561 Phil. 386

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[G.R. NO. 173034, October 09, 2007]

PHARMACEUTICAL AND HEALTH CARE ASSOCIATION OF THE PHILIPPINES, PETITIONER, VS. HEALTH SECRETARY FRANCISCO T. DUQUE III; HEALTH UNDERSECRETARIES DR. ETHELYN P. NIETO, DR. MARGARITA M. GALON, ATTY. ALEXANDER A. PADILLA, & DR. JADE F. DEL MUNDO; AND ASSISTANT SECRETARIES DR. MARIO C. VILLAVERDE, DR. DAVID J. LOZADA, AND DR. NEMESIO T. GAKO, RESPONDENTS.

D E C I S I O N

AUSTRIA-MARTINEZ, J.:

The Court and all parties involved are in agreement that the best nourishment for an infant is mother's milk. There is nothing greater than for a mother to nurture her beloved child straight from her bosom. The ideal is, of course, for each and every Filipino child to enjoy the unequaled benefits of breastmilk. But how should this end be attained?

Before the Court is a petition for certiorari under Rule 65 of the Rules of Court, seeking to nullify Administrative Order (A.O.) No. 2006-0012 entitled, ***Revised Implementing Rules and Regulations of Executive Order No. 51, Otherwise Known as The "Milk Code," Relevant International Agreements, Penalizing Violations Thereof, and for Other Purposes*** (RIRR). Petitioner posits that the RIRR is not valid as it contains provisions that are not constitutional and go beyond the law it is supposed to implement.

Named as respondents are the Health Secretary, Undersecretaries, and Assistant Secretaries of the Department of Health (DOH). For purposes of herein petition, the DOH is deemed impleaded as a co-respondent since respondents issued the questioned RIRR in their capacity as officials of said executive agency.[1]

Executive Order No. 51 (Milk Code) was issued by President Corazon Aquino on October 28, 1986 by virtue of the legislative powers granted to the president under the Freedom Constitution. One of the preambular clauses of the Milk Code states that the law seeks to give effect to Article 11[2] of the International Code of Marketing of Breastmilk Substitutes (ICMBS), a code adopted by the World Health Assembly (WHA) in 1981. From 1982 to 2006, the WHA adopted several Resolutions to the effect that breastfeeding should be supported, promoted and protected, hence, it should be ensured that nutrition and health claims are not permitted for breastmilk substitutes.

In 1990, the Philippines ratified the International Convention on the Rights of the Child. Article 24 of said instrument provides that State Parties should take appropriate measures to diminish infant and child mortality, and ensure that all

segments of society, specially parents and children, are informed of the advantages of breastfeeding.

On May 15, 2006, the DOH issued herein assailed RIRR which was to take effect on July 7, 2006.

However, on June 28, 2006, petitioner, representing its members that are manufacturers of breastmilk substitutes, filed the present Petition for *Certiorari* and Prohibition with Prayer for the Issuance of a Temporary Restraining Order (TRO) or Writ of Preliminary Injunction.

The main issue raised in the petition is whether respondents officers of the DOH acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and in violation of the provisions of the Constitution in promulgating the RIRR.[3]

On August 15, 2006, the Court issued a Resolution granting a TRO enjoining respondents from implementing the questioned RIRR.

After the Comment and Reply had been filed, the Court set the case for oral arguments on June 19, 2007. The Court issued an Advisory (Guidance for Oral Arguments) dated June 5, 2007, to wit:

> The Court hereby sets the following issues:
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> 1. Whether or not petitioner is a real party-in-interest;
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> 2. Whether Administrative Order No. 2006-0012 or the Revised Implementing Rules and Regulations (RIRR) issued by the Department of Health (DOH) is not constitutional;
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>   2.1 Whether the RIRR is in accord with the provisions of Executive Order No. 51 (Milk Code);
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>   2.2 Whether pertinent international agreements1 entered into by the Philippines are part of the law of the land and may be implemented by the DOH through the RIRR; If in the affirmative, whether the RIRR is in accord with the international agreements;
>
>   2.3 Whether Sections 4, 5(w), 22, 32, 47, and 52 of the RIRR violate the due process clause and are in restraint of trade; and
>
>   2.4 Whether Section 13 of the RIRR on Total Effect provides sufficient standards.
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> _____
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> 1. (1) United Nations Convention on the Rights of the Child; (2) the WHO and Unicef "2002 Global Strategy on Infant and Young Child Feeding;" and (3) various World Health Assembly (WHA) Resolutions.

The parties filed their respective memoranda.

The petition is partly imbued with merit.

On the issue of petitioner's standing

With regard to the issue of whether petitioner may prosecute this case as the real party-in-interest, the Court adopts the view enunciated in *Executive Secretary v. Court of Appeals,*[4] to wit:

> The modern view is that an association has standing to complain of injuries to its members. This view fuses the legal identity of an association with that of its members. **An association has standing to file suit for its workers despite its lack of direct interest if its members are affected by the action. An organization has standing to assert the concerns of its constituents.**
>
> x x x x
>
> x x x We note that, under its Articles of Incorporation, the respondent was organized x x x to act as the representative of any individual, company, entity or association on matters related to the manpower recruitment industry, and to perform other acts and activities necessary to accomplish the purposes embodied therein. The **respondent is, thus, the appropriate party to assert the rights of its members, because it and its members are in every practical sense identical. x x x The respondent [association] is but the medium through which its individual members seek to make more effective the expression of their voices and the redress of their grievances.** [5] (Emphasis supplied)

which was reasserted in *Purok Bagong Silang Association, Inc. v. Yuipco*,[6] where the Court ruled that an association has the legal personality to represent its members because the results of the case will affect their vital interests.[7]

Herein petitioner's Amended Articles of Incorporation contains a similar provision just like in *Executive Secretary*, that the association is formed "to represent directly or through approved representatives the pharmaceutical and health care industry before the Philippine Government and any of its agencies, the medical professions and the general public."[8] Thus, as an organization, petitioner definitely has an interest in fulfilling its avowed purpose of representing members who are part of the pharmaceutical and health care industry. Petitioner is duly authorized[9] to take the appropriate course of action to bring to the attention of government agencies and the courts any grievance suffered by its members which are directly affected by the RIRR. Petitioner, which is mandated by its Amended Articles of Incorporation to represent the entire industry, would be remiss in its duties if it fails to act on governmental action that would affect any of its industry members, no matter how few or numerous they are. Hence, petitioner, whose legal identity is deemed fused with its members, should be considered as a real party-in-interest which stands to be benefited or injured by any judgment in the present action.

On the constitutionality of the provisions of the RIRR

First, the Court will determine if pertinent international instruments adverted to by respondents are part of the law of the land.

Petitioner assails the RIRR for allegedly going beyond the provisions of the Milk Code, thereby amending and expanding the coverage of said law. The defense of the DOH is that the RIRR implements not only the Milk Code but also various international instruments[10] regarding infant and young child nutrition. It is respondents' position that said international instruments are deemed part of the law of the land and therefore the DOH may implement them through the RIRR.

The Court notes that the following international instruments invoked by respondents, namely: (1) The United Nations Convention on the Rights of the Child; (2) The International Covenant on Economic, Social and Cultural Rights; and (3) the Convention on the Elimination of All Forms of Discrimination Against Women, only provide in general terms that steps must be taken by State Parties to diminish infant and child mortality and inform society of the advantages of breastfeeding, ensure the health and well-being of families, and ensure that women are provided with services and nutrition in connection with pregnancy and lactation. Said instruments do not contain specific provisions regarding the use or marketing of breastmilk substitutes.

The international instruments that do have specific provisions regarding breastmilk substitutes are the ICMBS and various WHA Resolutions.

Under the 1987 Constitution, international law can become part of the sphere of domestic law either by **transformation** or **incorporation**.[11] The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.[12]

Treaties become part of the law of the land through **transformation** pursuant to Article VII, Section 21 of the Constitution which provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate." Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts.[13]

The ICMBS and WHA Resolutions are not treaties as they have not been concurred in by at least two-thirds of all members of the Senate as required under Section 21, Article VII of the 1987 Constitution.

However, the ICMBS which was adopted by the WHA in 1981 had been transformed into domestic law through local legislation, the Milk Code. Consequently, it is the Milk Code that has the force and effect of law in this jurisdiction and not the ICMBS *per se*.

The Milk Code is almost a verbatim reproduction of the ICMBS, but it is well to emphasize at this point that the Code did not adopt the provision in the **ICMBS absolutely prohibiting advertising** or other forms of promotion to the general public of products within the scope of the ICMBS. Instead, **the Milk Code**

expressly provides that advertising, promotion, or other marketing materials may be allowed if such materials are duly authorized and approved by the Inter-Agency Committee (IAC).

On the other hand, Section 2, Article II of the 1987 Constitution, to wit:

> SECTION 2. The Philippines renounces war as an instrument of national policy, ***adopts the generally accepted principles of international law as part of the law of the land*** and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. (Emphasis supplied)

embodies the **incorporation** method.[14]

In *Mijares v. Ranada*,[15] the Court held thus:

> [G]enerally accepted principles of international law, by virtue of the incorporation clause of the Constitution, form part of the laws of the land even if they do not derive from treaty obligations. The **classical formulation in international law sees those customary rules accepted as binding result from the combination [of] two elements:** the established, widespread, and consistent **practice on the part of States;** and a **psychological element known as the *opinion juris sive necessitates*** (opinion as to law or necessity). Implicit in the latter element is a **belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it.**[16] (Emphasis supplied)

"Generally accepted principles of international law" refers to norms of general or customary international law which are binding on all states,[17] *i.e.,* renunciation of war as an instrument of national policy, the principle of sovereign immunity,[18] a person's right to life, liberty and due process,[19] and *pacta sunt servanda,*[20] among others. The concept of "generally accepted principles of law" has also been depicted in this wise:

> Some legal scholars and judges look upon certain "general principles of law" as a primary source of international law because **they have the "character of jus rationale" and are "valid through all kinds of human societies."** (Judge Tanaka in his dissenting opinion in the 1966 South West Africa Case, 1966 I.C.J. 296). O'Connell holds that certain priniciples are part of international law because **they are "basic to legal systems generally" and hence part of the *jus gentium***. These principles, he believes, are established by a process of reasoning based on the common identity of all legal systems. If there should be doubt or disagreement, one must look to state practice and determine whether the municipal law principle provides a just and acceptable solution. x x x [21] (Emphasis supplied)

Fr. Joaquin G. Bernas defines customary international law as follows:

> Custom or customary international law means "a general and consistent practice of states followed by them from a sense of legal obligation