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JUDICIAL BULLETIN OF THE GAZETTE
BODY OF THE DEPARTMENT OF JUSTICE
Republic of Nicaragua, Central America

YEAR MCMXCII – MANAGUA, JANUARY 1st to DECEMBER 31, 1992 No. 14

JUDGMENT No. 152

SUPREME COURT OF JUSTICE, Managua, September 3rd, nineteen ninety-two. At ten and five minutes in the morning.

WHEREAS

I,
Via pleading filed before the Appellate Court of the III Region, at twelve p.m. of the twelfth of February of nineteen ninety two, Doctor GUILLERMO BERMUDEZ SOLORZANO, of legal age, married, attorney and from this address appeared, as Special Judicial Representative of Company “ELECTROQUIMICA PESADA S.A.”(ELPESA), at this domicile, setting forth the following, in sum: That, in June, nineteen ninety one, the Secretary General of the National Commission of the Environment and Territorial Framework (CONAMOR), without any participation from “ELPESA”, performed a study that it named “Analysis of the cost-benefit of the Electrochemical Complex ELPESA-BERCASA June 1991.” Once you were informed of the existence of said report, your principal’s representatives and technicians properly challenged its conclusions, as they considered that the report did not reflect the Company’s real situation. Officers and Advisors of the Nicaraguan Institute of Natural Resources and the Environment (IRENA) recognized the truth and justification of the challenge and, as a logical result, both IRENA as well as ELPESA agreed to the joint performance of a broad and well-founded study. That ELPESA is a for-profit Industrial Company that participates in the economic life of the Nation as of the month of September 1965. The factories belonging to said company are located in the Industrial Area that is designated by the Urban Development Plan of the city of Managua, which does not create any liability as to the environmental problems caused by the disorganized growth that the city experienced after the earthquake that took place in nineteen seventy-two, when the capital population abandoned the city, settling in new neighborhoods that were born in the surroundings of the Job Centers and in unhealthy settlements, such as the coasts of the lake. That, given said problems, ELPESA has had to deploy great efforts to improve its operating conditions and the safety and hygiene both in work areas as well as its surroundings and thus, in nineteen seventy-nine and from there on, new problems arose and the existence of the Companies became precarious; there were no dividends and the country suffers the consequences of a commercial embargo. However, nonetheless, ELPESA survives given the efforts of its employees and its executives. In nineteen ninety, with the new Government, we were able to see transformations in the Country’s economic policy and ELPESA faces development of an economic recovery program. As a first step, modernization is imposed to make the company technologically feasible under international standards; in this sense, the company was contacted by

American consultants and obtained the technical assistance of the United Nations for Industrial Development – (ONUDI, for its initials in Spanish), as well as from the BANCO CENTROAMERICANO DE INTEGRACION ECONOMICA (BCIE). The Government supported ELPESA's modernization plan, since, in its records, it preserves a copy of the communication that was written by then Vice Minister of Economy, Engineer DAYTON M. CALDERA S., to Mr. FRANCISCO VINCENTI, resident representative of the United Nations Organization in Nicaragua, officially expressing the government's approval of the implementation of the project. Furthermore, on the fourth of September of nineteen ninety-one, Engineer CLAUDIO VALENTI GARCIA, Director General of Industry of the Ministry of Economy and Development, addresses the United Nations representative in Nicaragua, stating that they have decided to provide the authorization to perform another project. That, in a sudden, drastic, and hurried manner, etc., the decision adopted by the Government **on the eighth of January** of nineteen ninety two, ordering the final closure of the productive operations is justified in ELPESA's case and it was the same Officer, the Director General of Industries of the Ministry of Economics and Engineering Development, Engineer VALENTI GARCIA, who, days before, had addressed the United Nations, to express that he had decided to approve the project to modernize the companies; and however, it was this very engineer, Valenti Garcia who, on September thirty of nineteen ninety one, requested that ELPESA file a scheduled closing plan for the plant, to which he had given his approval a few days before. That the order for the final closure of the operations was served at twelve and fifteen minutes in the afternoon of the thirteen of January of nineteen ninety two, on Engineer DAVID CALLEJAS SEQUEIRA, resident of the Board of Directors of ELPESA and legal representative of said Company. That, in compliance with the express will of all and each of the persons who work for "ELECTROQUIMICA PESADA, S.A." (ELPESA), in his position as Special Principal of said company, based on Art. 45 of the Constitution., filing a REQUEST FOR A WRIT TO PROTECT FUNDAMENTAL RIGHTS ("*Amparo*") against the Minister of Economy and Development, Engineer JULIO CARDENAS, of legal age, married, engineer and from this domicile; against the Minister of Health, Doctor ERNESTO SALMERON, of legal age, married, surgeon, in this domicile; and against the Minister Director of the Nicaraguan Institute of Natural Resources and the Environment (IRENA) Doctor JAIME INCER BARQUERO, of legal age, married, lawyer and from this domicile, as said Officers issued the resolution at four in the afternoon on the eighth of January of nineteen ninety two, regarding the complete closure of the operations of the Industrial Plant "ELPESA" within a term of ninety days from service of said resolution. The claimant noted that Arts. 80, 27, 32, 46, 57, 86, 104 and 130 of the CP had been violated, noting why the principal of the Corporation "ELECTROQUIMICA PESADA S.A., considered that said constitutional articles had been violated by the resolution to close issued by the challenged Officers. It requested that, in accordance with the provisions of Art. 31 of the Law of Amparo, a decree regarding suspension of the act be issued, by considering that if the closure of the company was to be consummated, certain irreparable damage would be consummated having great magnitude and harming the population in general and "ELPESA" in particular, and finally specified a judicial lockbox for notices.

II.

Via writ issued at eleven a.m. on March third nineteen ninety-two, the Civil and Employment Chamber of the Appellate Court for the Third Region, prior to any proceeding, inspected the facilities of the challenging Company, in order to have direct knowledge of the environmental conditions, of the systems of supervision and safety, workplace health and hygiene; as well as information regarding the importance of the Company for the economy of the country and the importance of its services to the population. Said resolution was served on the challenged Authorities and it was practiced via minutes dated 11 a.m. of the twelfth day of the same month of March. Via writ dated eleven and thirty minutes in the morning on the thirty first of the same month of March, the Tribunal resolved to have in the appeal, Doctor GUILLERMO BERMUDEZ SOLORZANO, as "ELPESA'S" representative; he ordered that the attorney general of justice be informed of the appeal, sending a complete copy of it to him. He postponed the deadline for the Company to close, and the Minister of Health was given the power, or the person that he designated, as contrary body or trustee with sufficient powers to take any emergency measures, even to close the Company, in the event of imminent danger of environmental contamination, or to await a reasonable decision during the pendency of the final ruling of the appeal. He sent an official letter to the challenged officers, warning them with respect to informing this Supreme Court within a term of ten days, warning that, with said report, they had the duty to send the diligence that had been created and finally, he warned the parties of the obligation to appear, within a term of three days, before this Supreme Tribunal, in order to make use of their rights.

III.

Doctor GUILLERMO BERMUDEZ SOLORZANO, appeared before this Supreme Tribunal, in his capacity as Special Judicial Principal of the Company "ELECTROQUIMICA PESADA S.A.", (ELPESA). DOCTOR JAIME INCER BARQUERO, Minister Director of the Nicaraguan Institute of Natural Resources and the Environment (IRENA); Doctor ERNESTO SALMERON, in his capacity as Minister of Health; Doctor ARMANDO PICADO JARQUIN, in his capacity as civil and employment national representative and as Delegate of Doctor Guillermo Vargas Sandino, General Legal Representative of Justice of the Republic; and Engineer JULIO CARDENAS, in his capacity as Minister of Economy and Development. They were considered to have appeared in the record at eight thirty in the morning on May twenty-eight of this year, and, as the officers had provided the respective reports, the proceedings were passed to the judge's office for review; and the record was in the condition of being ready for judgment.

CONSIDERS:

I.

In order to resolve the case on the record, this Tribunal believes that a brief analysis is necessary regarding the matters that, although are not directly subject to the request for a writ for protection of fundamental rights that was filed,

nonetheless, bear a relationship to their resolution. In effect, as the claimant is "ELECTROQUIMICA PESADA S.A." (ELPESA), an industrial for profit company that participates in the Nation's economic life and, given its capacity, projects its productive activities not just to Nicaragua but to Central America, the need arises to apply strict rules of Law to this case given the close relationship that the claimant has to the community of the Nicaraguan people.

In this manner, we proceed to the analysis of Art. 80 of the Constitution, as the first provision which is said to be violated, regarding which this Court believes that said provision does not constitute a rule created for the determined protection of a work sector, but rather, on the contrary, it implies a general protection for the individual or collective person that dedicates him or herself to produce alone or in the company of others in order to satisfy the needs of society, for which purposes the State ensures the full employment of the Nicaraguan people. Work is not a privilege noted to be performed for oneself or for persons under salary, but it is the means employed to satisfy, not only our own needs, but those for whom one works and, as a consequence, for the society in general, which is the primary component of the Nation and their survival is the citizen duty of Nicaraguans to keep. Further, we must state that the referenced provision is not a rule created for the protection of a certain job sector but, on the contrary, it implies a general protection for its exercise within the concept of being lawful. Art. 80 of the Constitution states two concepts at the same time: The right to work, and the social responsibility to implement work. These are concepts that attack human idleness given its own needs and those of the society that man must care for; further, the State must direct its encouragement to obtain the full and productive occupation of Nicaraguans in conditions that guarantee man's essential rights. In the present case, "ELPESA" carries out its activities with its employees with the guarantees that the State grants; these guarantees cease to exist from the moment that the Company, instead of working under the good faith provided by Nicaragua, is currently operating, far from being normal, in a manner that constitutes a danger to the lives of the Nicaraguan people. It is not working to produce with the work of its employees and its equipment, because if the worker wishes to continue working he cannot do so as the company's equipment has deteriorated. For these reasons, the action for protection of fundamental human rights cannot succeed and said constitutional provision has not been violated.

Performing the analysis of Art. 27 of the Constitution, which establishes that all persons are equal before the law and have the right to equal protection; the reasons given by the claimant in this regard, are irrelevant in considering the subject of the appeal as a legal basis for the matters resolved, because the claimant's claim that it is being denied the protection to exercise the freedom to work is not true, as said rule is in no way prohibiting the claimant Company from continuing to work, since, under the legal framework, when someone is forbidden from continuing with the activity that is currently considered to be dangerous for the life of the employees and residents of the Republic, and what the authority orders is not to withdraw the employees from the company, but to withdraw the equipment that is being used for production, because the equipment is not the rational person that works, but rather, the irrational

mechanical element that supports production, which ceased to be in good condition. Therefore, the appeal filed supporting itself on said provision does not apply.

Continuing with the analysis of the challenges, we find ourselves facing the claim based on Art. 32 of the Constitution, that the claimant invokes in its favor, stating that it is being forced to fulfill a resolution that the law does not require. Reviewing the background of the appeal, we find that the matters ordered by the challenged Ministries satisfy the duties of each branch in the resolution section of the ruling, and all agree that it covers the matters connected to work by the Directors of the claimant Company and the employees, requiring the final closure for reasons of security, health, and preservation of the lives of the Company's employees and the people in general. The claimant states that the order issued by the challenged officers at four in the afternoon on the sixth of January of nineteen ninety two, ordering the closure of the plant's operations within a term of ninety days from service of the notice, which was served at twelve and fifteen minutes in the afternoon of the thirteenth of January of nineteen ninety two, is unconstitutional because it seeks to force the company to fulfill an order that the law does not make, in other words, the closure that the Ministers have agreed upon, that, according to the claimant, they do not have the competence to do so, except for the Minister of Health. As the provision that is being examined does not contain the scope that the claimant attributes to it, the objection made must be dismissed.

II.

In performing the analysis of Art. 46 of the Constitution, noted by the claimant as violated because the challenged judgment disrespects and fails to promote the protection of Human Rights, in particular, the Right to Defense, as the company is defenseless, we observe that the claimant does not explain, in its pleading, what the violation consists of and why it has been caused. In the event being contemplated, which involves the health of the Nicaraguan people, it is worth stating that the ***inertia by the Country's authorities*** is unacceptable, but rather, they must act in a timely, intense and energetic manner to avoid worse wrongs than those that Nicaragua has already started to suffer with the Company's irregular and dangerous operation, given that, in the past, the company has already been required to stop its activities and no satisfactory answer has been obtained to date. Thus, the challenge filed by it cannot proceed because the Human Rights argued by the claimant itself give way in light of the demands made to ELPESA, not so much because of the wrongs caused to its workers, but the residents of the city instead, given the uncontrollable emissions of chlorine and mercury, which cause harm and risks to public health, causing harm to the respiratory tracts and the lungs due to the air breathed that is polluting the environment that surrounds us, to the point that it causes asthmatic crises, thoracic pain, bronchopneumonia, coughing, emetosis, and other serious illnesses, including, the most dangerous one – Acute lung edema. The record also shows that “ELPESA” is a company that is subsidized by the Government of Nicaragua, through the price that it pays for the electric energy that it consumes, which means the good will that the Government must live within a friendly treatment of the claimant Company. However, this Government, despite its good

will, cannot be indifferent to the facts subject to the request for a writ of fundamental protection, because this is not about a group of “ELPESA’s” workers but instead, the danger that the residents of the neighborhoods will suffer at the site where the Company is operating; and afterwards, the illness that would progressively advance to all of the residents of the capital and the Republic, if the matters ordered by the Ministers are not fulfilled and tomorrow may be too late to try and correct the irreparable damages. The problem, thus claimed, leaves us to conclude the impossibility of accepting the appeal.

Passing on to the analysis of Art. 57 of the Constitution, we must say that there is no comment to be made, as the claimant kept silent instead of stating what the harm consists of. Regarding Art. 80 of the Constitution, this Tribunal also abstains from opining on it, as this is the first legal provision that the claimant cited at a place different from the current place, and thus, the claim also does not survive.

With respect to Art. 86 of the Constitution, this Tribunal judges that the fundamental reason that this provision does not fit in the case being studied, first, because it originates in different causes, other than health. The fact that the State takes measures against the claimant Company in the exercise of its Power to supervise in the matter of the closure of the Company, does not mean, in any language, that the technicians, professionals and workers lose their rights to work in a place that they choose, in the security that in any place that they would be, they are subject to the Country’s safety measures and the laws that govern them. In turn, we must not confuse the Rights of citizens established by the laws, with the presence of the workers to want to work only where they want to do so, because this would be tantamount to subverting the value of the laws to the workers’ caprice, which really does not understand the provision of the article that is being studied and that states: “the worker has a right to choose his or her workplace without any more requirements than the academic title and a social function.” Further, in the instant case, we are not studying work conflicts, but health conflicts, conditions that are very different in that each one obeys different jurisdictions and laws. For all of these reasons, the provision of Art. 86 of the Constitution has not been violated.

Next, we must opine on Art. 104 of the Constitution, the first part of this provision literally states: “The companies that organize under any of the forms of property established in this Constitution, enjoy equality before the law and the State’s economic policies.” In term of principles, this provision refers to the conditions that persons have to interact as human beings; thus, far from building an abstract legal concept, we find them in the daily routine of each individual. Achieving recognition of these rights has required a long fight of thousands of persons and peoples throughout history and even today, many efforts are missing so that such rights have effective and real validity. In many parts of the world, without fear of exaggerating, we can affirm that the full validity of Human Rights continues to be an aspiration of Humanity. It is difficult to attempt a simple definition of the concept of Human Rights. We can say that these are fundamental requirements for people to interact as human beings; therefore, far from building an abstract legal concept, they are something real and we find

them in the daily routine of each individual. The cited provision has no bearing on the case being set forth. As the Appeal of *Amparo* filed has a clear relationship to equality before the Law and the State economic policies to the extent that the order to close the Company refers to the health of Managua's residents, it refers to the illnesses caused by chlorine and the other chemical elements that the Company produces and that, if it is not closed, these would bring even grater harm to Managua. The company has no complaints regarding the lack of equality and respect that it claims, as the state has respected these principles. In light of the foregoing, the Amparo, based on the cited provision in this paragraph, cannot proceed.

Now, passing the evaluation of Art. 130 of the Constitution, regarding which the claimant states that neither the Ministry of Economy, nor "IRENA, have any legal competence to issue the closure order against "ELPESA that they agreed upon with the Ministry of Health, without any form or figure of a suit, it is worth noting that, for such purposes, the Ministers that ordered the closure, invoked Arts. 50 and 60 of the Constitution which, according to the same claimant, are not regulated, which requires a contradiction of opinion and of the claimant's suit, as, once we have read the appeal carefully, the claims are based on constitutional arguments; they must take into account that when the authority is before a situation such as the one here, regarding harm to the health of the Nicaraguan people, it proceeds to guarantee the peoples' safety, and thus, the appeal cannot succeed.

Performing a review of Decrees 1-90 "Law creating the State Ministries; of 4-90 which notes the state's decentralized Autonomous Bodies" and 3-29 "Law Creating the Ministry of Economy, Industry and Commerce, we found that such provisions have value in the Nation's legal framework. In turn, justice in Nicaragua, especially the provisions related to the Amparo, set the manner how an Amparo is challenged, specifically noting the objections that must be made against the parts that have been considered violated, and the protests, criticism and objections are not relevant, so they did not in any way harm what is being objected and what is deemed to have been violated. However, the challenge must not set forth what the party wishes but what should be. Further, we must take into account that the regulation issued after entry into force of the Law does not withdraw nor does it alter its efficacy, nor does it obstruct its application, because it must be specific and timely in order to safeguard the validity of the judicial order.

THEREFORE:

In accordance with Arts. 424, 436 Pr., 3, 23, 24, 27 and 45 of the Law of Amparo, the undersigned Magistrates stated: We dismiss the Appeal of Amparo filed against Mr. Engineer JULIO CARDENAS R., Minister of Economy and Development; Doctor ERNESTO SALMERON, Minister of Health; Doctor JAIME INCER BARQUERO, Director of the Institute of Natural Resources and Environment (IRENA), by EMPRESA ELECTROQUIMICA PESADA S.A. (ELPESA). We order that the proceedings be filed away. We hereby order copying, service and publication. This judgment is written on seven pages of bond paper with the heading of the Supreme Court of Justice and sealed by the

Secretary of this Supreme Tribunal. - O. Trejos S. - O. Corrales M. - Rafael Chamorro M. - R. Romero Alonso. - A.L. Ramos. - R.R.P. - E. Villagra M. - S. Rivas H. - Adrian Valdivia R. – Before me, A. Valle P. - Secretary.

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