

Human rights as a tool for tobacco control in Latin America

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The tobacco epidemic is one of the most dangerous and pervasive public health concerns the world faces today. Tobacco consumption is an epidemic that spreads not by infection, but by promotion and advertisement, and, more importantly, lack of effective regulation. In other words, it is an epidemic that can be controlled if governments implement appropriate tobacco control measures.

Integrating a human rights approach in tobacco control has many advantages. Human rights law is one of the most powerful legal tools that can be used both domestically (in-country) and internationally. Moreover, human rights are also widely used in political discourse and they usually influence policy debates. As an area of discourse that is used globally, human rights law has a reach similar to the global dimension of the tobacco epidemic. Despite its utility, a human rights approach to advance tobacco control policies has not been widely used by the tobacco control movement. In fact, one could argue that the tobacco industry has been more proactive in using human rights law to attack tobacco control policies.¹ This article addresses the connections between human rights law and tobacco control. Providing concrete examples from Latin America, we demonstrate the potential of a human rights approach to tobacco control, while at the same time we aim to explain how such approach can be used.

This paper is divided into three sections. The first section provides background on human rights law and

identifies some of the connections between human rights and tobacco control. The second section focuses on the Framework Convention on Tobacco Control and its implications for a human rights based approach to tobacco control. Finally, the third section provides concrete examples of Latin American countries that have used human rights as a tool for tobacco control.

Human rights law and tobacco control

Why is a human rights approach relevant for the region?

Before we develop our main arguments, we would like to briefly mention the possible reasons why a human rights approach to tobacco control has not been used extensively. First, the tobacco control movement essentially originated in the United States (US), and the US Constitution does not include a positive right to health and has been resistant to the authority of international legal instruments and tribunals.² Second, the tobacco control movement outside of the US overwhelmingly recruits its advocates from the medical and public health communities, who do not typically use a human rights law framework. Third, human rights litigation is neither a financially sustainable activity nor a profitable one. Most of the early legal strategies deployed in tobacco control were variants of tort litigation, a more profitable practice. Finally, the tobacco industry has more effectively used human right arguments, such as freedom of

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speech, both in policy development and in litigation.³ The tobacco industry's greater experience with human rights discourse may deter tobacco control advocates from using a similar strategy.

This brings us to another important issue: why are human rights relevant to advance tobacco control in Latin America? First, human rights law has a prominent role in Latin American political and policy discourses. Once a relevant societal issue acquires the status of a human right, it has special consideration in public policy, providing an impetus for policy development. This has been the case of tobacco control policies. In countries such as Uruguay, a connection between tobacco control and the fundamental right to health (and the fulfillment of such right by implementing the Framework Convention on Tobacco Control) has been clearly made. This has had a predominant role in legislative debates, as well as in litigation, as the connection between the right to health and tobacco control policies has been argued several times in Uruguayan courts.⁴ In sum, implementing tobacco control policies in Uruguay is considered not a prerogative of the government, but a state obligation entrenched in fundamental rights⁵ and human rights law. Notably, Uruguay has one of the strongest and most effective tobacco control laws in the world today.

Second, most Latin American countries belong to the civil law tradition. Unlike the common law tradition, the civil law tradition has limited availability of tort law.⁶ Tort law in Latin America tends to be narrow in standing, limited in its remedies, and requires high standards of proof of causality. Hence, controlling private actors (e.g., tobacco companies) through tort litigation is quite challenging in Latin America. In contrast, Latin American legal systems have a more robust tradition of controlling state action through fundamental rights litigation. The *writ of amparo* (*tutela* in Colombia), a procedure designed to protect the fundamental rights of the citizens from state action, is widely present and commonly used in the region. Although there are still challenges,⁷ fundamental rights litigation and human rights discourse are better candidates for success in Latin America than tort litigation.

Finally, the Inter-American Human Rights System has played a pivotal role in mainstreaming the human rights discourse in the region. This regional system provides another avenue to find states accountable for human rights violations. Although its relevance to adjudicate health related claims may be limited, it is still a mechanism that has not been explored for advancing tobacco control in the region.

Basic overview of human rights law

Human rights treaties

Internationally, human rights law is comprised of several instruments, both binding and non-binding. Binding instruments are usually created and approved as "treaties" under public international law. Collectively referred to as the "International Bill of Human Rights," the three main human rights documents are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸ In international human rights law, there are other international treaties that impose binding obligations on State parties, which include the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities.

Some of these treaties (e.g., ICESCR) impose obligations directly connected with the right to health and implicitly include specific States' obligations related to tobacco control. Other treaties that have provisions that require States to address tobacco control include the CRC and the CEDAW.

In addition to international human rights law, there are also regional human rights systems. Most countries in Latin America are parties to the Inter-American Human Rights System, i.e., they have ratified the American Convention on Human Rights. Moreover, countries in Latin America tend to ratify international human rights treaties, and most of the countries in this region are State Parties of the CRC, ICCPR, ICESCR and CEDAW.

State's obligations (respect, protect, fulfill) and justiciability of health policies

Fundamental rights are expectations, established by law, that entitle individuals (right-holders) to claim that States (duty-bearers) fulfill their obligations. The State, as duty-bearer, "fulfills its responsibility towards" the individual right-holder.⁹

Traditionally, States' obligations regarding human rights were categorized as *positive* and *negative* obligations.¹⁰ *Negative* obligations required States to refrain from actions that directly infringed on human rights. For example, States should abstain from torturing or

imprisoning someone without respecting their due process rights. Civil and political rights¹¹ were traditionally considered to encompass negative obligations. On the other hand, *positive* obligations required States to engage in certain activities that are conducive to the fulfillment of rights. For example, in order to guarantee the right to health, States must devote resources to create a health system that can satisfy the needs of the population. Social, economic, and cultural rights¹² impose positive obligations. Under this distinction, and based on the need to devote resources (financial) to meet positive obligations, social, economic, and cultural rights were considered aspirational policy goals, but not enforceable rights.

Such rigid distinctions between positive and negative duties (and civil and political rights on the one hand and social, economic, and cultural rights on the other) have been abandoned, as new generations of lawyers in Latin America turn to constitutional and international courts for remedies.¹³ Currently, social, economic, and cultural rights are considered enforceable and justiciable rights.¹⁴ States' obligations regarding human rights are understood, not based on their *positive* or *negative* nature, but on the concrete content or type of the obligation. As to the types of obligations that stem from each right, there are many classifications. The following classification is widely used by the Universal Human Rights System (United Nations System). States' human rights obligations are as follows:

- i) An obligation to *respect*; that is, States must refrain from directly (or indirectly) interfering with the realization of human rights. States are under obligation to refrain from engaging in activities or developing regulations (policies and laws) that directly infringe upon human rights. For example, States must refrain from torture (right to freedom from torture), undue seizures (right to property), promoting substance abuse¹⁵ (right to health).
- ii) An obligation to *protect*; that is, an obligation to take measures to prevent third parties from interfering and affecting individual's realization of human rights. Examples of this are governments regulating how private health care providers deliver health services, e.g., in a non-discriminatory manner (right to health), bans on tobacco advertisement (rights to health and to information), bans on misleading advertisement (consumer rights).
- iii) An obligation to *fulfill*; that is, an obligation to adopt all appropriate legislative, administrative, budgetary and other measures towards the realization of human rights. For example, developing a comprehensive tobacco control regulatory system, which

includes tobacco control laws, regulations, and clear competencies to oversee the implementation and compliance with such regulations is in line with this obligation as it relates to the right to health.

The obligation to fulfill is the broadest of the States' human rights obligations. It encompasses a variety of activities that States need to carry out in order to meet their human rights obligations. For example, with the right to health, the content of this obligation has been expanded to include obligations such as *facilitate*, *provide* and *promote*.¹⁶

Human rights law and tobacco control

As mentioned above, there is a clear connection between tobacco control and human rights. This connection manifests itself in several ways. For example, measures to reduce tobacco control can render better health at individual and population levels. Conversely, lack of tobacco regulation (e.g., regulation of consumption, distribution, sale, and advertisement of tobacco products) could result in a violation of States' human rights obligations (e.g., right to health, right to information). This section expands further on this connection, specifically as it relates to the human right to health and other related rights.

Right to health

The right to health must play a central role in any strategy that deploys human rights in advancing tobacco control. The right to health is defined in international human rights law as "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."¹⁷ The content of the right to health and the specific obligations included within this right are developed by the Committee on Economic, Social and Cultural Rights in its General Comment 14.¹⁸ For present purposes, we will not expand on the specific normative content of the right to health, but instead focus on obligations under the right to health as they relate to tobacco control.

The right to health can provide significant support to tobacco control policies. First and foremost, the State must *respect* the right to health by refraining from spreading the tobacco epidemic. Mexico's infamous "Smoker's Paradise" media campaign is a clear example of how States can fail in this regard.¹⁹ State ownership of tobacco companies is also problematic from this perspective as States create an inherent conflict of interest between their human rights obligations and other governmental functions.²⁰ In sum, States must refrain

from engaging in activities that directly infringe on the right to health by incentivizing tobacco consumption.

The State also has an obligation to *protect* people's right to health from the threat of tobacco. As mentioned above this obligation requires the State to regulate private parties if their activities infringe on human rights. Clear examples of measures oriented at realizing this obligation are (i) smoking bans in public places, which protect individuals' health from involuntary exposure to second-hand smoke; and (ii) bans on advertising and promotion of tobacco products, which protect current or potential tobacco consumers from publicity that will likely increase the spread of the epidemic.

The State must also *fulfill* the right to health by implementing all the relevant measures, legislation, regulation and budgetary allocation that will be conducive to effective tobacco control regulation. As with the specific measures related to the obligations to facilitate, provide, and promote, we find the following (when applicable depending on specific countries legal frameworks): (i) providing health services for people afflicted by diseases stemming from tobacco use; (ii) facilitating smokers' access to cessation programs; and (iii) prevention campaigns that inform both the general population and specific groups targeted by the industry, about the dangers associated with tobacco use.

Other fundamental rights

Other fundamental rights linked to tobacco control include the right to information, the right to education, and, to some extent, consumer protection rights. In some cases, these rights intersect with the right to health, in others they carry their own weight. For instance, *fulfilling* the right to information is key in both *protecting* the right to health and *promoting* it. By ensuring that the population receives sufficient information regarding the effects of tobacco, the State protects the population from the risks of advertisement of tobacco products (which in the case of tobacco represents misinformation).

Consumers' rights also play a role (though they are not often included in the list of fundamental rights). Requirements that tobacco companies fully disclose to the State the ingredients added to the final product is a way to guarantee that there is some sanitary control over a dangerous commercial product. Warning labels can also be understood as not only a guarantee of the right to information, but also a specific demand by consumers to understand what it is that they are consuming.

Health education is considered a relevant component of the right to health, but is also regarded as a separate right, the right to education. Tobacco-related health topics in school curricula partially guarantee

the right to education and promote the right to health. Depending on the specific rights recognized in each country, other intersections between rights that sustain tobacco control policies should be examined in closer detail in the respective country. The above account is non-comprehensive and serves as a brief analysis of the most relevant connections to illustrate the potential of using a human rights framework within tobacco control.

Framework Convention on Tobacco Control (FCTC) and human rights²¹

Using the FCTC as a standard to measure States' parties compliance with human rights obligations vis-à-vis tobacco control

The Framework Convention on Tobacco Control (FCTC) is an international treaty that imposes binding obligations on States Parties once ratified. These obligations require States to implement FCTC policies and programs, as well as provide individuals with the right to compel ratifying States to comply with the treaty. Most Latin American countries have ratified the FCTC, generating momentum for developing tobacco control regulation in the region.²²

The possibility of using the FCTC as enforceable law, applicable in domestic jurisdictions is uncertain. Direct enforceability of international instruments within domestic jurisdictions is still disputed in many countries. Moreover, the text of the FCTC is often vague and defers to domestic law. However, civil society may nevertheless use it to compel governments into action on tobacco control. The FCTC provides an official standard of minimum domestic tobacco control policies. This provides a linkage between the FCTC and human rights law.

Regardless of whether the FCTC is considered a human rights treaty,²³ it has important implications for human rights discourse. By ratifying the FCTC, States acknowledge that the tobacco epidemic is a major threat to public health and that the FCTC is the minimum standard to protect the public's health. This requires States to develop laws and policies at the domestic level that meet these minimum international standards, and in doing so States protect the right to health.

Perhaps more importantly, from an international perspective, by ratifying the FCTC a State publicly and officially recognizes the minimum requirements for protecting health. As an international treaty, the FCTC can be, and has been, used as a standard to measure whether States fulfill their obligations under international human rights law as they relate to the right to health.²⁴ The FCTC helps inform the specific content

of a State's obligations regarding the right to health. In sum, if a State fails to implement the minimum tobacco control measures outlined in the FCTC, it could be found in violation of its obligations under the right to health, regardless of whether, in the specific case of each State, the right to health is binding under domestic constitutional law.

FCTC and specific content of States' obligation

As mentioned above, under human rights law States have obligations to respect, protect and fulfill human rights, and more relevant for present purposes, the right to health. Some of the requirements under the FCTC seem geared to ensure that States *respect* the right to health by not participating in the spread of the tobacco epidemic. For instance, States are obligated to shield tobacco control policies from tobacco industry influence (Article 5.3). This obligation is meant to prevent States from becoming an instrument of the tobacco industry to promote tobacco consumption. The Parties to the FCTC thus impose upon themselves an obligation to prevent themselves from failing to *respect* the right to health of its citizens.

Protecting the right to health from third parties is one of the central thrusts of the policies laid out in the FCTC. Protection from exposure to tobacco smoke in public places (Article 8) is a clear example. By restricting smoking in public places (e.g., workplaces and public transportation), the State specifically *protects* smokers and non-smokers alike from the harm that second-hand smoke represents. Regulating, testing, and measuring the contents and emissions of tobacco products (Article 9) is also a policy that protects consumers from the enhancement and manipulation of tobacco products that the tobacco industry has long practiced. The obligation to "adopt and implement effective measures for public disclosure of information about the toxic constituents of the tobacco products and the emissions that they may produce" (Article 10) is also a protective measure. Ensuring that "tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions . . ." (Article 11.1.a) also fits the bill of a State action that protects a person's rights to health and information. Notably, banning tobacco advertising, promotion and sponsorship is a necessary policy to effectively protect the right to health (and to information) from the harms caused by the tobacco industry (Article 13).

The FCTC also provides good examples relevant to the promotion of health. Warning labels (Article 11.1.b)

guarantee information while promoting health. As mentioned earlier, educational programs that include the health risks and addictive nature of tobacco (Article 12.a) promote the right to health by fulfilling the rights to education and information. Policies that increase prices and impose taxes on tobacco products (Article 6), also help promote the right to health. Through price control and taxes, the governments can *promote* health by discouraging initiation and providing incentives for cessation. Promoting cessation of tobacco use (Article 14.2) is a policy that directly encourages persons to live healthier lives.

There are many additional examples of the FCTC and States' obligations, but it is beyond the scope of this paper to explore them at greater length. For the most part, policies included in the FCTC can be understood as measures that can make fully effective the different fundamental rights relevant to combating the tobacco epidemic.

Role of the Committee on Economic Social and Cultural Rights in linking human rights States' obligation and tobacco control

Under international human rights law, each human rights treaty has a monitoring body that is in charge of (i) interpreting the content of provisions of the treaty; (ii) monitoring the domestic implementation of the treaty, i.e., States' compliance with their treaty-based obligations; and (iii) in some instances, receive petitions/complaints (communications) from individuals alleging violations of treaty-based obligations and issue decisions on such cases. For the purposes of linking human rights and tobacco control, one of the most relevant treaties is the International Covenant on Economic, Social and Cultural Rights, whose treaty monitoring body is the Committee on Economic, Social and Cultural Rights (CESCR or the "Committee").

In carrying out its functions, the CESCR issued a general comment where it interpreted the right to health (ICESCR, Article 12), helping to define specific State obligations. In relation to tobacco control, General Comment 14 clearly states that:

Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as [...] the failure to discourage production, marketing and consumption of tobacco²⁵

CESCR has clearly stated that tobacco control measures are an integral component of the protection of the

right to health, issuing recommendations specific to tobacco control, through the country reporting mechanism. Notably, in the 2009 periodic review of Brazil, CESCR expressly welcomed the Brazilian government's ratification of the FCTC. Moreover, regarding specific tobacco control measures, the CESCR stated the following:

30. The Committee notes with concern that it is still permissible to promote the use of tobacco through advertising in the State party and that, while the use of tobacco-derived products is banned in publicly accessible areas, smoking is permitted in areas specially designed for the purpose. The Committee notes, however, that the State party has taken important steps to reduce the threat tobacco poses for life, health, the environment and the general population by ratifying the WHO Framework Convention on Tobacco Control and developing public policies to reduce tobacco use. (Art. 12, para. 1)

*The Committee recommends that the State party take measures to ban the promotion of tobacco products and enact legislation to ensure that all enclosed public environments are completely free of tobacco.*²⁶

The Committee makes a specific connection between realization of the right to health and ratification of the FCTC. The specificity of the recommendation highlights the fact that Committee members used the FCTC as a standard to measure state compliance with its obligations enshrined in the right to health.

CESCR's reporting systems allows for non-state actors to present alternative reports to highlight specific human rights violations. Of note, the aforementioned recommendation, on the periodic review of Brazil, is primarily based on a shadow report submitted by an academic organization and tobacco control civil society organizations.²⁷ This represents another avenue for mainstreaming tobacco control into the human rights movement. Fortunately, civil society organizations are now moving toward using the reporting mechanisms in treaty monitoring bodies to bring tobacco control issues to the forefront of the human rights agenda.²⁸ In so doing, linking tobacco control and human rights at the international human rights level can have a positive impact on domestic tobacco control.²⁹

Examples of a human rights approach to tobacco control in Latin America

In several countries already, human rights arguments have been used in legislative discourse and have moved the agenda forward on tobacco control. The protection

of the right to health, to life, and of consumer's rights have been invoked in policy and legislative debates. Correspondingly, the tobacco industry has increased their efforts to thwart tobacco control initiatives by lobbying and litigation. In this section we will first address the connection between industry lobbying and human rights. Then, we will examine the role of human rights in tobacco control litigation. In the last section, we will discuss the use of litigation as tool to advance tobacco control as well as defensive litigation against industry's challenges to tobacco control policies.

Industry lobbying and human rights discourse

Fundamental rights will play a role in the future of tobacco control, regardless of whether tobacco control advocates take up human rights as a tool for advancing tobacco control policies. The tobacco industry and its allies often use fundamental rights to challenge tobacco control policies, invoking the fundamental right to economic freedom, freedom of speech, equal protection, and even going as far as arguing the existence of a fundamental right to smoke.³⁰ Similarly, the tobacco industry and its allies have used human rights discourse in lobbying legislatures, challenging regulations, and attempting to sway public opinion. For example, in Mexico, early arguments offered by the industry's lawyers against proposed tobacco regulation (in both Mexico City's local Congress and Federal Congress during the second half of 2007) held that a ban on smoking in public spaces would amount to discrimination on the grounds of health (as smokers are addicts with a health condition). In the Mexican House of Representatives, a memorandum arguing that the Mexican Constitution protected a right to smoke was widely circulated among congresspersons during the days prior to voting a tobacco control law in late 2007. This pattern of tobacco industry influence on legal discourse is repeated throughout the region.

Central to tobacco industry strategies is the use of human rights discourse, perhaps because of the robust tradition of fundamental rights litigation, individual or collective, in Latin America. The threat of using a fundamental rights litigation strategy, *amparo*, has yielded results for the tobacco industry. Although this has not proven to be a successful litigation strategy, the threat of *amparo* litigation alone sometimes is enough to undermine the creation of strong tobacco control bylaws and regulations.³¹ Because of this, tobacco control advocates must fully come to grips with human rights discourse if they want to effectively counter the tobacco industry.

Litigation and Human Rights

Passive/Defensive litigation: Industry arguments against tobacco control regulation

After lobbying strategies and attempts to undermine the creation of tobacco control regulation fail, the tobacco industry resorts to litigation. Litigation to attack tobacco control regulation is not uncommon in Latin America. For example, Mexico's federal tobacco control law, approved in February 2008, has been challenged by numerous restaurants, hotels and other service providers with close ties to the tobacco industry on the grounds of undue restrictions on the right to commerce and other fundamental rights.³² These challenges have been generally unsuccessful thus far, but there are still several cases pending a decision from the Supreme Court.³³ The tobacco industry's use of *amparo* litigation in this instance does not look promising and it has not stalled the law's implementation.

In Argentina, *Nobleza Piccardo*, a British American Tobacco subsidiary, filed a complaint against a strong tobacco control law passed by the legislature in the province of Santa Fe.³⁴ In addition to procedural arguments (related to the authority of the province to enact tobacco control regulations, i.e., preemption arguments), the industry based its central arguments on fundamental rights. For example, they argued that a ban on promotion and advertisement of tobacco products amounts to a violation on the right to free speech. Moreover, they argued that smoking ban in public places infringes on the freedom of commerce. Conversely, these and other industry arguments can be easily countered using an appropriate interpretation of human rights enshrined domestically and internationally.³⁵ This case is still pending before the Supreme Court of Argentina. Its resolution is likely to have implications for other countries in this region and therefore deserves support from regional tobacco control community.³⁶

Very recently, the Guatemalan Constitutional Court issued its decision on a case filed by the chamber of commerce against the Guatemalan Smoke-Free places law. The arguments raised by the chamber of commerce were related to the right to economic freedom. Universities in Guatemala, together with in-country civil society organizations, and with support from institutions outside Guatemala, presented documents in support of the law and which countered those of the chamber of commerce.³⁷ The Constitutional Court upheld the law and based its decision, in part, on the Guatemalan government's obligations to protect the right to health and the right to life. The Court based this decision on

both its constitutional law, as well as on international human rights instruments ratified by the Guatemalan government, such as the ICESCR.³⁸ This decision provides another example of the need to link tobacco control arguments with human rights law to advance tobacco control policies.

Active litigation: Promoting stronger tobacco control laws

Tobacco control litigation has already used the FCTC as a standard to measure the degree of satisfaction of the right to health and other fundamental rights within domestic law. In Mexico, an ambitious and innovative litigation strategy has been used to produce a substantive judicial interpretation of the role of the right to health and other related fundamental rights in establishing tobacco control policies. Specifically, this strategy aims to bolster a relatively weak federal tobacco control law that allows the promotion of tobacco products and indoor smoking in designated workplace areas within public spaces.

In October 2008, the "Front Against Tobacco Addiction" coalition of NGOs, local and federal congresspersons, academic institutions, and ordinary citizens presented 48 constitutional challenges in over 30 different courts in 9 circuits against the federal tobacco control law.³⁹ This litigation is being carried out by CIDE, a public university in Mexico City, through its Public Interest Clinic. The central argument holds that the policies implemented by the federal tobacco control law of 2008 are under-reaching if they are meant to protect the fundamental rights to health, to information, to an adequate environment, and of consumers and children. Specifically, the challenge holds that the federal law fails to fulfill the minimum standards of protection that the State officially recognized through its ratification of the FCTC (see earlier discussion). Such failures are evidenced because the law allows for tobacco products to be publicized in magazines, nightclubs and through ordinary mail to people's homes, and it also allows for smoking areas indoors. This legal strategy consisted of selecting the best-positioned cases and to push them through the court system, all the way to the Supreme Court (and to the Inter-American Human Rights System, if necessary and feasible). Currently, some of these cases are still under development, and although tobacco control advocates are optimistic, the final results are still uncertain. This approach to using fundamental rights litigation explicitly connects human rights arguments and tobacco control, and many lessons will come from this litigation experience in Mexico.

Conclusion

In this paper, our aim was to provide an overview of the main connections between human rights and tobacco control. We based our analysis on relevant Latin American jurisprudence and the current status of a human rights approach to tobacco control in the region. As discussed, human rights law is a promising strategy for tobacco control advocates, especially in Latin America, but it still remains underused.

Human rights law was considered a double-edged weapon, as the tobacco industry has been more successful historically in raising fundamental rights arguments. To effectively counter these claims, the tobacco control movement must respond with its own comprehensive and accurate human rights counter-arguments. In cases where the judiciary and tobacco control advocates have made such connections, the effects seem positive. The recent decision by the Guatemalan Supreme Court that upheld the constitutionality of the smoke-free law is a clear example. As the tobacco control movement moves more purposely to adopt human rights law as a tool for tobacco control, we can begin to understand and realize the benefits of active litigation strategies based on fundamental rights

Declaration of conflicts of interest

We declare that we have no conflicts of interest.

Notes

1. It is almost a recurring pattern that when countries decide to regulate and implement efficient tobacco control policies, i.e., when they decide to fulfill their obligations under international human rights law (e.g., right to health, right to life) vis-à-vis tobacco control, the tobacco industry challenges such policies. First, it will try to influence the legislative debate by claiming economic rights violations, such as against property rights or freedom of expression. Once such lobbying efforts fail and the government approves tobacco control regulations, the industry will challenge such regulations in court, often employing the same arguments used when lobbying the legislature. See, for example, *Nobleza Piccardo S.A.I.C. v. Provincia de Santa Fe*, 188/2006, Corte Suprema de Justicia de la Nación. [Supreme Court] (Arg.); *Complaint for Cámara de Comercio de Guatemala v. Partial General Unconstitutionality*, 2158-2009, Corte de Constitucionalidad de la República de Guatemala [Constitutional Court].

2. Constitution of the United States.

3. See comment *supra* 1.

4. In Uruguay, the government has successfully defended its tobacco control regulations against industries arguments brought up in Court. See for example, *British American Tobacco (South America) Limited (Uruguay) v. Public Health Ministry*, Tribunal de Apelaciones Civil de 6to Turno [Appellate Court], decision 2/2009 (Uru). At the same time, there are other cases that are currently pending decision, see *Abal Hermanos S.A. v. Legislative Power and others*, (constitutional challenge, arts. 9 y 24 de la ley 18.256) Suprema Corte de Justicia. [Supreme Court] (Uru).

5. Fundamental rights is a broad term referring to universally conferred rights that are enshrined in both the domestic constitutions of individual countries (and/or their federated entities—such as the Bill of Rights in the United States or the so-called “dogmatic” sections of most civil law constitutions) and in international instruments such as the International Bill of Human Rights. Generally, “human rights” is used in the international arena and “constitutional rights” or “constitutional guarantees” in the national arena, but the nomenclature is not rigid. In this text, we use the terms “fundamental rights” and “human rights” indifferently to refer to fundamental rights, whether established in domestic or international legal instruments.

6. “Tort (tort). 1. A civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another. 2. (*pl.*) The branch of law dealing with such wrongs.” Black’s Law Dictionary, 8th edition. New York: West Group, 2004.

7. This is not to say that every country in Latin America has a *strong* judicature regarding fundamental rights. In general, judicial control and, more broadly, the rule of law are struggling projects in several countries in the region. In some cases, weak institutions and a highly formalistic legal culture are not the best scenario for innovative litigation (although there are some clear exceptions to this formalistic culture, e.g., the Constitutional Court in Colombia).

8. For example, the ICCPR protects the right to life, the right to freedom of expression, the right to be free from torture or to cruel, inhuman or degrading treatment or punishment, etc. On the other hand, the ICESCR, protects the right to health, right to education, right to adequate standard of living, among others.

Article 12, International Covenant on Economic, Social and Cultural Rights:

- “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

9. See for example, UNFPA “The Human Rights based approach”, available online: <http://www.unfpa.org/rights/approaches.htm>

10. Ferrajoli L. *Derechos y garantías. La ley del más débil*. 2nd edition. Editorial Trotta, 2001:37-41.

11. For examples of right protected under the ICCPR see *supra* note 8.

12. For examples of right protected under the ICESCR see *supra* note 8.

13. The doctrine of fundamental rights that has emerged denies that rights can be classified as demanding either *positive* or *negative* obligations from the State. Classic rights usually understood as demanding only *abstention* by the State – i.e. that it abstain from unjustifiably seizing property – also implicate multiple *positive* actions that the State must undertake – i.e. the State must provide courts of law that can adjudicate disputes between citizens over their property rights; the State must pay for public registries where property is publicly documented. On the other hand, the new understanding of fundamental rights posits that rights such as health and education often do involve the direct provision of public services by the State but also impose negative obligations, such as the obligation to provide such services in a non-discriminatory manner.

14. For a long time scholars and practitioners debated the nature of social, economic and cultural rights, whether they were “real” rights – justiciable and enforceable – and whether they impose concrete obligations on States. For example see, Abramovich V, Courtis C. *Los derechos sociales como derechos exigibles*. 2nd edition. Editorial Trotta, S.A., 2004. However, it has been the judiciary around the world that has ended this scholarly debate by considering social, economic and cultural rights enforceable and justiciable rights. As Malcolm Langford argues: the debate went from practice to theory, as courts around determined that social, economic and cultural rights impose concrete obligations on States, and more importantly, courts are entitled to finding States accountable for not fulfilling such obligations. Langford M. *Social rights jurisprudence: emerging trends in international and comparative law*. 1st edition. Cambridge University Press, 2009. For a more detailed and theoretical analysis of the legal nature of social, economic and cultural rights see, Sepúlveda M. *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*. Intersentia, 2003.
15. In 2004, just as Mexico’s Senate was ratifying the FCTC, Mexico’s Ministry of Health subscribed an agreement with both Phillip Morris and British American Tobacco in which it agreed not to harden tobacco regulation or raise taxes on tobacco in exchange for a fixed “donation” in cash for every packet sold (see Madrazo A. Under the radar. *Infra-constitutional powers of the executive: the case of tobacco regulation in Mexico*. In: Roberto Saba, ed. *El Poder Ejecutivo*. Proceedings of SELA: 2006 June 8-11; Bogota, COL.) During the period in which the Ministry of Health-tobacco industry agreement, the Ministry of Health undertook a “cessation campaign” called *Smoker’s Paradise* (El Paraiso de los Fumadores) in which it displayed all images of the tobacco industry was banned by law from depicting: people smoking while doing sports, pregnant women smoking, parents smoking around their children, etc. All independent experts consulted by the authors who have watched the ad campaign agreed that rather than deterring people from smoking, it does quite the opposite. For a sample of this campaign, see <http://www.youtube.com/watch?v=ZdS4a3fXRfo>.
16. See, U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health*, 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [General Comment 14]. Moreover, in tobacco control, the obligation to promote plays a central role. Such obligation requires States to set up the circumstances that maximize the possibility of persons to gain access to the good or service in question. For instance, tax subsidies for first time family owners (property); ad campaigns promoting healthy eating habits (right to health); free wireless internet access (right to information), etc.
17. ICESCR article 12.
18. General Comment 14, *supra* note 16.
19. See *supra* note 15.
20. Is it justifiable that the State profit from the sale of a harmful product to its population? The answer, clearly, is “no”. That does not mean, however, that the State should under no circumstance be involved in the sale of tobacco. State ownership can itself be a form of regulation: State control of substance markets regulates the market and keeps the offer side of the equation from attempting to maximize sales and profits. Such a mechanism is seen in the UN’s Single Convention on Narcotic Drugs of 1961 as a way of making sure the market for a dangerous substance is kept under control. See articles 23, 27 and 28, mandating the establishment of national agencies monopolizing wholesale trading of legal opium, coca and marihuana.
21. For the purposes of this paper we are not addressing or clarifying whether the FCTC is a human rights treaty. We both agree this argument should be developed in more detail in a separate scholarly paper. For a more detailed discussion on the lack of human rights debate and considerations in the negotiation process of the FCTC please see Taylor A. *Trade, human rights and the WHO framework convention on tobacco control: just what the doctor ordered?* In: Cottier T, Pauwelyn J, Burgi E, ed. *Human rights and international trade*. Oxford: Oxford University Press, 2005:322-333.
22. See, O’Neill Institute for National and Global Health Law, *Latin American Toolkit* (document to address trends in tobacco litigation and industry arguments in the region), on file with O’Neill Institute authors.
23. As mentioned above, this article will not address the question regarding the nature of the FCTC as a human rights instrument.
24. See following subsection: “FCTC and specific content of States’ obligations”.
25. General Comment 14, *supra* note 16.
26. Committee on Economic, Social and Cultural Rights. *Concluding observations: BRAZIL* [online monograph]. [Geneva: ICESCR], Accessed May 2009. Available In: OHCHR website at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>.
27. The report “Preventing and reducing tobacco use in Brazil: Pending tasks” was submitted to the CESCR by the O’Neill Institute for National and Global Health Law, at Georgetown University, together with the Campaign for Tobacco Free Kids and ACT Brazil. Available at the O’Neill Institute website, online at <http://www.law.georgetown.edu/oneillinstitute/documents/ONeill-Shadow-Report-Brazil.pdf>. The report can also be found at the CESCR’s website at: <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>.
28. Additional reports have been filed on the periodical review of Egypt in front of CEDAW, online at: <http://www2.ohchr.org/english/bodies/cedaw/cedaws45.htm>.
29. In Latin America, domestic courts (especially high courts, such as Supreme Courts) had taken into account concluding observations and the reports from treaty-monitoring bodies when issuing their decisions.
30. A more comprehensive analysis of the different arguments that the tobacco industry has raised in the region, with the corresponding counter-arguments that should lean the balance towards tobacco control policies, is included in the report that the O’Neill Institute for National and Global Health Law is currently developing, with the support of the Campaign for Tobacco Free Kids, “Tobacco Industry Strategy in Latin American Courts: A Litigation Guide” forthcoming, 2010. For a summary of the constitutional arguments against tobacco control that the tobacco industry and its allies have deployed in the case of Mexico see Madrazo-Lajous A. *Sobre la constitucionalidad de la regulación del tabaco en México*. *Salud Publica Mex* 2008; 50 suppl 3: 326-331.
31. A persistent argument for weak bylaws held by lawyers of the Federal Ministry of Health in Mexico was that strict bylaws would invite “a shower of *amparos*” that would render them moot. For a more detailed explanation of the role played by Mexico’s Ministry of Health’s in-house lawyers in weakening and delaying the bylaws to the federal tobacco control law see Madrazo-Lajous. *Tabacaleras impunes y protegidas*. *El Universal* 2009 May 30. Available in: <http://www.eluniversal.com.mx/editoriales/44305.html>
32. On file with authors.
33. All *amparo* challenges against most provisions of the law have been unsuccessful. The only successful argument that we know of has been that banning the sale of cigarettes in restaurants is an unjustified burden on the right to commerce. During an informal conversation with one of the appellate judges who ruled in favor of the restaurant chain challenging the law, it was clear that the case was decided because the State did not sufficiently prove during trial that the measure was effective in deterring people from smoking. In short, it seems the case was lost by the government because of poor litigation, not because of insufficient constitutional grounding for the measure.
34. Unconstitutionality Claim Brief for Nobleza Piccardo S.A.I.C.Y F.v. Provincia de Santa Fe, 188/2006, Corte Suprema de Justicia de la Nación [Supreme Court] (Arg.)
35. A more comprehensive analysis of the possible counter-arguments that could be raised in response to industry attacks on tobacco control

regulation is developed in the O'Neill Institute for National and Global Health Law report on "Tobacco Industry Strategy in Latin American Courts: A Litigation Guide", *supra* note 30.

36. One of the authors of this paper, together with civil society institutions, has been collaborating in drafting an *Amicus Brief* in support of Santa Fe's tobacco control law. Since this brief has not yet been submitted, we will not expand on the details of the arguments we have made in support of the tobacco control law.

37. For example, Brief for Universidad de San Carlos de Guatemala as *Amicus Curiae* Opposing Claimant Cámara de Comercio de Guatemala.

38. The Court also resorts to the FCTC and to international human rights principles. *Complaint for Cámara de Comercio de Guatemala v. Partial General Unconstitutionality*, 2158-2009, Corte de Constitucionalidad de la República de Guatemala [Constitutional Court].

39. Both authors were involved in the design and implementation of the strategy. The challenge is on file with authors.