

Case No. 14593

Supreme Court, Constitutional Room, September 23, 2008, Case No. 14593, File No.: 08-012440-0007-CO (2008) (Costa Rica).

- Document type: Majority Vote
- Type of Law: Constitutional Law
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- **Themes (Descriptors)**
 - Municipal Mayor*

 - Law*

 - Regulation*

 - Right to Health*

 - Condemns to pay court costs*
- **Subtopics (restrictors)**
 - Mayor of Oreamuno
 - Related to the Mayor's practice of constantly smoking in the hallway near the dining area of the institution.

 - Smoking Regulation Act No. 7501

 - Article 3 of the Rules associated with the Smoking Regulation Act

 - Violation of the right to health. The smoking area must be moved because the area where it is set affects the health of workers.

 - The Court condemns the Oreamuno Municipality to pay the costs, damages and losses caused, which shall be paid as determined by the Statement provided under Administrative Litigation.

Majority Vote

I. SUBJECT UNDER APPEAL: The appellant claims a violation of the right to health (Article 21 of the Constitution) due to the Mayor of the Oreamuno Municipality's practice of constantly smoking in the hallway near the dining area in the institution.

II. REGARDING THE PROTECTION OF THE RIGHT TO HEALTH AND THE CONTROL OF TOBACCO AND SMOKING: The regulation regarding protection from the exposure to tobacco and smoking in our legal system offers a series of instruments such as the Smoking Regulation Act, Act No. 7501 issued on May 5 of 1995, which in Article 1 provides as follows: "The Role of the State. The State must ensure the individual and collective health of all Costa Ricans, while respecting individual and social rights recognized in the Constitution and in the laws." Moreover, recently the Parliamentary body approved as one of the Laws of the Republic, the World Health Organization Convention (WHO) on Tobacco and Smoking Control, published in Gazette No. 157 of August 14, 2008. In this regard, in Judgment No. 10859 issued on July the 1st 2008, by means of which the Court ruled on the draft of the Convention of the World Health Organization (WHO) on Tobacco and Smoking Control under the scope of the Required Legislative Consultation of Constitutionality formulated by the Board of the Legislative Assembly, this Court ruled as follows:

(A) *"The Convention sets out the basic principles and general obligations; actions related to the reduction in the demand for tobacco; general procedures related to the reduction on the supply of tobacco; environmental protection; other issues related to responsibility, technical and scientific cooperation and information; institutional arrangements and financial resources; dispute resolution; compliance with the Convention; and its final provisions. It is important to note that the UN's Board of Economic and Social Matter, at its plenary session No. 51 of 23 July of 2004, recognized among*

other things, the adverse impact that smoking has on public health as well as the social, economic and environmental consequences, even on efforts to improve people's well being in developing countries. Likewise, the Board recognize the need for a strong political commitment at all levels to establish effective control over tobacco within the framework of the Convention of the World Health Organization, of which our country is a part in accordance with Act No. 275 issued on November 25, 1948. Taking this into account, our country is involved in international efforts to establish a regulatory system that will help to control and stop the negative consequences and the addictive consumption of tobacco and that will help to improve our development considering it produces morbidity, mortality and disability, thus the productivity of the national population and of the world population is affected.

Therefore, the importance of the bill is unquestionable. By stating that human life is unfringeable, the Chamber has derived from the content of Article 21 of the Constitution, the right to life and to health of all citizens. The preeminence of human life and its conservation through the right to health are essential for the State; all this is derived from the Constitution itself (as an ethical obligation arising under its various numerals and principles, such as Article 21, 28, 46 and 74), and also from the international instruments that our country has in force, such as the Universal Declaration of Human Rights, the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man and the International Covenant on Economic, Social and Cultural Rights. The Court has indicated in its jurisprudence 'Doctrine and philosophy through all time have defined 'life' as the most important good/right, claiming it should and must be protected by law. Also, 'life' has been understood as a principal right within the range of human rights, which has a rationale, because, without the right to life, all other rights are useless, and thus, life must be especially protected by law. In our particular case, Article 21 of the Constitution states that human life is inviolable and from there is derived the right to health of all citizens, It is ultimately the State which is responsible for protecting public health by preventing whatever threatens it.' (Case 1994-5130). Moreover, data from a study by the Directorate of the Costa Rican Department of Social Security indicates that during 2007 they allocated the sum of C.38.920 million colones to treat patients with diseases attributable to tobacco. The relevance of the above is broken down as follows: (i) C.19,673 million colones were allocated for outpatients with some sort of condition related to tobacco consumption, (ii) for inpatient hospitalization, C.15.952 million colones were allocated for the same reasons and (iii) due to disabilities, C.3.295 million colones were paid to workers absent due to any condition related to tobacco consumption. (http://www.ccss.sa.cr/html/comunicacion/noticias/2008/05/n_568.html). Finally, it is important to note that the study also indicates that the two leading causes of death in our country are cardiovascular disease and cancer, which are highly related to smoking and precipitated smoke respiratory diseases.

The Convention being examined by the Court precisely points out in its principles that to achieve the basic objectives of the Convention everyone should be informed of all "... the health consequences, addictive nature and mortal threat posed by the consumption of tobacco and by smoke exposure, should be appropriately seen by all of the government branches and legislative, executive, administrative or any other measures should be taken in order to protect all people from tobacco smoke." All of this should be done by group effort engaging multiple countries and the World Health Organization, which has identified tobacco as an addictive product harmful to human health, affecting millions of people in the world, especially those in countries under development. Therefore, it is imperative to establish certain measures for the protection of the right to health of all this people, since smoking is a factor that hinders and prevents public health, the State must assume its role on the protection of third parties as it is required by the Convention itself.

(B) Also, by judgment No. 1993-3173, the Chamber stated:

"The fundamental rights and freedoms of each person must coexist with each and every one of the fundamental rights of others; so, for the sake of coexistence, often it becomes necessary to establish some reasonable limits on the exercise of those fundamental rights and freedoms, although it should be done only to a necessary and accurate extent in order that other people can

*be able to enjoy their right on equal terms. However, the principle of Coexistence of Rights and Freedoms—**third parties rights and freedoms**— are not the only fair measures seeking to impose limitations on the people's rights and freedoms; the "**moral**", conceived as a set of principles and beliefs fundamental in a specific society, whose breach seriously offends the generality of its members, and "**public order**", also act as factors supporting the limitations of fundamental rights. Nevertheless, as they are indeterminate legal concepts, their definition is extremely difficult.*

*(C) Notwithstanding the above, this Chamber recognizes the difficulty of defining with precision the concept of **public order**, and acknowledges that this concept can be used both to affirm the rights of an individual against the government and also to justify limitations on behalf of the collective interests of a group of people. It does not refer only to the maintenance of material order on the streets, but also refers to the maintenance of certain legal and moral order, which consists of minimum conditions for social life, which shall be convenient and adequate. It is based on the safety of persons, on their property, their health and their tranquility."*

The Convention seeks for countries that are members, to have a legal framework which allows the control of tobacco consumption, and whose justification lies in the possible risks for the health of millions of people around the world. Even though for the implementation of the Convention some legislative measures are required, the Board does not consider that in the present there is any breach of the right to health in the Constitution. In recognition of this, everyone has the right to the protection of health and thus to the protection of life. In this regard, Article 8 of the aforementioned Convention recognizes that science has unequivocally demonstrated that exposure to tobacco smoke causes mortality, morbidity and disability. It therefore seems appropriate to settle certain measures in order to preserve the right to health of these people to ensure that they can develop their daily business without unwanted risks and in a healthy environment.

III. CASE UNDER STUDY: In this particular case, the discontent of the appellant refers to the location of the smoking area provided by Circular No. 03-2006 issued on January 17, 2006 by virtue of its proximity to the kitchen of the institution where she works, causing great inconvenience to her right (and the rights of her co-workers) to health and to a healthy work environment when people smoke. In this respect, the Smoking Regulation Act, the Executive Decree No. 25462-S of 29 August 1996, published in Gazette No. 182 of 24 September 1996, Article 8 determines that: "*In the places indicated below, it can be permitted to smoke provided that the following rules and conditions are observed: (...) b) In cinemas, theaters, museums, concert halls, clinics, hospitals, sports facilities, state agencies located indoors and that are intended for collective use, offices, shops, factories, plants, warehouses and facilities in the private sector and restaurants, cafes, among others, when they have designated specific smoking areas. These areas shall be easily accessible, they shall be properly identified by a caption with visible characters to indicate the following: "Smoking Area".*

By virtue of the foregoing, current Costa Rican legislation allows the existence of a smoking area in state agencies which are destined for collective use as can be derived from the purpose of Circular No. 03-2006 issued on January 17 of 2006, by the Mayor of the Municipality of Oreamuno in which the hallway leading to the kitchen was allocated as a smoking area. However, to allocate a smoking area close to the kitchen, a place in which officials eat their food, in the opinion of this Court, might cause serious inconveniences and may have harmful effects on nonsmokers. In this regard, the report rendered under oath by the Mayor of the Municipality of Oreamuno said that while a group of officials expressed their dissatisfaction, it is not true that nothing has been done in this regard, because he decided not to go to the smoking area at the times that the workers/officials are enjoying their food. For this Court, this does not constitute an effective measure to protect the non-smoking population from the environmental pollution caused by cigarette smoke, and thus the claim must be sustained at least as regards the above-mentioned.

In light of the foregoing, and in accordance with the specific technical criteria set forth, the Municipality of Oreamuno must move the area designated as a smoking area, and ensure that the new assigned area does not jeopardize the right to health of workers. In this sense, the Court

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recommends reviewing what is established in Article 3 of the Regulation for Smoking (*Ley de la Regulación del Fumado*) which provides as follows: "*The Ministry of Health, through its administrative, executive and technical units, is responsible for the dissemination, consulting and application of this Regulation*".

Finally, according to the evidence presented before this Court and in accordance with what has been reported under oath to this Chamber, the Court does not have enough proof that the Mayor continued with his practice of smoking in a municipal premise at the time that workers/officials are enjoying their food, which would be to the detriment of the right to health contained in Article 21 of the Constitution. On these terms, the claim must be dismissed at least on this concern.

In light of the foregoing, the Court declares admissible the present claim, as indeed is previously commanded."