

Unofficial Translation

Supreme Court of Justice

Judicial Power

REGISTRY OF THE SUPREME COURT OF JUSTICE

DOCUMENT

Sir: MINISTRY OF PUBLIC HEALTH

Address: AVDA. 18 DE JULIO 1892, 2nd FLOOR, ANNEX

In judicial decision entitled: ABAL HERMANOS S.A. VS LEGISLATIVE POWER AND OTHERS. ACTION OF UNCONSTITUTIONALITY, ARTICLES 9 AND 24 OF LAW No 18,256, File 1: 65/2009

It is my duty to notify to you: JUDGMENT No 1713, whose attested photocopy is attached.-

Montevideo, November 17, 2010.

NOTIFIER

APPROVAL

NOTARY. BEATRIZ GAZZANEO

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SUPREME COURT OF JUSTICE

Judgement No. 1713

REPORTING JUDGE
DR LESLIE VAN ROMPAEY

Montevideo, November 10, two thousand and ten.

CONTEXT:

For final judgment, these judicial decisions entitled: **“ABAL HERMANOS S.A. VS LEGISLATIVE POWER AND OTHERS. ACTION OF UNCONSTITUTIONALITY, ARTICLES 9 AND 24 OF LAW No 18,256”, File 1: 65/2009.**

FACTS:

- I. The representative of Abal Hermanos S.A. filed a lawsuit asking to declare the unconstitutionality of articles 9 and 24 of Law No. 18,256, called “Control of Smoking”, since he considered that those provisions violated articles 7, 10, 32, 33 and 85 numeral 3 of the Constitution, as well as the principles of legal reserve and separation of powers, maintaining in summary that:
 - Articles 9 and 24 of the law gave the Executive Power the power to require manufacturers of tobacco products to place health warnings occupying “at least 50%” of the total main exposed surfaces of tobacco packages”.
 - To the extent that those powers were granted in an unlimited manner, constitutionally protected individual rights were violated, since that power is constitutionally reserved to the law exclusively, and cannot be delegated to the Executive Power, which is why articles 9 and 24 are unconstitutional.

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- The rights of people can only be limited by the Parliament, through the approval of a formal law and for reasons of general interest, since it is the power of the legislator, and only of it, to affect the rights of people, because it is so enabled by the Constitution.
- The Executive Power could only act within the limits determined by the law, and if the law does not establish them, the Executive Power could not do so, because otherwise its action would be illegitimate, for violating the principle of legality.
- Decree No. 287/09 was issued within that unlimited delegation granted to the Executive Power, which established that health warnings would occupy almost the entire package (the lower 80% of both main faces).
- Article 9 of the Law, by imposing the placement of health warnings, affects several rights, property rights, freedom of industry and commerce, intellectual property, freedom of expression, etc.
- Articles 9 and 24 of the Law, by establishing an unconstitutional delegation of powers in favor of the Executive Power, also violates the trademark rights of Abal S. A., enshrined by articles 32 and 33 of the Constitution.
- By allowing the law to restrict the available area of cigarette packages, it restricted the use of trademarks, to the point that they were rendered worthless, due to their inability to appear. This is so because the value of the trademarks derives from the possibility for consumers to distinguish it from other brands and associate the brand with the product (art. 1 Trademark Law No, 17.011)
- The Law delegated to the Executive Power the unlimited power to reduce, distort and even eliminate the possibility of Abal S.A. to use their trademarks on their packaging, by simply allowing it to require that the warnings occupy 80, 90 or 100% of the packages.

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- Those provisions deprive Abal S.A. of its right to use the surfaces of its packages, thus affecting property rights and expropriating the exploitation of the brand without fair compensation.
- In short, it requested that articles 9 and 24 of Law No. 18,256 be declared unconstitutional, or as a subsidiary claim that the part of Article 9 that says "at least" in the phrase "and will occupy at least 50% of the total main exposed surfaces" be declared unconstitutional, because it delegated in the Executive Power the power to increase the size of health warnings, images and pictograms from 50 to 100%, limiting and/or eliminating individual rights (pages 95-109).

II) By ruling No. 1665, issued on October 19, 2009, the Supreme Court of Justice decided to admit the mentioned action of declaration of unconstitutionality, being notified for the legal term (page 119).

III) The representatives of the defendant, the Legislative Power, answered the lawsuit after the notification within the legal term, requesting that the lawsuit for the unconstitutionality action brought against articles 9 and 24 of Law No. 18,256 should be dismissed based on the grounds they presented (pages. 208 et seq.).

IV) The representatives of the State-Ministry of Public Health answered the lawsuit after the notification within the legal term, requesting, on the grounds that they presented, to dismiss the petition, confirming the constitutionality of articles 9 and 24 of Law No. 18,256 (pages 282 et seq.).

V) After hearing the Attorney of the Court, in Judgment No. 307/10, he informed, on the grounds that he stated, that the action brought should be dismissed (pages 770-771).

VI) Previous the decision on the merits, a judgment was legally agreed (pages 797 et seq.).

CONSIDERING:

- I) The Supreme Court of Justice, unanimously, will dismiss the action of unconstitutionality, since it does not find that the provision in question would grant unlimited powers to the Executive Power to restrict the individual rights in violation of higher provisions.

- II) From the outset, it is necessary to bear in mind that the approval of Law No.18. 256 has its rationale in the development of a health policy carried out by the State, intensifying the campaign against smoking, and recognizes its immediate legal antecedent in the enactment of Law No. 17. 793, which approved the WHO Framework Convention on Tobacco Control (FCTC), adopted by the 56th World Health Assembly on May 21, 2003, which instructed on effective measures so that the legend about health warnings, describing the harmful effect of the tobacco use, appears in all packages. From article 11 of that agreement emerge the main features provided by the legislator in the challenged legal norms.

As noted by the Public Health Minister, "Law 18,256 is a law that requires a legal norm of enforcement. It is a law that by itself needs regulation and entrusts to it the activity of executing the legal norms established therein in order to make effective the protection to life and the full enjoyment of the right to health. But this does not mean in any way that the Law has delegated its competence to the executive regulation, nor that it has delegated its legislative competence to the Executive Power " (page 784).

Indeed, Public Health is an inherent essential role of the State, and in cases such as the present one, smoking legislation is a superior legal goal that is part of the notion of public order (art. 44 of the Constitution), therefore it is natural that its regulation is entrusted to the Ministry of Public Health,

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because according to the Organic Law of Public Health No. 9.202, it is up to it to adopt all the measures it deems necessary to maintain collective health, issuing all the regulations and provisions necessary for this primary purpose (article 2) (cited at page 785).

- III) The plaintiff does not question the purpose of the rule, that is, the general interest rationale for the limitation of rights, but focuses its claim only on the delegation that the law confers in favor of the Executive Power, an aspect in which it is not right, because from the analysis of the challenged articles, it is deduced that Law No. 18,256 (tobacco control) does not carry out any legislative delegation. It must be borne in mind the distinction between legislative delegation and legal extension of the regulatory power of the Executive Power to matters that exceed its normal competence. The first cannot be admitted in our constitutional system, while the second -that is, the authorization to regulate the details or minutiae necessary for the execution of a law- is legitimate, outside the hypothesis of the so-called "reserve of the law." (Sayagués Laso, Treaty ..., Volume I, page 123 et seq.) (Cf. Judgement No. 900/1995).

Risso Ferrand points out similarly, when, referring to the scope of the legal reserve in matters of fundamental rights, argues that: "*... a formal law will not be necessary for each limitation of fundamental rights, but rather the law will establish the general restrictions that will then be executed by the administrative or jurisdictional branches, within their respective spheres of competence*" (Derecho Constitucional, V. 1, p. 451).

- IV) From the mere reading of the contested provisions, it can be seen that the Parliament did not delegate competence, but, on the contrary, following the anti-smoking legislation adopted internationally by the country, it devoted itself to the issuance of the relevant regulations at the national level.

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In the case of art. 9 of Law No. 18,256, contrary to what the plaintiff understands, it does not delegate to the Executive Power a discretionary power to impose restrictions above that **minimum**, but rather imposes on the tobacco company the obligation that the external labeling of the packages includes a warning that occupies "at least 50% of the total main exposed surfaces".

As the representatives of the Legislative Power argued, the text "at least" of the legal norm should be understood in the sense that the health warning could occupy more space - if the tobacco company wanted it - but never less than the minimum set at 50%.

Likewise, it arises from the text that the only thing that the legal norm leaves in the sphere of the Executive Power (Ministry of Public Health) is to control -for the purposes of its approval- that the warnings and messages are clear, visible, legible and occupy at least 50% (fifty percent) of the total main exposed surfaces, as well as the periodic modification of the aforementioned warnings, an aspect that clearly refers to the message and not to the size of the warnings.

Consequently, since the minimum limit of warnings to be approved by the Ministry of Public Health is determined by the Law, and by leaving to regulation only aspects that have to do with their execution, the principles of legality and non-**delegability** cannot be considered violated.

It should still be noted that the legal provision establishes that the warnings and messages will occupy "*... at least 50% (fifty percent) of the total main exposed surfaces*", an expression that clearly excludes secondary surfaces (lateral, inferior and superior), a circumstance that leaves without support the possibility that the Executive Power eliminates ABAL's right to use its trademarks on its packages (page 106).

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In relation to art. 24 of Law No. 18,256, it is clear from its text that it does not specify any delegation of powers from the Legislative Power to the Executive. The provisions therein, as indicated by the Attorney of the Court, supposes the determination of the term for the Executive Power to proceed to dictate the necessary regulations for the execution of the law, in accordance with article 168 numeral 4 of the Constitution (page 771).

- IV) The fact that the Executive Power has issued a decree establishing that health warnings must occupy the lower 80% of both main faces (Dec. No. 287/009) and, consequently, that it has interpreted the challenged legal norms with a different scope than the one proposed, is a matter not subject to being reviewed by this Court by virtue of the regime established in Section XV, Chapter IX of the Constitution.

If, in that domain of regulation, the plaintiff considered that the Administration issued an illegitimate administrative act, it had to resort to the corresponding route, not being authorized to seek that challenge by the action of unconstitutionality, and even less to incur in hypothetical matters such as if it could affect 90 or 100% of the surface, as this would be suppositional and therefore unrelated to the process of unconstitutionality (article 509 General Code of Process).

- V) Regarding the alleged violation of the provisions of articles 32 and 33 of the Constitution, particularly, the plaintiff's right to position its trademark, the arguments are not acceptable.
- VI) As noted, the arguments around this issue are based on an unspecified hypothesis, that is, that the Executive Power could order that health warnings occupy 90 or 100% of the cigarette package. The possibility of the argument hinders to analyze its merits.

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On these grounds, the Supreme Court of Justice, unanimously,

DECIDES:

**TO DISMISS THE ACTION OF UNCONSTITUTIONALITY, WITH
LEGAL COSTS.**

AT THE APPROPRIATE TIME, BE IT FILED.

**DR JORGE OMAR CHEDIAK GONZÁLEZ
PRESIDENT OF THE SUPREME COURT OF JUSTICE**