

Type of extract: Majority vote

Legal branch: Constitutional law

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Matters (Descriptive)

- Presidential govern
- Costa Rican Social Security Fund
- Environmental, Energy and Telecommunications Ministry
- Public Works and Transport Ministry
- Health Ministry
- Right to life
- Right to health
- Competence of the Constitutional Chamber
- Municipality

Sub-matters (Restrictive)

- Disagreement by the petitioner the way the State allows the sale and consumptions of cigarettes to the extent that these items are harmful to human health.
- Referral to the contested authorities because the contested breach of duties does not directly harm petitioner's fundamental rights nor his families'.

MAJORITY VOTE

I.-

In this petition, the petitioner submits to being dissatisfied with the way the State allows the sale and consumption of cigarettes, knowing that these items are harmful to human health. However, the Constitutional Chamber has already ruled in the past on the issue that the petitioner presented in this amparo, as follows:

"This Chamber decided in ruling No. 4804-99 of the thirteenth hour and forty-five minutes of June 18th, 1999, writ of unconstitutionality No. 98-007407-007-CO, based on the following considerations:

II.-

As the Attorney General's Office correctly points out, the competence and legal powers that this Constitutional Chamber has defined in the Constitution and in the Law indicate a clearly defined scope concerning the way it can handle the issue of omissions in the positive law, as was indicated in the already quoted resolution number 06856-98 of the sixteenth hour and twenty-four minutes of

September 24, 1988. In the sub litem, the petitioners sustain that in article 9 of the Tobacco Regulation Act there is an omission since it only regulates and restricts, instead of banning, cigar and cigarette publicity, as should be done to properly protect the rights to life, health and to living in an ecologically balanced environment. That is to say, what they attack is not the content of the law but the choice of passing it in one way instead of another, which they feel is the correct one. The repair, therefore, is not directed to what the legal text says but to what it –in the petitioners opinions- did not say. From this perspective, it is obvious that even in the event that the Writ was accepted and the law was declared unconstitutional, the law would not be substituted for one with the content, which the petitioners propose. Naturally, this Chamber cannot dictate it either, nor would it be correct to ask the legislator to do so, because the Constitution –which collects and reaffirms the principle of separation and independence of State powers – gives no such power to this Court. What is more, it is important to remember, in any event, that declaring the inapplicability of the contested article could not, per se, have the virtue of creating a prohibition on the challenged publicity activity, because –dealing with a particular activity, of the private sector, ruled by the principles of liberty and freewill- such a prohibition can only come from a law that explicitly creates it and that exists under the parameters that the Constitution provides for the restriction of fundamental rights such as commerce, as the Attorney General's Office also points out. This circumstance makes the matter inadmissible, since in no case can it lead to the satisfaction of the expressed concrete interest.

II.-

It is also necessary to emphasize that regulations for smokers like the ones in the Law subject to revision are perfectly viable, where the legislator has established them using its sovereign powers, within the area of competence given to it by the Constitution. The exact terms in which the regulation is declared, within the framework of all possible solutions to the matter, is a sole competence of the legislator. **Moreover, agreeing with it or not, the truth is that the activity of commercialization and consumption of cigarettes is entirely legal. From that perspective, the regulation measures appear reasonable and proportionate, while a total prohibition like the one the petitioners propose might not be, given that –as it is well known- as long as the rights of others are not affected, we cannot restrict the exercise of fundamental freedoms of people who choose to smoke.** The Constitution does not oblige the legislator to opt for a clear prohibition in relation to tobacco publicity. This confirms the necessity of declaring the inadmissibility of what was requested.” (Ruling No. 6251-99 of 15:36 hours of August 11th, 1999, highlighted and underlined is not part of original).

Moreover, in ruling number 2768-97 of 15:12 hours of May 20, 1997, the Chamber said:

"If the petitioner believes that the people that work in Costa Rican Social Security Fund and in the Ministries of Health and Governance have not observed the functions inherent in the positions that they currently fill, on the grounds that they have failed to take necessary measures to prevent publicity of the cigarette consumptions, that constitutes a claim that is incompetent in this Jurisdiction, given that the investigation and following sanction-if it was the case- to a public authority that has not fulfilled the functions that the Law assigns, is the competence of other Jurisdictions (Penal) or administrative, so dissatisfaction must be expressed before the body in question; report the matter under breach of duties or to the Ombudsman, who is responsible for protecting and promoting the rights and interests of the citizens and ensuring the correct functioning of public sector institutions. For these reasons, the writ is inadmissible and so it must be declared."

Criteria that, even though in the foregoing matter it was aimed primarily at the publicity problem, is also applicable to the case under study.

II.-

In effect, if the petitioner considers that the Government, the Ministries of Health, Public Works and Transport, and Environment and Energy along with the Costa Rican Social Security Fund among others breach the duties that are established by the regulations on tobacco, that constitutes a complaint that should not be presented here, since the contested omissions – because of their generality- don't directly harm the petitioner or his family's fundamental rights, which makes this not the correct way to express his dissatisfaction. As a result, he must present himself before those authorities to report the breach claimed here.

III.-

Determining the danger that smoke from a cigarette poses to public health and what are the correct means to minimize this risk – or to eliminate it- is a matter of a technical and scientific nature that is beyond the domain of protection of the writ. In this way, the Constitutional Tribunal pointed out that:

"... The domain of protection of the writ is reserved to the analysis of facts and actions and to its comparison with the regulation, to conclude a possible illegality of the challenged act, without it being possible to venture into the fields of science or technique for this. The dispute of technical or scientific criteria is reserved for other institutions. Unless, as indicated by the case law cited, the decision becomes arbitrary violating superior principles like equality, proportionality and reasonability, among others, that determine such illegitimacy.

(Case No. 1611-98 of 16:36 hours of March 10th, 1998).

IV.-

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In light of the aforementioned considerations, the writ is inadmissible and must be declared so.