

Type of extract: Majority vote

Legal branch: Constitutional law

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Matters (Descriptive)

- Justice and Peace Ministry
- Deprived of freedom
- Right to health

Sub-matters (Restrictive)

- Petitioner's claim that his roommates are active smokers, estimated to directly harm the health of those who do not smoke.
- No violation of the right claimed by the inmate because those deprived of freedom are allowed to smoke inside the facilities of the penitentiary system, although the authorities must take note of protecting the health of those who do not smoke.

MAJORITY VOTE

Regarding the smoking restriction in the penitentiary centers, this Chamber already had the opportunity to comment on another occasion, in ruling number 2006-7146 of 08:30 of June 8th, 2005 on that occasion considered the following:

"...VI.-

As for the restriction on smoking in penitentiary centers. Petitioner claims that the authorities of the penitentiary center authorize the use and consumption of tobacco, which is harmful to his health. With Law number 7501 of May 5th, 1995 the Government seeks to ensure the individual and collective health of Costa Ricans, always respecting individual and social rights recognized by the Constitution and the Law (article 1). In article 2 of the Law this protection is put into practice with the prohibition on smoking in certain places, with article 3 excluding of such limitation for inmates of the National Penitentiary System. In this sense, any attempt to regulate this last case through infralegal standards would be illegal as it would contradict article 3, without forgetting that, as this Chamber has already declared, smoking is a legal activity and, on the basis of the freewill principle derived from article 28 of the Constitution, can only be deprived in a legal way (ruling number 04804-99 13:45 hours of June 18th of 1999). Consequently, authorities of penitentiary centers have issued the administrative acts here contested under the principle of legality, which means that the acts and behaviors of the Administration must be regulated by written rule, which means of course, submission to the Constitution, the Law, and in general to all legal standards.

However, the authorities of the penitentiary center must remember that health is a fundamental right of the human being since life itself depends, in great part, on its respect, and it is why authorities have the obligation to watch out for it regarding people who are deprived of freedom. It's clear that petitioner, as a human being, has the right to the protection of his health and thus to life. Scientific data exists about the health risks to the non-smoking population associated with environmental contamination of smoke from tobacco cigarettes. This is why it seems correct to devise measures that preserve the right to health of these people so they can develop their daily activities without undesired risks in a healthy environment. Government authorities must have in mind that in case of conflict the non-smoking population's right to health will always prevail against the smoker's right to consume tobacco; nonetheless, in the present case we find ourselves before the population of a penitentiary center, so the respective authorities must make the necessary studies and actions for the adoption of protective measures, especially those relative to the consumption of cigarettes in enclosed spaces, and assess where there is the least impact of cigarette smoke and initiate the corresponding studies so that in a reasonable margin of time special places for non-smokers are built according to the different levels of containment, wherewith the right of smokers deprived of freedom is not being restricted but instead a promotion of health protection with the creation of smoke-free spaces is created and, in this way, protect the quality of the breathable air free of contaminated smoke from tobacco inside penitentiary centers.

Consequently, if an inmate suffers from any illness duly confirmed by a medical expert affected by cigarette smoke or does not wish to remain in an area where he can be affected by cigarette smoke, he must request before the respective authority a change of location with the purpose of not worsening his illness, which must be granted by the authorities of the penitentiary center in which he is being held and provide him the necessary and adequate conditions to protect his health..."

About the particular case. In the matter at hand the petitioner –deprived of freedom-, does not agree with the fact that his fellow inmates can smoke, because he considers that this affects the health of people who choose not to. Regarding the prohibition or lack thereof on smoking, it is necessary to quote article 3 of the Tobacco Regulation Act, which states: "This prohibition excludes the inmates of the National Penitentiary System"; article 8 subsection e) of the same Act reads: "Inmates of the National Penitentiary System are allowed to smoke." From the above, it is clear in the present case, that there is no prohibition of a legal character which prevents inmates from smoking inside the Penitentiary Center, being that there is an express authorization which allows them to, so, in accordance with the principle of law reserve, this criteria cannot be modified without a future law that prohibits it. Notwithstanding the foregoing, this Chamber must highlight what was stated in the reasoning, in the sense that health is a fundamental right, which has been considered as one of the most important fundamental rights, so the State has the obligation of looking out for said right in the inmates, and for that to happen it must take

necessary measures for people who have any illness duly confirmed by the medical expert or for those who have made the decision not to smoke, to be relocated in areas where the impact of cigarette smoke is smaller and where they will not be affected by the consequences of passive smoking. To be able to comply with such obligation, the Administration must build places destined for non-smokers according to the levels of contamination, which could be considered as a limitation on smoking inmates, since as was explained before, they have an express authorization to smoke, given that the aim is to protect the health of non-smokers through the creation of smoke-free spaces.

In this way, the next step is to declare that the writ is inadmissible, given that based on the Tobacco Regulation Act, inmates have authorization to smoke inside the installations of the penitentiary system. Nonetheless, the authorities must take note of the fourth recital of that resolution, to protect the right to health of non-smokers.