

Montevideo, November 10, 2010

CITATION:

The case before the Court for final resolution is entitled: "ABAL HERMANOS S.A. V. LEGISLATIVE BRANCH ET AL. UNCONSTITUTIONALITY ACTION. ARTS. 9 AND 24 OF LAW NO. 18.256," Case 1-65/2009.

WHEREAS:

1) Abal Hermanos S.A., acting through its legal representative, brought a claim petitioning that Arts. 9 and 24 of Law No. 18.256, referred to as the "Tobacco Control" law, be declared unconstitutional, insofar as the claimant alleges that such provisions violate Arts. 7, 10, 32, 33 and 85, numeral 3, of the Constitution, as well as the principles of legal reserve and separation of powers, the summary of the claimant's arguments being as follows:

Arts. 9 and 24 of the law in question conferred to the Executive Branch the power to require tobacco manufacturers to use health warnings covering "at least 50%" of the total primary exposed surface area of tobacco packaging.

To the extent that the Executive Branch was thereby conferred an unlimited power, this resulted in the violation of constitutionally protected individual rights, given that such power is constitutionally reserved exclusively to the Legislative Branch of government and cannot be delegated to the Executive Branch. Therefore, Arts. 9 and 24 of the law in question are unconstitutional.

The rights of individuals may only be limited by Parliament, through the passage of a formal law and for reasons of the public good, as Parliament, and only Parliament, is authorized to take actions that may limit the rights of individuals, as provided by the Constitution.

The Executive Branch may only act within the limits imposed by the law, and if the law does not establish such limits, neither is the Executive Branch authorized to do so. Any action to the contrary would be unlawful, insofar as it would violate the principle of legality.

Decree No. 287/09 was issued within such a delegation of unlimited power to the Executive Branch, establishing that health warnings could occupy almost the whole surface of cigarette packaging (up to 80% of both main faces).

Art. 9 of the law, by requiring the use of health warnings, affects various rights, among these, the rights to property, freedom of industry and commerce, intellectual property, expression, etc.

Arts. 9 and 24 of the law, by permitting an unconstitutional delegation of authority to the Executive Branch, also violates the trademark rights of Abal S.A., as protected by Arts. 32 and 33 of the Constitution.

By allowing this law to restrict the available surface area of tobacco packaging, this results in a restriction on the use of the company's trademarks, to the point that such trademarks lose all value, as there is no space left in which for them to appear on the packages. The value of a trademark lies in the possibility that consumers will distinguish the mark from other brands and associate the trademark with the product (Art. 1 of the Law of Trademarks No. 17.011).

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This law has delegated to the Executive Branch the unlimited power to reduce, distort and even eliminate the possibility that Abal S.A. could use its mark on its packaging, by simply allowing the law to require that health warnings cover up to 80%, 90% or 100% of tobacco packaging.

These regulations deprive Abal S.A. of the right to make use of the surface of its packaging, thereby affecting its property rights and expropriating its use of its trademark without fair compensation.

In sum, the claimant petitioned for Arts. 9 and 24 of Law no. 18.256 be declared unconstitutional, or, alternatively, that the part of Art. 9 that states “at least” in the phrase “and will cover at least 50% of the total principal exposed surface area,” given that these provisions delegate to the Executive Branch the power to increase the size of the health warnings, images and pictograms from 50% to 100%, thereby limiting and/or eliminating individual rights (pages 95-109 of the record).

II) The Supreme Court of Justice, through Sentence No. 1665 handed down on October 19, 2009, resolved to admit the present unconstitutionality action, with notification to the parties during the time period as established by law (page 119 of the record).

III) Representatives of the respondent, the Executive Branch of the government, responded to the notification in a brief requesting that the Court definitively dismiss the unconstitutionality action brought against Arts. 9 and 24 of Law No. 18.256 on the merits (pages 208 et seq. of the record).

IV) Representatives of the State from the Ministry of Public Health responded to the notification in a brief requesting that the Court definitively dismiss the unconstitutionality action on the merits, and confirm the constitutionality of Arts. 9 and 24 of Law No. 18.256 (pages 282 et seq. of the record).

V) The District Attorney, in Opinion No. 307/10, informed the Court that the present action should be dismissed on the merits (pages 770-771 of the record).

VI) After discussion in chambers, the Court issued its legal ruling (pages 797 et seq. of the record).

WHEREAS:

I) The Supreme Court of Justice unanimously rules to dismiss the unconstitutionality action brought in this case, failing to find that the legal provision in question authorizes to the Executive Branch unlimited powers to restrict individual rights, in contravention of the Constitution.

II) Prior to reaching its decision, the Court took into account the fact that the approval of Law No. 18.256 was based on the development of a public health policy being advanced by the State, widening the campaign against tobacco use, and acknowledging the role of the law’s immediate forerunner, Law No. 17.793, which approved the WHO Framework Convention on Tobacco Control (FCTC), adopted by the 56th World Health Assembly on May 21, 2003, and which provided guidance on effective tobacco control measures, including the inclusion of a health warnings legend on all cigarette packaging, describing the harmful effects of tobacco use. Article 11 of the Convention sets forth the principal characteristics of the law in question.

As the MSP (the Ministry of Public Health) has indicated, “Law No. 18.256 is a law that requires implementing legislation. This is a case of a law that needs an implementing regulation, and [the

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legislature] charged [the Ministry of Public Health] with the execution of the provisions of the law in such a way so as to effectively protect people's lives and their full enjoyment of the right to health. But this in no way signifies that the law has delegated legislative powers to the Executive Branch" (page 784 of the record).

In fact, protection of the public health is an essential, inherent duty of the State, and in cases such as the case at hand, tobacco control legislation serves a superior legal interest that forms part of the notion of the public good (as per Art. 44 of the Constitution). Therefore it is to be expected that the MSP would be tasked with implementing such legislation, given that, as per Organic Law of Public Health No. 9.202, the MSP is authorized to adopt all measures it deems necessary in order to maintain the public health, and issue all regulations and orders necessary for this essential purpose (Art. 2) (cited at page 785 of the record).

III) The claimant does not call the purpose of the law into question—that is, the limitation of individual rights for reasons of the public good—but centers its claim only on the delegation of powers conferred by the law on the Executive Branch. In this respect, the claimant's argument is incorrect, given that from an analysis of the challenged articles, it can be concluded that Law No. 18.256 (Tobacco Control) does not make any delegation of legislative powers.

The distinction between the delegation of legislative powers and the lawful extension of regulatory powers to the Executive Branch in respect of matters that exceed its normal jurisdiction must also be taken into account. The former is not permitted under our constitutional regime, while the latter—that is, the authority to establish the necessary specifics or details for the implementation of a law—is legitimate, and does not fall within the scope of the so-called principle of "legal reserve" (Sayagues Laso, *Treaty...* Volume 1, page 123 et seq.) (Cf. Decision No. 900/1995).

Risso Ferrand supports this notion, referring to the scope of the principal of legal reserve in respect of matters of fundamental rights, stating that, "...a formal law is not necessary for each limitation of fundamental rights, but only that such a law establish the general restrictions, which will later be enforced by administrative or legal authorities, within their respective spheres of jurisdiction" (Constitutional Law (*Derecho Constitucional*), Vol. 1, page 451).

IV) From a simple reading of the provisions in question, it can be seen that the legislature has not delegated any powers, but on the contrary, in keeping with the international anti-tobacco legislation ratified by Uruguay, incorporated the relevant provisions thereof into national law.

In respect of Art. 9 of Law 18.256, contrary to the claimant's reading thereof, the article does not delegate to the Executive Branch any discretionary power to impose restrictions above the stated minimum, but imposes on the tobacco seller the obligation to ensure that the external labeling of its packages includes a health warning that occupies "at least 50% of the total principal exposed surface area."

As noted by the representatives of the Executive Branch, the phrase that the provision uses, "at least," must be understood in the sense that the health warning could occupy more space—as desired by the tobacco merchant—but in no case less than the fixed minimum of 50%.

In addition, the text shows that the only thing that the legislation leaves up to the Executive Branch (the MSP), is how to ensure—with its satisfaction—that the health warnings and messages are clear,

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visible, legible, and occupy at least 50% (fifty per cent) of the total principal exposed surface area of tobacco packaging, as well as the periodic updating of the aforementioned warnings, which clearly refers to the content, and not to the size, thereof.

As a result, the law having determined the minimum limit of the health warnings for approval by the MSP, and leaving only the regulatory aspects having do with the implementation of the law up to the Executive Branch, the Court cannot find that the principles of legality and reserve of law have been violated in the present case.

It should also be noted that the law establishes that the health warnings and messages shall occupy "...at least 50% (fifty per cent) of the total primary exposed surface area" of tobacco packaging. This provision clearly excludes secondary surfaces (the sides, bottom and top), which leaves without merit the allegation that the Executive Branch could do away with Abal's right to use its trademark on its packaging (pages 106 et seq. of the record).

In respect of Art. 24 of Law No. 18.256, it is clear from the text thereof that there is no concrete delegation of powers from the Legislative Branch to the Executive Branch. What is established, as noted by the District Attorney, is the determination of a period within which the Executive Branch will proceed to issue the necessary implementing regulations for the execution of the law, in accordance with Art. 168, numeral 4, of the Constitution (page 771 of the record).

V) The fact that the Executive Branch has issued a decree establishing that health warnings shall occupy up to 80% of both primary surfaces of tobacco packaging (Decree No. 287/009, and, as result, the issue of whether it therefore has exceeded its powers in interpreting the provisions of the law in question, is an issue that is not admissible for review in a suit brought by the claimant corporation, as per the statutory regiment established by Section XV, Chapter IX, of the Constitution.

If, within this regulatory scope, the claimant were to argue that the Executive Branch had issued an unlawful administrative regulation, the claimant would be required to bring such a claim through the proper channels. The claimant does not have standing to bring the present claim as an unconstitutionality action, and much less to raise hypothetical questions such as those supposing that the law could impose a health warning covering 90% or 100% of the surface area of tobacco packaging. These hypothetical scenarios are eventualities and therefore do not fall within the scope of the unconstitutionality action (Art. 509 of the CGP¹).

VI) In respect of the alleged violation of Arts. 32 and 33 of the Constitution, particularly as regards the claimant's right to make use of its trademark, the Court holds that such arguments are not admissible.

As the Court has indicated, the arguments in this vein are based on a hypothesis that has not been born out in reality—that is, that the Executive Branch could order that the health warnings in question cover 90% or 100% of the surface area of tobacco packaging. The hypothetical nature of this argument prevents this Court from considering it.

VII) Claimant ordered to pay costs.

¹ TN: acronym is not defined in the text, but this likely refers to the General Code of Civil Procedure

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For the reasons herein set forth, the Supreme Court of Justice unanimously

ORDERS THAT:

THE UNCONSTITUTIONALITY ACTION IS HEREBY DISMISSED, WITH COSTS.

SO NOTIFIED.