



Case 12/PUU-VIII/2010

Country: Indonesia

Region: Asia

Year: 2011

Court: Constitutional Court

Health Topics: Health care and health services, Health systems and financing, Hospitals, Medicines

Human Rights: Freedom from discrimination, Right to a clean environment, Right to health, Right to housing

Facts

The Plaintiffs were nurses and heads of rural health centers in the East Kalimantan Province of Indonesia. They challenged two provisions of Law No. 36 of 2009 Concerning Health. These were Article 108(1), which allowed only certain “health workers” to prescribe and distribute medicines, and Article 190(1), which made it an offence for workers in a health facility to fail to provide emergency care. The Explanation Provision of Article 108(1) defined “health workers” as trained pharmaceutical professional, but allowed limited pharmaceutical practice by doctors, dentists, midwives or nurses where a trained pharmaceutical professional was unavailable. Violation of either Article 108(1) or Article 190(1) carried a large fine and the possibility of imprisonment.

The Plaintiffs argued that these provisions created dilemmas and legal uncertainties for nursing and support staff at local health centers. On the one hand, nurses could undertake only limited pharmaceutical practices. On the other hand, nurses were required to provide emergency health services, including administering medicines if necessary. In the remote areas where these nurses worked, shortages of trained pharmaceutical professionals meant that only nurses were available to provide the required essential medical and pharmaceutical care in emergencies. It was therefore unclear what nurses should do when either providing or withholding medicines in emergencies in remote areas could potentially violate the law.

As such, the Plaintiffs contended that these provisions taken together violated their constitutional rights, particularly Article 27(1), Article 28D(1), Article 28H(1), and Article 28J(1) of the 1945 Indonesian Constitution, which prescribe the rights to equality before the law, collective advancement of rights, recognition and fair treatment, equal opportunities in government, and physical and spiritual prosperity (including health care) as well as the obligation to respect the human rights of others.

Decision and Reasoning

The Court accepted part of the Plaintiffs’ arguments, and rejected others.

The Court found that Article 108(1) on its own was not contradictory to any constitutional norm. In the opinion of the Court, the provision merely required that pharmaceutical practice be performed by a pharmaceutical worker with the relevant expertise and authority. In this respect, it merely placed someone in the position and function that was suited to their competence and professionalism.

Similarly, the Court found that Article 190(1) on its own was constitutional, as workers in health facilities implemented the State’s duty to sustain the right to life and the right to health under the Constitution. The law requiring them to provide emergency care was a means for the state to respect, protect, and fulfil these constitutional rights.

However, the Court found that when taken in conjunction with Article 190(1), the sentence “...must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation” in the Explanatory Provision, would create legal uncertainty in light of the health shortages throughout Indonesia if given the meaning ascribed to it by the Plaintiffs. The provision would therefore be unconstitutional, unless it was interpreted to mean that pharmaceutical practice would primarily be undertaken by pharmaceutical workers, but nurses would be given authority to practice emergency pharmaceutical functions if no qualified pharmaceutical worker was present. While the Court considered that such an interpretation was provided for in the Explanatory Provision, the lack of clarity in the Article itself rendered the provision uncertain in practice and therefore unconstitutional.

Decision Excerpts

“Based on such consideration, the Court is of the opinion that the sentence “... must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation” creates legal uncertainty. Therefore it is contradictory to Article 28D(1) of the 1945 Constitution if it is not construed in a certain interpretation that provides certainty so that the norm contained within the sentence can be applied in all areas in Indonesia under any conditions” Para. 3.25

“The Court is also of the opinion that in addition to the incorrect placement of the norm, the exclusion provision, as argued by the Plaintiffs, has led to a situation of dilemma. This is because on one hand, health workers with extremely limited authority are required to save patients in emergency situations, while on the other hand, they are faced with the threat of criminal sanction if they administer drugs or provide other medical treatments.” Para. 3.26

“Based upon all of the reasoning in the above considerations, the Court is of the opinion that the arguments in part of the petition of the Plaintiffs have no legal basis, and have legal basis for a separate part. Namely, in so far as it concerns the sentence “... must be implemented by health personnel who have the appropriate expertise and authority as prescribed by legislation” in Article 108(1) of Law No. 36 of 2009, it is unconstitutional in so far as it is not construed that the health workers shall be pharmaceutical workers and in the event that no pharmaceutical worker is available, certain health workers may perform limited pharmaceutical practices, including (among others) doctors and/or dentists, midwives, and nurses who perform their duties in an emergency situation which threatens the life of a patient and immediate medical treatment is required in order to save the patient. The Explanation provision of Article 108(1) of Law No. 36 of 2009 which provides extremely limited authority, creates a dilemma and results in the absence of a just legal certainty. Therefore it is contradictory to Article 28D(1) of the 1945 Constitution” Para. 3.27.