This overview contains the cover page, the summary and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

ELIMINATION OF THE ABSOLUTE PROHIBITION OF LUDIC OR RECREATIONAL USE OF MARIJUANA
(*ELIMINACIÓN DE LA PROHIBICIÓN ABSOLUTA DEL CONSUMO LÚDICO O RECREATIVO DE MARIHUANA*)

CASE: *Declaratoria General de Inconstitucionalidad* 1/2018

REPORTING JUSTICE: Norma Lucía Piña Hernández

DECISION ISSUED BY: Plenary of Mexico's Supreme Court of Justice

DATE OF THE DECISION: June 28, 2021

KEY WORDS: ludic and recreational use, cannabis, psychotropic THC, marijuana, right to free development of personality, right to health, COFEPRIS authorizations, *declaratoria general de inconstitucionalidad*.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Declaratoria General de Inconstitucionalidad* 1/2018, Plenary, Norma Lucía Piña Hernández, J. Decision of June 28, 2021, Mexico.

The full text of the decision may be consulted at the following link: https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-07/DGI%201-2018.pdf

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SUMMARY OF THE *DECLARATORIA GENERAL DE INCONSTITUCIONALIDAD* 1/2018

BACKGROUND: Mexico's Supreme Court of Justice (this Court), upon reaching the same decision in 5 *amparos en revisión* without any to the contrary, considered that the system of administrative prohibitions, established in various portions of articles 235, last paragraph, 237, 245, section I, 247, last paragraph, and 248 of the General Health Law (LGS), that absolutely prohibits the Ministry of Health (SS) from issuing authorizations to carry out activities related to self-consumption of marijuana for recreational purposes, is unconstitutional. This is because it causes an unnecessary and disproportionate impact on the right to the free development of personality established in article 1 of the Constitution, since there are alternatives to the absolute prohibition of the recreational consumption of marijuana that are equally suitable for protecting health and public order, but which have less effect on that fundamental right. The absolute prohibition severely impacts the right in question in comparison with the minimum level of protection of health and public order achieved by that measure. Because this Court had established binding precedent in which it determined the unconstitutionality of the mentioned general provisions, it ordered the Legislature to address the problem of unconstitutionality within the period granted; however, since this did not happen, this Court was requested to issue the *declaratoria general de inconstitucionalidad* of various portions of the articles in which the problem of unconstitutionality remained.

ISSUE PRESENTED TO THE COURT: Whether, through the legal changes it has made, the Congress of the Union has fulfilled its duty to eliminate the problem of unconstitutionality noted in the binding precedent of this Court in order to overcome the system of prohibitions established in various articles of the LGS, which absolutely prohibits the SS from issuing authorizations to carry out the activities related to the self-consumption of marijuana for recreational purposes.

HOLDING: It was decided to declare the unconstitutionality of articles 235, last paragraph, in its normative portion "they may only be carried out for medical and scientific purposes and", and 247, last paragraph, in its normative portion "they may only be carried out for medical and scientific purposes and", of the LGS, essentially for the following reasons. The Congress of the

Union, which issued the LGS, failed to comply within the 90-working-day period of the regular sessions determined in the Political Constitution of the United Mexican States (CPEUM) and with the extensions granted to solve the problem of unconstitutionality declared by the binding precedent of this Court regarding the system of administrative prohibitions on engaging in activities related to self-consumption of marijuana for recreational purposes. This is so considering that the problem of unconstitutionality this Court informed the Legislature about was not fully solved by the reform to the LGS of June 19, 2017, as only some of the articles that were declared unconstitutional were modified. Finally, it was clarified that the scope of this *declaratoria general de inconstitucionalidad* is limited to removing the legal obstacles to allowing the authorization of personal and regular consumption for purely ludic or recreational purposes, exclusively of marijuana, in the understanding that, henceforth, and as long as the Congress of the Union does not legislate in this regard, the SS shall issue such authorizations only to adults and for the specified purposes. Likewise, the Federal Commission for Protection from Sanitary Risks (COFEPRIS) must establish the guidelines and forms for the acquisition of seeds and take all the necessary measures to support the protected right, without allowing the right of self-consumption of marijuana for ludic or recreational purposes to be exercised in front of minors or in public areas where others who have not given their authorization are present, and it must specify that it is not allowed to drive vehicles or operate dangerous machines under the influence of that substance or to perform, in general, any other activity that may put at risk or injure third parties.

VOTE: The votes may be consulted at the following link: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=238513

EXTRACT OF THE *DECLARATORIA GENERAL DE INCONSTITUCIONALIDAD* 1/2018

p.1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of June 28, 2021, issues the following decision.

BACKGROUND

p.7 Various petitioners asked the Federal Commission for Protection from Health Risks (COFEPRIS), a decentralized entity of the Ministry of Health (SS), to issue an authorization that would allow them to consume, personally and regularly for purely ludic or recreational purposes, the narcotic cannabis (sativa, indica and American, its resin preparations and seeds) and the psychotropic THC (tetrahydrocannabinol, the isomers: Δ6a (10a), Δ6a (7), Δ7, Δ8, Δ9, Δ10, Δ9 (11) and their stereochemical variants), collectively known as "marijuana".

p.7-8 COFEPRIS denied the authorization in all cases, based on the normative portions of articles 235, last paragraph, 237, 245, section I, 247, last paragraph, and 248 of the General Health Law (LGS) that establish the system of administrative prohibitions that absolutely prohibits the SS from issuing authorizations to conduct activities related to self-consumption of marijuana.

p.8 Due to the above, the petitioners filed *amparo indirecto* lawsuits, in which they challenged articles 235, last paragraph, 237, 245, section I, 247, last paragraph, and 248 of the LGS.

The decisions issued by the judges were challenged through *recursos de revisión*, which were heard by the Fifth and Twelfth Collegiate Courts, both in administrative matters of the First Circuit, who reserved jurisdiction for this Court with respect to the general norms challenged.

The *amparos en revisión* were located under case files 237/2014, 1115/2017, 623/2017, 547/2018 and 548/2018, resolved by the First Chamber of this Court by a majority of 4 votes in sessions of November 4, 2015 (237/2014); April 11, 2018 (1115/2017); June 13,

2018 (623/2017); and October 31, 2018 (547/2018 and 548/2018) reversing the decisions appealed and granting constitutional protection.

p.9 In deciding these *amparos en revisión*, this Court considered, in summary, that the system of administrative prohibitions is unconstitutional.

This is so because it causes an unnecessary and disproportionate impact on the right to the free development of personality established in article 1 of the Constitution, since there are alternatives to the absolute prohibition of the recreational consumption of marijuana that are equally suitable to protect health and public order, but have less effect on that fundamental right. The absolute prohibition severely impacts the right to the free development of personality compared to the minimum degree of protection of health and public order achieved by this measure.

p.9-10 Consequently, the *amparo* was granted for the purpose of requiring the responsible authority of COFEPRIS to grant the plaintiffs the authorization referred to in articles 235 and 237 of the LGS (then in force) to carry out the activities necessary for recreational self-consumption of marijuana, such as the acquisition (only in the *amparos en revisión* 623/2017, 547/2018 and 548/2018), planting, cultivation, harvesting, preparation, possession and transport of marijuana, without applying the normative portions of the challenged provisions declared unconstitutional, and requiring COFEPRIS (in the *amparos en revisión* specified) to establish the guidelines and forms for the acquisition of seeds and to take all the necessary measures to support the protected right.

p.10 It was clarified that this authorization did not include under any circumstances the permission to import, trade, supply or engage in any other act that refers to the sale and/or distribution of the substance referred to above.

This Court was emphatic in specifying that the right to self-consumption of marijuana for ludic-recreational purposes may never be exercised affecting third parties, and therefore this right should not be exercised in front of minors or in public places where others who have not provided their authorization are present, nor is it allowed to drive vehicles or operate dangerous machines under the influence of that substance.

p.10-11 Finally, it was clarified that the persons who exercised the right to self-consumption of marijuana, under the authorization that COFEPRIS was obligated to issue with the limitations and differentiations specified as a result of these *amparos*, would not be engaging in the criminal behaviors against health established in the LGS and the Federal Criminal Code, since all of them required the concurrence of a normative criminal element, consisting of being carried out "without the corresponding authorization".

p.11-23 The following precedents resulted from these five consecutive decisions, with no other to the contrary: UNCONSTITUTIONALITY OF THE ABSOLUTE PROHIBITION ON LUDIC OR RECREATIONAL CONSUMPTION OF MARIJUANA ESTABLISHED BY THE GENERAL HEALTH LAW; ABSOLUTE PROHIBITION OF RECREATIONAL USE OF MARIJUANA. IT IS NOT A NECESSARY MEASURE TO PROTECT HEALTH AND PUBLIC ORDER; ABSOLUTE PROHIBITION OF RECREATIONAL USE OF MARIJUANA. IT IS NOT A PROPORTIONATE MEASURE TO PROTECT HEALTH AND PUBLIC ORDER; ABSOLUTE PROHIBITION OF RECREATIONAL USE OF MARIJUANA. IT PURSUES CONSTITUTIONALLY VALID AIMS; RIGHTS OF THIRD PARTIES AND PUBLIC ORDER. THEY CONSTITUTE EXTERNAL LIMITS OF THE RIGHT TO THE FREE DEVELOPMENT OF PERSONALITY; RIGHT TO HEALTH PROTECTION. INDIVIDUAL AND SOCIAL DIMENSIONS; RIGHT TO THE FREE DEVELOPMENT OF PERSONALITY. ITS EXTERNAL AND INTERNAL DIMENSION; RIGHT TO THE FREE DEVELOPMENT OF PERSONALITY. THE PROHIBITION ON SELF-CONSUMPTION OF MARIJUANA CONTAINED IN THE GENERAL HEALTH LAW HAS A PRIMA FACIE IMPACT ON THE CONTENT OF THIS FUNDAMENTAL RIGHT; and RIGHT TO THE FREE DEVELOPMENT OF PERSONALITY. IT PROVIDES PROTECTION TO A RESIDUAL AREA OF FREEDOM THAT IS NOT COVERED BY OTHER PUBLIC FREEDOMS.

p.3 On January 31, 2019, the President of this Court admitted the *declaratoria general de inconstitucionalidad*, ordered notification to the Congress of the Union, and turned the

matter over to Justice Jorge Mario Pardo Rebolledo for the preparation of the corresponding draft ruling.

On March 13, 2019, the President of this Court ordered its return to send the case record for the Draft Opinion of Justice Norma Lucía Piña Hernández.

STUDY OF THE MERITS

p.25 In accordance with the provisions of the third paragraph of section II of article 107 of the Constitution and articles 232 and 233 of the Amparo Law (LA), in relation to the first, second, third, fourth and fifth points of the *Acuerdo General Plenario* 15/2013 (AGP 15/2013), the *declaratorias generales de inconstitucionalidad* can only be made based on the rulings issued in *amparo en revisión* lawsuits in terms of the constitutional system in force as of October 2011.

In the third point of the AGP 15/2013 it was specified that when this Court establishes precedent by repetition in which it determines the unconstitutionality of a general provision that does not fall under tax matters, it will inform the President of this Court in order to notify the issuing authority of the provision considered unconstitutional by the corresponding court precedent and, if the problem of unconstitutionality is not overcome within 90 days, this Court will make the *declaratoria general de inconstitucionalidad* establishing its scope and conditions in terms of the regulatory law.

p.35-36 The period of 90 working days elapsed from February 20 to October 31, 2019, in terms of the applicable resolutions of the Chamber of Deputies and the Chamber of Senators.

p.37 As of the expiration of the deadline, the problem of unconstitutionality had not been resolved despite a reform of the LGS published in the Federal Official Gazette (DOF) on June 19, 2017, amending some of the articles declared unconstitutional, namely 237, 245, section I, and, implicitly, 248 (which expressly refers to section I of article 245).

p.37-40 It is also mentioned that the Congress of the Union, in representation of the Presidents of the Senate and the Deputies Chamber, requested three extensions which were not met.

p.40 Thus, this Court observes that the requested extensions expired, and the problem of unconstitutionality has not been entirely overcome.

In fact, the specified precedent did not declare the unconstitutionality of isolated norms, but of a system of administrative prohibitions, established in various portions of articles 235, last paragraph, 237, 245, section I, 247, last paragraph and 248 of the LGS, specifically those portions that absolutely prohibit SS from issuing authorizations to carry out activities related to self-consumption of marijuana.

p.45-46 In this regard, two clarifications should be made. The first, that the prohibition declared unconstitutional is not contained in all of these provisions, but only in articles 235 in the portion "may only be carried out for medical and scientific purposes and shall require authorization from the Ministry of Health"; article 237 "the following isomers and their stereochemical variants DO NOT CONTAIN THC Tetrahydrocannabinol: Δ6a (10a), Δ6a (7), Δ7, Δ8, Δ9, Δ10, Δ9 (11)"; article 247 "may only be carried out for medical and scientific purposes and will require, like the respective substances, authorization from the Ministry of Health".

p.46 Second, that the prohibition established in article 248 has a broader scope than what was declared unconstitutional, since it refers to the prohibition of any act established in article 247, in relation to all substances classified in section I of article 245, and not just the psychotropic THC.

p.46-47 Now, the problem of unconstitutionality noted was not overcome despite the reform of articles 237, 245, section I and 248 of the LGS (implicitly reformed, because it expressly refers to 245, section I) published in the DOF on June 19, 2017 (and currently in force), because these reforms did not eliminate the absolute prohibition on SS issuing authorizations to carry out activities related to self-consumption of marijuana for recreational purposes.

p.61 The following can be seen from the mentioned reforms.

From the prohibition established in article 237, the reference to cannabis indica, sativa and American was eliminated. However, this elimination was only in relation to the

permission for use of cannabis for medical purposes, but not for recreational purposes, since the prohibition survives in the last paragraph of article 235, which was not modified, and provides that the use of that substance may only be authorized for medical and scientific purposes; that is, the authorization for its use may only be granted for those purposes and no others, which logically implies the persistence of the prohibition on authorizing the use of that substance for different purposes, such as recreational consumption.

p.61-62 For its part, the reference to THC and its stereochemical variants was eliminated from section I of article 245, but this substance was reclassified in sections II and IV of that article, which establish, respectively, the substances with some therapeutic value that involve serious health problems (in concentrations greater than 1%) and those considered to have wide therapeutic uses despite the fact that they constitute a minor health problem (in concentrations lower than 1%).

p.62 This reclassification, while allowing the use of the psychotropic THC and its stereochemical variants for medical purposes, does not eliminate the problem of constitutionality, since the prohibition of the use of that substance for recreational purposes in the last paragraph of article 247, which was not modified, persists and provides that the use of that substance may only be authorized for medical and scientific purposes; that is, its use for those purposes and no others is a necessary condition for the authorization, which implies, logically, the persistence of the prohibition on authorizing the use of that substance for different purposes, such as recreational consumption.

And although article 248 was not modified, the fact that the psychotropic THC and its stereochemical variants have been removed from section I of article 245, to which it refers, does not eliminate the prohibition on authorizing its recreational use, which survives in article 247, last paragraph. In any case, this implicit modification, through the modification of the norm to which it refers, only allows its authorization for medical purposes.

p.62-63 Consequently, this Court considers that the problem of constitutionality noted in the precedent of the First Chamber of this Court, consisting of the absolute prohibition on the

SS issuing authorizations to carry out activities related to self-consumption of marijuana for recreational purposes, established in the system of administrative prohibitions set forth in various portions of articles 235, last paragraph, 237, 245, section I, 247, last paragraph, and 248 of the LGS, has not been overcome by the reforms to the LGS published in the DOF on June 19, 2017. And although it is a well-known fact for this Court that the Congress of the Union is considering a series of legal changes to overcome the system of prohibitions that gave rise to the specified court precedent, the legislative process has not yet concluded.

DECISION

p.63,66 Therefore, based on article 107, section II, third paragraph of the Political Constitution of the United Mexican States (CPEUM), prior to the reform published in the DOF on March 11, 2021, this Court issues the *declaratoria general de inconstitucionalidad*, only of the normative portions that indicate "they may only be carried out for medical and scientific purposes and" of articles 235, last paragraph, and 247, last paragraph of the LGS in force.

p.65 The foregoing is necessary because the prohibition on authorizing activities related to self-consumption of marijuana for recreational purposes persists in the LGS, in articles 235, last paragraph, and 247, last paragraph, as they have not been modified in the reform of June 19, 2017.

p.69 It is important to emphasize, first of all, that this *declaratoria general de inconstitucionalidad* does not have the effect of allowing the ludic or recreational consumption of narcotic or psychotropic drugs other than those that are known altogether as marijuana to be authorized.

p.70 Indeed, with the *declaratoria general de inconstitucionalidad* of those normative portions, the legal obstacle is removed for the SS, through the competent entity, to authorize henceforth the activities related to self-consumption of, exclusively, marijuana for recreational purposes, respecting the fundamental right to the free development of personality recognized by article 1 of the CPEUM. Therefore, it is considered necessary to order the notification of SS and COFEPRIS.

On the understanding that henceforth, and as long as the Congress of the Union does not legislate in this regard, the SS must issue these authorizations only to adults and for the purposes specified in the respective execution measures, namely: the acquisition, planting, cultivation, harvest, preparation, possession and transport, exclusively, of marijuana.

Likewise, COFEPRIS must establish the guidelines and forms of the acquisition of seeds and take all the necessary measures to support the protected right, without such authorization including, under any circumstance, the permission to import, trade, supply or engage in any other act that refers to the sale and/or distribution of the aforementioned substance.

p.70-71 In addition, when issuing authorizations, COFEPRIS will specify that the right of self-consumption of marijuana for ludic or recreational purposes may never be exercised affecting third parties, and therefore that right should not be exercised in front of minors or in public places where third parties who have not given their authorization are present, and it will specify that it is not permitted to drive vehicles or operate dangerous machines under the influence of that substance, nor to carry out, in general, any other activity under the influence of that substance that may endanger or injure third parties.

p.71 In this way, invalidating the specified normative portions and requiring the SS, through the competent body, to issue the necessary authorizations to allow the activities necessary for the recreational self-consumption of marijuana, with the limitations and restrictions specified, this Court considers that the problem of constitutionality noted by the court precedent is overcome.

Finally, this Court urges the Congress of the Union to legislate regarding the right to recreational self-consumption of marijuana, in order to generate legal certainty for users and third parties, as well as the conditions of information necessary to exercise it responsibly; to take the measures it deems appropriate to treat this matter as a public health problem; and to provide Health authorities with a regulatory framework that allows them to adequately delineate the exercise of this right to avoid harm to third parties, since

it is not up to the Court to give greater guidelines regarding the policies that the legislators, in use of their political freedom, decide to adopt in this regard.

p.72 It is understood that refusals of COFEPRIS to authorize the ludic or recreational consumption of marijuana based on the provisions of the LGS in its drafting prior to the reform published in the DOF on June 19, 2017 that are challenged in *amparo* lawsuits pending resolution may survive. In this regard, the amparo courts must decide considering the rules of the LGS applied in the said refusal and the precedents of this Court.