

JUDGMENT "TOBACCO UNION OF PARAGUAY AND OTHERS / WRIT OF PROTECTION".
YEAR: 2009 - No. 1278

Decision No.: NINE HUNDRED AND SIXTEEN

In the city of Asuncion, capital of the Republic of Paraguay, at twenty-eight days of December in the year two thousand nine, in the Chamber of Agreements of the Supreme Court, their Excellencies Ministers of the Constitutional Chamber, Dr. Antonio Fretes, President and Doctors Victor Manuel Nuñez Rodríguez and Sindulfo Balncó, who is part of the Chamber in replacement of Dr. Jose V. Altamirano Aquino, before me, the authorizing Secretary, it was brought to the agreement the file named: TRIAL: "TOBACCO UNION OF PARAGUAY AND OTHERS/ WRIT OF PROTECTION" to resolve the petition for a writ brought by the Attorney Carlos Alberto Palacios representing the TOBACCO UNION OF PARAGUAY, TOBACCO EAST SA, MERCURY TOBACCO SA, TOBACCO HERNANDARIAS SA and PARAGUAY INTERNATIONAL SA, and the attorney Veronica Diesel Junghans representing SAN FRANCISCO TOBACCO SA under the patronage of attorney RAUL PRONO Toñáñez .-----

After examining the facts of the case, the Supreme Court of Justice, Constitutional Chamber, decided to refer and vote as follows: -----

CASE:

Is it from the petition for unconstitutional writ deduced? -----

To the question posed, Dr. Nuñez Rodríguez asserted: In this process the representatives of the plaintiffs firms are promoting a petition for a writ against the Ministry of Public Health and Social Welfare (MSPBS by its Spanish acronym), request which is received by the Civil, Commercial, Labor and the Children and Adolescents Judge of First Instance, of the city of Hernandarias, who under the provisions of Law No. 600/95 Law which amends the Article 582 of the Civil Procedure Code raises this process to the Excellency Supreme Court so that the Court rule on the constitutionality of Resolution SG No. 298 dated 14 May 2009 issued by the Ministry of Public Health and Social Welfare, "*BY WHICH NEW HEALTH WARNINGS ON THE EFFECTS OF TOBACCO ARE ESTABLISHED, TO BE PRINTED ON CIGARETTE PACKETS AND OTHER CONTAINERS WHICH CONTAIN TOBACCO PRODUCTS,*" and such is how the case becomes filed with this Court .-----

1. Resolution SG. No. 298 dated May 14, 2009, issued by the Ministry of Public Health and Social Welfare, provides:

"Article 1. For the purposes of this resolution means: a) The term "outside packaging and labeling" in relation to tobacco products applies to any packaging and labeling used in the retail product. b) Is "health warning" whoever message through which reported in expressly on the adverse health effects of use, consumption and exposure to tobacco and smoke tobacco, and that may include legends, pictograms or warning images. c) The "product of tobacco" means

products entirely or partly used as raw material leaves tobacco, and for the purpose of smoking, sucking, chewing or snuffing.

Article 2. Packs and any other packaging of cigarettes or tobacco products of national or international production for domestic consumption shall contain health warnings in the manner indicated in this resolution.

Article 3. These warnings must meet the following conditions: a) be approved by the Ministry of Public Health and Social Welfare. b) be used simultaneously on the outer surface of each wrap tobacco products. A warning, with a full-color image and full text corresponding to the image by packing pack, and include the series of 4 warnings in each batch production packaging tobacco. c) Be available to manufacturers or importers of tobacco in the Directorate of Communications of the Ministry of Public Health and Social Welfare. d) Use the following texts, accompanying the respective images:

- SMOKING CAUSES LUNG CANCER, EMPHYSEMA and ASTHMA ATTACKS.

-SMOKING CAUSES STROKE.

-SMOKING CAUSES SEXUAL IMPOTENCE.

-SMOKING CAUSES HEART ATTACK AND HYPERTENSION.

e) The texts mentioned in paragraph 4 of this Article shall be preceded by the statement: " Ministry of Health and Social Welfare warning," in smaller size than the warning texts, and subject to annual revisions and modifications by the Ministry. f) The warnings shall be printed directly on a pack of tobacco products, in order that the image remains visible at all times, including during the period of display at retail outlets.

Article 4. The size of each warning center will occupy 60% of the front and rear end faces of the pack of cigarettes or tobacco container products without spaces between the warning and the box that contains it. Images must be clear, and the text should be clear and legible and written in black letters on a yellow background, as the accompanying model annexed to this resolution. All those packages which contain tobacco products, with different forms set forth herein, shall occupy in aggregate not less than 60% of the total surface of the package, warnings as to content and product specifications.

Article 5. Determine that the packages and labels of tobacco products do not promote a product in a false, misleading or deceptive manner or misleading with respect to its characteristics, health effects, hazards or emissions, and no term, descriptor, trademark or trade, figurative signs or other signs that directly or indirectly creates the false impression that a product of tobacco is less harmful than others. For example, words such as "low tar", "light", "ultra-light", "mild" and similar.

Article 6. Provide that the tobacco product packaging must indicate on one of the side of its faces, according to the model attached to this Resolution, the classification of substances that compose it, stating: "This product contains 4700 toxic and carcinogenic substances. There are no safe levels of exposure to smoke tobacco."

Article 7. Establish that a breach of the provisions of this resolution constitutes a grave offense, and shall subject those responsible to the penalties provided in the Health Code.

Article 8. Determine that the Advertising Control Department of the Ministry of Public Health and Social Welfare, with the technical support of the General Directorate of Legal Counsel, to undertake the monitoring and enforcement of this Resolution, from its entry into force 120 (one hundred twenty) days from this Resolution.

Article 9. To rescind Resolution SG N° 428/90 and any other previous ministerial provision contrary to the provisions of this Resolution. ... /// ...

*TRIAL: "TOBACCO UNION OF PARAGUAY
AND OTHER UNION S/ WRIT OF
PROTECTION*

". YEAR: 2009 - No. 1278 .-----

... /// ... Article 10 °. Communicating to those concerned and accomplished to archive. "-

2. The representatives of the plaintiffs claim that the firms themselves are a union and, among their different purposes, it is to foster the unionization of producers and manufacturers dedicated to tobacco category, as well as to protect and defend the interests of the union. They claim that Resolution No. SG 298 dated May 14, 2009 issued by the Ministry of Public Health and Social Welfare "*BY WHICH NEW HEALTH WARNINGS ON THE EFFECTS OF TOBACCO ARE ESTABLISHED, TO BE PRINTED ON CIGARETTE PACKETS AND OTHER CONTAINERS WHICH CONTAIN TOBACCO PRODUCTS*" is unconstitutional by violating the principles enshrined in articles 3 "*public power*", 137 "*of the supremacy of the Constitution*", and 238 "*Duties and powers of the President of the Republic of our National Constitution*". They also affirm that the "Resolution is arbitrary to have been issued by a body that is not competent.-----"

3. Proceeding to the analysis of this case, we have that, the Ministry of Health and Social Welfare (MSPBS by its Spanish acronym) through the General Secretariat issued Resolution No. SG 298 dated May 14, 2009 "*BY WHICH NEW HEALTH WARNINGS ON THE EFFECTS OF TOBACCO ARE ESTABLISHED, TO BE PRINTED ON CIGARETTE PACKETS AND OTHER CONTAINERS WHICH CONTAIN TOBACCO PRODUCTS*" and implemented the measures contained in such Resolution based on Article 203 of Law No. 0.836/80 of the Law of the Health Code, which states: "*The Ministry, when necessary, may determine that the containers that sell products made*

with tobacco, should have in clear and visible form the warning that can be harmful to health" and in the Article 11 of Law No. 2969/06 Act "Approving the World Health Organization Framework Convention on Tobacco Control". -----

4. Firstly, the rules may be operational or programmatic. The Operational are not required to be regulated nor conditioned by other legislative measure to be applicable. They contain sufficiently specific descriptions of such factual circumstances that enable immediate application. A rule is operational when it is directed to a situation of reality that can operate immediately without other institutions. Instead, programmatic rules are those whose effectiveness is subject to the condition of being regulated. That is, the rules of a treaty, constitution or a law, by nature may be operational or programmatic. The latter require the complement of other rule that specifies and brings to term the "program" of the programmatic rules. Those rules are not auto applicative due the requirement that complementary rules are needed for programmatic rules to be in operation. They have also been listed as imperfect or incomplete as subordinate to their effectiveness to the dictates of others rules.-----

5. In that sense and entering to the analysis of Resolution SG No. 298 dated May 14, 2009 issued by the MSPBS *"BY WHICH NEW HEALTH WARNINGS ON THE EFFECTS OF TOBACCO ARE ESTABLISHED, TO BE PRINTED ON CIGARETTE PACKETS AND OTHER CONTAINERS WHICH CONTAIN TOBACCO PRODUCTS"*, we note that the requirements to be met for the validity of a regulation are not given in the aforementioned Ministerial Resolution. That is, the requirements of the Constitution, the World Health Organization Framework Convention on Tobacco Control and Health Code are not met and as such, it cannot enforce compliance by those who have not observed them.-----

6. The National Constitution provides in Article 137 *"of the supremacy of the Constitution." - "The supreme law of the Republic is the Constitution. This, the treaties, international conventions and agreements adopted and ratified, the laws adopted by Congress and other legal provisions of lower rank, sanctioned in consequence, constitute national positive law in the order of priority stated..."* Similarly, and in accordance, Article 141 states that *"International treaties" - "The validly concluded international treaties, adopted by law by Congress and whose instruments of ratification were exchanged or deposited, form part of domestic law with the hierarchy determined by Article 137"*. In turn, among the duties and powers of Congress set in Article 202 of the CN, we have *"... 2) dictate codes and other laws, amend or derogate them, interpreting this Constitution9) approve or reject treaties and other international agreements signed by the Executive ... "and Article 238 states:" The powers and duties of who holds the presidency of the Republic: ... 5) issue decrees that, to be valid, require the endorsement of the appropriate Minister.. "*-----

7. In our country we have similar backgrounds to the particular case the Law Nº. 1333/98 *"On Advertising and Promotion of Alcoholic Beverages and Tobacco" which in Article 7o states: "The advertising in mass media written national (newspapers,*

magazines), in the street, in public institutions and places of public access (flyers, posters, murals, stickers and the like) in print, illustrated or light, as well as television spots, included within the same context of advertising space in not less than ten percent of the total advertisement, the following legend in clearly legible and contrast: a) For products containing tobacco should include: "SMOKING CAUSES CANCER AND RESPIRATORY DISEASES. It warns the Ministry of Public Health and Social Welfare"; as well as Law No. 825/95 "Protection of non-smoking people" that forbids smoking in public places. Both laws impose their standards through laws of the National Congress, and not mere ministerial resolutions.-----

8. Law No. 2969/06 "*Approving the World Health Organization Framework Convention on Tobacco Control*" states that each state, according to its domestic law, shall issue the recommended guidelines by the World Health Organization standards Health (WHO). This law is limited to ratifying the agreement that has a programmatic content, and therefore should be regulated through other operational rules. Law 2969/06 does not contain any item delegated to the Ministry of Public Health and Social Welfare to regulate the agreement, for which it requires an act of the National Congress or at least a Decree from the Executive, because in the absence of legislative delegation, it shall follow the constitutional rule that determines that regulation of a law can only be given by legislation, that is, through the National Congress or a presidential decree issued by the Executive.-----

9. In consideration of the aforementioned background and current legislation, the World Health Organization Framework Convention can only be regulated legislatively through the National Congress, or at least through a regulatory decree, as the National Constitution establishes in Article 202 "*Duties and powers of Congress ... 2) dictate codes and other laws, amend or derogate them, interpreting this Constitution9) approve or reject treaties and other international agreements signed by the Executive ... "and Article 238:" The duties and powers of who holds the presidency of the Republic: ... 5) issue decrees that, to be valid, require the endorsement of the appropriate Minister .. "*. Also in terms of the powers that the Health Code gives to the Executive "*The Executive Power will regulate the provisions of this Code*" and Article 203 of that code, which states: "*The Ministry, when necessary, may determine that the containers that sell products made with tobacco, should have in clear and visible form the warning that can be harmful to health*".-----

10. The Health Code allows the Ministry of Health to issue internal regulations, that is, resolutions that relate to the internal management of the institution; however, it does not allow dictating resolutions dealing outside the same issues. In the case ...///...

... /// ... particular, the Ministerial Resolution seeking to impose changes on the labels of containers of cigarettes, emerges as an overreaching function that is outside the regulatory authority of the Ministry of Public Health and Social Welfare contrary Articles 202 and 238 of the Constitution .-----

11. Thus, I consider that a reading of the above provisions, the Ministry of Public Health and Social Welfare (MSPBS by its Spanish acronym) has assumed powers beyond the limits established by current regulations, issuing a resolution establishing charges, obligations and restrictions not allowed in the National Constitution or in the World Health Organization Framework Convention, or the Health Code. While the Health Code establishes the obligation to place *clearly and visibly the warning that can be harmful to health*, in any way, it could be argued, and much less impose placed on labels and warnings so shocking images as serious as "*smoking causes cancer lung cancer, emphysema and asthma attacks*" "*smoking causes stroke*" "*smoking causes sexual impotence*" and "*smoking causes heart attack and hypertension*", through simple ministerial resolutions, exceeding the limits of competence and meaning of the word "*warning*" allowed.-----

12. Therefore, pursuant to the foregoing consider Resolution SG No. 298 dated May 14, 2009 issued by the Ministry of Public Health and Social Welfare, has been issued by an authority lacking competence, not adjusting therefore to the principles enshrined in Articles 137, 202 and 238 of the National Constitution, therefore, be declared null as unconstitutional.-----

13. In conclusion, based on the reasons stated above, the affirmative vote of the case in the sense of declaring null as unconstitutional Resolution SG No. 298 dated May 14, 2009 issued by the Ministry of Public Health and Social Welfare, "*BY WHICH NEW HEALTH WARNINGS ON THE EFFECTS OF TOBACCO ARE ESTABLISHED, TO BE PRINTED ON CIGARETTE PACKETS AND OTHER CONTAINERS WHICH CONTAIN TOBACCO PRODUCTS*". It is my vote.-----

At the Doctors FRETES and BLANCO, asserted that they adhere to the vote of the Minister, Doctor Nuñez Rodríguez, by the same reasoning.-----

With what was terminated immediately, signing SS.EE., everything before me, that certify, being agreed the sentence that immediately follows:

In front of me:

JUDGMENT ISSUE: 916.-

Asuncion, December 28, 2.009.-

SEEN: The merits of the foregoing Agreement, the

SUPREME COURT OF JUSTICE

Translation provided by the Lawyers Collective (New Delhi, India) and partners for the Global Health and Human Rights Database

Constitutional Chamber

D E C I D E:

DECLARE null as unconstitutional SG Resolution No. 298 dated May 14, 2009 issued by the Ministry of Public Health and Social Welfare, "*BY WHICH NEW HEALTH WARNINGS ON THE EFFECTS OF TOBACCO ARE ESTABLISHED, TO BE PRINTED ON CIGARETTE PACKETS AND OTHER CONTAINERS WHICH CONTAIN TOBACCO PRODUCTS*".-----

WRITE DOWN, registry and notify.-----

FDO.: Doctor ANTONIO FRETES, President and Doctors VICTOR MANUEL NUÑEZ RODRÍGUEZ and SINDULFO BLANCO, who is part of the Chamber in replacement of Dr. JOSE V. ALTAMIRANO AQUINO. BEFORE ME: HECTOR FABIAN ESCOBAR DIAZ (Clerk I)

In front of me: