políticas",. Ed. Ariel, Barcelona, 1980; en el mismo sentido, Hübner Gallo, Jorge Iván, "Panorama de los derechos humanos", p.18, Editorial Universitaria de Buenos Aires, Buenos Aires, 1977).

IX . With an examination what is found at stake fundamentally is the right to life, the first natural right of the human being preexistent to all positive legislation and that obviously results in recognized and guarenteed in our Carta Magan and laws.

While some rights of the human personality have a thorough regime provided by law, others on the contrary are characterized for their imprecision. The difficulties are caused by lack of the systemization of the respective norms and from another point of view, for the progress of science and technology, that stir-up risks and they generate, at the same times, hope to improve the health and general well-being. (Fallos: 302:1284, voto de los Dres. Frías y Guastavino).

X . The common good, the essential assignment of the organized society, succeeds at the end only they can be attained by the same state, such as the national defense or the justice in its frequent and common manifestations. But, there are other ends that the State likewise obtaines and that are coinciding, in the meantime, its reach does not correspond in exclusivity to the state, but it can determine also the action of the individual and other societies. (confr.: Fallos 305:1524, voto del Dr. Bargallo). In this nature, they can consider the educational, cutural and health prevention goals.

However, when in a case determined not to be provided – for reasons of economic convenience and commercial interest – that the persons and private institutions take care of the health of the population, it does not fit but to conclude that it is the concern of the State, in the position of guarantor, to offer the necessary services in order to face the sickness, (esta Sala, arg. in re “Alcalá, Cristina Beatriz c/M° de Salud y Acción Social”, 9 de marzo de 1998), in an effective and suitable manner.

XI . According to the attached documentation to these proceedings and the assumed positions by the parties, it is not debatable that:

a) the Argentinian hemorrhagic fever is an epidemic and endemic (confr.: fs. 3,5 del folleto agregado a fs. 44;45, entre otras);

b) the most complete protection against the Argentinian hemorrhagic fever is the Candid vaccine. (confr.: fs. 351, primer párrafo), cuya efectividad está en el orden del 95,5% (fs. 361).

c) the World Health Organization endorsed its effectiveness and the Argentinian Minister of Health and Social Action authorized its application in 1991, by resolution 100 (fs. 351, 6° párrafo);

d) Until the present time, the Candid vaccine has been produced totally by the Salk Institute, by means of a contract with the United States Defense Department. Approximately 320,000 doses of the vaccine have been acquired, making an available stock of 80,000 doses (fs. 326) and this amount is not sufficient to immunize the 3.5 million inhabitants of the endemic zone. (fs. 351, 7° y fs. 23, 3° párrafo).

e) Considering that this disease is exclusive to our country, that it is not provided to produce the Candid vaccine in the foreigner, and that due to the number of persons to vaccinate, the production of this vaccine is not attractive from the commercial point of view, the availability of the vaccine for the population of the endemic area is subject to the advance of the Candid 1 production in the laboratories of the National Institute of Viral Diseases "Dr. Julio Maiztegui." (confr. fs. 23, 3° párrafo).

XII .What is clearly apparent from the records of the case that the "Estado Nacional" through the ministry defendant, has assumed the obligation to produce the vaccine for the purpose to combat the FHA.

The question to decide resides then to determine if the defendant has punctually fulfilled its obligation or if, contrarily, it has committed with injurious omissions of the law to the health of the potential population affected by the renowned disease.

XIII . The project to produce the Candid 1 vaccine in Argentina was initiated in 1991, obtaining in 1997 eighty percent of the technology of production and quality control (fs. 101), remaining to finalize the work edificas and the equipment of the production laboratory (fs. 100) .

In spite of affirming it through the lawsuit (fs. 122) to the effect that in the presupposition of 1997 contemplated the special partition destined "to end to make suitable this Institute finally," the fact is that, according to the minute of fs. 346/361 and of the judicial examination affected with the date December 12 of this year, it was far from finding the conditions to produce the vaccine.

Although they had finalized the work, besides the acquisition and placing necessary apparatus to begin the production required of them, besides, a process of validation (control of operation)--according to the attached program in fs. 359- recently it was able to complete on the first trimester of 1999, considering that --no inconveniences exist --it would be in the conditions to liberate to use the Candid vaccine produced in the country for the end of the said year. (fs. 337)

XIV . It is necessary to clarify that the "sub lite" does not try to avoid the legal proceedings and regularities in effect for the purpose to obtain the authorization of the vaccine on behalf of competent state organization circumstances that would be found excluded from the court's jurisdiction.

XV . The report present on October 2, 1996, by the Director of the National Institute of Viral Diseases "Julio I. Maiztegui" states that "no investment has been realized during the last two years" that permits the capability of the unity of production of the vaccine it found consequently that paralyzed it (fs. 35) , which has been found corroborated by the newspaper clipping accompanied by the defendant at fs. 115, in which it mentions that the Ministry of Health announced that in the budget estimates of 1997 executed allowance for the mentioned Institute that would permit it to reactive its initiative.

XVI . Keeping in mind that--as indicated--the preservation of the community's health is one of the main priorities of the organized community like "Estado de Derecho", can arrive to the following conclusions:

- a) to have assumed the National States the obligation to produce referred to vaccine to combat the FHA, the habitants of the effected zones and obviously, the defense counsel of the nation finds legitimated to claim the fulfillment of the said obligation;
- b) If the budget estimate of 1997 is good, they had preview the special partitions intended to reactivation of the project, the fact is that, beforehand, of the said moment, were lapses which were paralyzed for lack of investment, with the following postponement of the final goal, that is, the production of the Candid 1 Vaccine;
- b) The gravity of the disease, to be added to the great quantity of persons with risk to contract the disease within the endemic area (estimated at 3.5 million persons), the maximum effort becomes absolutely necessary of the competent authorities in order to finalize, in the least amount of time possible, all the pertinent task, work, and acquisitions to produce the Candid 1 Vaccine in the country.
- d) All of the time that the cronogram, fs. 359, was realized by the the National Institute of Viral Diseases "Julio I. Maiztegui" and having in account its fulfillment exceeds the rights of the summoned organism, depending instead of the political decisions, budgetary and administrative of the superior authorities of the defendant, it is not absurd to sustain the proposal of orders has not been lost actually, neither can be consequentially, to declare inofficious a pronouncement about the matter.

XVII . In such conditions, it corresponds to make space, in the aspect, to the constitutional lawsuit obtained and consequentially, to order the Estado Nacional--Ministry of Health and Social Action--that "cumpla" strictly and without delay, with the conogram which copies is found attached at fs. 359, making responsible in personal form to the Ministers of Health and Social Action and of the Economic and Work and Public Services -- in their respective competent areas and obligating likewise, to the organismos direction to the fulfillment of the legal and regulatory terms.

XVIII . From the angle, it cannot be admitted the petition of the defendant referring to implementation, in coordination with the competent public areas of a campaign to reestablish the ecosystem that contemplates, in particular, the conservation and reestablishment in the effected zones of the natural

"pajonales", feline habit called the cat of the straw, and also that strong competent lands for the natural housing of the owls, captured birds, natural huntings of the rodents.

In effect, the documentation accompanied by the plaintiff does not arise in a definite form in the boundary of this constitutional action – these measures produce the effects that they were seeking. Whichever decision to this respect, in the meantime “fuese” of the competence of the judges would require a larger wealth of information and evidence that could permit to know in hte detailed form not only the actual situation and the impact the adopted measures and proposals could have.

In effect, to make a note of, in an example, the existing contradiction between the plaintiff’s position and defendant’s position as soon as the relative question to the custom of “to plow until the chicken wire fence.” The defendant opposes because it would be the cause of the elimination of the “that strong competent lands for the natural housing of the owls, captured birds, natural huntings of the rodents” (fs. 13), while for the health organism the recommendation is “to plow until the border of the chicken wire fences” (fs. 40 y 44-18).

Also, it can signal that there does not exist coincidence in the case of the batural “pajones.” According to the plaintiff, they have been conserved because the constitute the habitat of the feline cat of the straw, (fs. 15), in the meantime for the defendants it is necessary to maintain weeded the places in which the rodents constract their nests. (fs.40 y 44-15) .

It does not implicate, of course, a definite pronouncement something near to the validity or of the said measure, it is only that, in from of the demonstrating efficacy of the Candid 1 vaccine and before the shortage of the manifest origin of the other claims, to extend in this process concerning its origin efficacy exceeds the possibilities of evaluation of this court down the intended path.

For all of the above reasons, we partially accept the plaintiffs claim, and consequentially, it is ordered:

- a) The Ministry of Health and Social Action must strictly fulfill and without delays the schedule attached at pages. 359 which makes it personally responsible, The Minstery of Health and Social Action and the Ministry Social and Economic and Work and Public Services, in their respecitve areas

of competence, are likewise obligated, to fulfill of these legal terms and regulations.

- b) to create a bill for the President of the Nation and the Head of the Ministry Cabinet. By means of work of style;
- c) to entrust to the ombudsman the continuation and control of the fulfillment of the referred to schedule, without obstructing the rights of the plaintiff; and
- d) without derogating from the established precedent, the D should, inside the period of ten days after it is notified, to inform the court of the fulfillment of the schedule referred to in point a.

The court costs of this petition are to be imposed on the order caused in the attention to the result that arrived and to the newness of the established question.

This order is to be recorded and the Ministry of Health and Social Action and the Ministry of Economy and Work and Public Services are to be personally notified.

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Traducción a cargo de Amber L. Fitzgerald.