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Smoke-free Mexico, is an absolute ban constitutional?

By Pablo Arandia.

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Smoke-free Mexico, is an absolute ban constitutional?

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In the last few days, it has been reported that as of January 15, 2023, no establishment will be able to advertise or promote tobacco products, such as cigarettes. Can you imagine a convenience store or the typical grocery store without the classic red packs displayed on the shelves? Unless the points of sale seek protection, this will be the new reality throughout the country, as a result of the reform to the Regulations of the General Law for Tobacco Control, promoted and published by President López Obrador through the Ministry of Health.

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This article will not make a pronouncement on whether a prohibitionist policy on tobacco products is appropriate or on the harm they may cause to health, nor on the impact that advertising, promotion, or sponsorship may have on the consumption of these products in Mexico since these are issues that require the opinion of specialists in the field. However, we will analyze the legal problem of establishing absolute prohibitions through regulatory decrees that, at first sight, have no basis in the General Law for Tobacco Control (the Law) and, therefore, may contravene the principle of legality, reserve of law and hierarchical subordination.

It should be noted that this way of regulating by the Executive is not new. Since 2020, the Executive has issued multiple decrees and agreements, some of which have been subsequently declared unconstitutional by the Federal Judicial Branch, while others have not yet been resolved. Such is the case of the Reliability Policy of the Ministry of Energy, invalidated by the Supreme Court in November 2021. In colloquial terms, it seems that there is an intentional practice of wanting to turn the law around in different sectors and industries of the country.

Now, why is this problematic from the perspective of a constitutional democracy? The Regulation of the Law was issued based on the regulatory power set forth in Article 89 section I of the Constitution, which provides for the power of the acting president to issue the regulatory provisions necessary for the execution of the laws issued by Congress. In this sense, the Supreme Court has pointed out that the purpose of the power as mentioned earlier is to execute the law, that is, to develop and complete in detail its norms, but without exceeding the scope of its mandates, contradicting, or altering the provisions of the law, since that is where its measure and justification is born[1]. In this sense, the Supreme Court has established that the regulatory power is limited by the principle of legality, which in turn derives from the principles of (i) reserve of law and (ii) hierarchical subordination.

In general terms, what do these principles consist of? The principle of reservation of law consists in the fact that "when a constitutional rule expressly reserves to the law the regulation of a certain matter (...), it excludes the possibility that the aspects of that reservation be regulated by provisions of a nature other than the law"[2]. Likewise, the second states that "the exercise of the regulatory power may not modify or alter the content of a law", that is to say, the regulatory rules may not contain greater possibilities or impose limits, restrictions, or prohibitions beyond what is established by the law itself, nor extend it to different cases, much less contradict it.

1.- Amparo under review 127/2006 resolved by the Plenary of the Supreme Court.
2.- Jurisprudence Thesis: P./J. 30/2007, Digital Registry: 172521.

Now, once we land on the specific case, the Regulations of the Law prohibit points of sale from directly[3] or indirectly[4] display tobacco products by only allowing their sale through a written list containing just the prices, without logos, seals, or brands. In addition, it prohibits corporate social responsibility actions, i.e., financial, social, or other contributions that promote, advertise, enhance, or market the corporate brand, the product, and its consumption, related public relations or image[5].

On the other hand, the Regulations of the Law prohibit consumers from smoking or consuming tobacco or nicotine products in 100% smoke-free and emission-free spaces by obliging those in charge of such areas to request diners not to use them and, in case of refusal, to ask them to leave the place. The same order applies to public transportation, universities, places of collective concurrence, public areas of prisons and detention centers. So, in case you feel like smoking a cigarette, you must go to an exclusive area, that is, an area at least 10 meters away from cafes, restaurants, bars, and any establishment where food and/or beverages are served and away from exits and entrances of establishments; so you can practically only smoke at home.

"...the Regulations of the Law prohibit points of sale from directly or indirectly display tobacco products by only allowing their sale through a written list containing just the prices."

The new ruling under the Regulations of the Law is questionable because although, as anticipated, it is not disputed whether the prohibitionist policy supports the environment or the right to health of non-smokers, the fact is that from a strictly legal point of view, it does not seem to have any relation with the Law itself. In fact, article 23 of the Law —established as the basis for the provisions of the Regulation— is only limited to prohibiting all forms of advertising, promotion and sponsorship of tobacco products, directly or indirectly, through any means of dissemination or communication that seek to position the elements of the brand, encourage their purchase, consumption or preference; without this translating into a blank check via administrative channels to expand and specify to a greater extent the types of prohibitions.

When analyzing the concepts of advertising and promotion contemplated in the Law[6], the new prohibition does not seem to respect the principle of legality since it is not the same to exhibit a product (either by placing it in plain view on a shelf or by hiding it in a closed drawer), as it is to promote or advertise it, inciting its purchase. The above, since the Law does allow the display of tobacco products by permitting their sale, offering and exhibition for sale[7], except when placed in places within the consumer's reach or in vending machines.

Given what has been said, the Regulations of the Law seem to exceed the content of the Law itself, in violation of the principles of legality, reserve of law and hierarchical subordination, since it does not develop the Law, but even seems to contradict it, which is highly problematic in a country that seeks to guarantee and respect the Law. It should be noted that the ruling coalition has the numbers in both legislative chambers to reform the law in question; however, it is interesting to ask why it was not done in this way to harmonize such prohibitions with the principles mentioned above.

3.- Article 2 section VI Bis of the Regulations.
4.- Article 2 section VI Ter of the Regulations.
5.- Articles 2 XVII and XVIII; 33 section II Bis; 40 sections IX and XII of the Regulations.
6.- Article 6 section XXII of the Law.
7.- Article 6 section VI of the Law.

It should be noted that absolute prohibitions such as those of the Regulations of the Law are potentially unconstitutional since, in multiple cases such as the import and export of electronic cigarettes or the planting, cultivation and harvesting of cannabis, the Supreme Court has invalidated this type of prohibition[8]. Although protecting health through these restrictions is constitutional, and to a certain extent the ban could be suitable, it is not necessary since there are alternatives, such as restrictions on the sale to minors and educational campaigns that affect to a lesser extent, the freedom of commerce. In other words, there are other equally suitable alternative measures, such as subjecting such activities to comply with certain requirements.

"...the Regulations of the Law seem to exceed the content of the Law itself, in violation of the principles of legality, reserve of law and hierarchical subordination."

For the above, although the State must protect the rights of non-smokers, as well as the environment, the fact is that the absolute prohibition contemplated in the Regulations of the Law is not supported by the Law itself and could be disproportionate by unnecessarily affecting the freedom of trade of various establishments that sell these products, as well as in relation to the producers themselves, since, as pointed out by the National Association of Small Retailers, these prohibitions would put at risk 200,000 shopkeepers as well as 25% of their monthly income[9].

Finally, it should be noted that several businesses have filed amparo claims against the reform in question in order to be able to advertise, promote and allow the consumption of tobacco products on their premises; amparo claims in which provisional suspensions of the applicability of the act have been granted for such purposes at the expense of a final resolution of the claim, as well as the incident of suspension.

Based on the above, we can conclude that regulating and enforcing laws through administrative provisions is necessary and peremptory as long as the normative contents of the laws, the Constitution and international treaties are respected. When this is not the case, legal and factual distortions are generated that only cause arbitrariness or uncertainty.

8.- For example, in Contradiction of Thesis 39/2021, the Plenary of the Supreme Court considered that article 16, section VI of the Law, which absolutely prohibits acts of commerce related to products that are not tobacco products, is contrary to the freedom of commerce and does not pass a proportionality test.
9.- Prohibición de exhibición de cigarros pone en riesgo 200 mil tienditas, alerta ANPEC", El Financiero, Accessed February 20, 2023

Mexico to attract investment in electromobility plants; lithium nationalized.

The President of Mexico issued a decree for the nationalization of lithium, which was approved by the Legislative Branch, and as a result, 234,855 hectares in various municipalities were declared a reserve zone. Currently, nearshoring is a trend, and Mexican governments are engaged with the United States and Canada in the energy transition to achieve greater participation in the automotive industry. *www.t21.com.mx/general/2023/02/20/mexico-atraera-inversion-plantas-electromovilidad-nacionalizan-litio* February 20, 2023.

Senate approves "Plan B" of electoral reform; eliminates 'eternal life' clause.

The Senate approved the second part of "Plan B" of the Electoral Reform, with which the provisions of the General Law of Electoral Institutions and Procedures, the General Law of Political Parties, the Organic Law of the Federal Judiciary, and the General Law of Challenges in Electoral Matters are finally amended. Among the central decisions of the debate was the elimination of the "eternal life" clause that allowed the transfer of votes to minority political parties. This second block of laws on electoral matters was sent to the Federal Executive for its publication in the Official Gazette of the Federation, which can now be challenged with actions of unconstitutionality by the opposition legislators. They recriminated that the electoral reform supports the dismantling of the state and district executive boards of the National Electoral Institute (INE), which will result in the dismissal of 80% of the professional electoral service personnel in the country. *www.excelsior.com.mx/nacional/plan-b-de-la-reforma-electoral-es-aprobada-en-el-senado-en-lo-general-y-en-lo-particular* February 22, 2023.

Mexico's economy grows 3.1% in 2022, despite inflationary pressure.

Mexico grew in 2022 despite its environment of uncertainty and inflation. The performance of economic activity in the country was driven by industrial activities, which registered growth of 3.3% a level not seen since 2010. Since last year, inflation has been one of the biggest challenges to overcome in the Latin American country. However, the Mexican economy recorded a better performance than its northern neighbor, considering the US's Gross Domestic Product (GDP) grew 2.9%. The Mexican economy's growth in 2022 even exceed the World Bank's forecasts, but Rodolfo de la Torre, director of social development with equity at the Centro de Estudios Espionsa Yglesias, warns of a possible risk of a future slowdown in the US economy, on which the performance of national exports depends to a great extent. *www.elpais.com/mexico/2023-02-24/la-economia-de-mexico-crece-31-en-2022-a-pesar-de-la-presion-inflacionaria.html* February 24, 2023.

Foreign investment in Mexico's tourism sector hit US $3.4B in 2022.

Prior to the COVID-19 pandemic, the recorded figure of Foreign Direct Investment (FDI) was US $1.1B, which exceeded the country's past record of US $1.6B in 2017. However, in 2022 the recorded figure surpassed all of the previous records with FDI coming in at US $3.4B. The Tourism Minister, Miguel Torruco Marqués, accredits said increase the confidence that Mexico "offered and offers to international investors and businessmen, who contribute to the strengthening of tourist infrastructure of different destinations in the country." The state that most benefited from FDI in the tourism industry was Baja California Sur, with Nayarit, San Luis Potosí, Mexico City, and Yucatán following. *www.mexiconewsdaily.com/business/foreign-investment-in-mexicos-tourism-sector-hit-us-3-4b-in-2022/* February 27, 2023.

López Obrador confirms that Tesla will build an electric car plant in Nuevo León.

The state of Nuevo León will be the headquarters of electric cars in Mexico. The richest man in the world, according to Bloomberg, Elon Musk, has chosen the northern city of Monterrey to start up his factory. After weeks of political fuss and competition between states to attract the coveted investment of Tesla's owner, the president of Mexico, Andrés Manuel López Obrador, has announced the company's decision in favor of the north of the country, although he has not disclosed the amount of the investment. The president indicated that the details will be announced by the company during its Investors Day, however, he has stated that it is a "considerable" amount and thanked the billionaire for his upcoming arrival in the country. "The entire Tesla company is coming, the batteries are pending, but the entire automotive plant is going to be very large," he said at the National Palace. *www.elpais.com/mexico/2023-02-28/lopez-obrador-confirma-que-tesla-construira-una-planta-de-autos-electricos-en-nuevo-leon.html/* February 28, 2023.

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