Case SU-225/1998

Reference: File T-140800

Plaintiff: Sandra Clemencia Perez Calderon and others

Topics: scope of the fundamental right of children to health; constitutional relevance of the concept of unsatisfied basic needs; clause of eradication of present injustices contended in Article 13 of the National Constitution; development of the theory of the right to the minimum income.

Magistrate Rapporteur: Dr. EDUARDO CIFUENTES MUÑOZ

Bogota, D.C., 20 of May 1998.

The Full Chamber of the Constitutional Court, conformed by its President Vladimiro Naranjo Mesa, and by the Magistrates Antonio Barrera Carbonell, Eduardo Cifuentes Muñoz, Carlos Gaviria Diaz, José Gregorio Hernández Galindo, Hernando Herrera Vergara, Carmenza Isaza de Gómez, Alejandro Martinez Caballero and Fabio Moron Diaz

IN THE NAME OF THE PEOPLE

AND BY ITS CONSTITUTIONAL ATTRIBUTIONS

Has delivered the following:

JUDGEMENT

In the process of *tutela* T-140800 advanced by SANDRA CLEMENCIA PEREZ CALDERON and others against the MINISTRY OF HEALTH and the MAYORALTY OF BOGOTA, D.C. – DISTRICT DEPARTMENT OF HEALTH -

I. BACKGROUND

1. Four hundred and eighteen (418) parents, in the name and representation of their minor children, represented by the Foundation for the Defense of Public Interest - FUNDEPUBLICO -, filed a writ of *tutela* against the Ministry of Health and the District Department of Health, before the 12th Family Court of Bogotá, D.C. In the view of the plaintiffs, these public authorities violated their children's fundamental rights to life (Art. 11, National Constitution), to health (Art. 44 and 49, National Constitution), and to Social Security (Art. 48, National Constitution), by not providing, free of charge, the vaccine against the viruses that produce diseases known as *Meningococcal* meningitis and meningitis caused by *Haemophilus influenzae*.

The legal representative of the plaintiffs expressed that, in the majority of the cases, the plaintiffs are single mothers or workers in the informal sector, residents of the locality of Puente Aranda, Bogotá, D.C., who lack sufficient resources to pay the health care that their minor children require and moreover, they are not affiliated to any public lending institution that provides social security. He also informed that, since the present case primarily concerns workers of the informal sector of the economy, they are obliged to leave their children in the care of community welfare homes of the Colombian Institute of Family Welfare – ICBF. In these homes, the conditions of care and salubrity are quite precarious, because of the large number of children they have to take care of.

The legal representative also indicated that overcrowding and high level of contact between some children with other children, increased the risk of these children contracting the virus that causes meningitis.

On the other hand, the legal representative indicated that this disease is manifested in two ways: meningitis *Meningococcica* and meningitis *Haemophilus Influenzae*. The former, meningitis *Meningococcica*, is transmitted by direct contact with secretions of the nasal and pharyngal channels and is primarily a high risk for very young children and young adults. The symptoms consist of fever, intense migraines, nausea, vomiting, rigidity in the neck and, sometimes, petechiae. There have been cases of fulminant meningococcal diseases in which the rate of fatality is high. The second manifestation, meningitis *Haemophilus Influenzae,* is transmitted through infected nasopharyngeal secretions and is characterized as a manifestation which attacks young children whose ages oscillate between two (2) months and three (3) years. It is uncommon in children over five (5) years. The symptoms of the disease consist of fever, vomiting, lethargy, meningeal irritation, and stiffness in the neck and back. This disease is highly lethal and can cause side effects such as deafness, language disorders, mental retardation and behavioral disorders. Scientific studies indicate that the appearance of both manifestations of meningitis is higher when the aforementioned at-risk populations are exposed to conditions of overcrowding and poverty.

The legal representative of Fundepublico, indicated that the plaintiffs, conscious of the risky situation that the ICBF Zonal Center of Puente Aranda posed to their children, attempted to obtain the vaccination against the meningitis virus for their children. To achieve this, they approached the Secretariat of Health of the District

and other relevant State agencies. On 2 July, 1997, the Secretariat of Health of the District answered the petition of the plaintiffs and informed them of the costs of the vaccine and the places where it was available. Later, in a teleconference, the Minister of Health answered a mother from the community that "the Ministry is assuming the costs of the vaccine in epidemic depressed areas" and that in "the incoming year (1998) the vaccine against meningitis will be part of the Extended Program of Immunization (PAI)". Nevertheless, the official stressed that, "at this date, no national, departmental or district authority has taken the necessary precautions to ensure the services of vaccination and prevention against meningitis and the Extended Program of Immunization has not been implemented".

The plaintiff's legal representative expressed that the plaintiffs did not have the capacity to cover the cost of the vaccine against meningitis, the value of which was between 20 000 and 28 000 Colombian pesos. This fact, together with the situation of high risk to which the minors are exposed, constitutes a threat to the rights to life, health and social security of the children. He also states that this risk has increased, since there have been outbreaks of meningitis in other zones of the country, including Ibague (Tolima) and Banco (Magdalena), and that these outbreaks have taken the life of various children. The representative indicated that inspite of this situation, "neither the Health Secretary of Bogotá, nor the Ministry of Health have taken the necessary measures in order for the minors (…) to have free access to the vaccine against meningitis".

The plaintiffs' legal representative also considers that the authorities sued herein, by not offering for free the vaccines that the plaintiffs' children require, have violated the fundamental rights of the children pursuant to Article 44 of the National Constitution and the rights enshrined in the 1959 Declaration of the Rights of the Child. The representative also indicated that the jurisprudence of the Constitutional Court has established that the rights of the child to health and to social security are rights of a fundamental character that prevail over the rights of others and that can be protected directly through the process of *tutela*.

Finally, the plaintiffs' legal representative declared that in accordance with the above principles and constitutional rights, "it cannot be permitted that the lives and health of a group of children who have limited resources, in a situation of extreme poverty, and whose rights prevail over the rights of others, are threatened due to the lack of minimum attention that the authorities must give to them".

Evidence asked by the instance judge

2. The sued public authorities and other entities sent to the court of *tutela* the information summarized below.

2.1. The Health Ministry informed that the services of prevention, promotion and attention to health are served in a decentralized way, through the services and directions of departmental, municipal or district secretaries of health. For this reason, if in the zone of Puente Aranda of Bogotá city there is a focus on meningitis

epidemic, its control corresponds to the Secretariat of Health of the District. However, the Ministry manifested its disposition to coordinate any action directed to "surpass the speculative situation that is required".

On the other hand, the Health Ministry indicated that, in fact, the vaccine against meningitis "is not included in the unique scheme of vaccination for Colombia" and that this one is only provided, in a focalized way, to vulnerable groups and following the epidemic risk". The Ministry stated that in the high epidemic risk zones, the vaccine is available to children between 5 and 14 years and provided freely by the Ministry, those under high risk are able to access the vaccine through HPE (Health Promoter Entity) and other public and private health institutions that provide this service to them at a certain cost.

Lastly, the Ministry stated that the families of the zone of Puente Aranda have not solicited from this entity any kind of support. Moreover, it was noted that the District Health Secretary of Bogotá, throughout 1996, had vaccinated children between 5 and 14 years old against meningitis who were living in shelters in the capital city.

2.2. The District Health Secretary of Bogota, informed the judge of *tutela* that "the national action plan program does not include the vaccine against meningitis caused by *Haemophilus Influenzae,* because there is no budget for the purchase of the above mentioned vaccine, however at this moment the Health Secretary is acquiring a certain number of vaccines with the purpose of attending to the eventual presence of outbreaks and others". Moreover, the Health Secretary informed the court that some public institutions provide the vaccine at a cost between 17.000 and 25.000 Colombian pesos. It was further indicated that because of the importance of the vaccine for the protection of infantile health, measures have been taken in order to guarantee its application for children under one year of age in 1998.

In relation to meningitis *Meningococcica*, the Health Secretary attached a document in which the Ministry of Health, recommended to the public that the vaccine against the mentioned modality of meningitis shall be allocated to children older than 4 years old, as its effectiveness has not been proven in children under that age. The Health Secretary mentioned that where there is a case of this kind of meningitis "chemoprophylaxis must be initiated, as it is considered to be the most effective measure to end the risk of transmission and to prevent the presentation of new cases".

2.3. The Director of Health and well-being of the Colombian Red Cross informed the court of *tutela* that, through the Branch of Cundinamarca and Bogota, they had made available to the community the vaccines against meningitis in its two modalities at a cost of 28.500 Colombian pesos for each dose of the vaccine.

2.4. Finally, the Director of the Trinidad Galan Hospital stated that through the Primary Units of Care –PUC-, it has the capacity to offer the massive service of

vaccination to children, free or at a small cost, depending on the kind of vaccine.

In the case of the vaccine against meningitis for *Haemophilus Influenzae*, the court was informed that this is used in children under five years old for 22.000 Colombian pesos per dose, as it is not inside the immunization scheme of the Health Ministry which includes the vaccines administered to large sections of the population, free of charge.

First Instance Decision

3. By the decision of 17th July of 1997, the 12th Family Court of Bogota, decided in favor of the protection of the rights to life, to health and to social security of the children and ordered the Ministry of Health and the District Health Secretary of Bogota (in the time period of 48 hours) to "face the stated situation in respect of the infantile population of the zone of Puente Aranda, providing the necessary means in order to process immediately the pertinent study to allow the gratuitous provision to the plaintiff´s children of the dose or vaccines that are necessary in each case to prevent or control the meningitis disease".

In the opinion of the judge of *tutela*, the problem that had to be resolved in the present case consisted in determining if, in light of the National Constitution, it was pertinent to order the massive and gratuitous vaccination of the plaintiffs' children. In order to solve this question, the judge considered that the National Constitution, in accordance with international treaties, obliges the State to protect the fundamental rights of children (Article 44), in which the right to health is included. It was indicated that this was "a situation that implies an imminent risk of mortality and sickness for a great number of the infantile population located in the Capital, as meningitis is a disease that requires immediate and pertinent attention in order to prevent serious consequences such as incurable or irreparable consequences and even death; that is to say that in order to protect children's rights in the way that the Constitutional Court has done, it is necessary that family primarily and the State subsequently satisfy the children's necessities". Consequently, if the plaintiffs "are not financially able to cover the costs that grant access to the provision of the vaccine against meningitis, (…) and if they do not have access to a Health Entity as most of the parents are not (…) affiliated with this service, it is impossible for them to acquire the vaccine. As the families were in such a situation, what is established in international treaties and Governmental positions must be applied, in the sense that the State has to guarantee children's health. This is the reason why this court has to accede to the *tutela*, ordering the gratuitous provision of the vaccines against meningitis, by the State". However, it was indicated that, prior to the provision of the vaccines, the sued authorities ought to analyze the concrete case of each minor with the objective of providing the right dose in order to reduce to a minimum the risk of acquiring the disease.

4. The last decision was sent to the Constitutional Court for its eventual revision and, through the insistence of the Ombudsman and the plaintiffs lawyer, it was selected to be reviewed by this Court.

The Ombudsman and the plaintiffs lawyer considered that it was necessary to unify the constitutional doctrine with the purpose of establishing the scope of application of the fundamental rights of children in similar situations to the ones of the present case.

Furthermore, they stated that the jurisprudential unification regarding these matters "should be implemented also as a pedagogical instrument for all the public authorities that are nationally in charge of the provision of the public service of health, so that in identical situations to the present one, they would have to abstain from omitting the duty to prevent the presence of severe diseases such as meningitis, in the infantile Colombian population that may be exposed". They added that that unification "would contribute to the national Government's attempt to promote nationally an extensive campaign regarding vaccination against this disease. This campaign aimed to avoid the congestion of the judicial offices, due to the amount of *tutelas* that assuredly many parents would apply for if the refusal of vaccination of their children persisted".

Evidence asked by the Third Chamber of Revision of the Constitutional Court

5. The Third Chamber of Revision, stated that it was necessary to practice a series of additional evidentiary material to clarify some aspects related to the meningitis disease and its incidence in the health of the minors involved.

Ministry of Health and Secretary of Health of the District

The Chamber ordered the Ministry of Health and the District Secretary of Health of Bogota to inform the Court in respect of the following: (1) What are the criteria to define the vaccines that have to be provided obligatorily and free of charge; (2) the vaccines against meningitis that are actually provided to children obligatorily and free of charge; (3) what criteria defines that a certain zone or group of persons has high epidemic risk of contracting meningitis; (4) who is responsible for defining the "diseases of obligatory weekly notification" and the diseases under intense vigilance; (5) what criteria is used to determine that a disease has to be of "obligatory weekly notification" or under intense vigilance; (6) whether the meningitis is included in the group of "diseases of obligatory weekly notification" or if it is under intense vigilance; (7) how the conditions of overcrowding, lack of hygiene, poverty, undernourishment or absence of healthcare influence the epidemic risk of meningitis; (8) what percentage of the infantile Colombian population and of the Capital are vaccinated against meningitis; (9) how the decision of July 17,1997 was dictated by the Family Court 12 of Bogotá, in the process of *tutela* exercised by Fundepúblico against the Ministry of Health and the District Health Secretary of Bogota; (10) whether the vaccine against meningitis is included inside the Extended Plan of Immunization; (11) who is in charge of designing that Plan and under which criteria (12) who is in charge of its implementation, is it actually being implemented, and if not, what are the reasons?.

6. The head of the Legal Office of the Ministry of Health answered the majority of the questions asked by the Court. However, some of the questions were not answered in full and others were only partially answered. Thus, for example, although there exist different types of meningitis bacterial (two of them mentioned in the studied *tutela*), the memorial refers only to one of them (*meningococcal meningitis*); additionally, the head of the Office did not answer fundamental questions, such as the percentage of the population vaccinated against these diseases or the criteria to define the vaccines that have to be obligatorily provided and free of charge.

According to the abovementioned document, vaccines against meningitis are currently not being applied obligatorily and free of charge. Nevertheless, the vaccine against meningococcal meningitis is part of the Ministry's Extended Plan of Immunization. However, the mentioned vaccine "is only extended to zones considered to be of high risk and in children over 5 years old, since in children under 4 years old, the vaccine is not effective". Additionally, meningococcal meningitis is part of the diseases that are monitored through the "System Alerts Action". Through this system, weekly updates of "all the high-priority epidemic occurrences of obligatory notification" are made.

In the document it is manifested that the limited epidemic occurrences that are part of the SAA are selected with the following criteria:

* Diseases and deaths which are of high importance to public health in the national territory because of their magnitude and severity.

* Epidemic occurrences whose epidemic evolution requires an immediate prevention and control response due to its epidemical potential.

* Epidemic occurrences with actions of prevention and control that have been shown to be effective.

* Diseases and deaths that, due to international obligations, must be notified to the international community.

* Epidemic occurrences that have an occurrence that is limited in time and place and that can potentially create a situation of communitarian or hospitable emergency.

The document also states that "among the epidemic occurrences that fulfill those requisites a prioritization was done and a limited number of epidemic occurrences were chosen; among these epidemic occurrences was the meningococcal meningitis".

Nevertheless, although other types of bacterial meningitis, such as the one produced by *Haemophilus Influenzae*, can have the same effect as Meningitis *Meningococcica,* there is nothing in the aforementioned document that explains why the respective vaccine is not included in the Extended Plan of Immunization.

Lastly, it is necessary to establish that the aforementioned document states that "the conditions of overcrowding, lack of hygiene, poverty, and undernourishment are directly related to infectious diseases such as meningitis".

7. The District Health Secretary informed the Chamber that the vaccines that are provided obligatorily and free of charge are included in the Unique Vaccination System. This system is determined by the Ministry of Health, based on the following criteria: (1) epidemiological behavior of the disease and its impact on public health, particularly in the infantile population; (2) health policies established internationally; (3) those vaccines that have shown to be effective for the health sector, that is to say that the invested resources have a significant impact on individuals' health and, additionally, achieve decreases in treatment costs and disease rehabilitation.

The document details the criteria that the Ministry of Health uses to define the diseases of obligatory weekly notification (see above). The document identifies Meningitis contracted through *Haemophilus Influenzae* and Meningitis *Meningococcica* as diseases of the abovementioned events subject to intense vigilance.

In her memorial, the district health secretary informs the Court that risk factors associated with the mentioned diseases exist, including overcrowding, day care centers, "and socio-economic factors reflected in the lifestyle (i.e. malnutrition and limited or difficult access to medical attention)".

The district health secretary states that the order of the judge of first instance gave rise to a process of vaccination for *Haemophilus Influenzae* for the first 270 minors. Due to this order, the Health Secretary provided the respective vaccines, which consists in a "group of vaccines that the institution acquired for the purpose of conducting surveillance and epidemic control in vulnerable human groups with high incidence levels".

Summary of the measures adopted by the health entities in order to control and prevent bacterial meningitis in high-risk groups

8. Following the documents received by this Corporation from the Ministry of Health and the District Health Secretary, it is noted that meningitis *Meningococcica* and meningitis produced by *Haemophilus Influenzae*, are very grave diseases. This is why these diseases are monitored through the "System Alerts Action", by which weekly, "all the high-priority events of obligatory notification" are informed.

However, at the time the *tutela* was presented, the vaccination to prevent the mentioned diseases was not part of the obligatory and free of charge plans of vaccination, already defined by the Ministry of Health. Thus, the vaccines had to be paid for by the affected persons themselves, except in cases where they were affiliated with the general health system, a system that assumes the total or partial

cost of the vaccines.

Despite the previous statement, it should be noted that the vaccine against meningitis *Meningococcica* is part of the Expanded Program of Immunization (EPI) and is provided to children between 5 and 14 years of age who reside in zones considered to be endemoepidemic[1]. However, from the information sent to the Court, there is no evidence of the existence of studies that allows it to be determined with clarity whether a zone is of epidemic risk; neither there is certainty regarding the effective enforcement of the already mentioned EPI. It is important to indicate that the Court concretely formulated a question about the effective implementation of the program, a question that the Ministry did not answer.

Furthermore, in a document added to the file of this case, the Health Secretary affirmed that once the occurrence of a series of cases of meningitis in the capital city was confirmed; this entity provided vaccinations against meningitis *Meningococcica* of groups B and C during the months of January and February. This vaccination was focused on high risk groups in closed communities such as the prison population, military members and children from five to fourteen years old located in shelters". However, as the Secretary noted, "Bogotá is not an endemic epidemic region".

With respect to the vaccine against *Haemophilus Influenzae*, through Agreement No. 71, the National Council of Social Security in Health (NCSSH), allocated a percentage of the remaining resources from the health promotion subaccount of Fosyga, to co-finance the public entities, the Health Promoter Entity (HPE) and the ARS to vaccinate the population with under one year of affiliation to the General System of Social Security in Health. The HPE was required to have done this preventive action before 31 July, 1998. However, the mentioned program of vaccination does not cover the population that is merely *linked* to the General System of Health.

In this sense it has to be mentioned that the District Health Secretary of the District of Bogota sent a document to be added to the file of this case, in which it stated that it was acquiring a determinate number of doses of this last vaccine, with the purpose of taking care of the eventual presence of outbreaks and its subsequent contagious contacts. Likewise, it was indicated that the Secretary was taking "measures" to guarantee its application for children under one year of age in the Capital District for 1998.

Nevertheless, the Health Secretary did not send reliable information about investigations at the national level relating to the impact and localization of the disease (quantitative information about the incidence of the disease, zones of greater susceptibility, etc.), the percentages of the vaccinated population, the rates of morbidity and the epidemic incidence or the relation to cost-effectiveness of the vaccines available in the market. Nor is there information about eventual actions that can be taken to obtain additional funds useful to combat the disease, such as

[1] Official scheme of the Ministry of Health, published in Circular 0017- 30 July, 1997.

eventual negotiations with international organs (as the Revolving Fund of the Pan American Health Organization "PAHO") for the joint purchase of vaccines. Lastly, it was established that there are no studies regarding the different strategies of vaccination, such as the reduction of the dose or the reduction of the number of dosages.

Concept from Unicef

9. The Chamber solicited the representative of UNICEF Colombia, if possible, to answer the following questions: (1) what is the position of international entities protecting childhood related national policies of prevention and control of meningitis disease; the incidence of this disease in the public health area of the Colombian child; and its rate of mortality; (2) Which policies or international recommendations exist in relation to national schemes of obligatory and free of charge vaccination for children; what criteria is there for a certain vaccine to be included in the national schemes of obligatory and free of charge vaccination for children; (3) whether there are any recommendations from international entities regarding the protection of the child relating to schemes of infantile vaccination in Colombia; (4) whether there exists any program of international aid for epidemic countries related to meningitis, and whether Colombia is included in those programs? If it is not included, why not?

10. Cecilio Adorna, as a representative of Unicef Colombia, sent a document answering the above questions. In the document, it is indicated that bacterial meningitis is fundamentally manifested in two ways: Meningitis *Meningococcica* and Meningitis by *Haemophilus influenzae,* and that for both types there are currently vaccines available in the market. However, the vaccine against Meningitis *Meningococcica* is not recommended for children under five years of age due to its low effectiveness In this case, it is only recommended for concentrated high risk groups of epidemic zones.

Regarding the vaccine against meningitis *Haemophilus influenzae* type B (HIB), Unicef informs the Court that the twelfth (12) meeting of the Technical Advisory Group of the Pan American Health Organization on preventable diseases by vaccination, took place in Guatemala City, Guatemala, in September of 1997, and there it was concluded that:

> *"The vaccine is safe, effective and has had a huge impact in industrialized countries on the incidence of the HIB strand of the disease, particularly for meningitis and epiglottitis. Similar effects have been observed in other countries of the region (e.g: Uruguay and Chile) that had introduced this vaccine in its national programs of immunization. It is possible to observe a huge impact in the incidence of pneumonias in developing countries, as the Hib virus is a significant infectious agent in pneumonia contracted by children. However, in reality, the cost of the HIB vaccine is an impediment for its implementation. It is expected that an increase in demand produces a*

reduction of the prices".

Additionally, the Chamber was informed that the Technical Advisory Group made the following observations:

**It is recommended that the vaccine against HIB be introduced in the national programs of immunization, as long as there are additional funds available. The implementation of HIB should not divert necessary resources for the sustaining and fortification of the existing efforts of immunization.*

**Good quality quantitative information regarding the incidence of the HIB disease in the Region is not available, particularly regarding respiratory diseases. The establishment of a well-structured system of vigilance is recommended, with the purpose of monitoring the disease caused by HIB and to demonstrate the impacts of the vaccine.*

**The use of the Revolving Fund of the PAHO for the joint purchasing of vaccines facilitates the negotiations to obtain better prices.*

**It is important to do a careful evaluation of other strategies for vaccination, such as a reduced dosage amount or a reduced number of doses".*

Unicef added that in respect of bacterial meningitis, the fatality rate depends on the timeliness of diagnosis and on the type of medical attention received, as its treatment depends on antibiotics.

Unicef further stated that "following the Extended Program of Immunization in the Americas (EPI-bulletin of December of 1996), before introducing new vaccines in a national program of vaccination, there must be a detailed investigation of the epidemiological relevance of the vaccine and if it is possible what has to be tested is whether the introduction of the vaccine in the vaccination program represents an effective use of the resources with respect to the cost. Once the test is done and there are necessary resources, a plan of introduction and implementation must be elaborated".

In this respect the court is informed that "the World Health Organization, through the Pan American Health Organization, has a special program for vaccines and immunization (SVI) that is developed in the region. In the information document from the Technical Group that resulted from the twelfth meeting that took place in Guatemala, on 8 to 12 September, 1997 it is expressed:

"The immunization is widely recognized as one of the preventive measures of highest cost-effectiveness relation. In the Americas this impact has been demonstrated through the eradication of poliomyelitis in 1991, the stoppage of measles transmission in the majority of the countries of the Region, as in the noticeable reduction of morbidity by neonatal tetanus… It is important that the Ministries of Health assign high priority to the implementation of programs of

immunization that assure that adequate resources are directed to those programs. Likewise, it is indispensable that international agencies continue giving its support to national programs of vaccination".

Lastly, the Technical Group report, indicates that:

"The incidence of grave diseases caused by Haemophilus influenzae of type B (HIB) has been greatly reduced in the countries that had introduced the vaccine against this infection. Despite that this pathogenic agent has been associated principally with meningitis, recently obtained results regarding the implementation of the vaccine have demonstrated that the incidence of the H. Influenzae can be ten times greater in people who have acute respiratory diseases. In several countries of the Americas the vaccine Hib has been incorporated in the vaccination programs, but the high cost of the vaccine is preventing the vaccination of all children. The Americas are looking for other strategies of vaccination that are applicable to the situation of every country. The Special Program for Vaccines and Immunization is promoting the introduction of the vaccine in the Region, pointing out the importance of instituting an adequate system of vigilance that facilitates the evaluation of the effect of the vaccine".

Expert's Advise

11. The Chamber solicited the Colombian Association of Pediatrics and the Deans of the faculties of medicine at the Universidad Nacional de Colombia, Pontificia Universidad Javeriana and Colegio Mayor de Nuestra Señora del Rosario as coordinators of institutions expert in the matter, who would be able to shed light on the following questions: (1) What is the meningitis disease all about, which are its modalities, how is it transmitted, what are its symptoms, what are its possible consequences, its rate of mortality and what is the appropriate treatment?; (2) what type of conditions cause the appearance or the contagion of meningitis? How conditions of overcrowding, lack of hygiene, undernourishment, poverty and lack of opportune medical attention in the apparition, are implicated in the propagation or contagion of this disease?; (3) Which are the Colombian populations at higher risk of acquiring meningitis?; (4) What type of preventive measures can be adopted by the authorities of public health to prevent the appearance of this disease?

12. The representative of the Colombian Association of Pediatrics, sent to the Chamber a study from August 1997 by doctors Enrique Gutiérrez and Cristina Mariño, of the Universidad Militar "Nueva Granada". This study answers the questions asked. Also, the doctors Jorge Mauricio Palau Castaño, of the Universidad Nacional de Colombia, Paulo Vega Mateus, of the Colegio Mayor de Nuestra Señora del Rosario and, Juan Manuel Lozano, of the Pontificia Universidad Javeriana, assigned by their respective Deans, in a complete and relevant manner answered the questions formulated by the Court. Hereinafter the most outstanding parts of the respective answers are explained.

Characteristics of meningitis

13. In general, the consulted doctors indicated that "the term meningitis refers to the inflammation of the meninges (membranes that cover the brain and the spinal marrow). The immediate proximity of the meningitis to the brain, and the fact that the inflammation is presented in a rigid space, limited by bones of the skull, makes this condition, in general, a grave disease with a significant mortality and with frequent sequels between those that survive".2

Additionally, the doctors clarify that meningitis can have different etiologies (infectious, traumatic, chemical, postsurgical, neoplastic or tumor-like, vascular and immunological) 3. However, the types of meningitis that the *tutela* deals with are classified within the infectious meningitis, caused by bacteria (H. influenza y N. meningitides), also known as bacterial meningitis.

It is noted that bacterial meningitis is still the most serious infection of the Central Nervous System in children, especially in developing countries.4 The report indicated that the absence of rigorous investigations of national cover makes the real frequency of the problem difficult to evaluate in the country, but it is indicated that in the mentioned study it was found that "the 1% of 1208 patients of the Hospital de la Misericordia in Bogotá, were diagnosed with bacterial meningitis, with an incidence of 61 cases in 1000 consultations".5 Additionally, in an investigation carried out in the city of Cali it was registered that "2% of the pediatric patients of the Hospital Universitario del Valle, had diagnosis of bacterial meningitis". 6 In sum, despite the fact that there is no reliable data on the incidence of the disease in the infantile population, it can be verified that its occurrence is not merely intermittent.

Factors of risk

14. The studies agree in indicating that define factors exist that increase the possibilities of having the disease. For example, it is indicated that "there is a greater incidence of the disease in children of low socio-economic conditions, because of overcrowding where they live, as, there is a higher incidence in those who attend nurseries".7

The infectious meningitis is presented with higher frequency in children between 3

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2 Document elaborated created by doctor Juan Manuel Lozano

3 Document elaborated created by doctor Jorge Mauricio Palau Castaño.

4 Document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.

5 Study of Alvarez Palau (1997), mentioned in the document elaborated by doctor Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.

6 Study elaborated by López, Levi and Velasco (1994), quoted in the document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.

7 Document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.

months and 5 years old, that attend attention and care institutions, day nurseries, communitarian homes and shelters, among others, in which the spread of the causal agents is facilitated.8 The disease is passed on through contact with infected nasopharyngeal secretions, the overcrowding and the low degree of hygiene. These are determining factors for "ill people transmit the disease with greater efficiency". 9

Nutritional conditions, poverty and overcrowding, constitute factors of risk, especially when the disease is produced by *Haemophilus Influenzae* of type b. In respect of malnutrition, "the cause, alteration and degradation of the immunological system of the patients, with higher amount and worst gravity of the infectious diseases" is noticed. 10

In respect of the mentioned socio-economic factors, as poverty, it stands out that "it produces effects in different ways, as it can be associated with undernourishment, overcrowding, lack of attention by the relatives, minor and delayed attention by the health systems, lack of understanding on the necessity of treatment and probably lack of its implementation."11

In general it is highlighted that "all the **environmental factors** that increase the risk of propagation of the causative agents already mentioned between the individuals, increase the risk of acquiring the disease: 1) in general the bacterial meningitis is more frequent in the cities than in the rural zones; 2) studies made in the United States suggest that the higher frequency of the disease which has been observed in the individuals of black race than the individuals of white race is not due to racial factors, but due to the worst socio-economic circumstance of the former in respect of the latter; 3) the disease caused by some of the mentioned bacteria (H. influenzae and N. Meningitidis) can be transmitted from one affected by the disease to the people he or she comes in contact with, inside home and outside it, especially in day nurseries, schools and hospitals; however, the association between the disease and the overcrowding is not totally clear, as the results of different studies have been contradictory; 4) lastly, over the years there are variations in the frequency and the type of agents that cause the disease in different geographic places, but it has not been possible to identify the factors that are causing these variations."12

In sum, it is indicated that "the disease is more frequent in little children, in subjects with diseases that compromise his or her capacity to defend him/her self from infections and in socially disadvantaged populations."13

Possible sequels and rate of mortality

8 Document elaborated by doctor Jorge Mauricio Palau Castaño.
9 Document elaborated by doctor Paulo Vega Mateus.
10 Document elaborated by doctor Paulo Vega Mateus.
11 Document elaborated by doctor Paulo Vega Mateus.

12 Document elaborated by doctor Juan Manuel Lozano.
13 Document elaborated by doctor Juan Manuel Lozano.

15. The experts agree and affirm that "the bacterial meningitis is a devastating disease".14 On this matter, it is affirmed that "the mortality and consequences of the disease are still too high, due to the low effectiveness of the antibiotic treatment on the physio-pathological events responsible for the evolution and the consequences of the disease". 15

The experts express that "due to the mortality potential and neurological morbidity it is important to establish the antimicrobial therapy as soon as possible."16 But they added that, even if there was an adequate and opportune therapy, the majority of the affected children with the disease present neurologic consequences.

The experts added that it is fundamental to get the opportune medical attention to prevent majors injuries or sequels. Actually, following the opinion of the experts, "It is clear that the opportune medical attention is fundamental to detect the disease and to start its treatment early. In the preceding pages it was mentioned that the prognosis of the disease gets worse whenever appropriate therapy is delayed. In other words, although it is not possible to guarantee that opportune medical attention would change the frequency of the disease, it is decisive to modify its course once the individual acquires it."17

Following the opinion of the experts, the lack of opportune medical attention is possible keeping in mind that in newborn babies and in little children it is difficult to make a safe diagnosis, as the signs and symptoms of the disease, are not easily differentiable from the other less grave diseases. Certainly, in children meningitis can be manifested, simply, through temperature instability, refusal to feed or poor regulation of breathing, with episodes of tachypnea and apnea.[18] For that reason it is recommended that the medical staff always evaluate when those symptoms are presented for the possibility of meningitis. However, the situation is graver if the family is not affiliated to the General System of Health, as in these cases it usually happens that the symptoms are easily misunderstand and medical attention is given once the disease has caused devastating effects.

16. The most frequent consequences of bacterial meningitis are the following:

(1) Reduction or loss of the sensory functions (hearing loss, deafness, visual alterations, blindness, etc.);
(2) Reduction or loss of motor functions (plegias or paresis) of one, two or four limbs;
(3) Reduction or loss of the intellectual functions of different order (learning,

14 Document elaborated by doctor Paulo Vega Mateus.
15 Document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutierrez Saravia.
16 Document elaborated by doctor Ana Cristina Mariño Drews and Enrique Gutierrez Saravia.
17 Document elaborated by doctor Juan Manuel Lozano.
18Document elaborated by doctor Paulo Vega Mateus.

language, physical expression, among others);
(4) Reduction or loss of the functions of sphincter control;
(5) Various types of seizures (epilepsy);
(6) Reduction or loss of circulation of the cerebrospinal fluid, expressed in hydrocephalus of different degrees;
(7) Reduction or loss of the neuronal tissue with formation of cystic lesions that replace the lost nerve tissue.[19]

It has to be mentioned again that the possible sequelas of the bacterial meningitis, depend on the multiple factors that, among others are, the age of the patient, the nutritional and immunological state, the time of evolution of the disease, the severity of the disease at the moment of the diagnosis, etc.[20]

However, it is indicated that "every child that has suffered bacterial meningitis, has to be considered of high risk and has to have necessarily a closed monitoring from the point of view of its development".[21]

On the lethality rate, the consulted doctors indicated that there are no studies in Colombia on this. However, they indicated that local and regional information, show that the lethality rates are between the indicated ranges for Latin America. Therefore, it can be concluded that the rate of lethality, for the meningitis Haemophilus Influenzae type b oscillates between 14 and 28%. [22]

Lastly, summing up, it has to be indicated that "the meningitis, and particularly the one of bacterial type, is a grave disease and has a guarded prognosis. The factors that implicate the worst results include the age of the patient (with higher mortality in minors under one year old), the infectious agent (it is worst in the cases of E. coli, Klebsiella, Enterobacter and Serratia, and less grave in the cases when the meningitis is produced by N. meningitides), the duration and the extension of the inflammation before the therapeutic intervention, and the presence of other conditions in the person that can compromise its capacity to defend her/his self from the infection.

It is estimated that around 10% of children that present with meningitis die because of the disease, and that up to 35% of the survivors present with durable incapacities, most of the times permanent incapacities, under the appearance of neurologic sequelas, of sensorial or motor kind. 5% to 10% of these survivors have reductions in the detectable hearing 5 years after the disease. Between 10% and 20% present other sequelas as brain damage, hydrocephalus, motor impairments, visual or vestibular, seizures, and mental retardation of varying severity. In other cases the limitations are more subtle, manifested as mild brain dysfunction under the form of learning disabilities or behavior disabilities such as attention deficit or

19Document elaborated by doctor Jorge Mauricio Palau Castaño.
20Document elaborated by doctor Jorge Mauricio Palau Castaño.
21Document elaborated by doctor Ana Cristina Mariño Drews and Enrique Gutierrez Saravia.
22 Study made by Lagos R. (1996) quoted by doctor Jorge Mauricio Palau Castaño.

hyperactivity".[23]

Effectiveness of the vaccine

17. The consulted experts indicate that "the higher impact in the reduction of the mortality and morbidity because of bacterial meningitis is due to the introduction of the vaccines against the most frequent pathogens".[24]

In respect of the vaccine against meningitis because of H. Influenza, the experts warn that recently the frequency of that disease in the infantile population of Europe and United States "has dramatically declined, due to the impact of vaccination. Especially between 1985 and 1991 there was a reduction of 82% in the incidence of meningitis that is produced by this germ".[25]

Because of this reason, they indicated "that efforts have to be continued, especially in developing countries, to immunize all the infantile population through vaccines against the *H. Influenzae type b".*[26]

In fact, all of the information presented indicates that the vaccine against *H. Influenzae type b*, has the capacity to reduce the disease until a point of control is reached, and even has the capacity to eradicate the disease.

One of the documents sent and added to the file of this case, indicates that: "(f)irstly, from the beginning of this decade there are, globally, different vaccines against *H. influenzae,* that, as it has been said, is one of the principal agents that produces this disease. The obligatory implementation of these vaccines in developing countries has contributed to the partial disappearance of the meningitis produced by this bacterium;

The obligatory implementation of these vaccines in developed countries has contributed to the disappearance of almost all meningitis produced by this bacterium; it has been demonstrated by the epidemiological monitoring in United States and the Scandinavian countries. It is regrettable that these vaccines are not included in the ones offered in our country by the authorities of public health and that are apply only to those children whose family is able to pay its commercial cost. The Ministry of Health has expressed the intention in acquiring financial resources to resolve this inequity. These efforts must be reinforced, by obtaining the support from other sectors of the State, in order to be able to offer these vaccines to all the infantile population as little time as possible".[27]

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23 Document elaborated by doctor Juan Manuel Lozano.

24 Document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.

25Studies made by Quagriarello V.J. and Schelld M, (1997); Adams W, Deaver K., Cochi S., (1993); Peltola H, Kelpi T., Anttila M., (1992), quoted in the document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.

26 Document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.

27 Document elaborated by doctor Juan Manuel Lozano.

Despite the above, in other information it is established that: "the experience in other countries with better sanitary state, has demonstrated that a higher level of life quality is not enough to eradicate the disease, although it is an important factor in the diminution of its incidence; the use of vaccines that would protect from the agents that more frequently cause the disease is being investigated. The evidence now is encouraging as it happens with the vaccination against *Haemophilus Influenzae* type B that was done in Central America, but it is unknown if the high financial cost and the inherent risks that imply the vaccination of all the population, especially the infantile, compensate the diminution in the incidence of the disease or decreases its gravity".[28]

18. Regarding the vaccine that prevents meningitis caused by meningococcus (*Neisseria meningitidis)*, it is warned that although the studies are not conclusive, it may be affirmed that it is only effective in minors under five years old.

CONSIDERATIONS OF THE COURT

1. Through their representative, 418 parents, inhabitants of the sector of Puenta Aranda in Bogota, filed a *tutela* against the national and district health authorities, as they considered that these authorities violated the duty to protect the health of their children against the imminent risk of acquiring meningitis.

2. The first instance judge granted the *tutela* for the protection of the rights to life, to health and to social security of the plaintiffs' children.

In his opinion, the constitutional norms, in accordance with the international treaties relative to child protection, oblige the State to guarantee the protection of the fundamental rights of children (National Constitution, article 44), which include the right to health. It is indicated that the situation that resulted in the present *tutela* "implies an imminent risk of mortality and disease of a high number of the infantile population, located in the Capital, as it is the meningitis disease that requires immediate and timely medical attention to prevent grave consequences such as incurable or irreparable sequels and even death itself". Moreover, it is indicated that "to protect the rights of children in the way that the Constitutional Court has done, it is necessary that the family and secondly the State satisfy their necessities". Consequently, if the plaintiffs "are not in financial conditions of assuming the costs that allow access to the provision of the vaccine against meningitis, (…) do not have access to an EPS as the majority of the parents are not affiliated to that service, and it becomes impossible to acquire the vaccine, then, as these families are in this situation, (…) the State has to guarantee the health of the children".

As a result, the judge ordered the Ministry of Health and the District Health Secretary of Bogota, that at the end of 48 hours they shall "remedy the situation

28 Document elaborated by doctor Paulo Vega Mateus.

established in relation to the infantile population of the Puente Aranda zone of this city, providing the necessary study that would contribute to and process, immediately, the provision of the vaccines free of charge to the plaintiffs children to prevent and control the meningitis disease.

3.The Court has to adjudicate whether the decision subject to revision is in accordance with the National Constitution. The Court has to determine if, under the National Constitution, the plaintiffs children that conform to a marginalized social group, have the right to compel the State to provide free of charge, opportune and effective protection against the different kind of bacterial meningitis that can affect their health and put them in circumstances of manifest risk.

In order to resolve correctly, the question raised, it has to be defined, firstly, if the abstention of the State, in this case, violates the essential core of the social entitlement rights related to health matters, of the minors (N. C. art 44) and, in second place, if violates the constitutional mandate of eliminating marginalization and discrimination (N.C. Art. 13). The Chamber proceeds to analyze each of the questions raised.

The fundamental rights of the children (Art. 44 N.C.)

4. Fundamental rights are those that are recognized -directly or indirectly- in the constitutional text as subjective rights of immediate application. In other words, they are rights of such magnitude for the constitutional order that its validity cannot depend on political decisions of the representatives of the majority. Usually, fundamental rights are rights of freedom. However, in some cases, there are fundamental services rights, as the right to the legal or technical defense, the right to basic education, or the right to minimum income.

5. The constitutional order not only confers on children certain fundamental rights that are not recognized for other subjects of law, it also establishes that those rights take precedence over the rights of others. In the *social State* ruled by law, the political community has to give preferential treatment to those who are in circumstances of manifest vulnerability and are not able to participate under equal conditions, in the adoption of public policies that are applicable to them. In this sense, it is evident that the children are beneficiaries of preferential treatment that all public authorities, the community, and the family to which they belong are responsible for.(N.C. art. 44).

But the special protection of the fundamental rights of the child is not only due to the fragility of the child but also because of a world that he does not know and that he is not in the capacity of facing on his own. The National Constitution seeks to promote an order based on values that guide any civilized State: freedom, equality, tolerance, and solidarity. Nevertheless, such an order of values is thoroughly effective only if the subjects, to which this order is oriented, know it and share in it.
In this sense, the Constitution desires that people, from their childhood, have access to this axiological code, through a real and effective commitment of the society to

guarantee the conditions allowing them to grow up in conditions of equality and freedom, justice and respect for others opinions and beliefs. In these circumstances, it is reasonable to assume that the child on his majority of age will be a free person and autonomous, who knows the values of equality and justice that the Constitution mentions and because of that, is in the capacity of defend and promote them. These and other considerations explain that the Constitution prescribes, expressly, the constitutional special protection that the rights of children shall have in the national territory.

6. As it is established in Article 44 of the National Constitution, the right to life, to physical integrity, to health and to social security, to a balanced diet, to have a name and nationality, to have a family and not to be apart from them, to care and love, to education and culture, to recreation and to freedom of expression are fundamental rights of children. This position contemplates that the minors would be protected against any kind of neglect, physical or moral violence, abduction, sale, sexual abuse, labor or economic exploitation and hazardous work. However, in order for the mentioned rights not to exclude others, which, though not fundamental, are of great importance for the adequate development of the child, Article 44 indicates that the minors shall also have the other rights prescribed in the Constitution, in law, and in international treaties ratified by Colombia.

7.The content of Article 44 of the Constitution is not homogeneous from the point of view of the substantial nature of each of the rights that compose it. In effect, some are rights of freedom, while others tend to protect the formal and substantial equality. In general, the direct application of the rights that tend to promote life, physical and moral integrity, freedom, and formal equality of children does not offer serious resistance. Nevertheless, the rights that promote substantial equality of children in the community, like the rights of minors that are in conditions of special vulnerability in respect of others that are not, raise serious problems from the perspective of judicial control.

When these rights are the subject of protection, immediately, some important questions arise. These questions are related to the nature, content, and scope of those rights or the faculties of the judge of *tutela* in respect of fundamental rights of social entitlement character.

8. It has been revealed that one of the characteristic features of the fundamental rights consists in its direct application, that is to say, in the possibility of judicially invoking the claims and faculties that those rights rely on, without necessarily invoking the law or any administrative decision. Consequently, if it is accepted that, even when there are omissions of the legislator, the public authority is obliged to comply with the satisfaction of the fundamental rights of the child – rights that can have social entitlement nature – it has to be asked: Is the constitutional judge able to order the protection of a constitutional right of social entitlement character, that has different scopes and whose satisfaction implies tax expenses, in those cases in which there is no law on the matter or its provisions are clearly insufficient?

9. The Court, in its latest jurisprudence of unification, has indicated that the constitutional judge cannot intervene in the process of assigning constitutional rights of a social entitlement character, as that would imply a grave injury to democratic principles and, eventually, the rupture of principles and fundamental rights such as the right to equality. In this respect, the Decision SU-111 of 1997, indicated that:

> "economic, social and cultural rights, despite their relation with human dignity, life, equality and freedom, are not of immediate application, as they necessarily require the active intervention of the legislator in order to define public policies and their adequate organizational and budgetary implementation. The individual exercise of social entitlement rights, which arises from the legal execution of the mandate of existential seeking which is derived from the legal social State, is materialized, and structured in the terms of the law. It devolves also on the Court to define the procedures that have to be carried out for its assignment, and to establish the correlative schemes of judicial protection".

However, in the same decision, the Court considered that in some exceptional cases, the constitutional judge could protect a social or economic right if some strict constitutional conditions are met. On that matter the Court indicated:

> "The Court, under constitutional provisions, has restricted the procedural scope of the *tutela* to the exclusive protection of the fundamental rights. Exceptions are considered if economic, social and cultural rights are in connection with claims covered by *tutela*. Such a situation occurs when it is found that a serious violation against the human dignity of persons from vulnerable sectors of the population, and the State being able to protect them, has not provided the minimum material to a helpless person that succumbs to her own weakness. In these situations, covered by the concept of minimum income, the abstention or negligence of the State has been identified as the cause of the direct violation of the fundamental rights, a situation which allows the application of constitutional guarantees".

10. It could be argued that a flagrant violation of the economic and social rights prescribed in Article 44 of the Constitution would be typified in the exception that the Court is arguing in the aforementioned decision. However, it is not necessary in this case to maintain such an argument. This is because the discussion that the Court had in that decision is related to the eventual connection between social entitlement rights, such as the right to health and fundamental rights and the right to life. Nevertheless, the Court did not make a reference to the social entitlement rights that, additionally, by express constitutional mandate, are fundamental rights and, that way, are able to be defended through the judicial mechanism of the *tutela*.

For the above reason, the position adopted by the Court in its decision SU-111/97, cannot be implemented in the ambit of social entitlement rights, which, because of express constitutional disposition, are *per se* fundamental rights of immediate application. This would be the case, for example, in the right to defense or legal aid

(N.C. Art. 29), the right to basic primary education (N.C. Art. 44 and 67) or the right to health of children (N.C. Art. 44).

Pursuant to Article 44 of the National Constitution, children have various fundamental rights of social entitlement character. Such as the right to health, that necessarily have to be fulfilled by one of the three agents that the Constitution designates: family, society, or the State. However, there can be a case where the law has not designated the respective responsibilities, the family has no capacity to assume them, and the society is not organized well enough to do it. In those cases, three different alternatives of action can be proposed, each of them would give rise to a different judicial answer.

Firstly, it could be argued that Article 44 of the constitution recognizes that the constitutional judge has the authority to obtain the immediate disposition of all the resources that are necessary to guarantee to the infantile population the provision of the services of child promotion, protection and integral recuperation of health.

Certainly, if the right to health, in relation to children, is a fundamental right and if the judge has to integrally protect fundamental rights (C.P. art. 86), initially, there is no objection to this option. Nevertheless, this option has some difficulties in regard to other constitutional norms, especially those that establish the democratic form of government. In effect, assigning necessary resources to wholly cover the eventual effects that a child's health can suffer from involves a definite and marked interference in the same, contradicting basic principles of the democratic system such as the principle that assigns taxation and allocation of public resources to organs of political representation.

In conclusion, if this alternative is accepted, this position would be endorsing the intervention of the judge in spheres that, in a democratic State of law, have to be regulated by the organs of popular representation. In sum, this hypothesis would privilege the Social State, over the democratic State of law, without, apparently, having enough constitutional reason to do it.

In second place, it could happen that the judge would tend to disobey the constitutional mandate of Article 44, in name of the democratic principle (N.C arts. 1 and 3) and, in consequence, wrongly considers, that it is just advice for the political organs to apply policies of protection to infantile health whenever they consider necessary. However, in this case the judge would be acting outside the margin of the constitutional legal order, which clearly establishes the fundamental right to health of children and the duty of the State – and consequently of the judge – to protect it even when there is no administrative or legal development in the matter. Actually, as it was established, one of the main characteristics of a right that has being defined as a *fundamental* one, is that it has immediate application by the judge, consequently, there is an exclusion from the democratic discussion. In consequence, this second alternative cannot be accepted either, if the purpose is to assure the integral validity of the Constitution, as this unreasonably favors the rules that develop the Democratic State of law, over those that tend for the effective

validity of the Social State.

Lastly, there is the possibility of making a harmonious interpretation of Article 44 in relation to the other constitutional rules and, especially to those that establish the democratic principle (C.P. art. 1, 3, 40). This third alternative, closer to the view of the Social and Democratic Rule of Law of the State, implies that fundamental rights of social entitlement character have double content. In first place, they are composed of an essential minimum core that is not negotiable in the democratic discussion, that gives subjective rights directly enforceable through a *tutela*. In second place, they are composed of a complementary zone that is defined by political organs subject to the availability of resources and to a combination of policies.

In respect of the right to health of children (N.C. art. 44), the mentioned doctrine would mean the existence of various minimum rights in favor of children and directly applicable, creating duties for each of the subjects that Article 44 establishes as responsible for its full compliance. Therefore, the political organs would have the obligation of defining systems of prevention and care with constitutionally defined contents and the judges could oblige the family and the State to comply with them even if there is no administrative or legislative intervention.

In the view of the Court, this third alternative is the only one that allows the simultaneous application of the different constitutional rules as, on the one hand, it respects the constitutional mandate that provides, without exception, the fundamental character of the rights of children that is in Article 44; on the other hand, it also attends to the unavoidable imperatives of any democratic State of Law. Consequently, under the principles of integral application of the Constitution and concrete harmonization, that is the doctrine that this Court shall adopt.

12. Following the above argument, the Court considers that it can be clearly derived from Article 44 that, although the Constitution respects the democratic principle, this does not allow that the satisfaction of basic necessities of children, would be subject to eventual political majorities. For this reason, the mentioned rule, prescribes that the rights established in that article are fundamental rights, that is to say, true powers of the children that can be defended by any person against the actions and omissions of the public authorities and individuals. Nevertheless, the harmonization of this rule with the democratic principle – which establishes that the political organs are in charge of defining tax and budget policies – requires that only that part of the law that tends to satisfy the basic necessities of the minor – which has been called the essential core -, can be directly applied by the judge, while the legislator is the one that has to define its complete scope. Then, we have rights that have an essential content of immediate application that limits the discretion of political organs and that has a reinforced judicial mechanism for its protection: the *tutela*.

13. The previous constitutional restriction of the democratic principle is justified, among other reasons, as that principle cannot be opposed to the essential claims of a group of the population that has no capacity of taking part in the political discussion

and that, consequently, has no capacity of its own of participating in the adoption of political decisions that would affect it. In this case, to claim that the essential core of the fundamental rights of social entitlement character of Article 44 are not of direct application, but, that there has to be a political decision – legislative or administrative -, would mean the subjugation of the basic necessities of children, in the name of participation, to mean that they are completely marginalized. In other words, the reason that justifies the preferential application of the democratic principle when ascribing social entitlement rights, are of no result when we talk of fundamental rights of children.

14. Judges' intervention is limited to demand the effective accomplishment of the essential core of fundamental social entitlement right, as in order to act beyond that, there has to be a political decision. In these conditions, it is necessary to identify the criteria to define the essential core of a fundamental social entitlement right, which means, that part of the law which has immediate application.

It has been indicated that the part of the fundamental social right that cannot be subject to political discussion is, precisely, the one that tends to the most elemental satisfaction of the basic necessities of the right holder. Certainly, there are deficiencies, whose satisfaction is not under the control of the person that suffers them; that are inescapable as they do not depend on his/her will or desire; whose satisfaction is absolutely indispensable to prevent a damage, from any constitutionally acceptable concept, that constitutes a grave alteration of the minimum essential conditions of the human dignity concept.

For example, the essential core of the right to health of children covers grave attempts – by action or omission – against their health, that in no way can be avoided or averted by the affected person and that risks his life, his physical or mental capacities or his learning or socialization process. Consequently, when there is a presence of this grave circumstance, there is nothing that prevents the judge from ordering adequate measures to protect the child from a situation of extreme necessity in which he has been placed by action or omission of the constitutional agents responsible of protecting the fulfillment of his rights.

15. The principle of subsidiarity of the State's assistance, imposed on the legislator, firstly, is the obligation of regulating the responsibility of persons who primarily have to take care of the fundamental rights of the minor: family and society, if it is the case. Meanwhile, the administration, the control organs, and the judges of the State, have to be extremely diligent to make effective the obligations of the subjects mentioned. However, if the family nucleus lacks the capacity to satisfy the most basic needs of the children they are taking care of, it is up to the State, subsidiary, to assume that obligation.

16. In the mentioned cases, since there is a constitutional obligation to satisfy non-waivable goods, the State could only be released from this obligation if it is demonstrated that the satisfaction of those basic necessities, would imply the non-protection of other goods of identical level. In other words, the direct application of

the essential core of the fundamental social entitlement rights can be limited only if the State demonstrates that, despite all reasonable efforts, it is impossible to face them without disregarding the basic protection of other rights of the same category. However, this extreme situation should be duly verified in the respective process. In these cases, as for example the ones related to the protection of the minimum income of the poorest and marginalized population, it corresponds to the public authorities to demonstrate facts that allow the exoneration of its constitutional responsibility.

17. In sum, the constitutional judge is competent to apply, directly, in the absence of a legislative disposition, the essential core of those social entitlement rights that Article 44 of the Constitution prescribes. In these cases, the judge has to order the subjects that are directly obliged to fulfil their respective responsibilities, with the purpose of assuring the satisfaction of the basic necessities of the minor. If we are before cases that can only be faced by the State -because of their nature, or because the other subjects are not in the capacity of assuming the obligation –for the involved public authority to be released of the obligation, it has to demonstrate (1) that, despite the claim, the required attention does not tend to satisfy a basic necessity of the minors; (2) that the family has the obligation and the capacity of assuming the specific responsibility and that the administrative authorities have competence and are willing to enforce them; (3) that, despite taking all the enforceable efforts, the State is not in the effective capacity of satisfying the unsatisfied basic need.

Now the Court is going to answer the second juridical problem. The facts that motivated the *tutela* require an obligatory constitutional analysis around the clause to eradicate the present injustices, prescribed in Article 13 of the Constitution. Indeed, the minors on whose behalf this constitutional protection is requested, are part of sectors of the population historically marginalized, circumstances that cannot be unnoticed in the light of the aforementioned clause and that, necessarily, must be studied in order to adopt the present decision.

Positive duties of the State as a development of the clause of eradication of actual injustices (Political constitution art. 13)

18. In accordance with Article 13 of the Political Constitution, the "State (…) will take measures in favor of discriminated or marginalized groups". It is the task of the Legislator, firstly, to order the policies that it considers as more adequate to provide for people that are in such a situation, and the means that allow them to assume the control of their existence. Usually, laws in this field impose upon the State the obligation to provide services. Since the distribution of goods and the promotion of opportunities for this part of the population imply expenses of public funds, the Legislator is competent to legislate on this matter.

Adoption of measures on behalf of discriminated or marginalized groups do not constitute a merely optional competence of the legislator. Marginalization and discrimination are enunciated in the Constitution with the aim to repudiate this social phenomenon and not with the aim to normalize it. Accordingly, the

legislator's mandate is linked with the activity addressed to eliminate discrimination. In the constitutional norm we may find the attribution of competence addressed to transform the material conditions that cause exclusion and social injustice.

With the establishment of market institutions and competence in the society, satisfaction of an increasing number of needs is articulated through the system of offer and demand. However, due to different causes, such as extreme misery, several persons are placed outside the economic network. Furthermore, low coverage of State services may determine the loss of very important and valuable links of these persons with society. It is here where the challenge emerges for society and the State, the constant challenge of correcting discrimination and marginalization, because even if they are *per se* a pathological derivation of an actual organization, Constitution takes them into account with the exclusive purpose of creating a competent environment that will eradicate them.

19. Even if, in principle, a judge is not the first authority that is called upon to oblige the State to provide the entitlements of economic or social content to marginalized and discriminated people, the Court may ask another question; if, instead, it is authorized to indicate when an abstention from the State should, due to the gravity of the omission and its consequences over human dignity, entitles this part of the population to positive action.

In this sense, as it was established in juridical consideration number nine (9) of this decision, the Court has established that, in certain exceptional cases, the constitutional judge may grant the *tutela* of a service right. This may be done only if it is proven that there exists "a grave breach against the human dignity of people that are part of a vulnerable group of the population, and if the State, having the opportunity to do so, did not provide the minimum material support that a helpless person requires not to be subject of her own impotence. In these situations, which are part of the concept of **minimum income**, the abstention or negligence of the State has been identified as the cause of direct injury of fundamental rights that requires the exercise of constitutional guarantees".[29]

What does "minimum income" signify? How should it be constitutionally determined that an event referred to constitutes this situation bordering on a thin line? With the aim to clarify the limits of the abovementioned constitutional doctrine, it is pertinent to answer these questions since this doctrine reinforces the rights of children who do not have the resources to access a program of free vaccination. Although previous considerations – related to the concept of the fundamental right of health for children – are sufficient to support the decision of the Court, the doctrine of minimum income provides additional grounds. Indeed, the abovementioned constitutional doctrine refers to an institution of basic justice that should be applied. This Court has constantly done so, in borderline human situations caused by extreme poverty and indigence when the State and society do not coherently answer to the most basic and primary needs of that population and do not

[29] SU- 111 of 1997 (MR. Eduardo Cifuentes Muñoz)

find out the most extreme affronts to human dignity. Jurisprudence of the Court has set forth that flagrant violations of a human right that compromise in the most radical way, the existence of a person, oblige the judge to urge a positive action from the State. In light of the abovementioned, the Court proceeds to explain the ground, content and scope of the doctrine of minimum income, stated in case SU-111 of 1997, a doctrine that is reaffirmed and developed in the following paragraphs.

20. It is well known that the restrictions that are allowed in the rights of negative freedom – those in which the obligation of the State is mainly related to an abstention or non-interference in the individual sphere that is protected by the Constitution –, are exclusively those that are set forth in the law. At the same time, they are proportional and reasonable and do not affect the essential core of the right. Regarding the promotion of substantial equality – in which measures on behalf of discriminated and marginalized persons are taken –, the expected behavior of the State is not an omission, but a positive action. Therefore, from the constitutional point of view, the illegality is caused by the State's omission.

On this subject it is possible to conclude that the guilty abstention of the State, in other words, its passivity with respect to the marginalization and discrimination faced by some members of the society, is neither coherent with the effective fair order that legitimizes the legal social State, nor in compliance with the clause that prohibits marginalization and discrimination. Therefore, the function of the judge will not be to replace the organs of public powers that committed the omission, but to order the compliance of the State's duties, only if it is proven than the omission violates a fundamental constitutional right.

21. The correlative duty of the State to the constitutional mandate to eliminate social discrimination and marginalization should be developed by law. Only in these conditions, with the corresponding budgetary appropriation, the administration may turn the constitutional mandate into reality. However, what occurs in those borderline situations of extreme misery where the manifest negligence of both State and society is perceived? Does a basic need, essential for the preservation of life, that cannot be satisfied by the marginalized person due to the absolute lack of control and real possibilities, and that surely turns the person into a victim of irreparable damage, create an obligation on the State to assist?

The previous questions, at least partially, allows a marginalized and discriminated sector to be identified. Although discrimination and marginalization problems are not only applicable to cases of extreme poverty, this is probably the most common cause of the phenomenon. Poverty and indigence significantly reduce the possibility of satisfying vital needs in an autonomous manner.

An unsatisfied basic need – that fulfills the already mentioned characteristics - does not create by itself an obligation of the State to provide a service. However, once the Constitution or the law positively determines an obligation of this content (entitlement), the identification of a need will correspond to the factual situation that demands action from the State.

However, the express extent of the constitutional coverage under the form of an entitlement right and the consequent legal development only provides a partial answer to the questions asked. The real problem arrives when the unsatisfied basic need of a marginalized or discriminated group completely lacks every protection of positive rights or, even if the constitutional level recognizes the entitlement right, there is no equivalent recognition in the law or in the budget. In this context, is the constitutional mandate forbidding marginalization and discrimination, able to create subjective rights that can promote specific actions of the State with the aim of satisfying unsatisfied basic needs of the population that, objectively, cannot satisfy those needs?

22. In the view of the Constitutional Court a mandate of eradication of actual injustices can only be realised through time and requires a big set of actions that, undoubtedly, should be decided by the Congress and performed by the administration.

23. However, the respect of representative organs does not justify the abuse of competence, abuse that is presented, *inter alia,* when its performer manifestly disregards the constitutional action mandate or its unjustified delay produces manifest injuries to the dignity of a human person. It is important to underline that the clause of eradication of actual injustices implies the freedom to decide from the organs of power only. In the sense that they can find a space of free normative and administrative configuration based on available resources and means that are considered as more adequate and suitable, that is, based on what is possible within each concrete period of time. However, regarding the priority and the need that the measures are effectively performed, any organ of power may declare itself as free from this obligation. This is because the constitutional mandate on this regard has limited the competence of the constituent organs by linking them to a function that, in terms of the Constitution, is peremptory.

24. Judicial verification of a basic need that has not been satisfied – and that fulfills the abovementioned requirements – of a marginalized or discriminated group, as it influences the transgression of the minimum income, will create a presumption that the already mentioned constitutional mandate has been breached. It will be the responsibility of the concerned public authority to allege the facts that demonstrate the preclusion of constitutional responsibility. In these borderline situations, the reversal of the burden of proof is related with an equity principle in the determination of the duties that the parties of a constitutional process should assume in order to determine the truth. It goes without saying that an indigent is not the appropriate person to know the legal and factual possibilities that may be relevant to judge whether the mandate of positive action that lies with the State should be complied with or not in his case. Explanation of the public authority will be crucial for the judge of *tutela* to determine, in the specific case, whether the level of compliance of the abovementioned constitutional mandate has due justification. In any case, public conduct that reflects tolerance and passivity causing extreme harm to discriminated or marginalized people, will be unacceptable. This is so because in

such a hypothesis the omission will signify marginalization or discrimination caused by the organ that is constitutionally required to eliminate it.

It is important to determine if, in this case, the clause of eradication of actual injustices applies. The judge must exhaust, in strict order, the following levels of the analysis: (1) identification of a group of discriminated or marginalized persons; (2) demonstration of the existence of a basic need and of its lack of satisfaction; (3) examination of facts and reasons related to the response given by the State to the specific situation of marginalization or discrimination; (4) constitutional qualification regarding the degree of historical compliance that in the specific situation should have had the mandate of eradication of actual injustices, taking into account legal and factual possibilities at the time.

Study and evaluation of submitted proofs.

25. The Applicants are persons of scarce economic resources, they work in the informal economy sector, and they are obliged to leave their children every day in communitarian homes of the Family Welfare Institute. Additionally, – as it is affirmed in the writ or *tutela* – they are not affiliated to any of the schemes (subsidized or contributive) under the General System of Social Security. They allege that their children are in a high-risk situation because they live in overcrowded and unhygienic conditions, and poverty. Additionally, they do not have access to either opportune medical attention, or access to a subsidy to buy medication or to pay the costs of a potential rehabilitation.

26. In accordance with consulted experts, bacterial meningitis remains the most prominent infection of children's CNS (central nervous system), especially in developing countries.[30] This disease usually attacks children between 3 months and 5 years old, who go to care institutions, such as childcare, communitarian homes and shelters.[31] Experts have indicated that overcrowding and a low level of hygiene are determinant factors for "ill persons to transmit the disease with great efficiency."[32] In summation, in accordance with proofs, minors on behalf of whom the constitutional writ was presented, are part of the so-called risk groups, because there is an overriding convergence of subjective and environmental factors that are determinants for contagion.

Socio-economic conditions of these minors do not only place them in a manifestly weak circumstance in respect contracting the disease, but they will also have to endure grave and lasting effects, such as permanent deafness or mental retardation. Some of the consulted experts have indicated that opportune medical attention is fundamental in order to avoid grave neurological defects. However, the General Regime of Social Security does not cover the children on whose behalf the constitutional protection is requested. This implies that they are not part of the contributory regime, as they do not have sufficient economic capacity, but the

[30] Document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.
[31] Document elaborated by doctor Jorge Mauricio Palau Castaño.
[32] Document elaborated by doctor Paulo Vega Mateus.

subsidiary regime has not covered them either. Perhaps they are in this situation because they have not participated in the selection processes or because they are waiting for a wider and progressive coverage. Consequently, these minors are persons that are simply "linked" to the General System of Social Security in health, who are in clear marginalized conditions when requiring care in certain fields such as prevention, diagnosis, medical treatment or rehabilitation (art. 157 Law 100 of 1993). In those cases there are no elements to presume that the diagnosis will be opportune, or that families could integrally provide the antimicrobial therapy or the necessary treatment for a proper rehabilitation.

Consulted professionals agree on affirming that "due to the mortality and neurological morbidity potential – of the bacterial meningitis – it is important to provide the antimicrobial therapy as soon as possible."[33] However, they add that, even when adequate and opportune therapy has been provided, the majority of the affected children suffer from neurological defects. It is stated that "meningitis, and especially the bacterial one, is a grave disease and of non-guaranteed prognosis. Within the factors that imply a worst result of the disease are the patient's age (there is greater mortality in children under one year), the infectious agent, the duration and extension of the inflammations before the beginning of the therapeutic intervention, and the presence in the subject of other conditions that may compromise his capacity to fight the infection. In general, around 10% of children that have meningitis die because of the disease, and over 35% of survivors have lasting disabilities, several times permanent ones, that appear in the form of sensorial or motor neurological effects. Between 5% to 10% of these survivors have reduced hearing, a reduction that is detectable five years after the disease has been acquired. Between 10% to 20% of infected children have brain damage, hydrocephalus, motor, visual or vestibular impairments, seizures and mental retardation of different severity. In other cases, limitations are more subtle, and they are manifested as mild brain dysfunction through learning disorders or behaviors such as attention deficit or hyperactivity."[34]

To summarize, as established in the received medical reports, it may be affirmed that minors that are the object of this *tutela* are at risk of contracting any of the common bacteria that cause bacterial meningitis. It may also be affirmed that if children have the disease, they will have to suffer "devastating" consequences.

27. The memorial of the District Health Secretary indicates that Santafe de Bogota is not a risk zone. However, no reliable proofs are submitted in order to ground the abovementioned affirmation. On the contrary, apparently there were no global, systematic or reliable studies that could affirm with certainty that children who inhabit the zone of Puente Aranda, who belong to low socioeconomic stratus, and who live in places where there is a high degree of overcrowding and bad hygiene conditions (all of these risk factors are in accordance with the received medical reports), are not in a high risk group.

[33] Document elaborated by doctors Ana Cristina Mariño Drews and Enrique Gutiérrez Saravia.
[34] Document elaborated by doctor Juan Manuel Lozano.

The latter is particularly grave if it is considered that in the last year, several cases of bacterial meningitis were presented in the city and there was no epidemiological association between them. This suggests that, since bacterial meningitis is a disease of fast epidemiological evolution, it is urgent to initiate prevention and immunization campaigns in those groups where the factors of risk occur. As it was established (see *supra* "backgrounds"), one of these groups comprises of children that go to childcare facilities, who do not have good immunological or defense systems (due, among other things, to their poor nutrition), and that live together in conditions of overcrowding and low hygiene.

28. Medical reports indicate that there is no reliable research at a national level on the impact and location of the disease (quantitative data on the incidence of the disease, zones of higher susceptibility, etc.), the percentage of the population that is vaccinated, the mortality rates, and the epidemiological incidence or the relative cost-effectiveness of the existent vaccines that are in the market. This information is accompanied by the eloquent silence of the Health Minister on this subject. Apparently, no efforts have been made to obtain additional funds to fight against the disease, such as, for example, negotiations with international organs (i.e. the PAHO Revolving Fund) in order to jointly purchase vaccines. Lastly, it was established that there are no studies on the different vaccination strategies, such as the use of reduced doses, or the reduced number of doses.

29. In sum, in order to make a judgment on this case, the facts that should be taken into account are the following:

(1) By the time the writ of *tutela* was presented, health authorities were not implementing articulated campaigns of prevention or of immunization against the common bacteria that produce the meningitis; (2) there are effective vaccines available in the market against two of the most common types of bacterial meningitis, however only one of them produces safe results in children older than 5 years; (3) there are no reliable studies in the country regarding the impact of the disease, its location, the percentage of immunized population, the zones of higher risk, mortality rates and the epidemiological incidence or the relation between cost-affectivity of current vaccines; (4) risk factors occur in the Applicants turning them into a group of the population that is highly susceptible to contract the disease; (5) they are families with low-incomes, that are not affiliated to the General System of Social Security in Health and, therefore, do not have any subsidy to obtain the vaccine; (6) the market price of the vaccines is not proportional to the level of incomes of the Applicants;[35] (7) the disease's symptoms are not easily diagnosed and its effects are graver as the medical treatment is applied with more delay. Consequently, it may be affirmed that a minor that is not covered by the health system may suffer irreversible and devastating consequences; (8) in general, the effects of the disease may be of such magnitude that have the potential to transform a completely capable person into a permanently physically or psychologically

[35] In accordance with prooves that were taken into account by the Judge of first instance, only one doses of the vaccine applied in care centers for population of scarce resources, costs twenty thousand pesos.

disabled person. As it is established in the background, the most frequent effects of the bacterial meningitis are the following: (a) reduction or loss of the function of the organs of senses (hearing loss, deafness, visual disturbances, blindness, etc.); (b) reduction or loss of motor functions (plegias or paresis) of one, two or the four extremities; (c) reduction or loss of intellectual functions of different kinds (learning, language, body language, among others); (d) reduction or loss of the functions of sphincter's control; (e) seizures crises of different types (epilepsies); (f) reduction or loss of the circulation of cerebrospinal fluid, manifested in hydrocephaly of different degrees; (g) reduction or loss of neuronal tissue with formation of cystic lesions that replace the lost nerve tissue.[36]

Analysis of the specific case

30. The minors on whose behalf the positive action of the State is requested, action that consists in the enforcement of a vaccination program against a disease of an unusual gravity, are a marginalized and discriminated group. The difficult economic situation of their parents and the lack of coverage of public and private health services, have placed them within the category of the population that do not receive the abovementioned vaccination. While a substantial part of the youth population are protected against the risk that represents the contagion of pathogenic agents carriers of meningitis, the already mentioned minors are not within the scope of security that society and the State have created to face this adversity.

31. The existence of a vaccine that prevents the acquisition of a disease of such gravity as meningitis, socially signifies a conquest that enables society to control at least one contingency that, if it occurs, has devastating effects on members of society. Social answers that represent a higher capacity to control the hostile environment that surrounds human life, acquire the form of basic goods that should be shared by everyone. This is especially possible when it is due to medical and technological advances. The availability of a vaccine to substantially reduce the risk of a disease such as meningitis – whose lethal characteristics have already been described in the background –, protects life and avoids mental and physical disability, and therefore becomes a basic need for the children.

Deprivation of the vaccine to a child, particularly if the minor grows-up in an environment of high risk – as in the present case –, significantly increases the degree of the risk of contracting a disease that may terminate his life or transform him into a disabled person. Parents' poverty and lack of coverage of the public services of health are variables that are beyond the control of the child. It is easy to see that the child, in such conditions, simultaneously ignores his precariousness, and is objectively a subject without any power in respect to a risk of incalculable magnitude.

32. Once the existence of an unsatisfied basic need of a discriminated group is proven, the public authority that has responsibility over that specific area bears a

[36] Document elaborated by doctor Jorge Mauricio Palau Castaño.

burden. This burden is to explain the degree of possible institutional compliance of the constitutional mandate of eradication of marginalization and discrimination. In this case, evidence regarding attention given by the Ministry of Health to other groups that are part of the child population, through the national system of health, shows that implementation of a program that covers children on whose behalf the *tutela* was presented, in principle, does not exceed technical and financial capacity of the State. On the other hand, reports presented by the Ministry of Health do not make reference to the scarceness of economic and technical resources that avoided the extension of vaccination programs. It is neither possible to infer from the reports that, in order to satisfy the required basic need of this unprotected part of the child population, the administration had to face insurmountable obstacles. On the contrary, it is clear that, at the administrative level, there is little conscience on the gravity and dimension of the risk that these minors have to face. Therefore, reversal of the burden of proof regarding the compliance with the mandate of eradication of discrimination and marginalization, makes the administration clearly responsible for the unjust creation of a risk that has to be supported by those who are not obliged to do so.

33. The State can only comply with the constitutional mandate that has been referred to in this judgment as far as the legal and factual circumstances of the country allows it to do so. Responsible public authorities have not proven that the non-satisfaction of the basic need of a marginalized group closely linked with social conditions of marginalization, is justified by objective facts that excuse the abstention of the State or that reasonably explain such abstention. Therefore, when the abandonment of minors affects their right to minimum income, the presumption that such affectation is caused by the passivity of the State remains and is qualified as discriminatory.

34. In addition to the aforementioned arguments, which inevitably lead to the grant of the writ of *tutela*, the Court adds that children enjoy the fundamental right to health and to protection against every form of abandonment (P.C. art. 44). In this case, deficient coverage of vaccination service manifestly violates the right to health of the minors, because it unfairly exposes them to the risk of contracting a lethal disease or a disease with disastrous consequences. On the other hand, to leave the minors unprotected before the risk of contagion of meningitis is a form of abandonment that lacks justification.

As it was stated in considerations 10 to 17 of this judgment, priority of children's rights requires the satisfaction of their vital needs at every moment. In consequence, the fight against the eradication of injustices that are manifested through marginalization and discrimination must start by reducing the risks of contracting grave diseases that affect children of the poorest persons of the country more intensely. Higher probability to acquire misfortunes may not be the only assets of helpless people. No child can be excluded from his right to have a good future. Lack of vaccination against grave diseases causes dead children and children with disabilities. The omission of the State loses every democratic ground and does not have any legitimacy. The State's inaction ends lives and frustrates welfare and plenitude expectations that are constitutionally granted. In those conditions, and if

the abuse of the competence of the responsible organs is verified–as it is in this case– , then the constitutional judge must order the end of the state's abstention that traces the limit of what is intolerable in a Social Legal State.

35. The lack of a minimum State policy addressed to avoid the contraction of the bacteria that produces meningitis by minors in situations of risk, constitutes a grave omission that breaches the essential core of the fundamental right to health.

In fact, as it was established, the essential core of the right to health of the minors is breached when the State, having the opportunity to avoid the transgression of providing for health, does not do it, and creates a circumstance of risk that cannot be avoided in any manner by the minor, seriously threatening his life, physical or psychological capacities, or his learning or socialization process.

36. At this point of the considerations it is imperative to clarify that even if article 50 of the P.C. refers to order free attention in every health institution that receives funds from the State to children under one year of age, based on the rules set forth by the Congress, this does not restrict the fundamental right to health of children. The active subject of such a right is "all the children", and not exclusively those that are under one year. Every fundamental right can be legally developed, especially those that imply positive actions from the State. The protection that must be extended to minors under one year has lead to the Constituent power to fix a scope of the coverage in health that the legislator may not ignore. Concretely, the right to receive free medical attention will cover children that are younger than one year of age and, moreover, even private institutions that receive funds from the State will provide this attention. The idea is to fix minimum guidelines for the legal regulatory function, and to indicate a general situation in which private persons become the passive subjects of the entitlement right.

It is evident that the fundamental right to health of children is not limited to the entitlements set forth in article 50 of the P.C. If, as it has been demonstrated, the prevention of mortal diseases or of diseases that may cause grave effects on the children, is part of the essential core of the right to health and to live, through suitable and effective programs of vaccination in charge by the State, it would be absurd to argue that the complementary norm of article 50 of the Constitution sets forth a limitation of those two rights and restricts that entitlement to minors under one year old. It would be even worse to affirm that such entitlement, in cases such as the one that has been analyzed, should follow the legal regulation. The Court cannot accept that indigent children or those whose parents do not have sufficient resources, have to face the risks that are products of terrible diseases and the inaction of public health administrations. The Court also cannot accept that they are not holders of the subjective constitutional right to require the State to comply with the duties that the Constituent has categorically imposed through article 44 P.C. It is inconceivable that the same Constituent has limited the essential core of that right through article 50. In the latter article, in the issue related to children, the Constitution anticipates the work of the legislator of the social State and sets forth on behalf of children the minimum coverage that they should receive from the State and private institutions. To change

the purpose of the norm – which complements article 44 of the Constitution-, and, in its place, interpret it as an absolute limit to the rights to life and to health of children over one year, disregards constitutional justice in a radical manner, that the Constitution sets forth for every children. Such interpretation will entail the denial of essential entitlements that do not imply comprehensive care but precise and punctual care, and that serve to preserve children's lives, health and physical integrity, such as vaccination, which are part of the essential core of those rights.

The absolute value that the Constitution recognizes as owing to the child obliges the State to assist and protect him with the aim of guaranteeing his harmonic and comprehensive development and the full exercise of his rights (P.C., art. 44). This duty is even more demanding when, as in this case, family and society do not have sufficient means to satisfy a kind of basic need such as the provision of necessary vaccines that are indispensable to preserve the life and health of the child. In those cases, the subsidiary duty of the State set forth in paragraph 2 of article 44 becomes the principal duty. Once this obligation has arisen, the existence of a primary and direct duty of the State in respect to children under one year may not be alleged as a circumstance precluding such obligation. The duty of the State is not limited to exclusively bring protection to children younger than one year. The purpose is to protect childhood and to guarantee the conditions of vital and spiritual growth of the Colombian nation, a purpose that may not be achieved if only minors younger than one year old are treated.

37. In the current case, the State has stopped taking care of an unsatisfied basic need of the minors, although the need is recognized in a constitutional norm (P.C. art. 44). The result of this omission is the strengthening of the condition of marginalization in which the Applicants live. The State's passivity in respect to the marginalization that children of low socioeconomic strata suffer, contradicts the duties that were imposed on public authorities by the creation of the constitutional just order. This passivity negates the constitutional duty of protecting the essential core of the right to health of children.

38. In such cases, it is the responsibility of the public authority to demonstrate that it has acted with due diligence by defending the constitutional mandates that were breached. Certainly, the reversal of the burden of proof is grounded on a basic equity principle, because the affected person has the capacity to demonstrate his conditions of marginalization and neediness, but in no manner can indicate or controvert the efforts that were done by the authority to solve the circumstances of indignity into which she was inevitably subjected.

In this case, although the competent authorities were called under two circumstances to be part of the process, none of them submitted proofs of the existence of public policies addressed to face the risks to which the Applicants minors are subjected. Moreover, from the reports submitted by the consulted experts, it may be easily inferred that, at this moment in the country, there are no reliable studies that allowed an adequate policy of public health regarding meningitis to be initiated.

39. For the abovementioned reasons the judgment that is being reviewed will be confirmed. On the one hand, in this case, the State's abstention breaches the constitutional mandate of eradication of marginalization and discrimination. On the other hand, it violates the essential core of entitlement rights related to the health of minors.

40. The Court does not ignore that factual circumstances which have been considered to adopt this decision may vary, or that eventually there may be proofs that demonstrate that the minors that request the protection are not at risk of contracting the disease. However, the explanation provided by the authority on this regard was clearly insufficient and, when there is doubt, as it has been several times stated, the constitutional judge should order the protection of the fundamental right that has been allegedly breached.

41. The Chamber must clarify that resources addressed to satisfy the essential core of the right to health of minors that are at risk may not be obtained by reducing the assets that are addressed to achieve identical ends. In other words, immunization campaigns against meningitis may not be executed with the funds that were previously addressed to cover other pathological cases that threaten the essential core of the right to health of children, such as poliomyelitis or measles. It is the constitutional obligation of the State to establish a minimum structure of health in order to avoid dramatic, foreseeable and avoidable contingencies that threaten the minimum and non-negotiable content of the right to health of children. As it was established, this non-negotiable content is a constitutional priority that political organs may not disregard. Therefore, it is necessary to obtain additional funds and not merely to take funds from a program that satisfies a constitutionally recognized basic need to satisfy a different program with identical aims.

42. Lastly, the Court notes that the absence of a national policy of public health related to bacterial meningitis signifies a grave omission on the part of public authorities. Indeed, since the enormous risk to which minors are subjected is known, and taking into account the constitutional mandate that grants an indisputable priority to the fundamental rights of children, there is no justification for the non-existence of reliable studies on the location and incidence of the disease, the percentage and groups of the population at risk, the percentage of the population that is immunized, the lethality rates, the epidemiological incidence or the relation to cost-effectiveness of existent vaccines. It is also not possible to justify the non-existence of preventive national programs, the fact that no efforts have been made to obtain the resources that allow the population at risk to be vaccinated, or the fact that no research has been done to find different alternatives to immunization, such as the ones that were mentioned in this judgment. The aforementioned clearly shows that it is necessary that public authorities take into consideration constitutional priorities and assume with strength the obligations that the Political Constitution imposes on them.

DECISION

D E C I S I O N

Based on the abovementioned, the Third Chamber of Revision,

DECIDES:

First.- **TO CONFIRM,** in the terms of this judgment, the decision of 17th July1997, of 12th Family Judge of Santafe de Bogota D.C.

Second.- **TO SEND** a communication to the Judge 12 of Family of Santafe de Bogota D.C, in order to proceed to the notification of this case, in accordance with article 36 of Decree 2591 of 1991.

Copy, Notify, Comply and Publish in the Gazette of the Constitutional Court.

VLADIMIRO NARANJO MESA
President

ANTONIO BARRERA CARBONELL
Magistrate

CARMENZA ISAZA DE GOMEZ
Magistrate

EDUARDO CIFUENTES MUÑOZ
Magistrate

CARLOS GAVIRIA DIAZ
Magistrate

JOSE GREGORIO HERNANDEZ GALINDO
Magistrate

HERNANDO HERRERA VERGARA
Magistrate

ALEJANDRO MARTINEZ CABALLERO
Magistrate

FABIO MORON DIAZ
Magistrate

MARTHA VICTORIA SACHICA DE MONCALEANO
Secretary General