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Mini Review

Constitutionality of Local Tobacco Regulation: An Analysis of the Case of Philippine Tobacco Institute VS. City of Balanga

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Abstract

In 2016, the City Government of Balanga in Bataan passed an ordinance regulating the sale of tobacco products to all its citizens born on or after January 1, 2000, to protect the health of its citizens and maintain an environment that is conducive for the well-being, welfare, and learning of the youth of the city. This ordinance imposed one of the most comprehensive anti-smoking ordinances and among the most progressive in the country. It is based in the vision of the city to be a University Town. Prior to the ordinance the city has been strictly regulating tobacco and alcohol use since 2010 protect the health of its citizen.

The said ordinance is patterned after the effective measures stipulated by the WHO Framework Convention on Tobacco Control (FCTC) to which the Philippines have ratified two years after the enactment of R.A. 9211 or the Tobacco Regulation Act. The FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health and represents a paradigm shift in developing a regulatory strategy to address addictive substances. It was developed and adopted in response to the globalization of tobacco epidemic.

After the said ordinance was approved and passed by the City Council, the Philippine Tobacco Institute, representing multinational tobacco corporations, challenged the constitutionality of the said ordinance. In 2018, the Court of Appeals ruled that the Ordinance contravenes R.A. No. 9211 and therefore should be struck down as unconstitutional for being an ultra vires act.

The said decision of the Court of Appeals is premised upon the superiority of a municipal law (RA 9211) over a foreign law (FCTC) wherein it ruled that the foreign law finds no application in the city of Balanga because there is an existing national legislation which is RA 9211. However, since the FCTC is a foreign treaty ratified by the Senate, it can be argued that it also becomes part of the law of the land and has equal status to Acts of Congress [1]. Since the FCTC is a later law, the principle of *lex posterior derogate priori* should have prevailed.

This paper re-examines the ruling and arguments released by the Court of Appeals and seeks to establish whether or not the ordinance is unconstitutional based on the premise that FCTC being a later law supersedes and impliedly repeals the conflicting provisions of RA 9211.

Keywords: *Tobacco Control; Tobacco-Free Generation; Litiagation; Tobacco Industry Interference*

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition" World Health Organization.

Background

Cigarette smoking is the largest contributor of preventable deaths in the Philippines [2]. Science and studies have long established its strong causal relationship with cancer, cardiovascular disease, [3], diabetes, [4], emphysema, [5], and other preventable non-communicable diseases (NCDs) [6]. With this level of evidence and the amount of literature produced, the obvious and logical action is to ban, prohibit, and even to the extent of denormalizing [7] the use, sale, and distribution of cigarettes [8]. Unfortunately, this is not the case.

As early as 2003 the Philippines has passed laws on regulating the use, sale, and distribution of cigarettes. Republic Act 9211 or the Tobacco Regulation Act of 2003 puts into law the policy of the State to protect the populace from hazardous products, promote the right to health, instill health consciousness among the people, and promote the general welfare pursuant to the Constitution [9]. This Act also took into consideration the interests of tobacco industry and placed safeguards on regulation to supposedly protect the interests of tobacco farmers, growers, workers, and other stakeholders [10]. At face value, the latter provisions can be seen as a healthy compromise. However, as time goes by, the Tobacco Industry has used this and several other precedents as a footstool in interfering with pro-health tobacco control policies to the extent that the Philippines have been tagged as one of the countries with highest level of industry interference and one of the countries with the largest tobacco industry lobby [11].

In 2005, the Philippines ratified the treaty on the Framework Convention on Tobacco Control (FCTC) [12]. The FCTC is the first treaty negotiated under the auspices of the World Health Organization that reaffirms the right of all people to the highest standard of health [13]. The FCTC acknowledges not only the addictive nature of tobacco but also its detrimental properties and it being a legal commodity freely manufactured, traded, distributed and consumed without any penal or civil prohibition [14]. It introduces a paradigm shift in developing regulatory strategy to address addictive substances i.e. tobacco and its by products and asserts the importance of demand reduction strategies complemented by supply issues [15]. It is developed in response to the globalization of tobacco epidemic facilitated by trade liberalization, foreign direct investment, transnational tobacco advertising, promotion and sponsorship, and other factors [16].

Upon ratification, the treaty was deemed valid and effective pursuant to Section 21, Article VII of the 1987 Constitution. Subsequent laws have been passed to complement the FCTC such as the Graphic Health Warning Law which mandated a guideline on graphic health warnings on all cigarettes [17], the TRAIN Law which imposes excise tax on tobacco [18] and the Universal Health Care Law which subsequently increased the excise tax on tobacco [19]. In addition, Duterte, in his first years in office enacted Executive Order No. 26 which mandates the establishment of smoke-free environments in public and enclosed places. E.O. 26 also mentions the FCTC in one of its clauses in its preamble, to wit:

"WHEREAS, the Republic of the Philippines, under the World Health Organization Framework Convention on Tobacco Control (FCTC) to which it is a Party, being determined to give priority to the right to protect public health and to promote measures of tobacco control based on current and relevant scientific, technical and economic considerations, agreed to implement the measures provided in that treaty

x----------x

WHEREAS, <u>public health takes precedence over any commercial or business interest</u>

x----------x

WHEREAS, the FCTC provides that each party shall adopt and implement in areas of existing national jurisdiction as determined by national law, and actively promote at other jurisdictional levels, the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places (emphasis mine)

As seen in the previously cited statutes and upon review of the above-mentioned bills, FCTC did not just incorporate and become part of the law of the land by virtue of the Constitutional act of ratification done by the Senate but subsequent laws and even executive orders have acknowledged and used the FCTC as a basis.

The City of Balanga also used the FCTC along with the RA 9211 and other laws in enacting an ordinance regulating the sale of tobacco products to all its citizens born on or after January 1, 2000 to protect the health of its citizens and maintain an environment that is condu-

cive for the wellbeing, welfare, and learning of the youth of the city. In 2016, the City of Balanga imposed one of the most comprehensive and progressive anti-smoking ordinances in the country wherein the following acts are declared unlawful and prohibited:

1. Selling or distributing tobacco products in a school, public playground or other facilities frequented by minors within 100 meters from any point in the perimeter of these places

2. Selling and distributing tobacco products (and Electronic Nicotine Delivery System or ENDS) in all government premises

3. Selling and distributing tobacco products (and ENDS) per piece or in tobacco products packages that contain less than 20 pieces.

4. Selling and distributing of tobacco products (and ENDS) removed from its original individually sealed tobacco product package.

5. Selling and distributing of tobacco products (and ENOS) through ambulant or street vendors. including other mobile/non-fixed vending stalls. kiosks. station or units.

6. Placing, posting, distributing, announcing, publishing, broadcasting or conducting any form of direct or indirect tobacco (and ENDS) advertisement and/or promotion. including those situated in outdoor and indoor premises of tobacco {and ENDS) point-of-sale establishments.

7. Point-of-sale display of tobacco products (and ENOS) and their packaging outside of opaque gray or white-colored storages or containments, and without approval/permit by the City Health Office. Tobacco brands and variants available for sale at the transaction counter shall appear only in the containments and storage in plain serif fonts and devoid of recognizable product or brand typeface, insignia or markings.

8. Facilitating or participating of any government official or personnel of the City of Balanga regardless of employment status (permanent, casual, contractual, job order, consultant or special appointment), in any form of contribution or sponsorship to an event, activity, program or project, individual, or group, within the territorial jurisdiction, with the aim, effect or likely effects of promoting a tobacco product and/or ENDS, its use either directly or indirectly.

9. Ordering, instructing or compelling a minor to buy tobacco products and/or ENDS. Selling, distribution, advertisement and promotions of sweets, snacks, toys or other items to minors that is in in the form of tobacco products or bears resemblance to any tobacco product brand name, logo, indicia or packaging which may appeal to minors is also prohibited.

10. Selling. distribution. using. advertising and promotions of tobacco products and/or ENDS within the declared University Town area of the City and within three l3l kilometers radius thereof per City Ordinance No. 21 S. 2008. This include total ban on Designated Smoking Area (DSA) in any establishments within the U-Town Area and three (3) kilometers from the radius thereof without prejudice to existing ban on the perimeters of schools. playgrounds and other facility frequented by minors.

Expectedly, the same ordinance, along with previous ordinances passed by the City council heavily regulating the use of tobacco and other related products in the City, has seen opposition from the tobacco industry [20]. In 2018, the Philippine Tobacco Institute challenged the said city ordinance stating that by implementing the same and by refusing to issue the necessary permits, the members of the PTI were unable to sell tobacco products within the University Town and within a three (3) kilometer radius from the University Town. The members of the PTI includes:

- Associated Anglo American Tobacco Corporation;

- Filharvest Manufacturing, Inc.;
- Fortune Tobacco Corporation;
- GB Global Express, Inc.;
- GB-BEM Cigarette Company, Inc.;
- La Suerte Cigar and Cigarette Factory;
- JTI Philippines, Inc.;
- JTI Asia Manufacturing Corp.;
- Mighty Corporation;
- Philip Morris Philippines Manufacturing, Inc.; and
- PMFTC Inc., [21].

The Regional Trial Court granted the petition for prohibition of the assailed ordinance declaring the same as invalid and unconstitutional [22].

The City of Balanga filed the appeal with the Court of Appeals and the same upheld the ruling of the lower court voiding a provision on the ordinance against the prohibition on the use, sale, distribution and advertisement of tobacco products within the city's University Town [23]. The Court of Appeals denied the appeal of the City of Balanga and affirmed the ruling of the Regional Trial Court *in toto.*

The Court of Appeals found the appeal unmeritorious. It ruled that the ordinance in question should be struck down for being *ultra vires* since it contravenes RA 9211. The substantive portion of the ruling of the Court of Appeals reads as follows:

RA 9211 also provides that the prohibition on the sale or distribution of tobacco covers only one hundred (100) meters from any point of the perimeter of a school, public playground or other facility frequented by minors.

The challenged Ordinance, however, prohibits not only the act of smoking in specified public places but also the acts of selling, distributing, using, advertising and promoting tobacco products and not only within the declared area of the University Town and one hundred (100) meters from any point thereof but as far as three (3) kilometers from the radius thereof.

Clearly from the foregoing, the City Council of Balanga have overstepped Congress by passing an ordinance which imposes more prohibited acts than those specified under a national statute (RA 9211).

The *ratio decidendi* of the Court of Appeals in declaring the ordinance as unconstitutional is that it contravenes RA 9211 not accounting for the fact that the FCTC, which is the legal basis for the ordinance, being a ratified treaty has the same effect as a Republic Act and therefore can be used as a legal basis for the said ordinance. The CA also pronounced that the LGU cannot widen the prohibitions of RA 9211 and that in doing so it contravenes the legislative power of the Congress.

We are now faced with substantial questions which this paper aims to address using established jurisprudence and the principles of statutory construction is to whether or not the Honorable Court of Appeals gravely erred in declaring the local ordinance as unconstitu-

tional on the basis that RA 9211 is superior over FCTC and that the ordinance cannot use as basis the latter for its implementation of strict prohibition against cigarette smoking in the City of Balanga.

The FCTC is a valid statute incorporated as part of the law of the land

The Philippine Constitution provides two ways wherein an international law, customs, or traditions would have a binding effect in the Philippines.

Article II Section 2 it provides for the incorporation of the norms and principles of international law by stating that the Philippines adopts the generally accepted principles of international law as part of the law of the land. Through this constitutional provision, international law automatically becomes part of the laws of the land without any legislative act of the Congress. However, not every provision of international law is incorporated as the incorporation clause only includes customary international norms or international custom and general principles of international law. Treaties clearly are not part of the abovementioned.

Philippine Constitution also provides that "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate." [24]. This means that treaties must be transformed into national law in order to become part of the law of the land. This transformation is done by a vote of at least two thirds of the Senate and by entering into force by the treaty's own provision.

In the hierarchy of rules in the Philippine legal system, a treaty, once it becomes part of the 'law of the land', has equal status to Acts of Congress. A treaty may be invalidated if it conflicts with the Constitution or an Act of Congress [25].

The court in *deutsche bank vs. commissioner of internal revenue* ruled that

Our Constitution provides for adherence to the general principles of international law as part of the law of the land. The time-honored international principle of pacta sunt servanda demands the performance in good faith of treaty obligations on the part of the states that enter into the agreement. Every treaty in force is binding upon the parties, and obligations under the treaty must be performed by them in good faith. More importantly, treaties have the force and effect of law in this jurisdiction (emphasis mine) [26].

In its ruling in *Bayan v. Romulo*, the Court was able to define and clarify the meaning and the effect of treaty in our local jurisdiction and the Court was also able to distinguish the same from an executive agreement [27]. In this ruling the Court adopted the definition from the Vienna Convention on the Laws of Treaties which defines a treaty as *an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation* [28].

In comparing treaties with executive agreements, the Court held:

Under international law, there is no difference between treaties and executive agreements in terms of their binding effects on the contracting states concerned, as long as the negotiating functionaries have remained within their powers. Neither, on the domestic sphere, can one be held valid if it violates the Constitution.

Authorities are, however, agreed that one is distinct from another for accepted reasons apart from the concurrence-requirement aspect.

As has been observed by US constitutional scholars, a treaty has greater "dignity" than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people; a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment. (emphasis mine) [29].

In another ruling, the Court established further the characteristic of a ratified treaty and established that how the same would be incorporated in the judicial system. In *Suplico vs. NEDA,* the Court held that:

Only a treaty, upon ratification by the Senate, acquires the status of a municipal law. Thus, a treaty may amend or repeal a prior law and vice-versa. Hence, a treaty may change state policy embodied in a prior law. (emphasis mine) [30].

Treaties, according to the Court, is an exercise of executive power and legislative power. Under our Constitution, executive power is vested in the President and that no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate. It is this very concurrence requirement that transform the treaty as a municipal law of the land. The requirement therefore for a treaty to be considered as a transformed municipal law according to the ruling in Bayan vs. Zamora is (1) the treaty must be executed with the authority of the President, and that (2) the treaty must be concurred by no less than two-thirds of all Members of the Senate.

With regards to the FCTC, the records show that the same was adopted by the WHO on May 21, 2003 and that it was signed by the Philippines on September 23, 2003 [31]. Two years later, the Senate conducted hearings through the Senate Committee on Foreign Relations wherein concerned government agencies, and non-government organization including the Philippine Tobacco Institute (PTI), members of the academe, and other key stakeholders were consulted [32]. This consultation resulted to the subsequent concurrence of the Senate in the ratification of the FCTC through the Senate P.S. Res. No. 195 adopted on February 22, 2005 [33].

This process fulfills both the Constitutional requirement making the FCTC a valid statutes with the force and effect of law. Also, FCTC may also change state policy embodied in a prior law and may amend or repeal a prior law.

The FCTC is entitled to the presumption of constitutionality

It is a well settled rule established by jurisprudence that the presumption of constitutionalit. The FCTC as a valid statute and a ratified treaty is entitled to the same. However, in the case and in the ruling held by the Honorable Court of Appeals, the FCTC was not afforded of such presumption.

According to jurisprudence, the Court does not lose sight of this presumption along with the presumption of validity accorded to statutes. In fact, in *Fariñas vs. The Executive Secretary,* the Court held that:

Every statute is presumed valid. The presumption is that the legislature intended to enact a valid, sensible and just law and one which operates no further than may be necessary to effectuate the specific purpose of the law.

It is equally well-established, however, that the courts, as guardians of the Constitution, have the inherent authority to determine whether a statute enacted by the legislature transcends the limit imposed by the fundamental law. And where the acts of the other branches of government run afoul of the Constitution, it is the judiciary's solemn and sacred duty to nullify the same. (emphasis mine) [34]

Only the Courts, acting in their capacity as guardians of the Constitution, have the inherent authority to determine the Constitutionality of any statute, including treaties. In fact, the Constitution itself provides the power to the Supreme Court to review, revise, reverse, modify, or affirm on appeal or *certiorari,* as the law or the Rules of Court may provide, final judgments and orders of lower courts in all cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question. Further, in *Lawyers Against Monopoly and Poverty (LAMP) vs. The Secretary of Budget*, the Court held:

To justify the nullification of the law or its implementation, there must be a clear and unequivocal, not a doubtful, breach of the Constitution. In case of doubt in the sufficiency of proof establishing unconstitutionality, the Court must sustain legislation because "to invalidate [a

law] based on x x x baseless supposition is an affront to the wisdom not only of the legislature that passed it but also of the executive which approved it." This presumption of constitutionality can be overcome only by the clearest showing that there was indeed an infraction of the Constitution, and only when such a conclusion is reached by the required majority may the Court pronounce, in the discharge of the duty it cannot escape, that the challenged act must be struck down (emphasis mine) [35]

Up to date, there is no case filed before the Supreme Court nor is the instant case that clearly shows that there was indeed an infraction of the Constitution with regards to the FCTC. Without such, the FCTC and its provisions should be presumed valid, constitutional, and subsisting, in accordance with jurisprudence.

FCTC and RA 9211 are statutes in pari materia

We are then confronted with a situation wherein two statutes refer to the same subject matter. RA 9211 and the FCTC wherein both statutes are valid, constitutional, and subsisting, are statutes *in pari materia.* According to jurisprudence, statutes are *in pari materia* when they relate to the same person or thing or to the same class of persons or things, or object, or cover the same specific or particular subject matter [36].

In the ruling of the Court in *Office of the Solicitor General vs. Court of Appeals,* the Court established the rule in interpreting statutes *in pari materia.* It held that:

It is axiomatic in statutory construction that a statute must be interpreted, not only to be consistent with itself, but also to harmonize with other laws on the same subject matter, as to form a complete, coherent and intelligible system. The rule is expressed in the maxim, "interpretare et concordare legibus est optimus interpretandi," or every statute must be so construed and harmonized with other statutes as to form a uniform system of jurisprudence. (emphasis mine) [37].

In addition, in its ruling in *Vda de Urbano vs. GSIS,* citing the previous ruling in *C and C Commercial Corporation vs. National Waterworks and Sewerage* the Court ruled that statutes *in pari materia* should be construed together to attain the purpose of an expressed national policy, to wit:

On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together. Provisions in an act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act, when not inconsistent with its purpose. Prior statutes relating to the same subject matter are to be compared with the new provisions; and if possible by reasonable construction, both are to be construed that effect is given to every provision of each. Statutes in pari materia, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other." (emphasis mine) [38]

The honorable court of appeals erred in not appreciating the constitutionality of FCTC

Based on the foregoing, we have established that the FCTC is a valid and subsisting law and that the Court of Appeals in its ruling should have construed and interpreted RA 9211 and the FCTC to be in harmony with each other. Instead, the Honorable Court of Appeals, citing the ruling in *Secretary of Justice vs. Lantion,* ruled that the municipal law should be upheld by the municipal courts. However, in the same ruling, the Court held:

The doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there appears to be a conflict between a rule of international law and the provisions of the constitution or statute of the local state.

Efforts should first be exerted to harmonize them, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the observance of the Incorporation Clause in the above-cited constitutional provision.

In a situation, however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances.

The fact that international law has been made part of the law of the land does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere. The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments.

Accordingly, the principle lex posterior derogat priori takes effect - a treaty may repeal a statute and a statute may repeal a treaty. In states where the constitution is the highest law of the land, such as the Republic of the Philippines, both statutes and treaties may be invalidated if they are in conflict with the constitution (emphasis mine) [39].

The Honorable Court of Appeals erred in relying only on the ruling that states that when there exist a conflict between international law and the municipal law the latter shall prevail because in the latter portion of the ruling the Court held that treaties are given equal standing with but are not superior to national legislative enactments and both statutes and treaties may be invalidated if they are in conflict with the Constitution.

The Honorable Court of Appeals should have first made an effort to reconcile the two statutes and determine if whether or not the basis of the assailed portion of the Ordinance is based on valid and subsisting statutes.

Upon review also of RA 9211 and FCTC it is clear that upon ratification of the FCTC, the State incorporated a strict policy to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco and smoke. This expands the existing policy of RA 9211 and should be read as the State expanding the power of regulation in order to attain the objectives of the FCTC rather than be limited by only what the former law prescribes.

Article 3 of the FCTC reads

The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

Fortunately, this case is still to be decided by the Supreme Court and hopefully the Court would take judicial notice of the validity of the FCTC and the validity of the assailed portions of the ordinance passed by the City of Balanga and rule to reverse and set aside the ruling of the Honorable Supreme Court. To do so is to uphold the rights of the people of the City of Balanga in exercising their fundamental right to the highest attainable standard of health.

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